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CONSUMER CREDIT

Legal Advice. A firm of solicitors failed to draw to the attention of a lending bank an insolvency forfeiture clause in a lease of a property which was to be subject to a first legal charge to support a loan facility. The question arose as to when the loss was sustained for the calculation of damages and the Court of Appeal held that it was at the date of trial not the transaction date (*LSREF 111 Wight Limited v. Gateley LLP* [2016] EWCA Civ 359).

Interest Rate Swap. In respect of issued notes a bank applied for summary judgment. There was a Collateral Management Agreement with which the issuers were required to comply. The bank submitted that there had been a breach. The Chancery Division held that the bank had to establish that the swap agreements had not received rating agency confirmation nor were there form-approved interest rate hedges. The bank succeeded only on the second set of notes (*BNY Mellon Corporate Trustee Services v. Taberna Europe* [2016] EWHC 781 (Ch)).

Unfair Terms. Mortgage loans to two Spanish consumers contained cap and collar provisions and they asserted that the "floor" clauses had been imposed on them and created an imbalance to their detriment and sought an annulment of those clauses. Before those actions a consumer association had brought a collective action seeking an injunction prohibiting the continued use of the "floor" clauses. The defendant banks in the two proceedings then sought a stay pending final judgment in the collective action. The ECJ held that the Directive precluded a provision which requires a Court before which an individual action has been brought by a consumer automatically suspending such an action pending final judgment in an ongoing collective action (*Sinues v. Caixabank SA* Cases C-381/4 and 385/14).

Directive 2008/48/EC. The ECJ has held that the Unfair Terms Directive precludes national legislation which, in insolvency proceedings, does not permit the Court hearing the action to examine of its own motion any unfairness or which permits the Court to examine only unsecured claims solely in respect of a restricted number of complaints related to whether they are time-barred or have been paid, the Consumer Credit Directive requires a national Court to examine of its own motion whether the obligation to provide information has been complied with and to establish the consequences under national law, that the Consumer Credit Directive requires that the total amount of credit and the amount of draw down together designate the sums made available to the consumer and these exclude those used by the lender to pay the costs connected with the credit agreement and the Unfair Terms Directive requires the Court to evaluate the cumulative effect of all the penalty clauses regardless of whether the creditor actually insists that they all satisfied in full and the national Courts must exclude any found to be unfair (*Radlinger v. Finway a.s.* Case C-377/14).

Suspension Application. The Upper Tribunal refused an application to suspend a Decision Notice which refused an authorised person a variation of his permission to carry on regulated credit activities (*Koksal v. Financial Conduct Authority* [2016] UKUT 192 (TCC)).

Disclosure Regulations. The Disclosure of Information Regulations 2010 have been amended to allow references to interim permission numbers to be used for a period of grace before stating the firm registration number.

Appointed Representatives. In a case involving the sale of private medical insurance the Court of Appeal examined the scope of Article 25 of the Regulated Activities Order 2001. Because advisers who were unauthorised by notification to the principal, they were unauthorised within Article 25 and the principal was entitled to terminate the appointed representative relationship (*Personal Touch Financial Services v. Simplysure Ltd* [2016] EWCA Civ 461).

Unfair Relationships. A borrower with a number of properties subject to charges for loans instructed a broker to attempt to get a consolidated loan. The loan was granted and he paid the broker 0.75% of the advance. He also paid the bank a 1% arrangement fee. The bank was to pay the broker a procuration fee of 0.5%. The Judge held that the non-disclosure did not result in any unfairness. The Court of Appeal held that the fee constituted a breach of the duty owed to the borrower and that the relationship was unfair on that ground. The fact that undisclosed commissions were not uncommon at the time did not alter the position. Otherwise the Judge had been entitled to find there was no unfairness (*Nelmes v. NRAM Plc* [2016] EWCA Civ 491).

Cancellation of Register Entries. Solicitors commenced a stakeholder application seeking directions in respect of two form DS1s which the firm held to the order of the Defendant lender. The solicitors had acted on behalf of the claimant borrowers. The lenders made a part 36 offer. The borrowers paid the first instalment to the lender and sought delivery of the DS1s. The Court held they were not entitled to delivery up because the acceptance of the offer did not give rise to an enforceable contract and, even if it had, it would be unenforceable because of the Law of Property (Miscellaneous Provisions) Act 1989 (*Tuscola (110) Limited v. Y2K Co Limited* [2016] EWHC 1124 (Ch)).

Authority to Contract. A developer had sold units in an "apart-hotel". There were contract terms with various law firms who attended a fair. The relevant contract named a husband and wife as purchaser but this was entered into without the wife's consent and the husband only signed it. The Court of Appeal held that there was a valid and enforceable contract between the developer and the husband as this depended on the common intention of the parties and there was no evidence that the husband had

contracted solely on the basis that his wife would be a joint purchaser (*Marlbray Limited v. Laditi* [2016] EWCA Civ 476).

References. The Court of Appeal considered an appeal by a bank against a ruling that it was liable in negligence for providing a reference for a customer to an agent of a casino. The Court of Appeal allowed the appeal because the bank had assumed no responsibility and was totally unaware of the Club's existence or that the purpose of the reference related to gambling (*Playboy Club London Limited v. Banca Nazionale SPA* [2016] EWCA Civ 457).

Advice by a Bank. The claimants were the owners of two hotels and wished to purchase a third one. They met with the bank to discuss funding and the bank outlined some interest rate hedging products. The bank granted loans. The claimants brought a claim for alleged negligent advice. The High Court held that the claimants must have known in broad terms the essence of the claim and therefore the claims were statute barred. Further the bank was not estopped from relying on the limitation defence (*Qadir v. Barclays Bank* [2016] EWHC 1092 (Comm)).

Enforceability. In a number of Court cases it was held that loans to individuals were unenforceable because of the lack of compliance with the 1974 Act. The relevant companies and their director appealed to the Court of Appeal against a declaration that an assignment of book debts was either void or should be set aside. The Court of Appeal held that the High Court Judge had been wrong not to allow evidence to be given of the problems encountered in recovering its loans having regard to the numerous reported cases and the evidence of the OFT and therefore the Judge should not have found that the value of the book debts was an undervalue (*Barons Bridging Finance v. Barons Finance Limited (In liquidation)* [2016] EWCA Civ 550).

Mortgage Rate. The Court of Appeal allowed an appeal by mortgagors under buy-to-let tracker mortgages. The lower Court had held that a clause which provided that the borrower might be obliged to repay on giving one month's notice predominated. The Court of Appeal held the contractual documents made it clear that it was the offer document which set out the features etc. and the interest rates to be charged which were part of an integral to the product description and this includes the tracking element (*Alexander v. West Bromwich Mortgage Company Limited* [2016] EWCA Civ 496).

Summary Judgment. A borrower company defaulted and the bank appointed receivers. The company unsuccessfully applied for an interim injunction to restrain a sale saying that there had been an oral agreement that there would be two stages of the loan having regard to the grant of planning permission when the interest rate would decrease. The Master granted summary judgment and the High Court dismissed the appeal (*Blue Mango Investment Holdings v. Bank of Ireland*, 7th June 2016).

Financial Ombudsman Service. The Claimants in civil proceedings alleged negligence against two banks. The trial was due sometime in 2018. The Claimants applied to FOS to hear the dispute and applied for a stay of proceedings otherwise the FOS could not investigate. The banks opposed this. The High Court held the stay should be granted so that the more informal and economical process could be invoked (*Templars Estates Limited v. National Westminster Bank*, 10th June 2016).

Misrepresentation and Breach of Contract. A bank was sued for breach of contract, negligent misrepresentation and negligence. The Claimant had taken an assignment of a cause of action from a company in administration. The company had entered into a loan agreement with the bank. It was alleged that the bank owed a duty to advise about any onerous terms and the effect of a particular clause which obliged the company to make good any break costs as a result of early repayment. It was said that only after the loan agreement was made was the company told that such costs would include those incurred in having to break a swap agreement entered into as a hedge. The hedge was against the risk of lending at a fixed rate whilst borrowing at variable rates. The High Court dismissed the action saying that the alleged failure to advise was not made out and, as regards the contract claim, the Claimant had not pleaded and proved the contract in respect of which there was any agreement by the bank to provide a service including advice (*Finch v. Lloyds TSB Bank Plc* [2016] EWHC 1236 (QB)).

Overriding Interests. The owner of a flat sold it at an undervalue on the basis of a promise that she could stay in the flat after the sale. The purchasers mortgaged the property for a large sum of money and, when there was a default, the mortgagee sought possession. The Court of Appeal dismissed an appeal against the possession order holding that there was no interest that was potentially an overriding interest and it was overreached by the grant of the mortgage (*Mortgage Express v. Lambert* [2016] EWCA Civ 555).

Regulated Agreements. An opinion by the Advocate General relating to Article 10(2) of the Consumer Credit Directive said that this does not require the lender to indicate the exact date on which each repayment must be made and that the Directive does not preclude Member States from requiring lenders to provide additional amortisation tables at the start of the agreement. It was also said that it was for the national Judge to assess whether the items of compulsory information that were omitted were such as significantly to jeopardise the consumer's ability to assess the desirability of entering into the credit agreement in order to determine whether a sanction whose effect is to require the lender to forego all interest is proportionate or whether a lesser sanction would be appropriate (*Home Credit Slovakia v. Biroova* Case – 42/15).

Redemption of Notes. The Supreme Court held that the subsidiaries of a banking group could redeem enhanced capital notes because the notes had ceased to be taken into account for regulatory capital requirement test purposes (*BNY Mellon Corporate Trustee Services v. LBG Capital No 1 Plc* [2016] UKSC 29).

FINANCIAL SERVICES

Rectification. An interest rate swap connected to a loan agreement was to be under the International Swaps and Derivatives Association Master Agreement 1992. The facility was renegotiated and the swap restructured and this referred to the ISDA 1992 but the agreement was in the form of the ISDA Master Agreement 2002. The bank sought to rely on additional

termination event provisions by reference to the 2002 Agreement. The High Court held that it could not be said that there was a clear mistake requiring correction but there had been a continuing common intention that the restructured conformation should be under the 2002 Agreement and therefore the restructured swap was rectified to refer to the 2002 Master Agreement (*LSREF 111 Wight Limited v. Millvalley Limited* [2016] EWHC 466 (Comm)).

Collective Investment Schemes. The Supreme Court has considered the scope of Section 235 of FSMA and held that the lower Court had been correct to hold that a land banking scheme was an unauthorised collective investment scheme (*Financial Services Authority v. Asset LI Inc* [2016] UKSC 17).

Prohibition Order. The Court of Appeal heard applications on 18th May 2016 in respect of an appeal from the making of a prohibition order following a finding by the Upper Tribunal that the authorised person was not a fit and proper person to carry out the CF2 function (*Burns v. Financial Conduct Authority* [2015] UKUT 601 (TCC)).

Interest Rate Swaps. A bank was refused a striking out application where assignees of a claim that a bank missold an interest rate swap had the right to bring a further claim as regards the conduct of the bank under the loan agreement. It was claimed that the bank had breached an implied term to act in good faith. It was not possible to conclude that the claim was unarguable (*Hockin v. Royal Bank of Scotland* [2016] EWHC 925 (Ch)).

FOOD

Health Claims. The ECJ has ruled that Article 1(2) of Regulation 1924/2006 should be interpreted as meaning that nutrition or health claims made in a commercial communication of a food which is intended to be delivered as such to the final consumer, if that communication is addressed not to the final consumer, but exclusively to health professionals, falls within the scope of that Regulation (*Verban v. Innova Vital GmbH*, Case C-19/15).

Classification. Following a decision that certain products were not mechanically separated meat or meat preparations, the High Court held that the products could be sold if they were suitably labelled stating that they were no longer to be regarded as meat preparations (*R (On the Application of Newby Foods Limited) v. Food Standards Agency*, 3rd May 2016).

Health Care Products and Medicinal Products. The Court of Appeal considered the treatment of certain products as medicinal products by the Medicines and Healthcare Products Regulatory Agency and held that the decision of the Agency was wrong. Some products have been treated as medicinal products and some as unregulated food supplements (*R (On the Application of Blue Bio Pharmaceuticals Limited) v. Secretary of State for Health* [2016] EWCA Civ 554).

GAMING

Game of Chance. The Upper Tribunal held that "spot the ball" competitions were not games of chance in a case involving VAT. The Court of Appeal allowed an appeal and held that it was in general a question of fact. There could be a game without contestants being in touch with each other. The First Tier Tribunal was entitled to go beyond the contractual documentation in holding that it was a game of chance and the appeal was allowed (*IFX Investments Limited v. HMRC* [2016] EWCA Civ 436).

HEALTH & SAFETY

Prohibition Notice. A Health and Safety Inspector appealed against an Employment Tribunal's decision cancelling a prohibition notice. The High Court held that the Tribunal should have looked at the information which the Inspector knew or should have known when he issued the notice and the notice was upheld (*Wilcox v. Survey Roofing Group Limited* [2016] EWHC 868 (Admin)).

Prohibition Notice. The Court of Session considered the extent to which an employment Tribunal can take into account information which was not available at the time a prohibition notice was issued. It was held that the review of the evidence was not restricted to matters that were in existence before a particular date. There was no basis for restricting appeals to what would essentially be a review of the Inspector's opinion and the appeal against the cancellation of the Notice was refused (*HM Inspector of Health and Safety v. Chevron North Sea Limited* [2016] CSIH 29).

COMMERCIAL AGENTS

Goods. In a claim in respect of an alleged breach of an agency agreement the question arose as to whether the sale or supply of software was the sale of goods within the definition of "commercial agent" under the Regulations. The High Court held that software amounted to goods (*Software Incubator Limited v. Computer Associates Limited* [2016] EWHC 1587 (QB)).

PACKAGE TRAVEL

Jurisdiction. Following an accident in France a claim was brought against a travel company. Because of the different legal rules on strict liability the issue arose as to the proper law. It was held that the choice of English law governed the whole contract (*Cristiano Committeri v. Club Mediterranee* [2016] EWHC 1510 (QB)).

ANIMALS

Fighting. The RSPCA appealed by Case Stated against the dismissal on informations. The question was what constituted animal fighting within the meaning of Section 8(7) of the Animal Welfare Act 2006. The High Court dismissed the appeal because the other animal which was placed with the protected animal had to be subject to some form of control or restraint. Letting dogs go in the hope that they would attack wild animals could not amount to "placing" (*RSPCA v. McCormick* [2016] EWHC 928 (Admin)).

Defamation. The local authority defendant had prosecuted the first claimant for neglect of cows. He was convicted of five charges. It was claimed the defendant had placed a news release on the website falsely stating that the neglect had led to the death of cows. The High Court held that there was evidence that news of the conviction had caused revulsion amongst customers of the vegetarian restaurant operated by a company owned by the first

claimant but there was scarcely any evidence that anyone thought badly of the restaurant (*Undre v. Harrow London Borough Council* [2016] EWHC 931 (QB)).

LICENSING

Revocation. A restaurant was found to be employing an illegal worker and the police asked for the licence to be revoked and the licensing committee revoked it. The District Judge allowed an appeal because no crime had been committed. The High Court allowed the appeal. A prosecution or criminal conviction was not required for the crime prevention objective to be engaged (*East Lindsey DC v. Hanif*, [2016] EWHC 1265).

ENVIRONMENT

Vessels. The respondents were convicted of keeping a vessel on a waterway when it was not registered. The Crown Court allowed the appeal holding that houseboats were not vessels. The Divisional Court upheld the decision. The structures lacked navigability and could not easily be moved (*Environment Agency v. Gibbs* [2016] EWHC 843 (Admin)).

Noise. A breach of condition notice was issued against a bus company which appealed that decision. The notice required the bus company not to run the engines of coaches and buses outside specified hours. The notice referred to "industrial or commercial activities". The Divisional Court dismissed the appeal (*R (On the Application of XPL Limited) v. Harlow Council* [2016] EWCA Civ 378).

Sanitary Facilities. A local authority applied by way of judicial review in respect of a decision of the Better Regulation Delivery Office to endorse a primary authority view that a food outlet did not require sanitary conveniences. The High Court granted the application and held that official guidance was wrong (*R (On the Application of Kingston-Upon-Hull City Council) v. Secretary of State* [2016] EWHC 1064 (Admin)).

Noise. A local authority appealed by Case Stated against the dismissal of an information for failure to comply with an abatement notice. The defence was that the television volume was turned up to drown out the noise of building works. The Divisional Court allowed the appeal. The existence of another noise was not a good reason to cause further noise (*Waltham Forest LBC v. Mitoo*, 26th May 2016).

SALE OF GOODS

Consumption of Goods. The Supreme Court considered the issue of whether a contract for supply of fuel bunkers was a contract of sale within the 1979 Act. The Court held that this was not a straightforward agreement to transfer property being one to permit consumption prior to payment without property passing; the contract was an indivisible one to pay a single price for all the bunkers sold and was not within Section 2 (*PST Energy v. OW Bunker Malta Limited* [2016] UKSC 23).

Contaminated Material. The High Court held that a seller had breached the implied terms under the 1979 Act in respect of a contract for the sale of scrap steel. This only applied to some of the contracts (*Meadowbank v. Eurokey Recycling Limited*, 16th May 2016).

ADVERTISING

Tobacco. Judicial review was applied for in respect of a decision to adopt the Standardised Packaging of Tobacco Products Regulations 2015. These restricted the ability to advertise the brands on packaging and products. The High Court held the Regulations to be lawful (*R (On the Application of British American Tobacco Limited) v. Secretary of State for Health* [2016] EWHC 1169 (Admin)).