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Court of Appeal rules that class action conditional fee agreements were not caught by the Doorstep Selling Directive

Mrs Ozlem Kupeli v. Atlasjet Havacilik Anonim Sirketi
[2017] EWCA 1037

Article by David Bowden

Executive speed read summary

Following the collapse of Cyprus Turkish Airlines, customers with tickets wanted to obtain legal redress. The Committee of the UK (Alevi) Cultural Centre ('Cemevi') consulted with solicitors and arranged a public meeting at its Centre in London. 302 Conditional Fee Agreements (CFAs) were signed up at that meeting with solicitors who agreed to take the case on a 'no win, no fee' basis. The litigation was settled and the costs came to be assessed. Master Rowley in the SCCO ruled that the Doorstep Selling Directive applied, that there was an '*excursion*' and because no notice of cancellation rights had been given, the costs payable by Atlasjet were assessed at nil. That ruling was over-turned on 1st appeal by Slade J which has now been upheld by the Court of Appeal. It said that there is no definition of '*excursion*' in either the Doorstep Selling Directive or the UK implementing regulations. However Lewison LJ rules that there needs to be an element of surprise for a transaction to be caught. The location and purpose of the meeting was well advertised in advance. Many of the consumers were individually notified and the hall contained banners erected by the solicitors. The premises here were clearly identified as a place for sales to the public and there was no element of surprise in the meeting. He said that as a matter of ordinary language he would not characterise a consumer's visit to a community centre for the express purpose of meeting solicitors with a view to instructing them to take on his case as an '*excursion*'. A consumer who attends such a meeting whose purpose has been announced in advance would not be surprised or unprepared to give instructions. On the facts there had not been an '*excursion*' here because the initiative for the meeting came from Cemevi and not from the solicitors, Cemevi arranged the meeting, the invitation to the community to attend the Cemevi was issued by the committee, the date and time of the meeting had been determined by Cemevi and it was Cemevi that invited the solicitors to attend the meeting not the other way round. Lewison LJ ruled that it was unrealistic to view Cemevi as acting as agents for the solicitors. He ruled that the mere fact that a consumer leaves home in order to meet a trader away from his business premises does not without more amount to an '*excursion*'. Profit costs are accordingly due to the solicitors from the paying party under the CFAs. Although this is a costs case, the Doorstep Selling Directive applies to a large range of other unsolicited commercial sales. It is useful to have some clarity and context as to what amounts to an '*excursion*'.

Mrs Ozlem Kupeli v. Atlasjet Havacilik Anonim Sirketi
[2017] EWCA 1037 *21 July 2017*
Court of Appeal, Civil Division (Lords Justices Lewison, Kitchin and Floyd)

What are the facts of the case?

The Committee of the UK (Alevi) Cultural Centre (known as the '*Cemevi*') in East London became aware that hundreds if not thousands of members of the London Turkish community were concerned about the failure of Cyprus Turkish Airlines to honour their obligations to them. The committee sought advice on possible legal redress. They met two solicitors in the firm Goldsworth to discuss matters. The lawyers decided that there was some merit in pursuing the case and the question of obtaining instructions arose. A meeting between the solicitors and some of the potential claimants took place at the premises of Cemevi on 12 May 2012. Master Rowley described this meeting as '*chaotic*'. Legal proceedings were then brought by 669 members of the Turkish community living in London for the recovery of the price of airline tickets from Atlasjet Havacilik Anonim Sirketi ('*Atlasjet'*) following the insolvency of Cyprus Turkish Airlines.

How was the case funded?

Conditional fee agreements ('*CFAs*') with Goldsworth solicitors had been signed by 302 of the prospective claimants at a meeting held at the Turkish Community Centre on 12 May 2012.

What objections were taken by the paying party in the Points of Dispute?

The paying party said that a notice of cancellation in writing had not been given to the claimants under regulation 5 of the Cancellation of Contracts made in a Consumer's Home or Place of Work Regulations 2008 ('*the 2008 Regulations'*). The paying party submitted that because the CFAs had been made during an '*excursion*' under regulation 5, in the absence of a cancellation notice under regulation 7(2), no CFA could be enforced without breaching the indemnity principle. The paying party submitted that its liability in costs to those claimants was nil.

What did the Master Rowley in the SCCO below rule?

Master Rowley conducted a detailed assessment of costs in the SCCO. He made an order on 22 January 2015 that the CFAs entered into by the claimants were unenforceable by reason of regulation

7(b) of the 2008 Regulations. Master Rowley ruled that the claimants were not entitled to recover their costs from Atlasjet.

What did Mr Justice Slade and Senior Costs Judge Master Gordon-Saker rule on 1st appeal?
By their judgment dated 15 January 2016 **[2016] EWHC 1125 (QB)** they over-turned the ruling of Master Rowley on the regulation 7(2) point.

Slade J ruled that the CFAs had not been made during an 'excursion' so there had been no requirement to provide a notice of cancellation at the meeting. Slade J said that in considering the ordinary meaning of the word 'excursion', the broadest interpretation should be given to it. It could not be said that the fact that the prospective consumer claimants had travelled to meet a trader (their solicitor) away from the solicitor's usual business premises of itself rendered the consumer vulnerable to high-pressure salesmanship. Slade J observed that if that had been the intention of the 2008 Regulations then regulation 5 could have said so. Had it been practicable to have held the meeting at the offices of the solicitors, travelling to those offices would not have converted what otherwise would have been a visit into an excursion.

Slade ruled that there had been neither breach of regulation 7(2) nor any infringement of the indemnity principle thereby rendering the CFAs unenforceable. Slade J ruled that the claimants were entitled to recover their costs.

What does the Doorstep Selling Directive provide?
Council Directive of 20 December 1985 **85/577/EEC** is entitled '*To protect the consumer in respect of contracts negotiated away from business premises*'.

Article 1 provides that the Directive '*shall apply to contracts under which a trader supplies goods or services to a consumer and which are concluded during an excursion organized by the trader away from his business premises, or during a visit by a trader (i) to the consumer's home or to that of another consumer; (ii) to the consumer's place of work; where the visit does not take place at the express request of the consumer*'.

Article 4 provides that for transactions within the scope of the Directive '*traders shall be required to give consumers written notice of their right of cancellation within the period laid down in Article 5, together with the name and address of a person against whom that right may be exercised. Such notice shall be dated and shall state particulars enabling the contract to be identified.*'

Article 5 gives a consumer a '*right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law*'.

What do the UK transposing regulations say?
The Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 **SI 2008/1816** have transposed this Directive into UK law. The word '*excursion*' is not defined in the Regulations.

Regulation 5 deals with '*Scope of application'* and provides that the Regulations '*apply to a contract, including a consumer credit agreement, between a consumer and a trader which is for the supply of goods or services to the consumer by a trader and which is made—(a) during a visit by the trader to the consumer's home or place of work, or to the home of another individual; (b) during an excursion organised by the trader away from his business premises; or (c) after an offer made by the consumer during such a visit or excursion'*.

Regulation 7 deals with the right to cancel a contract and provides that a '*consumer has the right to cancel a contract to which these Regulations apply within the cancellation period' and that a 'trader must give the consumer a written notice of his right to cancel the contract and such notice must be given at the time the contract is made except in the case of a contract to which regulation 5(c) applies in which case the notice must be given at the time the offer is made by the consumer'*.

What is the dictionary definition of '*excursion*'?
The Shorter Oxford English Dictionary defines '*excursion*' as '*a pleasure trip taken especially by a number of people to a particular place*'. Lord Justice Lewison says that '*pleasure or study features in*

*almost all these dictionary definitions. Thus in all these various languages "*excursion*" or its cognates has a meaning which is something more than merely a trip or journey*'.

What were the grounds of appeal?
There was only 1 grounds of appeal, namely whether the May 2012 Cemevi meeting was an '*excursion*' or not such that the 2008 Regulations applied to the CFAs or not.

What authorities are referred to in the judgement?
These authorities are referred to in the judgment of Lord Justice Lewison:

Effort Shipping Co Ltd v Linden Management SA **[1998] AC 605** (House of Lords – Lords Goff, Lloyd, Steyn, Cooke and Clyde)
I would be quite prepared, in an appropriate case involving truly feasible alternative interpretations of a convention, to allow the evidence contained in the travaux préparatoires to be determinative of the question of construction. But that is only possible where the court is satisfied that the travaux préparatoires clearly and indisputably point to a definite legal intention:…Only a bull's eye counts. Nothing less will do.

Travel Vac SL v. Sanchis **[1999] 2 CMLR 1111, C-423/97 (**CJEU 3rd chamber – Judges Puissochet, Moitinho de Almeida and Gulmann. Advocate General Alber)
As regards the question whether a contract was concluded during an excursion organised by the trader, it must be observed that a contract concluded in a town other than the one in which the consumer lives and at a certain distance from it, such that he has had to undertake a journey to reach that town, must be considered to have been concluded during an excursion within the meaning of the Doorstep Selling Directive. Where the initiative for such an excursion comes from the trader, in the sense that he invites the consumer to a specified place by letters and/or telephone calls indicating the date, time and place of the meeting, it must be considered that the excursion has been organised by the trader. As regards the question whether the contract was concluded away from the trader's business premises, it must be observed that this concept refers to premises in which the trader usually carries on his business and which are clearly identified as premises for sales to the public. A contract concluded in a situation in which a trader has invited a consumer to go in person to a specified place at a certain distance from the place where the consumer lives, and which is different from the premises where the trader usually carries on his business and is not clearly identified as premises for sales to the public, in order to present to him the products and services he is offering, must be considered to have been concluded during an excursion organised by the trader away from his business premises.

Crailsheimer Volksbank eG v Conrads **[2006] 1 CMLR 21, C-229/04** (CJEU 2nd chamber – Judges Timmermans, Makarczyk, Gulmann, de Lapuerta and Kūris. Advocate General Léger)
Is it compatible with Article 1(1) of the Doorstep Selling Directive to be made subject not only to the existence of a doorstep-selling situation but also to additional criteria for responsibility, such as a trader's deliberate use of a third party in the conclusion of the agreement or a trader's negligence in respect of the third party's conduct in connection with the doorstep selling? Suffice it to observe that there is no basis in the wording of the Directive for inferring the existence of such an additional condition. Article 1 of the Directive provides that it applies to contracts concluded between a trader and a consumer in a doorstep-selling situation and under article 2 of the Directive 'trader' means any person who acts in the name or on behalf of a trader. To accept such an additional condition would be contrary to the objective of the Directive which is to protect the consumer from the element of surprise inherent in doorstep selling.

Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV v. Comtech GmbH **C-568/15** (CJEU - Advocate General Wahl, 29 June 2017)
The meaning and scope of that concept must be determined by considering its usual meaning in everyday language, whilst also taking into account the context in which it occurs and the purpose of the rule of which it is part.

Did the Court of Appeal decide that what took place at Cemevi on 12 May 2012 was an '*excursion*'?
No. Lord Justice Lewison gives the unanimous judgment of the court. He said that '*excursion*' has a meaning which is *'something more than merely a trip or journey'*. He ruled that '*something more'* meant '*at the very least, the trip or journey in question is not undertaken for the very purpose of entering into the consumer contract in question'* noting that this fitted '*with the purpose of the Directive'*. Lewison LJ observed that a recital to the Directive emphasized that the '*mischief against which the consumer is to be protected is the element of surprise and unpreparedness which would be occasioned if on such a trip he were to be presented with a legally binding contract to sign*'.

Lewison LJ ruled that as a matter of ordinary language he '*would not characterise a consumer's visit to a community centre for the express purpose of meeting solicitors with a view to instructing them to take on*

*his case as an "*excursion*" '* and said that this did not '*conflict with the purpose of the Directive'* because a '*consumer who attends such a meeting whose purpose has been announced in advance would not be surprised or unprepared to give instructions'*.

What assistance did the Court of Appeal gain from the case law of the Court of Justice of the EU?
Lewison LJ following the House of Lords ruling in *Linden Management* said he would only look at the draft legislation, reports and earlier texts ('*travaux préparatoires'*) that led to the final version of the Doorstep Selling Directive as to what '*excursion*' was meant to mean if there was a '*bullseye*' in there. He said there was no such bullseye and so declined to use any material from the *travaux préparatoires.*

The Court of Appeal looked in depth at 2 CJEU cases – *Travelvac* and *Conrads* – although the latter case was not of much assistance because the CJEU '*chose to answer a much easier question'*. *Travelvac* was a timeshare case, where a prospective customer had to travel 100 kilometres and was then given a hard sell. Lewison LJ observed that the CJEU had not '*purported to give a comprehensive description of what amounts to an "*excursion*" organised by the trader*'.

However Lewison LJ said 4 elements came out of the '*very compressed reasoning'* of the CJEU:

- the trader issued the invitation to the consumer to go to a specified place,
- the place to which the consumer was invited was 'a certain distance' from his home,
- the place was not the trader's usual business premises, and
- the place in question was not clearly identified as a place for sales to the public.

Lewison LJ was quite scathing of the CJEU's ruling in *Conrads* saying that by '*reformulating the question to cover only cases in which when a third party intervenes in the name of or on behalf of a trader, the court simply paraphrased the definition of "*trader*" in article 2*'. However he noted that what can be drawn from *Conrads* is a '*reiteration of the proposition that the objective of the Directive is to protect the consumer from surprise'*.

What conclusion did the Court of appeal reach?
Lewison LJ ruled that contact with Goldsworth was initiated by the Cemevi committee following unsuccessful attempts by the committee to interest other lawyers. He drew out these crucial points:

- The initiative for the meeting came from Cemevi and not from Goldsworth,
- It was Cemevi that arranged the meeting albeit at the request of Goldsworth,
- The invitation to the community to attend the Cemevi was issued by the committee and not by Goldsworth,
- The date and time of the meeting appeared to have been determined by Cemevi, and
- It was Cemevi that invited Goldsworth to attend the meeting not the other way round.

Lewison LJ ruled that what happened here was '*far removed from the persistent invitations made by Travel Vac to Mr Sanchis*. Lewison LJ made these 3 critical distinctions:

- It was '*quite unrealistic to view the committee as in some way acting as agents for Goldsworth'*,
- He did not consider that the CJEU's reference in *Travel Vac* to '*a certain distance'* to mean the '*same as any distance however small'*. However the '*mere fact that a consumer leaves home in order to meet a trader away from his business premises does <u>not</u> without more amount to an "*excursion*"*', and
- The location and purpose of the meeting was well advertised in advance. Many of the consumers were individually notified and the hall contained banners erected by Goldsworth. The premises were '*clearly identified'* as a '*place for sales to the public' and there was 'no element of surprise in the meeting*'.

What will happen next with this case?
The case will return to Master Rowley in the SCCO to apply the Court of Appeal ruling and deal with any other outstanding issues as to quantum of costs, success fees and 'after the event' insurance.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.