



LEGAL BRIEFING

Mylcryst Builders Ltd v Mrs G Buck

[2008] EWHC 2172 (TCC) Mr Justice Ramsey

The Facts

The defendant, Mrs Buck, engaged the claimant, Mylcryst Builders, to construct a single story extension to the front of her bungalow in Beltrise Herne Bay, Kent. A contract was formed on 8 December 2004 when Mrs Buck signed a letter, sent from the claimant, which confirmed that they were to proceed with the works in accordance with their previously issued cost estimate and on their Standard Terms & Conditions as identified on the back of the letter. A dispute subsequently arose regarding whether or not certain sums had been included in the agreed price of £23,580 which had been set out in that letter. As their Standard Terms & Conditions provided for an arbitration clause, Mylcryst Builders commenced arbitration proceedings in March 2006. Following the advice of two solicitors and the Kent County Council Trading Standards Department that the contract contained unfair terms and conditions in accordance with Unfair Terms in Consumer Contracts Regulations 1999, Mrs Buck refused to take part in the arbitration proceedings. Mylcryst Builders unilaterally appointed an arbitrator, and in February 2007, an award was issued finding Mrs Buck liable to Mylcryst Builders for £5,230.21, Mylcryst Builders costs, interest, and the arbitrator's fees. Mylcryst Builders subsequently applied to the court under s.66 of the Arbitration Act 1996 ("1996 Act") seeking permission to enforce the arbitration award.

The Issues

The principle issues in the case were:

- (i) Whether or not the arbitrator been properly appointed; and
- (ii) Whether or not the arbitration clause was an unfair term under the Unfair Terms in Consumer Contracts Regulations 1999 and therefore unenforceable against Mrs Buck.

The Decision

Mr Justice Ramsey held that, as Mrs Buck had made it clear that she was unwilling to participate in the arbitration and Mylcryst Builders had subsequently appointed the arbitrator unilaterally, s.16(3) of the 1996 Act had not been complied with in that the parties had not "jointly appointed" the sole arbitrator. Mylcryst Builders had argued that the arbitrator was properly appointed pursuant to s.17 of the 1996 Act, "*Power in case of default to appoint sole arbitrator*". However, Mr Justice Ramsey, referring to the 1996 Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration Law, stated that s.17 is to be used in those situations where there is to be two or three arbitrators under the arbitration agreement and one party has appointed his arbitrator, but the other party has not. Only in this situation would s.17 apply. That was not the case here. Accordingly, it was held that the tribunal lacked substantive jurisdiction to make the award and under s.66(3) permission to enforce the award was not given.

Mr Justice Ramsey also considered whether the arbitration provision itself was enforceable in light of the Unfair Terms in Consumer Contracts Regulations

1999 (“1999 Regulations”). The Unfair Arbitration Agreements (Specified Amount) Order (SI 1999/2167) states that, for the purposes of s.91 of the 1996 Act, a consumer arbitration agreement is unfair where the claim is for a pecuniary remedy which does not exceed £5000. For those exceeding £5000, the fairness of the arbitration agreement is determined by the general provisions of the 1999 Regulations. It followed therefore that the 1999 Regulations applied and accordingly, under Regulation 5, a contractual term which causes a significant imbalance in the parties’ rights and obligations, to the detriment of the consumer, must be individually negotiated. The judge held, referring to Lord Bingham of Cornhill in *Director General of Fair Trading v First National Bank plc*, that in this instance, the arbitration provision did cause a “significant imbalance” in the parties’ rights and obligations to the detriment of Mrs. Buck, and when taking into account the nature of the work under the Contract and the circumstances at the conclusion of the Contract, the arbitration agreement fell foul of the 1999 Regulations.

Accordingly, the arbitration clause in the Contract was not binding on Mrs Buck and, in any event, the Arbitrator was not properly appointed. The arbitration award was not enforced under s.66(3) of the 1996 Act.

Comment

In the absence of a joint appointment of an arbitrator under s.16(3) of the 1996 Act, Mr Justice Ramsey reminds us that the correct procedure in this circumstance would have been to apply to the court under s.18 of the 1996 Act, “Failure of appointment procedure”. s.17 is not to be used where there has been a default to appoint a sole arbitrator. Further, this case reinforces the Courts’ position with regards to consumer protection. This is again a reminder to those who are in contract with consumers to take the necessary precautions in order to not fall foul of the Unfair Terms in Consumer Contracts Regulations 1999.

Stacy Sinclair
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