



# TRADING LAW BULLETIN

ISSUE NO. 102  
SEPTEMBER 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

## FINANCIAL SERVICES

**Bank Accounts.** The High Court has held that a bank had been entitled to terminate its relationship with a customer without notice. The customer was an authorised payment institution which provided foreign exchange and payment services. There was a suspicion of fraud and money-laundering through the accounts without the customer's knowledge. It had come about, in the belief of the bank, that the customer had poor control. There had been exceptional circumstances for closing the accounts without notice (*N v. Royal Bank of Scotland* [2019] EWHC 1770 (Comm)).

**Appeals.** A lender obtained summary judgment for possession. The Defendant then obtained legal advice and, on appeal, the Judge permitted the Defendant to pursue new points including that the default interest was an unenforceable penalty and issues under the 1974 Act. The Court of Appeal held that an Appellate Court had a discretion to allow new points to be taken on appeal. The case did not have to be exceptional. The appeal of the lender was dismissed (*Notting Hill Finance v. Sheikh* [2019] EWCA 1337).

**Summary Judgment.** An individual brought a claim against a property development company for the repayment of sums loaned. Summary judgment was refused because the Defendants had a real prospect of establishing that the loan documents executed were not intended to have legal effect or be enforceable (*Bale v. Primesite Developments Limited* [2019] EWHC 2251 (QB)).

**Hire-Purchase.** The High Court discharged an injunction which required a finance company to return a car which was subject to a hire-purchase agreement. Payment of one-third had not been made. In order to cause the least injustice it would not be right to order the return of the car (*William v. Black Horse* [2019] EWHC 2433 (QB)).

**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 had entered into personal guarantees. There were also third-party mortgages over properties. These however, negated any personal liability in respect of the liabilities of the company. The issue was whether there was "security in respect of the debt". The argument by the creditor that the security was held over the properties by way of third-party mortgages and was in respect of the indebtedness of the company was rejected (*Promontoria v. Bell* [2019] EWHC 1581 (Ch)).

**Loan Calculation.** Defendants appealed against a decision which determined the amounts due under three loan agreements. They sought to take new points such as MCOBS but permission to appeal was refused. There was, however, a substantial point

about the entitlement to the sum claimed and the High Court held that it should be recalculated (*Ryan v. HNW Lending Limited* [2019] EWHC 2289 (Ch)).

**Data Protection.** The High Court heard an appeal against an order dismissing a claim for damages for breach of the 1988 Act and negligence arising out of an adverse credit reference entry made by the Defendant. The High Court held that the Judge was entitled to find that the case on causation was not made out and the appeal was dismissed (*Adelekun v. Yorkshire Building Society* [2019] EWHC 856 (QB)).

**Unfair Terms.** An Advocate General's opinion has considered contracts denominated in a foreign currency following a request for a preliminary ruling from a Polish Court. The opinion includes a proposal that the Court precludes the maintenance of unfair terms which are objectively beneficial to the consumer at the time a dispute is being settled where there is no express desire on the part of the consumer to maintain those terms (*Dziubak v. Raiffeisen Bank* Case C-260/18).

**Appointed Representatives.** The Court of Appeal has upheld a decision that a principal was not liable to investors in a Ponzi scheme. The principal had properly carried out its supervisory functions and the representatives had hidden the existence of the scheme from it (*Anderson v. Sense Network Ltd* [2019] EWCA Civ 1395).

**Credit.** In a bankruptcy hearing the Court had to decide if the schedule to a *Tomlin* order constituted a credit agreement. The schedule recited that the individual was being sued for a large sum of money which he agreed to pay in tranches. The Chief Insolvency and Companies Court Judge held this was a timetable payment agreement and was not credit (*CFL Finance Limited v. Gertner* [2019] EWHC 1839 (Ch)).

**Liquidation.** The Financial Conduct Authority has appointed a provisional liquidator in respect of an electronic money institution. The winding up petition against the company was based on just and equitable grounds in the public interest. One of the concerns was the way the company had treated funds which had been co-mingled with customers' funds. The Court upheld the appointment but declined to make an Administration Order (*FCA v. Allied Wallet Limited*, 23rd August 2019).

**Bank Account.** The Claimant brought proceedings against the Defendant Bank for defamation (including malicious falsehood), breach of contract and breach of common law duty in respect of a report made to credit reference agencies. This was in respect of an overdraft on the Claimant's student's current account. The Bank wrote closing the account because of concerns arising from a risk assessment of the Defendant's accounts. The Bank accepted that it did not serve a default notice but the Court held that the

reporting was not an activity contained within the list of circumstances requiring a notice. It was held that the defamation claim was not made out nor were the other causes of action. Whilst the claim was dismissed the Judge expressed regret and concern that the Bank did not show flexibility once the apparent concerns of fraudulent activity (not by the customer) had been allayed and did not try to resurrect the relationship and avoid highly contentious and costly litigation (*Boyo v. Lloyds Bank Plc* [2019] EWHC 2279 (QB)).

**Debt Management.** The High Court approved a plan whereby monies recovered following the winding up of a debt management company would be distributed to the clients (*Hunt v. Financial Conduct Authority* [2019] EWHC 2018 (Ch)).

**Financial Advisers.** A firm of financial advisers challenged a decision on the part of the FCA which varied regulatory permissions removing all its permitted regulated activities. The FCA alleged that the firm did not meet the threshold conditions of suitability in particular in respect of FOS complaints. The firm applied for a suspension of the FCA decision but this was refused (*Sussex Independent Financial Advisers Limited v. FCA* [2019] UKUT 228 (TCC)).

**Creditors.** The High Court held that, in respect of creditors' meetings to consider a proposed scheme of arrangement in respect of a company which had provided consumer finance products, it was appropriate for creditors with irresponsible lending claims to consult together and for trade creditors to consult together (*In the Matter of Instant Cash Loans Limited* [2019] EWHC 2329 (Ch)).

**Guarantees.** The High Court granted an order setting aside a statutory demand. The creditor had not served a written demand in accordance with the terms of a guarantee so that the debt was not payable immediately (*Martin v. McLaren Construction Limited* [2019] EWHC 2059 (Ch)).

**Summary Judgment.** A claim related to a loan of £10 million for the redevelopment of certain properties. The Chancery Master said that it was not an ordinary secured lending and there were features of a joint venture. A statement relied on by the defence abandoned the central defence based on promissory estoppel. The Master said that it was troubling that a defence was served, with a statement of truth, based primarily on the existence of a promissory estoppel and that plea had now been abandoned as being untenable. Summary judgment was granted (*Folgender Holdings Limited v. Letraz Properties Limited* [2019] EWHC 2131 (Ch)).

**Sanctions.** The owner of a group company was included as a specially designated national by the USA and the Claimant, because of the individual's indirect ownership of it, became a "blocked person". The Claimant sued the Defendant under a facility agreement. The High Court held that a provision in the agreement enabled the borrower to avoid paying because in doing so it would breach a "mandatory provision of law" (*Lamesa Investments Limited v. Cynergy Bank Limited* [2019] EWHC 1877 (Comm)).

**Unfair Relationships.** The Claimant applied for judgment in respect of sums due under an overdraft facility and also for

possession of commercial properties that had been charged. The Defendant sought relief under the 1974 Act on the ground that the relationship had been unfair. It was said that the bank had resiled from a common intention or understanding that a further facility would be provided at the end of the initial one. The High Court held that there had been no common intention as to the extension. Other issues such as the value of the leases and the validity of an assignment were decided in favour of the bank (*Promontoria (Henrico) Limited v. Samra* [2019] EWHC 2327 (Ch)).

**Hire-Purchase.** A claim of over £1.5 million was made in respect of an unregulated hire-purchase agreement. Judgment in default was entered. Issues arose as to the credit which should be given for the sale of the car which formed the subject matter of the agreement. The Court held that an estoppel defence had a real prospect of success. The estoppel was based upon an alleged representation as to the amount owing and what the defendant would have done if the true sum was known (*Praetura Asset Finance Limited v. Hood* [2019] EWHC 2231 (Comm)).

**Rectification.** The Court of Appeal considered the correct test to apply in deciding whether the written terms of a contract may be rectified because of a common mistake. The Claimant sought rectification of two deeds. The purpose of executing the deeds was to provide security. There was a missing security namely an assignment of the benefit of a shareholder loan. The Judge at first instance concluded that it was both objectively and subjectively the common intention of the parties to execute a document which satisfied the obligation to grant security over the shareholder loan. Rectification was granted. The decision was upheld by the Court of Appeal (*FSHC Group Holdings Limited v. Glas Trust Corporation Limited* [2019] EWCA Civ 1361).

**Film Schemes.** The Claimant took financial advice from a director of the defendants and put over £1 million into a succession of so-called film partnership schemes. His claim against the company of which the advisor was a director and employee was for damages for negligence and deceit, breach of fiduciary duty and conspiracy. The High Court dismissed the claim on the basis of limitations (*Walsh v. Greystone Financial Services Limited* [2019] EWHC 1719 (Ch)).

**Landlord and Tenant.** The FCMA (Regulated Activities) Order 2001 has been amended by SI 2019/1067 in relation to registered social landlords.

**Pricing.** In July 2019 the FCA issued a feedback statement (FS 19/104) on Fair Pricing in Financial Services: Summary of Responses and Next Steps.

## FOOD

**Meat.** The Supreme Court referred to the ECJ issues relating to a declaration by an official veterinarian about an animal carcass being unfit for human consumption. The issue related to whether a Magistrate could decide whether a carcass failed to comply with food safety requirements and whether EU Regulations mandated a right of appeal and whether judicial review would suffice (*R (On the Application of Association of Independent Meat Suppliers) v. Food Standards Agency* [2019] UKSC 37).

## ENERGY

**Feed-in Tariff.** In a claim against BEIS the High Court allowed a strike-out application. The claim was in relation to alleged loss resulting from the publication of a consultation containing proposals to reduce the subsidy payable under the feed-in tariff scheme (*Solaria Energy UK Limited v. Department for Business, Energy and Industrial Strategy* [2019] EWHC 2188 (TCC)).

## LICENCES

**HMOS.** The Upper Tribunal held that where a house in multiple occupation which requires a licence under the Housing Act 2004 Section 61 was sold, the purchaser took over management and control from the seller and had to obtain new licences. It was not possible to transfer the existing licence to the purchaser (*Taylor v. Mina Al Limited* [2019] UKUT 249 (LC)).

**Costs.** The Administrative Court has held that Magistrates pursuant to their appeal jurisdiction under Section 181 of the Licensing Act 2003 have power to make a non-party costs award. However, the Court concluded that a fair procedure had not been followed and the costs order had to be set aside and the applications for costs reconsidered (*Aldemri v. Cornwall Council* [2019] EWHC 2407 (Admin)).

## LETTING AGENTS

**Fines.** A letting agency that posed as a membership club to avoid tenancy laws was fined £42,273.00 in the first prosecution of its type. The prosecution was brought by Islington Trading Standards.

## DANGEROUS DOGS

**Destruction.** The Claimant applied for judicial review of a decision of the Crown Court to make a destruction order of a pit bull dog. The High Court dismissed the submissions that the Crown Court had failed to consider mandatory conditions of exemption and had wrongly concluded that the dog remained a danger to public safety (*R (On the Application of Golding) v. Maidstone Crown Court* [2019] EWHC 2019 (Admin)).

## TRAVEL

**Package Travel.** The Supreme Court referred to the ECJ the scope of the liability of a travel company in respect of the employee of a hotel. It was alleged by the Appellant that she was raped and sexually assaulted by an employee of the hotel. The questions referred concerned whether there had been a failure to perform obligations arising under a contract providing a package holiday to which Directive 19/314 applied (*X v. Kuoni Travel Limited* [2019] UKSC 37).

**Air Travel.** The ECJ gave a preliminary ruling concerning the interpretation of Article 8(2) of Regulation (EC) No 261/2004 regarding compensation and assistance to passengers. The Court ruled that a passenger has the right to hold the tour organiser liable for reimbursement of the cost of the air ticket but can no longer claim reimbursement of the cost of that ticket from the air carrier even when the tour organiser is financially incapable of reimbursing the cost (*HQ v. Aegean Airlines SA* Case C-173/18).

## ADVERTISING

**ASA.** The Advertising Standards Authority were granted a default judgment in respect of a breach of confidence claim. An

email had been sent to the Defendant in error by an employee of the ASA who was investigating a complaint (*Advertising Standards Authority v. Mitchell*, 22nd July 2019).

**Medical Device.** The High Court dismissed an application for judicial review of the ASA which upheld complaints against an advertisement in a newspaper placed by the Claimant for a medical device. The device applied neuromuscular electronic stimulation to the soles of the feet. The case concerned the claims for the efficacy of the device (*R (On the Application of Actegy Limited) v. Advertising Standards Authority* [2019] EWHC 2374 (Admin)).

**Broadband.** The High Court dismissed an application by way of judicial review against a decision of the ASA. The Claimant offered broadband services and the issue related to fibre optic cables. There has been an advertisement concerning broadband and a complaint by the Claimant had been rejected by the ASA. An issue arose as the point of view of the average consumer (*R (Cityfibre Limited) v. Advertising Standards Authority* [2019] BusLR 1777).

## CONTRACTS

**Electronic Signatures.** The High Court has ruled that an exchange of emails could suffice to be a valid contract within Section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 (*Neocleous v. Rees* [2019] EWHC 2462 (Ch)).

**Exclusion Clauses.** A Sheriff's Court has ruled that standard terms and conditions were incorporated into a contract relating to the provision of dialling software and support services and that an exclusion clause was not unreasonable under the Unfair Contract Terms Act 1977 (*Difference Corporation Limited v. Unitel Dialect Limited* [2019] SC EDIN 56).

## TRIBUNALS

**Procedure.** The Upper Tribunal have held that the First Tier Tribunal could grant an extension of time to appeal. The decision was in relation to a financial penalty under the Housing Act in respect of managing a house in multiple occupation without a licence. The appeal was dismissed (*Pearson v. City of Bradford* [2019] UKUT 291 (LC)).

## WEIGHTS AND MEASURES

**Legislation.** Amendments have been made to the Consumer Rights Act 2015 in respect of various provisions in order to update them. The measures include personal protective equipment, general product safety and the measuring instruments Regulations.