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FINANCIAL SERVICES

Judicial Review. A SIPP provider and administrator applied for judicial review of a final decision of the Ombudsman under the FOS scheme. The client concerned invested in a "green oil" scheme in Cambodia. It was said that the provider did not provide investment advice but was an administrator. The scheme was a scam and the FOS found against the Claimant. Consideration was given to COBS and the Principles and the FOS decision was upheld (*Berkley Burke SIPP Administration Ltd v. FOS* [2018] EWHC 2876 (Admin)).

Costs. In an IVA the Appellant submitted a claim for an unpaid loan of £87,000. The joint supervisor of the bankrupt's IVA rejected the claim on the documentation on the basis of the loan had been made to a company and not to the bankrupt. In due course the Appellant successfully challenged the decision and the claim was admitted. The High Court upheld the decision of the Judge that there should be no Order as to costs (*Bhogal v. Knight* [2018] EWHC 2952 (Ch)).

Mortgage. The High Court upheld a decision in respect of a mortgage which a mother had been induced to enter by fraudulent representations from her son. The decision which was upheld was that the bank acquired an equitable charge over the son's beneficial interest even though the mortgage was void for undue influence. There was an issue as to the declaration of trust in the TR1. The Appellant said that it was vitiated by mistake but the Court said mistake had simply not been explored at the trial (*Santander UK Plc v. Fletcher* [2018] EWHC 2778 (Ch)).

Guarantee. One of the former directors of a firm of solicitors which was acquired by other solicitors attempted to strike out a claim by Barclays Bank which sought to enforce a guarantee of £55,500 which was provided to cover a loan and overdraft. It was held that the term of the loan was repaid and the overdraft facility refinanced through Barclays and the question of whether the facility agreement was substituted for the overdraft would be an issue for trial (*Barclays Bank v. Cohen*, 29th October 2018).

Jurisdiction. The main proceedings concerned a dispute in respect of immovable property in Poland. The ECJ held that where a person entitled to a debt arising under a contract requests that an act by which his debtor has transferred an asset to a third party which was allegedly detrimental to his rights should be declared ineffective in relation to the creditor was covered by the rule of International Jurisdiction in Article 7(1)(a) of 1215/2012 (*Fenicks sp v. Azteza* (Case C-337/17)).

Preventative Attachment Instrument. The ECJ gave judgment on 4th October 2018 in a matter whereby a business sought the enforcement in Germany (by registration of a debt-securing mortgage against real property) of a Preventative Attachment Order issued in Italy. The ECJ held that Article 28 of 44/2001 must be interpreted as not precluding legislation by a Member State which provides for the application of a time limit for the enforcement of a Preventative Attachment Order from being applied in a case of an order which had been adopted in another Member State and was enforceable in the Member State in which enforcement was ordered (*Societa Innobiliare* (Case C-379/17)).

Limitations. In a Scottish case the Sheriff considered the issue of limitations in respect of a credit card debt. It was held that the defender had failed to aver that the contract fell within Article 5 of the Rome Convention and, even if it did, the Scottish rules on prescription were not of the nature of "mandatory rules" within Article 5.2 (*PRA Group (UK) Limited v. Reilly* [2018] SCGLA 59).

Insolvency. An Appellant successfully appealed against a bankruptcy order in respect of arrears of school fees. The Appellant had offered to pay the debt in instalments insofar as the debt was undisputed and the debt recovery costs were disputed bona fide on substantial grounds. A reasonable hypothetical creditor ought to have accepted the offer (*Boulton v. Queen Margaret's School, York Limited* [2018] EWHC 3729 (Ch)).

Up-front Fees. A finance company was granted summary judgment against the Defendant General Practice Surgeries. The Defendant's surgeries had a shortage of doctors and they entered into an agreement with a third party to provide them with locum GPs. An up-front fee was charged and was financed by the Claimant. The third party did not place any locums and went into administration. The defence was that the surgeries had been induced to enter into the agreements by misrepresentations made by the third party which was acting as the agent of the Claimant. The evidence was entirely consistent with the third party acting as an independent service provider or broker or as agent of the borrower if it was an agent at all. Summary judgment was granted (*Premium Credit Limited v. Primary Care Management Solutions Limited* [2018] EWHC 3083 (Comm)).

Security. A Czech aircraft manufacturer was sold using a loan which was secured by a pledge of shares and a personal guarantee. Summary judgment was granted and in the appeal it was contended that there was an equitable obligation to the surety to take reasonable steps to protect its security and it was at least arguable that this had been breached. The Court of Appeal held that there was no question of a creditor having an absolute duty to ensure that a surety could have recourse to a security. There was no real prospect of a successful defence on the basis of the breach of an equitable obligation (*General Mediterranean Holding v. Qucomhaps Holdings Limited* [2018] EWCA Civ 2416).

Transfer of Business. The High Court approved a scheme transferring an insurance group's business from the UK to main land Europe in part by an order under Section 112 of FSMA and

in part by a cross-border merger (*In the Matter of AIG Europe Limited* [2018] EWHC 2818 (Ch)).

Appointed Representatives. An action was brought to recover losses as a result of investing in a fraudulent Ponzi scheme operated by an appointed representative of the Defendants. It was held that even if the scheme was a collective investment scheme it did not form part of the business for which the Defendant had accepted responsibility under Section 39 FSMA. Further, there was no actual or apparent authority. It was not appropriate to attribute a whistle-blower's knowledge to the Defendant. SUP.12 did not impose absolute obligations. The obligations were to exercise reasonable care and could not be breached purely because an individual within the appointed representative knew of wrongdoing (*Adam Anderson v. Sense Network Limited* [2018] EWHC 2834 (Comm)).

FCA Decision Notices. The Upper Tribunal have dismissed a reference by two individuals in respect of prohibition orders and financial penalties. The scheme involved matters such as the distribution through independent financial advisors of structured products such as a secured income bond. The decision was based on breaches of statements of principle 1 and principle 4 (*Ford v. Financial Conduct Authority* [2018] UKUT 358 (TCC)).

FX Positions. The High Court considered issues relating to disclosure where it has been indicated that a claim may be brought against HSBC concerning certain "stop loss" FX orders (*ECU Group plc v. HSBC Bank plc* [2018] EWHC 3045 (Comm)).

Mortgages. The High Court dismissed a claim by borrowers who were loaned £487,500 under an interest free regulated mortgage contract. The claim was based on alleged breach of common law or contractual duty under the then Section 150(1) of FSMA. It was alleged that the lender should never have offered the mortgage and that the income figure on the application form (which it was said the broker was told to remove) was implausible and likely to be false (*Mason v. Godiva Mortgages Ltd* [2018] EWHC 3227 (QB)).

Ship Mortgage. The Court of Appeal upheld a decision that there is a long-standing rule that there should be no cross-undertaking for the issue of a warrant of arrest (*Stallion Eight Shipping v. Natwest Markets plc* [2018] EWCA Civ 2760).

Limitations. Independent financial advisers entered into an agreement with the FSA including the issuing of a final notice. They sold the business to the Claimant under a share purchase agreement which contained warranties. The Claimant brought an action on the basis that there had been breaches of the agreement. The main issue was whether the agreement was a "speciality" for limitations. It was held that the agreement was executed as a deed and a seal was no longer necessary so the limitation period was 12 years (*Liberty Partnership Limited v. Tancred* [2018] EWHC 2707 (Comm)).

Declarations. The Claimant brought proceedings for declarations as to whether money was due and payable in respect of notes issued by the Defendant company. The High Court held that the Claimant had standing to bring the proceedings as the Defendant had submitted to the jurisdiction and the proceedings had properly been served by being served on an agent. However, declarity relief was refused. It appeared that the Defendant simply could not pay and granting a declaration as to what was owed would not alter that position. There did appear to be issues in dispute and declarations would have no clear utility (*Bank of New York Mellon v. Essar Steel India Limited* [2018] EWHC 3177 (Ch)).

Unfair Terms. An individual entered into a mortgage loan with his employer. There was an automatic termination clause whereby the loan became immediately repayable if the borrower ceased to be an employee. The ECJ held that the agreement was with the aim of purchasing a dwelling and it was not therefore a contract relating to employment so that the loan agreement was concluded with the employer as a consumer. The unfair terms provisions therefore could apply (*Pouvin v. EDF* (Case C-590/17)).

Implied Terms. The Chief Chancery Master held that a loan agreement whereby the mortgagee had an absolute discretion to require the payment on giving 3 months' notice was not subject to an implied term that it should be exercised rationally. The presence of a duty of good faith pointed against the possibility of there being such an implied term (*UBS AG v. Rose Capital Ventures Limited* [2018] EWHC 3137 (Ch)).

Petition. The Court of Appeal held that a Judge had been wrong in granting an injunction restraining presentation of a winding up petition. The evidence was wholly inadequate to demonstrate a serious and substantial cross-claim. The petition was based on a statutory demand for money due under a loan agreement. It was said that the cross-claim arose from alleged breaches under a consultancy agreement. The cross-claim was not genuine and substantial (*LDX International Group Limited v. Misra Ventures Limited*, 22nd November 2018).

Expert Evidence. A number of Claimants had engaged the services of sports agents. The agents had disclosed the payment of commission. However, the commission was shared with the Claimants' agents and it was said that this was not disclosed. Certain of the Defendants were allowed to adduce expert evidence but not for establishing whether there was dishonesty or not (C*arr v. Formation Group Plc* [2018] EWHC 3116 (Ch)).

Equipment Leasing. The Court of Appeal allowed an appeal against a decision that a company which supplied postal equipment was vicariously liable for fraudulent misrepresentations made by its agent. The representations related to matters such as whether there could be substantial savings by leasing the equipment from a third party and whether "postal credits" would be obtained. It was held by the Court of Appeal that where a Claimant alleged loss by reliance on the deceit of an agent vicarious liability would only apply if the deceitful conduct was within the actual or ostensible authority of the principal. The matter was remitted for rehearing (*Winter v. Hockley Mint Limited* [2018] EWCA Civ 2480).

Default Judgment. Two loan facility agreements were provided to the First Defendant and were guaranteed by the Second and Third Defendant. The money was needed to fund a claim following decisions by Government that had a negative impact on the solar power sector. The Commercial Court held that there

was no realistic prospect of successfully defending the claim (*Therium Capital Management v. E-Tricity Limited* [2018] EWHC 3216 (Comm)).

Guarantees. The High Court gave judgment against a couple who had guaranteed the borrowings of a company. Questions arose as to the validity of the assignment, whether the guarantor security agreements were themselves guarantees or signature sheets and whether guarantees could be enforced having regard to alleged breaches of implied terms not to damage or destroy the business of the company. Judgment was given for the Claimant (*Ennis Property Finance Limited v. Thompson* [2018] EWHC 1929 (Ch)).

Guarantees. A company chairman appealed against the dismissal of applications to set aside statutory demands. Loans had been made on the terms of convertible loan facility agreements. It was held that there was no genuine triable issue that the lender had caused the company to go into administration. Even if there had been a breach of fiduciary duty in advocating administration, there was no triable issue that it caused any loss (*Wagner v. White* [2018] EWHC 2882 (Ch)).

Mortgages. The Court of Appeal dismissed an appeal by a law firm against the award of damages for negligence and/or breach of retainer. The firm had been instructed in respect of conveyancing transactions including mortgages. The firm failed to register the transfer, the DS1 or the new mortgage. It was accepted there had been negligence and breach of duty but it was said that the purpose of the transaction was to put the property into a person's name and to obtain a mortgage illegally. The Court of Appeal held that once the property had passed to an illegal transferee they had available to them all the remedies of a valid holder of the property interest. If there had been registration the property would have passed despite the illegal agreement (*Stoffel & Co v. Grondona* [2018] EWCA Civ 2031).

Unfair Relationships. A County Court considered the issue of unfair relationships in respect of a loan facility. It was held that once Court proceedings have started and once an Order under Section 36 of the Administration of Justice Act had been made suspending the warrant it was no longer open to the mortgagee to exercise its common law rights. To do otherwise created an unfair relationship (*Goldhill Finance Limited v. Berry*, 26th October 2018).

Sale at an Under Value. The High Court gave judgment for a Defendant bank in respect of two loan agreements. Under a three year loan agreement, the loan was to be drawn down in Euros. Following the credit crisis there was a second agreement. It was held, that notwithstanding reference to a lump sum in sterling, the first loan was one in Euros. In the alternative there would have been a clear case for rectification. In respect of the second loan agreement the argument that there was duress appeared hopeless. The bank's counterclaim for judgment was granted (*McDonagh v. Bank of Scotland Plc* [2018] EWHC 3262 (Ch)).

Equipment Finance. A claimant was given permission to increase the claim for damages to £4.3 million from £0.4 million shortly before the trial. The defendant marketed laser hair removal machines acquired by finance companies and the claimant company contracted to buy the machines. It was said that there were misstatements about the performance which were untrue or negligently made. The amendment was to substitute a claim for negligent misstatement with a claim for breach of warranty (*The New York Laser Clinic v. Naturastudios* 21st December 2018).

Registration. The Court of Appeal held that the registration of a Court Order which was fraudulently obtained (it was a Vesting Order) was not a mistake which gave the Court power to alter the Land Registry. The mistake had to be regarding the state of the Register and not the underlying disposition (*Antoine v. Barclays Bank* [2018] EWCA Civ 2846).

Termination. In a case between the owner and operator of a solar panel business and a local authority owning a large number of properties where the equipment was installed, an issue arose as to the termination of the agreements. The Scottish Outer House, Court of Session held that notice had not been given because a simple statement of fact that the sums are due or overdue will not suffice; payment must be required. In addition the written notice must also communicate to the other party that payment is required to establish a default (*Our Generation Limited v. Aberdeen City Council* [2018] CSOH 124).

Costs. The FCA applied for an Order to discontinue a claim against a law firm but also sought an Order that the firm should pay the costs of the FCA. It was said that the firm had failed to act properly in respect of contact and had not dealt with possible conflicts of interest. It was held that there were no sufficient circumstances to displace the ordinary rule as to costs (*FCA v. Da Vinci Invest Limited* [2018] 12 WLUK 122).

Chattel Mortgages. A Private Member's Bill has been introduced. It would create a new form of non-possessory security and would repeal the Bills of Sale Acts.

Electronic Signatures. The Law Commission has published early conclusions confirming the validity of electronic signatures under English law.

Brexit. On 4th December 2018 the Financial Services (Implementation of Legislation) Bill 2018 was given a second reading.

Rent-To-Own. In November 2018 the FCA published a consultation paper (CP18/35) being the feedback on the consultation on a price cap on rent-to-own and alternatives to high-cost credit.

FOOD

Nomenclature. The Court of Appeal allowed an appeal by a meat importer against a decision of the Upper Tribunal relating to uncooked chicken breasts from Brazil. The correct classification was Chapter 16 of the Combined Nomenclature (*Invicta Foods Limited v. Revenue & Customs Commissioners* [2018] EWCA Civ 2204).

Cheese. A decision by a Scottish Sheriff Court that four batches of cheese should be destroyed for failing food safety requirements was overruled on the basis that the Sheriff had misdirected himself in law (*South Lanarkshire Council v. Errington Cheese Limited* [2018] GWD 32-408).

UNFAIR COMMERCIAL PRACTICES

Consumer. The Divisional Court upheld a prosecution appeal against the dismissal of an information alleging a misleading action in respect of information regarding a car service. The "consumer" who had taken the car for service and received the invoice was a Trading Standards Officer. The Divisional Court dismissed the submission that, if a single transaction can be a commercial practice, and the individual concerned was not acting as a consumer there could be no unfair commercial practice (*Warwickshire County Council v. Halfords Auto Centres Limited* [2018] EWHC 3007 (Admin)).

WEIGHTS AND MEASURES

Brexit. The Weighing Measuring Equipment and Meters (Amendment of Secondary Legislation) (EU Exit) Regulations 2018 amend secondary legislation concerning measuring equipment and meters.

COMMERCIAL AGENTS

Termination. The Court of Appeal considered an appeal against the decision that the Appellant was liable to pay damages to a broker for breach of an oral contract. The Court of Appeal upheld the assessment of damages so that it was not necessary to decide the cross-appeal but consideration was given to the scope of the Regulations with reference to the "commodity market exception" in Regulation 2 (*W Nagel v. Pluczenik Diamond Co NV* [2018] EWCA Civ 2640).

ANIMAL WELFARE

Strict Liability. The Divisional Court decided that an offence under the Welfare of Animals at the Time of Killing Regulations 2015 alleging a failure to comply with a specified EU provision was an offence of strict liability (*Highbury Poultry Farm Produce Limited v. CPS* [2018] EWHC 3122 (Admin)).

BUSINESS CONTRACT TERMS

Assignment of Receivables. On 23rd November 2018 the Business Contract Terms (Assignment of Receivables) Regulations 2018 were made which, subject to exceptions, provide that a contract term has no effect to the extent it prohibits or imposes a condition, or other restriction, on the assignment of a receivable arising under that contract or any other contract between the same parties.

PENSION SCHEMES

Prosecution. A national recruitment agency, its directors and senior staff have been fined more than £280,000 and custodial sentences were imposed for plotting illegally to opt workers out of a pension scheme.

TRAVEL

Brexit. On 12th December 2018 the Timeshare, Holiday Products, Resale and Exchange Contracts (Amendments Etc.) (EU Exit) Regulations 2018 were made.

PRICES

Super Complaint. The FCA published a statement on the response of the CMA to the Citizens' Advice super-complaint on excessive prices for disengaged consumers.

CONSUMER RIGHTS

Brexit. On 12th October 2018 the Government published guidance on consumer rights if there is no Brexit agreement.

Regulations. A draft has been published of the Consumer Protection (Amendment Etc) (EU Exit) Regulations 2018.

CLAIMS MANAGEMENT

Legislation. The Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018 has been made.

Policy Statements. The FCA have published PS18/23 on "Claims management: How we regulate claims management companies".

UNFAIR TERMS

Leases. The Court of Appeal have held that the provisions of the 1999 Regulations disapplying them in respect of contract terms reflecting "mandatory statutory or regulatory provisions" apply only to terms prescribed by the provision in question. It did not apply to terms in an extended lease where the mechanism in the Leasehold Reform etc Act 1993 had to be included but the content of which had been agreed between the parties. (*Jones v Seymour* [2018] EWCA Civ 2284).

ROGUE TRADING

Roof Tiling. The Court of Appeal (Criminal Division) dismissed appeals in respect of convictions for fraud and under the 2008 Regulations. The fact that a trader ought to know of the Consumer Contracts Etc. Regulations 2013 can be evidence from which it can be inferred, depending on the circumstances, that he did have such knowledge (*R v. Armstrong* [2018] EWCA Crim 2363).

GAMING

Fine. A gaming company has been fined £500,000 by the Gambling Commission after it deliberately lured a customer back into betting after he had chosen to exclude himself because of heavy losses.

WEBSITES

Unfair Commercial Practices. A request by Bulgarian Court for a preliminary ruling from the ECJ asked whether the Directive should be interpreted as meaning that the action of a natural person who is registered on a website for the sale of goods and who published a total of 8 advertisements at the same time for the sale of different items via the website, is a trader within the meaning of the definition in Article 2(b) and whether this represents a business-to-consumer commercial practice (*Komisia v. Kamenova* (Case C-105/17)).