Consumer contract unenforceable where cancellation rights not given in proper manner or at correct time

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Litigation/Consumer: The London Mercantile Court has ruled that a consumer contract is unenforceable and no money is due from the consumer to the business that contracted to provide services to the consumer where a notice of cancellation rights was not given in the proper manner or at the proper time. Russell Kelsall, Partner in the Litigation and Financial Services Practice Group at Squire Patton Boggs (UK) LLP comments on the consequences of Allpropertyclaims v. Tang for consumer contracts more generally.

Original news

Allpropertyclaims Limited v. Tang
Unreported – 29 June 2015
HHJ Waksman QC in the London Mercantile Court.

The London Mercantile Court has ruled what is the position in a consumer contract where a consumer was not given notice of his cancellation rights in the proper manner and at the proper time. The Cancellation of Contracts made in a Consumer's Home or Place of Work, etc. Regulations 2008 (CCCH Regulations) deal in broad terms with what is to happen when sales are made in a customer's home or place of work. The CCCH Regulations provide that a notice of cancellation has to be "given" to the consumer at the time the contract is made. Here the business sent the cancellation rights notice by email to the consumer on the day after the home visit and after he had entered into the contract. HHJ Waksman QC ruled that this did not comply with the CCCH Regulations.

The court therefore ruled that the contract was correspondingly unenforceable. The business could not recover the £5,000 due to it from the customer under its standard form contract.

What is background to this case?

Allpropertyclaims Limited (APC) is an insurance claims management business. Mr Tang suffered water damage at his home. Mr Tang wanted to make an insurance claim. APC visited Mr Tang at his home. APC contracted with Mr Tang to deal with his insurance claim for him. Mr Tang's insurers dragged their heels and were not co-operative with APC. In the end Mr Tang got frustrated with APC and dealt with the resolution of his insurance claim on his own without any further involvement from APC.

The terms of the contract between APC and Mr Tang were that he agreed to pay APC £140 per hour for their services if he ended the contract. After Mr Tang terminated the contract, APC sued Mr Tang for what it claimed was due under the contract. APC calculated that this sum was £5,000. Mr Tang refused to pay APC anything. Mr Tang said APC had not complied in full with all the technical requirements of the CCCH Regulations and correspondingly that he had a complete defence to APC's claim.

What do the regulations say?

The CCCH Regulations (SI 200/1816) came into force on 1 October 2008. The CCCH Regulations revoked the Cancellation of Contracts Concluded away from Business Premises Regulations 1987. The CCCH Regulations implemented an EU Directive on doorstep selling (85/577/EEC) ("the Directive") which is designed to protect consumers in respect of contracts negotiated away from business premises. This Directive provides cancellation rights for contracts

made in similar circumstances during an unsolicited visit by a trader. The CCCH Regulations have now been revoked, for contracts entered into on or after 13 June 2014, and replaced by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

In particular Regulation 7(2) of the CCCH deal with a consumer's right to cancel. It provides 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.

What are the key issues?
There are 2 key issues in this case:

- Was emailing the cancellation rights to the consumer sufficient to amount to "giving" the consumer notice of his rights?
- Where the cancellation rights notice was provided on the next day, was this enough to be within the "time the contract is made"?

It should be noted that the consumer was not prejudiced and could have cancelled the contract within the 14 day cancellation period if he had wanted to do so.

What did HHJ Waksman QC in the Mercantile Court decide?
Neither litigant appeared to find much favour with Judge Waksman. Both litigants represented themselves. In his judgment the defence is castigated as being "wholly unmeritorious and technical". Nevertheless, it succeeded.

APC had not "given" the written notice at the same time within the meaning of Regulation 7(2). APC's genuine mistake and subsequent e-mail could not cure the defect. APC's agreement was irremediably unenforceable. There was no power to order enforcement. As to waiver or estoppel by the consumer, he would need to have had knowledge that APC's contract would be unenforceable, which he did not. An unjust enrichment argument would also go against the scheme of the CCCH Regulations.

The consumer was an experienced insurance professional and understood APC's agreement, which APC had explained fully to him. APC's contract made clear that the consumer might become liable for fees.

The FCA has issued Perimeter Guidance (PERG) setting out the position where a firm's activities operate at the perimeter or boundary of the field that the FCA regulates. In the PERG manual the FCA indicates that APC's activities fell within the category of "assistance". APC's website did not sufficiently make clear that its services were only free if it instructed the remedial work, but there were some attempts to qualify its statements. The terms should have been on the website in a form that a consumer could easily read using a clear format. This lack of clarity from APC was a breach of the FCA's Insurance Conduct of Business Rules Sourcebook (ICOBS).

APC is an appointed representative of another business (APC's principal) which holds authorisation from the Financial Conduct Authority. Although there was a technical breach of ICOBS rule 2.2.1, no separate damages would be awarded against APC's principal in the consumer's favour.

APC's written terms were perfectly clear and an average consumer would be able to understand them. Even if these terms were intelligible, there was no "significant imbalance" between APC and Mr Tang meaning regulation 5(1) of the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) would render APC's standard form contract unfair.

Will there be an appeal?
This is unclear at the moment. There is a 21 day period to appeal which will run out of 19 July 2015. This is a judgment by a judge of equivalent rank to a High Court judge and so any appeal lies to the Court of Appeal. Only the Court of Appeal can grant permission to appeal.

What are the implications for those advising on consumer contracts?
In *Harrison v Link Financial Limited* [2011] EWHC B3 (Mercantile), HHJ Chambers QC had to consider whether all a credit card company's terms and conditions were included in a fulfilment pack sent in an envelope to the customer. The customer was adamant he had not received them. The lender provided evidence as to its procedures as to how such contractual documents were usually sent out.

However in that case the lender's evidence was rejected. Judge Chambers found that things had gone wrong with the lender's system in the past and "it could have gone wrong again". In the end the Judge ruled that on balance he was "of the view that the terms and conditions were not sent with the card".

Both *Harrison* and this case provide clear illustrations of the importance of being able to prove compliance with detailed regulations. This needs good record keeping.

This case demonstrates that the requirements of the CCCH Regulations are strict. Even where a customer has not suffered prejudice, that is irrelevant (unlike the position, for example, where there is non-compliance with prescribed information on the form and content of regulated credit and consumer hire agreements). Judge Waksman notes that there is no power to order enforcement to cure a technical defect. He was bound to follow an earlier decision of the Court of Appeal in *Salat v Barutis* [2013] EWCA Civ 1499; [2013] CTLC 250. Moore-Bick LJ (on a 2nd appeal) ruled that there was no power under the Doorstep Selling Directive to order enforcement where there was a technical breach of its terms. So even where a customer has not suffered prejudice or loss (or was a professional person with experience in insurance) that is irrelevant.

Is there a read across for cancellation rights in other areas?
We see cancellation rights in a number of other consumer areas. The precise wording of the regulations differs and most are underpinned by EU Directives. This includes:

- Distance Marketing of Consumer Financial Services,
- Distance Selling,
- E-Commerce,
- General and Life Insurance,
- Consumer Credit.

In the case of consumer credit, section 58 of the Consumer Credit Act 1974 (CCA) provides for a right of withdrawal for a prospective agreement secured on land. Section 67 of the CCA provides (in general terms) that other concluded consumer credit and consumer hire agreements are cancellable where there have been face to face negotiations. There is also a right to withdraw under Section 66A for most regulated credit agreements. In contrast to the position under CCCH Regulations, the CCA provides an escape route for a business where there is non-compliance. This is in sections 65 and 127 of the CCA where a business can apply to the court for an enforcement order and the court has to balance prejudice and culpability in deciding what to do.

In *Helden v. Strathmore* [2011] EWCA Civ 542, Lord Neuberger MR in the Court of Appeal allowed a lender to enforce a charge secured by way of mortgage against a property using a provision under the Financial Services and Markets Act 2000 ("FSMA"). Section 28 of FSMA permits a court, in dealing with an agreement which is unenforceable, to allow it to be enforced if it is satisfied "that it is just and equitable of the circumstances of the case". In *Helden* the Court of Appeal did find it was just and equitable to allow enforcement.

What should lawyers do next?
In some ways it is disappointing that this decision did not appear a few months ago. If it had, then perhaps BIS could have been persuaded to amend what is now the Consumer Rights Act 2015 to provide for a general power to cure defects in any consumer contracts (in the same way as applies to many consumer credit ones) where there is technical non-compliance with regulations such as CCCH Regulations.

It is time for all businesses to review their documents to ensure they comply with the relevant regulations. This will not be enough on its own, because businesses must review their procedures to ensure documents are sent or given at the proper time, and in the proper manner. Where there is a challenge on this, businesses must be able to prove actual compliance. Mere reliance on standard processes may not be enough. Where compliance cannot be proved, then the results can be harsh: APC were unable to recover any money from their customer.

Interviewed by David Bowden of David Bowden Law (www.DavidBowdenLaw.com).