



TRADING LAW BULLETIN

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FINANCIAL SERVICES

Debt Respite. The Debt Respite Scheme (etc.) (England and Wales) Regulations 2020 will come into force on 4th May 2021.

Interest Free Credit. A change to the Financial Services Bill would permit the Treasury to use Section 107 of the Financial Services Act 2012 to disapply CCA provisions in respect of certain types of relevant credit activity. This is in the context of regulating Buy Now Pay Later credit.

LIBOR. A bank was sued by two local authorities. The bank had granted loans which involved LIBOR. The bank applied to strike out the claims which were based on fraudulent misrepresentations because of LIBOR fixing. For the purposes of the application the misrepresentations were admitted but the issue was reliance. It was held that the representees had to be aware of the misrepresentations and understand them. The claims were struck out (*Leeds City Council v. Barclays Bank* [2021] EWHC 363 (Comm)).

FCA/RDC. The FCA's Regulatory Decisions Committee proceedings were ordered to be stayed pending a decision of the Commercial Court brought by Danish authorities (*R (on the application of T) v. FCA* [2021] EWHC 396 QBD (Admin)).

SIPPS. In case of a SIPPS investment the Court of Appeal has held that the Claimant's case under Section 27 of FSMA was well-founded but the COBS claim was not (*Adams v. Options SIPP* [2021] EWCA Civ 474).

Unfair Relationships. Following a series of hearings spanning eight days, the High Court rejected a defence of unfair relationships in the context of a bridging loan. One issue went to rolled up interest. The Court held that there was nothing unfair about the relevant clause which provided for this. The use of "aggressive and coarse language" by someone acting for the lender did not result in an unfair relationship. An issue as to the identity of the purchaser of one of the properties involved also did not create unfairness (*Credit Capital v. Watson* [2021] EWHC 466 (QB)).

Guarantees. A bankrupt successfully appealed against a decision of the trustee in bankruptcy to admit an alleged debt said to be due to a bank on a guarantee. A handwriting expert said there was strong evidence that the applicant had not signed the guarantee but that the purported witness had. The alleged witness gave direct and credible evidence she had not signed and that she had not seen the applicant sign (*Lynch v. Cadwallader* [2021] EWHC 328 (Ch)).

Claims Management. The Court of Appeal has considered the wording "claims management services" in the Compensation Act 2006 in the context of damages based funding agreements in a

competition case (*Paccar Inc v. Road Haulage Association* [2021] EWCA Civ 299).

Duty of Bank. The Court of Appeal has dismissed an appeal by a property developer against a decision that a bank was not liable to him for breach of duty of good faith or to use reasonable skill and care. Nor had he been concerned by a threat to appoint a receiver (*Morley v. Royal Bank of Scotland* [2021] EWCA Civ 338).

PPI. A customer took a loan in 2006 and was sold PPI. She was not told that over 95% of the financed premium was commission. The customer repaid early and the agreement ended in March 2010. In August 2018 she was given compensation by the lender but this did not cover all her loss. In December 2018 she brought proceedings to recover the balance relying on Section 140A. The lender relied on limitations. The Court of Appeal upheld a High Court decision that there had been deliberate concealment within Section 32(1)(b) of the Limitation Act 1980 (*Cavendish Square v. Potter* [2021] EWCA Civ 339).

Liability of Information Publishers. An attempt to add additional Claimants was refused. The action was by shareholders. It related to a company providing security and other services to Government and an investigation relating to billing. The claim was under Section 90A of FSMA (*Various Claimants v. G48 PLC* [2021] EWHC 524 (Ch)).

Proper Law. In a case involving the purchase by way of mortgage of properties in Cyprus, the Judge hearing the trial in the High Court held that English or Scottish law applied not Cypriot law (*Barclay-Watt v. Alpha Panareti Public Limited* [2021] EWHC 642 (Comm)).

Identity Fraud. The High Court continued a freezing injunction in the case of an alleged identity fraud. The Claimant provided short-term asset-based lending. It agreed a loan to a couple who apparently had appointed Solicitors to whom £600,000 was transferred. Due to default it became clear that the apparent borrowers had been the victims of identity theft (*MSP Capital Ltd v. Persons Unknown* 26th March 2021).

Co-Guarantors. The Privy Council dismissed an appeal from the Court of Appeal of the British Virgin Islands by a co-guarantor who had been held liable for a contribution under a settlement of a guarantee claim. The trial Judge had correctly held there had been no sale of properties given as security and the delay in giving judgment did not result in an unfair trial (*Pickle Properties Ltd v. Plant* [2021] UKPC 6).

Commission. In two appeals the Court of Appeal considered the issue of brokers' commission. Dismissing appeals by assignees of lenders it was held that the commission payments had been fully

secret and the borrowers were entitled to rescission. The borrowers had also paid commission. The Court said there was no need to show a fiduciary relationship (*Wood v. Commercial First* [2021] EWCA Civ 471).

Mis-Selling Claims. Liquidators brought claims against Respondents in respect of a business running a scheme for funding claims against financial institutions for allegedly mis-selling bonds. Investors put in about £3.3 m and received payments only just over £230,000. The Respondents, directly or through companies, received just under £2.2 m. Claims against all but one of the Respondents who had not settled (as some had) were dismissed (*Biscoe v. Milner* [2021] EWHC 763 (Ch)).

Bankruptcy. A consumer successfully appealed against a bankruptcy order obtained as a result of default under a fixed-sum loan agreement for home improvements. The District Judge had failed to take the family's financial circumstances or the reasons why the debt had not been paid. There had also been an offer to pay by a family member. The matter should have been transferred to a specialist Judge (*Ndyabahika v. Hitachi Capital* [2021] EWHC 633 (Ch)).

Assignment. The owner of a Surrey mansion borrowed about £3.8 m. The rate was 2.8% flat monthly. If payments were made within seven days of the due date the rate reduced to 1.4%. The borrower stopped making payments and retained the Defendant Solicitors to look at challenging the loan agreement on consumer credit grounds. The Defendants' terms prohibited assignment by the client and gave no third party rights. The borrower became bankrupt and purported to assign the claim against the Defendant to the Claimant. A Deputy QB Master struck out the claim on the assignment (*Burleigh House (PTC) Ltd v. Irwin Mitchell LLP* [2021] EWHC 834 (QB)).

Illegality. The Claimant and a vendor effected a mortgage fraud. She did this to get funds from a high street lender she would not otherwise have got. The solicitors acting for the Claimant, the vendor of the property and the bank failed to register the transfer. The bank brought possession proceedings after default. The Claimant claimed against the solicitors who pleaded illegality. The Supreme Court rejected the defence on the basis of important public policies such as the policy that victims of solicitors' negligence should be compensated (*Gronadona v. Stoffel & Co* [2021] 2 All ER 239).

Strike Out. A company obtained funding from a bank secured on property. On default LPA Receivers were appointed and the Claimants in the present action issued proceedings. These were struck out for failure to comply with an unless order. The second proceedings alleged, amongst other matters, false accounting and forgery by the bank. It was held that the proceedings were essentially bringing issues the subject matter of the first action. The proceedings were struck out (*889 Trading Ltd v. Clydesdale Bank Plc* [2021] EWHC 850 (Ch)).

Duty of Care. The Court of Appeal considered a claim by liquidators against a bank of which the insolvent company had been a customer. The claims related to how the bank dealt with the company's accounts whilst the company was committing one of the largest and most prolonged Ponzi schemes in history. The company submitted that senior management of the bank

dishonestly allowed it to be run so that no one ever got to the point of realising the company was a Ponzi scheme. It was held the bank's appeal on a loss claim succeeded; the company did not sustain the specific loss it claimed. The appeal by the company on a dishonest assistance claim failed (*Stanford International Bank (in Liquidation) v. HSBC* [2021] EWCA Civ 535).

SIPPS Prosecution. A director of an investment company was alleged to have committed fraudulent trading. Investors were loaned SIPPS contributions by the company. Tax relief was paid by HMRC to another company which was an administrator which paid the money to the director's company. About £900,000 was paid and it was alleged that the Defendant spent it. Investors said they were told the money would be invested. The Defendant's appeal against conviction and six years' imprisonment was dismissed (*R v. Say (Darren Terrence)* [2021] EWCA Crim 520).

Swaps. The Claimant brought two interest rate swaps from the Bank. The claim was not about the original mis-selling but related to the bank's conduct in the review process under arrangements with the FCA. There were preliminary issues as to whether there had been a complaint within DISP and, if so, the statutory duties. The Court of Appeal upheld the Judge's decision that there had not been a complaint sufficient to trigger DISP. The review agreement made it (unusually) possible to bring a dispute before FOS even if the customer has not made a complaint to the business (*Davies v. Lloyds Bank Plc* [2021] EWCA Civ. 557).

FOOD

Time Limits. An abattoir operator was accused of offences under the 2013 Regulations. A District Judge held that the applications for the issue of a summons was invalid as it failed to demonstrate the prosecution were within the three year time limit in accordance with CPR 7.2. The FSA's appeal by case stated was dismissed. The Administrative Court refused to allow the FSA to resile from concessions made below that it had not complied. In any event the argument that there was no requirement to draw attention to any time limit was incorrect (*Food Standards Agency v. Bakers of Nailsea* [2020] EWHC 3632 (Admin)).

Code of Practice. On 16th March 2021 the FSA published revised Food Law Codes of Practice.

UNDER AGE SALES

Technology. The Home Office and the Office for Product Safety and Standards have proposed trials of technology for age verification in as regulatory sandbox.

HOUSING

HMOs. A director and majority shareholder of a company owning an HMO appealed to the Court of Appeal against penalties for breach of the 2007 Regulations and failure to comply with an enforcement notice. The Court said there was no rule as to penalties as between a director and a company but double punishment was to be avoided. The decision of the Upper Tribunal was upheld (*Sutton v. Norwich City Council* [2021] EWCA Civ 20).

HMOs. The Upper Tribunal upheld a rent repayment order which required a landlord to repay to the local authority universal

credit received in respect of an unlicensed HMO (*Ball v. Sefton MBC* [2021] UKUT 42(LC)).

HMOs. The Upper Tribunal allowed appeals by landlords from decisions of the FTT relating to repayment orders and a financial penalty. The FTT decisions had been made on paper. Although consent to this procedure had been given the Upper Tribunal said that there may have been a misunderstanding of the implications of this and the FTT had made findings that a criminal offence had been committed (*Raza v. Bradford MDC* [2021] UKUT 29(LC)).

ENVIRONMENT

Information. A local authority issued an abatement notice in respect of odour nuisance from a farm. The Applicant appealed to the Magistrates' Court. Pending the appeal he sought information from the authority in respect of matters such as complaints as well as emails etc. with neighbours including but not limited to the spreading of digestate. The First Tier Tribunal upheld the Information Commissioner's decision that this fell within the exemption relating to adversely affecting the course of justice (*Pinkerton v. Information Commissioner*, 22nd December 2020).

Sentence. A national house builder has been fined £600,000 for proceeding with development work notwithstanding a requirement of planning permission without obtaining mitigation and species licences beforehand in respect of bats (*Bellway Homes*).

FIREARMS

Limitation. Antique firearms were seized by the police in 2003. The High Court held that the Limitation Act 1980 applied to a claim for their return under the Police Property Act 1897 (*Commissioner of Police v. Meekey* [2021] EWHC 34 (Admin)).

PLANNING

Time Limits. The time limit in Section 127 of the Magistrates' Court Act 1980 was considered in a judicial review of a Magistrates' Court in respect of a prosecution relating to planning. It was held that an offence of failure to provide information including documents required by a planning contravention notice was a continuing one but in respect of an alleged offence of making a false or misleading statement in response to a notice it was "once and for all". The time limit applied irrespective of when the prosecutor had sufficient information to commence proceedings (*Russnak-Johnson v. Reading Magistrates' Court* [2021] EWHC 112 (Admin)).

UNFAIR TERMS

Water Supply. The ECJ has considered a case between a water company and a consumer with respect for invoices for drinking water. The issue was alleged inertia selling. However, the consumer had moved into a previously occupied dwelling and had used the water supply by the only supplier. If the rates are proportionate to usage and the consumer knows of the water connection there is no unfair term by inertia selling (*Stichting Waternet v. AG* (Case C-922-19)).

HEALTH AND SAFETY

Publication Notices. A Judge of an Employment Tribunal refused to stay appeals brought by a company against prohibition

notices. Whilst the appeal was pending the HSE stated that it intended to bring criminal proceedings. The Administrative Court upheld the Judge's decision. There was no substantial prejudice to the company (*Shiva Ltd v. Boyd* [2021] EWHC 371 (Admin)).

ENERGY

Renewables Accreditation. The High Court rejected a claim that the withdrawal of OFGEM of accreditation of a small solar photovoltaic electricity generating station had been unlawful (*R (Gravis Solar 1 Ltd) v. Gas and Electricity Markets Authority* [2021] EWHC 490 (Admin)).

TRAVEL

Compensation. An Advocate General has said that a strike by pilots was, in principle, an extraordinary circumstance so as to defeat a claim for compensation for a cancelled flight (*Airhelp Ltd v. Scandinavian Airlines Systems* Case C-28/20).

Compensation. The Court of Appeal have held that the sickness of a pilot just before take-off was not an "extraordinary circumstance" so that no compensation would be payable (*Lipton v. BA City Flyer* [2021] EWCA Civ 454).

COSTS

Private Prosecutions. The recovery of costs by a private prosecutor from central funds has been held to include the recovery of investigation costs. The constitution of the Appeal Court from a Costs Judge was also considered (*FA Premier League v. Lord Chancellor* [2021] EWHC 755 (QB)).

DOGS

Destruction Order. A dog owner was convicted of failing to comply with a contingent destruction order requiring the dog be on a lead and muzzled in public. He accepted he would be unlikely to be a fit and proper person for the purpose of appealing the destruction order and sought to have the dog transferred to a dog charity. The police refused the transfer. The High Court held that any discretion by the police entitled the Commissioner to take account of the retention of control of the dog. The fact that the result would be that a fit dog of excellent temperament might die was the result of the draconian legislation as a result of public concern (*R (On the application of Stronge) v. Commissioner of Metropolitan Police* [2021] EWHC 766 (Admin)).

INFORMATION

Non-UK Residents. Persons who were not UK residents could effectively ask for information held on them under the Freedom of Information Act 2000 and they could apply for a decision notice from the Information Commissioner's Office. They could appeal under Section 57 and there was no difference whether they were in the EU or not or whether they were a UK national (*Maurizi v. Information Commissioner* [2021] UKFTT 85 (GRC)).