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FINANCIAL SERVICES

Business Purpose. In a bankruptcy appeal borrowers contested the enforceability of two loans totalling £70,000 which had been used for the purchase of residential property. It was said that they were regulated agreements under the 1974 Act. The District Judge accepted that the Appellants were living in the property as well as carrying on a business but concluded that the loans were commercial and not regulated because they fell within the former Section 16B business exemption. The High Court said that while the Appellants were carrying on a business they were living there. It was therefore arguable that the loans had not been substantially for business purposes. However, there was debt that exceeded the bankruptcy limit and the appeal was dismissed (*Brooker v. Advanced Industrial Technology Corporation Limited* [2019] EWHC 3160 (Ch)).

Valuation. Borrowers claimed against a lender in respect of alleged misrepresentation and negligent valuation. The Queen's Bench Division struck out the claims on the basis that they were time barred. It was alleged that the lender had represented the mortgage product as being a normal regulated residential mortgage and this was not the case. However, they had known of the valuations over three years before the action was commenced (*Howard v. Bank of Scotland*, 29th October 2019).

Hire-Purchase. Hair removal devices were supplied by the Defendant via hire-purchase through finance companies. It was alleged that there was a breach of collateral warranty and/or a negligent misstatement about the performance of the devices. The High Court set out the requirements for breach of collateral warranty in a tripartite situation. In the circumstances the statements were warranties for the purposes of the collateral warranty claim. The Claimants had paid, through hire-purchase, for devices that were effectively useless and the total loss of profits were awarded (*New York Laser Clinic Limited v. Naturastudios Limited* [2019] EWHC 2892 (QB)). A post-judgment worldwide freezing order was made on 15th November 2019.

Commissions. The Claimant, a buffalo farmer, wished to raise money by giving mortgages over two farms. The First Defendants were non-standard lenders. All mortgage applications had to come through a broker or other intermediary. The Claimant's claim based on forgery, lack of due attestation, undue influence and breach of duty failed. However, her claim based on secret commission and unfair relationship succeeded. The broker had received a fee from the Claimant and a fee by way of commission from the lender. The Claimant was entitled to recover sums equivalent to the secret commission and she was entitled to rescission in respect of the transactions subject to counter-restitution. An account was directed (*Wood v. Commercial First Business Limited* [2019] EWHC 2205 (Ch)). Permission to appeal to the Court of Appeal has been granted.

Loans. The Chancery Division handed down a judgment in respect of a claim by a company incorporated in the British Virgin Islands against a Russian citizen. The debts alleged to be due were under some 17 contracts of loan totalling some £26 million. The defence was that there were never any genuine loan transactions and the proceedings had been brought as part of a process of so-called "corporate raiding". The Judge said that he was entirely unpersuaded that the Defendant signed the documents as alleged. The Claimant failed to prove the contracts and the claim failed (*Parallel Routs Limited v. Fedotov* [2019] EWHC 2656 (Ch)).

Jurisdiction. The Chancery Division overturned a decision of a Deputy Master that a claim alleging misrepresentations in loan agreements could be tried in the United Kingdom because the agreements were adapted from a model agreement originating in London. The relevant originating event was the making of the statement in Switzerland by the Defendant. Jurisdiction of the English Court under Article 5(3) was not established (*Bellmare Holdings Limited v. Wells* [2019] EWHC 2193 (Ch)).

Jurisdiction. Defendants applied to strike out or set aside proceedings brought by the Claimants for lack of jurisdiction. The Claimants were domiciled and resident in Russia and were customers of a bank there. The claim related to an alleged inducement to use their funds to invest in notes that had failed to perform. The Queen's Bench Division held that the Claimants failed to establish that the English Court had jurisdiction under the Co-Defendant gateways. Nor could the Claimants rely on the tort gateway under Article 7(2). They had not suffered damage in the UK. (*Tsareva v. Ananyev* [2019] EWHC 2414 (Comm)).

Jurisdiction. The Court of Appeal allowed an appeal against a decision concerning jurisdictional issues arising in a fraudulent misappropriation claim. There was an allegation of misappropriation of \$1.9 billion. The Third to Fifth Defendants were English limited companies. The Court held that a Claimant with a sustainable claim against an anchor Defendant which it intended to pursue in proceedings to which a foreign Defendant was joined as Co-Defendant was entitled to rely on Article 6(1) even if the sole logic in issuing the proceedings was to sue the foreign Defendant (*PJSC Commercial Bank v. Kolomoisky* [2019] EWCA Civ 1708).

Mortgage Possession. The Chancery Division heard an appeal by mortgagors against an order granting possession of the mortgaged property in favour of receivers. The Judge below had held that there was no power to postpone possession under Section 36 of the Administration of Justice Act 1970. The Court held that Section 36 referred to an action brought by a "mortgagee" but it was not an improper strain on the language to

say that the receivers derived title from the mortgagee and the mortgagor should have the opportunity of invoking the discretion (*Menon v. Pask* [2019] EWHC 2611 (Ch)).

Hire. A vehicle leasing company applied for summary judgment for over £500,000. The contract related to a fleet of vehicles. The Defendant submitted that historical overpayment should be re-allocated against outstanding invoices. However, the Court held that there was a no set-off clause. This did not seek to exclude liability or alter the rights of the parties and judgment was entered (*Venson Automotive Solutions Ltd v. Morrisons Facilities Services Ltd* [2019] EWHC 3089 (Comm)).

Mortgages. Mortgagors appealed against possession orders. They were a husband and wife who had transferred title to a third party as security for a debt. This was on the basis of an oral agreement to re-transfer when the debt was paid. The Court held that they could not establish a constructive trust or proprietary estoppel and thereby prevent a possession order. It was held that any equity based on a proprietary estoppel could not have come into existence until the ownership should have been transferred and it was inconceivable the Court would grant relief that had the effect of giving that equity a priority over the Respondent's mortgage (*Kensington Mortgage Co Limited v. Mallon* [2019] EWHC 2512 (Ch)).

Mortgages. The High Court considered an appeal against a mortgage possession order. There had been a number of orders one of which both parties failed to understand. The bank argued that the appeal had no merit. The mortgagor said the bank had encouraged her to borrow to invest in a fraudulent scheme. The Court ordered a rolled-up permission hearing (*Copeland v. Bank of Scotland Plc* [2019] EWHC 3484 (QB)).

Loans. The High Court dismissed an appeal by the mother of her deceased son. She alleged that she was owed £130,000 by the estate. The Defendants argued that the money was a gift and not a loan and this was upheld by the Judge. The High Court held that a presumption of advancement could exist between a parent and a child who was not a minor (*Farrell v. Burden* [2019] EWHC 3671).

Illegal Money-Lending. An illegal money-lender was ordered to repay £5 million or serve an additional 11 years imprisonment in default (*R v. Gopee*).

Bankruptcy. The Chancery Division allowed an appeal by Trustees against a refusal to order possession and sale of the home of a bankrupt under Section 335A of the Insolvency Act 1986. The Court held that the Section did not apply and the application was made under Section 363(2). There was no good reason not to make an order (*Mazars LLP v. Hewitt*, 5th December 2019).

Restitution. The Chancery Division granted an application by the FCA for a restitution order to distribute about £2.6 million to a group of investors (*FCA v. Paradigm Consultancy SA* [2019] EWHC 3648 (Ch)).

Film Investment. Schemes had been promoted as a tax-efficient vehicle by way of investing in films. An application was made by

two Defendant banks to dispose of certain claims against them as disclosing no reasonable cause of action or by way of summary judgment. It was alleged that there were breaches of contract based on terms said to be implied into contracts between the Claimant and the relevant bank, claims based on negligence and claims based on vicarious liability. The bank denied that there were implied terms or that there was a duty of care and submitted that there was no basis for vicarious liability. The applications by the bank were successful (*Barness v. Ingenious Media Limited* [2019] EWHC 3299 (Ch)).

Costs. The Claimant bought property secured by a bank mortgage. There was a default and in excess of £4 million was owed to the bank. The Defendants were appointed as Receivers. The claim against the Defendants was that they had failed to get suitable insurance policy, failed to manage the property and failed to make an insurance claim for damp. There was substantial disclosure and the issue was the costs of disclosure. The Court took into account the conduct of the parties and the fact that the Defendants had partially succeeded in obtaining disclosure. The sum sought by the Defendants of £62,000 was disproportionate and the order was for £18,000 in costs (*Centenary Homes Limited v. Liddell* [2019] EWHC 3405 (QB)).

PPI. In a Scottish case a bank appealed against a decision that a defence of insolvency set-off could not succeed. The pursuer claimed mis-selling of PPI and a settlement was reached for a payment of just under £12,000. The bank argued it could set-off the sum of the unpaid balance. The appeal was dismissed (*Royal Bank of Scotland v. Donnelly* [2019] CSIH 56).

Directors' Duties. The Chancery Division held that Defendant directors of a bank were not in breach of duty in approving the acquisition of another bank during the financial crisis. The failure to disclose certain arrangements was not causative since the shareholders would have approved the transaction even if there had been a fair presentation (*Sharp v. Blank* [2019] EWHC 3096 (Ch)).

Bridging Loans. An action was raised against a bank seeking payment of the cost of a bridging loan. The allegation was not substantiated because of a failure to make out any breach of contract by the bank and, in any event, despite breaches of the Mortgages and the Home Finance Code of Conduct Sourcebook the pursuer would have proceeded exactly as he did. There was no advisory relationship and the contract remained one of customer and banker (*Shanley v. Clydesdale Bank Plc* [2019] CSOH 75).

Loans. The High Court refused summary judgment in respect of a case concerning the payment of a loan for the acquisition of two vessels. The Claimants accepted they were in repudiatory breach of a loan agreement. The Defendants submitted, in reliance on the common law prevention principle, that the Claimants had caused an inability to repay the loan. The prevention principle excused a breach where performance was prevented by the other party's breach (*TMF Trustee Limited v. Fire Navigation Inc* [2019] EWHC 2918 (Comm)).

Illegal Money-Lending. The Court of Appeal upheld a decision to allow a company in liquidation to discontinue its claim against

its former sole director. He no longer had any right to speak for the Defendant companies. A challenge was made to a deed of assignment which purported to assign a loan book from one company to another. The liquidator disputed the date of the deed and claimed it was void. The appeal was dismissed (*Barons Finance Limited v. Barons Bridging Finance One Limited* [2019] EWCA Civ 2074).

Mortgages. The Court of Appeal held that where a property which was subject to a mortgage was vested in the Crown as bona vacantia and the Crown had subsequently disclaimed, the former owner of the company was not entitled to a vesting order. The proper course was to make a vesting order in favour of the mortgagee so it could realise its security (*Leon v. Attorney General* [2019] EWCA Civ 2047).

Attribution. The Supreme Court held that a bank had breached its duty of care by the transfer of funds from the account of a company on the instructions of its sole shareholder and chairman. His fraudulent misappropriation could not be attributed to the company (*Singularis Holdings v. Daiwa Capital Market Limited* [2019] UKSC 50).

Cleared Funds. The Court gave consideration to the meaning of “received as cleared funds” contained in a Court order relating to a proprietor’s claim based on the alleged unconscionable receipt of monies paid to two companies shortly before they went into administration. The expression referred to the point in time when the monies had been credited to the accounts of the company so that interest would accrue and customers would have lost a chance to countermand their cheques (*In the Matter of Crown Holdings (London)* [2019] EWHC 3302 (Ch)).

Striking Out. Claimants appealed against a decision whereby the Particulars of Claim were struck out in an action against a bank. The claim was that the bank, a subsidiary of the bank and an employee took steps to undermine the financial position of the company so as to acquire 80% of the equity of the company. The High Court upheld the decision of the Master that there was no sufficiently pleaded relationship between the acts of direction or instruction which caused someone to be a shadow director and the breaches of which complaint was made (*Standish v. Royal Bank of Scotland* [2019] EWHC 3116 (Ch)).

Mis-Selling. In an action against a bank involving an interest rate hedging product security for costs was granted (*Fine Care Homes Limited v. National Westminster Bank* [2019] EWHC 3623 (Ch)).

Guarantees. Applications to set aside statutory demands were granted by the High Court. The Applicant had signed guarantees. It was alleged that the Applicants had been induced to enter into the guarantees by material misrepresentations. There was sufficient evidence of a substantial dispute in relation to an argument that a potential guarantor would naturally assume that the book values and its debtors were correct (*Harrling v. Keith Ingram Midgley* [2019] EWHC 3278 (Ch)).

Guarantees. A bank failed in its summary judgment application in respect of a guarantee of a facility agreement. It was said an employee of the bank signed the guarantee pursuant to a power

of attorney. The Defendant said he had no knowledge of the guarantee and that the power of attorney did not have the intended guarantee annexed to it. A conditional order was made (*Industrial & Commercial Bank of China v. Ambani* [2019] EWHC 3436 (Comm)).

PPI. The Commercial Court interpreted a clause in a sale and purchase agreement whereby the seller was to reimburse the buyer 90% of customer redress payments. It was held that this was a covenant to pay and not a contract for indemnity (*Axa SA v. Genworth Financial International* [2019] EWHC 3376 (Comm)).

Credit Hire. A self-employed taxi driver appealed against a decision that he had not acted reasonably in incurring hire charges. The High Court dismissed the appeal and considered the relevant heads of loss including loss of profit. The Judge had been correct in concluding that the Claimant had not acted reasonably in incurring hire charges over a period of 18 days which equated to almost a year’s profit (*Hussain v. EUI Limited* [2019] EWHC 2647 (QB)).

FOOD

Non-Geographical Terms. The European Court of Justice has held that the protection of the name “Aceto Balsamico di Modena” does not extend to the use of the individual non-geographical terms of that name (*Consorzio Tutela Aceto Balsamico di Modena v. Balema GmbH – Case C432/18*).

Food Business Operators. An application by way of judicial review of a decision of the Food Standards Agency to withdraw official controls under the Meat (Official Controls Charges) (England) Regulations 2009 was dismissed. A previous operator had failed to satisfy a judgment for unpaid charges. It was held the words “any premises” and “those premises” meant the same physical facility where each of the predecessor and successor could at different times have operated. The power in the Regulation was not confined only to the defaulting operator (*R (Agro Foods (Ashford) Limited) v. Food Standards Agency* [2019] EWHC 2719 (Admin)).

HEALTH & SAFETY

Sentence. The Court of Appeal (Criminal Division) reduced a sentence where the Judge had improperly taken into account the turnover and resources of a parent company. The case involved the resident of a nursing home who died from legionnaires disease (*R v. BUPA Care Homes* [2019] EWCA Crim 1691).

TIMESHARE

Briefing Paper. The House of Commons have issued a briefing paper on 17th December 2019. This examines the various models and the 2010 Regulations.

CONSUMER RIGHTS

Limitations. The Queen’s Bench Division held that there was a seriously arguable case that the limitation period in the standard conditions of the British International Freight Association was ineffective where it was relied on to exclude liability under the 2015 Act. The application to strike out the claim in respect of the transportation of a yacht or for summary judgment was dismissed. It was seriously arguable that the limitation period contravened Section 57(3) and (4) in excluding or restricting the

liability of the Defendant (*Allner v. Peters & May Group Limited* [2019] EWHC 3258 (Comm)).

Housing. The Upper Tribunal considered the situation where misconduct or other behaviour was relied upon but there was no conviction. The context was applications for property licences under the Housing Act 2004. It was held that on the plain reading of the Rehabilitation of Offenders Act 1974 the decision-maker was entitled to receive and take into account evidence or information dealing with relevant conduct of a rehabilitated person, including conduct which has now been treated under the criminal law as an offence and resulted in a conviction which is now spent. It was also held that decisions by local authorities involved “proceedings before a judicial authority” within Section 4(6) of the 1974 Act (*Hussain v. London Borough of Waltham Forest* [2019] UKUT 339 (LC)).

CONSUMER PROTECTION

Limitations. The Queen’s Bench Division have held that the Consumer Protection Act 1987 and the Electrical Equipment (Safety) Regulations 1994 do not apply to a claim for breach of statutory duty. The claim was in respect of a house fire caused by a defective fridge-freezer (*Wilson v. Beko Plc* [2019] EWHC 3362 (QB)).

Gift Vouchers. The House of Commons library had issued a briefing paper on the 2nd December 2019 in respect of what happens to gift vouchers etc. on the insolvency of a retailer.

Draft Directive. On 18th October 2019 the European Parliament and the Council issued a draft Directive as regards the better enforcement and modernisation of EU Consumer Protection Rules.

Procedure. The Competition and Markets Authority conducted a market study in the home care market. The Authority appealed against a Deputy Master’s decision directing a claim against a Respondent care home provider to proceed under Part 7. The appeal was dismissed. The allegation was that the Respondents had breached undertakings concerning a non-refundable administration fee. A misleading action did not inherently require dishonest action. There were likely to be factual disputes and the appeal was dismissed (*Competition & Markets Authority v. Care UK Health & Social Care* [2019] EWHC 2828 (Ch)).

Investigations. It was held by the Queen’s Bench Division that a local authority conducting a Trading Standards investigation into energy brokers suspected of mis-selling had not acted ultra vires. The test in Section 222 of the Local Government Act 1972 only applied to decisions to prosecute and did not encompass investigations or Court application for investigatory purposes (*Qualter v. Preston Crown Court* [2019] EWHC 2563 (Admin)).

ENVIRONMENTAL PROTECTION

Liquidation. The Chancery Division held that the Court did not have jurisdictions to stay proceedings against a company in liquidation which was charged with environmental offences. While it would be open to making an order restraining the authority from pursuing criminal proceedings it did not have jurisdiction to order a stay (*In the Matter of Paperback Collection and Recycling Limited* [2019] EWHC 2904 (Ch)).

AIR TRAVEL

Costs. The Supreme Court have granted permission to appeal in the case of *Bott v. Ryanair* [2019] 1 WLR 3375.

ANIMALS

Time Limit. The Divisional Court dismissed an application for judicial review in respect of criminal proceedings commenced by the CPS under the Welfare of Animals at the Time of Killing (England) Regulations 2015. The certificate of the prosecution contained no error on its face and was therefore conclusive evidence of the relevant date (*Chesterfield Poultry Limited v. Sheffield Magistrates Court* [2019] EWHC 2953 (Admin)).