



# TRADING LAW BULLETIN

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#### FINANCIAL SERVICES

**Financial Services Act 2021.** On 29th April 2021 the Act received Royal Assent. It includes provisions as to the Debt Respite Scheme (Section 35) and the application of the 1974 Act to certain regulated activities (Section 37).

**Discretionary Enforcement.** The High Court has held that a “private” lender was carrying on a regulated activity without authorisation and declined to grant an enforcement order under Section 28 of FSMA (*Jackson v. Ayles* [2021] EWHC 995 (Ch)).

**A New Consumer Duty.** The FCA has published a consultation paper on setting clearer and higher expectations of standards of care in retail financial marks (CP21/13).

**Information Sheets.** New consumer credit information sheets are required from 25th October 2021.

**EU Consumer Credit Directive.** The Commission has proposed a new Directive.

**Guarantees.** The Court of Appeal dismissed an appeal by a company which had borrowed to finance the purchase of goods bought in Yen and sold in US dollars and Euros. Despite inordinate delay in giving judgment the Appeal Court could not disagree with the Judge’s findings as to the evidence. His assessment was not one-sided in favour of the bank (*Dansingani v. Canara Bank* [2021] EWCA Civ 714).

**Mortgages.** The Chancery Division upheld a decision that a claim against a bank should be struck out on grounds of res judicata. The claim involved an allegation that a mortgaged property had been sold at an undervalue (*Fernandes v. Bank of Scotland* [2021] EWHC 1610 (Ch)).

**Effective Cause – Commission.** The Claimant was engaged to provide services for raising long-term finance for the Defendant. A total of €7m was provided by a lender. The Judge held that the Claimant had not been the effective cause of the loan facilities and dismissed the commission claim. The Court of Appeal held that the contract was not a typical introducer’s agreement and not comparable to an estate agent’s contract. There were no grounds for implying an effective cause provision (*EMFC Loan Syndicates v. The Resort Group* [2021] EWCA Civ. 844).

**Advice.** The Supreme Court allowed an appeal by a building society which had entered into rate swaps hedge borrowing to fund lending on mortgages. This had been on the advice of accountants which was negligent. The distinction between advice and information was not rigid (*Manchester Building Society v. Grant Thornton* [2021] UKSC 20).

**Unfair Terms.** In a further series of cases involving consumer loans in a foreign currency the ECJ held that if the consumer does not know that the term is unfair there cannot be a limitation defence in answer to a claim for repayment (*BNP Paribas v. VE* (Case C-609.19)).

**Claims Management.** A former director of a Claims Management company fraudulently breached the duties he owed in relation to the acquisition of part of the business of a solicitors’ practice of which he was sole proprietor. Together with a deceit claim the damages were £9.75m being the purchase price (*Claims Direct Plc v. Hinton* [2021] EWHC 1613 (Ch)).

**Safety Deposit Boxes.** A bank applied for an order concerning 115 boxes. The earliest deposit had been in 1900. There was no record of the current representatives of the original depositors. Consideration was given to the Torts etc. Act 1977. The bank was permitted to inspect the contents of the boxes (*Credit Agricole v. Persons Unknown* [2021] EWHC 1679 (Ch)).

**Default Notices.** There is no rule of law or practice that the creditor under a regulated agreement which bears the burden of proving on the balance of probabilities the service of a default notice can only achieve this by production of the original notice (*Goodinson v. PRA Group (UK) Ltd* [2021] EWCA Civ 957).

**PPI Appeal Costs.** The decision of a single Lady Justice that, in granting permission to appeal, the PPI Claimants’ costs of a second appeal should in any event be paid by the Appellant bank was overturned. The case was a small claims one and there was no power to order costs. The appeal involves Plevin unfair relationships as regards the transitional provisions in the 2006 Act and limitations (*Smith v. Royal Bank of Scotland* [2021] EWCA Civ 977).

**LIBOR.** A bank was sued by two local authorities. The bank had granted loans which involved LIBOR. The bank applied to strike out the claims which were based on fraudulent misrepresentations because of LIBOR fixing. For the purposes of the application the misrepresentations were admitted but the issue was reliance. It was held that the representees had to be aware of the misrepresentations and understand them. The claims were struck out (*Leeds City Council v. Barclays Bank* [2021] EWHC 363 (Comm)).

**FCA/RDC.** The FCA’s Regulatory Decisions Committee proceedings were ordered to be stayed pending a decision of the Commercial Court brought by Danish authorities (*R (on the application of T) v. FCA* [2021] EWHC 396 QBD (Admin)).

**SIPPS.** The Court of Appeal has held that a Claimant’s case under Section 27 of FSMA was well-founded (*Adams v. Options SIPP* [2021] EWCA Civ 474).

**Unfair Relationships.** Following a series of hearings spanning eight days, the High Court rejected a defence of unfair relationships in the context of a bridging loan. One issue went to rolled up interest. The Court held that there was nothing unfair about the relevant clause which provided for this. The use of “aggressive and coarse language” by someone acting for the lender did not result in an unfair relationship. An issue as to the identity of the purchaser of one of the properties involved also did not create unfairness (*Credit Capital v. Watson* [2021] EWHC 466 (QB)).

**Guarantees.** A bankrupt successfully appealed against a decision of the trustee in bankruptcy to admit an alleged debt said to be due to a bank on a guarantee. A handwriting expert said there was strong evidence that the applicant had not signed the guarantee but that the purported witness had. The alleged witness gave direct and credible evidence she had not signed and that she had not seen the applicant sign (*Lynch v. Cadwallader* [2021] EWHC 328 (Ch)).

**Claims Management.** The Court of Appeal has considered the wording “claims management services” in the Compensation Act 2006 in the context of damages based funding agreements in a competition case (*Paccar Inc v. Road Haulage Association* [2021] EWCA Civ 299).

**Duty of Bank.** The Court of Appeal has dismissed an appeal by a property developer against a decision that a bank was not liable to him for breach of duty of good faith or to use reasonable skill and care. Nor had he been concerned by a threat to appoint a receiver (*Mosley v. Royal Bank of Scotland* [2021] EWCA Civ 338).

**PPI.** A customer took a loan in 2006 and was sold PPI. She was not told that over 95% of the financed premium was commission. The customer repaid early and the agreement ended in March 2010. In August 2018 she was given compensation by the lender but this did not cover all her loss. In December 2018 she brought proceedings to recover the balance relying on Section 140A. The lender relied on limitations. The Court of Appeal upheld a High Court decision that there had been deliberate concealment within Section 32(1)(b) of the Limitation Act 1980 (*Cavendish Square v. Potter* [2021] EWCA Civ 339).

**Liability of Information Publishers.** An attempt to add additional Claimants was refused. The action was by shareholders. It related to a company providing security and other services to Government and an investigation relating to billing. The claim was under Section 90A of FSMA (*Various Claimants v. G4S PLC* [2021] EWHC 524 (Ch)).

**Proper Law.** In a case involving the purchase by way of mortgage of properties in Cyprus, the Judge hearing the trial in the High Court held that English or Scottish law applied not Cypriot law (*Barclay-Watt v. Alpha Panareti Public Limited* [2021] EWHC 642 (Comm)).

**Identity Fraud.** The High Court continued a freezing injunction in the case of an alleged identity fraud. The Claimant provided short-term asset-based lending. It agreed a loan to a couple who apparently had appointed Solicitors to whom £600,000 was transferred. Due to default it became clear that the

apparent borrowers had been the victims of identity theft (*MSP Capital Ltd v. Persons Unknown* [2021] EWHC 1081(Comm)).

**Co-Guarantors.** The Privy Council dismissed an appeal from the Court of Appeal of the British Virgin Islands by a co-guarantor who had been held liable for a contribution under a settlement of a guarantee claim. The trial Judge had correctly held there had been no sale of properties given as security and the delay in giving judgment did not result in an unfair trial (*Pickle Properties Ltd v. Plant* [2021] UKPC 6).

**Commission.** In two appeals the Court of Appeal considered the issue of brokers’ commission. Dismissing appeals by assignees of lenders it was held that the commission payments had been fully secret and the borrowers were entitled to rescission. The borrowers had also paid commission. The Court said there was no need to show a fiduciary relationship (*Wood v. Commercial First* [2021] EWCA Civ 471).

**Mis-Selling Claims.** Liquidators brought claims against the Respondents in respect of a business running a scheme for funding claims against financial institutions for allegedly mis-selling bonds. Investors put in about £3.3 m and received payments of only just over £230,000. The Respondents, directly or through companies, received just under £2.2 m. Claims against all but one of the Respondents who had not settled (as some had) were dismissed (*Biscoe v. Milner* [2021] EWHC 763 (Ch)).

**Bankruptcy.** A consumer successfully appealed against a bankruptcy order obtained as a result of default under a fixed-sum loan agreement for home improvements. The District Judge had failed to take into account the family’s financial circumstances or the reasons why the debt had not been paid. There had also been an offer to pay by a family member. The matter should have been transferred to a specialist Judge (*Ndyababika v. Hitachi Capital* [2021] EWHC 633 (Ch)).

**Assignment.** The owner of a Surrey mansion borrowed about £3.8 m. The rate was 2.8% flat monthly. If payments were made within seven days of the due date the rate reduced to 1.4%. The borrower stopped making payments and retained the Defendant Solicitors to look at challenging the loan agreement on consumer credit grounds. The Defendants’ terms prohibited assignment by the client and gave no third party rights. The borrower became bankrupt and purported to assign the claim against the Defendant to the Claimant. A Deputy QB Master struck out the claim on the assignment issue (*Burleigh House (PTC) Ltd v. Irwin Mitchell LLP* [2021] EWHC 834 (QB)).

**Illegality.** The Claimant and a vendor effected a mortgage fraud. She did this to get funds from a high street lender she would not otherwise have got. The solicitors acting for the Claimant, the vendor of the property and the bank failed to register the transfer. The bank brought possession proceedings after default. The Claimant claimed against the solicitors who pleaded illegality. The Supreme Court rejected the defence on the basis of important public policies such as the policy that victims of solicitors’ negligence should be compensated (*Grondona v. Stoffel & Co* [2021] 2 All ER 239).

**Strike Out.** A company obtained funding from a bank secured

on property. On default LPA Receivers were appointed and the Claimants in the present action issued proceedings. These were struck out for failure to comply with an unless order. The second proceedings alleged, amongst other matters, false accounting and forgery by the bank. It was held that the proceedings were essentially raising issues the subject matter of the first action. The proceedings were struck out (*889 Trading Ltd v. Clydesdale Bank Plc* [2021] EWHC 850 (Ch)).

**Duty of Care.** The Court of Appeal considered a claim by liquidators against a bank of which the insolvent company had been a customer. The claims related to how the bank dealt with the company's accounts whilst the company was committing one of the largest and most prolonged Ponzi schemes in history. The company submitted that senior management of the bank dishonestly allowed it to be run so that no one ever got to the point of realising the company was a Ponzi scheme. It was held the bank's appeal on a loss claim succeeded; the company did not sustain the specific loss it claimed. The appeal by the company on a dishonest assistance claim failed (*Stanford International Bank (in Liquidation) v. HSBC* [2021] EWCA Civ 535).

**SIPPS Prosecution.** A director of an investment company was alleged to have committed fraudulent trading. Investors were loaned SIPPS contributions by the company. Tax relief was paid by HMRC to another company which was an administrator which paid the money to the director's company. About £900,000 was paid and it was alleged that the Defendant spent it. Investors said they were told the money would be invested. The Defendant's appeal against conviction and six years' imprisonment was dismissed (*R v. Say (Darren Terrence)* [2021] EWCA Crim 520).

**Swaps.** The Claimant brought two interest rate swaps from the Bank. The claim was not about the original mis-selling but related to the bank's conduct in the review process under arrangements with the FCA. There were preliminary issues as to whether there had been a complaint within DISP and, if so, the statutory duties. The Court of Appeal upheld the Judge's decision that there had not been a complaint sufficient to trigger DISP. The review process made it (unusually) possible to bring a dispute before FOS even if the customer has not made a complaint to the business (*Davies v. Lloyds Bank Plc* [2021] EWCA Civ 557).

**Jurisdiction.** A claim was made for the repayment of interest-free loans by an individual and companies of his to a friend who lived in France. The claim was against the estate of this friend who had died. The High Court held that, whilst a commercial loan would likely be a contract of service within Article 7.1(b) of Regulation 1215/2012, this was not part of a money lending business and therefore not a service. Under Article 4(2) of Regulation 593/2008 the governing law was English. There was a good arguable case the English Courts had jurisdiction under Article 7.1(a) of 1215/2012 (*Winslet v. Gisel* [2021] EWHC 1308 (Comm)).

**Unfair Terms.** Another case involving a loan agreement denominated in a foreign currency was before the ECJ. The result was that it was for the national court to determine issues relating to amendments so as possibly to restore the balance between the parties and the change in substance of the contract by removal of a term (*I.W. v. Bank BPH S.A.* (Case C-19/20)).

**Intercreditor Deed.** A preliminary issue was decided about the scope of a provision that "Neither lender should challenge or question ... the validity or enforceability of any Security". It was held that it was unlikely that it referred only to formal validity. More generally it included the effectiveness of the security. In any event there was an estoppel from contending that obligations were not secured obligations (*Re Arloretum (Devon) Ltd* [2021] EWHC 1047 (Ch)).

**Limitations.** Claims against two banks were struck out on limitations. The claims were for breach of contract and negligence in dealing with a business involving vehicles, including hire purchase. There were personal guarantees. The action was outside the primary limitation period. The background included criminal and civil proceedings. The High Court held that it had not been shown that there was a real prospect of success in showing that the limitation period had been deferred for concealment under Section 32(1)(b) (*Dixon v. Santander Asset Finance Ltd* [2021] EWHC 2044 (Ch)).

**Injunction.** A Judge of the Chancery Division granted an interim injunction to prevent the sale of properties by a lender until it had been determined if there had been a default under a bridging loan, the issue of penalties and undue influence (*Houssein v. London Credit Ltd* [2021] EWHC 1417 (Ch)).

## SALE OF GOODS

**Auction.** A successful bidder for two houses at an auction had not registered that he was an agent for a company and was therefore liable with the company jointly and severally for the purchase price. A submission that the grant of a period of grace to pay the purchase price amounted to a credit agreement to which the Defendant was not a party was rejected (*Tattersalls Ltd v. McMahon* [2021] EWHC 1629 (QB)).

## HOUSING

**Repayment Order.** A landlord failed to obtain a licence in respect of a flat in a selective licensing area. The Upper Tribunal held that only rent paid before the landlord made a licence application was recoverable. The FTT had not acted irrationally or outside its discretion when considering the conduct of the parties. A tenant's deposit could not be treated as rent for a repayment order (*Kowalek v. Hussanein Ltd* [2021] UKUT 143 (LC)).

**Statutory Nuisance.** The High Court considered the issues of compensation ordered by Magistrates. There were errors and the matter was remitted. The Court also considered the proper approach to an appeal by way of case stated (*Taylor v. Longfield Real Estate Ltd* [2021] EWHC 1454 (Admin)).

**Time Limits.** There had been a conviction in the Magistrates' Court of failing to cease to use a property as self-contained flats. The case was sent to the Crown Court. This was adjourned so there could be an appeal by way of case stated from the Magistrates' Court decision. The Crown Court held that the 21 days' time limit started from that day. The High Court held that that there was no power to extend time under Section 111 of the 1980 Act (*Aboutboul v. LB Barnet* [2021] EWHC 285 (Admin)).

## GAMING

**Spread Betting.** A Defendant in a claim for alleged losses was refused permission to introduce a COBS claim but an

amendment as to implied duties was allowed (*CMC Spreadsheet plc v. Tchenguiz*, 13th May 2021).

## ADVERTISING

**International Council.** The International Council for Advertising Self-Regulation which includes the ASA have adopted a Charter to strengthen self-regulation globally.

## PUB ADJUDICATION

**Preliminary Issue.** An appeal against a penalty on a pub-co by the Pubs Code Adjudicator should not involve a preliminary issue as it would not be determinative of the appeal (*Star Pubs & Bars Ltd v. Pubs Code Adjudicator* [2021] EWHC 1810 (Admin)).

## AIR TRAVEL

**Compensation.** The ECJ has held that compensation is not payable in the case of a mere diversion to a close by airport but the airline shall bear the cost of a transfer (*WZ v. Austrian Airlines AG* (Case C-826/19)).

**Extraordinary Circumstances.** The High Court has held that industrial action by a carrier's employees does not amount to extraordinary circumstances for the purposes of Article 5(3) of Regulation (EC) 261/2004 (*CAA v. Ryanair*, 29th April 2021). Permission to appeal to the Court of Appeal has been granted.

**Extraordinary Circumstances.** Staff illness was considered in *Lipton v. BA city Flyer Ltd* [2021] All R (D) 127 (Mar) and was followed in *CCA v. Ryanair* [2021] EWHC 1476 (Ch). This was an enforcement case under Pt 8 of the 2001 Act.

## ANIMALS

**Sentencing.** Sentences for animal welfare offences are increased by the Animal Welfare (Sentencing) Act 2021.

## CONSUMER PROTECTION

**Transfer of Ownership.** The Law Commission has published the draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill. It would modernise rules on the issue (HC 1365; Law Com No 398).

## PRIVATE PROSECUTIONS

**Notices.** Section 82(6) of the Environmental Protection Act 1990 requires a private prosecutor to give notice of intention to bring a prosecution. The Appellant brought a prosecution against a local authority in respect of mice infestation. The Appellant's solicitors sent a recorded delivery notice addressed to the "London Borough of Ealing" but not to the "secretary or clerk" or the relevant department. The District Judge accepted that the notice was ineffective. An appeal was allowed. The Section which provided for service on the "secretary or clerk" was permissible by use of the word "may" (*Allen v. Ealing LBC* [2021] EWHC 948 (Admin)).

## BETTING

**Terms.** Having played a form of blackjack online the Claimant was credited with some £1.7m chips. When he tried to redeem them he could not. A fault in the game meant that when play continued without a break, the player got much better odds than the Defendants intended. The Defendants said three terms in the contract excluded liability, relied on the doctrine of common

mistake and said they could limit their obligation to the return of the stake. The Judge held that the clause fell foul of the statutory obligation of fairness. In particular, there was a failure adequately to signpost the exclusion clauses. The clauses did not as a matter of language exclude liability. The mistake was said to be that the game was functioning properly. It was held that the doctrine of mistake was inapplicable. Summary judgment was granted (*Green v. Petre (Gibraltar) Ltd t/a Betfred* [2001] EWHC 842 (QB)).

## CONSUMER PROTECTION

**Defective Product.** An Advocate-General's opinion has been given to the effect that a physical copy of a newspaper which included a technically inaccurate health tip which caused damage to health was not a defective product. The case related to a civil claim by someone who followed the advice with regard to grated horseradish (*VI v Krone* Case C-65/70).

## PLANNING

**Confiscation.** A summons was issued for a failure to comply with a planning enforcement notice. The case came before the High Court by way of a prosecution appeal that the confiscation order based on one day's income was wrong. The matter had to be redetermined at a further hearing by the Court of Appeal (*LB Barnet v. Kamjab* [2021] EWCA Crim 543).

## RATES

**Check List.** The High Court set out a check list for the determination of occupation for the purposes of non-domestic rating (*R (on the application of Secretary of State) v. Harlow DC* [2021] EWHC 090 (Admin)).