Office of Fair Trading v Abbey National plc and Others [2009] UKSC 6, [2009] EWCA 116, [2008] EWHC 875 (Comm)

is a case about bank charges in the United Kingdom, concerning the situation where a bank account holder goes into unauthorised overdraft.

When a bank customer makes a payment request (whether by standing order, direct debit or using an ATM or debit card), banks generally make the payment as requested, and then charge fees (which may include "paid item" charges and unauthorised overdraft fees) which accrue on a daily basis whilst the unauthorised overdraft continues. The Office of Fair Trading ('OFT'), acting on behalf of consumers, challenged these fees under the Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCR'), which implements European Union Unfair Contract Terms Directive[1]. OFT claimed the sizeable fees charged were not a fair reflection of the banks' costs but were instead a penalty upon the consumer or bank account holder, hence unlawful. If these fees were confirmed to be a penalty for breach of contract then under UK law the amount that could be charged would be limited to reflect the actual (and considerably lower) costs which were incurred by the bank.

The High Court held that although the charges were not penal, they fell within the remit of the legislation and hence their fairness could be assessed by the OFT. The Court of Appeal agreed and held unanimously and emphatically that the charges could be assessed for fairness. But the UK Supreme Court reversed this decision, holding that the charges could not be assessed for fairness by the OFT, or the courts. They held that UTCCR 1999 r 6(2), as the United Kingdom chose to implement the European Directive, precluded any assessment of the "core terms" of a contract, and because overdraft fees related to a bank's remuneration, the fees charged to consumers could not be challenged. Baroness Hale asserted that while the court had no power to do anything, Parliament could have chosen to construe the directive more broadly, and it would be up to the legislature to decide differently. The Supreme Court denied any reference to the European Court of Justice (through art 234 TEC), so bringing to an end the litigation. The regulations could be challenged as failing to implement the directive through a separate case, but since any decision by the ECJ would be prospective only the government, and not the banks, would have to pay any compensation. This may be unlikely, since the Directive gives discretion to member states to regulate all terms or non-core terms.

Office of Fair Trading v. Foxtons case - implications for all consumer contracts

The decision in the case of the Office of Fair Trading (OFT) v. Foxtons was published on Friday (10 July 2009). This is an important case, and not just for the letting industry.

Basically the OFT challenged various clauses in Foxtons agency agreements with its landlords, claiming that they were unfair under the Unfair Terms in Consumer Contracts Regulations 1999. These were clauses entitling the agents to claim commission not just on letting a property to tenants (in a non managed agreement) but also if the tenant stays on and if the property is sold to the tenant.

The Judge ruled that the clauses were unfair because they were not the sort of thing an average consumer (these regulations only affect contracts between businesses and consumers) landlord would expect to see, particularly as they had not been adequately flagged up in Foxtons sales literature and web-site. He did not rule that such clauses were unfair per se.

Therefore in future, if agents want to claim commission when a tenancy is renewed, this fee will have to be given equal prominence to the initial fee, and it will have to be clearly explained in the companies literature explaining their services.

Looking wider than this, in all contracts between businesses and consumers, the business will be expected to provide full upfront information on the long term financial implications of the contract, both in the contract document itself and in the sales literature relating to it. This will particularly apply to clauses regarding commission and repeat fees and charges, but it is arguable that it should apply to everything. Any clause which is likely to have serious financial implications for the consumer must be disclosed in advance, and not buried in the small print so as to create something in the nature of a 'trap' or 'time bomb' (to use the words of the Judge in the Foxtons case).

Office of Fair Trading v Ashbourne Management Services Ltd and others

[**2011] EWHC 1237 (Ch)**

27 May 2011

Contract – Consumer contract – Unfair terms – Defendants providing managerial and fee-collecting services for gyms and fitness clubs – Claimant Office of Fair Trading receiving complaints about defendants' contractual terms – Whether defendants' terms credit agreements – Whether defendants' terms unfair – Consumer Credit Act 1974, s 8 – Enterprise Act 2002 – Unfair Terms in Consumer Contracts Regulations 1999, SI 1996/2083 – Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277.

Abstract

Contract – Consumer contract. The Chancery Division of the High Court found that although the defendants' contracts with regard to the administration of gyms were not credit agreements, they contained a number of aspects that were unfair, contrary to the Consumer Protection from Unfair Trading Regulations 2008.

The first defendant company carried on the business of managing aspects of gym and health and fitness clubs (the clubs). The second and third defendants were the directors of the company. The defendants recruited members for the clubs and provided standard form agreements to be used by the clubs, inter alia, for collecting payments from the members of the clubs. Following complaints by a number of consumers regarding the defendants' business activities, the claimant Office of Fair Trading began an investigation into the defendants' business in 2002. Since the commencement of

the instant matter, a number of amendments had been made by the defendants to their contracts after discussion with the claimant. However, a number of different contracts remained in use between the defendant and the clubs, which used a range of different wordings and clauses. The claimant commenced proceedings, alleging that the defendants had engaged in activities which contravened the Consumer Credit Act 1974 (the CCA), the Unfair Terms in Consumer Contracts Regulations 1999 (the UTCCR) and the Consumer Protection from Unfair Trading Regulations 2008 (the CPUR). The claimants commenced proceedings.

The claimant submitted that the defendants had: (i) recommended that gym clubs enter into membership agreements that were regulated consumer credit agreements, as defined in s 8 of the Consumer Credit Act 1974 (the CCA), on standard form agreements that did not meet the form and content requirements of s 61(1)(a) of the CCA; (ii) had recommended that the clubs enter into membership agreements which were unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999; and (iii) had adopted unfair commercial practices contrary to the CPUR.

The court ruled:

On the true construction of the contracts, the defendants' contracts were not credit agreements. However, a number of the agreements did contain aspects which the defendants had recommended that the clubs use, that were unfair contrary to the UTCCR. Those aspects included the defendants' statement in their fourth contract that they had a right to claim all subscriptions from gym users for the balance of their minimum membership period and without any discount. Further, inter alia, the defendants' introduction of a contractual right to terminate in the event of serious breach by a member, which had not been remedied within seven days of a written warning or was repeated within six months of a written warning, was a penalty clause that could be made to apply in circumstances where a defaulter had acted reasonably and had given no indication of no longer wishing to be bound by the agreement. It was inappropriate that the defendants would be able to claim all subscriptions from an individual in such circumstances (see [181]-[190], [238] of the judgment).

The defendants had engaged in activities that constituted Community infringements under the Enterprise Act 2002. The claimant would be entitled to declarations and injunctions to reflect those findings (see [240] of the judgment).

Mylcrist Builders Ltd v G Buck [2008] EWHC 2172

The applicant building co. applied to enforce an arbitration award following a dispute. The respondent had signed the standard terms & conditions of the builders which contained a clause referring all disputes to arbitration. The builders appointed an arbitrator but Mrs Buck refused to agree to arbitration. The arbitrator was appointed by the co. and found judgement in their favour.

The builder sought to enforce the award arguing that it was not an unfair term and it was made in good faith and UTCCR 199 No. 2083 did not apply to the legal provisions of the Arbitration Act 1996.

The Court held that the term was unfair as it had not been individually negotiated and caused a significant imbalance in the parties' rights & obligations, hindering Mrs Bucks right to take legal action or exercise any other remedies.