

## Property Newsletter

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December 2009

### VOLUME

#20

The members of Hardwicke's Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

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### Article: A 'Clear and Unambiguous Message' sent to Letting Agents

In a recent High Court case *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch) it was accepted that certain terms and conditions used by Foxtons Ltd in its letting agreements with landlords were manifestly unfair to consumers under the **Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)**.

Foxtons' standard contract terms in their letting agreements provided for a commission payment for the introduction of a tenant. However the wording stipulated that such a commission would continue to be paid even if the tenants renewed their existing tenancy or where the tenants themselves arranged new tenants. Commission would be also payable where the tenants later purchased the property from a landlord of where the landlord assigned the tenants' rights to a 3rd party.

Various landlords complained to the Office of Fair Trading (OFT) in 2008 over these letting agreements and Foxtons were forced to amend the wording slightly. However the situation remained unsatisfactory and unclear; the OFT took action and applied for declaratory relief. During the proceedings the Court of Appeal confirmed the OFT's long-held view that it can take enforcement action under the UTCCRs to protect consumers in relation to both existing and future contracts.

Mann J accepted that all the terms brought before the court by the Office of Fair Trading were contrary to the requirement of good faith, and caused a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumers (in this case the landlords). Such onerous contract terms were not automatically unfair but as they were not part of the core bargain between the parties they were insufficiently '*plain and intelligible*' as required by reg.6(2) and 7 of the

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UTCCRs. Few consumers were likely to read such terms, which appeared to be deliberately concealed within the rest of the contract wording.

Foxtons argued that the renewal commission was justified because it was part of the payment for an income stream that had been introduced to the landlord. Mann J rejected this submission, stating that *"the landlords in question are not sophisticated economists, or even sophisticated businessmen, and would be unlikely independently to think in those sort of terms"*. He held that such important contract terms must be flagged prominently not just in the contract, but also in any sales literature and processes (consider Denning's 'red hand test' from *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433).

An additional submission made by Foxtons was that the renewal commission was legally severable and that a blue pencil test could allow the clause to fall away from the rest of the contract. This was also refused by Mann J, who instead viewed that they were not *"divided up in that way"*. The OFT will now go on to ask the High Court to go on to grant injunctions under reg.12(4) of the UTCCRs preventing the continued use of the terms by Foxtons.

This ruling reiterates the principle that all terms which are likely to impact on a consumer financially should be communicated to that consumer before the contract is entered into. In light of the nature of the case and the fact that Mr Justice Mann was not ruling on the validity of relevant commission arrangements generally, the OFT may be more limited in what it can actually do. Nevertheless, the case could have implications for practitioners within the industry, and may perhaps be a catalyst for reform by the letting agents.

In his witness statement, Foxtons' Chief Operations Officer, Mr Budden, had this prediction:

*"Although no-one can say for sure at this stage, I suspect that were renewal commission to be ruled unfair in the manner sought by the OFT, there would either be significant upward pressure on the level of commission fee in the market (and hence also on rents) and/or increased pressure on prospective tenants to enter into longer initial tenancies or not to renew shorter tenancies"*.

Regardless of this, OFT Chief Executive, John Fingleton, championed the case as a victory for the hapless consumer in the lettings market:

*"This ruling sends out a clear and unambiguous message that businesses offering services need to ensure unexpected or surprising terms are not hidden away in small print. Contracts*

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*need to be written in clear and straightforward language with important provisions, particularly those which may disadvantage consumers as in this case, given prominence and actively brought to people's attention."*

**Wendy Parker**

**Did you see...? Recent cases you may have missed**

***Gregory Projects (Halifax) Ltd v (1) Tenpin (Halifax) Ltd (2) Tenpin Ltd [2009] EWHC 2639 (Ch)***

**Landlord and Tenant – Agreements for lease**

The claimant developer (C) sought a declaration as to whether the defendant company (D) was entitled to terminate their agreement for lease. The parties entered into the agreement for lease which was conditional on the satisfaction of certain conditions including a planning condition. C acquired the site and was granted planning permission subject to conditions. Under the agreement, C was to forward to D a copy of any relevant decision on the planning application and they each had 10 working days thereafter in which to give written notice to the other of whether the planning conditions were acceptable. C informed D by letter that permission had been granted with no onerous conditions but only sent D a copy of the written decision after the end of the 10 days. In the meantime, D served notice claiming to rescind the agreement. C submitted that if planning permission with the required characteristics had been granted before the end date the planning condition had been satisfied and D could not rescind.

**HELD:** The planning condition was satisfied on the "obtaining" of planning permission of a particular kind. Planning permission was obtained for that purpose when it was granted. D had known that planning permission had been granted and could have called upon C to send it a copy of the decision notice under the agreement but it did not do so.

**Laura Tweedy**

***Anthony Stephen Davies v Richard Dennis & Ors [2009] EWCA Civ 1081***

**Real Property – covenants – nuisance**

The appellant (A) appealed against a decision that a restrictive covenant to which he was subject applied to building works that he proposed to carry out. The covenant contained the following stipulation "...nor to do or suffer to be done on the Plot... anything of whatsoever nature which may be or become a nuisance or annoyance to the owners or occupiers for the time being of the Estate or the neighbourhood". A obtained planning

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permission to build a three-storey extension to his house and the question was whether this was in breach of the covenant.

**HELD:** Appeal dismissed. The covenant was clearly wide enough to be capable of extending to activities of all natures, including building an extension to an existing house which, when built, would be such an "annoyance", *Wood v Cooper* (1894) 3 Ch 671 Ch D applied.

**Laura Tweedy**

***Bee v Thompson* [2009] EWCA Civ 1212**

**Easement – Development of servient land – whether it would lead to excessive use of the way**

D's land, previously used for agricultural purposes, had the benefit of a right of way across A's land. The right was granted "at all times and for all purposes connected with the said [land]". D obtained permission to develop it to hold 3 houses. At first instance the judge held that the way could only be used for agricultural purposes and gave an injunction restraining D from using it for access to the proposed houses. D appealed.

**The Court of Appeal held:** (i) the phrase "at all times and for all purposes connected with the said [land]" should be taken to have its plain meaning unless there were compelling reasons to cut it down. Replacing "all purposes" with "agricultural purposes" was therefore not justified. (ii) The judge had indicated, however, that the development of the land would result in an excessive user of the way. That finding was justified and D was therefore prohibited from using the way for access to and from the three new residences.

**Phil Fellows**

***New v Gromore Ltd and others* [2009] All ER (D) 81 (Nov)**

**Trespass – C rented lock up from Ds 1 & 2 – D3 bought and demolished – Whether Ds 1 & 2 liable to C for giving permission – Whether D3 liable for trespass**

C was an artist renting a studio lock up from Ds 1 and 2. The freehold was sold to D3 who obtained planning permission to demolish the lock up and build upon the land. D3 went ahead, destroying C's studio and equipment. C sued D3 for trespass and Ds 1 and 2 for consenting to it.

D3 was liable for trespass for demolishing the lock up and for trespass to, and wrongful interference with, C's goods for clearing his equipment from the site. Ds 1 and 2 were not liable

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to C because they did not authorise D3 to demolish the lockup and clear C's goods from the site.

**Phil Fellows**

***Trustees Ltd v Papakyriacou* [2009] EWCA Civ 1089**

**Easement – Right to use loading bay – Right limited to certain periods – Whether Ds or their tenants used the bay outside the prescribed periods**

Ds owned land next to C's and enjoyed the benefit of an easement over C's land entitling them to use it as a loading bay. On 29 January 2008 C wrote to Ds informing them of the time restrictions. They suggested that Ds had since flouted those restrictions. The judge held that neither Ds nor their tenants used the loading bay outside the prescribed times and refused an injunction.

**The Court of Appeal held that:** (i) the judge had been entitled to find that Ds had not used the loading bay outside the prescribed times and would not do so in the future. (ii) The judge was wrong to hold that the tenants had not used the loading bay outside the prescribed period since he had disregarded evidence from Ds that the tenants had continued to do so. (iii) Ds should have limited the tenants' use of the bay to the prescribed periods and should have been ordered to inform them of the time limits and limit their permission to use the bay accordingly. The grant of an injunction was no longer appropriate, however.

**Phil Fellows**

***Stadium Capital Holdings (no2) Ltd v St Marylebone Property Company Plc and anr* [2009] All ER (D) 166 (Oct)**

**Trespass: Advertising hoarding occupying air space above neighbour's land. Damages**

With the permission of the then freeholder, an advertising hoarding had been erected by a leaseholder on a boundary wall between two parcels of land, which were in common ownership. Some time thereafter the lands changed ownership and the freeholder gave the defendant leaseholder notice to remove the hoarding and its service platform, on the basis that they encroached on its airspace. C subsequently bought the freehold and claimed damages in trespass.

**HELD:** The D's defence of adverse possession failed as the use of the air space had been by consent previously. Damages were awarded from the date of expiry of the notice to remove the hoarding to the date it was removed and calculated by reference

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to the revenue which licences of the advertising space had generated for the D.

## Andy Creer

### ***New v Gromore Ltd and ors* [2009] All ER (D) 81 (Nov)**

**Trespass to land and goods. Wrongful Interference with Goods. Site clearance for development.**

The C had rented a lock-up garage from D1 and D2 for storage. D1 and D2 obtained planning permission for the site on which the garage stood. They agreed to sell the land to D3, who proceeded to clear the site and demolished the garage. D3 alleged such actions had been with the authority of D1 and D2.

**HELD:** The judge found that D1 and D2 had not authorised D3's actions. Accordingly, D3 alone was liable in trespass for demolishing C's garage and, in both trespass and the wrongful interference with goods, for removing such items from the land subject to the C's lease during the site clearance.

## Andy Creer

Stephen Lennard	1976
Robert Leonard	1976
Wendy Parker	1978
Karl King	1985
Michelle Stevens-Hoare	1986
Steven Woolf	1989
Sara Benbow	1990
Daniel Gatty	1990
Rupert Higgins	1991
Arthur Moore	1992
Kerry Bretherton	1992
John de Waal	1992
Alexander Goold	1994
Andrew Skelly	1994
Alexander Bastin	1995
Edward Rowntree	1996
David Pliener	1996
Brendan Mullee	1996
Nicola Muir	1998
Alison Meacher	1998
Alastair Redpath-Stevens	1998
Andrew Lane	1999
Sarah McCann	2001
Dean Underwood	2002
Michael Wheeler	2003
Phillipa Harris	2005
Andy Creer	2005
Philip Fellows	2007
Laura Tweedy	2007

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