



TRADING LAW BULLETIN

ISSUE NO. 88
MARCH 2016

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

CONSUMER CREDIT

Hire Agreements. The Court of Appeal held that a District Judge had been wrong to limit the recovery of credit hire charges to the period of the initial credit hire agreement. It had been argued that the second hire agreement contravened the Cancellation of Contracts Etc. Regulations 2008. An attempt to introduce new evidence relating to the existence of cancellation notices was refused (*Sobrany v. UAB Transtira* [2016] EWCA Civ 28).

Further Advances. The appellant asserted that its second legal charge had priority over a first charge. The issue turned on whether there had been a new advance. The Court of Appeal held that an advance was a payment of money and no money had been advanced because there was merely a restatement of an original facility letter (*Urban Ventures Limited v. Thomas* [2016] EWCA Civ 30).

Amendments. The High Court granted permission to amend Particulars of Claim giving further incidences of alleged misrepresentations which alleged fraud in relation to a retainer in connection with a loan transaction (*Mortgage Agency Services v. Cripps Harries Hall LLP* [2016] EWHC 387 (Ch)).

Solicitors. The Court of Appeal allowed an appeal against a finding of dishonesty against solicitors. A charge had been granted in favour of a bank and its solicitors failed to ensure registration. Nevertheless the chargor was bound in equity and when the property was sold there was a trust in favour of the bank. The solicitors became aware of the non-registration and informed the chargor who then registered another charge in favour of a connected party thereby obtaining fraudulently almost all of the proceeds of sale. The Court of Appeal said that it was not a question of what the solicitors knew about the charge in favour of the bank but what they knew or believed about the subsequent charge (*Clydesdale Bank Plc v. Workman* [2016] EWCA Civ 73).

Mortgage Valuation. The High Court held that a valuer was liable in deceit where there had been no honest belief in an inflated valuation figure provided to a mortgage lender. The lender was not however, entitled to damages in relation to transactions completed after there was correspondence to correct the valuations (*Mortgage Express v. Countrywide Surveyors Limited* [2016] EWHC 224 (Ch)).

Unfair Terms. The European Court of Justice held that Directive 93/13/EEC does not preclude national legislation (in this case Hungarian) which allows a notary to affix an enforcement clause to a mortgage instrument without examining the instrument in respect of alleged unfair terms (*ERSTE Bank Hungary v. Sugar* Case C-32/14).

Leases. In a tax case it was held that employees entering into car lease arrangements with the employer at full market value were not in receipt of a taxable benefit. The Court held that contractual rights might have created a proprietary interest in favour of the hirer but there was not a transfer of the property in the chattels but merely a qualification of the owner's general property in the chattels (*Revenue and Customs v. Apollo Fuels Limited* [2016] EWCA Civ 157).

FINANCIAL SERVICES

Rate Swap Agreement. The Court of Appeal upheld the refusal of permission to amend defences in an interest rate swap agreement claim. An order was also made that there be payment into Court of £120,000,000 because, even if the defence of the borrowers succeeded, they would still have to make restitution (*Deutsche Bank AG v. Unitech Global Limited* [2016] EWCA Civ 119).

Financial List. A case alleging the improper fixing of LIBOR was transferred to the Financial List because it was in the nature of a lead case. The Chancellor of the High Court said that the Financial List was a specialist list without previous authority or precedent and it was cross-jurisdictional drawing on Judges from both the Chancery Division and the Commercial Court (*Property Alliance Group Limited v. Royal Bank of Scotland* [2016] EWHC 207 (Ch)).

Choice of Law. In a case involving long-term interest rate swaps between a Portuguese bank and a Portuguese State-owned transport company the choice of English law was not disapplied by the Rome Convention (*Banco Santander Totta SA v. Companhia de Carris de Ferro de Lisboa SA* [2016] EWHC 465 (Comm)).

Decision Notices. The Upper Tribunal considered the situation where the FCA had refused an application for Part 4A permission to carry on debt-adjusting and debt-counselling. There was a reference to the Upper Tribunal and it was asserted that the giving of the decision notice did not have the effect of terminating the interim permission. It was held that this was incorrect and that interim permission ceased to have effect subject to a right to make an application to the Upper Tribunal (*Firm A v. Financial Conduct Authority* [2016] UKUT 18 (TCC)). Such application was made and refused (*PDHL Limited v. Financial Conduct Authority* [2016] UKUT 129 (TCC)) as was a renewed application (*PDHL Limited v. Financial Conduct Authority* [2016] UKUT 130 (TCC)).

Mis-selling. In an application for judicial review the claimant sought review of the defendant company's approval of a bank's offer of compensation. The High Court held that the approval was not amenable to judicial review as it was part of a voluntary

scheme and did not have sufficient public law flavour (*R (On the application of Holmcroft Properties Limited) v. KPMG LLP* [2016] EWHC 323 (Admin)).

Amendments. The High Court ruled that a claim that losses had been incurred from four interest rate hedging contracts and a swap agreement had no real prospect of success and it was struck out. The claims had related to a collar claim which had been compromised, a wager claim, a rescission claim and a tort claim (*WW Property Investments Limited v. National Westminster Bank Plc* [2016] EWHC 378 (QB)).

Hedging Products. Proceedings were issued in relation to interest rate hedging products and, in order to avoid limitations, these were issued whilst there were pending complaints to the Financial Ombudsman Service. The High Court held that a stay should have been sought immediately but one was nevertheless granted pending the imminent resolution of those complaints (*Lampo v. Royal Bank of Scotland*, 17th March 2016).

Unfair Terms. Lenders applied for summary judgment against defendants in relation to a claim for money outstanding under a syndicated loan facility agreement. The Court held that there was no realistic prospect of establishing that the facility agreement was on written standard terms to fall within the Unfair Contract Terms Act 1977 (*African Export-Import Bank v. Shebah Exploration and Production Co Ltd* [2016] EWHC 311 (Comm)).

Identification. The Upper Tribunal has ruled that a former employee of a bank which had been given a financial penalty by the FCA for rate manipulation had not been identified in the Final Notice. The Tribunal referred to *Macris v. FCA* [2015] EWCA Civ 490 which is subject to an appeal to the Supreme Court (*Vogt v. Financial Conduct Authority* [2016] UKUT 103 (TCC)).

Permission. The FCA refused a company Part 4A permission on the basis that the sole director and shareholder had been involved in fraudulent activities. He had been employed by a bank and accessed customer details. Fraudsters posed as those customers to carry out banking transactions. He was acquitted in a criminal trial. The Upper Tribunal remitted the matter to the FCA to re-determine the application on the basis of the Tribunal's findings that the director is a person of honesty and integrity who had been subjected to an unjustified accusation (*ABI FOL Consulting Limited v. Financial Conduct Authority* [2016] UKUT 49 (TCC)).

References. In a case management hearing involving an application for a split trial and disclosure, the Upper Tribunal said that a reference is not an appeal from the Authority or the Regulatory Decisions Committee, the Tribunal has a first instance jurisdiction and considers the subject matter afresh by way of a complete rehearing (*Ford v. Financial Conduct Authority* [2016] UKUT 41 (TCC)).

Meaning of "Advance". The High Court considered a funding agreement. The applicant company had advanced sums incurred for expenses by provisional liquidators. The Court held that the applicant was entitled to reimbursement. The applicant had not made a gift but intended to have recourse. The word "advance"

connoted a loan with a right of recourse (*In the matter of Beppher v. Jacobson Ltd* [2016] EWHC 20 (Ch)).

Identification. A trader made a reference alleging that he had been identified in two decision notices. The Upper Tribunal said that whether a third party had been identified proceeded by looking at information within the public domain and not that which could be obtained by extensive investigation (*Ashton v. Financial Conduct Authority* [2016] UKUT 5 (TCC)).

Hedging Products. A claim in tort for alleged mis-selling of interest rate hedging products was held to be statute-barred and struck out. It was clear that the claimant had more than a mere suspicion that it had been a victim of mis-selling at the relevant time. The defendants could not be treated as having assumed a duty of care (*CGL Group Limited v. Bank of Scotland* [2016] EWHC 281 (QB)).

FOOD

Classification. In a tax case the Upper Tribunal considered the classification of uncooked chicken breasts. The relevant note did not suggest that the necessary distinguishing feature could be established by a comparative test (*Revenue and Customs v. Invicta Foods Limited* [2016] UKUT 1 (TCC)).

Classification. The High Court was required to consider the correct classification of a product in the light of a preliminary ruling by the European Court of Justice. The Court considered the correct classification of the product and whether it was mechanically separated meat (*R (On the application of Newby Foods Limited) v. Food Standards Agency* [2016] EWHC 408 (Admin)).

COSTS

Local Authority. The High Court overturned a decision of the District Judge not to award a successful appellant his costs in respect of a notice concerning a retaining wall. The Judge had been required to scrutinise the behaviour of the local authority to determine if it acted reasonably and properly. Such scrutiny would have resulted in the conclusion that the authority had not acted reasonably and properly and the case was remitted for summary assessment of the appropriate costs (*Burdett v. Devon County Council*, 14th January 2016).

NOTICES

Address. An enforcement notice was served on property owners at the address given in the Land Registry and did so by ordinary post. A Magistrates' Court had acquitted the owners of failing to comply with an enforcement notice. The Divisional Court held that the Magistrates had been entitled to hold that the authority could rely on the Land Registry address but wrong to hold that the notice had not properly been served (*Newham LBC v. Ahmed* [2016] EWHC 679 (Admin)).

CANCELLATION RIGHTS

Conditional Fee Agreements. The High Court held that the 2008 Regulations did not apply when conditional fee agreements were concluded at the claimants' community centre because the meeting was not an "excursion" organised by the solicitors within the Regulations (*Kupeli v. Cyprus Turkish Airlines*, 15th January 2016).

ENTERPRISE ACT

Contempt. The Court of Appeal held that the Judge below had not given consideration to whether a contemtor had received sufficient punishment for his breaches. The respondent was a rogue trader carrying out worthless and shoddily-executed work with agreed prices being increased. An order was made restraining him from carrying out the course of conduct. The original sentence was four months but the Judge had released him 8 days into the sentence (*Swindon Borough Council v. Webb (trading as Protective Coating)* [2016] EWCA Civ 152).

SMOKING

Relevant Area. A local authority appealed by case stated against a Deputy District Judge's ruling that there was no case to answer in respect of failing to cause a person to stop the smoking in a smoke-free premises. The matter was complex and the evaluation of witnesses and other evidence was at the heart of the Judge's function (*Newham LBC v. Iqbal* [2016] EWHC 720 (Admin)).

OFFICIAL UNIFORM

Lawful Possession. On an appeal from the Crown Court's decision to dismiss an appeal against a conviction of an offence under the Police Act 1996 the Divisional Court held that the seller in the ordinary course of business must prove that he had taken steps to ensure that his customers were buying the articles for a lawful purpose. The appeal was allowed (*Cooke v. DPP* (2016) 160 JP 27).

PREMISES LICENCE

Corporate Identity. The Court of Appeal (Civil Division) held that a District Judge had been wrong in holding that he had no power to amend an appeal notice against a revocation of a premises licence where the licence-holder's parent company had mistakenly been referred to in the notice. The High Court upheld the decision that there had been a mistake as to identity rather than name. The cases in criminal proceedings concerning corporate identities were not followed. The matter was remitted to the Magistrates' Court for the determination (*Essence Bars (London) Limited v. Wimbledon Magistrates' Court* [2016] EWCA Civ 63).

TRADE MARKS

Average Consumer. The High Court held that a hearing officer had been wrong in rejecting an opposition in respect of his identification of the average consumer. The concept was created to strike the correct balance between competing interests including the need to protect consumers and also to promote free trade. It had been a mistake to conclude that the average consumer would generally be a business (*GAP (ITN) Inc v. British American Group Limited* [2016] EWHC 599 (Ch)).

PLANNING

Evidence. In an appeal by case stated against a conviction of using a site as a builders' merchants contrary to an enforcement order it was held that there had been broad agreement about the meaning of the expression to the effect that it was "the supplier of building materials" and that expert evidence could have no place in reaching a decision on that matter of fact. The evidence overall could justify the dismissal of the appeal (*Matsons Limited v. Leicester City Council* [2016] EWHC 642 (Admin)).

ENVIRONMENTAL PROTECTION

Waste. The appellant sought to appeal to the Court of Appeal (Criminal Division) in respect of offences involving the transfer of commercial waste. The appellant operated clinics and the waste in question involved various items connected with it. The prosecution contended that the waste was commercial and the applicant argued it was household waste. The Court of Appeal upheld the Judge's decision that waste was defined by the nature of the premises that produced the waste rather than the precise nature of the waste itself. The application was dismissed (*R v. Sheill* [2016] EWCA Crim 2233).

HEALTH AND SAFETY

Management of Health Etc. A home carer slipped on an icy path in the course of her employment. In a civil case the Supreme Court held that the employer was liable and gave guidance on expert evidence and its admissibility (*Kennedy v. Cordia (Services) LLP* [2016] UKSC 6).

SALE OF GOODS

Agreements to Sell. A customer appealed to the Court of Appeal Civil Division against the decision that he had not entered into a contract with a car dealer. The case involved a Porsche and a vehicle order form. The Court held that the customer had entered into a binding agreement as opposed to the Judge's conclusion that the customer had only expressed his wish to purchase a vehicle (*Hughes v. Pendragon Sabre Limited* [2016] EWCA Civ 18).