

Challenges based on “fairness” in contractual relationships

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FCA Principle 6: TCF

- Outcome 1: Consumers can be confident that they are dealing with firms where the **fair** treatment of customers is central to the corporate culture.
- Outcome 2: Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly.
- Outcome 3: Consumers are provided with clear information and are kept **appropriately** informed before, during and after the point of sale.
- Outcome 4: Where consumers receive advice, the advice is **suitable** and takes account of their circumstances.
- Outcome 5: Consumers are provided with products that perform as firms have led them to expect, and the associated service is both of an **acceptable** standard and as they have been led to expect.
- Outcome 6: Consumers do not face **unreasonable** post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.



Ways to challenge “unfairness”

- Unfair contract terms legislation
- Unfair Relationship Provisions in the Consumer Credit Act 1974
- Express/implicit Terms
- Penalty clauses
- Consumer Protection from Unfair Trading Regulations 2008



Unfair Contract Terms

- Unfair Contract Terms Directive
 - Part II of the Consumer Rights Act 2015
 - Previously contained in the Unfair Terms in Consumer Contracts Regulations 1999
 - Key date is 1.10.15
- Unfair Contract Terms Act 1977



Consumer Rights Act 2015 – Part II

- Applies to contracts between a trader and a consumer
 - “Trader” means a person acting for purposes relating to that person’s trade, business, craft or profession
 - “Consumer” means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business craft or profession
- Also applies to some notices

The fairness test

- *“A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer”*
- This is a single test, but there are 3 elements
 - Contrary to the requirement of good faith
 - A significant imbalance in the parties’ rights and obligations under the contract
 - To the detriment of the consumer



Parking Eye v Beavis [2015] UKSC 67

- Also known as **Cavendish Square Holdings v Makdessi**
- Applied **Aziz v Caixa d'Estalvis de Catalunya Tarragona I Minresa (Catalunyacaixi)** Case C-415/11
 - Significant imbalance means an imbalance to the detriment of the consumer to be assessed by reference to rules of national law that would apply in absence of term
 - Must be contrary to the requirement of good faith – can the seller, dealing fairly and equitably, reasonably assume that the consumer would agree to the term in individual negotiations
 - Must take account nature of goods and services. Is the term necessary for legitimate objectives? Does it go beyond what is necessary to do so?

The Grey List

- Schedule 2 sets out an indicative list of unfair contract terms. For example
 - Exclusion of liability
 - Price or contract variation clauses (subject to caveats)
 - Disproportionately high default sum clauses
 - Terminating open ended contract without reasonable notice
 - Automatically renewing contracts where there is an unreasonably early deadline
 - Allowing trader to substitute goods/services/digital content
 - Excluding liability for agents
 - Assignment clauses without agreement, if less customer guarantees

Core Terms

- There is excluded from fairness a contract term to the extent that:
 - It specifies the main subject matter of the contract; or
 - The assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it
- To apply the term must be “transparent and prominent”
 - Transparent if plain and intelligible
 - Prominent if brought to consumers attention in a way that means average consumer aware of the term
- Does not apply to grey listed terms



Core Terms (cont)

- OFT v Abbey (the bank charges litigation)
 - Bank charges found to be a core term
 - But is this decision correct in light of EU case law?
- Can be a fine distinction
 - Contrast **Kasler** and **Andriciuc v Banca Romaneasca**

The effect of a term being unfair

- If a term is unfair it is not binding on the consumer
 - Subs.62(1) CRA
- The contract continues, so far as is practicable, to have effect in every other respect
- The court cannot simply rewrite the contract so that it is fair
 - Very limited exceptions. Can substitute a national supplementary rule if otherwise contract would fail to detriment of consumer
 - This can have draconian consequences

Unfair Contract Terms Act 1977

- Technically does not regulate “unfairness”
- Precludes a party from being able to exclude or restrict liability for death or personal injury resulting from negligence
- Prevents a party from being able to
 - Exclude liability if unreasonable to do so
 - Render a contractual performance substantially different from that which reasonably expect to perform (or to render no performance at all)
- Precludes unreasonably indemnity clauses
- Precludes various exclusion of liability in contracts for sale or supply of goods

S.3(2)(b) – render a performance different to that which reasonably expected

- Applies where one deals on the other's written standard terms of business
 - Does not apply to consumer contracts
- *“As against that party, the other cannot by reference to any contractual term-*
- *(a) [exclusion clauses...]*
- *(b) claim to be entitled*
 - *(i) to render a contractual performance substantially different from that which was reasonably expected of him, or*
 - *In respect of the whole or any part of his contractual obligation, to render no performance at all.*

Except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness”

S.3(2)(b) – what does it mean

- Is what the parties reasonably expect to be determined by the terms of the contract?
 - **Zockoll Group Ltd v Mercury Communications (No 2)**
[1998] ITCLR 104 suggests not
 - Otherwise it is very difficult to see where it would ever apply
 - 4 stage test
 - What performance did the Claimant reasonably expect?
 - What performance did the Defendant claim to be entitled to deliver
 - Was there a substantial difference?
 - Was the term reasonable?

S.3(2)(b) – Can this be used to challenge fairness?

- What reasonably expect can be guided by things such as pre-contract representations, marketing literature, terms.
 - AXA Sun Life Services v Campbell Martin Ltd [2011] EWCA Civ 133
“I have no doubt that it is principally aimed at the small print that entitles a party to a contract to provide something other than that defined by the principal terms of the contract, as where a holiday company reserves the right to substitute a hotel or resort for that specified in the main part of the contract.”
 - No set off and entire agreement clause found to be within its scope
 - Entire agreement reasonable
 - Set off unreasonable
- Might be able to use this to say – “I thought would perform the contract in a fair way”.



Reasonableness

- *“The term shall have been a fair and reasonable one to be included having regard to the circumstances which were or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.”*
- Look at at time the contract was made
- Guidelines
 - Strength of bargaining position
 - Inducement to agree to term
 - Should customer have known of existence of term?
 - If exclude liability, was is reasonable to expect compliance with the condition?
 - Were goods manufactured to special order

Reasonableness (cont)

- See also **Overseas Medical Supplies v Orient Transport Services Ltd** [1999] 2 Lloyds Rep 273
 - How conditions came into being and were used
 - Could the customer go elsewhere?
 - View the contract as a whole
 - Did the customer consent to the clause?
 - If there is a limit on liability, what is the size of the limit? How does this compare to other limits in widely used standard terms?
 - Was insurance available (although this is not decisive)
 - Was there an option to take a contract without the clause (but at a higher price?)

Unfair relationships under the CCA

- Allow the court to intervene where a relationship between a creditor and a borrower is unfair arising out of the credit agreement or the credit agreement taken with a related agreement
- They apply to “*credit agreements*” not “*regulated credit agreements*”
 - Unregulated credit agreements are therefore caught
- “*Credit agreement*” means any agreement between an individual (debtor) and another person (creditor) by which the creditor provides the debtor with credit of any amount
 - Individual includes an unincorporated association or a partnership of 2 or 3 partners
 - Corporate borrowers and large partnerships therefore outside scope.



What must the unfairness relate to?

- Unfairness must be because of:
 - Any of the terms of the agreement or a related agreement
 - The way in which the creditor has exercised or enforced any of his rights under the agreement
 - Any other thing done or not done by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement)
- Anything done by an associate of the creditor is treated as done by or on behalf of the creditor (unless court says this is not appropriate)



“Unfairness”

- There is no definition of “unfair” in the CCA
- Examples:
 - Interest rates too high
 - Default interest rates too high
 - Unjustified charges
 - Unfair debt collection practices
 - Irresponsible lending – should not have lent
 - Failure to provide further advances
 - Requiring refinancing
 - Underlying breach in financed contract for services



Plevin v Paragon [2014] UKSC 61

- Lender sold payment protection insurance and did not disclose the amount of commission
- No regulatory requirement to disclose commission
- Borrower knew the amount that they were spending on PPI
- Nevertheless unfair
 - There was an inequality of knowledge. Had borrower known the true position would have questioned the purchase of PPI

Unfair Relationships (Cont)

- There is a reverse burden of proof
- The court can take into account “all matters it thinks relevant”
 - If defending do not confine yourselves to matters raised by other side
- There is a single relationship. The test is whether it is the relationship that is unfair, not whether each of the allegations raised are unfair
- Limitation does not start until the relationship has ended (Patel v Patel [2009] EWHC 3264 (QB))
 - Can this be challenged?

The court's powers if the relationship is unfair

- Section 140B of the CCA
- It can:
 - Require the creditor (or an associate) to repay any sum paid
 - Require creditor to do or not do anything specified in order
 - Reduce or discharge any sum payable
 - Direct return of property to surety
 - Set aside any duty imposed on debtor or surety
 - Alter terms of agreement or related agreement
 - Direct accounts to be taken

Some recent unfair relationship claims

- **Wood v Commercial First Business Ltd** (5th November 2019)
 - No disclosure of commission from mortgagor to mortgage broker (57k)
- **Notting Hill Finance v Sheikh** (CA 25th July 2019)
 - Default interest at the rate of 289.6%
- **Pilgrim Rock Ltd v Iwaniuk** (17th January 2019)
 - Joint business venture. 6% interest compounded quarterly, did nothing to enforce for 4 years
- **Greenlands Trading v Pontearso** (16th January 2019)
 - Bridging loan. 3% per month default rate
- **Goldhill Finance v Berry** (26th October 2018)
 - Took repossession of property day after warrant possession suspended (on legal advice)

Express / implied terms

- Will a party likely place an express obligation on them to act fairly?
- Possibility of an implied term?
 - The courts will not imply a term merely because it is fair
 - **Marks and Spencer Plc v BNP Paribas Securities Services Trust** [2015] UKSC 72
 - But there are some limited circumstances where come close
 - Consent not to be unreasonably withheld
 - Discretion not to be exercised dishonestly, for an improper purpose, capriciously, arbitrarily or in a way that no reasonable person, acting reasonably, would act
 - May be a narrow class of contracts where under a duty to act in good faith (e.g. where fiduciary relationship)

Penalty Clauses

- Not an “*unfairness*” challenge but terms are unenforceable if they are a secondary obligation which impose a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the contract
 - **Parking Eye v Beavis** [2015] UKSC 67
- This can apply to commercial contracts.

Consumer Protection from Unfair Trading Regulations 2008

- Will apply where there is a trader and a consumer
- The CPUT Regulations mainly impose criminal liability for trading law offences
- But there is a right to redress in Part 4A for misleading actions and aggressive commercial practices
 - Replaces the law on misrepresentation for consumers
- Significant rights to redress
 - Right to unwind
 - Right to damages
 - Right to a discount
 - . 25-100% of price paid, depending on severity
 - Does not apply if price over £5,000, if the price paid is higher than the market price. Then relevant percentage is the difference.