



TRADING LAW BULLETIN

ISSUE NO. 101

JUNE 2019

Gough Square Chambers
6-7 Gough Square
London EC4A 3DE
Telephone: 020 7353 0924
Fax: 020 7353 2221
DX: 476 London
Email: gsc@goughsq.co.uk

Easements. The Upper Tribunal has held that a right of access to a parking space and a right to park were implied as easements into a mortgage but, in that particular case, no equitable easement arose (*Taurusbuild Limited v. McQue* [2019] UKUT 81 (LC)).

ISDA. For the purposes of credit support obligations the interest rate had fallen below zero. The Court of Appeal upheld a decision that the Credit Support Annex did not contemplate accounting for negative interest (*Netherlands v. Deutsche Bank AG* [2019] EWCA Civ 771).

ISDA. The Court of Appeal have held that the English Court had jurisdiction in respect of a claim by a bank for declaratory relief concerning a company's obligations under an interest rate swap with an English jurisdiction clause. This was notwithstanding that the lending relationship included an Italian jurisdiction clause in the financing agreement (*BNP Paribas SA v. Trattamento* [2019] EWCA Civ 768).

Secret Commission. A County Court has held that a broker used by a borrower was not an agent and, in that was wrong, there was no evidence justifying the conclusion either directly or by inference that there was a fiduciary relationship. Therefore, even if there had been a secret or half-secret commission the borrower's argument would be dismissed. The Court also dismissed an unfair relationship claim. The Defendants had satisfied the Court on the totality of the evidence that the transaction was fair. Permission to appeal was refused (*Scott v. Commercial First*, 28th March 2018).

Financial Penalty. The Upper Tribunal has confirmed an FCA decision to impose a penalty of £409,300 for breach of principal 3 by a failure to take reasonable care to organise and control affairs responsibly and effectively with risk management systems in relation to the detection and reporting of potential instances of market abuse (*Linear Investments Limited v. FCA* [2019] UKUT 115 (TCC)).

Mortgages. Claimants applied for permission to re-amend the Particulars of Claim. They owned properties on trust for another company which had borrowed money from the first Defendant. Mortgages were created over properties and the lender obtained a default judgment. Proceedings were brought seeking to redeem the mortgages. The amendment sought to allege that the mortgages had been rescinded as they were entered into as a result of fraud. Permission was refused. The Claimant sought to put forward serious allegations on an entirely different basis and had repeatedly told the Court that they were not seeking to rescind (*Rose v. Creativityetc Limited* [2019] EWHC 1043 (Ch)).

Jurisdiction. The Claimant sued an online trading platform because it has wrongfully blocked and terminated her account. The agreement provided that the Courts of Cyprus were to have

exclusive jurisdiction but the Claimant said that was ineffective because she was acting as a consumer within Section 4 of Brussels (Recast). The issue was whether investing private wealth for gain in the form of buying and selling foreign currency is by its nature a business activity. There was a divergence of opinion between previous decisions by English and Greek Courts. The Court held that wealthy consumers are consumers nonetheless and the amounts involved in the case did not mean that the Claimant was not a consumer (*Ang v. Reliantco Investments Limited* [2019] EWHC 879 (Comm)).

Shared Appreciation Mortgages. In 2009 litigation was commenced in respect of shared appreciation mortgages. This included unfair relationship claims and claims under the Unfair Terms Regulations. The litigation was conducted under a group litigation order. Each Claimant contributed £5,000 to a fighting fund. The action was settled by a withdrawal of the claims with no order as to costs. In the current action the Claimants sued their former solicitors who brought in Counsel as third party. The High Court held that there was no realistic prospect of success on the facts pleaded that Counsel assumed a general duty to advise on funding. An opportunity was given to the solicitors to seek permission to amend but this was declined and the additional claim was struck out (*Andrews v. Messer Beg Limited* [2019] EWHC 911 (Ch)).

Accelerated Repayment Clause. The ECJ has held that the Unfair Terms Directive must be interpreted as precluding an accelerated repayment clause in a mortgage loan contract that has been found to be unfair from being maintained in part, with the elements which make it unfair removed, where the removal of those elements would be tantamount to revising the content of that clause by altering its substance. The Directive does not preclude a national Court for compensating for the invalidity of such an unfair term by replacing that term with new wording provided that the mortgage loan contract cannot continue in existence if that unfair term is removed (*Abanca v. Mendoza* (Case C-70/17)).

Unfair Terms. An Advocate General has given an opinion in respect of terms contained in a foreign currency loan agreement. The opinion was that neither Article 4(2) nor Article 5 of the Directive should be interpreted as meaning that, in a loan contract concluded with a consumer, the requirement that terms should be drafted in plain and intelligible language requires that each price clause mentions the specific services provided in return. In such circumstances, however, it is necessary that the nature of services so provided can be gleaned or inferred from the contract itself. In addition, Article 3(1) does not mean that the fact that a price clause does not mention the specific services provided in return creates a significant imbalance in the parties' rights and obligations. If, however, it is not possible to determine the services provided in return for the consideration supplied,

then such a term may be declared to be unfair (*CIB Bank v. Kis* (Case C-621/17)).

Illegal Moneylending. The Court of Appeal (Criminal Division) have upheld a sentence of three-and-a-years' imprisonment for unlawful moneylending. In addition a sentence of 15 months imprisonment for contempt of Court was not excessive (*R v. Gopee* [2019] EWCA Crim 601).

Mortgages. A Claimant bought a claim for damages against receivers. They had been appointed under the Law of Property Act 1925. The High Court held that they had neither placed themselves in a position of conflict nor had they acted in bad faith when they sold the land to a company connected with the mortgagee. There was no self-dealing when a Receiver sold to an associate of the mortgagee (*Devon Commercial Property Limited v. Barnett* [2019] EWHC 700 (Ch)).

Notes. The beneficial owner of notices alleged that events of default had occurred. The High Court relied on a Supreme Court decision in *Goldman Sachs v. Novo Banca SA* [2018] UKSC 34 to conclude that a separate loan had never been transferred from the party which was the original guarantor of the notes to that which was the current guarantor so that no event of default had occurred (*Winterbook Global v. NB Finance Limited* [2019] EWHC 737 (Ch)).

Unauthorised Investment Scheme. The High Court declared that a business was in breach of Section 19 of FSMA. It was an unauthorised investment scheme. The scheme took money from investors of which only a small amount was ever used for trading (*FCA v. Xcore Capital Limited*, 14th May 2019).

Information Requirements. The High Court has considered the power to appoint investigators and to require information and assistance. It was held that the FCA can say that it was "the person imposing the requirement" when the requirement was imposed by an investigator acting on its behalf. The issue arose in respect of a request by the FCA for costs which was granted (*Financial Conduct Authority v. Neville Registrars Limited* [2019] EWHC 1611 (Ch)).

Guarantees. The Scottish Sheriff Appeal Court considered the terms of a guarantee. The context was an action by the Respondents against the First Defender concerning allegedly defective dry rot works. It was held that the guarantee meant that the Appellant undertook to pay all debts due whenever and however arising (*Shade v. A N Young Limited* [2019] SAC (CIV) 22).

Ombudsman. The High Court ruled that the Pensions Ombudsman had been wrong in finding that a loss caused by a financial services provider's administration had not been foreseeable. The Appellant had asked the Respondent to transfer his personal pension from one scheme to another. There had been undue delay in making funds available. The High Court held that when a customer asks for their pension to be moved and there was a delay the customer might lose the opportunity to invest. The issue arose in the context of money being available around the time of the Referendum and its availability during periods of resulting market fluctuations (*Tenconi v. James Hay Partnership*, 12th June 2019).

Mortgages. An application was made by a mortgagor to suspend a warrant for possession in favour of receivers. The Court held that there was compelling evidence that a notice required by the Mortgage Repossessions (Protection of Tenants Etc.) Act 2010 had been properly served. The Applicant in this case was not a party protected by the Act. The application for a stay was rejected (*Richards v. Avery*, 5th June 2019).

Unfair Terms. The ECJ considered a request for a preliminary ruling in respect of the Unfair Terms Directive. The request was made in proceedings between a leasing company and a borrower. It was held that the Directive was to be interpreted as not precluding the legislation of a Member State under which a loan agreement is not invalid if it is denominated in foreign currency and, although it specifies the sum corresponding to that set out in the consumer's application for finance in domestic currency, does not indicate the exchange rate applicable to that sum for the purpose of determining the definitive amount of the loan in foreign currency, but at the same time stipulates, in one of its terms, that the rate would be set by the lender in a separate document after the agreement has been concluded (*GT v. HS Case C-38/17*).

Pre-Contractual Explanations. An Advocate General has given an opinion in respect of the different pre-contractual obligations on a creditor as provided for in Article 5(6) of Directive 2008/48/EC and the potential importance of the assessment of the creditworthiness of the consumer provided for in Article 8. The opinion proposed that the Court reject the request for a preliminary ruling or, in the alternative, answers that Article 5(6) did not preclude a rule of national law under which the creditor and the credit intermediary must find, within the framework of the credit agreements which they usually offer or in which they are usually involved, the type and the amount of credit most suitable, taking into account the consumer's financial situation at the time the credit agreement is concluded (*Schyns v. Belfius Banque SA Case C-58/18*).

Early Settlement. An Advocate General's opinion dealt with the interpretation of Article 16(1) of Directive 2008/48/EC as to the meaning of the legislation concerning the entitlement of a consumer to a reduction in the cost of credit where he or she has fully or partially made an early settlement. The opinion proposed that Article 16(1) should be read in conjunction with Article 3(g) and is to be interpreted as meaning that, where the consumer has made an early settlement, the reduction to which that consumer is entitled may concern costs for which the amount does not depend on the duration of the credit agreement. However, a Member State cannot limit this reduction simply to the amount of expenses saved by the credit institution as a result of early repayment (*Lexitor v. Santander Consumer Bank Case C-383/18*).

Forgery. The High Court held that a letter agreeing to write-off a substantial bank borrowing signed by a relationship manager was a forgery. The manager did not have actual or apparent authority to bind the bank. The Claimant sought an order for specific performance compelling the bank to honour the term and this was dismissed (*Stavriniades v. Bank of Cyprus* [2019] EWCA 1328 (Ch)).

Mortgages. The FCA have published a Consultation Paper (CP 19/17) on proposed changes to mortgage advice and selling standards.

Hire-Purchase. The High Court discharged an injunction requiring a finance provider to return a car which was on hire-purchase when the consumer had not made payment of one-third. This would cause the least injustice irrespective of the outcome of the case (*William v. Black Horse*, 25th June 2019).

Statutory Demand. A petitioning creditor failed in an appeal against the setting aside of statutory demands. The individuals had been directors and shareholders of a company and they entered into personal guarantee in respect of a loan facility. This was limited to £170,000. They also executed third-party mortgages over properties they owned. These, however, negated any personal liability in respect of the company's liabilities. The bank assigned the rights when there was a default and the assignee appointed receivers. The issue in the appeal turned upon the expression "security in respect of the debt". The argument by the creditor that the security is held over the properties by way of the third-part mortgages was in respect of the company's indebtedness was rejected (*Promontoria v. Bell* [2019] EWHC 1581 (Ch)).

FOOD

Salmonella. The Control of Salmonella in Poultry (Amendment) Order 2019 came into force on 22nd March 2019.

Alcohol. The local authority has informed shops in Bradford that selling "super strength" lager to street drinkers could result in the loss of their licence.

Manslaughter. The Court of Appeal (Criminal Division) quashed as unsafe a conviction for gross negligence manslaughter following the death of a consumer who suffered from peanut allergy. There was a requirement that the reasonable person had to have foreseen an obvious and serious risk of death. The jury direction on attribution and knowledge rendered the conviction unsafe (*R v. Kuddus* [2019] EWCA Crim 837).

Spirits. The European Council have proposed a regulation on the definition, description, presentation and labelling of spirit drinks.

Mechanically Separated Meat. The Supreme Court have dismissed an appeal from the Court of Appeal on the proper interpretation of the CJEU judgment in respect of what should be categorised as MSM. The Court of Appeal had correctly understood the judgment and had been right to adopt a narrow reading of the notion of "cutting point" (*R (On the Application of Newby Foods Limited) v. Food Standards Agency* [2019] UKSC 18).

UNDER-AGE SALES

Knives. The Offensive Weapons Act 2019 makes amendments to the legislation in respect of the selling of knives to under-age persons.

PLANNING

Defendant. The Administrative Court granted a claim for judicial review and quashed the decision by which an individual was convicted and committed for sentencing in respect of alleged

breaches of an enforcement notice. The person who had attended Court had not been the Defendant (*R (On the Application of Babbahani) v. Ealing Magistrates' Court* [2019] EWHC 1385 (Admin)).

ADVERTISING

Advertising Standards Authority. The ASA applied for an injunction on an interim basis restraining the Respondent from publishing or using the contents of an email which had been sent in error. The underlying dispute concerned a billboard advertisement which criticised a bank. An ASA officer sent an email which was intended for a solicitor about legal advice to the Respondent. The High Court held that the ASA was likely to be able to establish that the Defendant was domiciled in the jurisdiction and interim relief was granted (*Advertising Standards Authority v. Mitchell* [2019] EWHC 1469 (QB)).

WAREHOUSING

Alcohol. The Supreme Court had held that where HMRC decided that a wholesaler was not a fit and proper person to carry on the wholesale supply of duty paid alcohol, it had no power to grant temporary approval pending appeal to the First Tier Tribunal (*OWD Limited v. HMRC* [2019] UKSC 30).

TIMESHARE

Tax. A professional trustee company was refused an indemnity to cover liability for Spanish Corporation Taxes. The indemnity was claimed against a body which owned holiday apartments. Permission to appeal to the Court of Appeal has been granted (*First National Trust Co v. Page* [2019] EWHC 1187 (Ch)).

VAT. The Court of Appeal allowed an appeal by HMRC against a decision that "fractional interests" were exempt from VAT. The property concerned was divided into 49 apartments. The grant of the interest involved more than a mere letting transaction and there were obligations as to providing hotel-type services which could not be regarded as ancillary (*HMRC v. Fortyseven Park Street Limited* [2019] EWCA Civ 849).

STATUTORY NUISANCE

Costs. The Administrative Court held that a Magistrates' Court had acted outside its jurisdiction in awarding the costs of a prosecution in respect of the abatement of a statutory nuisance to the interested parties' solicitors as the solicitors were not party to the proceedings. The prosecution involving allegations of mouse infestation had been settled and the Claimant agreed to pay the costs of the solicitors for the interested parties. The parties could not agree and the Magistrates ruled that there should be a payment of just over £21,000. The High Court held that the costs were grossly disproportionate and, in any event, the solicitors were not party to the proceedings (*R (On the Application of Nottinghill Genesis) v. Camberwell Green Magistrates' Court* [2019] EWHC 1423 (Admin)).

CONSUMER PROTECTION

Directives. The European Parliament has agreed to rules to improve transparency in respect of online market places and dual quality of products. It will now be submitted to the EU Council. The legislation will amend Directives on unfair commercial practices, consumer rights, unfair contract terms and price indications.

Ticketing. The First Tier Tribunal allowed an appeal in respect of secondary ticketing. The Appeal concerned the imposition of a civil penalty on the Appellants. The relevant time limits had not been complied with (*Worldwide Tickets Limited v. North Yorkshire County Council*, 10th April 2019).

UNFAIR TERMS

Care Homes. The Competition and Markets Authority have issued guidance in respect of care homes in connection with contract terms and in respect of fees and extra charges.