

The Unfair Terms in Consumer Contracts Regulations

The Unfair Terms in Consumer Contracts Regulations have been in force since 1995.¹ Since then the Office of Fair Trading² have considered over 7600 cases of contracts reported to them as being potentially in breach of the regulations.³ The complaints continue unabated and an adverse finding can have significant effects on a business.

On the 2nd October 2002, the OFT announced that it considered many of My Travel Group plc's standard terms and conditions in its brochures and booking forms to be unfair and contrary to the interests of consumers.⁴ Upon the OFT announcement the shares in My Travel slumped.⁵ The OFT finding against My Travel was quickly followed on the 21st October by a similar decision against Thomas Cook and ABTA.⁶ On the 28th February 2003, the Competition Commission announced that it was investigating the market for extended warranties for consumer goods. The Commission expressed concern about the apparent use of unfair contract terms in some of these warranties.⁷ The large electrical retailers affected by this investigation appear to be fighting a rearguard action to protect a business that in some cases amounts to around 50% of its profits,

Unfair terms in consumer contracts appear to be widespread throughout all sectors of the economy. The author regularly comes across examples on notice boards in car parks, car washes, contained within insurance and financial services documents and within standard terms in sale contracts which undoubtedly breach the regulations.

The regulations establish a challenging environment for those who draft consumer contracts to ensure compliance. They also offer an opportunity for those who advise

¹ The Unfair Terms in Consumer Contracts Regulations 1999 (S.I. 1999/2083). The current regulations replaced The Unfair Terms in Consumer Contract Regulations 1994 (S.I. 1994/3159)

² The OFT regularly publish details of the cases they have considered in a The Unfair Contract Terms Bulletin.

³ Bulletin 19 page 54, published August 2002.

⁴ OFT press announcement 2nd October 2002.

⁵ Since then My Travel shares have collapsed further but for other reasons.

⁶ OFT press release 21st October 2002, PN 67/02.

consumers to challenge unfair terms in the courts or by complaining to the OFT or their local Trading Standards Department.

To my knowledge, no attempt has been made in Scotland to rely upon the regulations in a private court action although such a course is possible. There is however a very large body of OFT decisions which give considerable guidance on the interpretation of the regulations and how they should be used to inform the drafting of consumer contracts.

This article considers the regulations and considers the OFT's case law. It attempts to provide some guidance on whether a contractual term should be inserted in a contract at all and if so what factors should be considered in order to avoid the term falling foul of the regulations. It concludes that an over legalistic approach to drafting consumer contracts is likely to lead to difficulties and a simpler approach should be considered. Contracts restricted to the bare essentials should ensure compliance with the regulations whilst preserving each party's rights.

Enforcement the Regulations

The Regulations allow unfair terms in consumer contracts to be challenged by consumers, the Trading Standards Departments of local authorities and a number of other statutory bodies which are identified in the regulations.⁸ The regulations also confer a private law right to the individual to litigate the matter in court. I am unaware of any reported cases.⁹ This is surprising given the regulations clear utility to the consumer.

⁷ Extended Warranties Monopoly Inquiry: Issues Under Investigation. www.competition-commission.org.uk/pressreleases/06-03.pdf

⁸ Schedule 1 contains a list of the qualifying bodies who can enforce the regulations. Various concordats exist between the OFT and the qualifying bodies which attempt to ensure a consistency of approach in the implementation of the regulations.

⁹ Six unreported cases taken by consumers under the 1994 regulation are mentioned in Susan Bright's article "Winning the battle against unfair contract terms" (2000) 20 LS, p3.

The regulations apply to non-negotiated contracts between suppliers¹⁰ and consumers.¹¹ They do not apply to individually negotiated and business-to-business contracts.¹² If a term falls foul of the regulations it is void.¹³

The regulations give effect to an EU directive.¹⁴ Where there is uncertainty over the interpretation the “regulations should be construed so as to give effect to the directive, to which resort may properly be made for purposes of construction.”¹⁵

Core Terms

The regulations do not apply to the core terms of a contract – price and the subject matter.

Regulation 6(2) states that: -

In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate-

(a) to the definition of the main subject matter of the contract, or

(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.

The regulations "are not intended to operate as a mechanism of quality or price control" and regulation [6(2)] is of "crucial importance in recognising the parties' freedom of contract with respect to the essential features of their bargain".¹⁶

But core terms are exempt from the regulations only where they are expressed “in plain intelligible language.”¹⁷ Where the price or subject matter of a contract is difficult to

¹⁰ A seller or supplier means any legal or natural person acting in the course of a trade, business or profession. Regulation 3(1)

¹¹ Regulation 5(2)

¹² Regulation 5(1)

¹³ Regulation 8(1).

¹⁴ The regulations implement Council Directive 93/13/EEC on unfair terms in consumer contracts (O.J. No. L95, 21.4.93, p. 29)

¹⁵ Director of Fair Trading v First National Bank, [2001] UKHL 52 Para 8 per Lord Bingham.

¹⁶ First National Bank, Para 12 per Lord Bingham.

¹⁷ Regulation 6(2)

ascertain or where some other uncertainty or lack of clarity is present within the contract, the regulations may apply.

In *FPD Savills Ltd* the payment terms were unclear and scattered throughout the contract the OFT insisted upon revision to bring all the payment terms together.¹⁸

As will be seen below, where core terms are not expressed in clear, plain intelligible language, they also may fail for want of this. To my knowledge there have been no attempts by consumers to have a court declare a contract void on this point. But the potential for this does, I would suggest, exist.¹⁹

Finally, it should be noted that Paragraph (1) of Schedule 2 provides that terms which allow the supplier to raise prices unilaterally or provide for the price to be determined at the time of delivery may be unfair. This provision is considered separately.

Fairness

The concept of fair dealing with the consumer is the central theme of the regulations. If a term is fair then the regulations will not apply.

A term will be regarded as unfair if, “contrary to the requirement of good faith,²⁰ it causes a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the consumer.”²¹

¹⁸ Bulletin 15 Case No. 7. This case was brought under regulation 7 which states that written terms must be expressed in plain intelligible language. The principles behind regulation 6(2) and regulation 7 are however the same.

¹⁹ Complex financial contracts may be vulnerable to a finding of unfairness. There has been some recent media interest in the difficulty of calculating the interest to be charged on consumer credit contracts. See “Banks attacked for Confusing Charges” *Glasgow Herald* 5th Aug 2002. “Credit card charges which stumped a Maths Professor” *Glasgow Herald* 24th June 2002. It should be noted that stating the APR in consumer credit transactions is a requirement of law and the regulations do not apply to contractual terms which reflect mandatory statutory provisions. A term which reflected a mandatory statutory provision but did so in a confusing way may however still be subject to the regulation.

²⁰ This provision is consistent with the terms of the Principles of European Contract Law Revised version 1998, Article 1:201 which holds: (1) Each party must act in accordance with good faith and fair dealing. The notion of good faith is beyond the scope of the article.

²¹ Article 3 and Regulation 5(1).

The assessment of fairness takes into “account of the nature of goods and services... to all the circumstances attending the conclusion of the contract and to all the other terms of the contract... on which it is dependent.”²² The concepts of fairness and good faith are bound together. Fairness requires the supplier to act in good faith towards the consumer.

Lord Bingham has described the concept of good faith thus:

“The requirement... is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations. 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. It looks to good standards of commercial morality and practice.”²³

Good faith requires that each party treats the other with commercial respect and does not seek to achieve an unfair advantage over the other by devious means. LJ Brooke provided the following example: -

“[I]t would be an affront to good faith to allow a party to rely on a "small print" term of a contract which expressly removed the whole of the benefit of the contract from the other party, with no diminution of the consideration

²² Article 4(1) and Regulation 6(1)

²³ First National Bank, Para 17

which flowed from that party when it thought it was acquiring the benefit in question.”²⁴

Good faith seeks to strike a balance between the legitimate interests of the supplier and consumer. The supplier should not seek to gain a contractual advantage over the consumer. Where a term exists for the benefit of the supplier there ought to be a counterbalancing term in favour of the consumer.

Contractual Interpretation

Regulation 7 (2) states that where,

“there is a doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail...”

The directive makes it clear that this rule of interpretation is not a defence against regulatory action.²⁵ Ambiguous terms may be challenged as being in themselves unfair for lack of certainty.

Regulation 8 provides:

(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

Suppliers cannot rely upon unfair terms in a contract. Unfair terms are void. A contract containing void terms continues to bind the parties’ so long as the remnants of the

²⁴ Lacey’s Footwear v Bowler International (CA) 1997. 2 Lloyds Rep at 385.

²⁵ Article 5.

contract are able so to do. A contract which minus the void terms is meaningless, is not binding.

Contractual Language and Presentation

Consumer contracts should be in plain English, be well presented, legible, highlight important terms and have no hidden terms. Ideally all of the contract should be found within a single document. The consumer must have the opportunity to become acquainted with the terms of the contract before he signs.

Regulation 7 (1) states:

A seller or supplier shall ensure that any written term of a contract is expressed in plain intelligible language.

The OFT have consistently held that this means no legal language or jargon can be used in contracts. Legal terms may have a very precise and definite meaning to lawyers but mean very little to the consumer. The OFT advise that:

“Ordinary words should be used as far as possible and in their normal sense... Sentences should be short, and...text should be divided into easily understood sub-headings.... Statutory references, elaborate definitions, and extensive cross-referencing... should be avoided.”²⁶

Thus, ‘indemnify’²⁷, ‘E.&O.E.’²⁸, tort²⁹, ‘title, waiver and Bailee’, ‘without prejudice’³⁰, ‘without prejudice to the generality of the foregoing’³¹, ‘time of payment shall be of the

²⁶ Guidance on Unfair Terms in Tenancy Agreements p56. OFT November 2001

²⁷ Galleria Carpets Ltd t/a Posners Carpets and Posners the Floor Store Bulletin 16 No 8. Northern LPG Supplies Ltd Bulletin 16 Case No. 11.

²⁸ Homeform Group Ltd t/a Moben Kitchens, Kitchens Direct and Dolphin Bathrooms. Bulletin No 16 Case No. 9.

²⁹ Richard Parkin & Co Bulletin 16 case No 13.

³⁰ The Student Support Centre (UK) Ltd Bulletin 14 Case No. 26.

³¹ Coomber Security Systems Ltd Bulletin 15 Case No. 4.

essence³², ‘of the essence’³³ ‘time not of the essence’³⁴, ‘irrevocably indemnify’³⁵, ‘whether arising by reason of statute, common law or otherwise,’³⁶ ‘warranted vehicles’³⁷ lien,³⁸ ‘consequential loss’³⁹ and ‘implied by law’,⁴⁰ have all been held to breach regulation 7(1).

Contract terms that have been imported from overseas may also fail for lack of familiarity. In *Microsoft UK Ltd*⁴¹ the use of a phrase, ‘customer feature suggestions (a product “wish”)’ which would be unfamiliar to a UK customer was deleted.

Regulation 7(1) goes beyond insisting on the use of plain English. A contract must also be clear, unambiguous and easy for the consumer to understand. Terms which fail to adequately highlight any potentially detrimental consequences of a contract may also breach regulation 7.

In *Exeter Friendly Society*⁴² the OFT insisted that warnings be inserted into a contract, which explained that, health insurance cover did not fully extend to certain hospitals in a higher band than the band for which the consumer was fully covered for his costs of treatment.

Contracts printed in small font and which may be illegible for some consumers may be void.⁴³ In *Singlepoint (4U) Ltd* the contract had to be reprinted with a larger font, as the existing contract was difficult to read.⁴⁴ In *Swiftcall Ltd* an important term providing that

³² Aquability (UK) Ltd Bulletin 14 Case No. 3.

³³ Motability Finance Ltd Bulletin 19 Case No. 15

³⁴ Roofline Systems Ltd Bulletin 14 Case No. 22. Classique Windows and Conservatories, Bulletin 17 Case No 7.

³⁵ Cheque Changers Bulletin 17 Case No. 14.

³⁶ The Student Support Centre (UK) Ltd Bulletin 14 Case No. 26.

³⁷ Hobbs Parker Bulletin 14 Case No. 12.

³⁸ Motability Finance Ltd Bulletin 19 Case No. 15

³⁹ Portland Enterprises (CI) Ltd t/a Television X – The Fantasy Channel, Bulletin 15 Case No 15.

⁴⁰ Talacre Beach Caravan Park Ltd Bulletin 19 Case No. 21.

⁴¹ Bulletin 5 page 41.

⁴² Bulletin 14 Case No. 8.

⁴³ Schedule 2 paragraph (i).

⁴⁴ Singlepoint (4U) Ltd Bulletin 15 Case No. 19.

unused call credits would expire after a period was reprinted in bolder type given its importance to the consumer.⁴⁵

The Grey terms

Schedule 2 of the Regulations contains an indicative and non-exhaustive list of the 17 types of terms (a-q), which may be regarded as unfair. Terms in a contract falling within one or more of the categories in the schedule, are not necessarily unfair. But, in practice terms that fall within the list invariably have to be deleted or heavily amended. Although the regulations do not use the phrase, terms that fall within the list, could be described as presumptively unfair.

.....Paragraph (d), (e) & (f): Compensation for cancellation of the contract

Paragraphs (d), (e) and (f) can be conveniently grouped together as they regulate terms which provide for compensation to be paid, normally to the supplier, in the event that the contract is cancelled by the consumer. The regulations ensure a fair balance is struck between the supplier and consumer. Only terms, which provide for reasonable compensation in the event of cancellation, are likely to be considered fair. Contractual terms must attempt a level of compensatory equivalence between the two contracting parties. Terms, which allow for the unilateral retention of a consumers deposit, will almost certainly fall foul of these provisions. But as will be seen the OFT insist that compensation terms go further than mere equivalence. Compensation for breach of contract is limited to that reasonably incurred as a consequence of the breach. The OFT may also insist that some reference to mitigation of loss be inserted in the contract.⁴⁶

....In any event paragraph (e) limits the use of terms, which act as penalty clauses. It reads:-

⁴⁵ Bulletin 17 Case No. 26

⁴⁶ Friern Manor Country House Hotel Ltd, Bulletin 14 Case No. 11.

A term which has its object as “requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation” may be regarded as unfair.

As with terms which fall under paragraph (d) the OFT will insist that such terms are delete and that any compensation for cancellation or breach of contract is reasonable.⁴⁷ Terms which provide for non-refundable deposits act as a penalty clause and will be unfair.⁴⁸ In *J.K.Lynch Construction* an unfair penalty clause using an onerous rate of interest had to be revised to remove any reference to the penalty.⁴⁹

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⁴⁷ Friern Manor Country House Hotel Ltd Bulletin 14 Case No. 11

⁴⁸ Woods Travel Ltd Bulletin 19 Case No. 22.

⁴⁹ J.K. Lynch Construction Ltd Bulletin 15 Case No. 9.