



# TRADING LAW BULLETIN

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## CONSUMER CREDIT

**Hire Purchase.** A finance company commenced proceedings for the balance of the price of a car repossessed under a hire purchase agreement. During the proceedings it was found that the date of first registration had been given incorrectly. Misdescription was not pleaded and the Judge refused to allow the point to be taken. The Court of Appeal held that there had been no substantial procedural error. The Defendant knew that the point needed to be pleaded. Further, the Judge's decision that the finance company had failed to mitigate its loss because of the manner in which the car had been re-sold was justified (*Lombard North Central plc v. Automobile World (UK) Limited* [2010] EWCA Civ.20).

**Bill of Sale.** The case was originally a simple claim for damages for wrongful interference with a van. The van had been taken pursuant to terms of business. A provision gave a right by way of a lien. The question before the Court of Appeal was whether the contract constituted a bill of sale and was unenforceable for non-registration. It was held that the seizure was unquestionably as security for the debt so the agreement fell within the ambit of Section 4 of the Bills of Sale Act 1878. But the acts do not apply to companies (*Online Catering Limited v. Acton* [2010] EWCA Civ.58).

**Title.** The Claimant had ordered a car from a dealer on the basis that the company intended to source one. The company obtained a car under a hire purchase agreement which it signed on the same day it delivered it to the Claimant. Three days earlier the car's registration number had been given to the Claimant. The owners repossessed the car and the Claimant brought a claim in conversion relying on the Hire Purchase Act 1964. The Court of Appeal held that there was no evidence that the registration plates had been put on the car before delivery and the Claimant would not have been bound to take delivery without them and so the car was not in a deliverable state. Alternatively, delivery was the decisive act in transferring possession in property and there was no constructive delivery so the parties should not be taken to have intended anything prior to actual delivery to turn their agreement into a sale (*Kulkarni v. Manor Credit* [2010] EWCA Civ.69).

**Irresponsible lending.** The OFT published guidance on irresponsible lending on 31st march 2010.

**Costs.** In a large number of cases claims brought in respect of alleged non-compliance with Section 78 of the Consumer Credit Act 1974 were discontinued or treated as discontinued. The High Court in Manchester gave guidance in respect of the liability for costs in those

circumstances. The Court held that the presumption that the Defendant should have its costs should not ordinarily be displaced particularly if the Claimant had chosen not to have their claim determined at trial. Further, if it was plain that the claim would have failed that would of course be a relevant factor against the disapplying the presumption (*Teasdale v. HSBC Bank plc* [2010] EWHC 612(QB)).

**Undue influence.** A husband persuaded his wife that they needed to remortgage their home to manage his debts. The Judge rejected the defence of the wife of undue influence and misrepresentation notwithstanding that she had found out about the husband's affair shortly after agreeing to the mortgage. It was common ground that the creditor had constructive notice of any undue influence. The Court of Appeal held that the concealment of the affair did amount to undue influence sufficient to vitiate the mortgage transaction (*Hewett v. First Plus Financial Group plc* [2010] EWCA Civ.312).

**Shared appreciation mortgages.** A certain type of group litigation order was made in respect of claims concerning shared appreciation mortgages but this was overturned on appeal. However, whilst the proposed GLO was set aside, a GLO was an appropriate vehicle for case management in respect of alleged unfair terms (*Tew v. BOS Shared Appreciation Mortgages (No.1) plc* [2010] EWHC 203(Ch)).

**Insolvency Credit.** The borrower had engaged a specialist company in an attempt to annul a bankruptcy order which involved remortgaging his property to discharge his indebtedness. A fee was payable. The Court of Appeal held that interest could only be determined by reference to when the legal fees and disbursements were actually paid (*Consolidated Finance Limited v. Cook*, 17th March 2010).

**Limitations.** A borrower appealed against a ruling that a lender was not statute barred. The Judge held that the borrower had started making monthly repayments less than 12 years before the claim was issued so that under Section 29(5) of the Limitation Act 1980 time started to run from then. The borrower submitted on appeal that he had not acknowledged or made any payment in respect of the mortgage debt but the repayments were only to stop the lender harassing him. The Court of Appeal held there had been both acknowledgement and part payment (*Ashcroft v. Bradford & Bingley Plc* [2010] EWCA Civ.223).

**Sections 77 and 78.** The Office of Fair Trading has issued guidance on requests for copy agreements under Sections 77 and 78 of the Consumer Credit Act 1974.

## FOOD

**Duty of care.** In the very unusual circumstances of a sikh wedding there was a duty of care on the caterer who was aware of egg allergies in respect of personal injury suffered by eating eggs. The Court of Appeal dismissed a caterer's appeal in a personal injury case. It was held that there was no general duty to give a warning about eggs even though some people were allergic to them. However, the nature of the occasion extended the ordinary duty of care (*Bhamra v. Prem Dutt Dubb* [2010] EWCA Civ.13).

## UNFAIR TERMS

**Estate agents.** The Office of Fair Trading have obtained a final High Court order against Foxtons Limited from using certain terms concerning sales and commissions in its letting agreements with consumer landlords.

**Sale and lease back.** Under an agreement the Defendant sold his house to the Claimants who leased it back. 70% of the sale price was payable on completion and 30% on expiry of a period of 10 years and the giving up of possession by the Defendant. The Court of Appeal held that there was no deposit within the Housing Act 2004 and, whilst the relevant term had not been individually negotiated, it was nevertheless fair (*UK Housing Alliance (Northwest) Limited v. Francis* [2010] EWCA Civ.117).

**Gyms.** The Office of Fair Trading have issued High Court proceedings against a gym management company in respect of consumer credit law and the fairness of its contract terms.

## PROSECUTIONS

**Financial services.** The Court of Appeal (Criminal Division) have held that the Financial Services Authority have power to prosecute offences in addition to those specifically mentioned in the Act in Sections 401 and 402. The general right of prosecutions was not excluded and the other powers conferred on the Authority were wide enough to include the institution of criminal proceedings within its objectives (*R v. Rollins* [2010] 1 ALL ER 1184).

**Abuse of process.** A prosecution involving the selling of kitchens collapsed when the Judge ruled that it had been an abuse of process and had been misconceived from the start. It had involved over 130 police officers and 270,000 pages of evidence. The case was brought by Oldham Trading Standards (*R v. Miller*, 12th January 2010).

## VEHICLES

**Licensing.** A question arose in a prosecution about a vehicle carrying a hearse carriage and horses. It was held that a heavy goods vehicle carrying a hearse and horses did not fall within the exemption concerning licensing and that the driver of such a vehicle required an operator's licence (*Vehicle and Operations Services Agency v. Clayton*, 19th January 2010).

## PLANNING

**Enforcement Notices.** On an appeal against a conviction for breach of an enforcement notice the Divisional Court allowed the appeal holding that there were two types of enforcement notice, namely a "do" and a "desist" notice. A

notice had to be unambiguous and set out what was required. The enforcement notice did not contain any specific obligation to cease using the mobile homes which were required to be removed (*Williams v. Herefordshire Council*, 16th February 2010).

## TRADING STANDARDS

**Funding.** The department for Business Innovation and Skills has issued a guidance for Trading Standards on a fighting fund.

## WATER

**Sentence.** A water company appealed against a fine of £125,000 for pollution. The Court of Appeal (Criminal Division) held it was very difficult to give general guidance as to the levels of sentence in such cases but allowed the appeal substituting a fine of £50,000 (*R v. Thames Water Utilities Limited* [2010] EWCA Crim.202).

## FINANCIAL SERVICES

**Consumer Protection Committee.** The FSA, the OFT and FOS are to establish a Consumer Protection Committee to scan new financial products for risk.

**Regulated activities.** The Defendants said that they were accepting loans rather than deposits and even if they were deposits they did not receive them by way of business. The High Court held that to call something a loan did not mean it was not a deposit. The Defendants all received sums of money from someone else and there was an obligation to repay. The money was received by way of deposits and judgment was granted (*Financial Services Authority v. Anderson* [2010] EWHC 599 (Ch)).

## LICENSING

**Costs.** A holder of a premise licence had brought proceedings on herself by her conduct and despite her successful opposition to revocation the District Judge had been entitled to award costs against her of £20,000 (*Prasannam v. Kensington & Chelsea* [2010] EWHC 319 (Admin)).

## UNFAIR COMMERCIAL PRACTICES

**Interpretation.** A reference had been made to the European Court of Justice for a preliminary ruling on the Unfair Commercial Practices Directive in respect of an invitation to purchase, an actual opportunity to purchase, the lowest price advertised, the time of a requirement concerning a product's characteristics, the position where the advertised product is offered in many versions and where there is essential information on a website and entry-level prices (*Konsumentombudsmannen (Ko) v. Ving Sverige AB* (Case C-122/10)).