



TRADING LAW BULLETIN

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FINANCIAL SERVICES

Buy-Now-Pay-Later. A consultation has been issued by the Treasury on the approach to regulation of the Buy-Now-Pay-Later product. It considers the possible scope of regulation where consumer detriment could arise.

Mortgages. On 30th November the FCA published a review on “mortgage prisoners”.

Mortgage Credit. On 22nd November the European Commission published a Review of EU Rules on mortgage credit.

Settlement. In a mortgage possession action a counterclaim by a consumer was struck out on the basis of a 2013 compromise. There were no grounds for setting it aside on the basis of fraud. In any event the fraud allegations would have been struck out as would a claim for damages based on an implied duty of good faith which was time barred (*Bank of Scotland v. Hoskins* [2021] EWHC 3038 (Ch)). Permission to appeal was refused by the High Court [2021] EWHC 3190 (Ch).

Valuer’s Negligence. The Privy Council considered an appeal about the loss recoverable by a lender consequent upon a negligent valuation of land of the borrower’s guarantor provided as security. In fact the guarantor had no legal title to the land. The valuer’s appeal was allowed (*Charles B Lawrence v. Intercommercial Bank Ltd* [2021] UKPC 30).

Hire Purchase. An action to overturn a default judgment on the basis that it was procured by fraud in respect of four hire-purchase agreements for farm machinery was considered by the Court of Appeal. A County Court Judge had dismissed the action. This was reversed. The finance company in the original action had entered into the agreements with a non-existent company and then relied on a Deed of Rectification which said the original agreements were intended to be with the individual farmer. This was not the case, not least because a personal guarantee had been sought on the basis the company was the hirer (*Park v. CNH Industrial Capital Europe Ltd* [2021] EWCA Civ 1766).

Guarantees. The Court of Appeal dismissed an appeal by a company which had borrowed to finance the purchase of goods bought in Yen and sold in US dollars and Euros. Despite inordinate delay in giving judgment the Appeal Court could not disagree with the Judge’s findings as to the evidence. His assessment was not one-sided in favour of the bank (*Dansingani v. Canara Bank* [2021] EWCA Civ.714).

Mortgages. The Chancery Division upheld a decision that a claim against a bank should be struck out on grounds of res judicata. The claim involved an allegation that a mortgaged property had been sold at an undervalue (*Fernandes v. Bank of Scotland* [2021] EWHC 1610 (Ch)).

Effective Cause – Commission. The Claimant was engaged to provide services for raising long-term finance for the Defendant. A total of €7m was provided by a lender. The Judge held that the Claimant had not been the effective cause of the loan facilities and dismissed the commission claim. The Court of Appeal held that the contract was not a typical introducer’s agreement and not comparable to an estate agent’s contract. There were no grounds for implying an effective cause provision (*EMFC Loan Syndicates v. The Resort Group* [2021] EWCA Civ. 844).

Advice. The Supreme Court allowed an appeal by a building society which had entered into rate swaps hedge borrowing to fund lending on mortgages. This had been on the advice of accountants which was negligent. The distinction between advice and information was not rigid (*Manchester Building Society v. Grant Thornton* [2021] UKSC 20).

Unfair Terms. In a further series of cases involving consumer loans in a foreign currency the ECJ held that if the consumer does not know that the term is unfair there cannot be a limitation defence in answer to a claim for repayment (*BNP Paribas v. VE* (Case C-609.19)).

Claims Management. A former director of a Claims Management company fraudulently breached the duties he owed in relation to the acquisition of part of the business of a solicitors’ practice of which he was sole proprietor. Together with a deceit claim the damages were £9.75m being the purchase price (*Claims Direct Plc v. Hinton* [2021] EWHC 1613 (Ch)).

Safety Deposit Boxes. A bank applied for an order concerning 115 boxes. The earliest deposit had been in 1900. There was no record of the current representatives of the original depositors. Consideration was given to the Torts etc. Act 1977. The bank was permitted to inspect the contents of the boxes (*Credit Agricole v. Persons Unknown* [2021] EWHC 1679 (Ch)).

Default Notices. There is no rule of law or practice that the creditor under a regulated agreement which bears the burden of proving on the balance of probabilities the service of a default notice can only achieve this by production of the original notice (*Goodinson v. PRA Group (UK) Ltd* [2021] EWCA Civ 957).

PPI Appeal Costs. The decision of a single Lady Justice that, in granting permission to appeal, the PPI Claimants’ costs of a second appeal should in any event be paid by the Appellant bank was overturned. The case was a small claims one and there was no power to order costs. The appeal involves *Plevin* unfair relationships as regards the transitional provisions in the 2006 Act and limitations (*Smith v. Royal Bank of Scotland* [2021] EWCA Civ. 977).

SIPPS. Article 25(2) of the RAO was concerned with the purpose of the arrangements not whether, as a matter of fact, they brought about the relevant purpose. The differences between Article 25(1) and 25(2) were considered. The Court of Appeal had considerable reservations about the FCA's position with regard to *Adams v. Options UK* [2021] EWCA Civ 474 but the Court proceeded on the FCA's concession. The Article 33 exception was also considered. The Defendants' appeal was dismissed (*FCA v. Avacade Ltd* [2021] EWCA Civ 1206).

Solar Panels. The High Court awarded damages of a little over £3,000 in a case relating to the sale of solar panels on the basis of Section 75 (*Hodgson v. Creation Consumer Finance* [2021] EWHC 2167 (Comm)).

Chattel Loans. Claimant companies brought claims against their former CEO for failing to implement or adhere to underwriting policies. Several loans were focussed on in particular. Reverse summary judgment was refused (*Burro Ltd v. Aitken* [2021] EWHC 1902 (Ch)).

VAT. A loan administration company failed in its appeal against an Upper Tribunal decision that its services were not within the financial services exemption in Article 135(1)(d) of the VAT Directive (*Target Group Ltd v. HMRC* [2021] EWCA Civ 1043).

FCA/PRA Decisions. The Upper Tribunal has remitted decisions following failings of the two authorities as regards disclosure and standards which are expected of them. The matter related to a small mutual insurance firm (*Forsyth v. FCA* [2021] UKUT 162 (TCC)).

SIPPS. The Court of Appeal considered Pt 36 offers in connection with a pension transfer which had been held to be unenforceable (*Adams v. Options UK Personal Pensions* [2021] EWCA Civ.1188).

Reflective Loss. The Privy Council upheld an appeal against a Cayman Islands' decision that the Claimants were barred from recovery by the reflective loss rule. The liquidator of the Claimant sought recovery against the custodian and administrators who had been involved in investments in a Madoff Ponzi scheme. It was held that the time to judge whether the reflective loss rule applied was when the loss was suffered and the Claimant was not a shareholder at that time (*Primeo Fund v. Bank of Bermuda* [2021] UKPC 22).

Costs. Following its decision in *Adams v. Options UK* [2021] EWCA Civ 474, the Court of Appeal made consequential orders. These included making enhanced costs order on the basis of a Part 36 offer (*Adams v. Options UK* [2021] EWCA Civ 1188).

Debt Respite. The first High Court decision on an application to cancel a mental health crisis moratorium has been given. The application was under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (*Axnoller Events Ltd v. Brake* [2021] EWHC 2308 (Ch)).

VAT – PPI. The Upper Tribunal has ruled that a CMC making PPI claims was not VAT exempt. The purpose of the service was claiming compensation for mis-selling not the cancellation of the

policy. The services were not insurance transactions or performed as an insurance agent (*Claims Advisory Group v. HMRC* [2021] UKUT 199 (TCC)).

Transfer of Mortgages. Borrowers failed to overturn the transfer of their loans from one Cypriot bank to another under legislation relating to the avoidance of financial instability or for the lack of formalities under the Companies Act 2006 (*Mars Capital Finance v. Hussain* [2021] EWHC 2415 (Ch)).

Penalties. In a case involving the sale of a commercial property, the High Court has considered whether an interest charging provision was a secondary obligation and if the law on penalties applied. It was held that a fourfold increase in interest was a penalty (*Ahuja Investments Ltd v. Victorygame Ltd* [2021] EWHC 2382 (Ch)).

Prohibition Orders. The Upper Tribunal dismissed a reference from an FCA decision to issue a prohibition order following a criminal conviction for attempting sexually to groom a child. The Tribunal held that if the fact of the conviction alone was relied on it was likely the Tribunal would have ordered a redetermination as the FCA had not shown the qualitative relevance of his conduct to his work as a financial adviser. However, factors such as the lack of remorse, lack of integrity and breach of bail conditions meant the FCA's decision was upheld (*Frensham v. FCA* [2021] UKUT 222 (TCC)).

Forgery and Illegality. In two appeals to the High Court, two issues were raised in connection with claims by a lender. The first related to the situation where two people own a property and one forges the other's signature on a transfer and the transferee knows of the forgery. The second issue was, if the first transaction was not a sham and the transferee charges the property to a lender, did the law as to illegality apply? The Judge allowed the lenders' appeals (*Victus Estates v. Monroe* [2021] EWHC 2411 (Ch)).

Receiver's Sale Duty. A decision of the Chancery Division considered the issue of the duty on receivers as to the price obtained on the sale of charged property (*Serene Construction v. Salata* [2021] EWHC 2433 (Ch)).

Unfair Relationships. The Court of Appeal allowed a Bank's appeals from decisions on PPI on limitation grounds. The day to day accrual of a cause of action under Section 140A does not mean that unfairness in the past is simply projected forward into the future. Consideration was also given to the effects of the transitional provisions under the 2006 Act. The Court did not agree with the proposition that if in fact a regulated agreement which came to an end before April 2008 was the cause or contributor to unfairness extant in 2015 it could not be a cause or contributor to such unfairness (*Smith v. RBS* [2021] EWCA Civ 1832).

Unenforceability. A trustee in bankruptcy applied for a declaration that the security over the bankrupt's home in favour of a lender was unenforceable under FSMA as unauthorised. The Chief Insolvency and Companies Judge refused to grant an enforcement order. Consideration was given to Section 28(5) as to reasonable knowledge (*Jackson v. Ayles* [2021] EWHC 995 (Ch)).

Assignment. The Court of Appeal considered issues relating to the redaction of documents relating to the assignment of loan portfolios (*Promontioia (Oak) Ltd v. Emanuel* [2021] EWCA Civ 1682).

SWAPS. A small Italian local authority entered into SWAPS with a bank. At the time the arrangements were beneficial to the authority but, after 2008, they were not. The authority alleged it was not bound by the contracts which were subject to English law. It was said that the contracts were void because, under mandatory rules of Italian public finance, the authority lacked capacity to enter into the contracts and they were not approved by the City Council. The High Court held that the authority could enter into derivative contracts for hedging and the contracts were valid. Issue of restitution if the contracts had been void was considered (*Deutsche Bank v. Commune di Busto* [2021] EWHC 2706 (Comm)).

Section 90A Claims. The High Court considered claims by investors in reliance on allegedly misleading or untrue statements and/or omissions in relevant published information (para 3 of Sch 10A FSMA). An application to strike out or for summary judgment on limitations was refused (*Allianz Global v. RSA* [2021] EWHC 2950 (Ch)).

Jurisdiction. The Claimants transferred UK pensions to recognised overseas pension schemes in Gibraltar. The High Court held it had no jurisdiction. Article 13(3) of the Brussels Convention was inapplicable because the claim did not relate to a contract for services (*Dooley v. Castle Trust and Management Services Ltd* [2021] EWHC 2682 (Comm)).

Warning Notices. The FCA appealed successfully to the High Court against a decision that the Court's permission was required before taking regulatory action against a company in liquidation. There was no financial penalty involved in issuing the warning notices (*FCA v. Carillion* [2021] EWHC 2871 (Ch)).

Unfair Relationships. Summary judgment was granted to a bank where the allegations related to a personal guarantee which had been re-financed. The Defendant was a major international trader and the rates of interest were not unfair nor was the default rate a penalty (*Bank of Beirut (UK) Ltd v. Moukarzel* 14th October 2021).

CONSUMER DUTY

Consultation. The FCA published a second consultation on 7th December. It is hoped to confirm final rules by the end of July 2022 with an implementation period ending on 30th April 2023.

FOOD

Expert Evidence. By a majority the Court of Appeal allowed an appeal by a tour operator in a second appeal in a case involving alleged food poisoning at a hotel in Turkey. The Court held that the High Court was wrong to hold that a Court should take an uncontroverted expert's report at face value (*Griffiths v. Tui (UK) Ltd* [2021] EWCA Civ 1442).

OVs. The Supreme Court considered a ruling by the CJEU referred to it by the Supreme Court. The outcome was that in a case involving the condemnation of food, Section 9 of the Food

Safety Act 1990 was precluded as it could override a decision of the Official Veterinarian (*R (On the application of the Association of Independent Meat Suppliers) v. Food Standards Agency* [2021] UKSC 54).

Health Foods. The Food (Promotion and Placement) (England) Regulations 2021 will come into force on 1st October 2022.

HOUSING

HMOs. The Upper Tribunal has considered the approach to be taken in respect of rent repayment orders for managing an HMO when unlicensed (*Williams v. Parmar* [2021] UKUT 244 (LC)).

Parties. The Upper Tribunal has held that the First Tier Tribunal did not have the power to substitute the correct landlord where the landlord had been wrongly identified in an application for a rent repayment order (*Guru Singh v. Drumlin Ltd* [2021] UKUT 268 (LC)).

HMOs. The Court of Appeal dismissed an appeal from a decision of the Upper Tribunal which set aside and remitted to the FTT a decision as to reasonable excuse in the context of an alleged offence of having control or managing an HMO when not licensed. The correct question was whether the landlord had a reasonable excuse for continuing to control and manage an HMO rather than a reasonable excuse for not applying for a licence (*Palmview Estates Ltd v. Thurrock Council* [2021] EWCA Civ 1871).

Community Protection Warning. The High Court has held that a warning could be issued to a landlord and it was amenable to judicial review. A warning could in principle be issued in respect of lawful conduct (*Halborg v. Hinkley and Bosworth BC*, 10th November 2021).

UNFAIR TERMS

Bailment. A bonded warehouse's liability to depositors was limited to £1,000 following a burglary. The limitation clause was an industry norm (*The Huntsworth Wine Co v. London City Bond* [2021] EWHC 2831 (Comm)).

Care Homes. The High Court dismissed a claim by the CMA that an administration fee payable by self-funding residents in care homes on their admission was unfair under the former 1999 Regulations or contrary to the Unfair Trading Regulations 2008. The evidence of a Project Director of the CMA was held to be tendentious as regards to the documentary record. The Court held that whilst evidence from individual consumers could be used to illustrate, by way of background or contextual information, the range of experience of consumers or anecdotal evidence it is not appropriate to rely on a small sample as reflecting or informing the Court's definition of the average consumer within a particular group. The issue of a transactional decision was also considered (*CCMA v. Care UK Health* [2021] EWHC 2088 (Ch)).

TRADING

Commonwealth Games. The Birmingham Commonwealth Games (Advertising and Trading) Regulations 2021 came into force on 19th November 2021.

TOY SAFETY

Guidance. The Office for Product Safety and Standards have published statutory guidance on the 2011 Regulations with the BREXIT amendments.

PRIVATE PROSECUTIONS

Abuse of Process. The Court of Appeal (Criminal Division) upheld a stay of a private prosecution. Although the dominant public interest is not required, the absence of a public interest rationale, taken together with an oblique motive, is telling (*Asif v. Ditta* [2021] EWCA Crim 1091).

TICKETS

Touts. The Court of Appeal (Criminal Division) upheld convictions in prosecutions taken by trading standards in respect of ticket touting where tickets had been obtained by bulk purchases on the web and re-selling them in breach of conditions imposed by event organisers. The Court said the case had been novel and complex. The trial Judge had not used unacceptably emotive language in summing up. Consideration was given to the offence of fraudulent trading under Section 993 of the Companies Act 2006 (*R v. Hunter* [2021] EWCA Crim 1785).

EMPLOYMENT

Jurisdiction. The Divisional Court has held that an English Magistrates' Court had jurisdiction in a prosecution of a director and administrator of failing to give notice of collective redundancies in respect of employees in Scotland (*R (Forsey) v. Northern Derbyshire Magistrates* [2017] EWHC 3013 (Admin)).

TRADING STANDARDS

Warrants. TSOs were investigating large scale counterfeiting and obtained entry warrants. On a judicial review the High Court dismissed the claim and considered the extent to which a warrant was required to refer to specific legislation; in this case the Trade Mark Act 1984 and the Consumer Rights Act 2015 (*R (on the Application of Proimage Ltd) v. Lancashire Magistrates' Court* [2021] EWHC 3244 (Admin)).