



TRADING LAW BULLETIN

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FINANCIAL SERVICES

Committal. The Applicant applied to commit Directors of the Respondent lending company and two of the solicitors who acted for it. The background was possession of a domestic property following default on a bridging loan. In separate proceedings the borrower had claimed under Section 140B. That was yet to be heard. The application to commit related to a Witness Statement and Attendance Note. The High Court said that the application had no merit whatsoever (*Anwer v. Central Bridging* [2020] EWHC 765).

Guarantees. The Defendant signed guarantees of the obligations of a company under a funding agreement. He alleged that the guarantees were not delivered and that the Claimants are estopped from claiming by reason of certain assurances given to him. The High Court held that the guarantees had been delivered unconditionally; they had been signed, witnessed, scanned and sent. As regards promissory estoppel, there is a requirement for there to be an existing legal relationship between the parties. The Claimants' case succeeded (*Umrish Ltd v. Gill* [2020] EWHC 1513 (Ch)).

Withdrawal Period. The ECJ has held that the Directive precludes a credit agreement making reference to the calculation of the withdrawal period by reference to a provision of national law which itself refers to other legislation (*JC v. Kreissparkasse* (2020) C-66/19).

Unfair Terms. An Advocate General's opinion dealt with a case revolving around a consumer credit agreement in foreign currency. Consideration was given to the decisions of other Member States as to whether a Court should review terms of its own motion. It was said that legal representation had no bearing and that a Court should review terms of its own motion where they related to the object of the dispute and have a link with the legal or factual elements in the case file. There is no requirement to examine of its own motion other terms (*Lintner v. UniCredit* (C-511/1)).

PPI. The High Court considered a PPI case in respect of the question of limitation. It found in favour of the borrower as regards the Limitation Act as applied to payment protection insurance (*Canada Square Operations v. Potter* [2020] EWHC 672). Permission to appeal has been given. It is to be heard in January 2021.

Default Judgment. The High Court held that a Master had been wrong not to set aside a default judgment. The case related to aircraft finance and a guarantee. In 2015 a summary judgment application was dismissed because of the question of the arrears which, contrary to what the creditor said, may have been trivial. The original borrower company went into liquidation but was restored to the register and applied to set aside the judgment. It

was held that the Master gave too much weight to delay for which there were reasons, there were reasonable prospects of defence and the judgment was set aside (*Lombard North Central v. European Sky* [2020] EWHC 679).

Consequential Orders. Following the decision on an appeal to a High Court Judge another High Court Judge considered consequential orders. The original Judge had said that the Claimant could not obtain possession of residential property based on an assignment. The instant High Court Judge held that this was correct but nevertheless the Claimant was entitled to possession and to claim the debt as registered proprietor (*Promentoria v. Emanuel* [2020] EWHC 563).

Summary Judgment. Summary judgment against the Director of a Defendant company was granted. The Defendant said that he was told that a guarantee would only be used if there was a shortfall after sale. It was held that this did not come close to a clear promise (*United Trust Bank v. Diamantopoulos* [2020] EWHC 658 (Comm)).

Peer to Peer. The High Court upheld a Master's decision to make a Representation Order. The Defendant was a peer to peer investment agency. The claim was under Section 140B against 612 lenders. The Defendant refused to disclose the identity of the lenders. It was held that Section 140B(8) did not override rules of Court. Instead of appointing the Defendant as representative one of the lenders was appointed. The High Court held that the consumer credit procedure in CPR PD7B should be disapplied in the case of complexity (*Milne v. Open Access Limited* [2020] EWHC 1420).

VAT. The Upper Tribunal considered the scheme relating to the sale of second hand vehicles in respect of a finance company following recovery of possession after the termination of the hire-purchase transactions (*Volkswagen Financial Services (UK) Limited v. Revenue and Customs* [2020] UKUT 42 (TC)).

VAT. The High Court concluded that there had been a VAT fraud by traders at a subsidiary bank. It was held that they must have been aware of the VAT fraud (*Bilta v. NatWest Markets Plc* [2020] EWHC 546 (Ch)).

Guarantee. A conditional order for payment into Court of US\$100,000,000 was made in a case involving a guarantee. It had been executed under a Power of Attorney. The Defendant said the Power of Attorney was invalid and that he only signed it to give the Attorney a right to sign a non-binding letter of comfort (*Industrial Commercial Bank of China v. Ambani* [2020] EWHC 272).

Standard of Proof. The Claimant claimed under personal guarantees and one personal loan. The counterclaim alleged

unlawful conspiracy to raid and seize assets of two of the Defendant's main businesses in Russia. The Court of Appeal allowed an appeal by the Defendant from the dismissal of the counterclaim and ordered the issue to be retried. The question was the standard of proof for dishonesty and a wholesale challenge to the inferences to be drawn from primary facts (*Bank of St Petersburg v. Oslo Marine Corporation Ports Limited* [2020] EWCA Civ 408).

Contracts for difference. The case involved limit orders speculating on the fall of the price of petrol placed on an online platform of the Defendant's. The Court considered Article 12(1) of 864/2007 (Rome II) being the law applicable to non-contractual obligations prior to the conclusion of a contract. This provided that, regardless whether the contract was concluded, the law shall be the law that applies to the contract or would have if the contract had been concluded. Article 18(1) of 1215/2012 allowed the consumer to bring proceedings in Courts where the other party was domiciled or where the consumer was domiciled. The Claimant said in a Rumanian Court that it was a victim of manipulation and there was a tort of non-compliance with consumer protection. It was held that it was for the National Court to decide if the Claimant was a consumer not taking into account the volume of trade within a short period and the amounts because they were in principle irrelevant as was the fact the person was a "retail client" within Directive 2004/39. An action in tort by a consumer under Section 4 of Regulation 1215/2012 can be brought if it is indissociably linked to the contract actually concluded which is for the national Court to verify (*AU v. Relintco Investments Limited* (C-500/18)).

Finance Broker Fee. The Claimant sued for an arrangement fee which it claimed was due for introducing a lender to solicitors. The Defendant said the Claimant had acted as agent but the Court found that it was contracting as principal. FSMA did not result in every appointed representative being only capable of acting as an agent. However, it had not been shown that the Claimant's lending proposal was the effective cause of the borrowing (*Silver Cloud Solutions Ltd v. High Street Solicitors Ltd* [2020] EWHC 878 (Comm)).

Defective Goods. The High Court ordered PayPal to refund money a consumer had paid for a defective laser machine from China (*PayPal Europe v. Jivoui* [2020] EWHC 1763 (QB)).

Disclosure. The High Court ordered some disclosure against a bank sued for mis-selling interest rate hedge products. Documentation in relation to FCA concerns was involved (*Fine Care Homes Ltd v. NatWest Markets Plc* [2020] EWHC 874 (Ch)).

Confidential Hearings. The High Court allowed an unopposed application for protective measures relating to documentation and a part private hearing (*Greystoke v. FSA* [2020] EWHC 1011 (QB)).

Foreign Illegality. The High Court dismissed a claim for US\$10 million. One of the issues related to the absence of witnesses and adverse inferences. None of the loan was outstanding. If it had been the contract would have been enforced notwithstanding a breach of foreign law (*Magdev v. Tsvetkov* [2020] EWHC 887 (Comm)).

Procedure. A lender failed in an appeal against a decision that a divorced couple had a common intention that a property purchased in their joint names was for the former wife alone. The Claimant had sought a charging order against the former husband's alleged interest in the property after he defaulted on a loan made to him. The Appeal Judge upheld the trial Judge's decision to admit late evidence by the former husband. The evidence was not to advance his case but pursuant to a genuine witness summons to assist the wife's case (*Capital Funding One Ltd v. Esqulant* [2020] EWHC 981 (QB)).

Priority of Enforcement. The Court of Appeal have upheld a decision of Turner, J as to priority as regards the debtor's goods. The duties to the Court of an agent of a creditor with lower priority were considered (*Court Enforcement Services Ltd v. Burlington Credit Ltd* [2020] EWCA Civ 588).

Restitution. The High Court has ordered a company and individuals to pay over £3m to those who bought unlawfully promoted shares. 259 investors paid between £1,200 and £252,000 (*FCA v. Skinner* [2020] EWHC 1097 (Ch)).

Mis-selling Indemnity. Purchasers of a business giving financial advice to consumers claimed under an indemnity. There were claims of mis-selling regarding defined benefit pension schemes. It was held that notice of a relevant thing or matter which might give rise to a claim had not been given as soon as possible so as to trigger the indemnity (*Towergate Financial v. Hopkinson* [2020] EWHC 984 (Comm)).

Tomlin Orders. In an insolvency case, the High Court has held that an agreement in a schedule to a Tomlin Order could be a regulated consumer credit agreement. The decision was in an appeal from a bankruptcy order which was allowed on grounds relating to the right to vote for an individual voluntary arrangement. The challenge to the debt of one of the creditors which opposed the IVA included that a settlement in the schedule to the Tomlin Order was subject to the 1974 Act and unenforceable. The High Court held that the Act could apply to such a schedule but did not in this case. An argument on penalties was also rejected (*Gertner v. CFL Finance Ltd* [2020] EWHC 1241 (Ch)).

Rectification. The Court of Appeal upheld a decision not to rectify the land register in order to remove a bank's charge. These were exceptional circumstances. The occupier would otherwise had become the unencumbered freeholder as a result of the fraud (*Dillon v. Barclays Bank plc* [2020] EWCA Civ 619).

Possession. The High Court upheld a decision not to set aside a possession order following default on a loan agreement. The appeal concerned the failure to take a point at the possession hearing and the nature of a final order (*Sangha v. Amicus Finance plc* [2020] EWHC 1074 (Ch)).

Administration. A building company had been a member of a trade federation operating a guarantee scheme backed by an insurance policy. Pursuant to that it was an Authorised Representative although the scheme was not used. However, it was registered with the FCA. The directors appointed an administrator and an FCA search did not reveal registration due

to a slightly different name being searched. Therefore, FCA consent had been required. The High Court held that there were conflicting authorities but it was at least arguable that without such consent the appointment was a nullity. A retrospective appointment was made by the Court (*In the matter of ARG (Mansfield) Ltd* [2020] EWHC 1133 (Ch)).

SIPPS. The Defendant carried on business as a SIPP administrator. The Claimant sued in respect of losses from the transfer to a SIPP. The High Court dismissed the claim. The role of the Defendant was to provide a mechanism for the transfer and not to give advice on the investment (*Adams v. Options Sipp UK LLP* [2020] EWHC 1229 (Ch)).

Market Manipulation. The High Court refused to grant a Norwich Pharmacal order when the Claimant alleged that a steep fall in its share price had been caused by market manipulation. The Claimant had not shown a good arguable case (*Burford Capital Ltd v. London Stock Exchange* [2020] EWHC 1183 (Comm)).

Hire. A college entered into a hire agreement in respect of the construction and hire of a modular building and associated equipment. In due course the college failed to make an annual instalment payment and the assignee of the debt sued. In the High Court the college and the Council argued that the contract was beyond the capacity of the college and the debt irrecoverable. That argument was upheld. The contract was a financial lease and required the consent of the Secretary of State. Issues of unjust enrichment also arose. The claim of the college for the return of payments which had been made failed because of change of position. The Claimant succeeded in unjust enrichment at a market rate from time of breach until trial (*School Facility Management Ltd v. Christ the King College* [2020] EWHC 1118 (Comm)).

Conveyancing. A director of a company which sold a commercial property was able to obtain borrowing of a large sum of money for the company from a commercial lender because the conveyancing solicitors for the purchaser failed to register the transaction. The lender registered its charge. The Court considered summary judgment and costs (*Property Protea Holdings Ltd v. 119 Molyneaux Road Ltd* [2020] EWHC 1322 (Ch)).

Declaratory Judgment. A Master dismissed a claim for €36 million said to be owed as a debt in respect of shares. The basis of the decision was that the cause of action had merged following an earlier judgment in a case about the shares. A High Court Judge allowed an appeal holding that a declaratory judgment could result in a merger but it did not extinguish the Claimant's right to claim the debt. The failure to make a debt claim in the first action did not result in the second action being an abuse of process (*Zavarco v. Nasir* [2020] EWHC 629 (Ch)).

Third Party Debt Order. A High Court Judge dismissed an appeal against the discharge of a third party debt order. The debt had arisen from a loan to fund legal costs in an arbitration. It was held that a requirement to give 30 days' notice to repay was a condition precedent so that the debt was not due or accruing (*Michael Wilson and Partners Ltd v. Sinclair* [2020] EWHC 1249 (Comm)).

Third Party Costs. A company director was ordered to pay the costs of the Secretary of State who had successfully petitioned for the winding up of companies some of which he was a director. The grounds for winding up were the public interest. The companies had run investment schemes whereby trees impregnated with truffle spores had been leased. About £6.5 million was raised. At the petition hearing it was held that no investor could have reasonably expected to make money and the scheme lacked commercial propriety (*In the Matter of Viceroy Jones New Tech Ltd and others* [2020] EWHC 1155 (Ch)).

Bailment. The Defendant agreed to indemnify the Claimant if it suffered losses under a collateral management agreement whereby the Claimant granted a loan to a borrower. Issues of proper law arose but the High Court held that the Claimant could rely on possessory rights as the Defendant acted as agent of the lender in the control of copper belonging to the borrower as security for the loan. Consideration was given to estoppel against denying a bailor's title which was not abolished by the Torts Etc. Act 1977 as regards contractual bailment (*Scipion Active Trading v. Vallis Group Ltd* [2020] EWHC 1451 (Comm)).

Possession. In an appeal against a mortgage possession order the High Court lifted the COVID-19 stay for the limited purpose of handing down a reserved judgment dismissing the appeal. There was no prospect of success (*Copeland v. Bank of Scotland plc* [2020] EWHC 1441 (QB)). This decision was disapproved in *TFS Stores Ltd v Designer Retail* [2020] EWCA Civ 833.

Review of EU Consumer Credit Legislation. The EU is consulting on legislation. It is said several challenges have been highlighted in terms of scope, information and creditworthiness. The proposal is for a further directive.

Administration. An administrator was appointed purportedly under a floating charge. The applicant company successfully challenged the appointment as it had not been established there had been a statutory power of appointment. The notice of appointment did not comply with statutory requirements and the appointment was void (*Secure Mortgage Corp Ltd v. Harold* [2020] EWHC 1364 (Ch)).

Privilege. The High Court considered questions of privilege in a case where the proceedings were protected by confidentiality and anonymity orders (*A v. Financial Reporting Council* [2020] EWHC 1492 (Ch)).

Payment Services. The Commercial Court declined to strike out a claim against a payment service provider. A question arose as to whether the Payment Services Regulations 2017 created a private law cause of action (*Hamblin v. World First Ltd*, 23rd June 2020).

Pensions. Avacadi Ltd provided a service which contacted people with existing pensions and they were given options to transfer to SIPPS. The investments included assets such as melina trees in Costa Rica and teak trees in Malaysia. None of the Defendants were authorised. The primary defence was that only information and options were provided. The argument that the due diligence defence applied to other than criminal proceedings was rejected. It was held that there had been breaches of FSMA and individual directors were knowingly concerned (*FCA v. Avacadi Ltd* [2020] EWHC 1673 (Ch)).

Mandatory Law. The Court of Appeal has upheld a decision that a borrower could refuse to make interest payments when to do so could result in sanctions under a USA Executive Order (*Lamesa Investments v. Cynergy Bank Ltd* [2020] EWCA Civ 821).

Guarantee. The Chancery Division dismissed a bankruptcy appeal based on an alleged guarantee in relation to a \$500 billion transaction. The alleged debtor had not applied to set aside a statutory demand. The Court concluded that there was sufficient evidence of a genuine dispute relating to sham, the allegation of a forged signature and the failure to constitute a deed (*Go Capital Ltd v. Phull* [2020] EWHC 1235 (Ch)).

Exemptions. A new form of exempt agreement has been created by Article 60C(4A) of the RAO in respect of the Bounce Back Loan Scheme.

Dual Consumer Rights. The FCA Covid Information updated on 29th June 2022 considers the issue of consumer rights against more than one business. Particularly in a travel situation a consumer could have a claim against the travel operator, a reserve fund, a credit card issuer or an insurer.

FOOD

Information. Minor changes have been made to the Food Information Regulations 2014.

ENVIRONMENTAL LAW

Waste Treatment. The Court of Appeal (Criminal Division) considered a situation where the operations of a waste treatment company breached the requirements for exemption under the Environmental Permitting (England and Wales) Regulations 2010. It was held that the exemption ceased to apply upon the breach (in this case the amount of wood waste stored and treated) and that date of the removal from the public register was not the relevant date (*Mustafa v. Environment Agency* [2020] EWCA Crim 597).

Information Request. The Divisional Court allowed an appeal by way of case stated against a conviction for failing to respond to a request for information in breach of Section 110(2)(b) of the Environment Act 1995. Officers entered an industrial estate and suspected an offence relating to waste disposal. Some nine months later written requests for information were sent to the director of three companies believed to have been involved. It was held that the power to request information could only be used pursuant to powers of entry and was not free standing (*Walker v. Chelmsford City Council* [2020] EWHC 635 (Admin)).

AIR TRANSPORT

Compensation. The ECJ has held that the unruly behaviour of a passenger may be an “extraordinary circumstance” which exempts a carrier from having to pay compensation for cancellation or long delay either of that flight of a subsequent one using the same aircraft (*Transportes Aereos Portugueses* (Case C-74/19)).

HOUSING

HMOs. The Upper Tribunal has held that a house converted into flats became a house of multiple occupancy if the conversion did not comply with appropriate building standards (*Hastings BC v. Turner* [2020] UKUT 184 (LC)).

Penalty. The Upper Tribunal has held that the First Tier Tribunal were wrong to take into account fire hazards as a major factor when imposing a penalty for control and management of premises without a licence. It had not been suggested that the hazards were caused by the lack of a licence; a “holistic approach” as regards criminal liability was not appropriate (*AA Homes v. Croydon LBC* [2020] UKUT 181 (LC)).

PLANNING

Enforcement Notice. The Administrative Court refused an application for judicial review of a Crown Court decision to allow a Defendant to vacate a plea of guilty to an offence of failing to comply with an enforcement notice. The plea had been entered in the Magistrates’ Court following an unsuccessful abuse of process argument. In the Crown Court defence Counsel who appeared in the Magistrates’ Court gave evidence. The thrust of the defence argument was that the prosecuting local authority were driven by an improper motive namely the prospect of gain from a confiscation order. The High Court held the Crown Court’s decision was correct (*R (on the application of Kombou) v LB Enfield* [2020] EWHC 1529 (Admin)).

Insolvency. A statutory notice was served on a company shortly before its voluntary liquidation. It related to waste deposited in breach of the 1990 Act. The Chancery Division held that (unlike in a personal insolvency) a fine following a prosecution in relation to the waste disposed was a debt provable in the liquidation. It was imposed in respect of an offence occurring before the liquidation even though it was imposed after the liquidation (*In the Matter of Paperback Collections & Recycling Ltd* [2020] EWHC 1602 (Ch)).

TIME LIMITS

Communication. A bank’s fraud investigator was prosecuted for allegedly using the internal system of the bank to ascertain phone numbers of a couple who were customers and complained about potentially fraudulent activity. He did it in order to harass. The District Judge held that the prosecution was in time. The Divisional Court held that it should not hear an appeal by case stated in respect of an interlocutory ruling. The Defendant undertook to plead guilty if the matter was converted to an application for judicial review and it was dismissed. The Court held that the CPS were the prosecutor, and on the basis of a senior prosecutor’s certificate, the charges had been brought within the time limit in Section 127(5)(b) of the Communications Act 2003 (*Winder v. DPP* [2020] EWHC 1611 (Admin)).

CONSUMER PROTECTION

ADR. After the transition period on 31st December 2020 much of the requirements for an online ADR option will be removed.