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The Jig is Up: First Judgment on Consumer Rights Act 2022

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The High Court has recently handed down its first judgment on the Consumer Rights Act 2022 (*Flatley v Austin Group Ltd*[1]). The case involved a claim by businessman and professional dancer Michael Flatley that an arbitration clause in an insurance policy amounted to an "unfair term" in a consumer contract, contrary to the provisions of the 2022 Act.

Background

Mr Flatley sought to dispute the terms of an insurance policy (the "**Policy**"), which had been negotiated on his behalf by a broker. The Policy contained a clause, set out below, which required disputes to be resolved by arbitration. Mr Flatley, who was seeking to sue the insurer in the Commercial Court, contended that the arbitration clause amounted to an "unfair term", contrary to the provisions of the Consumer Rights Act 2022, and, consequently, he should not be bound to submit the dispute to arbitration.

Claims under the Act

Mr Flatley sought to rely on section 129(1) of the Act, which provides that consumers are not bound by unfair terms in consumer contracts. Mr Flatley claimed that the arbitration clause was "unfair" because it did not expressly state that Mr Flatley would not have to bear his own costs of any arbitration. The arbitration clause read as follows:

"This insurance is governed by the laws of Ireland. Any dispute arising out of or relating to this insurance, including over its construction and validity, will be referred to a single arbitrator in Dublin in accordance with the Arbitration Act then in force…"

In making this argument, which the Court deemed "novel", Mr Flatley sought to rely on section 132(1)(e) of the Act, which provides:

"… a term of a consumer contract shall always be unfair if its object or effect is—[…]

(d) to exclude or hinder a consumer's right to take legal action or exercise a legal remedy, including by requiring the consumer to take a dispute to an arbitration procedure that is not governed by law,

(e) to require a consumer to bear his or her own costs in respect of any arbitration".

Mr Flatley contended that to be "fair" the clause should have stated that the arbitration would be at no cost to him (i.e. that if he were to lose the arbitration, he would not be liable for the insurance company's legal costs and that the insurance company would have to pay his costs). In making this argument, his counsel relied on the reference to paying one's "own costs" under section 132(1)(e).

Mr Flatley also argued that, once the 2022 Act had come into force, the insurance company should have amended the terms of the Policy to make it clear that Mr Flatley would not have to "bear his own costs".

The Court's Judgment

It was not disputed that Mr Flatley was acting "as a consumer" (within the meaning of the Act) when he took out the policy, notwithstanding the high value of the Policy and that he used a professional agent to do so. Mr Flatley took out the Policy in relation to his home and was acting "for purposes that are wholly or mainly outside that individual's trade, business, craft or profession"[2].

Nevertheless, the Court rejected Mr Flatley's claim that the arbitration was an "unfair term" contrary to the provisions of the Act.

Section 132(1)(e) of the Act (quoted above) provides that a term in a consumer contract in relation to arbitration is unfair if that term provides that the consumer is required to pay his or her own costs. In the present case, the Policy contained no term requiring a consumer to "bear his or her own costs". According to the Court, the plain intention of section 132(1)(e) is to capture clauses that require consumers to bear their own costs regardless of the outcome.

The Court noted that Mr Flatley's interpretation of the Act, if accepted, would have "far-reaching consequences for every consumer arbitration in Ireland". According to the Court, the interpretation would mean that traders pursued through arbitration would be required to pay consumers' legal fees, even if an arbitrator found the claim to be without merit.

Additional Grounds

The Court also rejected a number of other arguments that had been advanced by Mr Flatley's counsel.

Claim under section 132(1)(d) of the Act

While counsel did not place particular reliance on the point, it was argued that the arbitration clause was an "unfair term" on the basis of section 132(1)(d) (quoted above). To fall under section 132(1)(d), the arbitration in question would have to be "not governed by law".

In this case, the Policy provided that arbitrations would be conducted in accordance with the "Arbitration Act then in force". Thus, it is clear that the arbitration would be "governed by law" and section 132(1)(d) had no application.

Transparency

Mr Flatley claimed that the arbitration clause lacked "transparency", and that it was consequently "unfair" and unenforceable against him.

The Court rejected this claim for a number of reasons, including that there was no evidence that the arbitration clause (quoted above) was not "transparent". While the Court did not explore the meaning of transparency in detail, Twomey J indicated that Mr Flatley would at least have needed to be able to show that "*…the words or phrases in the clause were difficult for him to understand…or…would prevent a person of normal intelligence from concluding that they had agreed to refer their disputes to arbitration".*

Alleged lack of good faith

Section 130(1) of the Act states: *"A term of 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".*

Mr Flatley contended that a decision by the insurance company to terminate the Policy before its expiry date amounted to bad faith, rendering the arbitration clause itself unfair. The Court rejected this claim on the basis that the termination of a contract has no impact on whether the contract contains an unfair term or not.

Outcome

Since Mr Flatley's claims under the Act failed, the Court referred the dispute to arbitration, in accordance with the terms of the Policy.

Comment

While the claims under various provisions of the Consumer Rights Act 2022 all failed, the judgment in *Flatley v Austin Group Ltd* is notable for being the first time an Irish court has engaged with the Act. In addition to providing clarity as to how a Court would address specific claims of the type involved in this case, the judgment provides some broader insight for traders, consumers and advisors as to how a Court is likely to interpret the fundamental issues of transparency and unfairness in the context of disputes based on the Act.

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1. [2024] IEHC 359. Judgment available here.
2. Section 2(1) of the Act.