



# TRADING LAW BULLETIN

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## CONSUMER CREDIT

**Commissions.** The Court of Appeal held that a credit broker owed the borrowers a fiduciary duty and therefore had to account for commissions received without informed consent (*McWilliam v. Norton Finance (UK) Limited* [2015] EWCA Civ 186).

**Guarantee.** Summary judgment was refused where it was held that it was arguable that a claim was made on the basis of a consent letter and not the original facility agreement (*Barclays Bank Plc v. Orlandofin BV*, 4th March 2015).

**Variations.** The European Court has considered a "risk charge" and a unilateral right to vary interest in the context of the Unfair Terms Directive (*Matei v. SC Volksbank Romania SA* Case C-143/13).

**Litigation Funding.** A company provided disbursement funding to clients who entered into conditional fee agreements. The solicitors were obliged to indemnify the lender in respect of outstanding loan liabilities. The Court of Appeal allowed an appeal holding that the indemnity insurers were obliged to indemnify the firm (*Impact Funding Solutions Limited v. Barrington* [2015] EWCA Civ 31).

**Hire Charges.** The Court of Appeal considered the proper approach to the daily basic hire rate under credit hire agreements (*Stevens v. Equity Syndicate Management Limited* [2015] EWCA Civ 93).

**Costs.** The costs rule in respect of small claims cases (in this case car hire charges) apply to second appeals (*Conlon v. Royal Sun Alliance Insurance* [2015] EWCA Civ 92).

**Variations.** A borrower sought declarations as to the right of the lender to vary the interest rate under a buy-to-let mortgage. The High Court held that the question was the interpretation of the contract and not of fairness (*Alexander v. West Bromwich Mortgage Co* [2015] EWHC 135 (Comm)).

**Beneficial Interest.** The Court of Appeal considered the relationship between the satisfaction of a mortgagee's claim and a claim for a beneficial interest in the property (*Graham-York v. York* [2015] EWCA Civ 72).

**Penalties.** Only if the amount payable on breach was out of all proportion to the loss would it be struck down as a penalty. This was in respect of a fee to a lender on default (*Edgeworth Capital v. Ramblas Investments* [2015] EWHC 150(Comm)).

**Mortgages.** The Mortgage Credit Directive 2015 was made on 25th March 2015 and generally comes into effect on 21st March 2016.

**Default Interest.** Summary judgment was refused where the contract provided that interest would accrue at a rate 2% higher than that otherwise payable and should be treated as a loan. More needed to be ascertained about the structure of the loan agreement (*Export Development Canada v. GTL Limited* [2015] EWHC 683 (QB)).

**Mortgages.** The European Court considered fairness, an arbitration and jurisdiction in respect of a mortgage loan agreement (*Baczo v. Zrt* Case C-5 67/13).

**Mortgages.** The European Court considered unfair terms and default interest together with enforcement proceedings (*Unicaja Banco SA v. Rueda* Case C-482/13).

**Statutory Demand.** The High Court upheld a decision dismissing an application to set aside a statutory demand in respect of a claim in excess of £400,000 under a loan agreement. There had been insufficient evidential material to support the application notwithstanding a counterclaim said to be due in respect of unpaid fees and damages in respect of share transfers (*Mills v. Stuart-Smith*, 30th March 2015).

## FINANCIAL SERVICES

**Misrepresentation.** The High Court held that an insolvent Danish bank was liable to an Irish investment company in respect of misrepresentation in public documents (*Taberna Europe v. Sclskabet* [2015] EWHC 871 (Com)).

**Scheme of Arrangement.** The Companies Court determined that certain claims by consumers under the 1974 Act were made in their capacity of debtor and not barred from proceeding under the terms of the scheme. Such claims included unfair terms (*In the Matter of Welcome Financial Services Limited* [2015] EWHC 815 (Ch)).

**Valuation.** Summary judgment was granted on certain issues in respect of the valuation of a partly-built residential development. The issue arose because there had been two valuations (*Tiuta International Limited v. De Villiers Surveyors Limited* [2015] EWHC 773 (Ch)).

**Start-Up Loans.** Loans were allocated to young entrepreneurs. The High Court held that there was no implied term in respect of exclusivity in respect of a company which carried out the allocations (*Start Up Loans Company v. Ariadne Capital Limited*, 12th March 2015).

**Development Funding.** The Supreme Court reinstated the Scottish decision at first instance that a bank had made a legally binding promise in respect of funding for a particular development (*Carlyle v. Royal Bank of Scotland* [2015] UKCS 13).

**Contempt.** The Court had found that there had been a massive fraud against a bank. A contempt order was made. The Court of Appeal held that the Court should hear the Appellant's appeal as there was no real connection between the contempts and the charging order proceedings (*JSC BTA Bank v. Avlyazov* [2015] EWCA Civ 70).

**Unauthorised Facilities.** The Court granted summary judgment against an ex-employee who had granted unauthorised banking facilities where there was little or no prospect of the sums being repaid (*Clydesdale Bank Plc v. Stoke Place Hotel Limited*, 30th January 2015).

**Regulated Activities.** The Regulated Activities Amendment Order 2015 will come into force on 1st April 2015.

**Disclosure.** A confidential document had been placed under seal by a USA Court. The Chancery Division held that it was to be disclosed for inspection. The proceedings related to interest rate swaps and LIBOR (*Property Alliance Group Limited v. Royal Bank of Scotland* [2015] EWHC 321 (Ch)).

**Financial Ombudsman.** A challenge to the jurisdiction by a firm of chartered accountants in respect of a decision of FOS concerning an alleged collective investment scheme was dismissed (*R (On the Application of Chancery (UK) LLP) v. Financial Ombudsman Service* [2015] EWHC 407 (Admin)).

**CER-Linked Notes.** The Commercial Court considered the recalculation of certificates of emission reduction and held that it was only if the current CER was unavailable that there was to be a recalculation (*Metlife v. JP Morgan* [2015] EWHC 463 (Comm)).

**Interest Rate Swaps.** Consideration was given to the ISDA Master Agreement in an application for summary judgment. The dispute related to a form of netting between the parties and default (*MHB Bank v. Shanpark Limited* [2015] EWHC 408 (Comm)).

**Investigations.** A claim by a financial trader for judicial review of a decision by the FCA terminating an investigation was refused (*R (On the Application of Grout) v. Financial Conduct Authority* [2015] EWHC 596 (Admin)).

**Loan Market Association.** The Supreme Court considered the entitlement to a payment premium and the question of the word "accrue" (*Tael One Partners v. Morgan Stanley* [2015] UKCS 12).

**Suspension of Decision.** The Upper Tribunal considered an application for a direction that a decision notice be suspended pending the determination of the reference to remove all regulated activities from the Applicant's permission. This was refused (*Walker v. Financial Conduct Authority*, FS/2013/0011).

**Burden of Proof.** In an appeal to the Upper Tribunal from the First Tier Tribunal following the revocation of consumer credit licences the Upper Tribunal considered the burden of proof and a claim of procedural irregularity (*HFO v. Financial Conduct Authority* [2015] UKUT 118 (AAC)).

**Evidence.** The Upper Tribunal considered a situation where the FCA based its argument on evidence not before the Regulatory

Decisions Committee and which was not foreshadowed in the notices (*Allen v. Financial Conduct Authority* FS/2012/0019).

**Winding Up Proceedings.** A permanent injunction was granted preventing an individual from issuing winding up proceedings against the FCA. The matter arose because of an investigation concerning an alleged substantial boiler room fraud (*Wilmott v. Financial Conduct Authority*, 31st March 2015).

**Loan Notes.** The Claimants alleged that invalid amendments had been made to a vendor loan note. The claim was dismissed (*Myers v. Kestrel Acquisitions Limited* [2015] EWHC 916 (Ch)).

**Collective Investments.** The Financial Services and Markets Act 2000 (Collective Investment Schemes) (Amendment) Order 2015 will come into force on 13th April 2015.

**Pensions.** The Upper Tribunal held that it had a discretion to permit the Pensions Regulator to rely on additional grounds not in the warning notice (*ITV Plc v. Pensions Regulator* [2015] EWCA Civ 228).

**Amendment.** In a swaps claim the Claimant sought permission to extend time for service. On appeal from the Master the decision to refuse this was upheld as the application was late and there were no exceptional circumstances (*Bellcrown Associates Limited v. Royal Bank of Scotland*, 17th March 2015).

**Harassment.** A retired financial advisor brought a second appeal to the Court of Appeal against the summary dismissal of his harassment claim. The conduct of the former Financial Services Authority was in communicating three times concerning pension misselling. This did not constitute harassment (*Calland v. Financial Conduct Authority* [2015] EWCA Civ 192).

## FOOD

**Fishing.** The Appellant was convicted in the Crown Court and appealed in respect of landing excess fish. The Court held that the different quota allocations did not breach the principle of equality (*R v. JC* [2015] EWCA Crim 210).

**Food Poisoning.** Following the death of a woman who had a Christmas turkey lunch at a Hornchurch pub, a pub company was prosecuted together with the manager and a chef. After a trial the company was convicted of food offences and the individuals convicted of perverting the course of justice in respect of food records. Sentences of a fine of £1.5 million were imposed on the company and prison sentences passed on the two individuals (*R v. Mitchell and Butler*).

**Contempt of Court.** The Defendant had served three months imprisonment for contempt of Court. The matter concerned a conspiracy to sell meat for human consumption which was not fit. Restraining Orders were made and a Receiver appointed. The High Court held that the Defendant had been in breach of the Orders and a nine months sentence was passed (*Re Drewett*, 5th February 2015).

**Frozen Fish.** In a sale of goods case it was established that a cargo of frozen swordfish had been found unfit for human consumption and this was as a result of the breach of duty on the part of the carrier (*Sau v. AP Moller-Maersk* [2015] EWHC 458 (Comm)).

## ESTATE AGENTS

**Money Laundering.** A claim was brought for recovery of a registration fee which was payable in return for finding a buyer for a business. The High Court held that the agent was not registered with the former Office of Fair Trading under the 2007 Regulations and a breach of that provision resulted in any contract being illegal. In addition it was held that if the contract had been enforceable the client was not a consumer for the purposes of the Cancellation of Contracts Etc Regulations 2008. Preliminary steps to selling a business such as advertising and employing an agent was not outside the relevant trade or professions for the purpose of Regulation 2(1) (*RTA (Business Consultants) Limited v. Bracewell* [2015] EWHC 630 (QB)).

## PARKING

**Notices.** The High Court allowed an appeal against the Parking Adjudicator's decision concerning a penalty charge notice. The Appellant had been unaware that the bay in which he had parked had been suspended and the Adjudicator's decision was flawed (*Humphreys v. Parking and Traffic Appeals Service* [2015] EWHC 713 (Admin)).

## SCRAP METAL

**Unregistered.** The Court of Appeal (Criminal Division) considered the argument that a conviction was for a regulatory offence and the underlying trading was lawful but for the absence of registration. It was held that the Judge had been wrong to find that trading activity was criminal and a benefit had accrued. The criminal conduct was a failure to register but the trading receipts had been lawfully obtained (*R v. Singh* [2015] EWCA Crim 173).

## CANCELLATION

**Legal Services.** The Court of Appeal dismissed an appeal against a decision that a conditional fee agreement was unenforceable under the Cancellation of Contracts Etc. Regulations 2008. The Court held that the client had been legally committed when making the CFA when a solicitor visited her home (*Cox v. Woodlands Manor Care Home* [2015] EWCA Civ 415).

## MEDICINAL PRODUCTS

**Recreational Purposes.** The European Court held that Directive 2001/83 Article 1(2)(b) did not cover substances the effects of which merely modified psychological functions but did not have any beneficial effects. The substances were not consumed for therapeutic effect but recreational purposes and were harmful to health (*Criminal Proceedings Against D* [2015] All ER (EC) 317).

## LICENSING

**Criminal Association.** Judicial review was sought of a certificate by a senior police officer under the Licensing Act 2003 to the effect that the premises were associated with serious crime. The High Court dismissed the application saying that there was no requirement that the certificate had to be to the effect that the premises had been associated with a pattern of serious crime or serious disorder. A single incident would suffice (*Lalli v. Commissioner of Police* [2015] EWHC 14 (Admin)).

## UNFAIR TERMS

**Legal Services.** The European Court had held that the Unfair Terms Directive applies to standard forms of contracts for legal services concluded by a lawyer with a natural person acting for purposes outside his trade, business or profession (*Siba v. Devenas* Case C-537/13).

## UNFAIR COMMERCIAL PRACTICES

**Sentence.** The Appellant appealed against a total sentence of 42 months imprisonment in respect of fraud involving overcharging a vulnerable victim for home improvement works. The Court of Appeal held that the sentence was within the appropriate range (*R v. Montague* [2015] EWCA Crim 902).

**Sentence.** The Defendant was sentenced to 42 months' imprisonment for fraud and unfair commercial practices. He appealed in respect of the 12 of those 42 months which were imposed for offences under the 2008 Regulations. The trade involved kitchens, bathrooms and bedrooms. The appeal was allowed with the 12 months reduced to 3 months to run concurrently with the 30 months for fraud (*R v. Tolliday* [2015] EWCA Crim 603).

## PRODUCT LIABILITY

**Pacemakers.** The European Court held that Directive 85/374/EEC should be interpreted to the effect that where it was found that products belonging to the same group or forming part of the same production series such as pacemakers and defibrillators have a potential defect such a product may be classified as defective without there being any need to establish that the product had such a defect (*Boston Scientific v. AOK Sachsen-Anhalt* Cases C-503/15 and C-504/13).

## PAYMENT SERVICES

**Regulations.** The Payment Services (Amendment) Regulations 2015 will come into force on 1st April 2015.

## ANIMALS

**Warrants.** The Divisional Court refused an application for judicial review by the RSPCA of a decision to exclude evidence at a trial. The defence had argued that the search was in breach of PACE 1984 and the District Judge had excluded the evidence obtained which was found in circumstances after the object of the search warrant had been achieved (*R (On the Application of RSPCA) v. Colchester Magistrates Court* [2015] EWHC 1418 (Admin)).

## NOISE

**Abatement Notices.** An abatement notice had been issued in respect of amplified music and shouting. The Divisional Court allowed an appeal because the Magistrates had applied the wrong test. The correct test was the common law one of the standards the average person which could differ depending on the location. The case was remitted (*London Borough of Newham v. White*, 12th March 2015).

## HIRE

**Personal Injury.** A Claimant alleged that an accident occurred because the Defendant was in breach of an implied term of the hire agreement that a platform used for pruning trees was of satisfactory quality and fit for the purpose. The platform had been destroyed by the Defendant before the Claimant had sought inspection. The High Court Judge held that no adverse inference could be drawn. The Court held that the platform was not satisfactory and there was judgment for the Claimant (*Baxter v. Barnes* [2015] EWHC 54 (QB)).