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Financial Services Case-law Digest

CONSUMER CREDIT

Courts must decide if EU rules complied with even where customer doesn't take the point

Radlinger v Finway Case: C-777/14; [2016] WLR(D) 203

The Court of Justice of the European Union (CJEU) ruled that legislation of an EU member state could not prevent its courts during insolvency proceedings from investigating whether the Consumer Credit Directive 2008/48/EC and/or the Unfair Terms in Consumer Contracts Directive 93/13/EEC had been complied with. The case has been remitted back to the lower court in Prague so it can apply the CJEU ruling and determine what remedy, if any, should be provided to a consumer.

Comment: The CJEU said that national courts should examine if there has been compliance with EU consumer protection rules in cases that come before it in every case even where neither party raises the point. The CJEU says that consumers are in a weak position as regards his bargaining power and level of knowledge. This may prove to be overstating the position as if this ruling was applied routine debt collecting matters in British courts would simply grind to a halt.

Assignment fee in retirement village is not credit

Burrell v Helical Healthcare [2015] EWHC 3727 (Ch); [2016] CTLC 1; [2016] P. & C.R. DG 21

Tenants of a retirement village claimed that a fee payable to assign was the provision of credit under the CCA 1974. They also claimed the contract contained unfair contract terms. In granting summary judgement the judge found there was no deferment of payment and hence no credit was provided. As the CCA point failed the judge also granted summary judgement for the landlord and dismissed the tenants' allegations in relation to unfair contract terms too.

Comment: There is an outstanding claim alleging that a price variation clause is unfair under the UTCCR 1999 due to be tried in autumn 2016.

CONVEYANCING

Scottish conveyancing solicitor held liable in negligence because of email

Northern Rock Asset Management PLC v Jane Steel and Bell & Scott LLP [2016] CSIH 11 CA7/13

The Inner House of the Court of Session in Scotland, in a majority ruling, has construed a routine email sent to a lender by a borrower's solicitor about completion to give rise to a positive duty of care to the lender.

Comment: An application for a final appeal to the Supreme Court of the United Kingdom is pending. The decision has been heavily criticised for going too far in imposing a duty of care.

FSA REGULATION

Borrowers too late to allege mortgage unenforceable

Dickinson v UK Acorn Finance [2015] EWCA Civ 1194; [2016] CCLR 10; [2016] CTLC 20

A lender provided a short term bridging loan to refinance existing debts secured by way of a legal charge. The borrowers failed to pay the sums due, a possession order was made in 2011 and a warrant of possession was issued in 2013. The borrowers made several unsuccessful applications to have the possession order set aside. The borrowers then issued their own proceedings alleging that the mortgage was unenforceable pursuant to s.26 of FiSMA 2000. The lender applied to have the claim struck out on the grounds of cause of action estoppel, issue estoppel and abuse of process. The judge held that neither estoppel could prevail against s.26 but that it was an abuse of process to seek to litigate the issue at that late stage. The borrowers appealed against the striking out of their claim. The Court of Appeal dismissed the borrowers' appeal and ruled that FiSMA was neither a trump card and nor could it dictate the result of the abuse of process application.

Land banking promotion is regulated collective investment scheme

Asset Land Investment PLC v Financial Conduct Authority [2016] UKSC 17

Asset Land sold individual plots at 6 possible development sites around the UK. It divided the sites into plots which they sold to investors representing that it would be responsible for seeking re-zoning for residential development and for arranging a sale to a developer. The Supreme Court held that in the circumstances this amounted to operating a collective investment scheme. The FCA's claim that Asset Land had carried on a 'regulated activity' without authorisation (the operation of collective investment schemes) contrary to section 19 of the FiSMA 2000 was upheld.

Where is the line to be drawn between regulated and exempt activities?

Simply Sure v Personal Touch Financial Services [2016] EWCA Civ 461, [2016] WLR(D) 265

The first three questions on a fact-find document for private medical insurance were completed by an unqualified adviser. It was then handed on to advisers who were Financial Conduct Authority (FCA) authorised. Following a compliance audit, these breaches were unearthed and the distribution contract was terminated. A claim for damages alleging wrongful contractual termination was brought. HHJ Nigel Bird in the Manchester Mercantile Court gave judgment for the claimant, Simplysure Limited. The appeal of Personal Touch Financial Services (PTFS) to the Court of Appeal was allowed.

Comment: This is the first time a case has reached the Court of Appeal on this topic requiring it to interpret the ambit of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (**SI 2001/544**). The Court of Appeal decided that article 25 when it refers to 'making arrangements' means that completion of introductory questions is within it scope its judgment. This remains a matter of some importance because conducting regulated activities within the scope of RAO 2001 without permission from the FCA is a criminal offence.

GUARANTEES

Bank under no duty to give voluntary advice

Finch v Lloyds TSB Bank [2016] EWHC 1236 (QB)

HHJ Pelling QC in the Manchester Mercantile court has dismissed claims brought by assignees of a borrower that a bank breached its duty of care in failing to advise the borrower as to the existence of an onerous term on early repayment in its standard loan facility. The judge declined to accept that a contractual duty to advise arose either at common law or under section 13 of the Supply of Goods and Services Act 1982. The judge ruled that the bank did not owe a tortious duty of care because it is not under a general legal obligation to provide advice. Where a bank does give advice then it must do so using reasonable care and skill.

Comment: The borrower had been represented throughout by brokers and lawyers. To find the existence of a tortious duty of care would be to go further than any of the prior authorities.

INTEREST RATE HEDGING PRODUCTS

Interest rate swaps mis-selling case resolved in bank's favour

Thornbridge v Barclays Bank PLC [2015] EWHC 3430 (QB) (HHJ Moulder QC)

Following a 5 day trial in which it was alleged that an interest rate swap had been mis-sold to a business customer the Manchester Mercantile Court dismissed the claim and ruled in favour of the bank. Claims were made in negligence, breach of contract and for breach of statutory duty. The bank had not assumed an advisory duty. The borrower was estopped from asserting such a relationship by a representation it made in the bank's standard form swap confirmation that it was not relying on the bank's communications as investment advice.

Comment: Permission to appeal this decision has been granted. In considering whether there has been a breach of duty by a bank when selling a hedging product, you need to carefully consider the actual discussions between the customer and the bank, statements made orally and those in written presentations. These need to be analysed in order to identify whether there was a positive false or misleading statement made by the bank about the risks or effect of the product. If so, you must investigate whether the customer would in fact have entered in to the transaction had it known the truth.

POSSSESSION PROCEEDINGS

Possession proceedings after arrears do not breach tenant's human rights

McDonald v McDonald [2016] UKSC 28

A court is not required to consider the proportionality of making an order for possession against a residential occupier where a landlord seeking possession was not a public authority. Section 21(4) of the Housing Act 1988 requires a court to make a possession order against a tenant with an assured shorthold tenancy ('AST') who had been served with an appropriate order. The court has to make a possession order. It is not open to a tenant to contend article 8 of the ECHR could justify a different order from that which is governed by the AST. The possession order made follows due process under the HA 1988 made by the democratically elected legislature which has already balanced the competing interests of private sector landlords and residential tenants.

Comment: Although this judgement was given in relation to an assured shorthold tenancy, given the wide ranging nature of the arguments (especially from the intervenors), the result is highly likely to be the same if a similar defence was raised in a possession action by a mortgagee.

PROCEDURE

Court of Appeal signals end of pursuit of Scottish claims in Carlisle County Court

Cook v Virgin Media Ltd; McNeil v Tesco plc [2015] EWCA Civ 1287, [2015] All ER (D) 127 (Dec)

The Court of Appeal granted permission for a second appeal on the basis that an important point of principle or practice was involved. The Master of the Rolls in giving the judgment of the court upheld the rulings of the two lower courts. These rulings concerned claims for personal injury which occurred in land or premises in Scotland which was owned by a company with its registered or head office in England. The Court of Appeal has confirmed these claims must be brought in a court in Scotland.

Comment: This ruling is intended to have wide application and will apply to financial claims as well. Those acting for or advising companies who have live claims against them from Scottish claimants should apply to stay those claims under CPR part 11 rather than applying to strike them out. It will depend on the stage those proceedings have reached as to whether an application will be granted. For new claims, those advising defendants should act promptly and within the 14-day window after acknowledging the claim to make the stay application with evidence in support.

Re-trial ordered due to harsh exclusion of evidence by trial judge

Barons Finance v Gopee [2016] EWCA Civ 550

The Court of Appeal has allowed an appeal against a decision finding that the loan portfolio of Barons Finance Limited had been assigned at an undervalue. The judge allowed the liquidator's application setting this transaction aside. The Court of Appeal ruled that Mr Gopee (who made the assignment) had not received a fair trial because the judge refused to allow in as evidence a witness statement with exhibits tendered at the beginning of the trial. It said it was harsh for a ruling tantamount to a fraud finding to be made without allowing Mr Gopee into the witness box to be cross examined.

Comment: There are previous reported decisions about Barons Finance Limited. Mr Gopee said these decisions meant the Baron Finance loans were unenforceable. Accordingly, Mr Gopee said the loan book was not very valuable and there had not been a transaction at an undervalue. This decision, by the back door, allows a court even more leeway on a relief from sanctions application.

SALE OF GOODS

Retention of title clause in insolvency claim

PST Energy 7 Shipping LLC v OW Bunker Malta Limited [2016] UKSC 23

PST Energy 7 (owner/manager of a ship called *Res Cogitans*) ordered marine fuel ('bunkers') from OW Bunker Malta. The contract provided for payment 60 days after delivery and included a clause under which property was not to pass until payment had been made. It also entitled the owner to use the bunkers for the propulsion of the ship from the moment of delivery. There was a complex supply chain of the bunkers and their financing and 1 party in that chain became insolvent. The owners used all the fuel bunkers in the ship's propulsion without making payment to Bunker Malta.

Another party in the financing chain (RMUK) paid its supplier and demanded payment from the owners saying it remained the bunkers' owner. An arbitrator had to decide if the owner was bound to pay for the bunkers (or not) and whether Bunker Malta had been unable to pass title to them under sections 2(1) and 49 of the Sale of Goods Act 1979. The arbitrators determined that the owners remained liable to pay Bunker Malta and a final appeal to the Supreme Court was dismissed.

Comment: Section 49(1) of the SoGA enables an action for the price to be brought where a seller has transferred property and the buyer has failed to pay the price due. The Court of Appeal held in *F*

G Wilson (Engineering) Ltd v John Holt & Co (Ltd) **[2014] 1 WLR 2365** (‘*Caterpillar’)* that where goods are delivered under a contract of sale but title is reserved pending payment of the price, the seller cannot enforce payment of the price by court action. The Supreme Court declined to over-rule *Caterpillar* but said here the price was recoverable by virtue of the contract’s express terms in the event which has occurred namely the complete consumption of the bunkers supplied.

Disappointed buyer awarded damages when dealer did not fulfil order

Hughes v Pendragon Sabre Limited [2016] EWCA Civ 18

Mr Hughes ordered a limited edition Porsche 911 GT3 RS4, signed an order form and paid a £10,000 deposit. He was assured by the dealer he was first in the queue but there was no guarantee the dealer would be assigned any of these cars. The dealer did in fact get a car and sold it to someone else instead. Mr Hughes brought a claim for damages. This was dismissed by District Judge Knifton on 22 November 2013 in Preston County Court and Mr Hughes appealed to the Court of Appeal. It over ruled the district judge and awarded him damages of £35,000. Although the retail price of the car was £135,000, as it was a limited edition its value had increased and buyers were willing to pay around £170,000 to secure one. Cranston J accordingly ruled that the measure of damages was the difference between these figures.

Comment: The facts in this case are unusual. The Court of Appeal cannot have been impressed with the car dealer’s conduct. That said, the ruling is extraordinary as the evidence was that Mr Hughes wanted to keep the car and not sell it.

UNFAIR RELATIONSHIPS

No unfair relationship in business buy-to-let arrangement

Nelmes v NRAM [2016] EWCA Civ 491

In 2007 Nelmes remortgaged his buy to let portfolio of 26 properties with NRAM which included his own home. In June 2013 the lender conducted a revaluation of the portfolio and found that 1 property had been demolished after an explosion. The lender demanded payment of the loans and appointed LPA receivers to collect the rents. Nelmes’ allegation that there was an ‘unfair relationship’ was rejected. There was nothing unfair about the bank appointing receivers. The terms in the loan offer and mortgage were commonplace for products of that kind. There were sound commercial reasons for them as they sought to limit the risk to the lender and they represented a legitimate and proportionate attempt by the creditor to protect its position.

Comment: This shows yet again the courts have taken a wholly different approach in deciding whether there is an unfair relationship where the context is business lending. In *Paragon Mortgages Ltd v McEwan-Peters* **[2011] EWHC 2491 (Comm)** concerning lending to buy to let investors, David Steel J declined to find the relationship was unfair noting that there was neither an improper motive nor an arbitrary decision by the lender in its decision to enforce the loan contracts. In *Deutsche Bank (Suisse) SA v Khan* **[2013] EWHC 482 (Comm),** Hamblen J ruled that the lending was not an unfair relationship as the debtor had negotiated changes to the terms originally proposed by the bank.

Summary determination upheld

Momoh v Bluestone Mortgages [2016] CCLR 5 (Court of Appeal, Tomlinson LJ)

An ‘unfair relationship’ does not arises under s140A of the Consumer Credit Act 1974 where a lender pays outstanding service charges due under a lease and does not tell the borrower in advance that it has done so. The unfair relationship allegation here was far removed from cases on payment protection insurance selling which raised allegations that there had been hidden commissions. The mortgage was in standard form and did not of itself give rise to an unfair relationship.

Comment: This appeal decision together with *Axton v GE Money* [2015] EWHC 1343 (QB) shows that courts can determine cases summarily where an allegation of an unfair relationship (even with the reverse burden of proof) is raised.

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