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On level terms

Terms and conditions for consumer contracts

In [June 2011 I wrote](#) about the Ashbourne case¹ on consumer contracts, focusing on penalty clauses. But perhaps the biggest impact should be on the way businesses write their standard terms for dealing with consumers.

The [Unfair Terms in Consumer Contracts Regulations 1999](#) caused a major shift in contract law. Until then, unless the OFT intervened, most contract terms meant what they said. There were exceptions for some kinds of exclusion clauses, but most terms did not have to be reasonable or fair. Contract terms for dealing with consumers looked much like business-to-business standard conditions: heavily slanted in favour of the supplier.

Now, most consumer contract terms are automatically unenforceable if they are unfair.

A term is unfair “if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”. All written terms must be in clear and intelligible language. The only terms exempt from a fairness assessment are terms required by law or regulatory requirements, any terms individually negotiated with the consumer, the definition of the main subject matter of the contract, and the adequacy of the price. Even then, the last two must be expressed in clear and intelligible language, and are narrowly interpreted.

¹ [OFT v Ashbourne Management Services \[2011\] EWHC 1237](#). The Court’s order is at http://www.of.gov.uk/shared_of/consumer-enforcement/ams/order.pdf

Unfairness is judged in the context of the particular consumer's position, not in relation to consumers generally. The Ashbourne case demonstrated that the courts are prepared to be quite picky in deciding what is unfair, looking at each term individually and the effect it could have. The court held that the following were (or would be) unfair in the context of a health club contract:

- A long minimum period (1, 2 or 3 years), even with exceptions for contingencies such as unemployment or moving house – “the defendants' business model is designed and calculated to take advantage of the naivety and inexperience of the average consumer using gym clubs at the lower end of the market”.
- A term allowing the supplier to terminate the contract due to the consumer paying late, if the delay was not sufficient to amount to the consumer indicating he or she was no longer intending to be bound by the contract or undermining the supplier's confidence in his or her ability to pay
- A term requiring the consumer to pay the whole undiscounted balance for the minimum period if the consumer breached the contract
- A requirement for a notice of termination to be given in an unexpected manner, in this case to a central office rather than to the club
- Terms allowing payments to be recovered from the consumer despite representations made to him by the supplier.

What does this mean for your standard terms and conditions, if you deal with consumers? You really have two options.

The first is to continue as before with potentially unfair terms, but to accept that many of them will be unenforceable against consumers. Most companies selling primarily to business buyers will probably do this – if you are a consumer business, what's the point of using terms you know are unenforceable? So long as you give way quickly and do not build a business model based on unfair terms (as Ashbourne did) you should be reasonably safe from action by the OFT, unless you are in a particularly sensitive sector such as (at the moment) health clubs.

Otherwise, reassess your terms for dealing with consumers. Consider having separate terms for consumer and business sales. Have your terms drafted so that they are fair in the context of your particular business.

Unfortunately that is not an easy thing to do, and it is likely to increase the legal costs of drafting your terms. Your lawyer can no longer use a standard form, or write the terms with minimal knowledge of your business. You need to work with him to decide what is fair in circumstances, and to adapt your business model if necessary.

Then you both need to make sure the terms are in plain and intelligible language. The requirement is probably different depending on the target audience – are your consumers likely to be educated and technically astute? Important terms should be given prominence, perhaps with bold type or capital letters – though every term is important if it happens to cover the issue that arises. The more you try to explain things, the longer and more unintelligible the contract gets. The OFT then says that the time available to the consumer to read the contract affects its fairness².

The OFT publishes a [general guide to making contract terms fair](#) and a selection of [guides for particular industries](#).

And while you are reviewing your contracts, don't forget the consumer's cancellation rights!³

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August 2011

² http://www.of.gov.uk/shared_of/reports/unfair_contract_terms/oft311.pdf at pages 10-11

³ Especially under the [Consumer Protection \(Distance Selling\) Regulations 2000 as amended](#) or the [Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008](#)