is one to which UCTA or the Regulations apply, then the term can be challenged directly for its unreasonableness or unfairness, meaning that the "red hand" rule is not necessarily needed to invalidate the clause. Guidance is often lacking where the rule matters most, and the difference in approach between Sir Anthony Evans and the majority in *O'Brien* reminds us that the question of adequate notice can be far from straightforward.

JESSE ELVIN

EVOLUTION OR REVOLUTION? UNFAIR TERMS IN CONSUMER CONTRACTS

DIRECTOR General of Fair Trading v. *First National Bank plc* [2001] 1 UKHL 52, [2001] 3 W.L.R. 1297 marks the beginning of an evolution in the common law of contract. The House of Lords considered for the first time whether a contractual term was an unfair term under the Unfair Terms in Consumer Contracts Regulations 1994, S.I. 1994/3159 (which implemented Council Directive (EEC) 93/13, now implemented by the Unfair Terms in Consumer Contracts Regulations 1999, S.I. 1999/2083). The case arose when the Director General sought injunctive relief, pursuant to regulation 8(2), to restrain the use of a contractual term.

First National Bank is a major provider of consumer finance. It lends money under agreements regulated by the Consumer Credit Act 1974. A standard term in its non-negotiated contract was the debtor's obligation to pay the contractual rate of interest after as well as before any judgment. The term was included to prevent the covenant to pay interest merging in the judgment. A lender seeking to enforce a regulated credit agreement is obliged by the 1974 Act to bring his action in the county court, which was precluded by legislation from awarding statutory interest on a money judgment. The court can order that a money judgment be paid in instalments over time. In such circumstances the effect of the impugned contractual term was that it was possible for a debtor to make all his instalment payments and still be substantially in debt. But this was not necessarily its effect. Under the 1974 Act, the court had the power in making any order to include "such provision as it considers just for amending any agreement or security in consequence of a term of the order". It could also reopen credit agreements to do justice between the parties where the credit bargain was extortionate. In practice, however, judgments were entered in the county court without the court considering whether to exercise these powers.

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Two issues were present. First, was the term subject to scrutiny under the 1994 Regulations or was it an essential term within regulation 3(2) and thus immune from scrutiny? Second, if the term was subject to scrutiny, was it an unfair term within regulation 4(1)? Both at first instance and in the Court of Appeal, it was held that the term was subject to scrutiny. Evans-Lombe J. found that it was not unfair, the Court of Appeal found that it was. The House of Lords allowed First National's appeal. Whilst each Law Lord delivered a separate speech, all agreed with Lord Bingham's reasons.

Lord Bingham dealt briefly with the first issue. The object of the Regulations in protecting consumers against unfair and prejudicial terms in standard form contracts would be thwarted if regulation 3(2)(*b*) was given a broad interpretation to encompass terms other than those which clearly fell within it. The term in question was an ancillary provision, intended to operate upon default. It did not concern the adequacy of remuneration received by First National. It was not within regulation 3(2)(*b*).

The second issue, of unfairness, received greater consideration. This is not surprising since Article 3(1) of the Directive is based upon concepts familiar to the civil law yet exotic to the common law. Lord Bingham stated that the purpose of the Directive was to harmonise the law in this area. The Directive did not state the law of any particular Member State. Instead, it created a common test to be applied in all Member States. Lord Bingham identified this test in the words of regulation 4(1): "a term falling within the scope of the regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith". A significant imbalance exists "if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour". The contract as a whole must be examined to determine if this imbalance exists. Lord Bingham did not define detriment to the consumer.

Lord Bingham established good faith as a substantive requirement, one that "looks to good standards of commercial morality and practice". It requires fair and open dealing; it seeks to prevent a supplier taking advantage of the consumer. Importantly, "good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers". Because there was no particular consumer involved in this case, the position of typical parties was examined to establish whether or not the term was unfair.

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Lord Bingham then considered the regulatory framework established by the 1974 Act; it was significant that the Act, passed to protect consumers, did not prohibit terms providing for post-judgment interest. Unacceptable consequences can arise in these cases because borrowers are unaware that the court has the power, under the 1974 Act, to redraw the terms of their contractual obligations. They do not occur because of the unfairness of the contractual term. First National's failure to alert borrowers to potential grounds of relief was not unfair by the customs of the industry. Regulation 4 is not directed at "the use which a supplier may make of a term which is in itself fair". The term was not unfair within the meaning of regulation 4(1).

The decision is a welcome one. A strange aspect to this case is that while consumers could face an unpleasant state of affairs, this occurred within an existing regulatory system. The 1974 Act arguably provides a greater degree of protection to consumers than the Directive. The decision establishes a number of important points. First, the judgments strive to interpret the pre-existing consumer regulations and case law in such a way as to provide a system of substantive fairness to borrowers independently of the Directive. Secondly, there is emphasis that the requirement of good faith does not come from the legal system of any particular Member State but that it is a new requirement of European Union law. Thirdly, it is recognised that this concept is not an alien irritant to the common law, but one already present within it in one form or another: the Directive's requirements mark an evolutionary, rather than revolutionary, change to the common law. This is true; much of the Directive's protection is provided within the common law by various doctrines and devices. However, the concept of good faith is not widely recognised in modern contract law. Revolutionary changes will occur in the common law of contract. The nature of this revolution is unpredictable.

CATHARINE MACMILLAN

FARLEY V. *SKINNER*: RIGHT OR WRONG?

MR. Farley's action for breach of contract against his surveyor gave the House of Lords an opportunity to consider the recovery of damages for non-pecuniary loss (*Farley* v. *Skinner* [2001] UKHL 49, [2001] 3 W.L.R. 899). Mr. Farley had been considering buying a house and instructed Mr. Skinner to survey the property. In particular, Mr. Farley asked Mr. Skinner to investigate whether the

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