



TRADING LAW BULLETIN

ISSUE NO. 106
SEPTEMBER 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

Hire. A college entered into a hire agreement in respect of the construction and hire of a modular building and associated equipment. In due course the college failed to make an annual instalment payment and the assignee of the debt sued. In the High Court the college and the Council argued that the contract was beyond the legal capacity of the college and the debt irrecoverable. That argument was upheld. The contract was a financial lease and required the consent of the Secretary of State. Issues of unjust enrichment also arose. The claim of the college for the return of payments which had been made failed because of change of position. The Claimant succeeded in unjust enrichment at a market rate from time of breach until trial (*School Facility Management Ltd v. Christ the King College* [2020] EWHC 1118 (Comm)).

Conveyancing. A director of a company which sold a commercial property was able to obtain borrowing of a large sum of money for the company from a commercial lender because the conveyancing solicitors for the purchaser failed to register the transaction. The lender registered its charge. The Court considered summary judgment and costs (*Property Protea Holdings Ltd v. 119 Molyneaux Road Ltd* [2020] EWHC 1322 (Ch)).

Third Party Debt Order. A High Court Judge dismissed an appeal against the discharge of a third party debt order. The debt had arisen from a loan to fund legal costs in an arbitration. It was held that a requirement to give 30 days' notice to repay was a condition precedent so that the debt was not due or accruing (*Michael Wilson and Partners Ltd v. Sinclair* EWHC 1249 (Comm)).

Misselling. The High Court dismissed claims under indemnities provided in respect of a share purchase agreement. The business provided financial advice. The FCA started a review of alleged misselling concerning pensions. Notice of a possible claim had not been given "as soon as possible" (*Towergate Financial (Group) Ltd v. Hopkinson* [2020] EWHC 984 (Comm)).

Third Party Costs. A company director was ordered to pay the costs of the Secretary of State who had successfully petitioned for the winding up of companies some of which he was a director. The ground for winding up was public interest. The companies had run investment schemes whereby trees impregnated with truffle spores had been leased. About £6.5 million was raised. At the petition hearing it was held that no investor could have reasonably expected to make money and the scheme lacked commercial propriety (*In the Matter of Viceroy Jones New Tech Ltd and others* [2020] EWHC 1155 (Ch)).

Bailment. The Defendant agreed to indemnify the Claimant if it suffered losses under a collateral management agreement

whereby the Claimant granted a loan to a borrower. Issues of proper law arose but the High Court held that the Claimant could rely on possessory rights as the Defendant acted as agent of the lender in the control of copper belonging to the borrower as security for the loan. Consideration was given to estoppel against denying a bailor's title which was not abolished by the Torts Etc. Act 1977 as regards contractual bailment (*Scipion Active Trading v. Vallis Group Ltd* [2020] EWHC 1451 (Comm)).

Restraint Orders. Short-term loans were made to a borrower secured on his home. Following default the property was sold. Numerous applications were made by the borrower a number of which were certified as totally without merit. An extended restraint order was made (*Central Bridging Loans Ltd v. Anwer* [2020] EWHC 1745 (Ch)).

VAT. A First Tier Tribunal has considered VAT exemptions in respect of a travel agent charging a fee for accepting credit or debit cards (*Ulook Ubook Ltd v HMRC* [2020] UKFTT 226 (TC)).

Redaction. A borrower sought to set aside a statutory demand on the basis that a copy of a Deed of Assignment had been heavily redacted. The Court of Appeal upheld a decision that, in the circumstances of the case, this did not provide for a successful application to set aside (*Hancock v. Premantoria (Chestnut) Ltd* [2020] 4 WLR 100).

Unfair Terms. The ECJ has given a judgment in respect of interest rate "floor" terms. A Spanish mortgage agreement provided for a floor of 3.25% reduced by agreement to 2.35%. The debtor sought a declaration that the floor was unfair and asking that she be reimbursed sums unduly paid. It was held that it was for the National Court to determine if a waiver as to the unfair effect of a term was the result of free and informed consent. A term whereby a consumer waives the right to take legal action under Directive 93/13 is not binding on the consumer. A term of a contract amending a potentially unfair term may itself be regarded as not having been individually negotiated and, where appropriate, be found to be unfair. As regards a floor, the consumer must be placed in a position to understand the economic consequences in particular by means of information on past changes in the index on the basis of which interest is calculated (*XZ v. Iber Caja Banco SA* (Case C-452/18)).

Restitution. Issues of time limits for restitution following findings of unfair terms in credit agreements have been considered by the ECJ. If there was no limit on an action seeking nullity of an unfair term, an action seeking to enforce the restitutionary effects to a limitation period under national law was not precluded provided the period was not less favourable than those governing similar domestic actions and that it does not render practically impossible or excessively difficult the exercise of

rights conferred by the EU legal order, in particular Directive 93/13. The Directive precludes judicial interpretation of the national rule whereby an action for reimbursement is subject to a three year limitation period from performance when it is assumed, without need for verification, that the consumer should have known about the unfairness at that time (*SC Raiffeisen Bank SA v. JB* (Case C-698/18)).

Unfair Terms. The ECJ considered a case where Rumanian currency was replaced by Swiss Francs in a consumer credit agreement. It was held that a term which has not been individually negotiated but which reflects a rule that, under national law, applies between contracting parties provided that no other arrangements have been established in that respect, falls outside the scope of the Directive (*NG v. SC Banca Transilvania SA* (Case C-81/19)).

Guarantees. The Defendant signed guarantees of the obligations of a company under a funding agreement. He alleged that the guarantees were not delivered and that the Claimants were estopped from claiming by reason of certain assurances given to him. The High Court held that the guarantees had been delivered unconditionally; they had been signed, witnessed, scanned and sent. As regards promissory estoppel, there is a requirement for there to be an existing legal relationship between the parties. The Claimants' case succeeded (*Umrish Ltd v. Gill* [2020] EWHC 1513 (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).

Tomlin Orders. In an insolvency case, the High Court has held that an agreement in a schedule to a Tomlin Order could be a regulated consumer credit agreement. The decision was in an appeal from a bankruptcy order which was allowed on grounds relating to the right to vote for an individual voluntary arrangement. The challenge to the debt of one of the creditors which opposed the IVA included that a settlement in the schedule to the Tomlin Order was subject to the 1974 Act but unenforceable. The High Court held that the Act could apply to such a schedule but did not in this case. An argument on penalties was also rejected (*Gertner v. CFL Finance Ltd* [2020] EWHC 1241 (Ch)).

Administration. An administrator was appointed purportedly under a floating charge. The applicant company successfully challenged the appointment as it had not been established there had been a statutory power of appointment. The notice of appointment did not comply with statutory requirements and the appointment was void (*Secure Mortgage Corp Ltd v. Harold* [2020] EWHC 1364 (Ch)).

Payment Services. The Commercial Court declined to strike out a claim against a payment service provider. A question arose as to whether the Payment Services Regulations 2017 created a private law cause of action (*Hamblin v. World First Ltd* [2020] EWHC 2383 (Comm)).

Pensions. Avacadi Ltd provided a service which contacted people with existing pensions and they were given options to transfer to SIPPS. The investments included assets such as melina trees in Costa Rica and teak trees in Malaysia. None of the Defendants were authorised. The primary defence was that only information and options were provided. The argument that the due diligence defence applied to other than criminal proceedings was rejected. It was held that there had been breaches of FSMA and individual directors were knowingly concerned (*FCA v. Avacadi Ltd* [2020] EWHC 1673 (Ch)).

Mandatory Law. The Court of Appeal has upheld a decision that a borrower could refuse to make interest payments when to do so could result in sanctions under a USA Executive Order (*Lamesa Investments v. Cynergy Bank Ltd* [2020] EWCA Civ 821).

Guarantee. The Chancery Division dismissed a bankruptcy appeal based on an alleged guarantee in relation to a \$500 billion transaction. The alleged debtor had not applied to set aside a statutory demand. The Court concluded that there was sufficient evidence of a genuine dispute relating to sham, the allegation of a forged signature and the failure to constitute a deed (*Go Capital Ltd v. Phull* [2020] EWHC 1235 (Ch)).

Payday Lending. After a trial the High Court gave judgment in a test case on payday lending. The Claimants were borrowers and alleged breaches of CONC and unfair relationships. The Court held that there had been breaches of the creditworthiness assessment particularly as regards repeat borrowing. The interest rates were excessive even prior to the cap imposed in January 2005. A negligence claim based on aggravation of previous depression failed. A borrower's dishonesty was considered in relation to alleged unfair relationships. No specific orders were made as the creditor was in administration (*Kerrigan v. Elevate* [2020] EWHC 2169 (Comm)).

Additional Parties. The main claim was under a loan agreement and guarantee. The Defendant denied liability on the basis of other agreements and sought to join other companies involved and bring an additional claim. The application was refused. The proposed additional parties added nothing to the existing proceedings (*Gaja River SA v. Behike Ltd*, 17th July 2020).

Disability. There was no disability discrimination where, under the Loans for Mortgages Interest Regulations 2017, disabled persons were required to repay a mortgage interest loan immediately on the sale of the property (*R (Vincent) v. Secretary of State* [2020] EWHC 1976 (Admin)).

Freezing Order. The Court of Appeal allowed an appeal in respect of a freezing injunction to allow the company to pursue a fledgling business. The company had borrowed €12m from a Spanish company. The Spanish company issued Spanish proceedings alleging that the managing director, who was the father of the borrower company's sole shareholder and director, did not have authority to enter into the lending contract (*Organic Grape Spirit Ltd v. Nueva JQT SL* [2020] EWCA Civ 999).

LIBOR. A Defendant bank's application to strike out a claim on lowballing submissions on LIBOR on the basis of limitations was refused (*Federal Deposit Insurance Corp v. Barclays Bank Plc* [2020] EWHC 2001 (Ch)).

Costs. A claimant failed at trial in a case relating to alleged breach of contract in respect of pension advice. The Defendant had dispensed with the services of the IFA Claimant. Although successful, the Defendant was only awarded part of its costs for failure to engage in mediation (*Wales v. CBRE Managed Services Ltd* [2020] EWHC 1050 (Comm)).

Unfair Terms. The ECJ considered a term governing the variable ordinary and remunerative interest rate in a mortgage loan agreement. It was held that the Directive applies where the rate is based on an official index where national legislation does not provide for mandatory application of the rate. To be fair, the term must enable the average consumer to understand the functioning of the rate. A National Court could replace a null and void rate with a statutory index (*Guasch v. Bankia SA* Case C-125/18).

Guarantees. Summary judgment was granted in respect of guarantees given to German export credit lending. The principal debtor company went into an Indian insolvency process. The Commercial Court held this could not be a defence as the guarantees were governed by English law (*KFW v Singal* [2020] EWHC 2214 (Comm)).

Possession. Following an order for possession in a mortgage action, a renewal application for permission to appeal was due to be heard a little over four weeks after possession could have been obtained under the restriction on possessions and a stay was ordered (*Werner v. Ioannou* [2020] EWHC 2513 (Ch)).

Mis-selling. The First Tier Tribunal has held that compensation paid by a bank to a customer as a result of mis-selling a swap contract is taxable as a receipt of the customer's property business (*Wilkinson v. HMRC* [2020] UK FTT 362 (TC)).

ISDA. The Commercial Court granted declarations in favour of a bank against an Italian entity in respect of rate hedging under the 1992 ISDA Master Agreement. The court considered non-reliance clauses, the Misrepresentation Act 1967, the Unfair Contract Terms Act 1977, an entire agreement clause and negative declaratory relief (*BNP Paribas SA v. Trattarmento Rifiati Metropolitan* [2020] EWHC 2436 (Comm)).

Duty of Care. The High Court refused an application to strike out and an application for reverse summary judgment in respect of a claim by liquidators of an Antiguan bank. The claim was that the Defendant bank owed a duty of care to ensure monies paid out from accounts it controlled were properly paid out (*Stanford International Bank Ltd v. HSBC* [2020] EWHC 2232 (Ch)).

Commission. The FCA have published feedback on CP19/28 and final rules on motor finance commission and consumer credit and hire commission. (PS20/8).

FOOD

Expert Evidence. The High Court reviewed a trial Judge's decision relating to a food case involving a gastric illness at a hotel in Turkey. The Court held that it was wrong critically to analyse an uncontroverted report (on behalf of the Claimant) unless, which did not apply here, the report was bare ipsa dixit or assertions without proof (*Griffiths v. TUI UK Ltd* [2020] EWHC 2268 (QB)).

Director's Disqualification. A disqualification application was dismissed by the Chancery Division. It was against a restaurateur. The fact that he had applied for a premises licence on behalf of the company together with companies for which he was responsible and an illegal worker at the restaurant had referred to someone with the same surname as "boss" did not result in him being a de facto director (*Secretary of State v. Rahmen* [2020] EWHC 2213 (Ch)).

Halal Meat. A claim by an organization representing halal meat butchers had their claim against the Defendants who ran an accreditation scheme struck out. There was no case in restraint of trade and there were no grounds to base a case on natural justice (*Halal Meat Sellers Ltd v. HMC (UK) Ltd* [2020] EWHC 2190 (Comm)).

ENVIRONMENTAL

Waste. In dismissing appeals in respect of two offences of the illegal export of household waste to China the Court of Appeal (Criminal Division) considered evidence in cases under the Transfrontier Shipment of Waste Regulations 2007 (*R v. Biffa Waste Services Ltd* [2020] EWCA Crim 827).

Confiscation. Following convictions for operating a regulated facility without a permit a confiscation order was made. The business appealed to the Court of Appeal (Criminal Division) which held that it was right to include a figure for the avoidance of paying the costs of waste removed from the site. However, there had been an error in respect of the share of one owner in a jointly-owned property (*R v. Ryder* [2020] EWCA Crim 1110).

SALE OF GOODS

Defect Devices. The ECJ has ruled as to the State in which a consumer may claim in respect of a vehicle fitted with software manipulating data relating to exhaust gas emissions. An Austrian consumer protection association claimed damages against the German manufacturer in an Austrian Court. It was held the place where the damage occurs is in the Member State where the vehicles were purchased from third parties (*Verein für Konsumenteninformation v. Volkswagen AG* (Case C-343/19)).

DOGS

Time Limit. The six month time limit to lay a complaint for the destruction of a dangerous dog runs from the time of seizure (*Garrett v. Chief Constable of West Midlands* [2020] EWHC 1866 (QB)).

HOUSING

Penalty. A landlord had a £10,000 penalty imposed for failure to licence a house which had become an HMO. The FTT set the penalty aside. The Upper Tribunal substituted a penalty of £4,000 which balanced the contravention against the imprecise policy of the council. The policy was "impenetrable" (*Thurrock Council v. Daoudi* [2020] UKUT 209 (LC)).

Repayment Orders. An unlicensed HMO owner appealed against a rent repayment order. The Upper Tribunal held that the limit of the landlord's profits no longer applied (*Vadamalayan v. Stewart* [2020] UKUT 183 (LC)).

Costs. A challenge to a local authority's bill of costs in judicial review proceedings failed. The suggested rate of £317 per hour

was upheld even though the maximum hourly rate for paid legal staff was £41.75. The Judge said there were many other costs the council had to pay (*Kuznetsov v. London Borough of Camden* [2019] EWHC 3910 (Admin)).

Confiscation. A confiscation order of £200, being rents for one day, for offences concerning overcrowding and disrepair, could not be overturned by the Court of Appeal (Criminal Division). The Appellant local authority argued for an order in the amount saved by not properly and lawfully housing the occupiers. The Court said it was artificial to take that approach. The order was as a result of the incorrect drafting of the alleged offences which the Court of Appeal could not correct (*R v. Baja* [2020] EWCA Crim 1111).

MISSELLING

Solar Panels. An appeal against conviction in respect of false representation in the sale of solar panels was dismissed. The representations included the benefit of savings, the sale of extra energy, the repayment of the cost of the panels and the benefit of insurance and guarantees. The Appellant had been sentenced to 90 months imprisonment. The appeal related to adverse inferences and a defence case statement (*R v. Ludovic Black* [2020] EWCA Crim 915).

HEALTH AND SAFETY

Abuse of Process. The Court of Appeal (Criminal Division) upheld a conviction relating to an employee's injury whilst using a rip saw. The Crown Court Judge's rejection of an abuse of process application had been correct. The company argued that the services of an improvement notice would have been in accordance with the HSE's enforcement policies (*R v. Connors Building and Restoration Ltd* [2020] EWCA Crim 868).

PLANNING

Sentence. The Court of Appeal (Criminal Division) reduced a fine imposed for failure to comply with an enforcement notice because the maximum fine was given without credit for the guilty plea. The Recorder had said this was because he would have wished to impose a heavier fine if he could. The confiscation order being the gross rental income from the property was upheld (*R v. Roth* [2020] EWCA Crim 967).

CONSUMER PROTECTION

Regulations. The Consumer Protection (Enforcement) (Amendment etc) Regulations 2020 came into force on 2nd June 2020. They deal in particular with online interface orders which the CMA may apply for.

ADVERTISING

ASA. A House of Commons briefing paper considers the functions and remit of the ASA in the regulating of advertising (CPB 06130, 20th August 2020).

TRAVEL

Aviation. A passenger may require that any compensation payable for cancellation or delay is payable in the national currency of a passenger's place of residence (*Delfly v. Smartwings Poland* Case C-356/19).