



TRADING LAW BULLETIN

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FINANCIAL SERVICES

Consumer Duty. The FCA have published final guidance (FG22/5) on the Consumer Duty. It was issued under Section 139A of the FSMA. It applies across retail financial services.

CMA Directions. The CMA has given directions to Monzo Bank Limited under the Retail Banking Market Investigation Order 2017. The directions are in respect of steps to be taken to comply with Part 5 of the Order.

BNPL. The FCA has issued warnings concerning buy-now-pay-later where credit is at present non-regulated but where businesses still need to comply with financial promotion provisions.

Disclosure. The FCA suspected market abuse. A Court in Athens refused an extradition request. The FCA brought civil proceedings under Section 382 and/or 383 of FSMA. The Chancery Division ordered disclosure of letters of request (*FCA v. Papadimitrakopoulos* [2022] EWHC 2061 (Ch)).

FOS – Limitation. An assignee of a mortgagee applied by way of judicial review against a FOS decision regarding the SVR. The High Court held that changes in the interest rate before the relevant date were material to the provisional decision R (*Mortgage Agency Service Number Five Ltd*) v. FOS [2022] EWHC 1979 (Admin)).

Settlement. Facilities were granted under SWAP agreements. Litigation against the bank was settled. Thereafter the companies and individuals involved brought proceedings against the administrators appointed by the bank and solicitors on the basis of their advice on the settlement. The Court of Appeal held that the claims should be summarily dismissed (*Schofield v. Smith* [2022] EWCA Civ 824).

FOS. Permission to apply for judicial review of an Ombudsman's decision relating to the transfer of pensions was refused (*R (On the Application of Portal Financial Services LLP) v. FOS* [2022] EWHC 710 (Admin)).

CMCs. The Upper Tribunal held that the FCA was entitled to conclude that a sole trader CMC had failed to comply with three threshold conditions and was not a fit and proper person (*Suszynski v. FCA* [2022] UKUT 247 (TCC)).

FOOD

Promotion. The Food (Promotion and Placement) (England) Regulations 2021 (SI 2021/1368) came into force on 1st October 2022.

Animal Welfare. Advocate for Animals has begun proceedings on behalf of the Humane League UK in respect of what are

described as “Frankenchickens” being breeds which grew unnaturally large and fast.

TRADING STANDARDS

Authority to Prosecute. In appeals against rulings in preparatory hearings, the Court of Appeal (Criminal Division) has held that the power to prosecute consumer offences irrespective of the area concerned for alleged offences by reason of Paragraph 46 of Schedule 6 to the Consumer Rights Act 2015 was not governed by Section 222 of the Local Government Act 1972 which restricts legal proceedings if expedient for the interests of the inhabitants of the area (*R (City of York) v. AUH* [2022] EWCA Crim 1113).

PROCEDURE

Summonses and Abuse. The Divisional Court considered the Bakers of Nailsea case in the context of an under-age knife case where there is a fixed six months' time limit and held in favour of the prosecution. An abuse argument based on non-RESA advice was dismissed (*LB Barking and Dagenham v. Argos Limited* [2022] EWHC 1398 (Admin)).

PRODUCT LIABILITY

Emission Controls. The ECJ held that software in diesel vehicles was prohibited under Regulation 715/2007 and that rescission was not in principle precluded (*GSMB Invest* (Case C-138/20) and others).

UNFAIR TERMS

Limitations. The ECJ has held that the Directive prevents a limitation period which runs from when each payment was made under unfair terms (*EK v. M* Cases (C-80/21 to C82/21)).

HOUSING

Part 3 Licensing. The Upper Tribunal considered the regime for selective licensing under Part 3 of the Housing Act 2004 in respect of a building consisting of five flats and the imposition of separate financial penalties (*Northumberland Mews Ltd v. Thanet District Council* [2022] UKUT 179 (LC)).

HMOs. The Upper Tribunal allowed a tenants' appeal and remade the FTT's decision on a rent repayment order. The FTT had not taken into account the poor conduct of the landlord (*Simpson House 3 Ltd v. Osserman* [2022] UKUT 164 (LC)).

Repayment Orders. The Court of Appeal has considered how a rent repayment order should be calculated. It was held that the maximum amount of a rent repayment order must be determined without regard to rent which, while it might have discharged indebtedness which arose during the period specified in Section 44(2), was not paid in that period (*Kowalak v. Hassanein Ltd* [2022] EWCA Civ 1041).

Management Regulations. An HMO owner appealed against a civil penalty and, following an FTT decision appealed to the Upper Tribunal. The argument that the Act and Regulations are concerned with the proper management of HMOs and not to guarantee that no individual defendant will ever exist was rejected. The construction of the word “ensure” was considered in detail (*Adil Catering Ltd v. City of Westminster* [2022] UKUT 238 (UT)).

Licensing. The Upper Tribunal held that the First Tier Tribunal could decide an appeal on the basis of facts existing at the date of the appeal hearing. It was a re-hearing from a Housing Authority’s decision (*Hassain v. Waltham Forest LBC* [2022] UKUT 241 (Ch)).

TRAVEL

Pandemic. An Advocate General’s opinion is that if operators cannot perform a package travel contract there is an obligation to provide a cash refund if the tour is cancelled or a reduction in price if the tour is truncated, unless there are exceptional difficulties. (*FTI Touristik Case C-396/21 and UFC – Que Chaisir at CLCV Case C-407/21*).

Compensation. The ECJ has held that a Member State can grant a power to award compensation to a national body which becomes responsible for taking enforcement action (*LOT* (Case C-597/20)).

COOPERATION

EU Consultation. A Commission consultation requests comments on proposed changes to the Cooperation Regulation with regard to digitalisation and new business models.