Further arguments on unenforceability: telephone negotiations and the Doorstep Regulations – Salat v Barutis [2013] EWCA Civ 1499

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Introduction

This recent decision of the Court of Appeal addresses the issue of when a credit hire agreement is actually made, and whether an initial telephone conversation prevents the application of the Cancellation of Contracts Made in a Consumer's Home or Place of Work etc. Regulations 2008 ('the Regulations'). The Court also considered whether, where an agreement is unenforceable, the Claimant will have suffered any loss, considering the cases of *Dimond v Lovell* [2002] 1 AC 384 and *W v Veolia Environmental Services (UK) plc* [2011] EWHC 2020 (QB), [2012] 1 All ER (Comm) 667.

Facts

The claim arose from a road traffic accident which occurred on 28 April 2009 when the Claimant was knocked off his motorcycle when the Defendant carelessly opened his front door. The bike was damaged, and ultimately deemed to be beyond repair. The Claimant required an immediate replacement, and contacted BLD Group Ltd ('BLD'), a credit hire company.

On 7 May 2009, the Claimant received a telephone call from BLD to discuss his needs. During the course of that conversation, the Claimant satisfied BLD that he was not at fault for the accident, that he needed a replacement, and that he did not have the means to pay for one.

On 9 May 2009, an employee of BLD delivered a bike to the Claimant's address. At that point the Claimant completed the necessary paperwork, including a credit hire agreement. However, the agreement did not include a notice of the right to cancel. As such both the District Judge at first instance, and a Circuit Judge on appeal had found the agreement to be unenforceable.

The Claimant appealed on the grounds that (1) the Regulations did not apply, the contract having been made over the telephone, and (2) even if the Regulations did apply and the contract was unenforceable, the Claimant was entitled to general damages for loss of use.

The Regulations

The Regulations are designed to implement the provisions of Council Directive 85/577/EEC, which protects consumers from unfair commercial practices in connection with doorstep selling and similar practices.

The relevant provisions state as follows:

5. *These Regulations apply to a contract, including a consumer credit agreement, between a consumer and a trader which is for the supply of goods and services to the consumer by a trader and which is made –*

(a) during a visit by the trader to the consumer's home…

…

7. (1) A consumer has the right to cancel a contract to which these Regulations apply within the cancellation period.

(2) The 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…

…

(4) Where the contract is wholly or partly in writing the notice must be incorporated in the same document.

…

(6) A contract to which these Regulations apply shall not be enforceable against the consumer unless the trader has given the consumer a notice of the right to cancel and the information required in accordance with this regulation.

Did the Regulations apply?

The Claimant's first submission was that the contract was made during the course of the telephone conversation on 7 May 2009, and therefore the Regulations did not apply. It was argued that on that occasion, the parties had entered into a legally binding agreement for the hire of a motorcycle on BLD's standard terms, to be formally recorded in a document that would be signed when the bike was delivered.

The Court rejected that submission in the following way (per Moore-Bick LJ at ¶14):

"We are unable to accept that submission, which seems to us to be at odds with both commercial common sense and everyday experience, as well as being unsupported by the evidence. There was no evidence that either Mr Salat or the person to whom he spoke at BLD thought that he was entering into a contract on the telephone or that they intended to do so. We doubt whether anyone entering into a contract for the hire of a valuable machine of this kind would expect to do so in such an informal manner."

[Emphasis added]

The Claimant's second submission was that the word "made" in regulation 5 is to be understood at encompassing the entirety of the exchanges between the parties that culminated in a concluded agreement.

Although the Court accepted there is a practical distinction between a case of "cold-calling" leading to an invitation to a trader to visit a consumer's home for the purposes of selling him goods or services, and as in this case, a visit whose purpose is to complete a transaction that began on the telephone, it was held that the Regulations did not make such a distinction. Moore-Bick LJ noted that that finding was consistent with the Court of Appeal decision in *Swift (trading as A Swift Move) v Robertson* [2012] EWCA Civ 1754, [2013] Bus LR 479, where the Court held that a contract is "made" for the purposes of regulation 5 when and where it is concluded, regardless of the fact that negotiations had taken place during a previous visit.

Having rejected those two submissions, the Court held that the agreement was unenforceable.

Is there any recoverable loss?

The question then fell to be considered whether, although the contract was unenforceable, the Claimant could still recover general damages for loss of use. In practical terms the Claimant had lost nothing as she had been provided with a bike by BLD.

Therefore, following *Dimond v Lovell* [2002] 1 AC 384, the Claimant had suffered no loss.

The Claimant's counsel attempted to distinguish that case on the basis that the Claimant had affirmed the contract by supporting the proceedings. The Court doubted whether the Regulations allow for a consumer to affirm a contract that would otherwise be unenforceable against him, but made no firm determination on that point. On the facts of the case, Moore-Bick LJ stated as follows (¶22):

"In order for any affirmation to occur it would be necessary at least for the consumer to know that the contract was unenforceable and, in that knowledge, to express in unequivocal terms his willingness to be bound. In the present case Mr Salat did not become aware that the contract was unenforceable until the point was raised in the defence and nothing he did after that could possibly be regarded as amounting to an unequivocal statement that he was willing to be bound…for these reasons alone this attempt to distinguish Dimond v Lovell fails."

Nor was the Claimant assisted by the case of *W v Veolia Environmental Services (UK) plc* [2011] 2020 (QB), [2012] 1 All ER (Comm) 667. In that case, although the agreement was unenforceable, the Claimant's insurers had paid the hire charges, and the Claimant was therefore held to have suffered loss in obtaining a replacement vehicle. The present case was plainly distinguishable as BLD's charges had not been paid.

Human Rights Argument

The Claimant argued that if the Regulations rendered the contract unenforceable, they were incompatible with Article 1 of Protocol 1 of the European Convention on Human Rights ('the ECHR'), which prohibits a public authority from depriving a person of his possessions except in the public interest and subject to conditions provided by law. On this issue, the Court held as follows:

"…in the present case BLD must be taken to have been aware of the effect of the Regulations at the time it entered into the agreement. It can therefore have had no legitimate expectation of being able to enforce the agreement against Mr Salat if it did not comply with regulation 7(2)."

Comment

This judgment will give further peace of mind to defendant insurers regarding the application of the Regulations to credit hire agreements. The Court of Appeal has given clear guidance to the effect that where an agreement is signed at a consumer's home, the Regulations will not be excluded by the fact that a previous telephone conversation took place.

It is also helpful that the Court has clarified the position regarding a claim for losses where an agreement is unenforceable, a vehicle has been provided, and the charges have not been paid. In that situation, in line with *Dimond v Lovell* there is no recoverable loss, as the Claimant has been indemnified by the credit hire company through the provision of a replacement vehicle.

Isaac Hogarth

10th March 2014.