Attack of the zombie regulations

Lucy McCormick assesses consumer cancellation regulation and the recoverability of legal fees

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The Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 (the Cancellation Regulations) were repealed on 13 June 2014 and replaced with the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the Consumer Contracts Regulations). Yet, as shown by two recent cases, the Cancellation Regulations continue to reach beyond the grave to bite unwary lawyers.

The Court of Appeal decision in *Cox v Woodlands Manor Home* [2015] EWCA Civ 415 confirmed solicitors cannot recover their costs where conditional fee agreements (CFAs) fail to comply with the Cancellation Regulations. The decision applies to all CFAs entered into between 1 October 2008 and 13 June 2014, and so potentially impacts a significant number of cases.

Factually, the decision arose out of a claim by Ms Cox against her employer for injuries sustained in an accident at work. The matter was ultimately settled for £100,000, with the defendant to pay costs to be assessed if not agreed.

At the detailed assessment stage, the defendant raised the point that the CFA had apparently been concluded at Cox's home, yet she had not been sent a formal notice of her right to cancel in accordance with the Cancellation Regulations. If correct, this would render the CFA between Cox and her solicitors unenforceable, and, under the indemnity principle, the defendant would not be liable to pay those costs.

Cox (or, in reality, her solicitors) attempted to resist this argument by asserting that, although the CFA was indeed signed at Cox's home, there was no intention to create legal relations at that stage. They pointed to an understanding that the CFA would only come into effect if Cox's legal expenses cover under her home insurance policy did not agree to cover her preferred solicitors.

This submission was accepted at first instance by District Judge Britton (sitting as a costs judge). However, it was rejected on appeal by His Honour Judge Denyer QC, and then again on second appeal by Lord Justice Underhill, Lady Justice Sharp, and Lord Justice Longmore. Giving the leading judgment, Underhill LJ found the CFA was plainly made on the occasion that it was signed and that it was impossible to say there was no intention to create legal relations at that time. He commented: 'It would undermine the protection given by the right to cancel, and would potentially be open to abuse, if the court was obliged to treat the agreement as being "made" at some date subsequent to the operative decision only because it contained a condition which as of that date was not satisfied.'

> **The Cancellation Regulations continue to reach beyond the grave**

A decision reached 'with regret', Underhill LJ remarked it was 'difficult to think that a case like this falls within the mischief of the regulations', particularly since the only reason Cox was visited at home was due to her injuries. He expressed hope that the new Consumer Contracts Regulations would prove 'somewhat less inflexible'. His frustration at having his hands tied by the Cancellation Regulations closely echoes that of Lord Justice Jackson in *Robertson v Swift* [2012] EWCA Civ 1794 (reversed in part last year on another point).

Allpropertyclaims Ltd v Pang Tang

The High Court has recently had to grapple with a similar issue. In the unreported *Allpropertyclaims* of 29 June 2015, an insurance claims management representative had concluded an agreement at a client's home. He had intended to give a cancellation notice in accordance with the Cancellation Regulations, but had inadvertently taken it home with him, and so had emailed a copy the following day. Judge Waksman QC (having heard submissions from litigants in person on both sides) held that this rendered the agreement unenforceable, as notice had not been 'given' to the client at the same time as the agreement within the meaning of the regulations.

An underused weapon?

Solicitors should not only be watchful for further *Cox*-style challenges to their CFAs – and for opportunities to challenge the fees of their opponents – but should also bear in mind that a 'technical' argument based on the absence of a cancellation notice can be deployed across a range of market sectors. I have known it to be used successfully in the context of credit hire, construction, removal contracts, and estate agency fees. SJ