Trinity Term
[2014] UKSC 50
On appeal from: [2012] EWCA Civ 1794

JUDGMENT

Robertson (Appellant) *v* Swift (Respondent)

before

Lady Hale, Deputy President
Lord Kerr
Lord Wilson
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

9th September 2014

Heard on 19th March 2014

Appellant
John Antell
(Instructed Directly)

Respondent
Terence John Swift

Intervener
Sarah Ford
(Instructed by Office of
Fair Trading)

LORD KERR (with whom Lady Hale, Lord Wilson, Lord Carnwath and Lord Hodge agree)

Introduction

1. Mr Swift owns a removal business. On 27 July 2011 he received a telephone call from Dr Toby Robertson, the appellant in this appeal. Dr Robertson asked for a quotation for moving his furniture and effects from Weybridge to his new home in Exmouth. The following day Mr Swift visited Dr Robertson's home and inspected the items to be moved. He proposed a price of £6,000. This did not compare well with other quotations that Dr Robertson had received. These had ranged between £3,000 and £4,000 but the firms that had quoted these figures had been unable to move Dr Robertson's furniture etc at a time that suited his plans. Dr Robertson explained the position to Mr Swift. The latter responded that the quotes Dr Robertson had been given were not typical and that his was a standard price. So, after some discussion, the two men agreed a price of £5,750 plus extended liability insurance cover and VAT, making a total of £7,595.40.

2. Mr Swift prepared a removal acceptance document which he sent by email to Dr Robertson. He also sent a copy of his standard conditions. These included the following:

> "7.1 If you postpone or cancel this agreement, we will charge you according to how much notice is given. 'Working days' refer to the normal working days of Monday to Friday and excludes weekends and public holidays.
>
> 7.1.1: More than 10 working days before the removal was due to start – no charge; 7.1.2: Between 5 and 10 working days inclusive before the move was due to start – not more than 50 percent of the removal charge;
>
> 7.1.3: Less than 5 working days before the removal was due to start – not more than 80 percent of the removal charge

3. On the evening of 28 July Mr Swift made a second visit to Dr Robertson's home. On this occasion he delivered some boxes to be used for packing. At the same time Dr Robertson signed the acceptance document and gave it to Mr Swift. It was

agreed that the removal operation would begin on Tuesday 2 August and Dr Robertson paid a deposit of £1,000.

4. Over the following days, Dr Robertson reflected on what had been agreed and made further inquiries of other removal firms. These led him to believe that the price which Mr Swift had quoted was well above the average cost of removal. After further research, he found a firm that was prepared to undertake the work for £3,490. On 30 July 2011 he telephoned Mr Swift and told him that he wished to cancel the contract. Mr Swift reminded Dr Robertson that there were cancellation charges; he said that the normal charge was 60% of the contract price but that he would accept 50% and, at this stage, Dr Robertson agreed to pay that. On 1 August he wrote to Mr Swift confirming his decision to cancel the contract, posting the letter on the day that it was written. It appears that Mr Swift did not receive the letter but, for reasons that will become clear, this is of no importance.

5. In due course Mr Swift demanded payment of the cancellation charges. Dr Robertson, having conducted some research in the meantime, decided that he had no liability for the charges and he refused to pay. Mr Swift duly issued proceedings and Dr Robertson counterclaimed for the return of his deposit.

The proceedings

6. The case was heard as a small claim by Deputy District Judge Batstone at Exeter County Court on 5 January 2012. Dr Robertson argued that he was entitled to cancel the contract by virtue of The Cancellation of Contracts made in a Consumer's Home, or Place of Work etc Regulations 2008. The deputy district judge held that these regulations did not apply because the contract had not been concluded during a single visit to Dr Robertson's home. That decision was upheld by His Honour Judge Tyzack QC in the Torquay and Newton Abbot County Court on 27 April 2012.

7. Dr Robertson appealed. The Court of Appeal (Mummery, Jackson and Lewison LJJ) allowed his appeal in part. Jackson LJ, delivering the principal judgment, held that the 2008 Regulations applied if the consumer's home was where the contract was concluded, irrespective of whether there had been earlier negotiations between the parties. He also held, however, that although, by virtue of regulation 7(6), the contract was unenforceable as against Dr Robertson, it remained alive and the deposit could not be recovered. This was because Mr Swift had not given Dr Robertson notice of his right to cancel the contract as required by regulation 7(2) of the 2008 Regulations and Dr Robertson was therefore not entitled to cancel under regulation 7(1). Dr Robertson appeals that decision to this court.

The Consumer Protection Directive

8. Council Directive (85/577/EEC) was the genesis for the 2008 Regulations (and their predecessor, The Consumer Protection (The Cancellation of Contracts concluded away from Business Premises) Regulations 1987). The preamble to the Directive contains the following recitals:

> "Whereas the special feature of contracts concluded away from the business premises of the trader is that as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared or which he does not [expect];
>
> Whereas the consumer is often unable to compare the quality and price of the offer with other offers;
>
> Whereas this surprise element generally exists not only in contracts made at the doorstep but also in other forms of contract concluded by the trader away from his business premises;
>
> Whereas the consumer should be given a right of cancellation over a period of at least seven days in order to enable him to assess the obligations arising under the contract;
>
> Whereas appropriate measures should be taken to ensure that the consumer is informed in writing of this period for reflection …"

9. In Case C-227/08 MARTÍN MARTÍN v EDP Editores SL [2010] 2 CMLR 27 CJEU in para 22 explained the importance of the first two of the recitals cited above:

> "In that regard, it should be noted that the Directive, as is apparent from recitals 4 and 5, is designed to protect consumers against the risks inherent in the conclusion of contracts away from business premises (Hamilton v Volksbank Filder eG (C-412/06) [2008] E.C.R. I-2383; [2008] 2 C.M.L.R. 46 at [32]), as the special feature of those contracts is that as a rule it is the trader who initiates the contract negotiations, and the consumer has not prepared for such door-to-door selling by, inter alia, comparing the price and quality of the different offers available."

10. Article 1(1)(i) of the Directive provides that it is to apply to contracts under which a trader supplies goods or services to a consumer and which are concluded during a visit to the consumer's home. Article 4 requires traders to give consumers written notice of their right to cancel the contract within a period stipulated in article 5. In the case of article 1(1) transactions (such as involved in this case) the notice is to be given at the time the contract was concluded. Significantly, article 4 also requires member states to ensure that their national legislation prescribes "appropriate consumer protection measures" in cases where the information about cancelling the contract has not been supplied by the trader.

11. Article 5 gives the consumer the right to "renounce the effects of his undertaking" by sending notice within 7 days of receiving the notice provided for in article 4. It is sufficient if the notice is dispatched before the end of the period and the giving of notice has the effect of releasing the consumer from any obligations under the cancelled contract.

12. Article 7 provides that if the consumer exercises his right of renunciation, the legal effects of that are to be governed by national laws, particularly regarding the reimbursement of payment for goods or services.

The 2008 Regulations

13. Regulation 2 defines 'cancellation notice' as a notice in writing given by the consumer that he wishes to cancel the contract. 'Cancellation period' is defined as the period of 7 days starting with the date of receipt by the consumer of a notice of the right to cancel. Regulation 5 deals with the scope of application of the regulations. By regulation 5(a) they are said to apply to a contract for the supply of services by a trader to a consumer which is made during a visit by the trader to the consumer's home or place of work, or to the home of another individual.

14. Regulation 7(1) gives the consumer the right to cancel a relevant contract within the cancellation period and regulation 7(2) requires the trader to give the consumer written notice of his right to cancel. In the case of a contract such as was made between Mr Swift and Dr Robertson that notice is required to be given at the time the offer was made. Regulation 7(3) requires the notice to be dated and to indicate the consumer's right to cancel the contract within the cancellation period. Regulation 7(6) provides:

> "A contract to which these Regulations apply shall not be enforceable against the consumer unless the trader has given the consumer a notice

of the right to cancel and the information is in accordance with this regulation."

15. Regulation 8(1) provides that if the consumer serves a cancellation notice within the cancellation period, the contract is cancelled and regulation 8(5) provides that a cancellation notice sent by post is taken to have been served at the time of posting, whether or not it is actually received. The deputy district judge in this case accepted that Dr Robertson had, as he claimed, sent the letter in which he purported to cancel the contract on 1 August 2011. He also accepted Mr Swift's evidence that he had not received it. If the cancellation notice contained in the letter was effective, by virtue of regulation 8(5), it is irrelevant that Mr Swift did not receive it.

16. Regulation 10 deals with recovery of money paid by the consumer. Paragraph (1) provides that on the cancellation of a contract under regulation 8, any sum paid by the consumer in respect of the contract shall become repayable except where the regulations provide otherwise. The latter provision does not arise in the present case.

The decision of the Court of Appeal

17. In para 40 of his judgment Jackson LJ adumbrated two possible interpretations of regulation 5(a). The first was that the regulation only applied where the contract was negotiated and concluded during a single visit to the consumer's home. The second was that it applied if the consumer's home was where the contract was concluded, whether or not earlier negotiations had taken place there. For a number of reasons, which need not be repeated, he concluded that the second of these was to be preferred. This was plainly right. To have the important protection of these regulations depend on the adventitious circumstance that negotiations were confined to a single occasion would be distinctly out of keeping with their intended breadth of application.

18. Jackson LJ acknowledged that a consequence of the finding that the contract was governed by the 2008 Regulations was that Mr Swift was obliged to give Dr Robertson written notice of his right to cancel whereupon the latter would have the right to do just that during the cancellation period. He found force in Mr Swift's submission that this was absurd because, among other things, Dr Robertson had invited Mr Swift to his home; Mr Swift had had to turn away other work in order to carry out this commission; and Dr Robertson was able to cancel the contract at one day's notice. In making these observations, Jackson LJ noted that the Directive did not apply if the trader visits the consumer's home at his express request and this prompted him to consider whether the 2008 Regulations were ultra vires their enabling provisions, section 59 of the Consumers, Estate Agents and Redress Act

2007 and s.2(2) off the European Communities Act 1972. He concluded that they were not, particularly having regard to article 8 of the Directive which makes it clear that member states should feel free to adopt provisions which are more favourable to consumers than those required by the Directive. Again, this conclusion was plainly correct.

19. Since the contract was unenforceable against Dr Robertson, by virtue of regulation 7(6), Jackson LJ held that Mr Swift was unable to make any charge for cancellation under clause 7 of his standard conditions. He found, however, that because no written notice had been given as required by regulation 7(2), there was no cancellation period as defined in regulation 2(1). On that account he decided that Dr Robertson was not entitled to cancel the contract. He therefore dismissed the counterclaim.

The correct approach to interpretation of the regulations

20. A national court must interpret domestic legislation, so far as possible, in the light of the wording and purpose of the Directive which it seeks to implement. This is now well settled. Thus in Case C-350/03 Schulte v Deutsche Bausparkasse Badenia AG [2006] 1 CMLR 11, the Court of Justice of the European Union said at para 71:

> "… when hearing a case between individuals, the national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive (see Pfeiffer and others, [2005] 1 CMLR 44] paragraph 120)"

21. The breadth and importance of this principle was authoritatively set out in Vodafone 2 v Commissioners for Her Majesty's Revenue and Customs [2010] Ch 77, where, at paras 37 and 38, after listing the authorities to which the court had been referred, Sir Andrew Morritt, C said:

> "37 … The principles which those cases established or illustrated were helpfully summarised by counsel for HMRC in terms from which counsel for V2 did not dissent. Such principles are that:

> "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular: (a) it is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in the Pickstone case, at p 126B); (b) it does not require ambiguity in the legislative language (per Lord Oliver in the Pickstone case, at p 126B and per Lord Nicholls of Birkenhead in Ghaidan's case, at para 32); (c) it is not an exercise in semantics or linguistics (per Lord Nicholls in Ghaidan's case, at paras 31 and 35; per Lord Steyn, at paras 48—49; per Lord Rodger of Earlsferry, at paras 110—115); (d) it permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the Litster case, at p 577A; per Lord Nicholls in Ghaidan's case, at para 31); (e) it permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the Pickstone case, at pp 120H—121A; per Lord Oliver in the Litster case, at p 577A); and (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the Pickstone case, at p 112D; per Lord Rodger in Ghaidan's case, at para 122; per Arden LJ in the IDT Card Services case, at para 114).

38. Counsel for HMRC went on to point out, again without dissent from counsel for V2, that:

> "The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should go with the grain of the legislation and be compatible with the underlying thrust of the legislation being construed: see per Lord Nicholls in Ghaidan v Godin-Mendoza [2004] 2 AC 557, para 33; Dyson LJ in Revenue and Customs Comrs v EB Central Services Ltd [2008] STC 2209, para 81 …"

22. It is important to note that, in order to observe the imperative that this guidance contains, the court must not only keep faith with the wording of the Directive but must have closely in mind its purpose. Since the overall purpose of the Directive is to enhance consumer protection, that overarching principle must guide interpretation of the relevant national legislation.

The wording and purpose of the Directive

23. The centrality of the right to cancel a contract as a feature of the protection which the Directive is designed to afford to the consumer was emphasised by CJEU in the MARTÍN case cited above. At paras 23 et seq CJEU dealt with that issue in this way:

> "23. … the directive ensures consumer protection by granting, first of all, a right of cancellation to the consumer. Such a right seeks specifically to offset the disadvantage, for the consumer, of sales which take place away from business premises, to enable him over a period of at least seven days to assess the obligations arising under the contract (see, to that effect, Hamilton [2008] 2 C.M.L.R. 46 at [33]).
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> 24 In order to strengthen consumer protection in situations where consumers find themselves caught unawares, art 4 of the Directive also requires traders to give consumers written notice of their right to cancel the contract and the conditions for and means of exercising such a right.
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> 25 Lastly, it is apparent from art 5(1) of the Directive that the minimum period of seven days must be calculated from the date of receipt of that notice from the trader. That provision is explained, as the Court has previously indicated, by the fact that if the consumer is not aware of the existence of the right of cancellation, he will not be able to exercise that right (Heininger v Bayerische Hypo-und Vereinsbank AG (C-481/99) [2001] E.C.R. I-9945; [2003] 2 C.M.L.R. 42 at [45]).
>
> 26 In other words, the system of protection established by the Directive assumes not only that the consumer, as the weaker party, has the right to cancel the contract, but also that he is made aware of his rights by being specifically informed of them in writing.
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> 27 It must therefore be held that the obligation to give notice of the right of cancellation laid down in art.4 of the Directive plays a central role in the overall scheme of that directive, as an essential guarantee, as the Advocate General stated in [AG55] and [AG56] of her Opinion, for the effective exercise of that right and, therefore, for the effectiveness of consumer protection sought by the Community legislature."

24. The requirement to give notice of the right to cancel should not therefore be seen as a technical prerequisite to the arousal of the right but as a means of ensuring that the consumer is made aware that he is entitled to cancel the contract after a period of reflection. That this is its essential purpose is underscored by the provision in article 4 of the Directive that national legislation should lay down appropriate consumer protection measures where a trader fails to give written notice of the right to cancel. Although this gives national authorities a discretion as to the consequences that should follow a failure to give notice, the discretion must be exercised in a way that will promote the overall purpose of the Directive. This is clear from para 32 of CJEU's judgment in MARTÍN:

> " … it must be pointed out, first, that the concept of "appropriate consumer protection measures" in the third paragraph of art.4 of the Directive, affords to the national authorities a discretion in determining the consequences which should follow a failure to give notice, provided that that discretion is exercised in conformity with the Directive's aim of safeguarding the protection granted to consumers under appropriate conditions with regard to the particular circumstances of the case."

25. To hold that the consumer did not have the right to cancel because the trader had not served written notice of the right to cancel would run directly counter to the overall purpose of the Directive in ensuring that a consumer has the opportunity to withdraw from a contract without suffering significant adverse consequences. The circumstances in which the particular contract in this appeal was made and in which Dr Robertson sought to cancel it may be out of the ordinary. There may even be reason to suppose that Mr Swift, the owner of a small business, fared rather badly out of this transaction. But if the right to cancel could be effectively nullified by a failure (or refusal) of a trader to give written notice of the right to the consumer, this would create a considerable gap in the level of protection that the Directive sought to provide.

26. Although Dr Robertson invited Mr Swift to his home and was clearly a man of intelligence, well able, as the Court of Appeal found, to conduct negotiations, it is clearly the intention of both the Directive and the regulations that those less well equipped than Dr Robertson should have what is considered to be the necessary protection. Moreover, although the Directive did not cover solicited visits, it is clear that Parliament intended that a consistent approach to solicited and unsolicited visits was appropriate. At para 7.7 of the Explanatory Memorandum to the regulations states:

> "The government believes that these regulations will make the law simpler and clearer for consumers, businesses and enforcement

> agencies. Consumers will be less at risk from disreputable traders exploiting the different treatment of solicited and unsolicited visits; businesses will, in general, be able to work with one contract for both unsolicited and solicited visits, reducing ongoing costs in training sales staff; and enforcers will not have to use valuable resources determining whether a visit was solicited or not as the same rules will apply."

27. The question of entitlement to cancel in the absence of a written notice has been authoritatively settled by CJEU in Case-481/99 Heininger [2003] 2 CMLR 42 at para 45 and Case C-215/08 E Friz GmbH v Carsten von der Heyden [2010] 3 CMLR 23 paras 37-39 as follows:

> "37 … art.5 (2) of the Directive provides that notification by the consumer of the renunciation of the effects of his undertaking has the effect of releasing him from any obligations under the cancelled contract.
>
> 38 It follows that, if the consumer has been properly informed of his right of renunciation, he may be released from his contractual obligations by exercising his right of renunciation within the period provided for in art.5(1) of the Directive, in accordance with the procedure laid down by national law.
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> 39 On the other hand, as the Court has already held, where he did not receive that information, that period of not less than seven days does not start to run, so that the consumer can exercise his right of renunciation under art.5 (1) of the Directive at any time (see, to that effect, Heininger [2003] 2 C.M.L.R. 42 at [45])."

28. In fairness, it should be said that these authorities were not drawn to the attention of the Court of Appeal. But it is clear from the decisions in these cases that the objective of the Directive where a contract is cancelled is that the consumer should not suffer adverse consequences; that, in effect, he should be placed in the position that he would have been in if he had not entered the agreement in the first place. That the achievement of this objective should be dependent on whether the trader has given written notice to the consumer of his right to cancel would be incongruous, to say the least. Again, there is authoritative guidance from CJEU on the point. In Schulte (cited above at para 20) the consumers had not been informed of their right to cancel a contract made with a bank for the purchase of an apartment. The court dealt with the consequence of that in paras 97-101 as follows:

> "97 If the Bank had informed Mr and Mrs Schulte of their right of cancellation under the HWiG at the correct time, they would have had seven days to change their minds about concluding the loan agreement. If they had chosen then to cancel it, it is common ground that, given the link between the loan agreement and the purchase contract, the latter would not have been concluded.
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> 98 In a situation where the Bank has not complied with the obligation to inform the consumer incumbent on it under Art.4 of the Directive, if the consumer must repay the loan under German law as construed in the case law of the Bundesgerichtshof, he bears the risks entailed by financial investments such as those at issue in the main proceedings …
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> 99 However, in a situation such as that in the main proceedings, the consumer could have avoided exposure to those risks if he had been informed in time of his right of cancellation.
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> 100 In those circumstances, the Directive requires Member States to adopt appropriate measures so that the consumer does not have to bear the consequences of the materialisation of those risks. The Member States must therefore ensure that, in those circumstances, a bank which has not complied with its obligation to inform the consumer bears the consequences of the materialisation of those risks so that the obligation to protect consumers is safeguarded.
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> 101 Accordingly, in a situation where, if the Bank had informed the consumer of his right of cancellation, the consumer would have been able to avoid exposure to the risks inherent in investments such as those at issue in the main proceedings, Art.4 requires Member States to ensure that their legislation protects consumers who have been unable to avoid exposure to such risks, by adopting suitable measures to allow them to avoid bearing the consequences of the materialisation of those risks." (emphasis added)

29. By analogy, where Mr Swift had failed to inform Dr Robertson of his right to cancel the contract, national law, in the form of the 2008 Regulations should have ensured that he (Mr Swift) bore the consequences of that failure and that Dr Robertson was allowed to avoid the forfeit of his deposit. The question therefore arises whether the 2008 Regulations can be interpreted in a way to achieve this result.

Purposive construction of the regulations

30. The 2008 Regulations can, and should, be given a purposive construction under both EU and domestic law. A purposive construction is one which eschews a narrow literal interpretation in favour of one which is consonant with the purpose of the relevant legislation, in this case, the comprehensive protection of the consumer in the event of the cancellation of the contract. As Lord Bingham observed in R (Quintavalle) v Secretary of State for Health [2003] 2 AC 687 at para 8, "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose." Parliament's purpose was plain. As the Explanatory Memorandum makes clear, it was to ensure that all consumers should have the "safety net" of a cooling-off period. The efficiency of that safety net would be significantly compromised if a deposit paid was not recoverable because the trader had not given written notice of a right to cancel.

31. On behalf of the intervener, the Office of Fair Trading, Ms Ford suggested that there were two possible means of achieving a conforming/purposive construction of the regulations which would fulfil the Directive's objective. The first would be to read the word "within" where it appears in regulation 7(1) and regulation 8(1) as meaning "at any time prior to the expiration of". This, she submitted, would have the effect that a consumer would have the right to cancel at any time before the end of the cancellation period which would either expire 7 days after the consumer received notice of the right to cancel or, in the event that no such notice was served, would not expire at all so that the consumer could cancel at any time.

32. The second possibility advanced by Ms Ford was to interpret "cancellation period" in regulation 2(1) so as to permit the words, "the period of 7 days starting with the date of receipt by the consumer of a notice of the right to cancel" as meaning, "the period commencing from when the trader is required to give the consumer a written notice of his right to cancel pursuant to regulation 7(2) and expiring 7 days after the date of receipt by the consumer of a notice of the right to cancel".

33. Either of these interpretations is feasible and both would achieve the object of advancing and being in conformity with the obvious purpose of the Directive. But the first interpretation has much to commend it, not least because it is a simple and tenable reading of the actual wording of the 2008 Regulations. I would therefore hold that this is the interpretation to be preferred.

Conclusion

34. A failure by a trader to give written notice of the right to cancel does not deprive a consumer of the statutory right to cancel under regulation 7(1) of the 2008 Regulations. Dr Robertson was therefore entitled to cancel the contract as he did by his letter of 1 August 2011. He is therefore entitled to recover his deposit of £1000. I would allow the appeal.