

***The Office of Fair Trading v Ashbourne Management  
Services Ltd &ors [2011] EWHC 1237 (Ch):***

**Unfair terms in contracts for gym membership**

*BACKGROUND*

*Held: terms setting out minimum periods in contracts for gym membership are “core terms” falling within the scope of regulation 6(2) of UTCCR. In the present case, the minimum term clauses in ten out of the 13 Agreements, and in all Agreements where the minimum term exceeded 12 months, caused a significant imbalance in the parties’ rights and were therefore unfair.*

*The Office of Fair Trading was represented by Julia Smith of Henderson Chambers*

The Defendant Company acted on behalf of around 700 gyms and health clubs nationwide. It recruited and signed up potential members (believed to number around 300,000) on standard form contracts and collected payments. Going as far back as 2000, the OFT received complaints from consumers about Ashbourne’s conduct. Not satisfied by assurances given (and seemingly broken), the OFT issued proceedings to restrain Ashbourne’s practices, alleging that the standard form agreements (“the Agreements”) which it executed were regulated by the Consumer Credit Act 1974 (“the Act”) and improperly executed, contained unfair terms within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 (“UTCCR”) and that the Defendant Company’s practices (recommending unfair terms, exaggerating the impact of credit reference agency reporting, and chasing payments which were not payable) infringed the Consumer Protection from Unfair Trading Regulations 2008 (“CPR”).

*ARGUMENT*

Kitchin J heard argument from Julia Smith of Henderson Chambers on behalf of the OFT. Having determined that consumers were not provided with credit under the Agreements – and therefore that the Agreements were not regulated – his Lordship considered the fairness of the terms, which included the following:

- Minimum membership periods of 12, 24 or 36 months;
- Upon early termination, the member would be liable for the payments which would have been made during the remaining period (with or without a discount for accelerated receipt); and
- Requirement for notice of termination to be given to the Defendant Company and not to the gym.

*Held*

Of note, the term setting out the minimum period of the Agreement was a “core term” falling within the scope of regulation 6(2) of UTCCR. Further, it was expressed in plain intelligible language. Therefore, the court was precluded from considering the fairness of the term insofar as it related to the main subject matter of the contract or the adequacy of price as against the value of the service received. However, his Lordship nonetheless

ALERTER 1 JUNE 2011

found (on the facts of the present case) that the minimum terms in 10 out of the 13 Agreements (regardless of length) and a minimum term of more than 12 months in any of the Agreements created a significant imbalance in the parties' respective rights and were contrary to good faith. Such minimum terms were therefore unfair.

It was also held that a term requiring the immediate payment of all future monthly instalments upon early termination without a discount for accelerated receipt was unfair and a penalty at common law. Similar terms which provided for future instalments to become payable immediately with a 1% or 5% discount for accelerated receipt were also held to be unfair and penalties. The terms requiring notice to be given to the Defendant Company, and not to the gym, were unfair.

Kitchin J also held that reporting non-payment and threats to report non-payment to a credit reference agency were unfair practices where the term providing for payment of the sum in question was unfair and so not binding on the gym member, where the amount in question was merely the subject of a claim for damages, was disputed by reference to representations made by the club or by reference to the contract terms or, obiter, arose upon the making of a demand for early payment under an improperly executed regulated credit agreement.

Of general application, the judgment contains guidance on the nature of the typical consumer for the purposes of the UTCCR. Drawing on his knowledge of European consumer law in the context of registered trademarks, the judge recognised that the typical consumer is generally assumed to be reasonably well informed and reasonably observant and circumspect, to have read the relevant documents and to have sought to understand what was being read.

The OFT was therefore entitled to declaratory and injunctive relief to give effect to the judgment of Kitchin J.

The Office of Fair Trading was represented by Julia Smith of Henderson Chambers.

Alerter: Thomas Evans

**Henderson Chambers**

2 Harcourt Buildings, Temple  
London EC4Y 9DB

T 020 7583 9020 F 020 7583 2686

E [clerks@hendersonchambers.co.uk](mailto:clerks@hendersonchambers.co.uk)

DX 1039 Chancery Lane

[www.hendersonchambers.co.uk](http://www.hendersonchambers.co.uk)