



# TRADING LAW BULLETIN

## ISSUE NO. 112 MARCH 2022

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

**FCA.** The FCA issued PS21/16 in respect of a new approach to decision makers when issuing statutory notices. The key change is the ability of the FCA to take decisions on many issues without reference to the Regulatory Decisions Committee.

**BNPL.** The FCA have published a statement about the charges made by four buy-now-pay-later businesses as to their terms as regards fairness and transparency. The FCA refer to the Consumer Rights Act 2015.

**CMCs.** FCA restrictions on CMC fees by way of a cap came into force on 1st March 2022 (PS21/18).

**Illegal Moneylending.** A detailed report by the Centre for Social Justice "Swimming With Sharks" deals with "Tackling illegal moneylending in England". It considers the fall-out by high-cost short term lenders having to leave the market and the impact on BNPL.

**Debt and Possession Claims.** A possession claim had been commenced in a circuit commercial court. The owner of the property which secured the debt brought a claim for a declaration that her signature was a result of fraud. The debt claim was due to take place the following week with a three day estimate. The Judge said the two claims could not be heard together as it would result in an adjournment of the debt claim (*Avison v. Emmanuel*, [2022] EWHC 555 (Comm)).

**Venue.** A judicial review claim was issued in London but the Claimant and her lawyers were based in the North. The Defendant Financial Services Compensation Scheme submitted that the claim should stay in London as it was providing a national service and it and its lawyers were London based. A transfer order was made (*R (On the application of Fortt) v. Financial Services Compensation Scheme* [2022] EWHC 152 (Admin)).

**Damages.** A fraudster deceived a person into selling at an under value valuable and appreciating cars. A dishonest car dealer presented a package for the purchase and sale of cars. This was highly unfavourable and included taking out a substantial loan. The Court of Appeal dismissed an appeal by the dealer on the basis that the Judge had not taken into account the notional benefit of the cash element of the consideration over time (*Tuke v. Hood* [2022] EWCA Civ 23).

**Guarantees.** Summary judgment was granted against a sole director who had signed a loan agreement as director and guarantor. The defences of not acting reasonably, the signature not also being in a personal capacity and duress were dismissed (*Square Leg International Inc v. Raen Construction Ltd* [2022] EWHC 554 (Comm)).

**Jurisdiction.** In a case arising out of the difficulties with the Lebanese banking system with regard to the transfer of foreign currency, the Court considered the provisions relating to consumer law in Rome 1. It was held that a bank's customer seeking to recover what he was owed by the account was subject to Lebanese law: this was the choice of law and overrode Article 6 (*Khalifeh v. Bom Bank SAL* [2022] EWHC 3399 (QB)).

**Decision Notice Suspension.** The Upper Tribunal dismissed an application to suspend a decision notice pending appeal. The decision was to refuse the registration of a crypto asset exchange provider so that the temporary registration ceased to have effect (*Gidiplus Ltd v. FCA* [2022] UKUT 433 (TCC)).

**Unenforceability.** A decision of the Chancery Division dealt with a wide-ranging number of questions as to whether a loan agreement was enforceable. The loan was for £250,000 secured by a second charge of the matrimonial home. It was held that the failure to include the words "or predominantly" in the business purpose declaration cannot affect the validity of the declaration if the loan was "wholly" for business purposes. The use of the green deal wording was a plain and obvious mistake. However, the lender knew that the declaration was false. The agreement was regulated and there had been no default notice and no enforcement order had been obtained. The agreement and charge were unenforceable (*Campbell v. Goldcrest Finance Ltd* [2022] EWHC 423 (Ch)).

**Compensation.** The question of the meaning of Section 38L of FSMA to order compensation was considered by the Court of Appeal. It arose from the promotion of shares. The Judge had ordered the Appellant to pay about £2.7m for the benefit of the investors. The appeal was allowed. Knowledge of the facts which make the act complained of a contravention of the statute must include knowledge of the factual circumstance that prevents a potentially relevant disapplication from operating (*FCA v. Ferreira* [2022] EWCA Civ 397).

**Jurisdiction.** The High Court has considered jurisdiction in the context of an auction for non-fungible tokens. The Claimant made claims relating to the unfairness of the arbitration and governing law clauses, which it was said were inconsistent with the 1982 Act and that the contract was illegal under the Gambling Act 2005. The Defendant was granted a stay of all of the claims (*Soleymani v. Nifty Gateway LLC* [2022] EWHC 773 (Comm)).

**Unfair Terms.** In another CJEU case involving loans denominated in foreign currency it was held that, if it is possible to re-establish the situation existing prior to the conclusion of the contract, the national Court must restore the contractual balance without going beyond what is strictly necessary to that end (*Lombard Lizing* – Case C-472/20).

**Jurisdiction.** The High Court held that it had special jurisdiction under the Lugano Convention contrary to the Defendant investment bank's argument that the Swiss Courts had jurisdiction as it was domiciled there. The claim relates to alleged negligent misstatements and advice. An appeal to the Court of Appeal is outstanding (*Wano v. UBS AG* [2022] EWHC 245 (Comm)).

**Regulated Mortgage Contracts.** As part of a series of transactions a secured loan was made and the Defendants asserted that it was a regulated mortgage contract. The High Court considered the question of the mixed use of land and held that the loan was an RMC but that it was not made by way of business. An allegation of unfair relationship was upheld (*Arthistory Ltd v. Campbell* [2022] EWHC 848 (Ch)).

**Securitization.** Following a trial the High Court held ([2021] EWHC 171 (Ch)) that the Defendants targeted securitization structures relentlessly amongst other things pretending to be directors of issuers, trustees for the noteholders and receivers of the underlying assets. In an application of issuers one of the Defendants has been held to be in contempt by breach of an injunction (*Business Mortgage Finance 4 plc v. Hussain* [2022] EWHC 449 (Ch)).

**FOS Compensation.** With effect from 1st April 2022 the award limits have been increased to £375,000 for complaints referred on or after that date about acts or omissions on or after 1st April 2019 and £170,000 for such events before 1st April 2019.

## FOOD

**Poultry Feed.** The High Court ruled on a case where manufacturers claimed against a supplier in respect of "Vitamin D3 500 Feed Grain". The claim was dismissed. The statutory implied terms had been excluded (*Provimi France SAS v. Stour Bag Co Ltd* [2022] EWHC 218 (Comm)).

**HFSS.** On 1st October 2022 the Food (Promotion and Placement) (England) Regulations 2021 will come into force. They relate to products high in fat, sugar or salt by location and by volume price.

**Calorie Labelling.** On 6th April 2022 the calorie labelling legislation comes into force.

**BREXIT.** The Food and Feed Safety (Miscellaneous Amendments and Transitional Provisions) Regulations 2022 deal with additives, flavourings, enzymes and extraction solvents.

## SALE OF GOODS

**Time for Payment.** In a claim involving a Ferrari racing car the High Court held that time for payment was not of the essence (*DD Classics Ltd v. Chen* 29th March 2022).

## HOUSING

**HMOs.** In an appeal against a penalty imposed for managing or being in control of an HMO without a licence consideration was given to the standard of proof in respect of statutory time limits (*Pinto v. Welwyn Hatfield BC* [2022] UKUT 47 (LC)).

**HMOs.** A former office building was held to be an HMO by the Upper Tribunal. It was occupied by "property guardians" but their function of protecting against damage or trespass was secondary to the use of building as living accommodation (*Global 100 Ltd v. Jemenez* [2022] UKUT 60 (LC)).

**HMOs – Directors.** The Upper Tribunal has held that a rent repayment order could not be made against a director of a company landlord (*Kasowska v. White* [2022] UKUT 11 (LC)).

**HMO Penalties.** Two people had control of an unlicensed HMO. The FTT upheld penalties of £10,000 on each. Section 249(3) provides that only one financial penalty may be imposed on a person in respect of the same conduct. The Upper Tribunal held that both people were persons having control of the premises and it is permissible for separate financial penalties to be imposed on each of two or more joint landlords where each has committed a relevant housing offence based on the same acts or omissions. A local authority or the FTT should give separate consideration to the conduct on each person on whom a penalty is to be imposed (*Gill v. Royal Borough of Greenwich* [2022] UKUT 26 (LC)).

## TRAVEL

**Compensation.** Passengers are entitled to compensation from a non-EU carrier which operates all of the relevant flight on behalf of an EU carrier (*United Airlines - Case C-561/14*).

**Package Travel.** The European Commission has sought views about experiences etc. on Directive 2015/2303.

**Cancellation.** The High Court granted a declaration that two travel companies had breached the 2018 Regulations by failing to refund customers (*CMA v. Truly Travel Ltd* [2022] EWHC 386 (Ch)).

## WEIGHTS AND MEASURES

**Imperial Measures.** The CTSI has urged caution concerning the Government's study on reintroducing imperial markings.

## PROCEDURE

**Costs.** There was a successful private prosecution for statutory nuisance concerning a garden wall. A judicial review claim of the costs' decision should have been brought by case stated but was allowed to proceed. The means of the parties should not have been a predominant consideration (*R (Parker) v Teeside Magistrates' Court* [2022] EWHC 358 (Admin)).

## CONSUMER PROTECTION

**Intermediaries.** The CJEU has held that an intermediary is a trader within Directive 2011/83/EU. The Court also considered the issue of "durable medium" (*Tiketa UAB v. M.S.* Case C-536/20).

**Cladding.** In a claim concerning domestic building cladding, Claimants who owned four high-rise towers were permitted to amend out of time to add a claim about combustible cladding. The permission was upheld by the Court of Appeal (*Mulally & Co Ltd v. Martlet Homes Ltd* [2022] EWCA Civ 32).