JUDGMENT : The Honourable Mr Justice Ramsey : 19th September 2008

Introduction

1. This is an application by the Claimant under s.66 of the Arbitration Act 1996 seeking permission to enforce an arbitration award dated 1 February 2007 ("*the Award*"). The background to that award is as follows.

2. In 2004 the Defendant, Mrs Buck, decided to have a single story extension built to the front of a bungalow in Beltrise Herne Bay, Kent. The extension was to provide a bed room and bathroom for Mrs Buck's disabled father. She, herself, is now a pensioner.

3. Mrs. Buck engaged Peter Jackson Architects ("the Architect") in Whitstable to prepare a design. They produced two drawings which showed the floor plans and elevations of the existing bungalow and the proposed extension, together with details of the work to be done.

4. Mrs Buck contacted Mr Geoff Mylcrist of the Claimant, Mylcrist Builders Limited of Whitstable. She provided him with the Architect's drawings. He produced an estimate on 2 December 2004. On 7 December 2004 he wrote to Mrs Buck to say "*We confirm your order to proceed with works as described in our estimate of 2 December … and revert as follows*".

5. The letter of 7 December contained seven paragraphs with a number of sub-paragraphs in each. On the third page it stated "*Please sign and return the enclosed copy of this revised letter to our office as soon as possible to confirm your order so that we can schedule you in.*"

6. There was a box at the end of the letter for completion by Mrs Buck. It stated: "*We have understood and agreed with the estimate and its terms and conditions and confirm our order with Mylcrist Builders Ltd to commence work on the property as detailed above.*" Mrs Buck signed the box and dated the document 8 December 2004. This therefore formed the agreement between Mrs Buck and the Claimant and I shall refer to this as "the Contract".

7. There were references in the letter and in that box to terms and conditions. On the reverse of the first page of the letter were the Claimant's Standard Terms and Conditions which included at paragraph 11 the following provision concerning Arbitration:

   "Should any other disagreement arise in connection with or out of this contract the matters in dispute shall be referred in accordance with the Arbitration Act 1950 or any statutory modification or re-enactment thereof for the time being in force."

8. The Claimant commenced work and after some five months a dispute arose between Mrs Buck and the Claimant as to whether certain sums which had been set out on page 2 of the letter of 7 December 2004 were included within the price of £23,580 which had been set out on paragraph 1 of that letter.

9. Mrs Buck went to see Kent County Council Trading Standards Department. In a letter dated 6 July 2005 Ms. Tidy of that department wrote to Mr Mylcrist saying she had been contacted by Mrs Buck. She referred to the Unfair Terms in Consumer Contracts Regulations 1999 ("the 1999 Regulations") and said that she had considered the Claimant's standard terms and conditions and felt that there were a number of clauses that had the potential for unfairness. She added that only a court could ultimately decide whether a clause is unfair.

10. Mrs Tidy concluded by inviting Mr Mylcrist to contact her to discuss the position. He evidently did so because on 24 August 2005 Ms Tidy wrote to Mr Mylcrist referring to the 1999 Regulations and stating that, having considered the contract between the Claimant and Mrs Buck, there were terms which she considered unfair. Those terms were set out in a schedule to the letter.

11. In that schedule it was stated in relation to Term 11, Arbitration: "*It may be seen as a restriction of consumers rights to impose an arbitration scheme as a final remedy.*" Reference was made to Schedule 2 paragraph 1(q) of the 1999 Regulations.

12. Mrs Buck says that she has contacted two solicitors who agreed with what the trading standards department had said. She says that her solution was for Mr Mylcrist to start proceedings against her in Canterbury Crown Court which she described as *"a quick solution",* but he refused and said that he never goes to Court but only to Arbitration.

13. There were evidently discussions between Mr Mylcrist and Mrs. Buck concerning the dispute. The way in which matters proceeded in relation to the arbitration was set out in the Award and in the other documents, as follows:

    (1) In March 2006 a Notice of Arbitration was given by the Claimant to Mrs Buck.

    (2) RSS Limited, consultants acting on behalf of the Claimant, then contacted Mr David Hannent FRICS MCIArb to see whether he would be willing to act as arbitrator.

    (3) On 9 June 2006 Mr Hannent sent a letter to RSS Limited, copied to Mrs Buck, in which he confirmed his fees and requested confirmation from both parties of certain information.

    (4) On 19 June 2006 Mrs Buck telephoned Mr Hannent "*indicating that she did not wish to make representation on the dispute*".

    (5) Mrs Buck wrote to Mr Hannent on 22 June 2006 to say that "*On advice from the Legal Department of Trading Standards we have no wish to go to arbitration as ours is a legal matter. We have repeatedly sent letters confirming this*".

    (6) Mr Hannent wrote to RSS Limited on 23 June 2006 pointing out that Mrs Buck did not wish to take part.

(7) Mrs Buck telephoned Mr Hannent and denied "*the liability for Arbitration*".

(8) On 28 June 2006 Mr Hannent received an Agreement to Appoint dated 26 June 2006 signed only by the Claimant.

(9) On 3 July 2006 Mrs Buck responded "*indicating that there was a process taking place by which she would respond*".

(10) On 7 July 2006 Mr Hannent produced an order for directions "*confirming my appointment as one party had signed the Agreement and provided the deposit for both*".

(11) Mrs Buck in a letter of 12 November 2006 confirmed that she did not wish to participate in the arbitration.

(12) Mr Hannent proceeded to consider the Claimant's statement of account which accompanied a letter dated 6 December 2006.

14. In the Award dated 1 February 2007 Mr Hannent decided that Mrs Buck was liable to pay the Claimant an outstanding amount of £5,230.21 (including VAT), £4,366.29 (including VAT) for the Claimant's costs and £2,079.75 (including VAT) for his fees in the arbitration. He awarded interest at 2% per month on the outstanding amount to the date of the award and compound interest at 4 % above base rate on sums not paid under the award.

15. On 21 January 2008 the Claimant issued the Claim Form seeking permission to enforce the Award in the same manner as a Judgment or Order of the Court to the same effect.

16. Directions were given for service of the Claim Form on Mrs Buck. After Acknowledgement of Service directions were given for the exchange of evidence and written submissions, with the application being dealt with on paper without a hearing.

17. As a result of that evidence and submission it became apparent to the there were two issues which in principle might affect the enforceability of the award:

(1) Whether Mr Hannent had been properly appointed as arbitrator.

(2) Whether the arbitration clause was an unfair term within the 1999 Regulations and therefore unenforceable against Mrs Buck.

18. I asked whether the parties wished to submit any further written submissions on these issues. The Claimant did so and I now deal with those two issues and their effect on the Award and the application under s.66 of the Arbitration Act 1996 ("the 1996 Act").

The appointment of the Arbitrator

19. The arbitration clause provided no mechanism for the appointment of an arbitrator. It merely states that disputes are to be referred in accordance with the Arbitration Act 1950 or any statutory modification or re-enactment thereof for the time being in force. That means that the provisions of the 1996 Act apply.

20. The 1996 Act provides at s.15(3) that if, as here, there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator. Similarly, s.16(3) provides for what is to happen when, as here, there is no agreement on the procedure for the appointment of the sole arbitrator. It provides:

"*If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.*"

21. There was a Notice of Arbitration given by the Claimant. However, it is clear on the facts that Mr Hannent was not jointly appointed by the parties. He was initially approached unilaterally by the Claimant and in the end only the Claimant signed the Agreement to Appoint. Mrs Buck made it clear that she was not participating in the process.

22. In those circumstances, in the absence of a joint appointment under s16(3), there was a failure of the appointment procedure and s.18 of the 1996 Act provides that the court can then appoint an arbitrator. That did not occur in this case.

23. Instead, Mr Hannent was appointed unilaterally by the Claimant. This is accepted by the Claimant. They say that Mrs Buck denied that the arbitration clause was applicable and had made it known that she was unwilling to participate in the arbitration. Rather the Claimant says that it served the signed Agreement to Appoint on Mrs Buck and that this was clear notice on the part of the Claimant to appoint Mr Hannent to act as sole arbitrator. In doing so, the Claimant submits that Mr Hannent was properly appointed as sole arbitrator pursuant to s.17 of the 1996 Act. It is therefore necessary to consider the provisions of that section.

24. The title to s. 17 is "Power in case of default to appoint sole arbitrator". On initial reading it might be thought to apply in cases where there was a default to appoint a sole arbitrator. However, as the provisions show, it is a power to appoint a sole arbitrator where there is a default by one party to appoint its arbitrator. At s.17(1) it provides:

"*where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") refuses to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.*"

25. In the present case, s.16(3) provides that the parties are jointly to appoint a sole arbitrator. That is not the same as a provision where each party is to appoint an arbitrator. Rather, as can be seen from s.16(4) to (5) where

there are two or three arbitrators, each party shall appoint one arbitrator. It is in such cases, where one party appoints his arbitrator, but the other party does not, that s.17 permits that arbitrator then to act as sole arbitrator. This is confirmed by s.17(1) which provides that it applies where one party has "*duly appointed his arbitrator*". That arbitrator will then be authorised to act as sole arbitrator. In this case, where there has been a failure jointly to appoint the arbitrator, there was no arbitrator "*duly appointed*" by the Claimant and therefore no such arbitrator who can then act as sole arbitrator.

26. As the 1996 Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration Law ("the DAC Report") said at paragraphs 83 to 86, s.17 replaced the provisions of s.7(b) of the Arbitration Act 1950 and was intended to improve it. The introduction to s.7 of the 1950 Act made it clear that it applies "Where an arbitration agreement provides that the reference shall be to two arbitrators, one to be appointed by each party." The provisions of s.10(3) of the 1950 Act were introduced in 1985 to deal with the position where there was a tribunal of three arbitrators, one of whom is to be appointed by each arbitrator.

27. The authors of ***Mustill & Boyd on Commercial Arbitration (2001 Companion)*** state that s.17 re-enacts s.7(b) with two additional requirements. They point out that the section only applies where there are two parties, each of whom is to appoint an arbitrator, but this includes the usual case where the two so appointed are to appoint a third.

28. Accordingly, in my judgment, the provisions of s.17 of the 1996 Act do not apply in this case and Mr Hannent was not properly appointed as arbitrator. He was not jointly appointed as arbitrator and cannot be treated as sole arbitrator by reason of the provisions of s.17 of the 1996 Act. On that ground, the tribunal lacked substantive jurisdiction to make the Award and under s.66(3) permission to enforce the Award would not be given on that basis. However, there is a logically preceding question as to whether the arbitration provision itself was enforceable in the light of the 1999 Regulations.

The 1999 Regulations

29. The 1999 Regulations, like the predecessor Unfair Terms in Consumer Contracts Regulations 1994 ("*the 1994 Regulations*") implemented Council Directive 93/13/EEC on unfair terms in consumer contracts (OJ L95/29) ("the Directive"). The 1999 Regulations replaced the 1994 Regulations and contained modifications which reflect more closely the wording of the Directive.

30. The courts have considered the applicability of the 1994 and 1999 Regulations to dispute resolution provisions in construction contracts in a number of cases. In ***Zealander & Zealander v. Laing Homes*** [2000] TCLR 724 His Honour Judge Havery QC considered the 1994 Regulations in the context of the arbitration clause which was then incorporated into the NHBC Buildmark documentation. In ***Heifer International Inc v. Christiansen*** [2008] Bus LR D49 His Honour Judge Toulmin CMG QC considered the fairness under the 1999 Regulations of a clause providing for Danish arbitration.

31. Later, in a series of cases involving adjudication provisions incorporated into standard forms of contract with consumers, the courts have considered the application of the 1999 Regulations to adjudication. Many consumer contracts are excluded from the statutory regime of adjudication under s.108 of the Housing Grants, Construction and Regeneration Act 1996 because s.106 excludes construction contracts with residential occupiers, that is construction contracts which principally relate to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence. However, where despite that, the parties expressly include adjudication in their agreements, the courts have considered the impact of the 1999 Regulations on such provisions in ***Picardi v. Cuniberti*** [2003] All E.R. (D) 322; ***Lovell Projects Ltd v. Legg and Carver*** [2003] BLR 452: ***Westminster Building Company Ltd v. Beckingham*** [2004] 1 BLR 265 and ***Bryen & Langley Ltd v Boston*** [2004] EWHC 2450 and, on appeal at [2005] BLR 508.

32. In relation to arbitration the approach of the legislature to consumer arbitration has changed over the years. Initially in s.1 of the Consumer Arbitration Agreements Act 1988 ("the 1988 Act") it was provided that where a consumer entered into a contract, any agreement that future differences arising between the parties to that contract were to be referred to arbitration could not generally be enforced against that consumer. The court could however order that a cause of action should be treated as one to which s.1 should not apply but had to be satisfied that it was not detrimental to the interests of the consumer for the differences in question to be referred to arbitration in pursuance of the arbitration agreement instead of being determined by proceedings before a court. In making that decision, the court had to have regard to all factors appearing to be relevant, including, in particular, the availability of legal aid and the relative amount of any expense which may result to the consumer if the differences in question were referred to arbitration in pursuance of the arbitration agreement and if they were determined by proceedings before a court.

33. The 1996 Act repealed the 1988 Act and consumer arbitration agreements are now dealt with under ss.89 to 91 of the 1996 Act. As stated in s.89 of the 1996 Act, ss. 90 and 91 extend the application of the 1999 Regulations. The relevant provision in this case is s.91(1) which provides:

"*A term which constitutes an arbitration agreement is unfair for the purposes of the Regulations so far as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order for the purposes of this section.*"

34. By the Unfair Arbitration Agreements (Specified Amount) Order (SI 1999/2167) it was provided that the amount of £5000 was specified for the purposes of s.91 of the 1996 Act. This therefore means that a consumer arbitration agreement is unfair where the claim is for a pecuniary remedy which does not exceed £5000. Where

the pecuniary remedy is greater than £5000 then the fairness of the arbitration agreement falls to be determined under the general provisions of the 1999 Regulations.

35. In this case the claim was £5230.21, inclusive of VAT. There is no definition of pecuniary remedy which would indicate whether or not it excludes VAT and on its ordinary meaning I consider that a pecuniary remedy would relate to the whole of the monetary value of the claim which would include VAT. It follows that the fairness of the arbitration agreement in paragraph 11 of the Contract would not fall to be considered under s.91 of the 1996 Act and its fairness has to be determined under the 1999 Regulations to which I now turn.

The 1999 Regulations

36. The 1999 Regulations are concerned with unfair terms in a contract between a consumer and a seller or supplier. If any term is unfair then under Regulation 8(1) the term shall not be binding on the consumer.

37. Regulation 3(1) defines "consumer" as "*any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession*" and this clearly includes Mrs Buck. Similarly that regulation provides that "seller or supplier" means "*any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned*" and evidently covers the Claimant.

38. Regulation 5 defines what can amount to an unfair term in these terms:

"*(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to a 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.*

(2) 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.

(3) Notwithstanding that a specific term or certain aspects of it has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.

(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

(5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair."

39. Schedule 2 at paragraph 1(q) includes terms which have the effect of:

"*(q) Excluding or hindering a consumer's 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…*"

40. In this case, as the Contract of 8 December 2004 shows, the arbitration clause was not individually negotiated within the meaning of Regulations 5(1) and (2) because it had been drafted in advance by the Claimant and there is no evidence that Mrs Buck was able to influence the substance of the term. The question is therefore whether, contrary to a requirement of good faith, the clause causes a significant imbalance in the parties' rights and obligations arising under the Contract, to the detriment of Mrs Buck. The provisions of Regulation 5(5) and paragraph 1(q) of Schedule 2 indicate that certain arbitration clauses may be regarded as unfair.

41. In determining whether a term in unfair, Regulation 6(1) provides that "*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 the conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.*"

Application of the 1999 Regulations

42. As I have said, the question of the fairness of dispute resolution clauses in construction contracts with consumers has been considered in a number of cases. Obviously, given the matters which have to be taken into account in determining fairness, each case must depend on its own facts. However, in the House of Lords decision in ***Director General of Fair Trading v First National Bank plc*** [2002] 1 AC 481 relating to the 1994 Regulations and in the Court of Appeal decision in ***Bryen & Langley Ltd v. Martin Boston*** [2005] BLR 508 relating to the 1999 Regulations, guidance has been given as to the proper approach to be taken.

43. In ***Director General of Fair Trading v. First National Bank plc,*** the House of Lords considered the provisions of Regulation 4 of and Schedules 2 and 3 to the 1994 Regulation in the context of a provision for interest in a consumer credit agreement. Regulation 4(1) contained similar provisions to Regulation 5 of the 1999 Regulations and Regulation 4(2) contained similar provisions to Regulation 6 of the 1999 Regulations. In a speech, with which all the other Law Lords agreed, Lord Bingham of Cornhill said at [17]:

"*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.*"

44. He then dealt first with "significant imbalance" and said:

"*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."

45. He then dealt with "good faith" stating:

"*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.*"

46. At [36] and [37] Lord Steyn also considered the requirements of Regulation 4(1) of the 1994 Regulations. He said: "*There are three independent requirements. But the element of detriment to the consumer may not add much. But it serves to make clear that the Directive is aimed at significant imbalance against the consumer, rather than the seller or supplier. The twin requirements of good faith and significant imbalance will in practice be determinative.*"

47. In relation to "good faith" he said:

"*Schedule 2 to the Regulations, which explains the concept of good faith, provides that regard must be had, amongst other things, to the extent to which the seller or supplier has dealt fairly and equitably with the consumer. It is an objective criterion. Good faith imports, as Lord Bingham of Cornhill has observed in his opinion, the notion of open and fair dealing: see also* ***Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433*** *and helpfully the commentary to Lando & Beale, Principles of European Contract Law, Parts I and II (combined and revised 2000), p 113 prepared by the Commission of European Contract Law, explains that the purpose of the provision of good faith and fair dealing is "to enforce community standards of decency, fairness and reasonableness in commercial transactions"; a fortiori that is true of consumer transactions. Schedule 3 to the Regulations (which corresponds to the annex to the Directive) is best regarded as a check list of terms which must be regarded as potentially vulnerable. The examples given in Schedule 3 convincingly demonstrate that the argument of the bank that good faith is predominantly concerned with procedural defects in negotiating procedures cannot be sustained. Any purely procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected.*"

48. Lord Steyn then dealt with "significant imbalance" and said:

"*It has been pointed out by Hugh Collins that the test "of a significant imbalance of the obligations obviously directs attention to the substantive unfairness of the contract":* ***Good Faith in European Contract Law*** *(1994) 14 Oxford Journal of Legal Studies 229 , 249. It is however, also right to say that there is a large area of overlap between the concepts of good faith and significant imbalance.*"

49. At [54] Lord Millett referred to Regulation 4(1) and said:

"*A contractual term in a consumer contract 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". There can be no one single test of this. It is obviously useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the inquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion. The list is not necessarily exhaustive; other approaches may sometimes be more appropriate.*"

50. In ***Bryen & Langley Ltd v. Martin Boston,*** the Court of Appeal considered the fairness of an adjudication clause in relation to the 1999 Regulations. In giving a judgment with which the other members of the court agreed, Rimer J did not consider whether there was a "*significant imbalance*" but concentrated on the question of "*good faith*" in deciding whether the provision was fair. He referred to the speech of Lord Bingham of Cornhill in ***Director General of Fair Trading v. First National Bank plc*** and continued at [45]:

"*45. It follows, in my view, that in assessing whether a term that has not been individually negotiated is "unfair" for the purposes of Regulation 5(1) it is necessary to consider not merely the commercial effects of the term on the relative rights of the parties but, in particular, whether the term has been imposed on the consumer in circumstances which justify a conclusion that the supplier has fallen short of the requirements of fair dealing. The situation at which Regulation 5(1) is directed is one in which the supplier, who will normally be presumed to be in the stronger bargaining position, has imposed a standard-form contract on the consumer containing terms which are, or might be said to be, loaded unfairly in favour of the supplier.* ***The Picardi*** *case was one in which the terms had been imposed by the claimant architect (in that case, the supplier). In the* ***Lovell*** *case the terms had been imposed on the supplier by the employers' (i.e. the consumers') architect, the judge finding not only that they caused no significant imbalance to the employers, but that nor in the circumstances in which the contract came to*

be made was there any question of any lack of good faith or fair dealing by the supplier contractor. HH Judge Thornton QC arrived at a similar result, in like circumstances, in ***Westminster Building Company Limited v. Beckingham*** *[2004] 1 BLR 265.*

46. In my judgment, Mr Boston faces exactly the same difficulties in relation to his Regulation 5(1) argument as did the consumers in the ***Lovell*** *and* ***Beckingham*** *cases."*

51. From those authorities the following principles can be derived in relation to the application of the 1999 Regulations:

(1) A term 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.

(2) There is "significant imbalance" 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.

(3) The element of "detriment to the consumer" makes clear that the Regulations are aimed at significant imbalance against the consumer, rather than the seller or supplier.

(4) The requirement of good faith is one of fair and open dealing in which:

(a) 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.

(b) 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 1994 Regulations (an inducement to the consumer to agree to the term, whether goods or services were sold or supplied at the special order of the consumer or whether the seller or supplier dealt fairly and equitably with the consumer). The supplier should deal fairly and equitably with the consumer.

(5) Schedule 2 to the Regulations is best regarded as a check list of terms which must be regarded as potentially vulnerable to being unfair.

(6) Useful approaches include:

(a) assessing the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it.

(b) considering the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion.

(7) Where the consumer has imposed the term either by their own choice or a choice made by their professional agent then it is unlikely that there would be any lack of good faith or fair dealing with regard to the incorporation of the terms into the contract.

The fairness of the arbitration clause

52. On behalf of the Claimant it is submitted that, by reference to matters in Schedule 2 to the 1994 Regulations, the assessment of "good faith" should, in this case, take account the fact that Mrs Buck was in the stronger bargaining position; that the work was to the special order of Mrs Buck and that the Claimant has dealt fairly and equitably with Mrs Buck. The Claimant also submits that paragraph 1(q) of Schedule 2 to the 1999 Regulations does not apply as the arbitration is covered by the legal provisions in the 1996 Act but that in any event Schedule 2 only contains guidelines. It is submitted by the Claimant, relying on the judgment of Rimer J in ***Bryen & Langley***, the Claimant has not fallen short of fair dealing.

53. For the following reasons, I do not accept the Claimant's submissions but consider that, contrary to a requirement of good faith, the arbitration clause in paragraph 11 of the Contract did cause a significant imbalance in the parties' rights and obligations arising under the Contract, to the detriment of Mrs Buck.

54. First, the fact that paragraph 1(q) of Schedule 2 to the 1999 Regulations includes a term excluding or hindering a consumer's 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 shows that such a term must be regarded as potentially vulnerable to being unfair. The existence of an arbitration clause together with the requirement for a mandatory stay under s.9 of the 1996 Act means that an arbitration clause does exclude or hinder a consumer's right to take legal action. I respectfully adopt the approach of Judge Havery in ***Zealander & Zealander*** at 729 as to the meaning in paragraph 1(q) of "arbitration not covered by legal provisions". I do not consider that, as the Claimant submits, arbitration under the 1996 Act is arbitration covered by legal provisions. Rather, I consider that phrase would apply to a case where, for instance, there is a statutory arbitration requirement. It does not apply to arbitration generally.

55. Secondly, the arbitration clause is a requirement which prevents Mrs Buck from having access to the courts and causes an imbalance between the Claimant as a professional builder and Mrs Buck as a layperson, to her detriment. Whilst the sum at stake in this case does not lead to the automatic unfairness imposed by ss. 89 to 91 of the 1996 Act, there is a further element of imbalance to the detriment of the consumer where the claims are

small and where the fees payable to the arbitrator are comparatively significant. In this case the fees properly payable to the arbitrator of over £2000 illustrate this point. In this connection, I also note that under the 1988 Act one of the matters for the court to take into account in determining whether the arbitration provision was detrimental to the interests of the consumer was the relative amount of any expense which may result to the consumer if the differences in question were referred to arbitration in pursuance of the arbitration agreement and if they were determined by proceedings before a court.

56. Thirdly, whilst the box signed by Mrs Buck properly drew her attention to the existence of terms, the impact of the arbitration clause would not be apparent to a layperson and was not apparent to Mrs Buck who was not aware of its effect, as her subsequent conduct shows. The requirement of fair and open dealing means that for consumer transactions the arbitration clause and its effect need to be more fully, clearly and prominently set out than it was in this case. I do not consider that the reference in paragraph 11 of the Contract to matters in dispute being "*referred in accordance with the Arbitration Act 1950 or any statutory modification or re-enactment*" can be said to be sufficient. Equally, whilst there is no suggestion that the Claimant deliberately took advantage of Mrs Buck's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract or weak bargaining position, I consider that the Claimant by including arbitration in the Claimant's standard terms did take such disadvantage, albeit unconsciously. I do not accept, as the Claimant submits, that Mrs Buck had the stronger bargaining power. Rather the Claimant evidently proffered its standard terms and conditions and whilst Mrs Buck could have chosen other contractors, I do not consider that this made her bargaining position stronger in terms of negotiating terms with the Claimant. Equally, the fact that the particular works were being carried out to Mrs Buck's order does not, in my judgment, affect the assessment of good faith in this case in relation to the term. I consider that, applying the test set out in the authorities, the Claimant did not deal fairly and equitably with the consumer.

57. Fourthly, as the evidence of Mrs Buck's approach to arbitration shows, it is likely that if at the time of the Contract the clause and its effect had been drawn to her attention she would both have been surprised by it and objected to its inclusion.

58. Fifthly, whilst she obtained plans of the work from an architect, this is not a case where there is any evidence that Mrs Buck's professional advisers were involved in the drafting of the Contract.

59. Therefore, assessing the fairness of the arbitration clause, taking into account the nature of the work for which the Contract was concluded, the circumstances at the conclusion of the Contract and the terms of the Contract, I have concluded that the provision for arbitration in the Contract does fall foul of the 1999 Regulations. As a result, under regulation 8(1) the arbitration provision in paragraph 11 of the Contract is not binding on Mrs Buck.

60. This conclusion is consistent with the approach taken by His Honour Judge Havery QC in ***Zealander & Zealander*** where he found that the arbitration clause was unfair under the 1994 Regulations. In ***Heifer*** His Honour Judge Toulmin CMG QC held that an arbitration clause was fair relying largely on the nature of the work and the manner in which the contract in that case had been negotiated. This case has none of those features.

Conclusion

61. Accordingly, for the reasons set out above, I find that the arbitration clause in paragraph 11 of the Contract was not binding on Mrs Buck and that, in any event, the Arbitrator was not properly appointed. For these reasons, the Award does not fall to be enforced under s. 66(3) of the 1996 Act because the tribunal lacked substantive jurisdiction to make that Award. I therefore dismiss the Claimant's application and invite written submissions as to any consequential matters.

David Mallinson (of Girlings, Solicitors) for the Claimant
Mrs Buck appeared in person