Alexander Hickey QC and Martyn Naylor Successful in Appeal Hearing Regarding the Consumer Rights Act 2015

On 4 May 2018, Alexander Hickey QC and Martyn Naylor were successful in an appeal hearing which will be of interest to all contractors who carry out domestic construction projects. The case itself concerned two contracts for the installation of a fitted kitchen and other bespoke installation works between a consumer, Mr Kharlamov, and a contractor, McCarron & Co Limited ("McCarron"). Three days into the fitted installation works (which were planned to take several weeks), Mr Kharlamov purported to terminate the contracts and demanded a full refund. He claimed that he was entitled to do so under the Consumer Rights Act 2015, which came into effect in October 2015. He claimed that the works were not of satisfactory quality and, on the basis that the contract was a 'mixed' contract covering both 'goods' and 'services', argued that he was entitled "to reject the goods and treat the contract as at an end" under section 20 of the 2015 Act.

Following trial in November 2017 (in which Martyn Naylor represented McCarron as sole Counsel), the judge determined that the 'goods' remedies under the 2015 Act did not apply to these particular contracts, which concerned the installation of fixtures in a property rather than the supply of 'goods', and so held that Mr Kharlamov did not have the statutory right to reject in those circumstances. Instead, Mr Kharlamov's termination was premature, since McCarron would have completed the work to the required standard if they had been allowed to do so.

With the assistance of Leading Counsel, Mr Kharlamov applied for permission to appeal against the judge's decision, arguing that the materials used to construct the fitted kitchen and other installations constituted 'goods' under the 2015 Act, such that he had been entitled to reject them and rescind the contracts as and when he did and was entitled to a full refund of the money he had paid under the contracts.

On behalf of McCarron in response, Alexander Hickey QC and Martyn Naylor argued that the 2015 Act maintained the traditional distinction between contracts for 'work and materials' which become fixtures on the one hand, and contracts for the supply of 'goods' on the other. While the 'goods' provisions (and remedies) in the 2015 Act plainly would apply to the latter category of contracts, they did not apply to the former; and the judge had held that the contracts between Mr Khalamov and McCarron fell into the 'works and materials' category.

Hearing the permission to appeal application in the Central London County Court, His Honour Judge Saggerson accepted the arguments advanced on behalf of McCarron, and refused permission to appeal. Accordingly, the learned judge confirmed – in one of the first decisions on this issue since the 2015 Act came into effect – that the 'goods' provisions of that Act do not apply to certain construction contracts, namely those which involve the supply of 'works and materials' where they become fixtures rather than 'goods' per se.

Mr Kharlamov's further application for permission to appeal (to the Court of Appeal) was also refused on the basis that the judge lacked jurisdiction to grant such permission.

This decision, albeit by a County Court Circuit Judge on a permission to appeal application, is likely to be of some provisional comfort to construction contractors, whose ongoing work may be defective in some minor (but remediable) respect and who find themselves faced with a consumer arguing that they have the right to rescind the entire contract and obtain a full refund under the 2015 Act. But given the number of construction contracts entered into with

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‘consumers’ across the UK every week, it is likely that this question will be come before the Courts again in due course.

An interesting question which did not arise in this case, but could well arise in others is what happens where some parts of the contract involve supplying identifiable goods that are not technically fixtures. Imagine for example a JCT style contract for the design and construction of a substantial extension, reconfiguration and interior design of a London home with a massive basement underground cinema, bar and kitchen. Such a contract has various aspects of work involving design work, the supply of materials and labour but will also include the supply of fridges, wine-cellar appliances and the latest cinema equipment. There is the potential for a consumer to argue that if he has a problem with the quality of the cinema equipment, or the fridge isn’t what he expected, that he has the right to rescind the entire contract and get his money back. Potentially it could be argued that the CRA 2015 gives him that far-reaching right. It is not clear whether Parliament intended this, or thought through the ramifications for the construction industry. The CRA 2015 does not adequately address what happens in that situation but it does envisage the potential for the obligations to be treated severably. To minimise that risk, it might make sense for contractors to address the supply of appliances by way of a separate contract.

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