

FINANCIAL SERVICES DISPUTES - DEVELOPMENTS OF NOTE

WHAT DO YOU NEED TO KNOW? #5

During the course of the Coronavirus pandemic, we have produced a number of short notes which have looked at developments which may be of interest to those dealing with financial services disputes. After a short break since our last publication, this note looks at developments which have taken place over the Summer. We do not solely focus on COVID-19 related issues in this update and this explains the change in title.

RECENT CASE LAW

Recent decisions which have been particularly noteworthy include:

1. In *Pengelly v Business Mortgage Finance 4 PLC [2020] EWHC 2002 (Ch)*, the High Court considered the issue of secret commissions received by a mortgage broker. On appeal, Marcus-Smith J concluded: (i) there was a fiduciary relationship between the Claimant and his broker [69]; (ii) the broker's failure to disclose the amount of a commission received from a lender amounted to a breach of fiduciary duty [78]; (iii) the lender was "equally accessory to that breach" [78]; and (iv) "[80] in short, the breach of fiduciary duty committed by [the broker] was both extremely serious and resulted in a non-disclosure, not a partial disclosure, of the secret commission received by [the broker] from [the lender]. This was not, in short, a "half-secret" commission, but a secret commission or bribe, and in my judgment rescission is a remedy to which [the Claimant] is entitled, provided he is able to make counter-restitution... [83] ... subject to Mr Pengelly making satisfactory proposals for counter-restitution, I will make an order setting aside the Mortgage".

The full decision of 28 July 2020 can be found by clicking [here](#).

2. In *Kerrigan and 11 others v Elevate Credit International Limited (t/a Sunny) (in Administration) [2020] EWHC 2169 (Comm)*, the High Court considered complaints in relation to payday lending schemes. Following the trial, and ahead of judgment being handed down, a Notice of Appointment of Administrators was filed in relation to Sunny and accordingly, the Judgment concludes without reaching final conclusions in relation to the individual claims. The lengthy judgment does though address how Courts may go on to deal with claims of irresponsible lending and unfair relationships in a "high cost short term credit" context.

The full decision of 5 August 2020 can be found [here](#).

3. In *CFH Clearing Limited v Merrill Lynch International* [2020] EWCA Civ 1064, the Court of Appeal determined an appeal arising from the “de-pegging” of the Swiss Franc from the Euro in January 2015. The Claimant in this case had fared badly from currency exchange transactions and contended that the Defendant should re-price the transactions at an “Official Low” set by the main platform for trading Euros and Swiss Francs. The Court of appeal dismissed the Claimant’s appeal and held that: (i) “the parties had agreed that their FX transactions would be governed by a standard ISDA 2002 Master Agreement...” [37]; (ii) “It follows that the 27 transactions were governed by a detailed contract which was on industry standard terms, reflected market practice” [40]; and (iii) “CFH’s contention that “market practice” was incorporated into the 27 transactions, overriding the express pricing and settlement provisions of the ISDA Master Agreement, fails on the basis of the express scope of [the Defendant’s] Terms” [43].

The full decision of 14 August 2020 can be found [here](#).

DRAFT DEBT RESPITE SCHEME (BREATHING SPACE MORATORIUM AND MENTAL HEALTH CRISIS MORATORIUM) (ENGLAND AND WALES) REGULATIONS 2020

On 15 July 2020, the government published a draft version of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020. The draft version provides that the Regulations will come into force on 4 May 2021 (save for the provisions identified in Section 1 (3)-(7) of the Regulations). A copy can be found [here](#).

The explanatory memorandum to the draft Regulations provides: “*This instrument establishes the first part of a debt respite scheme for people in problem debt. This part gives eligible people in problem debt who receive professional debt advice access to a 60-day period in which interest, fees and charges are frozen and enforcement action is paused. This moratorium period is often referred to as ‘Breathing Space’. For people receiving mental health crisis treatment, this instrument establishes an alternate route by which the protections of a moratorium may be accessed and ensures that the protections are in place for the duration of their crisis treatment.*” The full explanatory memorandum is available [here](#).

A “qualifying debt”, for the purposes of the Regulations is defined in Section 5 as being “(a) any amount which a debtor is liable to pay under or in relation to – (i) an order or warrant for possession of the debtor’s place if residence or business, (ii) a court judgment, or (iii) a controlled goods agreement; (b) any debt owed or liability payable to the Crown”.

POSSESSION ACTIONS AND COVID-19

The stay of possession proceedings due to Coronavirus has been extended until 20 September 2020 by virtue of the provisions in The Civil Procedure (Amendment No.5) (Coronavirus) Rules 2020. The explanatory notes provide that: “*These Rules amend the Civil Procedure Rules 1998 (SI 1998/3132) to amend rule 55.29, which provides that possession proceedings and enforcement proceedings by way of writ and warrant for possession are stayed until 23rd August 2020. This amendment extends the stay imposed by this temporary rule until 20th September 2020. This applies to proceedings that were stayed immediately prior to the date that rule 55.29 first came into force, those brought after that rule came into force and those brought after this amendment comes into force and on or before 19th September 2020*”. A copy can be found [here](#).

For regulated firms, this will likely be of little consequence, given the FCA’s continued guidance on “Mortgages and coronavirus” (last updated on 31 July 2020) continues to be that: “*Firms should not commence or continue repossession proceedings against customers before 31 October 2020, given the unprecedented uncertainty and upheaval they face, and Government advice on social distancing and self-isolation. This applies irrespective of the stage that repossession proceedings have reached and to any step taken in pursuit of repossession. Where a possession order has already been obtained, firms should refrain from enforcing it.*” Developments are likely to be seen over the course of September 2020, as firms will require greater visibility on their enforcement options moving forward.

Practice Direction 55C has also recently been published. This Practice Direction sets out what will be required before possession proceedings can be resumed. Time will tell what the commencement date will be for this Practice Direction, though early indications are that once implemented, the Practice Direction will continue through to March 2021. A copy of the Practice Direction can be found [here](#).

Key points to observe are:

- litigants will be required to file a written “reactivation notice” to continue a possession claim that has been stayed owing to the earlier stay on possession actions. A reactivation notice will not be required if a final possession order has been made or the claim was brought on or after 3 August 2020;
- the reactivation notice must “*except in proceedings relating to an appeal, set out what knowledge that party has as to the effect of the Coronavirus pandemic on the Defendant and their dependants*”; and
- in any claim brought on or after 3 August 2020, Claimants must take to the possession hearing two copies of a notice “*setting out what knowledge that party has as to the effect of the Coronavirus pandemic on the Defendant and their dependants*”. This notice must also be served on the Defendants in advance of the possession hearing.

OTHER AG BRIEFINGS

Other articles include:

- Green Loans and Sustainability Linked Loans: What is the difference?- click [here](#).
- The Brief Case – Summer 2020- click [here](#).
- Financial Conduct Authority’s Business Interruption Insurance Test Case – click [here](#).



SALLY EMERTON

Partner

+44(0) 7764 256455

sally.emerton@

addleshawgoddard.com



STEVE WALPOLE

Managing Associate

+44(0) 7742 848847

steve.walpole@

addleshawgoddard.com

addleshawgoddard.com