



TRADING LAW BULLETIN

ISSUE NO. 104
MARCH 2020

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

Committal. The Applicant applied to commit Directors of the Respondent lending company and two of the solicitors who acted for it. The background was possession of a domestic property following default on a bridging loan. In separate proceedings the borrower had claimed under Section 140B. That was yet to be heard. The application to commit related to a Witness Statement and Attendance Note. The High Court said that the application had no merit whatsoever (*Anwer v. Central Bridging* [2020] EWHC 765).

Withdrawal Period. The ECJ has held that the Directive precludes a credit agreement making reference to the calculation of the withdrawal period by reference to a provision of national law which itself refers to other legislation (*JC v. Kreissparkasse* (C-66/19)).

Unfair Terms. An Advocate General's opinion dealt with a case concerning a consumer credit agreement in foreign currency. Consideration was given to the decisions of other Member States as to whether a Court should review terms of its own motion. It was said that legal representation had no bearing and that a Court should review terms of its own motion where they related to the object of the dispute and have a link with the legal or factual elements in the case file. There is no requirement to examine of its own motion other terms (*Lintner v. UniCredit* (C-511/1)).

PPI. The High Court considered a PPI case in respect of the question of limitation. It found in favour of the borrower as regards the Limitation Act as applied to payment protection insurance (*Canada Square Operations v. Potter* [2020] EWHC 672).

Default Judgment. The High Court held that a Master had been wrong not to set aside a default judgment. The case related to aircraft finance and a guarantee. In 2015 a summary judgment application was dismissed because of the question of the arrears which, contrary to what the creditor said, may have been trivial. The original borrower company went into liquidation but was restored to the register and applied to set aside the judgment. It was held that the Master gave too much weight to delay and there were reasons for the delay, there were reasonable prospects of defence and the judgment was set aside (*Lombard North Central v. European Sky* [2020] EWHC 679).

Consequential Orders. Following the decision on an appeal to a High Court Judge another High Court Judge considered consequential orders. The original Judge had said that the Claimant could not obtain possession of residential property based on an assignment. The instant High Court Judge held that this was correct but nevertheless the Claimant was entitled to possession and to claim the debt as a registered proprietor (*Promentoria v. Emanuel* [2020] EWHC 563).

Summary Judgment. Summary judgment against the Director of a Defendant company was granted. The Defendant said that he was told that a guarantee would only be used if there was a shortfall after sale. It was held that this did not come close to a clear promise (*United Trust Bank v. Diamantopoulos*, [2020] EWHC 658 (Comm)).

Peer to Peer. The High Court upheld a Master's decision to make a Representation Order. The Defendant was a peer to peer investment agency. The claim was under Section 140B against the 612 lenders. The Defendant refused to disclose the identity of the lenders. It was held that Section 140B(8) did not override rules of Court. Instead of appointing the Defendant as representative one of the lenders was appointed. The High Court held that the consumer credit procedure in CPR PD7B should be disapplied in the case of complexity (*Milne v. Open Access Limited*, 12th March 2020).

VAT. The Upper Tribunal considered the scheme relating to the sale of second hand vehicles in respect of a finance company after recovery of possession following the termination of the hire-purchase transactions (*Volkswagen Financial Services (UK) Limited v. Revenue and Customs* [2020] UKUT 42 (TCC)).

VAT. The High Court concluded that there had been a VAT fraud by traders who were the traders of a subsidiary bank. It was held that they must have been aware of the VAT fraud (*Bilta v. NatWest Markets Plc* [2020] EWHC 546 (Ch)).

Guarantee. A conditional order for payment into Court of US\$100,000,000 was made in a case involving a guarantee. It had been executed under a Power of Attorney. The Defendant said the Power of Attorney was invalid and that he only signed it to give the Attorney a right to sign a non-binding letter of comfort (*Industrial Commercial Bank of China v. Ambani* [2020] EWHC 272).

Standard of Proof. The Claimant claimed under personal guarantees and one personal loan. The counterclaim alleged unlawful conspiracy to raid and seize assets of two of the Defendant's main businesses in Russia. The Court of Appeal allowed an appeal by the Defendant from the dismissal of the counterclaim and ordered the issue to be retried. The question was the standard of proof for dishonesty and a wholesale challenge to the inferences to be drawn from primary facts (*Bank of St Petersburg v. Oslo Marine Corporation Ports Limited* [2020] EWCA Civ 408).

Contracts for difference. The case involved limit orders speculating on the fall of the price of petrol placed on an online platform of the Defendant's. The Court considered Article 12(1) of 864/2007 (Rome II) being the law applicable to non-contractual obligations prior to the conclusion of a contract. This

provided that, regardless whether the contract was concluded, the law shall be the law that applies to the contract or would have if the contract had been concluded. Article 18(1) of 1215/2012 allowed the consumer to bring proceedings in Courts where the other party was domiciled or where the consumer was domiciled. The Claimant said in a Rumanian Court that it was a victim of manipulation and there was a tort of non-compliance with consumer protection. It was held that it was for the National Court to decide if the Claimant was a consumer not taking into account the volume of trade within a short period and the amounts because they were in principle irrelevant as was the fact the person is a “retail client” within Directive 2004/39. An action in tort by a consumer under Section 4 of Regulation 1215/2012 can be brought if it is indissociably linked to the contract actually concluded which is for the national Court to verify (*AU v. Relintco Investments Limited* (C-500/18)).

Unconnected Reference. The FCA cancelled permission to carry on regulated activities and the Upper Tribunal therefore held that there was no live question on an earlier unconnected reference in respect of the removal of certain activities (*PF (International) Limited v. FCA* [2020] UKUT 2 (TCC)).

FOOD

Use-By Dates. The Divisional Court held in judicial review proceedings that a deeming provision is definitional and designed to include within the scope of “unsafe” food past its use-by date irrespective of the fact that there was evidence that it was safe (*R (Tesco Stores Limited) v. Birmingham Magistrates’ Court* [2020] EWHC 799 (Admin)).

SALE OF GOODS

Defeat Devices. The High Court considered whether certain vehicles had contained defeat devices within Article 30(10) of Regulation 715/2007. The Court held that the vehicles did contain such devices. In any event the Court was bound by a letter from KBA being a “competent authority” from Germany to that effect (*Re VW NOx Emissions Group Litigation* [2020] EWHC 783 (QB)).

AIR TRAVEL

Jurisdiction. The European Court of Justice dealt with a case where there had been a booking through travel agents and a claim for air traffic delay. The Court held that a passenger could bring a compensation claim against the airline in the Courts of the place of departure (*Kralova v. Primera* (C-215/18)).

Compensation. If there is a single booking with several connecting flights by different carriers compensation for cancellation of the final leg may be brought in the Courts of the State of the first leg of departure (*Flightright v. Iberia* {C-606/19}).

FRANCHISE

Proper Law. The Court of Appeal considered the governing law of an arbitration agreement in a franchise development agreement. The question arose as to a “non-oral modification” clause (*Kebab-Ji Sal v. Kout Food Group* [2020] EWCA Civ 6).

CARAVANS

Licence. The Upper Tribunal considered the issue of a licence for

a caravan park. It was an appeal from the First Tier Tribunal requiring the local authority to issue a licence. The Upper Tribunal held this was irrational and put the local authority in an impossible position because there was an ongoing planning issue. The matter was remitted for rehearing (*Amber Valley BC v. Haytop Country Park* [2020] UKUT (LC)).

TRADING STANDARDS

Misfeasance. The Claimant alleged that a Trading Standards Officer for whom the Defendant was vicariously liable was responsible for misfeasance in public office. The case related to a Trading Standards’ investigation into alleged mis-selling by an electricity supplier. The instant judgment dealt with the degree of disclosure by a neighbouring local authority which had been involved in the investigation (*BES Commercial Electric Limited v. Cheshire West and Chester BC* [2020] EWHC 701 (QB)).

HEALTH & SAFETY

Costs. In the High Court the Costs Budget Case Management Conference considered a number of items and there was an item relating to one aspect of the procedure which the Judge said was “redolent of a degree of financial incontinence” (*Re British Steel Coke Oven Workers Litigation* [2020] EWHC 771).

TIMESHARE

Trustees. The Court of Appeal dismissed an appeal by a timeshare corporate trustee that an indemnity granted by timeshare owners as regards losses etc. did not indemnify against Spanish taxes on the timeshare owning company (*First National Trust Company Limited v. McQuitty* (2020) EWCA Civ 107).

UNFAIR TERMS

Consumers. In a contract for the supply of thermal energy there was a default rate of 9.25%. An Italian Court held this as unfair but referred to the ECJ as to whether the entity concerned was a consumer. It was said that the commonhold association acts on behalf of unit holders who must be regarded as consumers. It was held that the entity was not a natural person within the Directive but that was a Directive of minimum harmonization and Italian case law did not preclude the conclusion that the association should be treated as a consumer (*Condominio di Milano* (C-329/19)).

HOUSING

Sentence. Fines of £236,000 on a company and its director were reduced to £75,000 and £99,000 respectively. The local authority had applied a policy resulting in disproportionate penalties. The offences related to the 2007 Regulations and improvement notices (*Sutton v. Norwich City Council* [2020] UKUT 90 (LC)).

Penalties. The Upper Tribunal considered the financial penalties under housing legislation. It was said that the First Tier Tribunal should give proper weight to a local authority policy which in this case involved the use of a matrix on civil penalties. The decision of the local authority was reinstated (*Waltham Forest LBC v. Marshall* [2020] UKUT 35 (LC)).