

The Property Ombudsman
Beckett House
4 Bridge Street
Salisbury
Wiltshire
SP1 2LX

Your ref		Direct line	020 7211 8302
Our ref	CRE-E/13627	Fax	(020) 7211
Date	10 March 2010	Email	lorraine.flisher@oft.gsi.gov.uk

Dear Sir or Madam:

**Re: Office of Fair Trading v Foxtons Ltd [2009] EWHC 1681 (Ch)
Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)**

I am writing to you following the recent High court case between the Office of Fair Trading (OFT) and Foxtons Limited (Foxtons), in which the OFT challenged the fairness of certain terms in Foxtons' letting contracts with consumers. The case was brought under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs). Foxtons have not appealed the ruling and in OFT's view the judgement represents good law.

I would be grateful if you would cascade this letter to your members or inform them of the outcome of this case and the significance it has for them and their letting contracts with consumers. As I explain further below, the OFT is of the view that all other letting agents should be complying with the law as set out in the Foxtons' Judgment and OFT will be monitoring the market and will consider taking action against other agents which, in its view, continue to use unfair terms in their letting (and management) contracts with consumers.

Terms challenged in the Foxtons case

The OFT challenged three kinds of terms:

- i. **Renewal commission terms.** Terms which provided that commission shall be paid to Foxtons on renewals, continuations and extensions of a tenancy.



- ii. **Third Party Renewal commission terms.** These terms covered the situation where the landlord sold the property with the tenant still in it. If the new landlord wished to let the tenant stay in the property at the end of the initial lease, the old landlord would still have to pay Foxtons' commission – for as long as the tenant remained in occupation.
- iii. **Sales commission terms.** Terms which provided that commission shall be paid to Foxtons in the event of a sale of the property by a landlord to the tenant.

The Unfair Terms in Consumer Contracts Regulations 1999 ('the UTCCRs')

As you will be aware, the UTCCRs apply to terms which have not been individually negotiated in contracts between businesses and consumers (e.g. standard form contracts). The UTCCRs require that such terms must be in plain and intelligible language and where they are not, the interpretation most favourable to the consumer will apply or the terms may be found to be unfair and not binding on the consumer.

If a term defines the main subject matter of the contract or the adequacy of the price or remuneration (the 'core bargain') and it is drafted in plain and intelligible language then there cannot be any assessment of that term as regards the adequacy of the price in comparison to the product or service provided in exchange. However, such terms ('core' terms) can be assessed for fairness on other grounds, such as whether they are transparent or sufficiently brought to the attention of consumers.

All other terms in the contract ('non-core' terms) which have not been individually negotiated will be unfair under the UTCCRs if, contrary to the requirement of good faith, they cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Foxtons' ruling and Order

In the Foxtons case, applying the UTCCRs, Mr Justice Mann ruled that all of Foxtons' terms which the OFT challenged were unfair and he ordered that Foxtons refrain from using or relying on such terms (or terms of like effect). The Judgement can be found at

www.bailii.org/ew/cases/EWHC/Ch/2009/1681.html

I also enclose a copy of the Order of the Court dated 23 December 2009. . In addition, I would draw your attention to the OFT website where we have a dedicated webpage on the case. This

webpage contains a link to the Judgement, the Order of 23 December and other information such as OFT press releases and a Questions and Answers page (Q & A) on the case. .
http://www.offt.gov.uk/oft_at_work/markets/markets/foxtons/

The ruling and Order prohibit Foxtons from using sales commission and third party renewal commission terms in letting contracts and require that where renewal commission terms are used they must be transparent and clearly brought to the attention of consumers. The liability to pay the renewal commission, the circumstances in which it is payable and the amount or rate of renewal commission must be clear and ‘actively flagged’ up to consumers. The renewal commission terms should also be written in plain and intelligible language, so that the consumer can understand the nature and extent of his liabilities.

In particular, the Judge ruled against specific terms which made the landlord liable to pay renewal commission where someone other than the original tenant was in occupation (eg a “nominee” or “associate”), on the grounds that these terms were not in plain and intelligible language. We consider that it is difficult for agents to draft such terms plainly, and would advise agents to be cautious about extending liability to pay commission where someone other than the original tenant is in occupation, because it is hard to draft this sufficiently plainly.

Foxtons has made significant changes to their standard letting contract with consumers as a result of OFT intervention, including making the liability to pay renewal commission more transparent and applicable only where the original tenant remains in occupation. They have reduced the rate of commission payable on renewal, and limited the duration of the term to two renewals, as well as providing that the landlord is entitled to a pro-rated refund where the tenant does not remain in occupation for the full length of the agreed minimum period. The OFT will continue to monitor whether Foxtons’ letting agent contract operates fairly under the UTCCRs, but accepts that the changes Foxtons have made mean that their current terms are not “of like effect” to the terms the Judge found to be unfair.

Application of the ruling in Foxtons case to other letting agents

The OFT expects other letting agents which use similar terms in contracts with consumers, to comply with the law as set out in this ruling and will take the necessary steps to ensure this where appropriate. Although this case concerned Foxtons’ terms in letting contracts with consumers, the Judgment sets out what the law is in this area and contains key principles that apply to all letting agents’ contracts (including contracts for management services) with consumers, which have not been individually negotiated.

In summary, the Judge in the Foxtons case found that the renewal commission, third party renewal commission and sales commission terms were not 'core' terms and could therefore be assessed for fairness. The Judge said that consumers approach letting agents to find a tenant for their property and are not concerned about selling their property or what happens on a resale. As the Judge pointed out the letting contract was to instruct Foxtons 'to act on your behalf in marketing your property for rental.' The typical consumer approaches a letting agent to find him a tenant and the core bargain will usually be getting the tenant in, in exchange for commission.

When the Judge assessed the third party renewal commission and sales commission terms for fairness he found that they operated to the significant detriment of consumers under the contract. Both terms were found to be unfair under the UTCCRs because they potentially required a consumer to pay an agent a large sum of money (and in the case of third party commission, an ongoing or indefinite sum), and moreover Foxtons provided no services in exchange. In the case of the sales commission, the Judge pointed out that the liability arises before the consumer receives any sale money, and exists even if the contract for sale is not completed. Additionally, he found that both terms were not transparent and consumers would be 'astonished' to find that a contract which was concerned with the consequences and effects of the rental of a property, contained such terms.

Therefore, in OFT's view other letting agents should not be using sales commission and third party renewal commission terms in their letting or management services contracts with consumers.

When the Judge assessed renewal commission, he held that it represented a significant sum and a significant proportion of the rent, and it operates adversely to the landlord the more time goes on. Commensurate services are not provided in return. Further, consumers did not expect the term to be there, and it operated as a trap or time bomb.

In our view there is therefore a presumption against renewal commission being fair, unless it is, as the Judge recommended, actively flagged to the consumer. Such terms, if agents wish to rely on them, must be drafted in plain and intelligible language, they should be transparent, clearly set out and given appropriate prominence both in the contract and any accompanying promotional literature or advertising, including on an agents' website.

It remains to be seen whether agents will be able to flag renewal commission sufficiently clearly to be able to rely on such terms, and the OFT will continue to monitor their success, including levels of complaints to the effect that consumers are surprised by bills for renewal commission. The OFT has also recently launched a study into consumers' understanding of contracts which

will consider, amongst other things, the extent to which consumers are able sufficiently to understand future liabilities such as renewal commission.

What happens if the term is unfair under the UTCCRs?

The consequences of a term being unfair (for example because an agent's entitlement to renewal commission is not set out clearly, in terminology consumers can understand, and actively flagged in the contract, promotional literature and in their sales practices), is that the agent will not be able to rely on the term against the consumer.

Agents should also be aware that where a term is unfair, this may mean that consumers will seek a refund of commission already paid to an agent, or refuse to pay the renewal commission which the agent claims is owed. A term must be drafted in plain and intelligible language and be transparent and actively flagged to the consumer before and at the time he signed the contract.

What happens next?

The OFT expects other letting agents to comply with the ruling in the Foxtons case and will be monitoring complaints to ensure that they are doing so. The OFT is writing to a number of stakeholders, such as yourselves, to bring to their (and their members') attention the judgement and the effect of it on letting agents. Where it comes to the attention of the OFT that a letting agent is using unfair terms (such as sales commission and third party renewal commission terms) in their contracts with consumers, the OFT will consider taking legal action to ensure compliance with the law.

I hope that this information is helpful and clarifies OFT's the position following the Foxtons judgement. Please disseminate this information to your members so that they may ensure that their contracts and business practices comply with the law.

Yours sincerely

Lorraine Flisher
Consumer Markets Group

Enc: [Order of Mr Justice Mann in Office of Fair Trading v Foxtons Ltd dated 23 December 2009]