



# TRADING LAW BULLETIN

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Gough Square Chambers  
6-7 Gough Square  
London EC4A 3DE  
Telephone: 020 7353 0924  
Fax: 020 7353 2221  
DX: 476 London  
Email: gsc@goughsq.co.uk

## FINANCIAL SERVICES

**Fraud.** A victim of a scam obtained a Norwich Pharmaceutical order against the fraudster's bank to assist in identifying the fraudster. The company was given permission to use the documents against the bank itself as the documents suggested the bank had been on notice of wrongdoing (*IFT Sal Offshore v. Barclays Bank Plc* [2020] EWHC 3125 (Comm)).

**Insolvency.** The High Court held that the process by the FCA of deciding whether to impose sanctions on a company was an action or proceeding under the Insolvency act 1986 so the leave of the Court was required. Leave was granted but no execution of a financial sanction could take place without the Court's permission (*FCA v. Carillion plc* [2020] EWHC 2146 (Ch)).

**Bank's Duty of Care.** The High Court has held that a bank owed an equitable duty of care to borrowing companies but not an implied duty or common law duty. However, the bank had not breached its duty in respect of enforcement in connection with an insurance company following damage to a ship (*Aegean Baltic Bank v. Renzlor Shipping Ltd* [2020] EWHC 2851 (Comm)).

**Default Judgment.** A default judgment was entered on a personal guarantee. The Defendants submitted that an alleged agent of the bank had fraudulently misrepresented the nature of the guarantee. Two of the Defendants claimed undue influence. The Judge held that there had been an opportunistic move in entering judgment following the service of a defence by email even if the move was in accordance with the Rules. The defence was not fanciful and the judgment was set aside (*Ipsium Capital Ltd v. Lyall* [2020] EWHC 3508 (Comm)).

**Co-Guarantors.** A Defendant was sued under a guarantee. He sought to claim against a co-guarantor and solicitors. Permission to bring additional claims was granted. If it was refused fresh proceedings could be brought with the possibility of inconsistent results (*Contour No.1 Ltd v. Farah*, 25th November 2020).

**Finance Arrangements.** A summary judgment application was granted by the High Court in respect of a US\$11.5mn claim. The defences were that the agreement was an unconscionable bargain and unlawful duress. The arrangements were the result of negotiations by professional advisors and the parties were sophisticated and experienced. The elements of an unconscionable bargain were set out (*Adare Finance DAC v. Yellowstone Capital* [2020] EWHC 2760 (Comm)).

**FOS.** The High Court held that a decision by the Ombudsman had been taken on the basis of the wrong test. Complaints against an online platform for dealing in investments had been upheld following the closing of the complainant's accounts and

withholding profits. The Court said that the contracts had to be construed objectively. There was regular use of discretionary words. The decision was quashed and remitted to the Ombudsman to determine if the business had exercised its discretion properly with regard to alleged taking advantage of price latency or being engaged in arbitrage (*R(TF Global Markets) v. Financial Ombudsman Service* [2020] EWHC 3178 (Admin)).

**Administration.** A facility agreement was secured by debentures. The lender applied to appoint an administrator. The High Court rejected the submission by that company that there had been no default, that there had been a variation of the agreement, that there was an estoppel, and that there was no real prospect of achieving the statutory purpose. The Court exercised its discretion to allow the application (*High Street Rooftop Holdings Ltd* [2020] EWHC 2572 (Ch)).

**Mis-selling.** A company involved in the provision of nursing and care homes failed in its mis-selling claim in respect of an interest rate hedging product being a structured collar. The company rejected an offer from the bank under the redress scheme set up by the FSA. Claims in negligent advice, misstatement/misrepresentation or breach of implied terms failed (*Fine Care Homes v. National Westminster Bank* [2020] EWHC 3233 (Ch)).

**Preliminary Issue.** In a case involving a small island off Weston-Super-Mare the High Court ordered a preliminary issue as to whether a waiver had been granted in respect of a loan agreement. The matter was urgent as the RNLI had made a time limited offer to buy the island at a generous price (*Sullivan v. Ross*, 18th December 2020).

**Valuation.** Property was acquired by a local authority by way of compulsory purchase. The Upper Tribunal determined compensation in respect of an outstanding mortgage debt (*Bank of Scotland v. Burnley BC* [2019] UKUT 370 (LC)).

**Administration.** A lender placed a small property company into administration. The company defended possession proceedings alleging breaches as regards delays in advancing money and alleged economic duress. The sole shareholder and director offered to buy an assignment of the cause of action. This was declined and the High Court refused an application to require the administrators to assign. The issues had been adjudicated on in the possession proceedings and were, in any event, doomed to failure (*L & N D Developments v. Myers* [2020] EWHC 2803 (Ch)).

**Foreign Proceedings.** An issuer of bonds under an interest rate swap transaction commenced proceedings in Italy. The banks then started English proceedings. The issuer sought to strike out parts of the Particulars of Claim and to stay the proceedings in

England. The High Court refused both applications (*Banca Intesa Sanpaolo Spa v. Comune Di Venezia* [2020] EWHC 3150 (Comm)).

**Secret Commission.** On appeal from the County Court the High Court allowed the appeal as regards secret commission but dismissed the appeal against a finding that there was no unfair relationship. The County Court Judge had held that there had been no fiduciary relationship with the broker. This decision was overturned (*Pengelly v. Business Mortgage Finance 4 Plc* [2020] EWHC 2002 (Ch)).

**Credit Hire.** On the issue of impecuniosity resulting in the need for a replacement car on credit hire the Court of Appeal said there was an evidential burden on the Claimant. Coulson, LJ said that there was “the incorrect notion that a claimant was entitled to advance a rubbishy case in stages” (*Ali Dinige v. Bojaj* [2020] EWCA Civ 1400).

**Guarantees.** In a bank guarantee case, the Defendants alleged undue influence and misrepresentation. They also said that the obligation to pay had not arisen. The High Court held that there was no evidence to support the allegations and there was no postponement of the payment obligation (*Punjab National Bank v. Furniturewala*, 13th November 2020).

**Solicitors.** A solicitors’ negligence claim was dismissed in relation to a short term loan facility of about £350,000. It was secured on commercial property. The arrangement involved the Bankruptcy Protection Fund Ltd for which the Defendant solicitors were accustomed to be instructed. The case centred on whether the solicitors were also acting for the borrower and owed a duty of care. It was held they were not. The allegation was that the solicitors had breached a duty of care as to the nature of the loan (*NDH Properties Ltd v. Lupton Fawcett LLP* [2020] EWHC 3056 (Ch)).

**Summary Judgment.** The Commercial Court refused to grant an adjournment of a summary judgment application listed in two days’ time. The Defendants submitted that there were longstanding negotiations with a potential investor. The Judge said the application was too late and the hearing would not adversely affect the proposed investment (*Union Bank of India v. Alectrona Energy Private Ltd* [2020] EWHC 3237 (Comm)). Summary judgment was granted [2020] EWHC 3344 (Comm).

**Compromise.** The Court of Appeal upheld an appeal against a decision that litigation in respect of a loan had been compromised. Following the sale of a property which was charged by way of security there was a sum of money and the lender said the question of how the money would be distributed had been settled. It was held that the Judge had seriously undervalued the force of the subject to contract label (*Joanne Properties Ltd v. Moneything Capital Ltd* [2020] EWCA Civ 1541).

**Unfair Terms.** The ECJ considered a term governing the variable ordinary and remunerative interest rate in a mortgage loan agreement. It was held that the Directive applies where the rate is based on an official index where national legislation does not

provide for mandatory application of the rate. To be fair, the term must enable the average consumer to understand the functioning of the rate. A National Court could replace a null and void rate with a statutory index (*Guasch v. Bankia SA* Case C-125/18).

**Guarantees.** Summary judgment was granted in respect of guarantees given to German export credit lending. The principal debtor company went into an Indian insolvency process. The Commercial Court held this could not be a defence as the guarantees were governed by English law (*KFW v Singal* [2020] EWHC 2214 (Comm)).

**Mis-selling.** The First Tier Tribunal has held that compensation paid by a bank to a customer as a result of mis-selling a swap contract is taxable as a receipt of the customer’s property business (*Wilkinson v. HMRC* [2020] UKFTT 362 (TC)).

**ISDA.** The Commercial Court granted declarations in favour of a bank against an Italian entity in respect of rate hedging under the 1992 ISDA Market Agreement. The court considered non-reliance clauses, the Misrepresentation Act 1967, the Unfair Contract Terms Act 1977, an entire agreement clause and negative declaratory relief (*BNP Paribas SA v. Trattarmento Rifiati Metropolitan* [2020] EWHC 2436 (Comm)).

**Duty of Care.** The High Court refused part of an application to strike out and for a summary judgment in respect of a claim by liquidators of an Antiguan bank. The claim was that the Defendant bank owed a duty of care to ensure monies paid out from accounts it controlled were properly paid out (*Stanford International Bank Ltd v. HSBC* [2020] EWHC 2232 (Ch)).

**Data Requests.** A claim in respect of a failure to comply with Data Subject Access Requests was dismissed by a High Court Master. It was held that the bank had adequately responded but said that, in any event, the Court would have refused an order as the requests were repetitive and were for a collateral litigation purpose to obtain documents rather than data (*Lees v. Lloyds Bank* [2020] EWHC 2249 (Ch)).

**Claims Management.** Litigation funding by a third party is not a claims management service (*UK Trucks Claims Ltd v. Fiat Chrysler* [2019] CAT 26).

**Default Notices.** The 1983 Regulations have been amended by the Consumer Credit (Enforcement Etc. Notices) (Coronavirus) (Amendment) Regulations 2020/1248.

**BREXIT and RMC.** After Exit Day, security on non-UK EEA property will not count for the purpose of regulated mortgage contracts.

**Moratorium.** The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 were made on 17th November 2020.

**SECCI.** A five month transition period is provided for after the end of the BREXIT transitional period.

**CCA Reform.** In December trade bodies wrote to the Treasury concerning the need to progress the FCA's review of retained CCA provisions.

## FOOD

**Brexit.** On 12th October 2020 the Department for Environment, Food and Rural Affairs issued guidance on Food and Drink labelling changes from 1st January 2021.

**VAT.** A decision by the FTT that juice cleanse programmes were zero rated was upheld by the Upper Tribunal (*HMRC v. Cove (Swindon) Ltd* 2020 UKUT 301 (TCC)).

**Information.** On 23rd December 2020 the Commission published a roadmap seeking views on a proposed revision on food labelling including date marking.

## ANIMALS

**Slaughter.** The Supreme Court Act rejected an appeal by a slaughterhouse in respect of convictions under the Welfare of Animals at the Time of Killing (England) Regulations 2015. The offences were ones of strict liability. Domestic rules of statutory interpretation were displaced by EU principles. The Divisional Court had been correct in respect of a deeming provision. The relevance of preambles was considered (*Highbury Poultry Farm Produce Ltd v. CPS* [2020] UKSC 39).

## PROCEDURE

**Time Extension.** In an appeal by way of case stated it was held that the Crown Court could extend time for an appeal after the end of the 21 day period under the Crown Court Rules 1982 (*Crocker v. Devon and Cornwall Police* [2020] EWHC 2838 (Admin)).

## ENVIRONMENT

**Waste.** In the context of used kerosene the High Court considered the meaning of "waste" (*Safety Kleen UK Ltd v. Environment Agency* [2020] EWHC 3147 (Admin)).

**Sentence.** The Court of Appeal (Criminal Division) considered sentencing guidelines in the context of multiple acts of wrongdoing. The offences related to a waste management site. The impermissible volume caused outbreaks of fire and environmental harm. A suspended sentence with an unpaid work order were upheld (*R v. Lawrence* [2020] EWCA Crim 1465).

## RATES

**Adjournment.** The Appellant appealed by way of case stated against a refusal of an application for an adjournment in a business rates case. The Court had not managed the case. The appeal was allowed (*Chelmsford Cars Ltd v. Braintree DC* [2020] EWHC 478 (Admin)).

## DATA PROTECTION

**Consent.** The ECJ has held that a term giving consent by the customer in a telecommunications agreement to storage was not valid consent where the box giving consent to the contractual provision had been ticked by the other party before signature of the contract (*Orange Romania SA v. Autoritatea* (Case C-61/1)).

## PRODUCT SAFETY

**Brexit.** The Office for Product Safety and Standards has issued guidance relating to product safety and metrology from 1st January 2021.

## HOUSING

**HMOs.** The Upper Tribunal upheld an FTT decision as to the making of a rent repayment order against a landlord who committed an offence under certain provisions of the Housing and Planning Act 2016 including a superior landlord (*Rakusen v. Jepsen* [2020] UKUT 298 (LC)).

**Licences.** The Rehabilitation of Offenders Act 1974 prevented evidence being given of the spent convictions of an applicant for a licence to manage an HMO but not the conduct underlying the offences. The Court held that a local authority is a Judicial Authority in Section 4 of the Act (*Hussain v. Waltham Forest LBC* [2020] EWCA Civ 1539).

**HMOs.** An employee of a local authority told a landlord of an HMO that there was no need to apply for a licence pending the resolution of a planning issue. The FTT cancelled a civil penalty for being unlicensed. This was reversed by the Upper Tribunal as there was no reasonable excuse for committing the offence (*Thurrock v. Palm View Estates* [2020] UKUT 355 (LC)).

**Time Limits.** A defendant was not able to require a case stated from the Magistrates' Court for failing to cease using property as self-contained flats in breach of an enforcement notice. The time limit could not be extended (*Aboutboul v. LB Barnet* [2020] EWHC 285 (Admin)).

**Penalty.** The Upper Tribunal heard an appeal against a civil penalty in respect of licensing of privately rented housing. The penalty imposed was reinstated on appeal from the FTT (*LB Waltham Forest v. Marshall* [2020] UKUT 35 (LC)).

## GAMING

**Non-Negs.** In a case involving gaming duty the Supreme Court considered non-negotiable gaming chips given to selected gamblers as a promotional tool. They could be used as a stake but they could not be encashed or to pay for goods or services. It was held that they did not form part of the casino's profits (*HMRC v. London Clubs Management Ltd* [2020] UKSC 49).

## AVIATION

**Compensation.** An Advocate-General's opinion is to the effect that no lump sum compensation is payable if there has been a mere diversion of a flight to an alternative airport; in the case it was a diversion from Berlin Tegel to Berlin Schönefeld (*WZ v. Austrian Airlines* (Case 6-826/19)).

## CONSUMER PROTECTION

**Cancellation.** A gardening business was alleged to have failed to give the right to cancel. The Court of Appeal (Criminal Division) dismissed an appeal against conviction. One issue was the use of an article for fraud (*R v. Smith* [2020] EWCA Crim 38).

**BREXIT.** The Consumer Protection (Enforcement) (Amendment Etc.) (EU Exit) Regulations 2020 were made on 25th November 2020.

## PLANNING

**Article 4 Directions.** Article 4 directions disapply general permitted developments. The Defendant was prosecuted for carrying out works and not remedying this under an enforcement notice for which permission would otherwise apply but for the local authority's Article 4 direction. The prosecution could not produce the direction. The Defence relied on S.133 of the Criminal Justice Act 2003 as to the proof of documents. However, there was much evidence that the direction had been made. The magistrates convicted. The High Court upheld the conviction because there had been a breach of the planning regime, in the enforcement notice. The enforcement notice was valid and the Article 4 Direction was irrelevant (*Aneel Zafar v. Stoke-on-Trent Council* [2020] EWHC 3249 (Admin)).

## COSMETICS

**Function.** The ECJ has ruled that the function of a cosmetic product must appear on the container and packaging (*A.M. v. E.M.* (Case C-667/19)).

## TRAVEL

**Timeshare.** A timeshare trustee failed in an appeal against a decision that an indemnity for losses etc. did not indemnify against Spanish Corporation taxes (*First National Trustco (UK) Ltd v. McQuitty* [2020] EWCA Civ 107).

**Jurisdiction.** In a personal injury case it was held that the Courts of England had jurisdiction in respect of an injury in a Spanish hotel. Issues arose as to "package" and "consumer" (*Lackey v. Mallorca Resorts SA* [2020] All ER 448).