TRADING LAW BULLETIN

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FINANCIAL SERVICES

Limitations. The Court of Appeal have held that the limitation period in respect of a regulated consumer credit agreement does not start to run until the date for payment specified in the Section 87(1) default notice. Without a default notice there was no right to treat a running-account agreement at an end and demand accelerated payment and this, therefore, qualified the substantive legal rights of the creditor. The Section was not merely a procedural requirement (*Doyle v. PRA Group (UK) Limited* [2019] EWCA Civ 12).

Unfair Relationships. A High Court Judge upheld a decision that there had been no unfair relationship in respect of a six month fixed term bridging loan which was subject to a 3% default rate per month. The Judge had been entitled to find that 3% was an industry standard default rate. The Judge was also entitled to find that the rate was not penal or unfair which was an evaluative judgment which the High Court could not interfere with. The question of whether a relationship was an unfair was not limited to the borrowers' perception (*Pontearso v. Greenlands Trading Limited* [2019] EWHC 278 (Ch)).

Unfair Relationships. A High Court Judge dismissed an appeal from a decision that a relationship had been unfair. The loan had been for £1.2 million which was found to be part of an informal joint venture. The rate of interest was 6% compounded quarterly rising to 9% in the event of default. The Judge upheld the decision that the lender had failed to show that the relationship between it and the borrower was fair. The lender had done nothing to enforce its rights for four years whilst interest was accruing at an escalating rate. The two lending companies involved were not commercial lenders but corporate vehicles of an individual. The variations ordered by the Judge under Section 140B were not unreasonable. The variations reduced the rate of interest and provided for annual compounding as well as lengthening the term for repayment which limited the period for which default interest could be charged (*Pilgrim Lock Limited v. Iwaniuk* [2019] EWHC 203 (Ch)).

Secret Commission. The Court of Appeal overruled an award of nominal damages in a case involving an introducing broker and contracts for difference. Issues relating to secret commission and the consumer credit case of *Hurstanger* were considered. It was held that, in the present case, even if there was a fiduciary relationship the duty was limited where the principal knew that the agent was being remunerated by the opposite party. If the principal knows this he cannot object on the ground that he did not know the precise particulars of the amount paid. He can, of course, always ask and if he does not like the answer he can take his business elsewhere. Unlike the borrowers in *Hurstanger* the clients were not vulnerable and unsophisticated but wealthy Greek citizens. However, the appeal was allowed on grounds relating to secret trading by the Respondent (*Medsted Associates Limited v. Canaccord Genuity Wealth* [2019] EWCA Civ 83).

Secret Commission. In a case involving the sale of domestic property a purchaser refused to complete. The defence was that the contract had been concluded following the vendor's promise to pay a bribe or secret commission to the purchaser's agent. The Court of Appeal held that whether the law of bribery is engaged is dependent upon the nature and extent of the fiduciary duties owed by the recipient of the benefit or promise and the nature of the transaction in question. The enquiry is inevitably extremely fact sensitive. It was held that the Judge had carefully evaluated the case and the conclusion was that the agent was not to be regarded as a trusted advisor but someone who provided a ministerial service (*Prince Arthur Eze v. Conway* [2019] EWCA Civ 88).

Advice. The Court of Appeal dismissed an appeal by a building society against a decision that its auditor was not liable in respect of losses incurred on interest rate swap agreements. The Court held that the instant case was an "information" case and not advice as to the decision to enter into the swaps. The building society had not proved that the losses would not have been suffered if the auditor's advice had been correct (*Manchester Building Society v. Grant Thornton* [2019] EWCA Civ 40).

P2P. A borrower was liable to the Claimant peer-to-peer lender for deceit and breach of contract. The Defendant was a fine art dealer. Summary judgment was granted because the Defendant was in breach of contract in selling the artworks without informing the Claimant about the pledges and subsequent sales and the breach of contract had been dishonest (*Fundingsecure Limited v. Green* [2019] EWHC 208 (Ch)).

Permission. The Upper Tribunal dismissed a reference following a decision by the FCA to refuse an application for permission to carry on debt adjusting and debt counselling. The FCA had been justified in concluding that it would be unable to ensure that the threshold conditions relating to supervision, resources and suitability would be complied with. The role of the Tribunal was to determine whether the decision was one which fell within a range of reasonable decisions. The Applicant had demonstrated a reluctance to provide information and comply with the rules (*Lewis Alexander Limited v. FCA* [2019] UKUT 49 (TCC)).

Investments. The Court of Appeal allowed an appeal against the decision of the Commercial Court in respect of a failed investment in the Cape Verde islands. The issue concerned a claim in contract between an LLP and a bank under a letter of instruction. The Court held that there was simply no evidence that the letter was subject to a pre-condition. Having concluded that there was in fact a binding contract it followed that there

should be judgment for the Claimants because the bank was in breach resulting in the monies not being deposited in a new segregated account (*Chudley v. Clydesdale Bank Plc* [2019] EWCA Civ 344).

Solicitor's Loans. The Court of Appeal held that loans made by a solicitor did not constitute "all sums of money held by or on behalf of the solicitor" within the Solicitors Act 1974 so that they would, on intervention, vest in the Law Society (*Pathania v. Law Society* [2019] EWCA Civ 517).

Retained Provisions. On 25th March 2019 the FCA issued a report on its review of the retained provisions of the Consumer Credit Act 1974. It provides analysis and evidence to enable decisions to be made as regards these provisions by the Treasury.

TRAVEL

Costs. The Court of Appeal held that the Claimant solicitors did not have liens because the services provided had to be the conduct of litigation or in contemplation of litigation. That did not extend to compensation claims made by solicitors against airlines for cancelled or delayed flights (*Bott & Co v. Ryanair* [2019] EWCA Civ 143).

Airlines. The Court of Appeal considered the defence available to airline carriers in respect of applications for compensation where there were "extraordinary circumstances". It was held that such circumstances should be deemed to exist where an air traffic management decision had caused a long delay to a particular aircraft (*Blanche v. Easy Jet Airline Co Ltd* [2019] EWCA Civ 69).

VEHICLE REGISTRATION

Duty of Care. The Court of Appeal held that the DVLA did not owe a duty of care to prospective purchasers in respect of the registration of an "historic vehicle". There was no direct relationship between the agency and the Appellant and certainly not one akin to contract (*Seddon v. Driver & Vehicle Licensing Agency* [2019] EWCA Civ 14).

DATA PROTECTION

Defences. The Appellant had leaked a confidential report which contained personal data. At the trial reliance was placed upon the defences in Section 55 in that he acted in a reasonable belief that the data controller would have consented to disclosure and it was justified in the public interest. The Court of Appeal (Criminal Division) held that the section imposed no more than an evidential burden on a defendant and an appeal was allowed (*Shepherd v. Information Commissioner* [2019] EWCA Crim 2).

DOGS

Police. The prosecution appealed against a ruling made by the Judge in the Crown Court in respect of a police constable who was charged that he had been in charge of a dog which was dangerously out of control. The Court held that on the assumed facts the Respondent was exercising the dog and not "using it" within Section 10 of the Dangerous Dogs Act 1991 (*R v. PY* [2019] EWCA Crim 17).

ENVIRONMENTAL PROTECTION

Obstruction. The Divisional Court quashed some convictions in respect of allegedly obstructing an authorised person in the exercise of his powers. It was alleged that during an investigation by the Environment Agency officers had encountered a lack of cooperation in respect of employees of a water company. It was held that an omission to act could constitute an obstruction but only if the individual was under a duty to act. In respect of one of the Appellants there was no finding which justified the conclusion that he had failed to comply with a requirement to assist (*Millmore v. Environment Agency* [2019] EWHC 443 (Admin)).

HEALTH & SAFETY

Asbestos. The Court of Appeal Criminal Division dismissed an appeal by a company following conviction for breach of its duty towards employees by failing to do all that was reasonably practicable to protect them from exposure to asbestos. However, the fine of £400,000 was reduced to £190,000 (*R v. Squibb Group Limited* [2019] EWCA Crim 227).

COSUMER PROTECTION

Brexit. The Consumer Protection (Enforcement) (Amendment etc) (EU Exit) Regulations 2019 make amendments to legislation including the Consumer Rights Act 2015, the Enterprise Act 2002 and the Data Protection Act 2018.

Withdrawal. The ECJ has ruled that the removal of a protective film from a mattress does not prevent the consumer from exercising their right of withdrawal (*Stewo v. Sascha Ledowski* (Case C-681/17)).

WAREHOUSING

Injunction. The High Court granted an interim injunction permitting a company whose approval as a warehouse keeper had been revoked to continue acting in that role pending its appeal before the First Tier Tribunal (*Q Limited v. Revenue and Customs Commissioners* [2019] EWHC 713 (QB)).

Appeals. In an appeal against a First Tier Tribunal finding that a sole director of a company was not a fit and proper person to be a director of a company registered under the Warehouse Keepers Regulations, the Upper Tribunal held that it could grant a non-party a right of appeal. However, the appeal was dismissed as there had been no procedural unfairness (*Pierhead Drinks Limited v. Revenue and Customs Commissioners* [2019] UKUT 7 (TCC)).

ESTATE AGENTS

Commission. The Supreme Court held that an oral agreement with an estate agent would be complete and enforceable even though it did not expressly specify the event triggering the vendor's obligation to pay commission (*Wells v. Devani* [2019] UKSC 4).

UNFAIR TERMS

Sub-Postmasters. The High Court considered "common issues" in group litigation against the Post Office. It was held that a number of terms relied upon by the Defendants failed the test of reasonableness (*Bates v. Post Office Limited* [2019] EWHC 606 (QB)).

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This is the first publication of a quarterly newsheet produced by Gough Square Chambers noting recent cases and developments of interest to Trading Law practitioners. The areas covered will include, in particular, consumer credit, food safety, trade descriptions but will also extend to other areas of concern to those advising and litigating in this area. Any comments or contributions are welcomed.

CONSUMER CREDIT

Cancellable Hire Agreements The question whether a regulated hire agreement can be cancellable under s56 and s67 of the Consumer Credit Act 1974 was raised in the County Court in *Woodchester v. Clayton*. The Judge distinguished the leading case of *Branwhite v. Worcester Works* [1969] AC 552 because the whole thrust of the supplier's representations had been directed to the virtues of leasing as opposed to buying a fax machine. The case was a leasing case as opposed to a hire-purchase case, unlike *Branwhite*. It was to the suppliers advantage to persuade a customer to lease, which was thoroughly disadvantageous to the customer. The agreement was therefore unenforceable for non-compliance with the requirements for a cancellable agreement. This case will be more fully reported in the Consumer Credit Law Reports.

APR In *NatWest v. Devon CC and Devon CC v. Abbey National* (1994) 158 JP 156 the Divisional Court quashed convictions under s46 of the 1974 Act (misleading advertisement) and s167 (offences under the Advertisements Regulations) in one case and dismissed a prosecution appeal in another where a Bank and Building Society had calculated and advertised the APR for a 25 year mortgage with an initial fixed rate by application of that fixed rate - notwithstanding that a fluctuating rate of interest could apply after the fixed period. The lenders were correct in interpreting regulation 2 of the CC (Total Charge for Credit) Regulations 1980 to permit an assumption that a change in interest rates would not occur.

Macpherson J suggested simplification of the Regulations and said that probably 99% of borrowers had no real idea what the APR means and said that the prosecution of reputable lenders acting in good faith was undesirable.

Enforcement In *Re C* an application to set aside a statutory demand based on a demand for payment of sums due under a regulated agreement failed notwithstanding that the creditor had not obtained a prior judgement. The High Court was not persuaded by the argument that Part IX of the Act was a complete statutory code which did not permit enforcement directly by insolvency proceedings. The Judge found that the fact that the debtor was deprived by the creditor's choice of proceedings of the opportunity to apply for a time order was a matter which the District Judge could take into account in exercising his discretion to set aside a statutory demand.

Advertisements Regulations 1989 Advertisements in a local newspaper related to a low-start scheme. The Crown Court upheld appeals in respect of convictions under:

(i) Regulation 8(1)(b)(iii) on the basis that the APR did not have to be as prominent as headlines and headings even though they contained amounts of payments: and

(ii) Regulation 8(2) on the basis that the secured lending warning only had to be as prominent as the minimum full advertisement material. The prosecution did not appeal.

The Divisional Court dismissed the Defendants' appeals against other convictions, holding that:

(i) an information referring to a number of statements in an advertisement was not bad for duplicity;

(ii) statements such as "why pay £500 a month on your mortgage when you could pay £383" which referred to hypothetical readers with existing mortgages were comparative statements within Regulation 7(b)

(*Carrington-Carr v. Leicester CC* - to be reported in the CCLR)

Since 24th May 1993, by the Magistrates Courts (Miscellaneous Amendments) Rules 1993 the consequence of a duplicitous information is now that the prosecutor is required to elect as to the offences upon which he wishes to proceed. The other charges are to be struck out and the prosecutor must start the hearing afresh upon charges which are not duplicitous.

Circulars to Minors In *Alliance & Leicester Buildings Society v. Babbs* [1993] CCLR 77 the Divisional Court allowed an appeal against conviction in the case of a Building Society convicted by magistrates of an offence under s50(1)(a) of the 1974 Act for sending a consumer credit advertisement to a boy of 9 with his savings statement of account. The advertisement said that loans were not available to applicants under 18 and a computer programme had been installed to prevent loans to such people. It was held that the brochure should be construed as excluding persons under 18 from its scope and it was clearly established that it was not the society's intention to obtain financial gain.

Connected Lender Liability Review The Director General General of Fair Trading has published the OFT review of Section 75 of the