Feature

KEY POINTS

- Whilst the English legal system has historically been adversarial (in contrast to the inquisitorial systems more familiar on the Continent), two recent legal developments significantly undermine this key principle.
- The Consumer Rights Act 2015 places a duty upon the court to consider of its own motion the fairness of contractual terms in cases involving consumers.
- Further and independently, in *Radlinger v Finway*, the ECJ held that courts of member states have a duty to consider any points arising out of the Consumer Credit Directive whether or not raised by the parties themselves.
- Both developments will place significant burdens upon the courts which will undoubtedly increase litigation costs for banks whilst slowing down the debt recovery process.
- Once introduced, these rules are unlikely to be affected by eventual Brexit.

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Adversary or inquisitor? Judicial intervention in consumer banking litigation

Two recent and separate legal developments have impacted upon the historic principle that the English legal system is adversarial in nature. The first arises out of the Consumer Rights Act 2015 and the new duty for the court to consider of its own motion the fairness of contractual terms. The second comes from the ECJ and the case of *Radlinger v Finway* and the similar new duty for courts to consider of their own motion points arising out of the Consumer Credit Directive. This article considers these two changes and their likely consequences for banking and consumer credit litigation.

INTRODUCTION

Every first-year law student is taught that the legal systems of the UK are adversarial and not inquisitorial. There are, of course, exceptions to the rule. Coroners, for example, exercise an inquisitorial jurisdiction, dating from the days when they had an investigative role in the absence of a police force. Election Commissioners have a mixture of adversarial and inquisitorial functions but, in general, the courts of the UK jurisdictions have operated on adversarial principles since the Middle Ages. This aspect of the legal process has been exported to the countries of the former British Empire (even those not strictly "Common Law" countries such as South Africa) and reaches its apogee in the US.

Inquisitorial justice was, the student learned, the province of unenlightened foreigners with civil law systems. The word "inquisitorial" itself had bad vibes: "inquisitor" carried with it connotations of Torquemada and Ximines, the rack and the thumbscrew, lit by the lurid fires of Smithfield. "Adversarial", on the other hand, indicated a fair fight between equal opponents, squaring up to each other in the prize ring of the Law Courts. As Monty Python so acutely puts it '*nobody* expects the Spanish Inquisition'.

With the concept of adversarial justice came the concept of the judge as impartial arbiter, acting as umpire or referee, above the fray. In civil cases, his job was to decide only those issues put before him by the parties and in criminal cases, to hold the ring between prosecution and defence and to sum up impartially for the jury to make its decision. It also carried with it the concept of the advocate as an officer of the court, under an obligation to draw the attention of the court to any relevant law, even if adverse to his case.

There were always, of course, instances where judges had the right, even the obligation to intervene. Claims founded on illegality were, as a matter of public policy, occasions where a judge could and should raise the question even if the parties themselves were unaware of or, more likely, anxious to conceal, the illegality. Our hypothetical student may well have been told the hoary old chestnut of the (mythical) action for a partnership account between two eighteenth century highwaymen where the judge not only refused to hear a case based on illegality but (in some versions) ordered the litigants to the gallows.

The illegality principal was re-stated by the Supreme Court as recently as 2015. In *Les Laboratoires Servier and another v Apotex Inc and others* [2014] UKSC 55, [2015] AC 430, Lord Sumption JSC said:

> 'The illegality defence, where it arises, arises in the public interest, irrespective of the interests or rights of the parties. It is because the public has its own interest in conduct giving rise to the illegality defence that the judge may be bound to take the point of his own motion, contrary to the ordinary principle in adversarial litigation. In some contexts, notably the invalidity of contracts prohibited by law, the ex turpi causa principle can be analysed as part of the substantive law governing the parties' rights. The contract is void, and any right derived from it is non-existent. But in general, although described as a defence, it is in reality a rule of judicial abstention. It means that rather than regulating the consequences of an illegal act (for example by restoring the parties to the status quo ante, in the same way as on the rescission of a contract) the courts withhold judicial remedies, leaving the loss to lie where it falls. This is so even in a contractual context, when the court is invited to determine the financial consequence of a contract's voidness for illegality. The *ex turpi causa* principle precludes the judge from performing his ordinary adjudicative function in a case where that would lend the authority of the state to the enforcement of an illegal transaction or to the determination of the legal consequences of an illegal act.'

The general rule, however, has always been that, where only the rights of the parties are engaged and there is no over-riding public interest, the job of the judge is to keep quiet and let them get on with it. Thus judges would refrain from drawing to the parties' attention non-compliance with rules that particular contracts or other dispositions were required to be in writing or signed by the party to be charged under the Statute of Frauds 1677 and its derivatives such as the Law of Property Act 1925 s 40. Similarly, in some cases absence of a duty stamp would render a document (such as, in the past, a cheque) ineffective but the most any judge would ever do would be to make a pantomime of examining the document minutely and raising his eyebrows significantly. If the parties were too dim or too canny to take the hint, the judge would go no further.

Similarly it is no part of the judicial function to oblige the parties to raise defences that might be open to them if they choose not to do so. A good example is limitation defences. If a defendant does not take the point that the claim is statute-barred, the judge will not do it for him.

THE CONSUMER RIGHTS ACT 2015

Well, *nous avons changé tout cela*. The Consumer Rights Act 2015 (CRA) for perhaps the first time in UK legal history imposes on the judiciary the duty to intervene. Part 2 of the CRA gathers together the existing statutory rules concerning unfair contract terms in consumer contracts and, with some variations, re-enacts them in a single statute. Part 2 is concerned with assessing the fairness of a contractual term but only in cases where the fairness may be a matter of legitimate dispute. Part 1 of the CRA, which codifies the terms to be imposed on (gone is the concept of terms being "implied into") consumer contracts for the supply of goods, services and digital contracts, simply outlaws virtually all contractual terms which would seek to exclude or restrict any of these imposed terms. With statutorily imposed terms such as, for example, the term requiring satisfactory quality of goods, fairness is irrelevant: the term is there and cannot be excluded or restricted however fair it might be to do so in the particular circumstances.

Part 2 largely replaces those parts of the Unfair Contract Terms Act 1977 not already incorporated into Part 1, and replaces the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083). The latter (replacing earlier and similar regulations) were themselves designed to implement Council Directive 93/13/EEC, one of the core documents of EU consumer rights legislation.

Like its predecessors, the CRA Part 2 is not entirely straightforward and, at the same time, it affords courts a very wide latitude to apply very generalised criteria of fairness. This is not, of course, the same concept as that of judicial discretion: the judge is, in theory at least, making an assessment of fairness in the light of the commercial and social standards of the day. To that extent, it is more akin to assessing the demands of "reasonable care" in a negligence case than to exercising discretion whether to grant or refuse an injunction. In principle, this is an exercise of objective judgment. But "fairness", to a far greater extent even than "reasonableness" is in the eye of the beholder. It is a term much used – and abused – by politicians. When politicians talk of "fair" taxes or "fair" wages, they almost invariably mean taxes or wages heavily slewed against which ever section of the community they wish to attack and in favour of which ever section they wish to support (and whose votes they hope to garner). While the judiciary, it goes without saying, is invariably non-political and impartial, it must always be borne in mind that, however much you dress it up, fairness, like beauty or wisdom, is in reality a subjective criterion.

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Even the parameters of the unfair terms legislation are sometimes unclear. Take, for example, CRA s 64:

> '(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—
>
> (a) it specifies the main subject matter of the contract, or
> (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.
>
> (2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.
> (3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.
> (4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.
> (5) In subsection (4) "average consumer" means a consumer who is reasonably well-informed, observant and circumspect.
> (6) This section does not apply to a term of a contract listed in Part 1 of Schedule 2 [the "Grey List"].'

This reproduces the essential provisions of reg 6 of the 1999 Regulations. Readers will recall that their meaning was heavily litigated in *Office of Fair Trading v Abbey National plc and others* [2009] UKSC 6; [2010] 1AC 696 (the bank charges case). Andrew Smith J held that the relevant contractual term was excluded by what is now s 64(1) (then reg 6(2)(b)), the Court of Appeal held that it was not and the Supreme Court that it was after all. The point here is not simply to say *quot homines, tot sententiae* and pass on: it is to emphasise that the working out of the 1999 Regulations and now Pt 2 of the CRA raises difficult questions of legal interpretation on which very eminent judges disagreed. Furthermore – and this is the crucial point – their Lordships had the benefit of adversarial

argument from the cream of the English Bar, with no fewer than nine silks before the Court of Appeal and nine (not identical) silks before the Supreme Court.

It comes, therefore, as somewhat of a surprise to find CRA s 71:

> '(1) Subsection (2) applies to proceedings before a court which relate to a term of a consumer contract.
> (2) The court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it.
> (3) But subsection (2) does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term.'

This is obviously a new departure but where does it come from? The unthinking will assume (not unreasonably) that it must be down to those devious men in Brussels, determined to subvert the sturdy Anglo-Saxon legal system but is it? Not entirely. The supposed authority for this provision is Art 7 of the 1993 Directive:

> '1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.
> 2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.
> 3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.'

Nothing there about judges intervening to ensure that terms are fair. What this does is simply to make it obligatory for the member states to implement the provisions of the Directive into national law in such a way as to provide consumers with effective remedies against unfair terms and to allow consumer organisations to make collective complaints. Furthermore this provision has been with us since 1993. It seems a bit strange that, 22 years later, it should impel Parliament into making a substantial inroad into established jurisprudence. Indeed it could be argued that the provision for representative complaints established in Art 7.2 was designed to obviate a judicial duty to investigate unfair terms.

> ... the ECJ held ... it was the duty of the court to raiseany point arising out of the Consumer Credit Directive or its national implementing legislation ...

It is true that there has been some ECJ jurisprudence which suggests that Art 7.1. does place an obligation on the courts to take unfairness points not raised by the parties – see the cases summarised in *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637 – but the cases relate to legal systems where the inquisitorial rather than the adversarial method is followed. As far as can be ascertained, no appellate court in the UK has ever been asked to consider whether the trial judge was at fault in not raising of his own motion that a contractual term was unfair.

RADLINGER v FINWAY

But, if this were not problematical enough, hot on the heels of the CRA comes *Radlinger v Finway a.s*, a case decided by the ECJ on 21 April 2016 (ECLI:EU:C:2016:283). This was a reference by the Regional Court in Prague for a preliminary ruling in a case arising out of an insolvency. In the course of the reference an issue arose whether the relevant debt was enforceable, as arising under a consumer credit agreement regulated by the Consumer Credit Directive (2008/48/EEC). It was said that there was a breach of Art 10 of the Directive which sets out the rules for the form and content of agreements, essentially the provision which is implemented in the UK by the various Consumer Credit Information and Agreements Regulations.

The relevance of *Radlinger* in this context is the view the ECJ took of the obligations of the court of first instance. In short, the ECJ held that in consumer credit cases, it was the duty of the court to raise any point arising out of the Consumer Credit Directive or its national implementing legislation, whether or not the parties had raised – or were even aware of – the point.

The peg on which this finding was hung was the statements of the objectives contained in the 2008 Directive. The justification was, in essence, the facilitating of a well-functioning internal market which, the ECJ held, meant that the courts of member states had an obligation to enforce the provisions of the 2008 Directive independent of the arguments or the wishes of the parties litigating before them.

The narrow question was whether the national court should raise obligations relating to form and content contained in Art 10(2) of the 2008 Directive. As the court put it:

> '60. By its second question, the referring court asks, in essence, whether Article 10(2) of Directive 2008/48 must be interpreted as meaning that it requires a national court hearing a dispute concerning claims based on a credit agreement within the meaning of that directive to examine of its own motion whether the obligation to provide information laid down in that provision has been complied with and to establish all the consequences under national law of an infringement of that obligation.'

The court answered the question firmly in the affirmative (para 63) saying:

'… such a requirement is justified by the consideration that the system of protection, in accordance with the settled case-law of the Court, is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms…'

The court went on:

'64 In that regard, information, before and at the time of concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is, in particular, on the basis of that information that the consumer decides whether he wishes to be bound by the conditions drafted in advance by the seller or supplier …

65 Furthermore, there is a real risk that the consumer, particularly because of a lack of awareness, will not rely on the legal rule that is intended to protect him …

66 It follows therefrom that effective consumer protection could be achieved only if the national court were required, of its own motion, to examine compliance with the requirements which flow from EU law on consumer law …

67 In fact, as has been recalled in paragraph 53 of this judgment, in order to guarantee the protection intended by that directive, the imbalance which exists between the consumer and the seller or supplier may be corrected by the court hearing such disputes only by positive action unconnected with the actual parties to the contract.

68 Examination by a national court, of its own motion, of compliance with the requirements which flow from Directive 2008/48 constitutes, moreover, a means both of achieving the result sought by Article 10(2) of that directive and of contributing to achieving the aims set out in recitals 31 and 43 thereto ….

69 …

70 Since the national courts are required to ensure the effectiveness of consumer protection intended to be given by the provisions of Directive 2008/48, the role attributed to the national court by EU law in this area is not limited to a mere power to rule on the compliance with those requirements, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task …

71 In addition, where the national court has, of its own motion, found an infringement of Article 10(2) of Directive 2008/48 it is not obliged, in order to be able to draw the consequences arising under national law from that infringement, to wait for the consumer to make an application to that effect, provided always that the principle of audi alteram partem has been complied with…'

> Not only does all this place a wholly unreasonable burden on hard-working District and County Court judges … but it is fraught with danger.

This decision is potentially binding on our courts and it is likely that, faced with CRA s 71 as well, the courts will be slow to think up reasons for distinguishing it. We will thus be left with a situation where, both in unfair contract cases (potentially *any* case involving a consumer) and in consumer credit cases there will be a positive duty on the court to examine whether there is an unfair contract term and, in the latter, whether there has been some infringement of the CCA, FSMA, the various regulations or (nowadays vital) the FCA Handbook.

THE CONSEQUENCES

Not only does all this place a wholly unreasonable burden on hard-working District and County Court judges, who are the ones who will bear the brunt of the rules but it is fraught with danger. The provisions of consumer credit legislation are highly complex and technical and senior judges have wrangled over what they mean (invariably after professional adversarial argument). Is the judge expected himself to have called up the version of CONC current on the relevant day(s) in order to see whether that day's edition provides one of the parties with an argument under FSMA s 138D? Let's be honest, how many judges of your acquaintance have *heard* of s 138D? Is the judge to be expected to calculate the APR, a job which requires a computer considered complex by NASA?

Requiring the judge to look for unfair terms is even more fraught with peril. Take the "Grey List". At present both UK and ECJ jurisprudence treats the list as no more than indicative of what terms *may* be considered unfair. This is unrealistic. One may safely predict that, over the years the Grey List will become an ever darker shade of grey. It might not become an out-and-out Black List but one can easily envisage jurisprudence growing up to the effect that a term on the list is presumed to be unfair unless there are exceptional circumstances (which, in most cases, there won't be).

Moreover, it's all very well paying lip service to *audi alteram partem* and providing that the judge must have sufficient materials (CRA s 71(3)) but a judge who has got it into his head that a term is manifestly unfair may steamroller the matter through even if only by threatening the parties with a costly adjournment so that they can come back another day and argue the point. And, sadly, experience has often shown that some judges have taken eccentric views of the provisions of consumer credit law.

And what is the juridical effect of this? Will it form grounds for appeal (as *Ratlinger* seems to suggest) if the judge fails to spot the unfair term or the nice piece of consumer credit arcana? Who should pay the costs of the appeal? One of the parties or the Lord Chancellor? Where will it end? Assume the case is fought out at first instance with neither the parties nor the judge taking the

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point, can (indeed should) an appellate court faced with an appeal on entirely different issues raise unfair terms or a consumer credit wrinkle of its own motion at that late stage? Again – who pays? Appellate courts are normally stern with appellants who could have raised a point below but did not. Now they can simply say: 'it was the judge's job to do that, not mine.'

WILL BREXIT MAKE ANY DIFFERENCE?

Although most lawyers are, like the revolutionaries of 1776, singing 'the World Turned Upside Down', Brexit, when it eventually comes (one is tempted to say 'I should live so long'), is very unlikely to make a ha'porth of difference to these kinds of provision. The UK had the world's most highly developed system of consumer credit law long before the EU started legislating and, in reality, the 2008 Directive is simply a tribute act for the CCA with a few bells and whistles.

As explained above, CRA s 71 is not a provision dictated by Brussels – if it were, it would have been in the Unfair Contract Terms Regulations since they first appeared back in 1993. It is something entirely dreamed up by Parliament and one cannot imagine Parliament being persuaded (in the teeth of every consumerist in the Kingdom) to abandon it. Brexit or no Brexit, s 71 is here to stay.

That being so, what of *Radlinger*? ECJ decisions are binding on UK courts and will remain so at least until Brexit actually happens. It is a moot point whether pre-Brexit jurisprudence will continue to bind our courts after Brexit. If CRA s 71 had never existed, it is conceivable that our judges might dismiss *Radlinger* as a piece of Euro-folly and disregard or distinguish the decision if it were raised in UK litigation. As it is, this is all part of a trend, one led by the fact that more and more cases involve litigants in person.

So the betting is that CRA s 71 and *Radlinger* will still be around, long after we have cast the hapless continentals into outer darkness where there is wailing and gnashing of teeth.

CONCLUSION

The crude fact is that a rule designed for an inquisitorial court system is being forced on an adversarial system without any thought as to the practical consequences whatsoever.

'It seems to me, Jeeves, that the [this] may be fraught with considerable interest.'
'Yes, sir.'
'What, in your opinion, will the harvest be?'
'One finds it difficult to hazard a conjecture, sir.'
'You mean the imagination boggles?'
'Yes, sir.'
I inspected my imagination. He was right. It boggled. ■

Further Reading:

- The Consumer Rights Act 2015: clarity and confidence for consumers and traders? [2015] 8 JIBFL 504.
- Rethinking conduct regulation [2015] 7 JIBFL 413.
- LexisNexis Financial Services blog: Consumer Rights Act 2015 – remedies and enforcement of rights.