

FINANCIAL SERVICES

Financial Promotions. The Financial Services and Markets Act 2000 (Exemptions from Financial Promotions General Requirement) Regulations 2023 deal with authorised persons preparing financial promotions communicated by others.

Directive. On 18th October 2023 Directive (EU) 2023/2225 on credit agreements and repealing Directive 2008/48/EC with effect from 20th November 2026 was made. The new Directive must be adopted by Member States by 20th November 2025.

Business Loan Guarantees. The Federation of Small Businesses has issued a super complaint under Section 234C of FSMA in respect of persons and guarantees for business loans.

Mortgage Prisoners. FOS determined that customers of the Cooperative Bank were entitled to compensation. Monthly payments were increased by up to £500. The increases were unfair (Daily Telegraph, 15th November 2023).

Mortgage Credit Directive. The FSMA 2023 (Commencement No.4 and Transitional and Savings Provisions) (Amendment) Regulations 2023 brings into force many provisions of the 2023 Act including, by Regulation 2(c)(xiii), Article 33 of the Mortgage Credit Directive Order 2015 on 14th December 2023.

Unfair Relationships. The Supreme Court has considered unfair relationships in the context of PPI. The Court of Appeal had held that, although Paragraph 16 of Schedule 3 to the 2006 Act provided that Section 140B of the CCA did not apply to related agreements which had ended before the end of the transitional period, such an agreement could be taken into account in assessing fairness. The context was PPI with a credit card agreement, the claim was, however time-barred. The Supreme Court allowed an appeal. The claims were brought within time. The cause of action arose when the relationship ended (*Smith v. Royal Bank of Scotland* [2023] UKSC 34).

Credit Hire. The High Court upheld a Judge's decision that hire charges should be disallowed where the MOT on the Claimant's car had expired some four months before the accident so that the use of the car was illegal (*Ali v. HSF Logistics Polska* [2023] EWHC 2159 (KB)).

Guarantees. The Claimant bank obtained final judgments on the basis of guarantees in Abu Dhabi. A new law in that country prevented enforcement there. The English Commercial Court held that the money judgment had the

effect of *res judicata* and the judgments could be enforced (*Invest Bank PSC v. El-Husseini* [2023] EWHC 2302 (Comm)).

Arbitration. An individual challenged an arbitration award in California on the basis of Section 103 of the Arbitration Act 1996. Claims of unenforceability under FSMA were made and the issue of who is a consumer in the context of a digital online crypto asset exchange was raised (*Payward v. Chechetkin* [2023] EWHC 1780 (Comm)). Issues as to who is a consumer also arose in *Eternity Sky Investments v. Zhang* [2023] EWHC 1964 (Comm) which is subject to appeal.

Strike Out. A summary judgment application by a defendant was dismissed as an abuse of process. A similar application had previously been dismissed ([2023] Ch 101). The main issue related to a request for mutual legal assistance from Greece (*FCA v. Papadimitrakopoulos*).

Financial Services Compensation Scheme. The Court of Appeal has upheld a High Court decision that the Scheme should not compensate for post litigation interests and costs. The underlying issues related to a defective building and insurance (*R (on the application of Manchikalapiti) v. FSCS* [2023] EWCA Civ 1006).

Litigation Funding. The Court of Appeal considered the position where a financial remedies case is funded by a loan (*Simon v. Simon* [2023] EWCA Civ 1048).

FOS – PPI. Consumers used credit facilities for home-shopping catalogue purchases with PPI. The Claim in judicial review proceedings as to FOS jurisdiction was by the underwriter of the PPI policies. In particular, it was said that the retailers were not acting as its agent when selling the PPI. The Court of Appeal held that it should examine the question of law itself and concluded that there was an agency relationship (*R (Assurant General Insurance Ltd) v. FOS* [2023] EWCA Civ 1049).

Unregulated Lending. The High Court considered numerous issues in a case where loans were made by an unauthorised company on the basis that the loans were not regulated under Article 61 of the RAO. Issues included declarations as to business use. The Court of Appeal has given permission to appeal (*Kumar v. LSC Finance Limited* [2023] EWHC 1439 (Ch)).

Loan Administration. The Supreme Court considered the nature of outsourced loan administration services in the context of VAT (*Target Group Ltd v. HMRC* [2023] UKSC 35).

Publicising. An application was made that the making of a

penalty by the FCA should not be publicised pending the outcome of a reference to the Upper Tribunal. This was refused (*Reynolds v. FCA* [2023] UKUT 234 (TCC)).

Unfair Terms. In a case involving barristers' fees for direct access in a family case, the High Court considered the unfair terms provisions in the Consumer Rights Act 2015. The Court referred to the Consumer and Trading Standards Law and Practice (11th Ed) being the "Pink Book" and concluded that the amount of the fees agreed was a core term but the timing of payment did not and was unfair. A quantum meruit approach could not be adopted to overcome statutory unfairness (*Glaser v. Atay* [2023] EWHC 2539 (KB)).

Litigation Funding. The High Court has held that there was a serious issue to be tried as regards litigation funding in the light of the decision in *Paccar* (*Therium v. Bugsby Property LLC* [2023] EWHC 2627 (Comm)).

Valuation. A lender brought a claim against valuers following the sale of property subject to a bridging loan where the sale resulted in a significant deficit. It was held that there was no loss despite an admitted over-valuation because of the effects of COVID (*Hope Capital Ltd v. Alexander Reece Thompson* [2023] EWHC 2389 (KB)).

Novation. In a claim based on a loan the Defendant alleged that the agreement and liabilities were novated to an individual who was chairman of the football club defendant. This was upheld and the claim was dismissed (*Necarcu Ltd v. Oldham Athletic* [2023] EWHC 2096 (Comm)).

Unfair Terms. In a hire-purchase case exclusion clauses were considered by the Court of Appeal. There had apparently been a previous case where summary judgment had been given in respect of unfair terms against a creditor. It was held that the matter should, contrary to the Judge's decision, go to a full trial (*Last Bus Ltd v. Dawsongroup* [2023] EWCA Civ 1297).

Limitations. In a PPI case the Supreme Court has held that a claim was not time-barred by reason of Section 32(1)(b) of the Limitation Act 1980. The period ran from when the Claimant was given advice to the effect that the premium may have included commission (*Canada Square v. Potter* [2023] UKSC 41). Consideration was given to similar issues in a different context in *Primeo Fund v. Bank of Bermuda* [2023] UKPC 40.

Arrangement Fee. A claim of £24,700 by way of an arrangement fee for a mortgage loan was tried in the County Court. The Defendant said she did not accept the mortgage. An issue related to the wording of the contract with a broker as regards a "confirmation of instructions letter". On appeal the Circuit Judge held that the point was a new point and dismissed the appeal. The decision was upheld by the Court of Appeal (*Azhar v. All Money Matters* [2023] EWCA Civ 1341).

Collective Investments. The High Court considered a scheme whereby capital was raised from private investors by the sale of a leasehold interest in a room in rented commercial

property such as a care home, at a very substantial overvalue. There was a guaranteed return by way of rental in the order of 10% p.a. for the first 25 years of the investment and at various points there could be a repurchase for at least 115% of the investment. Investments in total in excess of £53,000,000 were made across 16 care homes. Four preliminary issues were tried. The ultimate issue was whether restitution should be ordered under Section 382 of FSMA. It was held that the individual could not avoid liability because of having taken Counsel's advice when he must or should have known it was given on the basis of incorrect facts. The scheme was a collective investment scheme and the First Defendant was knowingly concerned in the contraventions and had been personally enriched (*FCA v. Forster* [2023] EWHC 1973 (Ch)).

Mistake. The High Court dealt with a summary judgment application of a bank to have the discharge of charges rescinded on the basis of mistake. The Court operated on a bifurcated process (*Barclays Bank v. Terry* [2023] EWHC 2726 (Ch)).

Registration. The High Court dealt further with issues arising from a bank's mistaken discharge of registered legal charges and considered priorities (*Barclays Bank v. Terry* [2023] EWHC 3113 (Ch)).

Representative Proceedings. A local authority as administering authority of Merseyside Pension Fund began representative proceedings to pursue claims under Sections 90 and 90A and Schedule 10A of FSMA. The claim related to the marketing of a drug under the brand name "Suboxone" a treatment for opioid addiction. The High Court held that there should not be representative proceedings (*Wirral Council v. Indivior Plc* [2023] EWHC 3114 (Comm)).

Account Freezing. The High Court refused to grant a mandatory interim injunction to require a bank to unfreeze a customer's account. The Court agreed that the Claimant was correct to submit the matter was urgent and a submission by the bank that it not was a bad point. It was unquestionably the case that the bank in large part contributed to the enormous frustrations of the Claimant but the Court did not feel to the high degree of assurance that the Claimant would satisfy the Court at trial that the bank had not been exercising its contractual rights (*Harvey v. Santander UK Plc* [2023] EWHC 2947 (KB)).

Foreign Law. Appeals were heard following a High Court hearing in a dispute relating to interest rate swaps. A bank's appeal was allowed as to whether an Italian local authority lacked capacity. It was held that it did as the transactions were not speculative. If it had not lacked capacity the transaction would have been void. If it had been relevant, English law governed a claim for restitution. Limitations and a change of position were also considered (*Banca Intesa v. Comune di Venezia* [2023] EWCA Civ 1482).

FOOD

Evidence. The Claimant with his family met on a holiday to Turkey. He became ill with acute gastroenteritis. The trial Judge dismissed the claim. The Court of Appeal by a majority

upheld the appeal. The Supreme Court agreed with the dissenting judgment and held for the Claimant. Subject to some exemptions, if a witness's evidence is not challenged and he or she has not had the opportunity to deal with any challenge, their evidence should be accepted by the Court. In this case an expert in food etc. law made a report which was not challenged until closing submissions by the Defendant. It was held that, unless a report was a bare ipsi dixit, it should be admitted in evidence as correct (*TUI UK Ltd v. Griffiths* [2023] UKSC 48).

Milk. In a trade mark case a description used to promote a product to people who no longer drank dairy milk did not infringe Regulation 1308/2013 (*Oatly AB v. Dairy UK Ltd* [2023] EWHC 3204 (Ch.)).

TRADING STANDARDS

Covid. The Court of Appeal (Criminal Division) dismissed an appeal against conviction and sentence relating to a conviction based upon fraud and CPUT where the Defendant sold an oil mixture said to protect or cure coronavirus. The initial price was £91 a bottle. The defence had invoked the role of the Defendant as, amongst others, a Bishop of Kingdom Church in Camberwell. The oil had "sat upon the altar for 7 days". The special ingredients were said to "act like an invisible barrier" (*R v. Climate Wiseman* [2023] EWCA Crim 1363).

CONSUMER RIGHTS

Costs. The High Court dismissed an appeal by a former client relating to bills of costs. However, issues of consumer rights had been raised and held to be res judicata by the Costs Judge. Permission was granted by the High Court to appeal (*Boodia v. Slade* [2023] EWHC 2963 (KB)).

DATA PROTECTION

Commissioner's Responsibilities. The Court of Appeal considered the obligations of the ICO to read a definitive decision on each complaint or whether there was a discretion and, if so, how it should be exercised. The complaint related to a data subject access request to a financial institution. The Court agreed with the Judge that an apt description of the decision was "outcome". The discretion had not been made irrationally (*R (Delo) v. Information Commissioner* [2023] EWCA Civ 1141).

ADMINISTRATION

Liability. Administrators were appointed under the Insolvency Act 1986. They failed to give notice of an intention to make redundancies in accordance with Section 193 of the Trade Union etc. Act 1992. An administrator was found guilty of an offence under Section 194(1) by a Magistrate's Court and this was upheld in the Divisional Court. The Supreme Court allowed an appeal (*R (Palmer) v. Northern Derbyshire Magistrate's Court* [2023] UKSC 38).

CONSUMER PROTECTION

Debt Packaging. The FCA will carry on with its defence of the judicial review of the prohibition on commission on debt packaging relating to referral fees (PS 23/5)).

Fraud. The Appellant sold over 9,000 properties off plan principally in the Caribbean. Only approximately 200 properties were constructed despite stage payments of approximately £398 million being made. The Court of Appeal (Criminal Division) dismissed an appeal. Section 4(1)(c) of the Fraud Act 2006 contains a single ingredient of the offence (*R v. David Ames* [2023] EWCA Crim 1463).

Air Travel. Regulation 261/2004 has been amended by the Aviation (Consumers) (Amendment) Regulations 2023.

EXCLUSION CLAUSES

Insurance. A bomb which was dropped in 1942 remained undiscovered until 2021 when it was detonated. The two events were of approximately equal efficacy. The first one was excluded in an insurance policy but the second one was not. The exclusion prevailed and the claim failed (*University of Exeter v. Allianz Insurance Plc* [2023] EWCA Civ 1481).

HOUSING

Banning Orders. In a case involving an order under the 2016 Act in respect of a prohibition as regards tenanted property, the Upper Tribunal held that, notwithstanding official guidance, spent convictions could be used in evidence (*Hussain v. Newham LBC* [2023] UKUT 287(LC)).

HMOs. The Upper Tribunal allowed an appeal by a health service body. The Appellants were property guardians and were not "persons having control". It was not receiving rack rent on it as it was not in a position to grant a least at rack rent (*Cottam v. Lowe Management Ltd* [2023] UKUT 306 (LC)).

HMOs. If a rent repayment order was made the amount should be calculated by reference to the amounts paid by the tenants who made the application not on the rents paid by all the tenants in an HMO (*Moreira v. Morrison* [2023] UKUT 233 (LC)).

FTT Powers. In respect of an FOI request a Council was requested to supply information and did not despite an FTT decision. The FTT certified an offence to the High Court which held that the failure did not amount to a contempt. The Court of Appeal dismissed an appeal holding that an FTT certification is not a finding of fact. It was in respect of managing property (*Moss v. Royal Borough of Kingston-Upon-Thames* [2023] EWCA Civ 1438).

COSTS

Health and Safety. A Crown Court trial had to be abandoned as it over-run. An issue as to the Official Secrets Act 1989 had been raised. Costs of nearly £70,000 were ordered against the Defendant Company. The Administrative Court held that it had jurisdiction in a judicial review application but there was no material public law error (*R (on the Application of Exolum Pipeline Systems Ltd) v. Great Grimsby Crown Court* [2023] EWHC 2811 (Admin)).