GUILDHALL CHAMBERS

Commercial News

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Autumn 2005

Team news

The commercial team will be presenting a seminar on 'Compromise and Commercial Claims' on **Monday 17 October at Bristol Zoo**. The seminar attracts 1.5 CPD hours and the fee is £75 + VAT per delegate. The seminar starts at 5pm and will be divided into two sections – the first presentation will cover issues concerning making and breaking compromises and the second presentation will revisit CPR Part 36. The seminar will be followed by a drinks reception and an opportunity to meet members of the Commercial team.

For more information on the seminar or to book your place, please email commercial@guildhallchambers.co.uk

Licensing - The New Law

The second edition of Kerry Barker and Susan Cavender's book "Licensing - The New Law" is to be published by Jordan Publishing in October 2005. The Licensing Act 2003 marked a major shift in licensing law and practice by introducing a new and unified system of alcohol and entertainment licensing. All those involved in implementing, enforcing and advising upon the new regime need to have a detailed knowledge of the Act and subsequent Regulations and Guidance. The second edition has been extensively revised and updated to provide complete coverage of the new regime coming into force on 24 November 2005. The book gives a clear and coherent account of the new regime and explains its implications for licensing practice.

To order a copy of the book, please go to the Jordans website at www.jordanpublishing.co.uk

This issue considers important new cases in commercial and financial law, many of which involved members of the Commercial Team.

In our *Commercial Law Update*, Adrian Palmer QC considers the implications of the decision of the Court of Appeal in *London North Securities Ltd v Meadows* handed down at the end of July. The first instance decision attracted great media interest given its colourful facts whereby a couple who were initially looking to borrow just some £2,000 eventually found themselves faced with a claim for some £384,000! The byzantine Consumer Credit Act 1974 and its associated plethora of secondary legislation lays many traps for unwary lenders in the regulated sector and conversely provides opportunities for those advising defaulting borrowers. The non-specialist is soon left floundering. The Act often imposes the draconian sanction of total unenforceability on lenders who fail to comply with its arcane requirements, leaving some borrowers with a windfall. Adrian led Neil Levy in representing the lenders in the Court of Appeal. As he observes, it is disappointing that the Court shirked the task of dealing with all the issues which were ventilated in argument, including the thorny jurisdiction over extortionate credit bargains.

In his regular *Banking Law Update*, Neil Levy digests recent case-law including the – at least in my view – inevitable decision of the House of Lords in *Spectrum Plus* that it is near impossible for a corporate fixed charge to extend to circulating business assets such as book debts. Whilst many will rush to criticise this decision as uncommercial, it must be recalled that Parliament has ordained an order of priority on corporate insolvency and there is a limit to what fancy drafting can do. The clock has been turned back to before 1979, or perhaps 1903. Neil also notes the ongoing progress of the Consumer Credit Bill (to amend the 1974 Act) and the Law Commission proposals on company charges, which may render the fixed versus floating charge debate one of historical interest only. We intend to return to these proposed reforms as they come to fruition in future issues.

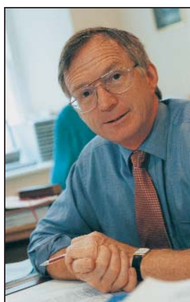
Lastly, in the *Financial Services Update*, John Virgo examines the implications for the financial services world – investors, advisers and product providers – of the important ruling in *Seymour v Caroline Ockwell & Co*. It is a curious story of how the proceeds of the sale of a Wiltshire farm in search of a safe home ended up in a worthless and fraudulently-run offshore fund in the Bahamas, via the Isle of Man. There was an almost immediate reaction from the industry regulator, the Financial Services Authority. In the context of its review of the responsibilities of the producers and distributors of financial products it said it would have to examine the implications of the case and "whether it has any broader implications for our regime" (*Treating Customers Fairly – Building on Progress, July 2005*). John and I crossed swords in the case, with me acting for the investors and John acting for the provider of the offshore wrapper bond. There are important lessons for all in the distribution chain of financial products.

If you have any comments (I am expecting hate-mail from those acting for banks over my *Spectrum* comments!) or questions about this newsletter or the work of the Commercial Team please do not hesitate to contact me or the Clerks, Justin Emmett and Heather Mings.

Gerard McMeel

Commercial law update

London North Securities Ltd v Meadows



The first instance judgment of HHJ Howarth in *London North Securities Ltd v Meadows*[1] attracted widespread publicity, reporting the exercise by the court of the power to declare a regulated credit agreement unenforceable under the provisions of the Consumer Credit Act 1974 ("CCA"). The lenders' appeal to the Court of Appeal was heard in June 2005, with all the various issues fully argued. Judgment was handed down on 27 July.[2]

The appeal against the first ground for the judgment of the trial judge succeeded, but the appeal against the second ground failed. In those circumstances, the appeal itself failed and the Court of Appeal declined to go on to consider the further significant issues. This outcome was disappointing; it leaves those further issues unresolved. Nevertheless, some lessons can be drawn and comments made.

The facts

As long ago as 1989, Mr and Mrs Meadows sought to borrow £2,000 for home improvements. Their finances were such that they were obliged to seek to borrow on the non-status lending market, where interest rates are inevitably high. It will be recalled that all interest rates were at a historically high level at that time (base rate was 13%); in the present case, the APR was to be 34.9%.

Through brokers, an application was made to borrow the money from some lenders. (These lenders were in due course to assign the agreement to the appellant company, immediately after completion of the loan. But this is an immaterial fact for present purposes). It was a standard term of the lenders – as for many other lenders at both secondary and non-status level – that any arrears on existing mortgages should be paid off. Mr and Mrs Meadows had substantial arrears and for this reason, the proposed borrowing rose to about £5,000. In addition, Mr and Mrs Meadows agreed to the purchase of a payment protection insurance policy, for a single premium of £750, which sum was also to be borrowed. The total borrowing was therefore set at £5,750.

Defaults in repayment, protracted legal proceedings, the lapse of many years and the application of compound interest led to an enormous sum being payable under the contract – some £384,000. Finally, in 2003, Mr and Mrs Meadows raised for the first time a defence that the agreement was actually unenforceable. It was this defence that came to trial in October 2004.

The findings at trial

The defence of Mr and Mrs Meadows was upheld and the judge declared the agreement unenforceable. He did so on four grounds, in each case with findings adverse to the lenders. He also went on to consider an additional issue, namely the time order under s.129 that he would have made if he had not held the agreement to be unenforceable. He stated that he would have made an order with retrospective effect, amounting (as he expressly accepted) to a re-writing of the bargain from the outset.

It is convenient to consider each of the findings of the trial judge under the next two headings in this Note.

The Court of Appeal judgment

Ground 1: "Amount of Credit" or "Charge for Credit"?

Under a regulated agreement, "the amount of credit" and "the charge for credit" are mutually exclusive terms of art, to be calculated in accordance with the Consumer Credit (Total Charge for Credit) Regulations 1980, as amended from time to time. The terms of the CCA are such that it is crucially important that the amount of credit is correctly shown in the agreement. The reasoning for this is fully set out in the judgment of Clarke LJ in *Watchtower Investments Ltd v Payne*[3]. The consequence of any error by the lender is that the agreement is irredeemably unenforceable.

Mr and Mrs Meadows contended that the mortgage arrears that were paid out of the sum borrowed constituted part of the charge for credit, such that their inclusion in the amount of credit on the face of the agreement rendered the latter figure incorrect. In *Watchtower*, slightly different facts had led to a finding that borrowings to pay off arrears were correctly included within the amount of credit. But the trial judge rejected any similarity, substantially on the basis that Mr and Mrs Meadows had not wished to pay off the arrears at the outset and that they would not willingly have borrowed at such a high rate for this purpose. He also placed reliance on the decision in *McGinn v Grangewood Securities Limited*[4], being a result which was opposite to and difficult to reconcile with the result in *Watchtower*.

The Court of Appeal ruled effectively that *Watchtower* should prevail; *McGinn* was "a case on very special and unusual facts". On this first ground therefore, the appeal succeeded. And the textbook criticism of *McGinn*[5] as being incorrect was vindicated, even if the case was not actually overruled.

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[1] 28 October 2004.

[2] [2005] EWCA Civ 956

[3] [2001] EWCA Civ 1159.

[4] [2002] EWCA Civ 522.

[5] See e.g. *Goode, Encyclopaedia of Consumer Credit Law*, ("Goode") para.29.148.

Ground 2: The Insurance Premium

Mr and Mrs Meadows here contended that the amount of credit was misstated because the £750 insurance premium was included. This issue required detailed examination of Regulations 4 and 5 of the 1980 Regulations, which in due course occupied the remainder of the Court of Appeal judgment. It may be noted that the Regulations themselves have been amended since 1980, in particular such that Reg.5(1)(j) no longer exists. Nevertheless, similar issues survive within the Regulations to the present day, in different forms.

Detailed discussion is not undertaken in this Note; the Court of Appeal found against the lenders and dismissed the appeal for the detailed reasons set out in the judgment. For present purposes, the practical result is to draw attention to the present Reg.4(c): if the contract of insurance is required by the creditor as a condition of making the agreement, then the premium falls within the total charge for credit, not the amount of credit. Lenders may be well advised to ensure that the purchase of such insurance is truly voluntary.

The further issues

We now move to the remaining grounds, where the Court of Appeal heard full argument, but declined to give any rulings. Comment is now offered nonetheless.

Ground 3: Compound Interest?

In line with universal practice at all levels of the lending market (including primary), the loan agreement provided for compound interest, to include compound interest on any arrears of instalments. Mr and Mrs Meadows contended that this constituted a penalty at common law. It was common ground that the interest rate on the principal sum outstanding included an element to reflect the risk of a non-payment. However, so the argument ran, the same justification could not apply to interest on arrears, which constituted actual non-payment. By implication, the argument required that interest on arrears should be charged at a lesser rate.

The trial judge upheld this contention. If correct, the implication would be large indeed. It is disappointing therefore that no further answer has been obtained from the Court of Appeal. However, the author suggests that the more detailed scrutiny in the course of argument in that Court would ultimately justify a reversal of the judge's finding. Modern thinking on the topic of compound interest, as in *Sempra Metals*[6], shows that compound interest reflects commercial reality at all stages of a lending agreement. And in *Lordsvale Finance plc v Bank of Zambia*[7], Colman J not only restated the modern law of penalty in terms subsequently approved by the Court of Appeal[8], but also upheld a contract that provided for default interest at a rate 1% higher than the original contractual rate.

Ground 4: Extortionate Credit Bargain?

Mr and Mrs Meadows contended that the loan agreement constituted an extortionate credit bargain, within the meaning of CCA s.138. They accepted that the APR of 34.9% was an average (if not slightly less than average) rate amongst those prevailing in the non-status market at the date of agreement and they did not base their contention on the interest rate as such. Rather, they returned to the topic of default interest being charged at the same rate, combined with the high APR. The trial judge found that this combination did indeed constitute an extortionate credit bargain, on the basis that "he could recognise an elephant when he saw it".

Once more, it is suggested that the judge's finding was surprising. If the interest rate was not itself extortionate, how could its extension to arrears (which ex hypothesi was not a penalty) render it extortionate? And notably, CCA s.93 forbids a default rate higher than the contractual rate, without in any sense seeking to prohibit a default rate equal to the contractual rate. It is suggested that Goode para.47.29 is correct in its proposition that the common law test of penalty is more sensitive here than the test for extortionate credit bargain. Overall, the judge's recognition of an elephant may well be contested in further cases.

The Time Order

As described earlier in this Note, the trial judge would have exercised his jurisdiction to make a time order so as to re-write the loan agreement with retrospective effect. Moreover, he indicated that he would have specified a default interest rate equal to the special account rate. If correct, this jurisdiction would appeal to many/most borrowers, who could request its discretionary exercise in their favour, without any need to establish an extortionate credit bargain. In such circumstances, the absence of any such orders since 1974 is somewhat surprising.

In the event, it is suggested that close analysis of *Southern & District Finance Plc v Barnes Lewis*[9] not only provides guidance as to a prospective time order (as then under consideration), but also shows why CCA ss.129 and 135-6 do not permit a retrospective order; the key lies in the phrase in s.136 "in consequence of a term of the order". In the result, the author suggests that any claim in future cases to a retrospective jurisdiction will be rigorously challenged.

Adrian Palmer QC and Neil Levy appeared for the lenders in the Court of Appeal.

Adrian Palmer QC

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[6] [2005] EWCA Civ 389.

[7] [1996] QB 752.

[8] *Cine Bes Filmcilik v UIP* [2003] EWCA Civ 1669.

[9] [1999] GCCR 1935.

The Commercial Team

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Adrian Palmer QC (1972, QC 1992) Adrian's commercial practice covers contract, sale of goods, insurance, restraint of trade and professional negligence of solicitors, valuers and financial service providers. Adrian is currently leading John Virgo in a 400 strong group action against Equitable Life now proceeding in the Commercial Court in London which has been brought by a group of 'trapped annuitants'. Previously, Adrian has advised on various actions on behalf of financial advisers arising from alleged mis-selling of financial products.

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Brian Watson (1979) developed a professional negligence specialism out of a wide ranging common law and family property practice. His particular interests lie in lawyers' negligence - both transactional claims and litigation mishandling - the latter having inspired his book *Litigation Liabilities* (2002) of which plans for a second edition are underway. Among his recent work are familiar claims arising out of conveyancing negligence and the mishandling of personal injury and ancillary relief litigation, and a rarer case concerning the transmission of professional negligence claims on bankruptcy (*Mulkerrins v Pricewaterhousecoopers* [2003] UKHL 41).

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Malcolm Warner (1979) specialises in traditional chancery and commercial work. Recent cases have concerned proprietary estoppel, S 30(1)(f) of the 1954 Act, the finality of Notice to Complete, rectification of wills and estoppel arguments raised by one of the clearing banks where the appointment of its LPA receiver many years before was declared invalid. In addition Malcolm frequently advises on injunctions, property matters (especially commercial property and options) and a whole panorama of contractual disputes together with solicitors' negligence.

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Ralph Wynne-Griffiths (1981) is a member of TechBar and an adjudicator. He specialises in the areas of adjudication; professional negligence; contractual claims under the JCT and ICE forms of contract and employment disputes, including restraint of trade and dismissal and claims in the Employment Tribunal. He was co-author of *Surveyors' Liability: Law and Practice* (1998).

John Virgo

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John Virgo (1984) specialises in financial services product mis-selling and acted as lead counsel for the Royal College of Nurses and GMB Trades Unions in group proceedings over personal pension plan mis-selling. John is currently being led by Adrian Palmer QC in a 400 strong group action against Equitable Life now proceeding in the Commercial Court in London which has been brought by a group of 'trapped annuitants'. His publications include *Financial Advice and Financial Products* (Oxford University Press); *The IFA's Guide to the FSA Handbook; A Practical Guide to the FSA's Regulation of Mortgages* (City and Financial); and *Mortgage Regulation for Intermediaries and Compliance Officer's Handbook* (Lexis-Nexis).

Neil Levy

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Neil Levy (1986) specialises in banking disputes and advising on financial transactions. He has particular experience of domestic banking transactions, having worked as part of the Lloyds Bank in-house legal team from 1987 to 1992. His field of expertise also covers professional negligence in financial transactions, insolvency and commercial disputes. His recent cases have included disputes concerning the realisation of securities (*Corbett v Halifax*, 2002; *Edwards v Lloyds TSB*, 2004), receiverships and guarantees (*Triodos v Dobbs*, 2004 & 2005) and the enforceability of consumer credit agreements (*London North Securities v Meadows*, 2005). Neil is a contributor to two leading banking textbooks: *Paget's Law of Banking* and *Penn & Shea: The Law Relating to Domestic Banking*.

Martha Maher

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Martha Maher (1987) has wide experience in corporate and partnership disputes and in the fields of corporate and personal insolvency. Her practice embraces shareholder disputes, breach of directors' duties, unfair prejudice petitions and partnership and LLP disputes. She has been on the panel of Treasury Counsel for over 10 years in the field of directors' disqualification. She is a contributor to *Insolvency and the Enterprise Act 2002* (Jordans).

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Jeremy Bamford (1989) specialises in insolvency work. His practice also covers live company work e.g. *Dyment v Boyden* [2005] 1 WLR 792 (financial assistance), drafting shareholder agreements, shareholders' disputes and unfair prejudice petitions (a recent case in respect of UK's third largest cider brewery resulting in a multi-million pound settlement). In addition, Jeremy deals with schemes of arrangement and reductions of capital, directors' disqualification proceedings (*Re Uno/World of Leather* [2005] BCC 24; *Re Finelist* [2004] BCC 877; [2005] EWHC 603 Ch), bank recovery work and general commercial litigation. He contributed chapters (appointment of administrators by floating charge holders, conduct of administrations and exit routes) to *Insolvency and the Enterprise Act 2002* (Jordans) and contributes to *Mithani: Directors' Disqualification* (Butterworths), having had 10 years experience as Panel counsel for the Secretary of State.

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Richard Ascroft (1995) originally qualified in New Zealand (1990) where he practised for three years. He has developed a strong practice in commercial litigation with something of an emphasis on shareholder disputes and company matters generally but which also extends to supply of goods and services, enforcement of securities (acting both for and against lenders) and civil recovery claims. Recent cases include *Allscan Services Ltd v Dougland Support Services Ltd* [2003] EWCA Civ 61 (construction of written contract) and *Kranidiotes v Paschali* [2003] BCC 353 (CA) (s 459; valuation evidence). Richard has extensive experience of urgent, pre-emptive applications (freezing and other injunctions, orders for delivery up etc). In 2002 he was appointed Junior Counsel to the Crown and is regularly instructed by the Treasury Solicitor.

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Matthew Wales (1993) is a busy junior specialising in commercial litigation, including contractual disputes, property and property-related insolvency work. His commercial work mainly revolves around property-related topics including issues arising in commercial developments (such as easements, rights of way and boundaries), commercial leases and dilapidations. In addition Matthew has experience of contractual disputes. Recent work of interest includes a shareholder dispute in Cardiff Mercantile Court concerning ownership of a South Wales coal mine, and acting in an access dispute against parties represented by Herbert Smith. Matthew was a contributor to *Insolvency and the Enterprise Act 2002* (Jordans), often gives seminars and training to solicitors in the region, and spoke at the 2005 R3 regional conference.

Gerard McMeel

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Gerard McMeel (1993) specialises in commercial and financial disputes, with particular interest in supply, carriage and agency agreements, and expertise in negligent investment advice cases and claims for restitution. He was counsel for the investors in *Seymour v Caroline Ockwell & Co and Zurich IFA Ltd*. Other recent instructions involve "precipice bonds" or SCARPS, shared appreciation mortgages or SAMs and various domestic and off-shore investment contracts. Another recently reported case of his is *21st Century Logistic Solutions Ltd v Madysen Ltd* [2004] 2 Lloyd's Rep 92 where he acted for a whistleblower in a VAT "carousel fraud", which concerned the application of the rules of contractual illegality to the chain of sales. He is also Professor of Law at the University of Bristol and is working on a new text on contractual interpretation to be published in 2006.

Katie Gibb

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Katie Gibb (1999) joined Chambers in 2001 after completing her pupillage in London. Katie practises in a wide range of commercial disputes. She has developed a growing practice in relation to all types of contractual claim, sale and supply of goods and services and consumer credit. In particular, she undertakes work involving partnership and joint venture disputes, recovery and securities work for both lenders and borrowers and cases involving claims under guarantees and indemnities.

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Hugh Sims (1999) undertakes general commercial work, including sale of goods, breach of confidence, banking, shareholder actions, partnership disputes and professional negligence. Hugh has experience of cases of high value and complexity and is recognised as an established junior in the field of commercial litigation on the Western Circuit. He also enjoys a growing practice in commercial sports law disputes, as evidenced by his participation in the case of *Exeter City Football Club v Football Conference Ltd and Stevenage Borough FC Ltd*, (HC) The Times, February 12 2004; [2004] BCC 498 (s.459 petition challenging the "football creditors" rule, whether a s.459 petition is arbitrable and ancillary commercial disputes concerning the operation of football competition rules).

Jennifer Newstead

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Jennifer Newstead (2003) became a tenant at Guildhall Chambers in 2004 and undertakes general commercial work including banking, construction and insolvency law. She is a member of the Chancery Bar Association.

Banking law update

Proceeds of Crime Act 2002 - blocking bank accounts

A bank which suspected that its customer's account contained the proceeds of crime acted properly by reporting to the relevant authority in accordance with the POCA, blocking its customer's account and refusing to give any reason to its customer for doing so. That remained the position unless and until consent to the use of the account was given by the appropriate authority or the relevant time limits under s 335 expire. An application by the customer for an order that the account be unblocked was therefore dismissed. *Squirrell Ltd v National Westminster Bank Plc [2005] EWHC 664 (Ch) (22.4.05)*.

Guarantees - enforceability

The defendant guaranteed the liabilities of the bank's customer. The bank agreed that its customer would not be in default of its facility by failing to pay an agreed instalment if another guarantor (Gardiner) was called on to pay. The bank also agreed not to renegotiate this arrangement without the defendant's consent. The bank later varied the arrangement so that the customer would also be in default if a guarantee was not provided to replace Gardiner's guarantee. That variation was to the defendant's potential detriment as the new event of default could trigger his own guarantee liability. Since he had not consented to it, his guarantee was discharged under the rule in *Holme v Brunskill (1877)*. *Lloyds TSB Bank plc v Hayward [2005] EWCA Civ 466 (27.4.05)*.

A director's guarantee which was expressed to cover the company's liabilities under two specific loan agreements would have covered any later loan agreement which had merely varied the earlier loan agreements as that was contemplated by clauses in the earlier loan agreements and in the guarantee. But the guarantee did not cover the company's liabilities under a later loan agreement which went beyond a mere variation of the earlier loan agreements by providing increased funds on substantially different terms. The guarantor might be estopped from denying that the guarantee covered the later loan agreement, but that was a matter for evidence and had not been suitable for determination on an application for summary judgment. *Triodos Bank NV v Dobbs [2005] EWCA Civ 630 (24.5.05)*.

Consumer Credit Act 1974 - enforcement of loans and overdrafts

A CCA regulated overdraft agreement had fallen within the exemption in s 74 CCA from the need to be fully documented. The bank had notified the OFT of its intention to enter into such agreements for the purpose of the Determination made by the Director General under s 74. On its proper construction, condition (b) of the Determination (requiring the debtor to be notified in advance of the credit limit, interest rate, charges, and termination procedure) applies if the facility is expressly agreed. Condition (c) (requiring notice of the interest rate and charges) applies if the facility is provided by tacit/implied agreement. The condition (c) notice can be sent at any time up to 7 days after the end of 3 months from the time the agreement is made. In both conditions, the reference to charges does not include current account charges payable even if no facility exists. On the facts both conditions had been satisfied. *Coutts & Co v Sebestyen [2005] EWCA Civ 473 (28.4.05)*.

A CCA regulated credit agreement made by a pawnbroker but back-dated 3 months before the date on which it was signed was unenforceable because such agreements must allow the borrower a minimum of 6 months to redeem the pawn. By back-dating the agreement the parties had sought to contract out of this requirement and allow only 3 months to redeem. The CCA prohibits contracting out and the contract had to be regarded as made when it was signed. In addition, a document fee deducted immediately at source was wrongly included in the amount of credit and this also caused the agreement to be unenforceable. *Wilson v Robertsons (London) Ltd [2005] EWHC 1425 (Ch) (5.7.05)*.

A CCA regulated credit agreement required prior mortgage arrears to be paid off. Although it had not originally been the debtor's intention to borrow for that purpose, the sum loaned to pay off the arrears was held to be part of the credit, not part of the charges for credit, because by the time the agreement was signed the debtor had agreed to the arrears being paid off so as to make this part of the objective purpose of the transaction. However the amount advanced to pay a premium for insurance required as a condition of making the loan was a charge for credit, and since it had been wrongly included in the amount of credit the agreement was unenforceable. *London North Securities Ltd v Meadows [2005] EWCA Civ 956 (27.7.05)* - considered in detail on page 2 by Adrian Palmer QC.

Loan agreement - default

Under a loan agreement the lenders were entitled to issue a default notice if specified events of default occurred. On its proper construction, an event of default had occurred before the lenders served notice. But even if default had not then occurred, the lenders would have been able to rely on an admitted later default in the absence of an express or implied term that they would not give notice of default in circumstances where their resolution to do so was unreasonable or did not properly arise under the provisions of the loan agreement. *BNP Paribas v Yukos Oil Co [2005] EWHC 1321 (Ch) (24.6.05)*.

Cheques - conditional payment

The claimant had vacated premises and left behind a cheque which the defendant had given in payment of a debt. Since acceptance of payment by cheque suspended the underlying debt until the cheque was paid or dishonoured, the suspension implied by acceptance of the cheque had continued and the creditor had not been entitled to seek to enforce its security for the underlying debt. *Fusion Interactive Communications Solutions Ltd v Venture Investment Placement Ltd [2005] EWHC 736 (Ch) (10.5.05)*.

Financial Ombudsman - basis of award

The claimant negligently invested a client's funds in a high risk fund contrary to the client's wishes. The fund was later depleted as a result

of a fraud. The Financial Ombudsman made an award requiring the claimant to compensate the client for loss caused by the fraud, although the loss had not been foreseeable and was irrecoverable under English law on SAAMCO principles. The claimant's application for a judicial review was dismissed. Having taken into account English law, the Ombudsman had been entitled not to follow it because section 228(2) FSMA 2000 provides for him to determine complaints by reference to what is in his opinion fair and reasonable. *R v Financial Ombudsman Services Ltd [2005] EWHC 1153 (Admin) (19.5.05)*.

Investment advice - misrepresentation

The claimant was induced to invest in Russian Treasury bonds on the faith of misrepresentations by the defendant which marketed the product that investors would have an interest in the underlying bonds and have a say in how the investment was to be liquidated in the event of default. The claimant succeeded in its claim for damages. The fact that the claimant's director later signed terms and conditions and a risk disclosure statement did not prevent the claimant from relying on the misrepresentations since he had only glanced through them not expecting them to contain any unexpected provisions making the nature of the product so fundamentally different. *Peekay Intermark Ltd v ANZ Banking Group Ltd [2005] EWHC 830 (Comm) (25.5.05)*.

Charges on book debts - fixed or floating

A debenture expressed to create a fixed charge on book debts created a floating charge if there was no restriction on the company's ability to withdraw from its bank account funds representing the book debts it had collected. The decision to the contrary in *Siebe Gorman v Barclays Bank* (1979) was wrong. The Court of Appeal had also been wrong in *Re New Bullas Trading* (1994) to decide that a charge can float over a book debt but fix on its proceeds. Nor were the circumstances sufficiently exceptional to justify the House of Lords expressing its decision as not having retrospective effect. *National Westminster Bank Plc v Spectrum Plus Ltd [2005] UKHL 41 (30.6.05)*.

Mortgages - sale of ransom strip

In selling mortgaged property which included a ransom strip needed to gain access to adjoining development land, a mortgagee must obtain the best price reasonably obtainable from the owner of the ransomed land. That can be 33% - 50% of the development value of the ransomed land. On the facts the bank had not been in breach of duty in selling at £60,000 to the adjoining owner who later sold the ransomed land for £527,000, because the adjoining owner had not been willing to pay more than £60,000 and the later sale at £527,000 was an exceptional price for the ransomed land which the bank had rightly believed to be worth no more than £300,000. *Freeguard v RBS Plc [2005] EWHC 978 (Ch) (19.5.05)*.

Mortgages - title to sue

The fact that a lender had transferred its mortgage portfolio to a special purpose vehicle (SPV) had not divested it of the right to seek possession of the mortgaged property because the lender had remained the registered proprietor, so legal title remained vested in it as trustee for the SPV. The borrowers' claim that the lender had exercised its power to vary the mortgage interest rate improperly was rejected. Even if the lender had used 'old book' borrowers to finance new borrowers, that would have been a legitimate commercial basis on which to set its rates. *Paragon Finance Plc v Pender [2005] EWCA Civ 760 (27.6.05)*.

Mortgages - limitation

The limitation period for a lender to bring a claim for the shortfall after sale of mortgaged property is 12 years under s 20 Limitation Act 1980. Although the mortgage deed did not expressly make the whole balance payable on default, on its proper construction the balance had become payable when the lender first had the right to exercise the power of sale which was expressed to be one month after the debtor first defaulted in paying the monthly instalments. That was more than 12 years before the proceedings were started, so the claim was time-barred. *West Bromwich BS v Wilkinson [2005] UKHL 44 (30.6.05)*.

Letters written by a borrower in an attempt to reach agreement about repayment of a mortgage shortfall were to be regarded as without prejudice communications and privileged in the same way as letters attempting to settle a claim would be. The letters were therefore inadmissible and could not be relied on as acknowledgements of the debt which re-started the limitation period. As a result the lender's claim to payment of the mortgage shortfall was time barred. *Bradford & Bingley Plc v Rashid (CA) (22.7.05)*.

Mortgage fraud - solicitor's liability

A husband forged his wife's signature on a transfer of property which he simultaneously mortgaged to Woolwich plc. Woolwich accepted that its mortgage was ineffective, but succeeded in a claim to be subrogated to an earlier valid mortgage, and to have an equitable charge on the husband's beneficial interest. The defendant solicitors had acted for Woolwich in the transaction. The wife's claim against them for negligence failed. They owed her no duty of care as they had not acted for her or had reason to believe her signature was forged. Nor had the transaction caused her loss as the Woolwich mortgage had been ineffective. She had not lost the chance to obtain a transfer of the husband's beneficial interest in ancillary relief proceedings because such proceedings had not been in contemplation at the time of the transaction. *Woolwich plc v Jones-Dunross [2005] EWHC 1488 (Ch) (13.7.05)*.

Administration - improper purpose

An application by a company for an administration order was refused where the prime purpose was to prevent a receiver previously appointed by a secured creditor selling the company's land at a lower price than the company wished. That was not within the statutory purposes of administration and even if the administration could be said to be intended to rescue the company, the order would be refused in the court's discretion. *In re Doltable Ltd [2005] EWHC (Ch) (13.6.05)*.

Administrator - liability for wrongful interference

The court would not strike out a claim that joint administrators of a company were personally liable for wrongfully interfering with a contract between the company's parent and the claimant, by causing the company to retain materials which the parent was contractually obliged to deliver up to the claimant. It could not be said that the claim stood no real prospect of success when on the evidence the administrators had refused to deliver up the materials to the claimant knowing of the parent's obligation to do so. *SCI Games Ltd v Argonaut Games Plc [2005] EWHC (Ch) 1403 (5.7.05)*.

Administration - administrator's expenses

Payments in lieu of notice and protective award payments under s 189 Trade Union Labour Relations (Consolidation) Act 1992 which are payable in respect of adopted employment contracts do not fall within para 99, Sch B1 of the Insolvency Act 1986, so they do not take priority over an administrator's expenses when the administrator vacates office. *Re Globe Worsted Co; Re Granville Technology Ltd [2005] EWCA Civ (9.8.05)*.

Neil Levy

Some key dates

11.5.05 EU Directive (2005/29/EC) on Unfair Business to Consumer Commercial Practices adopted.

1.7.05 The Insolvent Partnerships (Amendment) Order 2005 in force.

1.7.05 British Bankers Association launched revised Statement of Principles for lending to small businesses.

19.7.05 First reading of Consumer Credit Bill in House of Lords. Second reading due 24.10.05.

19.7.05 Law Commission published draft Company Security Regulations designed to implement its recommended reforms of company charges.

19.7.05 EU Commission Green Paper on Mortgage Credit in the EU published.

Financial services law update

Seymour v Caroline Ockwell & Co and Zurich IFA Ltd

On 13 May 2005 a landmark judgment was handed down by the High Court in *Seymour v Caroline Ockwell & Co and Zurich IFA Ltd.*[1] The decision has implications for both the independent retail and product provider sectors of the UK financial services market. This was swiftly recognised by the Financial Services Authority in its July 2005 paper, *Treating Customers Fairly – Building on Progress*[2], in which the Authority indicated the judgment would be examined in the context of its regulation of producers and distributors of investment products.

The facts

On 4 July 2000 Mr and Mrs Seymour sold their farming business and premises at Round Robin Farm for £1.4m. The proceeds were required to be re-invested in qualifying business assets by July 2003 in order to benefit from capital gains tax ("CGT") roll over relief. In the meanwhile, the Seymours were looking for a short term, safe home for the sale proceeds which offered some investment return. They sought advice from Caroline Ockwell & Co, an independent financial adviser. Miss Ockwell presented a range of initial investment proposals, including a Building Society deposit account. She also made enquiries of Zurich IFA Ltd ("Zurich") which was responsible for marketing Zurich products (including the Allied Dunbar and Eagle Star brands) to financial advisers for on-sale in appropriate cases to their clients.

The Zurich representative with whom Miss Ockwell dealt, a Miss Clark, suggested to her to a portfolio bond offered by the Zurich group (and in particular Allied Dunbar's off-shore operation on the Isle of Man) which served as an insurance wrapper for (in this instance) off-shore investments. One such off-shore fund which Zurich had agreed to house within the wrapper comprised shares in the Imperial Consolidated Alpha Plus Fund ("the IC Fund") located in the Bahamas. A detailed brochure produced by the IC Fund described a complicated series of arrangements in which the share

[1] [2005] EWHC 1137 (QB); handed down by HHJ Havelock-Allen Q.C. in the Bristol Mercantile Court on 13 May 2005. The case is to be reported in [2005] *Professional Negligence and Liability Reports*.

[2] FSA, *Treating Customers Fairly – Building on Progress* (July 2005), p. 41.

purchase money was loaned back to UK firms of solicitors via a number of IC subsidiaries to finance "no-win, no fee" personal injury litigation. Guaranteed returns of 15% were promised and the scheme was asserted to be entirely safe and covered by a variety of complex re-insurances.

Miss Ockwell raised questions about the nature of the scheme with both Miss Clark and the IC Fund manager. Miss Clark's contribution was to indicate that she understood the investment was "low risk" and she believed her employer would have "gone through the books" of Imperial Consolidated to satisfy itself as to the status of Imperial Consolidated before including them in the range of acceptable products able to be linked to the wrapper. Miss Ockwell duly promoted the investment to the Seymours who in consequence invested £500,000 in it. Shortly before the expiry of the cooling off notice given in relation to the inception of the bond, Zurich acquired knowledge that problems were being experienced with the IC Fund and a number of other product providers had ceased to recognise it for inclusion in their portfolio bonds. Zurich issued an internal memorandum declining to accept further investments into the fund and to contact advisers with outstanding "pipe-line" business to inform them of this. Miss Ockwell was not contacted and the transaction accordingly proceeded so far as the Seymours were concerned. In July 2002 the fund collapsed and was placed into administrative receivership; all remaining investors (including the Seymours) lost the entire value of their investments.

The investor's claim against the financial adviser

The Seymours brought proceedings against (1) Caroline Ockwell and (2) Zurich IFA Ltd, in each instance alleging that they had breached a duty of care to protect them against economic loss. The claim against Miss Ockwell involved conventional allegations of mis-selling i.e. sale of an unsuitable product and breaches of section 62 of the Financial Services Act 1986 and the PIA (Adopted Rules of FIMBRA) regime relating to the advisory duties of independent financial advisers. It succeeded in full. In addition Miss Ockwell was found liable for improperly promoting an offshore unregulated collective investment scheme under the (perhaps less well-known) sections 76 and 95 of the 1986 Act.[3]

The investor's claim against Zurich

The claim against Zurich IFA Ltd was novel in that although there had been no direct contact between Miss Clark and the Seymours, it was contended the description of Imperial Consolidated as "safe" by Miss Clark was inaccurate and Zurich ought accordingly to have appreciated that offering such an endorsement to the scheme (in particular in not retracting this endorsement after Zurich had decided not to process new business with it) was negligent; so the argument ran, Miss Clark ought to have foreseen this would be passed on to the Seymours and thus Zurich owed them a direct duty of care. The claim proceeded by analogy with *White v Jones*[4], as applied in the financial services context in cases such as *Gorham v British Telecommunications plc.*[5] This claim failed; the intervention of the independent financial adviser in the form of Miss Ockwell was considered sufficient to negate any direct product provider duty to the Seymours.

The financial adviser's claim against Zurich

In a separate claim brought by Miss Ockwell against Zurich, however, she sought (essentially) a contribution/indemnity in respect of any liability to the Seymours. This case succeeded as to 80%, the Court holding that the endorsement of the product if correct at the outset had ceased to be correct shortly before the cooling off notice had expired; Zurich ought accordingly to have notified Miss Ockwell at once that it had suspended further investments in the fund; had it done so, the Court held, this would have been communicated to the Seymours who would have pulled out and invested elsewhere.

Analysis

Seymour v Caroline Ockwell & Co is the first reported case of an attempt to make a product provider directly liable to an investor where no advice was given directly by any representative of the life office. Although that claim failed, the potential for liability now clearly exists in any case where incorrect information or advice as to the product is conveyed to the investor's independent financial adviser. Undoubtedly part of the reason for the Court concluding that Zurich was better placed to warn Miss Ockwell as to their concerns with the IC Fund lay in the comparative size and resources of the two concerns. Although Miss Ockwell had sought to avoid liability by describing herself as a "one man band" of whom less should be expected in terms of advice on the product than a larger practice of independent financial advisers, that argument unsurprisingly failed. Put shortly, compliance with the regulatory conduct of business rules set a minimum standard below which no IFA was entitled to fall (however small). It is also true, however, that a larger firm with better resources may have identified that the investment was clearly not "low risk" from the outset and dismissed it as unsuitable for recommending to clients such as the Seymours. The distinction may yet therefore prove significant in future cases where contribution is sought from product providers in similar circumstances.

Gerard McMeel represented Mr and Mrs Seymour
John Virgo appeared for Zurich IFA Ltd.

John Virgo

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[3] Corresponding provisions are to be found in the Financial Services and Markets Act 2000, which superseded the 1986 Act in December 2001 (about a year after the advice to the Seymours).

[4] [1995] 2 AC 207.

[5] [2000] 1 WLR 2129.

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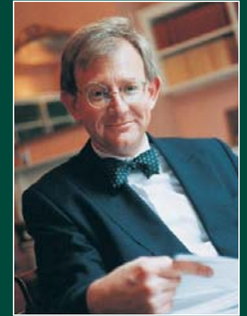

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