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ALL OR NOTHING

Glaser v Atay [2023] EWHC 2539 (KB) is a significant decision in two respects. First, it is a vanishingly rare example of a superior court striking down a contractual term as unfair under Part 2 of the Consumer Rights Act 2015 (CRA). Second, the case contains interesting – and ultimately problematic – discussion of the effect of a term being unfair, an issue seldom explored in previous cases.

The case arose when Mrs Atay commenced proceedings against her ex-husband for financial relief. Under the Public Access scheme, she contracted two barristers for 'preparation of and representation at' the trial listed to commence on 21 September 2020. The barristers' fees were payable in four instalments, the third and largest of which fell due on 31 August. The so-called 'payment term' provided that 'if the hearing … is adjourned to another date or does not go ahead for any reason beyond our control, then the full fee is still payable and another fee will be payable for any adjourned hearing'. On 26 August, Mr Atay successfully applied to adjourn the trial. On 31 August, Mrs Atay informed the barristers that she no longer wished to instruct them but the barristers sued her for their fees.

At first instance in the Winchester County Court, HHJ Berkley applied Part 2 of the CRA and held that the payment term was unfair, precluding the barristers relying on it. Nevertheless, the barristers were entitled to a quantum meruit equating to 70% of the contractual fee. Mrs Atay appealed and the barristers cross-appealed.

In the King's Bench Division, Turner J affirmed the judge's conclusion that the payment term was unfair. He decided that this also ruled out a quantum meruit, so the barristers were entitled to nothing at all. His reasoning proceeded in five principal steps.

First, he found that the payment term fell within the 'grey list' of Schedule 1 because, under Paragraph 5, it was a 'term which has the … effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum … for services which have not been supplied'. As a result, under section 64(6), the term could not make it into the 'safe harbour' of section 64 and escape review as a core term.

Second, failing that, the payment term was not a core term relating to price, so would not have been in the 'safe harbour' of section 64.

Third, the payment term, contrary to the requirement of good faith, caused a significant imbalance in the parties' rights and obligations to the detriment of the consumer, and so was an unfair term under section 62(4). The term caused a significant imbalance because it meant that the barristers were entitled to their fees even if they had done 'no work done whatsoever' (at [59]). Consequently, 'the financial risk of the trial not proceeding was borne entirely by' Mrs Atay and so this was 'an "all or nothing" term weighing 100% in favour of the barrister' (at [60]-[61]). This was contrary to the requirement of good faith because the term was 'not the product of individual negotiation' and because of the power imbalance between a barrister and their client (at [63]).

Fourth, section 62(1), which provides that an 'unfair term of a consumer contract is not binding on the consumer', precluded the barristers claiming any payment, whether in contract or a non-contractual quantum meruit.

Finally, if a non-contractual quantum meruit were available, then 70% of the contractual fee would be too generous, since 'the level of restitution is generally assessed not by reference to the cost to the provider but the benefit of the recipient' (at [88]).

The case is likely to become a textbook example of a term which is unfair under Part 2 of the CRA. Nevertheless, two elements of the reasoning may be questioned.

First, there was imprecision in identifying the unfair term. Turner J twice referred to 'the term as to timing of payment and the consequences of the trial not going ahead' (at [51], [59]). This describes two separate terms. There is a distinction between when a payment is due and when it is earned. For instance, I might contract you to give me five weekly French lessons at £30 a lesson, payment due up front. I am obliged to pay you £150 now, but your entitlement to retain each £30 is conditional on you delivering each lesson. For each lesson which you fail to deliver, I am entitled to restitution of £30: *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93 (CA).

In *Glaser*, the significant imbalance was created by the term which provided that the fees were non-refundable if the trial was adjourned. In effect, this term said the trial did not have to go ahead for the barristers to earn their fees. This was the unfair term.

The unfair term was not the term requiring payment up front, as every online retailer ought to be relieved to hear. The court's reasoning did not justify describing 'the term as to timing of payment' as unfair and indeed such a term does not necessarily create a significance imbalance since the consumer is entitled to restitution of any unearned payments, as *Biggerstaff* illustrates.

A second problem with *Glaser* is the conclusion that the CRA barred the barristers claiming any payment whatsoever. Turner J reasoned that 'once the claimants are precluded from relying upon the payment term, the contract falls to be treated as providing for a lump sum payment for the services of preparation and appearance at trial. The parties could have agreed a divisible contract but they did not' (at [71]). As a result, the barristers had an 'entire obligation' (at [72]): an obligation which must be substantially performed to earn any part of the price. The barristers had not substantially prepared and appeared at trial, so they had not earned any of the price.

This does not follow. Once the unfair 'no refunds' term was struck out, it was not a logical necessity that the barristers must have an entire obligation. Instead, once the term was struck out, the parties' agreement was silent about when the barristers earned the price. The court could fill this gap with an entire obligation. But usually, if the parties are silent, the default position is that the parties' obligations are divisible and so the price is earned as and insofar as they perform: eg *Roberts v Havelock* (1832) 3 B&AD 404, 110 ER 145; *Smales v Lea* [2011] EWCA Civ 1325.

Turner J added that allowing the barristers any payment:

> 'would have the potential to disincentivise traders from ensuring that the terms under which they contracted were fair. Otherwise they could opt to incorporate unfair terms in the hope that they would not be challenged but confident that there would be a safety net providing for the payment of a reasonable sum in the event that they were.' (at [77])

Removing this safety net allows the consumer to receive services for free, even if the trader believed their terms were fair. In this respect, the barristers were treated worse than criminals. A criminal who makes a payment for illegal insider dealing can recover their money (*Patel v Mirza* [2016] UKSC 42, [2017] AC 467) while barristers who lawfully part perform their services having contracted for non-refundable fees can recover, according to *Glaser*, nothing whatsoever. It seems odd to reserve the harsher treatment for the barristers, who breached no legal duty, rather than the claimant in *Patel*, who breached a criminal prohibition.

The court could instead have held that, once the unfair ‘no refunds’ term was struck out, the barristers earned the contract price as their performed their obligations. This would leave no need and no room for any quantum meruit, contractual or non-contractual. The barristers would have been entitled to a sum representing not their loss, nor Mrs Atay’s gain, but the extent to which they had done what Mrs Atay agreed to pay them for.

As it happens, it seems that the only thing the barristers had done was blocked out their diaries for four weeks in September (at [85]). 70% of the price would indeed be generous, since blocking out their diaries was not 70% of what the barristers were paid for. In fact, this may be merely a preparatory step before contractual performance, in which case the barristers had not earned anything and the case reached the right result. But if the barristers could prove that they had begun preparation for the trial, then they should have been awarded a pro rata proportion of the contract price.

To summarise, there was no need to replace the unfair term, which was all-or-nothing in favour of the barristers, with an entire obligation which was all-or-nothing in favour of Mrs Atay. A middle way was possible and preferable.

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