

9 February 2005

IN THE BATH COUNTY COURT

Case Number: EV300106

Claimant: DAVID JOHN CARTWRIGHT

Defendant: Miss LYDIA FAY

JUDGMENT

The Claim

Miss Lydia Fay ("Miss Fay"), the Defendant in this action, and Colonial Preservation & Construction Ltd entered into a JCT Building Contract for a Home Owner/Occupier on 30 May 2001. Clause K of the contract between the parties allowed either the customer or the contractor to start court proceedings to settle any disputes or alternatively to have disputes decided by an adjudicator appointed under an adjudication scheme run by the Royal Institute of Chartered Surveyors (RICS) or the Royal Institute of British Architects (RIBA).

Following a request by Withy King, the solicitors acting on behalf of Colonial Preservation & Construction Ltd, the Claimant Mr David John Cartwright ("Mr Cartwright") was duly appointed adjudicator by RICS on 19th February 2002 and issued his terms on 21st February 2002. Under the RICS scheme his fees could not exceed £750.00 (Rule 10) with the apportionment of those fees being at his discretion (Rule 11).

Mr Cartwright issued his decision on 13th March 2002 with an invoice to the parties of the same date apportioning his fee on a 50/50 basis. On 15th March 2002 Mrs Fay's solicitors asked to amend an alleged slip in respect of VAT, but having received submissions from both parties Mr Cartwright advised the parties on 20th March 2002 that there was no slip to amend.

On 24th June 2002 the 50% of the fee due from Colonial Preservation & Construction Ltd was paid. The amount of £282.37 plus VAT of £49.42 totalling £331.79 due from Miss Fay remains outstanding. Mr Cartwright seeks the outstanding balance of his fee plus interest pursuant to the provisions of s 69 of the County Court Act 1984 at the rate of 8% per annum.

The Defence

The Defence was pleaded on the basis that as Miss Fay did not have sight of the Rules upon which Mr Cartwright's contract to adjudicate was founded, he did not have jurisdiction to make her liable for a proportion of his fee. Alternatively Miss Fay claimed that she was a "consumer" and clause K 3 of the JCT contract as to adjudication and the rules thereunder were unfair and not binding under Regulation 8(1) of *The Unfair Terms in Consumer Contracts Regulations 1999*

The hearing

I heard the case on 1st February 2005 for some 2 hours and in view of its general importance for JCT contractual arrangements and the number of cases to which I was referred, I reserved judgment. Mr Cartwright was represented by Mr Wynne-Griffiths of Counsel and Miss Fay by her Solicitor Mr Chapman. I would like to thank both of these gentlemen for their helpful and detailed presentation of the facts and the Law.

I heard oral evidence from:

Mr Anthony Paul McKenty, the employee of Colonial Preservation & Construction Ltd who negotiated the terms of the contract with Miss Fay and was in charge of the work at her premises,

Miss Lydia Fay, and Mr David Conradi, a friend of Miss Fay who was present when the contract was signed.

In addition there was a witness statement from Mr Cartwright which was not challenged.

Issues

The issues were

- is Mr Cartwright entitled to claim against Miss Fay under the contract, although she was not actually a party to it
- were the adjudication rules incorporated into the contract
- was Miss Fay a "consumer" and entitled to rely on *The Unfair Terms in Consumer Contracts Regulations 1999*
- if she was a consumer, is clause K 3 of the contract ("if the customer or the contractor chooses adjudication to decide disputes they both accept that the cost rules and procedures involved will become part of this contract") or the rules thereunder unfair and not binding under Regulation **8(1)** of *The Unfair Terms in Consumer Contracts Regulations 1999*
- did Mr Cartwright act outside his jurisdiction and as a result was not entitled to his fee?

Is Mr Cartwright entitled to claim against Miss Fay under the contract, although he was not actually a party to it?

The Claimant relies upon Section 1 (1) of the *Contracts (Rights of Third Parties) Act 1999* which provides that:

"a person who is not a party to a contract ("third party") may in his own right enforce a term of the contract if-

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection 1 (b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

Under the adjudication rules, Mr Cartwright is given an express right to impose liability for all or part of his fee on one of the parties in his decision, which the parties are obliged to comply with under their contract. Rule 13 provides that the adjudicator may take proceedings against the party responsible for paying his fee if that party does not pay. **I find that if the contract incorporated the adjudication rules then by virtue of those rules It expressly provided that Mr Cartwright might enforce the term which related to payment of his fees and that there was no intention that the parties did not intend the term to be enforceable by the third party.**

Were the adjudication rules incorporated Into the contract?

Miss Fay does not dispute that she signed the contract containing the provisions for adjudication in clauses K 2 and K 3. *Chitty on Contracts 29th Edition* says:

"where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will ordinarily be bound by the terms of the written agreement whether or not he has read them and whether or not he is ignorant of their precise legal effect'.

Miss Fay complains that she did not have notice of the adjudication rules at the time that she signed the contract. In law a party who signs a contract to signify her acceptance is taken to agree to all of the terms printed on the contract, whether she has read them or not. The printed terms may by express reference, as in this case, incorporate other provisions which then become terms of the contract. Where the terms are incorporated by the terms of an agreement which is signed, the question of notice - which is material when no contract document is signed - does not arise. In *L'Estrange v Graucob* 1934 2 KB 394 pages 402-3 Lord Justice Scrutton said:

"In *Parker v. South Eastern Railway Company* Meilish L.J. laid down in a few sentences the law which is applicable to this case. He there said: 'in an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents.' Having said that, he goes on to deal with the ticket cases [and then continued] when a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not".

Miss Fay contends that she was pressured into signing the contract without understanding its full terms, and that on that ground they are not binding upon her. However in her evidence she accepted she had the contract for some time but put it "to one side until Mr McKenty pestered me to sign. The meeting [with Mr McKenty] probably took 20 minutes [Note: Mr Conradi in his evidence said it probably took 40 minutes]. An interval of time had occurred. I accept I had plenty of time to read the contract. I accept I could have got copies of the Rules from RICS or RIBA."

I find as a fact that Miss Fay was not put under pressure to sign, that she had ample time to consider the contract, that she could have obtained a copy of the relevant Rules but chose not to do so. It follows that she is bound in accordance with the principle enunciated in *L'Estrange v Graucob*.

Was Miss Fay a "consumer" and entitled to rely on *The Unfair Terms In Consumer Contracts Regulations 1999*?

Mr Wynne-Griffiths contended that as Miss Fay was an interior designer by profession, had business dealings in a number of properties, made payment under the contract from a business account and probably only lived in the property covered by the JCT contract (1 Cavendish Place) for a short period in order to benefit from Capital Gains Tax exemption, then when she entered into this contract it was part of her normal business. This would mean that she was not a consumer within the definition of section 3 of *The Unfair Terms in Consumer Contracts Regulations 1999*. There was also a letter from her solicitor suggesting he thought she was not a residential occupier.

However Miss Fay's evidence was quite clear that the property was being renovated for her own personal use and that after completion of the works she resided there for some 2 years. In my view it cannot be right that a person in a particular line of business cannot be a consumer within the meaning of the Regulations when engaged in a personal activity. **I find as a fact that Miss Fay was engaged in this contract not as part of her business activities but in a personal capacity and therefore was a consumer within the meaning of the Regulations.**

Is clause K 3 of the contract ("If the customer or the contractor chooses adjudication to decide disputes they both accept that the cost rules and procedures Involved will become part of this contract") or the rules thereunder unfair and not binding under Regulation 8(1) of *The Unfair Terms In Consumer Contracts Regulations 1999*?

The claim is made under a contract between a supplier and a consumer. The terms were not individually negotiated and the Court must apply the tests of fairness and good faith under regulation 5(1) as interpreted in *D-G of Fair Trading v first National Bank* 2002 1 AC 481 page 494 where Lord Bingham of Cornhill says:

“A term falling within the scope of the Regulations is unfair if it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the Regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties’ rights and obligations under the contract. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the Regulations seek to address. The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer’s necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice.

Regulation 4(1) lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the Regulations are designed to promote.”

In claiming that the adjudication clause was unfair, Miss Fay sought to rely on the judgment of His Honour Judge Toulmin CMG, QC in *Gennaro Maurizio Picardi v Paolo Cuniberti and Aud Cuniberti* [2002] EWHC 2923 (OB) (*“Picardi”*). In *Picardi* Judge Toulmin had to consider upon what terms the claimant architect had been engaged by the defendants, and in particular whether, as the claimant contended, he had been engaged on the RIBA Conditions of Engagement. Judge Toulmin found that the claimant had not been engaged on those terms. Had he found that the claimant had been engaged on the RIBA Conditions of Engagement issues would have arisen as to whether the provisions in those terms for adjudication and against the withholding of payment of fees were unfair for the purposes of the 1999 Regulations. Because the point as to unfairness had been argued Judge Toulmin dealt with it in his judgment, but, understandably, somewhat briefly and his comments are *obiter*.

I distinguish *Picardi* because in that case there was no signed contract and Mr Picardi was in a position of trust advising Mr and Mrs Cuniberti. Further *Picardi* was not even cited in the recent case of *Westminster Building Company Ltd v Andrew Beckingham* [TCC 8 December 2003/20 February 2004].

The fairness of an adjudication clause was considered by His Honour Judge Moseley QC in *Lovell*

Projects v Legg & Carver [2003] BLR 452 at paragraphs 24-31. Although that case concerned a different form of contract - the JCT Agreement for Minor Building Works 1998 Edition, which includes provision for adjudication and its procedure - it deals with a number of points which also arise here. Judge Moseley says:

24 Regulation 4(1) of the regulations provides that the regulations apply "in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer". Regulation 3(1) defines a "seller or supplier" as "any ... legal person who, in contracts covered by these regulations, is acting for purposes relating to his trade". It is conceded by the contractor that the contractor is a seller or supplier for the purposes of the regulations. In the same regulation "consumer" means "any natural person who in contracts covered by these regulations is acting for purposes which are outside his trade, business or profession".

25 Regulation 5(1) provides:

A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

26 Regulation 8(1) provides:

(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer

(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

27 Regulation 5(1) (*supra*) contains a number of different elements some of which are supplemented by other parts of the regulations. These include:

(1) The term must be one 'which has not been individually negotiated. Regulation 5(2) provides that "a term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term".

(2) Regulation 5(5) provides that Schedule 2 to these regulations contains an indicative and non exhaustive list of the terms which may be regarded as unfair'. Schedule 2 repeats those words as a heading and lists in a number of sub- paragraphs terms which may be regarded as unfair under the introductory words "terms which have the object or effect of. . . ". The employers rely particularly on paragraph (q) of the schedule (Mr Stansfield's skeleton argument paragraph 26) which provides:

Excluding or hindering the consumers right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

I do not regard paragraph (q) as having any relevance to those terms in the minor works contract which provide for adjudication. Those terms do not exclude or hinder the consumer's right to take legal action or exercise any other legal remedy. On the contrary an adjudication only binds the parties until the dispute or difference is resolved by legal action arbitration or agreement (supplemental condition D7.1). The terms do not require the consumer to take disputes exclusively to arbitration. Nor do they restrict the evidence available to him or alter the burden of proof. In any case Schedule 2 simply sets out a list of examples of terms which "may. . .be regarded as unfair. In my judgment the word 'may' does not confer any discretion. It simply introduces terms which may possibly qualify as unfair if the other requirements of Regulation 5(1) are satisfied.

(3) Regulation 6(1) refers to various matters which the court must take into account when assessing whether or not a term is unfair. It provides: the unfairness of a contractual term shall

be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract...

(4) Finally Regulation 5(1) (quoted in paragraph 25 above), a complex provision which contains numerous sub elements which it is difficult succinctly to disentangle. In my judgment these words set out a definition of what is or is not an unfair term for the purposes of the regulation. The words 'shall be regarded as unfair at first sight' appears to give rise to two separate categories, those which the court may find to be "unfair terms for reasons which are not listed in the regulation and those terms which the court must treat as unfair terms because they satisfy the requirements of the regulation. I do not think that there are two such classes of unfair terms. The regulations update earlier regulations (The Unfair Terms in Consumer Contracts Regulation 1994) in which the equivalent regulation (Regulation 4(1)) undoubtedly sets out a definition introduced by the words "unfair term means". It was so treated by the House of Lords in *Director General of Fair Trading v First National Bank* [2002] 1 AC 481. There it is described by Lord Bingham as "the test" (at page 494) and by Lord Steyn (at page 499) as a regulation which implements article 3(1) of the relevant European Council Directive 93/13/EC (OJ1993L95 page 29). It has not been argued that the 1999 Regulations alter the law so as to provide for two categories. It follows in my judgment that to be an unfair term a term must cause a significant imbalance in the parties rights and obligations arising under the contract to the detriment of the consumer, contrary to the requirement of good faith.

To summarise from the above:

At paragraph 27(2) Judge Moseley referred to Schedule 2 which sets out a list of terms which 'may be regarded as unfair', including at paragraph (q) terms which "exclude or hinder a consumer's right to take legal action or exercise any other legal remedy ... ' Judge Moseley held that the adjudication provisions did not exclude or hinder the consumer's right to take legal action etc because adjudication only bound the parties until the dispute was resolved by legal action or agreement. The same applies in this case - see rule 22.

At paragraph 29 Judge Moseley also considered the wider issue under regulation 5(1) of whether the adjudication provisions caused a significant imbalance in the parties' rights and obligations to the detriment of the consumer. In his judgment, there was no imbalance because the adjudication provisions applied equally to both parties.

Most recently in *Westminster Building Company v Beckingham* [2004] BLR 163 at paragraphs 29-32 His Honour Judge Thornton QC relied upon and followed Judge Moseley's observations regarding adjudication. That case concerned a contract for the refurbishment of a residential house which was held to have been performed under the terms of the JCT Intermediate Form of Contract which provided by the adjudication of disputes between the parties.

I make the following findings with regard to *The Unfair Terms in Consumer Contracts Regulations 1999*:

- 1 The contract the subject of this action was a contract between a supplier and a consumer (reg. 3)
- 2 If the contract contained unfair terms the regulations would apply (reg.4)
- 3 The contractual term as to adjudication was not individually negotiated but adopting HHJ Moseley's reasoning above It did not cause a significant imbalance to the detriment of Miss Fay and In particular it did not exclude or hinder her right to take legal action or exercise any other legal remedy (Sched.2 q)
- 4 The JCT contract is specifically designed for use by consumers and it has been drafted to be as clear and straightforward as possible. The contract states that details of the adjudication rules and procedure are freely available from RICS and RIBA and how copies may be obtained by post, telephone, fax and e-mail. The details of the procedure are readily accessible. Requesting the

customer to sign a contract which provided clear directions as to how such terms could be obtained did not breach the requirement of good faith.

5 The contract did not therefore contain unfair terms.

Finally, did Mr Cartwright act outside his Jurisdiction and as a result was not entitled to his fee? In a letter from her solicitors, McCloy & Go, dated 28th February 2002, Miss Fay disputed Mr Cartwright's jurisdiction to determine the claim for payment for additional work and purported to engage in the adjudication process only on a without prejudice basis. However that letter states:

"Our client has instructed us that she will take part in the adjudication proceedings without prejudice to her contention that you do not have the necessary jurisdiction to decide the dispute referred to you by the Claimant. In short, Miss Fay shall not consider herself to be bound to comply with any decision that you may make.

Our client is of the view that your jurisdiction extends only to deciding disputes that arise out of the contract between the parties and that in this case clearly defines the work to be carried out. The conditions of the contract, again quite clearly (at section 4 thereof, state how changes to the work may be agreed between the parties and incorporated into the contract.

It must follow that if a dispute that is referred to you arises out of alleged additional works (as does the dispute between the parties now before you) that have not been incorporated into the contract you do not have the necessary jurisdiction."

From this it is quite clear that any "without prejudice" term related only to extras. Variations are clearly covered by Clause D5 and condition 4 of the contract. Miss Fay, acting through her solicitor in the letter referred to above, has affirmed the contract and/or waived any want of jurisdiction and this objection is misconceived. **I find as a fact that Mr Cartwright was acting within his Jurisdiction and is entitled to his fee.**

Order

It follows from the above that Mr Cartwright is successful in his claim and I am issuing an Order as follows:

(1) The Defendant do on or before 22nd February 2005 pay to the Claimant £331.79 plus interest @ 8% of £69.73 calculated from 24 June 2002 to 8th February 2005 (2 years 229 days) **total £401.52**

(2) The Defendant do on or before 22nd February 2005 pay to the Claimant the Court fee of £50, the fee on the witness summons of £30 and the expenses of the two witnesses £102.46 **total £182.46.**

If there are any inaccuracies in this Judgment or matters which I have not taken into account the Parties may take up an appointment to discuss these.

MARK RUTHERFORD

District Judge 8th February 2005