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CONSUMER CREDIT

Charging Orders. The Court of Appeal overturned a decision that an application to intervene in an application for a final charging order by a bank was an abuse of process. There had been committal proceedings and the Judge had held that the application to intervene was a collateral attack on the findings. The Court of Appeal disagreed (*Salim Shalabayev v. JSC BTA Bank* [2016] EWCA Civ 987).

Conveyancing Solicitors. A lender made allegations of fraud against two lawyers employed by solicitors acting for a borrower. It had been said that misrepresentations had been made about various matters such as the property development in question. After a long trial all the allegations were dismissed and the lawyers completely exonerated. The High Court said that some of the allegations should not have been made and that the Claimants approached the case with "fraud goggles" (*Mortgage Agency Services v. Cripps Harries LLP* [2016] EWHC 2483 (Ch)).

Litigation Funding. In a claim said to be worth about £700 million in respect of a Bank's former dealings with a property group which had become insolvent the Defendant applied for an order requiring the Claimant to identify a third party who was funding the litigation. The High Court made the Order (*Wall v. Royal Bank of Scotland* [2016] EWHC 2460 (Comm)).

Unfair Relationships. The Court of Appeal in Northern Ireland dismissed an appeal from a judgment in favour of a bank. The Court said that the argument that the unfair relationship provisions applied to an exempt agreement (for business purposes) was irrelevant because it was not a credit agreement as the credit was provided to a limited company albeit guaranteed by the Defendant. For the same reason Section 86E did not apply but, in any event, the case did not involve a default sum (*Bank of Ireland (UK) Plc v. McLaughlin* [2016] NICA 33).

Security for Costs. Companies were granted overdraft facilities and, through their joint liquidators, brought proceedings alleging that the Defendants had breached duties to them and used unlawful means to cause loss. The High Court declined to order security for costs on the basis of an existing ATE policy (*Premier Motor Auctions Limited v. Price Waterhouse Coopers and Lloyds Bank Plc* [2016] EWHC 2610 (Ch)).

Hire-Purchase. UK VAT legislation excluded from VAT debt relief debts in connection with the supply of goods containing retention of title clauses including hire-purchase agreements. A finance company argued that those conditions were incompatible with the VAT Directive. The Supreme Court said that the exclusion was neither appropriate nor necessary (*Revenue and Customs Commissioners v. GMAC (UK) Plc* [2016] EWCA Civ 1015).

Disbursement Funding. The Supreme Court held that a funding agreement between a finance company and a firm of solicitors whereby loans were made for litigation disbursements was a supply of a service and therefore the finance company's claim against the professional indemnity insurer failed (*Impact Funding Solutions Limited v. AIG Europe Limited* [2016] UKSC 57).

Jurisdiction. The Court of Appeal dealt with a case concerning a Portuguese bank which had been established as a bridge bank following the collapse of another bank. The Court of Appeal held that it was not a party to a facility agreement entered into by its predecessor and was not therefore bound by a jurisdiction clause in respect of English jurisdiction or an agreement for English law to apply. The principle was established in Article 3 of Directive 2001/24 and therefore an appeal by the bank against a decision that the English Courts had jurisdiction was allowed (*Guardians of New Zealand Superannuation Fund v. Novo Banco SA* [2016] EWCA Civ 1092).

Summary Judgment. A company appealed against a decision which granted a bank summary judgment on the claim and counterclaim. There had been a first loan facility and subsequently a second facility to refinance the first. The company asserted that there was a serious procedural irregularity by not adjourning proceedings because of the question of legal representation. The Court of Appeal held that the Judge's refusal to adjourn fell within the ambit of the reasonable discretion (*Serene Construction Limited v. Barclays Bank Plc* [2016] EWCA Civ 1379).

Restitution. Following a decision that certain swap agreements with an Italian local authority were invalid because the bank did not state the entitlement to a mandatory seven day cooling off period pursuant to consumer law in Italy, issues of restitution arose and the bank succeeded in a restitutionary claim for recovery of the net difference paid out under the swaps which had been held null and void and the payments received by the local authority (*Dexia Crediop Spa v. Comune Di Prato* [2016] EWHC 2824 (Comm)).

Credit Cards. A cardholder appealed against the refusal to annul a Bankruptcy Order against her. The debt was a credit card debt and she said that the creditor had not proved the agreement. An illegible microfiche copy of the agreement had been produced. It was also alleged that the Default Notice was defective under the 1983 Regulations because it sought the entire outstanding balance. The High Court Judge refused permission to appeal (*Blackshaw v. MFS Portfolio Limited*, 20th November 2016).

Expert Evidence. The Claimants brought an action for damages including negligence in respect of the provision of interest rate hedging products. In a case management conference, the Chancery Master held that expert evidence should not be allowed as all the issues were factual (*Barby Properties Limited v. Lloyds Bank Plc* [2016] EWHC 2494 (Ch)).

Valuation. The High Court dismissed a claim by a bank which had loaned money to a couple to purchase property being used as a care home. The business failed and it was alleged that the valuation had been negligent. The Court adopted the test of earnings before interest, taxation, depreciation, amortization and rent. It was held that the valuation of the property was challenging and there were very limited comparables. Therefore a 15% margin of error was appropriate. The claim was dismissed (*Barclays Bank Plc v. TBS & V Limited* [2016] EWHC 2948 (QB)).

Overseas Proceedings. The High Court granted summary judgment to a bank on a claim against Tanzanian companies for repayment of sums advanced. The Defendants raised allegations concerning current proceedings in Tanzania and alleged that two variations involving restructuring of the loan were invalid or illegal. It was held the illegality case was inherently fanciful and there was no sustainable defence (*Standard Chartered Bank v. Independent Power Tanzania Limited* [2016] EWHC 2908 (Comm)).

Possession. The High Court dismissed an appeal against the striking out of a defence. The Appellant had a home which was mortgage-free and bought a second property with a mortgage from the bank. She took a mortgage on the first property to raise money for an investment. She alleged that the bank knew that the scheme involved was fraudulent and that the bank had not been authorised to make a re-investment. Although the defence was struck out the Court said she would arguably have an equitable set-off and allowed a defence to be re-pleaded and the case was transferred to the County Court (*Copeland v. Bank of Scotland*, 17th November 2016).

Event of Default. The terms of a loan provided that there would be an event of default if arrangements were made in respect of the debts of the borrower. The Court of Appeal held that this did not require the arrangement to have been made in respect of all of the debts of the borrower (*Fomento de Construcciones v. Black Diamond Off Shore* [2016] EWCA Civ 1141).

LIBOR Swaps. After many interlocutory hearings and decisions there was a trial in the swaps case against RBS. The Chancery Division held that all the claims failed. There had been an express provision excluding advisory duties or a fiduciary relationship. The term "hedge" in the agreement would not have been understood to contain a representation as to the quality of the transaction. There was no implied term that the bank would carry out the agreements in good faith and if there had been such a term, the bank would not have been in breach because of the transfer to the Global Restructuring Group. Although there would be an implied term that the parties would conduct themselves honestly merely proffering the draft swaps referable to LIBOR did not constitute the alleged misrepresentation as regards LIBOR-setting (P*roperty Alliance Group Limited v. Royal Bank of Scotland* [2016] EWHC 3342 (Ch)).

Promissory Notes. The High Court granted summary judgment on promissory notes. The Respondent asserted that the documents were not promissory notes because they were not negotiable. It was also alleged that the bank had given assurances it would not draw down on the notes. It was held that the documents were promissory notes and satisfied the Bills of Exchange Act 1882 and the notes were negotiable and if they had not been they would have been valid between the parties. There was no real prospect of success on the assurance argument because the instruments excluded all evidence to contradict them (*Banque Cantonale de Geneve v. Sanomi* [2016] EWHC 3353 (Comm)).

Per Annum Interest Rate. The Court of Appeal considered issues concerning the interest entitlement under certain notes issued as part of a mortgage-back securitization. It was held that the interest which was paid on the underlying loans was exclusive of any element of default interest and "per annum interest rate" was interpreted as ordinary interest only (*Credit Suisse Asset Management v. Titan* [2016] EWCA Civ 1293).

Choice of Law. The Court of Appeal considered the choice of law in long-term interest rate swaps between a Portuguese bank and a Portuguese state-owned transport company. The fundamental principle was the parties' freedom to choose the applicable law and the choice was not disapplied by the Rome Convention (*Banco Santander v. Companhia de Carris* [2016] EWCA Civ 1267).

Rate of Interest. The High Court dismissed an appeal granting summary judgment to a lender. The issues related to a LIBOR linked loan but with the proviso that if this did not accurately reflect the lender's costs the lender could determine and certify an alternative interest rate basis (*Blackwater Services v. West Bromwich Commercial Limited* [2016] EWHC 3083 (Ch)).

Inflation-linked Event. It was asserted that the bank had used a fabricated figure which, for political purposes, the Argentine Government had procured. It was said that the "CER Event" referred to a genuine measurement of inflation and not a fabricated number. The Court of Appeal held that the bank's construction of the relevant clause was to be preferred, the documentary context was critically important (*Metlife Seguros v. J P Morgan Chase Bank* [2016] EWCA Civ 1248).

Jurisdiction. The two claimants were a UAE registered bank and the London Branch of an Indian bank. The claim was under a facility agreement. There were guarantees which are governed by English law. The banks had served a notice under Indian legislation to enforce a security interest but the High Court held that this did not constitute the taking of proceedings for the purposes of a jurisdiction clause. The banks had been entitled to issue in England (*Bank of Barova v. Nawany Marine Shipping* [2016] EWHC 3089 (Comm)).

Disclosure. A claim was brought against a wealth management company in respect of alleged negligence and breach of contract. The High Court ordered disclosure of a report by the FSA investigating the business. The report was relevant to the issues in the trial (*Rocker v. Full Circle Asset Management*, 1st December 2016).

Independent Financial Advisers. An IFA went into administration because of claims. The Claimants claimed a declaration that the insurance company had not validly avoided the indemnity insurance policy. The High Court held that there had been material non-disclosure and the claim was dismissed (*Mark Nicholas Kennedy Aldrich v. Liberty Mutual Insurance*, 23rd November 2016).

FINANCIAL SERVICES

Prohibition Orders. The Upper Tribunal dismissed a reference from an FCA decision imposing a limited prohibition in respect of compliance oversight and money laundering significant influence functions (*Carrimjee v. FCA* [2016] UKUT 447 (TCC)).

Costs. On 23rd November 2016 the Court of Appeal heard an appeal from the Upper Tribunal relating to costs which had been awarded against the FCA even though they succeeded overall because of unreasonable conduct (*Burns v. Financial Conduct Authority* [2015] UKUT 601 (TCC)).

Financial Advisors. The Chancery Division concluded that a tied financial advisor had not applied reasonable skill and care in exercising his professional duties in that he had failed to consider his client's domicile and tax planning affairs and had negligently misstated the charges which would be levied. The product was a gift and loan trust scheme. For the purpose of bringing the action an independent financial advisor agreed to investigate the advice on the basis of receiving 20% of any sum obtained. It was held that the claim was not champertous because it only related to monies received from the formal complaints process and not to damages. Even if there had been a champertous agreement it would not have been a defence. On the facts the claim was not statute barred having regard to the health of the Claimant and the involvement of her children. Damages were assessed at £223,000 (*Lenderink-Woods v. Zurich Insurance Limited & Others* [2016] EWHC 3287 (Ch)).

Authorised Persons. The Upper Tribunal upheld the FCA's refusal to vary the permission of a financial consultant to enable him to carry out consumer credit related activities. The decision was within the range of reasonable decisions. There had been repeated failure to comply with requests by the authority and the FCA could not be satisfied it would meet the threshold conditions. However, the Upper Tribunal made comments about how the FCA may assist a firm struggling with the complexities of regulatory provisions (*Koksal v. Financial Conduct Authority* [2016] UKUT 478 (TCC)).

UNFAIR TERMS

Leases. In a case involving service charges the Upper Tribunal referred to the 1999 Regulations but, having regard to a drafting error and the position of the parties, it was not necessary to consider their application (*Thomas Homes Limited v. MacGregor* [2016] UKUT 495 (LT)).

UNFAIR COMMERCIAL PRACTICES

Anti-Social Behaviour. A local authority alleged that over a period of years the Defendants had repeatedly engaged in a particularly unpleasant form of anti-social behaviour by targeting elderly and vulnerable persons and charging them excessive sums for building works which were unnecessary or shoddy. An Order was made and a Defendant appealed alleging that the Act precludes the Court from taking into account conduct relied upon prior to the coming into force of the Act. The High Court held that it was necessary to prove that anti-social behaviour had occurred after the relevant date but evidence of conduct before that may also be taken into account when considering whether to grant an injunction (*Birmingham City Council v. Pardoe* [2016] EWHC 3119 (QB)).

Advertising. Proceedings were brought against an undertaking providing television programme packages in Denmark. In an advertisement on television the monthly charge was given in text and voiceover but no information about the card service was given by voiceover. Even though the requirement to consider limitations of time and space was not expressly referred to in the national legislation the Court should take them into account in accordance with the Directive. If a commercial practice divides the price of a product into several components and highlights one of them this must be regarded as misleading since that practice would be likely to give the average consumer the false impression that he has been offered a favourable price (*Criminal Proceedings against Canal Digital* (Case C-611/14)).

Health Insurance. The ECJ held that a health insurance fund established as a public body under German law was within Directive 2005/29 (*EKK v. Zentrale* (C-59/12)).

GAMING

Cheating. The Court of Appeal upheld a decision against a professional gambler who had sued to recover winnings. The Court considered whether dishonesty was an essential element of cheating (*Ivey v. Genting Casinos UK Limited* [2016] EWCA Civ 1093).

PACKAGE HOLIDAY

Liability. The Claimant alleged that she was sexually assaulted at a hotel in Sri Lanka. The holiday was a package within the 1992 Regulations. The Judge held that it could not sensibly be said that the actions of the man concerned formed any part of the contractual services which were to be supplied. The Defendant could not be held to be liable under the Regulations (*X v. Kuoni Travel Limited* [2016] EWHC 3090 (QB)).

TIMESHARE

Timeshare Exchange. The Claimant brought an action against the Defendant timeshare exchange company for breach of contract. The Chancery Division held that there was no significant imbalance in the term regarding "permitted use". The Court considered the requirement of good faith and held that the Claimants had not shown that what the Defendant did caused a shortfall in suitable exchange opportunities. Although there was little doubt there had been a breach in certain years, causation had not been shown and the Claimants had not be able to prove any loss. There is an application for permission to appeal (*Abbott v. RCI Europe* [2016] EWHC 2602 (Ch)).

ESTATE AGENTS

Contract. The Court of Appeal considered a case involving the sale of certain flats by a developer. The Court of Appeal allowed the developer's appeal against the decision that he was liable to pay commission to the Defendant estate agent. The majority of the Court of Appeal held that there was no trigger event in a telephone conversation or the documentation so that there was no completed bargain. If there had been a binding oral contract the Court would have dismissed the appeal in respect of the provision of information under the 1991 Regulations and Section 18 of the 1979 Act. The test of culpability and prejudice should not be considered separately but should be considered together in the round. The speed of the transaction was an aggravating factor. However, the Judge was right to reduce the commission which would have been payable (*Wells v. Devani* [2016] EWCA Civ 1106).

TRADE MARKS

Grey Goods. The defence brought an appeal from a preparatory hearing in the Crown Court. The question was Section 92 of the 1994 Act. The issue was whether a criminal offence can be committed where the proprietor of a trade mark has given its consent to the application of the sign or has itself applied its own registered trade mark but has not given its consent to the sale, distribution or possession of the goods. The Court of Appeal rejected the Appellant's argument that where the relevant sign has been applied with the consent of the proprietor this cannot constitute criminal offending. The goods in question were all manufactured outside of the EU and it was not a case of parallel imported goods (*R v. C* [2016] EWCA Crim 1617).

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Costs. After a trial in the Magistrates Court the Appellant publicans were convicted of offences contrary to Section 297 of the 1988 Act. The prosecutions were brought privately. The prosecutor was an independent company carrying out its own commercial activity. There was an appeal by way of Case Stated raising issues of EU law. However, following an earlier case it was held that the proceedings were a nullity because the employee who laid the informations was not authorised to do so under the Legal Services Act 2007. The Court treated the proceedings as an application for judicial review and quashed the convictions. The Divisional Court refused to order that the Football Association Premier League pay the Appellant's costs in the Magistrates' Court. On appeal the Court of Appeal considered whether there was jurisdiction. It was held that the matter related to a criminal cause or matter and so there was no jurisdiction. The Court nevertheless considered certain provisions of the Prosecution of Offences Act 1985 (*Darroch v. Football Association Premier League Limited* [2016] EWCA Civ 1220).