This article was first published in CILeX Journal
The Journal of the Chartered Institute of Legal Executives in September 2016.

Financial Services Case-law Digest

BREACH OF CONTRACT

Email exchange insufficient to form business contract

JAS Financial v I Cap [2016] EWHC 591 (Comm), [2016] All ER (D) 163 (Mar)

The Commercial Court dismissed a claim regarding an alleged agreement between 2 businesses under which one business was to provide services to the other. On the evidence, no legally binding contract had been made between the parties either orally or in writing. The court denied that a contract had been inferred from a proposal sent by email setting out the services to be provided and the price.

Comment: No note was made of what was said or agreed at the critical meeting. The prudent course would have been to have written something up shortly after the return to the office and to then circulate and agree. It cannot have plausibly thought that a discussion of a proposal in a wine bar followed by handshake would be all that it would take to get a contract - it must have been expecting to see a contract to sign. By the time this case came to trial the judge was trying to piece together what had happened nearly eight years ago. Inevitably, memories had faded and the focus in such a case inevitably shifts to contemporaneous documents which here were few.

CHEQUES

Bank not obliged to accept worthless cheques

Evans v Santander UK Unreported. Central London County Court. 6th April 2016.

WeRe Bank is a UK-based venture which purports to be a people's bank and appears to have created its own currency, the RE. Members of the Re-Movement are required to issue a promissory note to WeRe Bank to the sum of £150,000, which is payable 'within a ten-year anniversary' from the time of joining. WeRe Bank states that it will not need to call this in. Members are then able to buy RE cheque books.

WeRe Bank states that its cheques can be used to pay all public liabilities (such as council tax demands, utility payments, tax) and private payments between consenting parties (including mortgages). Its website claims that, under sections 42 and 43 of the Bills of Exchange Act 1882, if payment is refused the payee is acting in dishonour and liability for the payment ceases. The sort code and account number on the cheque book is invalid and is the same number that WeRe Bank issues to everyone who signs up.

Mr Ewen issued 3 cheques totaling £640,000 payable to Santander UK to discharge his liability under 'buy to let' mortgages he had with the lender. The lender refused to present the WeRe bank cheques. Mr Ewen brought a claim for a declaration that his liability had been discharged. The lender applied for summary judgement. A recorder dismissed Mr Ewen's claim and ruled the lender was under no obligation to accept the worthless cheques issued by WeRe Bank.

MORTGAGES

Bank not liable for loss in 'sale and rent back' scheme

Mortgage Express v Lambert [2016] EWCA Civ 555

A home owner in financial difficulties sold her home at an undervalue and was allowed to stay there under a lease. The transaction was presented to the lender as a sale. When the lender found out what had really happened, the home owner claimed an over-riding interest. The Court of Appeal ruled the loss could not be laid at the door of the lender and held that the home owner did not have an overriding interest.

Comment: Last year the Supreme Court handed down its judgment in *Southern Pacific Mortgages Ltd v Scott (North East Property Buyers Litigation)* **[2015] 1 All ER 277** *('Scott')*. This case also concerned a 'sale and rent back' scheme. However despite the Scott judgement, this issue has not gone away because the way all the schemes are set up varies. Here there was a bridging loan which was not secured by mortgage which the homeowner's lawyers claimed unsuccessfully made a difference to *Scott.* Lambert's solicitor says he wants to ask for permission for a final appeal.

Unfair to raise margin by 2% on tracker mortgages

Alexander (as representative of Property 118 Action Group) v West Bromwich Mortgage Company Limited [2016] EWCA Civ 496

Condition 5 of the lender's standard mortgage terms mentioned the right to vary interest rates in this way but the lender's mortgage offer did not. The court allowed an appeal and held that what was in the mortgage offer took precedence. Accordingly the Court of Appeal ruled that a lender was prevented from increasing its margin on a tracker mortgage by 2% to business buy-to-let investors. It held that the

Comment: The lender has said it will not appeal this case further. The mortgage contained a term allowing it to be terminated on notice by the lender even where the borrower was not in breach. The future of these sort of terms must now be in serious doubt.

Burden of proof for mortgagee selling repossessed property

Alpstream AG v PK Airfinance Sarl [2015] EWCA Civ 1318, [2016] All ER (D) 05 (Jan)

The Court of Appeal held that a mortgagee could bid for or buy repossessed property and there was no absolute bar on it doing so. However, a mortgagee continues to owe a duty to obtain the best price reasonably possible and in a sale to self the burden of proof is reversed.

Comment: The circumstances of this case are unusual. It will be rare that where there is a retail mortgage used to buy residential property that a mortgagee in possession will be able to sell that property to itself. Such a sale can only be made by a court and even then such a prospective purchaser will need to obtain the permission of the court to bid at an auction

PAYMENT PROTECTION INSURANCE

Remediation not limited to commission

Plevin v Paragon [2016] CCLR 6 (Court of Appeal, Sir James Munby P)

A judge in determining the amount of remediation in an unfair relationship case is not limited to looking at the amount of commission received by a lender. However the cost of obtaining alternative insurance cover was not raised before the judge below. The judge below did not treat as axiomatic that the question of remediation should be tied to the quantum of the PPI premium.

Comment: The DTI White Paper '*Fair, Clear and Competitive – the consumer credit market in the 21st century'* **Cm 6040** said this about 'unfair credit costs: 'However, it is important to note that high costs alone would not necessarily render the agreement unfair. Transaction costs are not 'high' or 'low' in the abstract, but must be considered in the light of the nature and type of the agreement and circumstances in which it was made or how the lender has acted subsequently.'

UNFAIR CONTRACT TERMS

19% interest rate on consumer mortgage unfair

Ibercaja Banco SAU v González Case C-613/15

The Court of Justice of the European Union has ruled that a clause in a consumer mortgage contract that permitted the lender to increase the interest rate payable to 19% in the event of default or non-payment was an unfair contract term. The case has been remitted back to the lower court in Madrid so it can apply to CJEU ruling in contested possession proceedings.

Comment: The judgement is only available in French and Spanish.

Assessment of compensation in unfair contract terms case

Milena Tomášová v. Slovenská republika *Case* C-168/15

This case under the 1993 Unfair Contract Terms Directive has been referred to the CJEU by a Slovakian court. The referred questions include asking for a ruling whether in the case of a serious breach, the government of an EU member state can be held liable for damages for losses suffered as a result of a contract's unfair terms. The CJEU has also been asked to rule whether debt collecting amounts to unjust enrichment by a creditor. Advocate-General Nils Wahl of Sweden has given his opinion on 14th April 2016 (but this has not been translated into English) in which he says a government does not have liability for these losses.

Comment: It remains to be seen if the CJEU will endorse everything its Advocate-General has said.