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Consumer Rights Act 2022: High Court Considers Arbitration Clause in Contract of Insurance

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The Commercial Court, in interpreting the Consumer Rights Act 2022 (**2022 Act**), determined that an arbitration clause in an insurance policy was not an unfair term in the consumer contract.

In *Flatley v Austin Newport Group Limited & Ors [2024] IEHC 359*, the plaintiff sought to proceed with the litigation of his action before the Commercial Court, arguing that pursuant to s. 129(1) of the 2022 Act, the arbitration clause was not binding on him as a consumer as it amounted to an unfair term.

Background

The dispute between the parties centred on whether the cost of property damage and alternative accommodation, which arose in respect of alleged defective works carried out on the plaintiff's home, were covered by an insurance policy (**Policy**) between the plaintiff, as homeowner, and the 6th named defendant (**Hiscox**). Hiscox applied to the court to refer the proceedings to arbitration pursuant to Article 8(1) of the UNCITRAL Model on International Commercial Arbitration, as allowed for under the terms of the Policy.

The plaintiff had engaged an insurance broker to negotiate the Policy, which had an annual premium of €69,285. There was no dispute that the plaintiff was a consumer under the

terms of the 2022 Act as he was "*acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession*".

Unfair Term

Payment of Costs

The plaintiff argued that the arbitration clause was unfair and not binding on the basis it did not make it clear that he would not have to bear his own costs of the arbitration. Instead, for the clause to be fair, it should make it clear that the arbitration would be at no cost to him, even if he were unsuccessful.

The plaintiff relied upon sections 132(1)(d) and (e) of the 2022 Act, which set out that a consumer contract shall be unfair where it excludes or hinders a consumer's right to take legal action, including requiring a consumer to take a dispute to an arbitration procedure that is not governed by law, and requiring a consumer to pay their own costs in respect of any arbitration.

The court rejected this argument, referring to the far-reaching consequences that would incentivise baseless claims against a trader, who would have to discharge its own legal costs for winning the arbitration and also pay the consumer's legal costs for bringing the groundless claims. This would be a reversal of the situation when such claims are brought through litigation, namely that costs, generally, follow the event. The court emphasised the importance legal costs play in discouraging unmeritorious claims, noting such an interpretation would have the opposite effect, namely operate as an incentive for bringing unmeritorious claims in consumer arbitration.

Furthermore, the court found this could not be the intention of the Oireachtas. The court held the plain meaning of the section was 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 own costs, for example, that the consumer would have to pay their costs even if they won the arbitration. This did not arise in the clause in the Policy.

Clarity and Transparency

The Commercial Court rejected arguments that the arbitration clause was not transparent or lacked clarity, thus making it unfair pursuant to section 130 of the 2022 Act, noting that there was no explanation by the plaintiff as to which of the words or phrases in the clause were difficult to understand and while the clause referred to the '*relevant arbitration act*', rather than the particular legislative provision governing the clause, this did not detract from the clear and obvious meaning of the clause, namely to refer disputes to arbitration.

Absence of Good Faith

This plaintiff alleged that Hiscox, in terminating the Policy before its expiration, acted in bad faith, thus falling foul of the 2022 Act. However, the court held that the termination of a contract does not impact on whether a consumer contract contains an unfair term or not.

The Commercial Court confirmed it would refer the dispute to arbitration, affirming there was nothing 'unfair' in the possibility of the plaintiff having to pay his own legal costs and those of Hiscox if unsuccessful in the resulting arbitration.

Conclusion

The High Court has interpreted the Consumer Rights Act 2022 by applying what it deemed to be the plain and literal meaning of certain provisions and so ensuring the viability of arbitration clauses in consumer contracts. The judgment emphasised the unfeasibility of a scenario whereby the trader would be liable for both its own costs and those of the consumer in even the most unmeritorious of claims. However, contractual terms can be avoided by consumers if they are found to be unfair under the 2022 Act and caution should be exercised in ensuring the wording of relevant clauses does not fall foul of the legislation.

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