



TRADING LAW BULLETIN

ISSUE NO. 93 JUNE 2017

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

Costs. A mortgagor in default brought a small claims track action against the lenders in respect of the level of fees of the receivers appointed. The claim was dismissed as was an appeal and an order for costs was made on the basis of unreasonable behaviour. The Court of Appeal allowed an appeal against that decision because the conduct may have been regarded as optimistic but it was not unreasonable (*Dammermann v. Lanyon Bowdler LLP* [2017] 2 Costs L.R.393).

Bankruptcy. A husband secured a loan on the family home. The loan was to pay business creditors. The Court of Appeal held that the wife was entitled to an equity of exoneration in respect of her equitable half share in the property (*Armstrong v. Onyearu* [2017] EWCA 268).

Professional Negligence. A loan was made relying on a due diligence report by accountants. The accountants admitted that the advice was negligent but, because the loan in question had been repaid and a further loan made to the borrower which was not repaid, the lender had suffered no actionable loss (*Lowick Rose LLP v. Swynson* [2017] 2 WLR 1161).

VAT. The Supreme Court has referred to the European Court of Justice questions about the right to deduct input tax on overhead costs in respect of hire-purchase transactions which are exempt supplies (*Volkswagen Financial Services v. Revenue and Customs Commissioners* [2017] STC 824).

Default Notices. In an application for permission to appeal in respect of the refusal of an application to annul a bankruptcy order consideration was given to the enforceability of a credit card agreement. There was an argument put forward to the effect that the default notice was defective in that the action required to remedy the breach was payment of the whole sum due and not the arrears. This was rejected by the High Court Judge who said that "if by the time the default notice is served circumstances have arisen which entitle the lender to recover not merely sums which might be regarded as arrears, by which I assume is meant accumulated minimum payments, but also the whole sum, then they are entitled to claim that sum, and the sum to require to remedy the breach for non-payment of that sum is the payment of the whole sum due". (*Blackshaw v. MFS Portfolio Limited* [2016] EWHC 3708 (Ch)).

Reference to Upper Tribunal. During the course of very substantial references from the FCA relating to decisions regarding prohibition orders and financial penalties, the Upper Tribunal considered the power to summons a person as a witness. Issues such as jurisdiction and the relevance of the potential evidence was considered. (*Ford v. FCA* [2017] UKUT 147 (TCC)).

Unfair Terms. An Advocate General's opinion was delivered on 27th April 2017 in respect of contractual terms where credit agreements are denominated in a foreign currency. Consideration was given to the main subject matter of the contract and plain intelligible language. (*Andriciuc v. Banca Romaneasca* Case C-186/16).

Commercial Customers. In a case involving student lets the Court of Appeal considered whether the letting was done by the landlord as a consumer so that an insurance issue did not fall within the FCA Sourcebook. (*Ashfaq v. Hannover Plc* [2017] EWCA Civ 357).

Proper Law and Distance Selling. A local authority in Italy entered into a number of swap contracts with the Claimant and defaulted. The local authority resisted the claim for a number of reasons including that the failure to give it a right to withdraw within seven days under Italian legislation made the agreements invalid. This was upheld in the High Court. Other defences such as illegality and lack of capacity were not upheld. The Court of Appeal upheld the Judge's finding that the swaps were not contrary to the Italian constitution and that the final swap did not involve new debt within an Italian statutory provision. However, the Claimant's appeal was allowed in respect of whether Article 3.3 of the Rome Convention applied. The Court of Appeal disagreed with the Judge that there were no "other elements relevant to the situation at the time of choice" which were connected with one country only, because the ISDA Master Agreement was an international form in routine use in International markets and, in the case of each of the swaps, the Claimant had entered into back-to-back hedging swaps with banks outside Italy. The Court also held that the final swap did not involve distance marketing of investment services because the day before it was entered into there was a meeting between the parties so that the contract involved a simultaneous physical presence (*Dexia Crediop SpA v. Comune di Prato* [2017] EWCA Civ 428).

Appointed Representatives. The High Court refused to set aside a default judgment based on Section 39(3) of FSMA 2000 which makes the principal responsible for anything done or omitted by the representative in carrying on the business for which the principal has accepted responsibility as if he had expressly permitted it. The representative had contravened COBS Rules in respect of investments by the Claimants. The principal could not rely on an arbitration clause in the representative's client agreement (*Oucharenko v. Investak Ltd*, 16th June 2017).

Financial Ombudsman. The High Court has held that a review in respect of interest rate hedging products agreed between a bank and the then FSA was not itself a specified activity and therefore

a regulated activity. Thus FOS did not have compulsory jurisdiction in respect of a complaint about the review (*Mazarona Properties Ltd v. Finance Ombudsman Service* [2017] EWHC 1135 (Admin)).

Leases. The possibility of a lease being forfeited (which could impact on security taken by way of the lease) exists if there is a breach of the covenant to occupy the premises as a private residence by reason of short term lettings (*Nemcova v. Fairfield Rents Limited* [2016] UK UT 303 (LC)).

Creditworthiness. A bill has been introduced in the Commons to require certain matters to be taken into account when assessing a potential borrower's creditworthiness.

Remuneration. The FCA have published their findings on a review of staff incentives and performance management in consumer credit firms. A new set of rules in CONC is proposed (CP 17/20).

FOOD

Desinewed Meat. The Court of Appeal have held that desinewed meat should be classified as mechanically separated meat for the purposes of Regulation 853/2004. (*R (On the application of Newby Foods Limited) v. Food Standards Agency* [2017] EWCA Civ 400).

UNFAIR TERMS

Insurance. A policy of insurance was in place on the basis that it was for residential let property owners. The property was damaged by fire. The insurance company discovered that the insured had failed to disclose a pending prosecution and voided the policy. The insured appealed against an adverse finding on the basis that he was a consumer within the 1999 Regulations and that the relevant clauses were unenforceable. The Court of Appeal held that a person taking out a policy under a buy-to-let mortgage was a commercial customer and dismissed the appeal (*Ashfaq v. International Insurance* [2017] EWCA Civ 357).

Betting. In a Scottish case the Outer House, Court of Session held that the 1999 Regulations did not apply to a contract under which a bet was placed on whether a Club would be relegated from the Scottish Premier League because the bet was placed for the purposes of the person's profession as a professional gambler.

ESTATE AGENTS

Money Laundering. A local rural estate agency was subject to a penalty by the former Office of Fair Trading on the basis that it did not have sufficient due diligence measures as required by the Regulation. The business challenged the penalty and HMRC, who had become responsible for the regime, upheld it. The Upper Tribunal allowed an appeal and subsequently a Costs Order was made against HMRC because the defence of the appeal was unreasonable (*Revenue & Customs Commissioners v. Jackson Grundy Limited* [2017] UKUT 180 (TCC)).

PROSECUTIONS

Local Authorities. Individuals involved in a legal practice were prosecuted and awaiting trial at the Crown Court. The allegation was conspiracy to defraud in respect of claims for payment for legal aid work. The prosecution was brought by a local authority. The Defendants submitted that the local authority had no power

under Section 222 to prosecute. The Court of Appeal said that the Council did not seek to prosecute kinds of crime other than fraud for the simple reason that there would be no income stream derived from it. It was held that the prosecution fell well outside the scope of Section 222 and it would be harmful to the public interest to have such a prosecution as an alternative to the CPS (*R v. AB* [2017] EWCA Crim 534).

PACKAGE TRAVEL

Consumer Rights. A bill has been introduced to give stronger protection if travel companies become insolvent even if the travel was not sold as a package.

GAMING

Advertising. A firm of bookmakers successfully appeared against an Advertising Standards Authority decision in respect of email advertising campaign based on the new film "Iron Man 3".

Bingo. The Appellants who operated public houses were refused a licence because the Commission considered it would be harmful to the statutory licensing objectives to provide gambling in pubs in the way proposed. The decision was successfully appealed to the First Tier Tribunal but the Upper Tribunal allowed the Commission's appeal. The Court of Appeal dismissed a further appeal (*Greene King Brewery & Retailing Limited v. The Gambling Commission* [2017] EWCA Civ 372).

ENVIRONMENT

Planning. The Crown Court upheld a notice served under the 1990 Act in respect of paving on a house. The Crown Court upheld the notice but the Divisional Court allowed an application for judicial review because issues of aesthetics fell outside the intention and spirit of the Planning Code (*R (Lisle-Mainwaring) v. Isleworth Crown Court* [2017] EWHC 904 (Admin)).

PROCEDURE

Delegation of Authority. A Defendant sought to stay a prosecution by the Secretary of State alleging an offence under the Trade Union and Labour Relations (Consolidation) Act 1992 in respect of the failure to give notice of redundancies. The challenge was on the basis that the proceedings had not been instituted in a lawful and regular manner because the authority to prosecute had been given by a suitably qualified official. An appeal to the Divisional Court was dismissed (*R (Forsey) v. Northern Derbyshire Magistrates Court* [2017] EWHC 1152 (QB)).

Pleas. The Defendants were prosecuted in respect of planning enforcement notices. The matter came before the Crown Court which held that the indications of guilty pleas before the Magistrates were invalid and therefore the committal to the Crown Court and confiscation proceedings were also invalid. The Defendants had been present in Court and it was submitted that there was an incurable error which is fatal to any subsequent proceedings in that they did not personally enter pleas. The Divisional Court held that the non-compliance was jurisdictional in nature and the pleas were nullities (*Westminster City Council v. Owadally* [2017] EWHC 1092 (Admin)).

HEALTH & SAFETY

Fire. The Court of Appeal (Criminal Division) upheld a sentence

of 8 months' imprisonment for the owner of a hotel in respect of admitted breaches of Fire Safety Legislation over a long period of time. The Court also commented on the inappropriateness of using newspaper reports in respect of sentences for similar breaches (*R v. Sandhu* [2017] EWCA Crim 908).

Sentencing. Substantial fines were appropriate after a major steel-producer had pleaded guilty to offences. Employees had got their hands caught in dangerous machinery. The Court of Appeal considered the sentencing guidelines and upheld the fines subject to a revision in the categorisation of one offence and therefore a reduction in the fine (*R v. Tata Steel UK Limited* [2017] EWCA Crim 704).

PRIVATE HIRE LICENCE

Revocation. The High Court considered the power to suspend a private hire vehicle driver's licence. The local authority appealed against the decision to allow an appeal against the revocation of a private hire vehicle driver's licence. He had been charged with being in charge with excess alcohol and the authority revoked the licence. He was found not guilty and appealed against the revocation. The Magistrates' Court allowed the appeal and ordered the local authority to pay costs because the driver was in "some financial difficulty" following the revocation. The High Court upheld the decision and made comments regarding the power to suspend (*Reigate & Banstead Borough Council v. Paulowski* [2017] EWHC 1764 (Admin)).

PRODUCT LIABILITY

Hip Replacements. The High Court tried a preliminary issue in respect of the alleged failure of a steel femoral shaft by way of an artificial hip. The issue was whether a claim could be brought under the Consumer Protection Act 1987. The High Court held that it could not (*Wilkes v. Depuy International Limited* [2016] EWHC 3096 (QB)).