



# TRADING LAW BULLETIN

ISSUE NO. 110  
SEPTEMBER 2021

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## FINANCIAL SERVICES

**Handbook.** On 25th October 2021 changes to the handbook come into force as regards information sheets under the Consumer Credit (High-Cost Short Term Credit Refinancing and Peer-to-Peer Lending Information Sheets) Instrument 2021.

**Guarantees.** The Chancery Division upheld a decision to set aside statutory demands. The Defence was that the directors had been induced to enter into the guarantees in reliance on what the finance company said to the effect it was a formality and representations as to the source and funding of the loans to the company. An issue as to affirmation could only be decided at a trial (*William Luttmann-Johnson v. West Sussex Agricultural Ltd* [2021] EWHC 2580 (Ch)).

**Reflective Loss.** The Privy Council upheld an appeal against a Cayman Islands' decision that the Claimants were barred from recovery by the reflective loss rule. The liquidator of the Claimant sought recovery against the custodian and administrators who had been involved in investments in a Madoff Ponzi scheme. It was held that the time to judge whether the reflective loss rule applied was when the loss was suffered and the Claimant was not a shareholder at that time (*Primeo Fund v. Bank of Bermuda* [2021] UKPC 22).

**Costs.** Following its decision in *Adams v. Options UK* [2021] EWCA Civ 474, the Court of Appeal made consequential orders. These included making enhanced costs order on the basis of a Part 36 offer (*Adams v. Options UK* [2021] EWCA Civ 1188).

**Debt Respite.** The first High Court decision on an application to cancel a mental health crisis moratorium has been given. The application was under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (*Axnoller Events Ltd v. Brake* [2021] EWHC 2308 (Ch)).

**VAT – PPI.** The Upper Tribunal has ruled that a CMC making PPI claims was not VAT exempt. The purpose of the service was claiming compensation for mis-selling not the cancellation of the policy. The services were not insurance transactions or performed as an insurance agent (*Claims Advisory Group v. HMRC* [2021] UKUT 199 (TCC)).

**Illegal Moneylending.** On 29th July 2021 the FCA determined the removal of about 625 charges, notices or restrictions entered by businesses controlled by the illegal moneylender Dharam Gopee. The result was achieved by the use of Section 380(2) of FSMA (*FCA v. Barons Finance* [2021] EWHC 2363 (Ch)).

**Transfer of Mortgages.** Borrowers failed to overturn the transfer of their loans from one Cypriot bank to another under legislation

relating to the avoidance of financial instability or for the lack of formalities under the Companies Act 2006 (*Mars Capital Finance v. Hussain* [2021] EWHC 2415 (Ch)).

**Penalties.** In a case involving the sale of a commercial property, the High Court has considered whether an interest charging provision was a secondary obligation and if the law on penalties applied. It was held that a fourfold increase in interest was a penalty (*Abuja Investments Ltd v. Victorygame Ltd* [2021] EWHC 2382 (Ch)).

**Prohibition Orders.** The Upper Tribunal dismissed a reference from an FCA decision to issue a prohibition order following a criminal conviction for attempting sexually to groom a child. The Tribunal held that if the fact of the conviction alone was relied on it was likely the Tribunal would have ordered a redetermination as the FCA had not shown the qualitative relevance of his conduct to his work as a financial adviser. However, factors such as the lack of remorse, lack of integrity and breach of bail conditions meant the FCA's decision was upheld (*Frensham v. FCA* [2021] UKUT 222 (TCC)).

**Forgery and Illegality.** In two appeals to the High Court, two issues were raised in connection with claims by a lender. The first related to the situation where two people own a property and one forges the other's signature on a transfer and the transferee knows of the forgery. The second issue was, if the first transaction was not a sham and the transferee charges the property to a lender, did the law as to illegality apply? The Judge allowed the lenders' appeals (*Victus Estates v. Monroe* [2021] EWHC 2411 (Ch)).

**Receiver's Sale Duty.** A decision of the Chancery Division considered the issue of the duty on receivers as to the price obtained on the sale of charged property (*Serene Construction v. Salata* [2021] EWHC 2433 (Ch)).

## FOOD

**Fish.** The High Court considered the Sea Fishing (Illegal, Unreported and Unregulated Fishing Order) 2009. Notices were issued prohibiting the movement of shipments of tuna from Ghana. It was said this was for verification as to compliance with Regulation 1005/2008. The notices remained in place so long the tuna became unusable. It was held that the continuing detention after the verification procedure was unlawful (*John West Foods Ltd v. Marine Management Organisation* [2021] EWHC 1763 (QB)).

**Amending Domestic Legislation.** In July 2021 DEFRA published a summary of consultation, responses and Government response about amendments to domestic only pieces of food legislation.

**Civil Claim.** A pub landlord who was in prison for 57 days for not paying fines for alleged food safety offences which were overturned following a referral by the Criminal Cases Review Commission is claiming nearly £14m from the successor authority of East Northamptonshire Council.

#### PACKAGE TRAVEL

**Liability.** The Supreme Court has held that a tour operator was liable when a hotel employee raped a customer. The Court of Appeal had held there was no liability as the holiday arrangements did not include a member of the hotel staff guiding a guest to her room (*X v. Kuoni Travel Ltd* [2021] UKSC 34).

#### HOUSING

**Rent Repayment Orders.** There was an unlicensed HMO. The Court of Appeal held that a rent repayment order could be made against the immediate and not superior landlord (*Rukusen v. Japsen* [2021] EWCA Civ 1150).

**Planning.** Rental properties were converted into flats contrary to a planning enforcement order. The Court of Appeal (Criminal Division) upheld a confiscation order (*Barnet LBC v. Kamjab* [2021] EWCA Crim 1170).

**Financial Penalty.** The Upper Tribunal held that a local authority should deal with a case where a landlord had failed to be licensed in a selective licensing area informally without a financial penalty (*Ekweozoh v. LB Redbridge* [2021] UKUT 180 (LC)).

#### ENFORCEMENT

**Procedure.** The CMA appealed from an order that enforcement proceedings should be under CPR Part 7. The Deputy Master had concluded that the CMA's claim included allegations of deceit. The CMA said that the 2008 Regulations did not rely on matters such as deceit. The High Court upheld the order (*CMA v. Care UK Health and Social Care* [2019] EWHC 2828 (Ch)).

**Costs.** An application for costs by the prosecution in respect of a confiscation order appeal was refused (*LB Barnet v. Kamgab* [2021] EWCA Crim 1209).

#### HOLIDAYS

**Park Lease.** A park owner could not, as part of the Service Charge, including the "notional" cost of the park wardens' on-site staff accommodation (*Francis v. Sandoz* [2021] UKUT 174 (LC)).

#### UNFAIR TERMS

**Cancellations.** The High Court has held that a cancellation clause was unduly onerous when it was concealed in terms and conditions and not drawn to the attention of the purchaser. The contract involved 800 mobile phone connections and the charge was £225 per connection (*Blu-Sky Solutions Ltd v. Be Caring Ltd* [2021] EWHC 2619 (Comm)).

#### SALE OF GOODS

**Emissions.** An Advocate General has given an opinion that the use of software to alter gas emissions levels resulted in the vehicle not being in conformity under Directive 1999/44 (*GSMB Invest* (Cases 128/20, 134/21 and 145/20)).

#### COSTS

**Central Funds.** The Administrative Court held that a Crown Court was wrong to refuse costs from central funds to a private prosecutor. The case involved a plea of guilty to selling goods which appeared to be but were not genuine handbags etc. It was said that simply applying for the "usual order" was not the correct approach. Whilst the Judge was wrong to base the decision on the fact that "effective prosecutors" have money, the application for judicial review was refused. The Claimant had contributed to the Judge's error (*R (TM Eye Ltd) v. Crown Court At Southampton* [2021] EWHC 2624 (Admin)).