Neutral Citation Number: [2009] EWHC 1681 (Ch)

Case No: HC08C00498

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

IN THE MATTER OF THE UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1999

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2009

Before :

MR JUSTICE MANN

- -

Between :

THE OFFICE OF FAIR TRADING	**Claimant**
- and -	
FOXTONS LIMITED	**Defendant**

- -
- -

MR. N. GREEN Q.C. and MS. H. DAVIES Q.C. and MS. S. LOVE (instructed by **The Office of Fair Trading**) for the **Claimant.**
MR. M. KENT Q.C. and MR. A. DAVIS (instructed by **Mishcon de Reya**) for the **Defendant.**

Hearing dates: 29th & 30th April and 1st May 2009

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Judgment

Mr Justice Mann :

Introduction

1. This is an application under the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR") for orders in respect of what is said to be the operation of unfair terms in contracts made between the defendant ("Foxtons") of the one part and various landlords as consumers of the other. Foxtons is a well known estate agent and letting agent, and the terms in question are standard form terms of agreement pursuant to which Foxtons provided the services of letting agents. Various terms in the standard forms of contract are said by the Office of Fair Trading ("OFT") to be unfair, and declaratory, and perhaps injunctive, relief is claimed in respect of two contracts. Shortly before the hearing before me, Foxtons stopped using the terms and started to use different terms. They addressed some of the complaints of the OFT in the sense that some of the questioned terms have now been removed, but the question of the fairness of the old terms still remains. Furthermore, questions arise in relation to the new terms. I am asked to rule on those as well.

2. It has been agreed that the precise form of relief should be determined once I have ruled on the fairness of the terms. That is a sensible course of action and I shall adopt it.

The old terms

3. The terms on which Foxtons contracted until some time this year are contained in a form running to four sides of A4. I shall call these "the old terms". The first side contains the address of the property and various details about the landlord. At the bottom of the page is a box with the heading "Our Fees" above it. In the box the following appears:

> "Long Term Lettings (including Rent Collection and Comprehensive Property Management)(*initial term greater than six months*) – 17%
>
> Short Term Lettings (including Rent Collection and Comprehensive Property Management)(*initial term of six months or less*) – 26%
>
> Unless otherwise instructed, Foxtons will offer your property to tenants looking for either a long or short term tenancy."

4. At the foot of each of the other pages, there is a space for signature by the landlord. The second page contains "Information about your property" and is not material for present purposes. At the foot of the second page there is a provision for modifying the services to be provided by Foxtons:

> "Opting out of long let Comprehensive Management service:
>
> Landlords who do not wish to take up Foxtons' Comprehensive Property Management service must tick below and complete the following information. Please note that Foxtons is required to provide this information to your tenant. Our fee for the letting service only (including rent collection) is 11%."

Below that is a box for the landlord to tick if he wishes to take full responsibility for the management of the property. The typical cases with which these proceedings are concerned all involve landlords who ticked that box and who therefore take the letting only service. These proceedings do not concern landlords who have engaged Foxtons to provide full management services.

5. The third and fourth pages contain the terms and conditions which lie at the heart of this case. The relevant ones are as follows. Condition or clause 1 is as follows:

> "1.0 Introduction of Tenant
>
> 1.1 In the event that Foxtons introduces a tenant who enters into an agreement to rent the landlord's property, commission becomes payable to Foxtons Ltd. (Please see 6.3 regarding outstanding fees). The commission fee is payable on or before the

commencement of the tenancy and upon any extension(s), renewal(s) or hold-over(s) thereof, and for any further periods for which rental income is received (hereafter referred to as renewal commission, see 2.14 below), whether or not negotiated by Foxtons. The scale of commission fees charged is as set out on pages 1 and 2.

1.2 The commission is payable for any tenant introduced to the property by Foxtons, whether or not the tenancy is finalised by Foxtons. The commission fee is charged as a percentage of the total rental value of the agreed term as specified in the tenancy agreement or where the tenant extends and/or holds over indefinitely, commission will be payable for the same period as the initial agreement, subject to clause 1.5 below.

….

1.5 If the landlord or tenant terminates the tenancy agreement prior to the end of the tenancy term, and if in accordance with any break clause contained in the tenancy agreement at the time the agreement was executed, Foxtons will refund the commission for the remaining period of the tenancy. The commission will be refunded within 14 days of the tenant vacating the property."

6. It is claimed that Foxtons' terms are unfair so far as they provide for commission to be charged on periods after the initial term. This will be elaborated below.

7. Clause 2 describes the "Lettings Service". It provides for the following services: collection of rent, transfer of monies to the landlord, providing a tenancy agreement (at an extra charge of £320), verifying the identity of potential tenants where the initial period is six months or less, and taking up references if it is more; drawing up an inventory at the start of each tenancy (at the cost of the landlord); checking the tenant out at the end of the tenancy, where instructed (the cost being borne by the tenant); holding a tenant's deposit (Foxtons retains the interest).

8. Clause 2.14 is an important provision:

"2.14 Renewals and Extensions

2.14.1 Foxtons will endeavour to contact both landlord and tenant before the end of the tenancy to negotiate an extension of the tenancy, if so required.

2.14.2 We will also draw up the appropriate documents for the renewal of the tenancy for signature by both parties. The charge to the landlord for this is £60.

> 2.14.3 Renewal commission will become due in respect of renewals, extensions and hold-overs or new agreements where the original tenant remains in occupation. It will also become due where the incoming tenant is a person, company or other entity associated or connected with the original tenant, either personally, or by involvement or connection with any company or other entity with whom the original tenant is or was involved or connected. Where there is more than one tenant, renewal commission will be payable in full where any or all of them remain in occupation. Commission is due whether or not the renewal is negotiated by Foxtons.
>
> 2.14.4 Renewal commission is charged in advance, either as a percentage of the rental value of the new agreed term or where the tenant extends and/or holds over indefinitely, commission will be payable for the same period as the initial agreement subject to clause 1.5 above. The scale of commission fees charged is as set out on page 1."

So far as this provides for commission to be charged on renewals, extensions and continuations, this is said to be unfair. Furthermore, the expressions referring to connected or associated persons are said to be not plain and intelligible for the purposes of the UTCCR.

9. Clause 5 is said to contain further objectionable provisions providing for commission to be paid in the event of a sale of the property to a tenant, and to provide unfairly for the continuation of the commission obligation where the landlord sells his interest in the property. It reads:

> "5.0 Sales provisions
>
> 5.1 Sale of property to tenant
>
> In the event that the tenant, occupant or licensee of the property enters into an agreement with the owner/landlord to purchase the property, a commission of 2.5% of the purchase price becomes payable by the owner/landlord to Foxtons when contracts for the sale of the property are exchanged. Foxtons reserves the right to defer payment of this commission until completion.
>
> 5.2 Sale of property by landlord
>
> Where a property is sold, transferred or otherwise dealt with, with the benefit of a tenancy, Foxtons' fees remain the responsibility of the original landlord for the duration of the tenancy and for any extensions,

> renewals or periods of holding-over, irrespective of whether negotiations were carried out by Foxtons. The landlord should instruct his solicitor to assign responsibility for Foxtons' fees to the purchaser."

The shorthand used in this case for those commissions are "sales commission" and "third party renewal commission" respectively.

10. While the headings are bigger, all those terms are in very small type face – I would assess that they are no more than 7 or 8 point in a non-Serif font. The headings are emboldened, and the terms appear in two columns.

The new terms

11. There is a long history of correspondence (about two years) leading up to these proceedings. When the OFT first challenged the terms referred to above, Foxtons had dealings with the OFT in order to remove the concerns, either by convincing the OFT that nothing was amiss or, more usually, proposing amendments to the terms. As a result of this negotiation Foxtons put into circulation some new terms. There was a false start or two, and before me there was a bit of confusion as to precisely which terms it was that Foxtons were now using (from some date in 2009) but in the end the parties agreed which terms were now in use and also agreed that I should rule on them so far as renewal commission was concerned. After the end of the hearing, which had taken place on the footing of a specific set of terms, I was supplied with yet another version. I could not detect any relevant distinction between those terms and the ones on which argument took place.

12. The new terms do not contain any terms providing for third party renewal commission or sales commission. These terms require a consideration of renewal commission only. The principally relevant term is clause 1:

> "1.0 LETTINGS SERVICE
>
> 1.1 Payment of Commission
> 1.1.1 In the event that Foxtons introduces a tenant who enters into occupation of the landlord's property, commission becomes payable to Foxtons.
> 1.1.2 The commission is calculated as a percentage of the rental income payable to the landlord for the period during which the tenant introduced by Foxtons remains in occupation of the property. The scale of commission charged is as set out on pages one and four.
> ….
> 1.1.4 Where a tenant introduced by Foxtons is replaced as tenant (whether or not under a formal tenancy agreement) by his nominee (whether a natural or legal person) the commission will remain payable for as long as the nominee remains in occupation.
> 1.1.5 The commission is payable whether or not any tenancy agreement is finalised by Foxtons,
> 1.1.6 For the purposes of these Terms and Conditions, *"occupy"*, *"occupies"*, *"occupier"* and *"occupation"* include the right as against the

landlord to occupy the property whether or not the occupier in fact resides at the property.

1.2 Timing and Mechanism of Payment of Commission

1.2.1 The commission becomes due to Foxtons as follows:

(a) where the tenant occupies the property under a tenancy agreement with a defined period, the commission due on the whole of the rental income payable throughout the term of the tenancy agreement shall become due at the date that the first rental payment is due from the tenant;

(b) otherwise, the commission calculated on each rental payment shall become due from the landlord on the due date for each further payment of rent to the landlord.

….

1.2.4 Where the landlord or tenant terminates a tenancy agreement prior to the end of the tenancy term in accordance with any break clause contained in the tenancy agreement at the time the agreement was executed, Foxtons will refund the commission for the remaining period of the tenancy. The commission will be refunded within 14 days of the tenant vacating the property.

….

1.5 Tenancy agreement

1.5.1 The charge to the landlord for the tenancy agreement is £320 plus VAT."

13. The agreement goes on to provide for other similar events to those referred to in the old terms (tenancy agreement, references, inventory and check-in, deposit holding and so on). Clause 1.7 relates to "Agency":

"1.7 Agency

1.7.1 We will ask you for written confirmation of your instructions to proceed with a letting. Upon receipt of such confirmation, we will sign the tenancy agreement and exchange contracts on your behalf.

1.7.2 …

1.7.3 By instructing Foxtons to hold a Foxtons Fresh, you are appointing us as your sole agent for a period of four weeks from the date of this instruction. Where we act as your sole agent you are giving us the sole and exclusive right to let your property. This means that you will be liable to pay us commission as set out in clause 1.1 if at any time a tenant who views or is otherwise introduced to your property during the period of the sole agency enters into an agreement to rent your property, whether the viewing or introduction was conducted by Foxtons, or by any other agent or third party."

14. Clause 3.10 contains an entire agreement clause and a reminder to the landlord to read the clauses carefully.

15. All these terms are in print which is slightly bigger than that of the old terms – between 8 and 9 points of a non-serif font. The headings are emboldened but scarcely bigger. The old pages 1 and 2 are now outer pages (1 and 4). Their contents are much the same, except that some opening rubric from the old terms is missing in the new. The first page refers to the management service; the opt-out in favour of the lettings only service is about 4/5ths of the way down the back page, in not very prominent print.

The criticisms of the terms

16. At this stage, I shall merely set out an outline of the criticisms of the terms in order to provide a context for the identification and consideration of the relevant provisions of the UTCCR and its preceding Directive. The criticisms are:

    i) Various provisions, and in particular clause 2.14, contain language that is not plain and intelligible, contrary to the obligations of the UTCCR.

    ii) The provisions relating to renewal commission are unfair.

    iii) The provisions relating to sales commission are unfair.

    iv) The provisions requiring the payment of commission, notwithstanding a sale of the landlord's interest to a third party, are unfair.

The directive and the UTCCR

17. The UTCCR implement the Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts. In those circumstances, in accordance with the proper principles of construction, the UTCCR have to be interpreted in the light of the Directive, and it is convenient, if not necessary, to set out the terms of the Directive as well as the UTCCR. I shall set out the terms of both because the authorities refer to both. It was, however, accepted that there was no difference in their overall terms and effect.

18. The Directive starts with a number of recitals. The 16th recital reads:

> "Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account."

That recital brings in the concept of good faith. This is an autonomous Community expression and has been elaborated in English authority as will in due course appear.

19. The 19th recital reads:

> "Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract, nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless betaken into account in assessing the fairness of other terms…."

This recital introduces a distinction between what have been called the core elements of the bargain on the one hand which cannot be the subject of a fairness assessment under the Regulations, and other terms, which can.

20. Article 2 sets out some definitions:

> "Article 2
>
> For the purposes of this Directive
>
> (a) 'unfair terms' means the contractual terms defined in Article 3;
>
> (b) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for the purposes which are outside his trade, business or profession;
>
> (c) 'seller or supplier' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned."

It is not disputed that Foxtons is a 'seller or supplier' within the meaning of the Directive, and it is not disputed that some of the landlords with whom it deals are 'consumers' for those purposes.

21. Article 3 contains the key definition of unfairness:

> "Article 3
>
> 1. A contractual term which has not been individually negotiated shall be regarded as 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.
>
> …..

> 3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair."

It is accepted that the terms which are the subject of these proceedings have not been individually negotiated for the purposes of this Article. I shall not lengthen this judgment by setting out the detailed provisions of the Annex. Suffice it to say for present purposes that none of the terms in the Annex have a particularly close parallel to the terms which are attacked in this case.

22. Article 4 contains important provisions concerning the limit of any assessment of fairness, and around which much of the debate in this case has taken place. Paragraph 1 provides that the assessment shall take place as at the time of conclusion of the contract, having regard to all the circumstances attending the conclusion of that contract. Paragraph 2 is the important provision:

> "Article 4
>
> 2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language."

23. Article 5 provides a requirement of plain intelligible language:

> "Article 5
>
> In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2)."

24. Article 6 provides for the consequences of the presence of an unfair term. It requires Member States to provide that unfair terms shall not be binding on the consumer. Article 7 provides that Member States should ensure that means exist to prevent the continued use of unfair terms in contracts, and requiring that proper persons be charged with taking collective action to identify and prevent the continued use of unfair terms. I do not need to set out the provisions of those Articles.

25. The terms of the UTCCR mirror very closely the terms of the Directive. I do not need to set out most of them in this judgment. Regulation 5 mirrors Article 3 and Regulation 6 mirrors Article 4, albeit in slightly different terms. Regulation 6(2) provides:

> "(2) Insofar 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 goodwill services supplied in exchange."

Regulation 7 provides for intelligibility:

"7. Written contracts

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

b. If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail, but this rule shall not apply if proceedings are brought under regulation 12."

26. Regulation 8 provides for the consequences of an unfair term:

"8. Effect of unfair term

(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."

27. Regulations 10 to 15 impose powers and obligations on the Director-General of Fair Trading in relation to the consideration of complaints and taking action where unfairness exists. I do not need to set them out in this judgment, though their terms may become relevant should it be necessary to consider the question of relief and its form. The functions of the Director-General have now been assumed by the OFT. Schedule 2 reproduces the indicative list which appears in the Directive.

The consumers

28. The UTCCR operate in favour of consumers. As I have indicated, it is accepted in this case that some of the people with whom Foxtons deal on the impugned terms are consumers, though many are not, being "professional" or "commercial" landlords. (Those are my terms and not terms in the legislation). Foxtons accepts that the nature, qualities and general identities of the typical consumer for these purposes are as set out in two paragraphs of the supporting witness statement of Mr Nicholas Allen, a section head within the OFT's consumer protection group. He says:

"18. However, there are numerous individuals who find themselves in a position of requiring the services of an individual letting agent who cannot be classified as doing so for

> the purposes of a trade, business or profession within the meaning of the UTCCRs…They include individuals who decide to let out their only property whilst travelling temporarily abroad, as a result of relocation by their employer or for other reasons connected to 'lifestyle' choice, individuals who let out part of their property in order to fund their mortgage on the remainder, and individuals for whom their property investment represents part of their pension plan or other long term saving….
>
> 19. Indeed, it appears that significant numbers of landlords are acquiring one or two properties as a more secure way of providing future pensions and savings…More than four out of 10 [asked] respondents to [a described survey] had only one or two properties in their portfolios…This underlines the significance of the issues raised by these proceedings for the consumer landlord."

29. Some of the qualities to be attributed to typical consumers for the purposes of the legislation have been elaborated on in the authorities:

    i) The consumer "must be regarded as the 'weak party', who needs special protection" (Oceano Grupo Editorial SA v Quintero (conjoined cases C/240/98 to C-244/98), per A-G Saggio). See also *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481 per Lord Steyn at para 31.

    ii) *Abbey National plc v Office of Fair Trading* [2009] EWCA Civ 116 was a decision of the Court of Appeal on appeal from Andrew Smith J [2008] EWHC 875 (Comm). I shall call the first instance decision *Bank Charges 1*, and the appeal decision *Bank Charges 2*. The case involved terms in standard bank dealing terms and at both levels there was an extensive consideration of the principles embodied in the Regulations and the Directive. In *Bank Charges 2* it is recorded that it was common ground:

> "not only that the typical customer is reasonably well-informed and reasonably observant and circumspect, but also that he or she is taken to read the relevant documents and to seek to understand the contractual terms from that reading" (para 117)

    I shall adopt that same view.

30. The typical consumer is relevant at various levels of the present dispute, but principally in considering whether the terms are expressed in plain and intelligible language, and in assessing what the core bargain should be taken to be for the purposes of regulation 6(2). The OFT put in documents from half a dozen or so complainants who had complained about the operation of Foxtons' terms in various respects, and in some cases demonstrating their understanding or perception of things relevant to the two factors that I have mentioned. The OFT did not put forward any of the complainants as embodying the typical consumer, but did rely on what they said as being within the sort of things that typical consumers would think.

31. Other than that there was no evidence or other material to assist me in determining the mindset, thinking or attributes of a typical consumer. Where it is necessary for me to form views on such things, I shall do so on an analogous footing to that on which the court approaches the attributes of the reasonable man in other realms, such as the realms of tort.

The legal issues

32. The OFT seeks to establish that certain of Foxtons' terms are not in plain and intelligible language, and that various of its terms are unfair contrary to the provisions of the Regulations and the Directive. Foxtons disputes those matters. In the circumstances the following issues are raised:

    a) Are the renewal commission provisions in both the old and the new terms unfair? This involves the following points:

        i) Are those provisions of a nature which exempts them from a fairness scrutiny by virtue of Regulation 6(2)?

        ii) If so, does that exemption in fact not apply because the provisions are not in plain intelligible language, with the effect that they are subject to fairness scrutiny?

    b) If they are subject to a fairness scrutiny, are they unfair?

    c) Are the third party renewal commission provisions unfair?

    d) Are the sales commission provisions unfair?

    I shall take those issues in turn.

The renewal commission – generally and Regulation 6

33. I should first make clear what I am not deciding, and what I am not asked to decide. I am not asked to decide, and do not decide, that renewal commissions (in the sense used in these proceedings) are always unfair. I make that clear because some of the evidence and submissions of the OFT come close to asserting a case that they are always unfair, and some of the correspondence seemed to be based on such a proposition, though Mr Nicholas Green QC, for the OFT, eventually made it clear that that was not his case. Mr Michael Kent QC, for Foxtons, opened his submissions by saying that I would eventually have to, and should, rule on renewal commission generally, but he moved away from that. I shall not decide whether or not renewal commission is always unfair to consumer landlords.

34. The first point that falls for decision is whether the renewal commission provisions are outside the scope of the fairness inquiry by virtue of the provisions of Regulation 6. The essence of the parties' positions is as follows. Foxtons relies on both limbs of Regulation 6(2) and says that a fairness inquiry is prevented because such an inquiry would relate to the definition of the main subject matter of the contract or to the adequacy of what is in effect the price or remuneration paid by the customer. In essence Foxtons says that there is one overall commission, or one overall price, for its services, and the renewal commission is an element of that price. The OFT says that

that is contrary to the perception of customers and it is wrong to treat the renewal commission in that way. Alternatively, insofar as it might otherwise have been right to do so, the provisions are not in plain and intelligible language, so the Regulation 6 exclusion does not apply. I shall first consider whether the commission comes within Regulation 6(2) on the assumption that it is in plain intelligible language, and consider the language point second.

The renewal commission and Regulation 6

35. The Court of Appeal in *Bank Charges 2* considered the purpose of Regulation 6 and how it was intended to operate. They emphasised that the exclusion from consideration of fairness which was effected by Regulation 6 applied to that part of the bargain between the supplier and the consumer which could be described as "core" and not "ancillary or incidental". It is unnecessary for me to set out the extensive reasoning in that case. It is sufficient to refer to the following:

i) At paragraph 49, Sir Anthony Clarke MR, giving the judgment of the court, said:

> "As we see it, it follows from the reasoning of the House of Lords [in *First National Bank*] that what article 4(2) of the Directive was seeking to exclude from the assessment required by the national authorities (here the OFT) was the core bargain or the core price but not ancillary or incidental provisions. In our judgment, regulation 6(2) of the 1999 Regulations should be construed with that underlying purpose in mind."

ii) At paragraph 50, the Master of the Rolls said:

> "It follows that the House of Lords' approach to the 'core bargain' applied not only to 'the main subject matter of the contract' in paragraph (a) but also to 'the price or remuneration' in paragraph (b)."

iii) At paragraph 52 he said:

> "In our view these considerations support the conclusion that the purpose of regulation 6(2)(b) was to limit the exclusion to the essence of the price, just as the purpose of regulation 6(2)(a) was to limit it to the main subject matter of the contract. As appears below, the reason for the limitation was to reflect the fact that the parties would be likely to (or might well) negotiate the main subject matter of the contract and the essential price but not the detail."

36. Thus they emphasised the need to enquire as to whether or not the term in question lies at the heart of the bargain. If it does then the consumer is considered to be able to

perceive the merits or demerits of the deal in terms of fairness, subject to matters being plainly expressed. However, one does not approach this exercise purely as a matter of common law construction of the contract. It is necessary to go beyond such notions and to ascertain how the matter would be perceived by the typical consumer (as well as the supplier). This is apparent from paragraph 72 of the judgment of the Master of the Rolls in which he sets out extracts from Chitty on Contracts which itself quotes the director general of Fair Trading:

> "…it would be difficult to claim that any term was a core term unless it was central to *how consumers perceived* the bargain. A supplier would surely find it hard to sustain the argument that a contract's main subject matter was defined by a term which a consumer had been given no real chance to see and read before signing it – in other words if that term had not been properly drawn to the consumer's attention." (the emphasis appears in the judgment)

Chitty goes on:

> "Rather than relying on the construction of the contract in the traditional way (the intention of both the contracting parties as viewed objectively), this view proposes that a court should look at the reasonable expectation of the consumer in question."

37. On several other occasions the Court of Appeal's judgment emphasises the need to ascertain whether or not the payment, or if necessary the obligation itself, forms part of the "essential bargain" between the parties. It is not necessary for me to set out all those citations, but examples can be found in paragraphs 86 and 90. The court also emphasised the position of the typical consumer and what he or she might expect in conducting this enquiry. For example, in paragraph 86(c)(iii) the Master of the Rolls says:

> "Moreover, it ensures protection in respect of the kind of issues that a consumer will not have in focus when entering into a bargain. The purpose for which the exception was included was to carve out from the assessment of fairness that part of the bargain which can genuinely be viewed as representing the consensus between the parties and thus a genuine reflection of freedom of contract."

38. Other important pointers emerge from the judgments in *Bank Charges*. The assessment to be carried out is a broad one. In *Bank Charges 2* the Court of Appeal observed at paragraph 89:

> "The next question is how to decide whether a particular term forms part of the essential bargain. It seems to us that this is a broad question which depends upon the circumstances of the particular case. The judge said this at [358]:
>
> > 'The question whether a term falls within regulation 6(2)(b) is not answered simply according to whether or not it is a default provision.

> It requires broader consideration of the substance of the provision and the part that the term plays in the contract, and of whether it is directly to do with a payment that is properly within the expression, 'the price or remuneration'. Thus it is necessary to consider both the nature of the payment and how directly the term is directed to defining the payment obligation.
>
> We agree."

39. The answer to the question in the *Bank Charges* case turned, of course, on the facts of that case, but some of the factors which were important in that case have a resonance with factors in the present case and are useful pointers. Paragraph 109 points out that whether or not the obligation on the customer is contingent is a "strong indication" that the provisions are incidental or ancillary rather than core. So is the fact that the relevant provision is not specifically negotiated. The position of the provision in any advertising material is also apparently relevant; it follows from that that the fact that it is not referred to at all also has relevance. I shall consider these, and other points, separately. I shall consider first the old terms, and then the new ones.

Core bargain – the old terms

40. I embark on this exercise having reminded myself of two key elements which emerge from the foregoing:

    i) The inquiry is as to substance, not form.

    ii) The inquiry has to be what both parties would view as the core bargain. It matters not that Foxtons would treat the renewal commission as an integral part of its commission (which it apparently does). If the renewal commission is to be treated as part of the core bargain the typical consumer has to think that too.

41. Regulation 6(2) refers to the fairness of "a term". As will appear, the renewal commission obligation appears in two parts of the terms, one dealing in terms with the commission and the other dealing with all commission obligations. There was no analysis before me as to how the expression "the term" operates where the language of the provision covers both admitted core obligations, but the answer is, in my view, to look at substance, not form, and therefore to focus on obligations, not precise written terms. I deal with this topic in a little more detail under the "unfairness" heading later in this judgment.

42. The starting point should be the terms of the contract itself. Clause 1.1, taken by itself and shorn of context, supports the idea that there is one overall commission payable on the initial tenancy and on any renewals. It draws no firm distinction between two types of commission – rather, it tends to suggest an overall commission payable on certain events. I do not think that the use of "renewal commission" in that clause lends much support to the notion that this clause in substance creates two commissions (the concept of two commissions is one that lies at the heart of the OFT's submissions on this point). That makes the renewal commission element at first blush part of the core bargain. In accordance with the authorities, the customer is treated as reading this clause.

43. This impression from this clause is slightly attenuated by the presence of 2.14 which takes up the "renewal commission" again and which, as a matter of impression, makes it look like something separate. It would, in my view, tend to suggest that to a typical consumer who reads the terms. This is important because treating it as something separate is a concept which is necessary if it is to be treated as being not part of the core bargain.

44. The documentary context is, of course, a 4 page (or 4 sided) form. At the top of the first page there is a paragraph in bold type which is considerably larger than the terms themselves, and which says:

> "Thank you for instructing Foxtons to act on your behalf in marketing your property for rental. Our marketing includes full colour brochure, floorplans, location map, aerial photography, 360º photography, colour advertising and promotion on Foxtons.co.uk"

That emphasises the marketing, ie the initial, services provided by Foxtons. At the foot of the page is the box with "Our Fees" in, which I have described above. This certainly does not point up any renewal commission element, but since it is concerned with management fees that would not necessarily be germane. The letting only commission is referred to on the next page, where it is in much smaller print – "Our fee for the letting service only (including rent collection) is 11%". It does not say 11% of what, but the tenant would doubtless understand it was 11% of the rent. But the reference to "letting service only", coupled with the words at the top of the front page, would be likely to suggest that the fees are correlated to the service, that is to say that they are for marketing leading to a letting only, which would be more likely to lead to an understanding that what the customer is really paying for is the initial service, and that he pays for it by paying commission on the rent of the initial term. The reference to "initial term" under "Our Fees", albeit in a different fees regime, would, to say the least, not dispel this impression.

45. The activities of Foxtons as provided under the terms are very much focussed on the original grant and activities during the term, and few additional or onerous activities are specified as taking place in connection with a renewal. Section 2 provides for the collection of rent "in accordance with the terms of the tenancy agreement"; provision of a tenancy agreement (at an extra charge); the obtaining of references; signing and exchanging on behalf of the landlord; drawing an inventory and checking out against it; and holding the deposit. The only activities to be conducted in relation to a renewal are contacting the tenant for negotiation "if so required", and drawing up a renewal document (again for an extra charge).

46. Mr Green also places significant reliance on the way that the matter was presented to the customer in Foxtons' publicity and marketing material. This was another factor which the Court of Appeal found relevant in *Bank Charges 2*:

> "Moreover, it seems to us to be of some significance that the Relevant Charges, although referred to in the Banks' leaflets, are not at the forefront of the Banks' advertising." (para 109).

47. I was taken through the material, and the point made by Mr Green is a fair one. Not only is the renewal commission not "at the forefront" of the publicity; it is nowhere even hinted at, much less referred to. The marketing material has its focus on the initial activities of identifying the tenant and getting him or her into the property. Foxtons' glossy brochure extols the virtues of Foxtons in relation to the activities involved in marketing the property, finding the tenant and negotiating a tenancy, apart from one page referring to managing the property. The accompanying separate leaflet on "Short term lettings" does nothing to suggest that there will be renewals, let alone commission paid on renewals, and refers to ongoing management activities anyway. The same point can be made about its website, though the website is pretty general and of less significance in this respect.

48. Mr Green put much emphasis on the contingent nature of the renewal commission charge. He pointed to the emphasis put on that factor by the Court of Appeal in *Bank Charges 2* and said that renewal commission was similarly contingent, and that was therefore a strong pointer to renewal commission not being part of the core bargain between Foxtons and its letting clients. The factor is plainly relevant, but I do not think that it has the force that it had in *Bank Charges*. At paragraph 107 Sir Anthony Clarke said:

> "Moreover, the Relevant Terms operate so as to impose Relevant Charges in contingent circumstances. They are therefore akin to default charges which are triggered by a breach of contract. Although they are not in fact triggered by a breach of contract because of the manner in which the contractual relationship has been expressly framed, this does not mean they are not contingent charges of the kind with the Law Commissions had in mind in the sentence just quoted."

The Law Commission sentence was:

> "Consumers are much less likely to take into account terms which will only apply in certain circumstances (whether or not those circumstances involve a default) and accordingly these terms should be subject to review."

The full context of that sentence in The Joint Consultation Paper of the English and Scottish Law Commissions (in paragraph 3.32) indicates that the Law Commissions had in mind something which had other qualities than merely being contingent. I think that the Law Commissions were considering matters whose occurrence did not obviously have a high degree of likelihood of occurrence, and the Court of Appeal's reliance on the concept indicates that the court had quasi-breach occurrences in mind – again, something which would not be predicted as having an obviously high degree of likelihood of occurrence. It is in that context that the Court of Appeal made the remarks that it did about contingency. The nature of the contingency tended to remove it farther from what might be regarded as the centre of the contract. The renewal commission element does not seem to me to have the same quality. A renewal might be thought to be more likely than quasi-defaults, and it does not have the same feeling of remove from what might otherwise be regarded as the centre of the contract. Accordingly, while it is relevant, I do not think that this factor has all the weight that Mr Green would seek to give it.

49. For their part Mr Kent and Foxtons sought to make a case justifying the renewal commission on the basis that it was wrong to view the contract as one in which the main obligation of Foxtons was to find a tenant for an initial term. The purpose of the introduction went further than that – it was to introduce the tenant to the property. If that tenant stayed and paid rent for a second (and subsequent) term, then that was part of the benefit of the work done by Foxtons, and required that the benefits of the renewal (and if required the activities leading to the renewal) be treated as part of the core bargain between the parties. The evidence of Foxtons' witnesses developed this theme and pointed out that if a tenant did not remain then a justifiable introductory commission would have to be paid anyway in respect of the next tenancy. The introduction of the tenant is said to benefit the landlord for as long as the tenant remains in occupation. The renewal service offered by Foxtons was a real and valuable service which reduced the possibility of a costly void in the letting. Accordingly the renewal commission was part of the core bargain, or part of the core bargain price paid for the tenant.

50. At the end of the day the question of whether the obligation to pay renewal commission is part of the core bargain in the contract is a matter of impression. Having weighed the above matters, and considered the remainder of the material submitted to me, I have come to the conclusion that it is not part of the core bargain, on the facts of this case. I start from the position that the core has to be seen as such by both Foxtons and the typical consumer. It is therefore not compelling that Foxtons itself seems to see the commission as part of an overall price for the overall benefit of introducing a tenant to the property. For it to be part of the core bargain the customer would have to be taken to acknowledge, if not share, that view. I consider that he or she would not. The typical consumer approaches Foxtons so that they can assist in finding a tenant. He will understand that he has to pay for that service, and payment by commission, as such, is intelligible and will be understood and accepted. At this stage the focus will be on getting a tenant found, checked and engaged, and it is likely that the consumer would be focussing on the initial term of the engagement (assuming a fixed term, which has been the hypothesis of the present case). I doubt if the client will necessarily be looking to a renewal at that stage in the sense of thinking forward to it and considering it likely. The publicity material presented by Foxtons focuses almost exclusively on this stage of the operation. It describes the services offered, and I consider that it is likely that that is what the tenant will be thinking that he is paying for. The first two pages of the form that he signs will do nothing to dispel that notion and if anything would reinforce it. The thrust of these pages is that the landlord will be paying for management activities (i.e. real activities in exchange for commission) but the landlord will pay less if he chooses lesser activities (letting only without management). This focus on activities does not point towards the occasion of renewal, where most of these activities will not take place. True it is that if and when he reads the terms the client will see that commission is payable on renewal, but the uncertainty of renewal will make this a subsidiary matter in his eyes. If he then looks to the clauses which govern the activities of Foxtons in relation to a renewal he will see that they do relatively little (and even charge separately again for providing the agreement). That is hardly likely to engender a realisation or acceptance that the renewal commission is part of the core bargain. As far as the landlord is concerned the core bargain will be getting the tenant in, in exchange for commission which would seem naturally to be associated with that activity, that is to say the commission payable on the first period's rent.

51. I reach the same conclusion by looking at the matter from another angle. Imagine that the landlord is told, in terms, that he will pay 11% commission on all the rent due in respect of the first term, and an equivalent amount in rent on renewals for as long as the tenant remains in the property as tenant, whether or not Foxtons play any part in putting that renewal in place, and whether or not other agents act in a renewal and charge commission themselves (because that brings the point home). The first element of the commission would not surprise him. However, I think the second element would, even if he is a circumspect client who reads the terms properly. That is not because the terms are hidden away; it is because the point is more likely to be something that the client would not really have focussed on or thought through. A renewal is in the future, and is another event, different from the initial activities, so far as the client is concerned. It might or might not happen (a version of the "contingency" point). That surprise is a result or reflection of the fact that the renewal commission element and conversely Foxtons' participation in renewals, is not part of the core bargain; it is not the sort of central thing that the client would be looking at.

52. I gain some comfort for that view from some of the complaints of which evidence was given before me. I do not rely on those complainants as embodiments of the typical consumer, or draw direct support in that way. But they are (so far as I know) ordinary people, some of whom were surprised at the notion that commission was payable on renewals. So far as my conclusions in relation to surprise are concerned, they demonstrate that at least there is something in the point. However, I would have reached the same conclusion even in the absence of this evidence.

53. Mr Green placed a lot of reliance on cases about estate agents which generally required an estate agent to have been the "effective cause" of a transaction in order to be entitled to commission. He sought to use this line of cases to support a proposition that the court would not allow an agent commission merely for some "introductions". I did not find this line of authority helpful in the present context. It deals with different problems.

54. I emphasise at this point of the judgment that my conclusion on the present point relates to the renewal commission element of the relevant Foxtons contracts in the circumstances of those contracts (such as they were) as they were put before me. I am not making any finding that renewal commission, per se, cannot be part of the core bargain and be immune from a fairness challenge pursuant to Regulation 6(2). I am not even finding that Foxtons' renewal commission, within this contractual framework, would be incapable of becoming part of the core bargain. As I have pointed out above, Foxtons' witnesses sought to make a commercial case for saying that there was one overall commission, and it has been suggested that if renewal commission cannot be charged then the "first term" commission might have to be raised. I make no findings on such a case – it involves commercial and economic considerations which were not tested or debated before me. It might be possible to bring about a state of affairs in which the renewal commission element becomes part of the core bargain. That might (and I stress "might") be possible if there is something in the nature of a real negotiation or real bargain between the parties which involved this element. That would almost certainly involve a real degree of clear disclosure, if not active flagging, of the point. Such conduct might put the client in the position of being sufficiently well informed that one could conclude that he had

accepted this important element of the deal. But nothing like that happens in the cases which I have to consider. There was no suggestion that, as part of the negotiation, the renewal commission was drawn to the attention of the client. In their joint paper the two Law Commissions drew attention to the importance of how the deal was presented to the client in paragraph 3.23:

> "In other words, whether the term relates to the definition of the subject matter depends (at least in part) on how the 'deal' was presented to the consumer."

There is nothing to suggest that the deals which I have to consider were presented in such a way as to refer to, let alone bring into the centre, the question of renewal commission.

55. For those reasons I hold that the renewal consideration provisions under the old Foxtons terms are not exempted from a consideration of fairness by Regulation 6.

The renewal commission – the new terms

56. There is no material difference in terms of physical presentation between the old and the new terms save for the difference in the terms themselves. Similarly, there is no difference in the circumstances in which those terms are agreed between the parties. Accordingly, I can determine whether the renewal consideration is part of the core bargain between the parties by considering whether the difference in the actual contractual provisions makes a difference.

57. This point can be dealt with shortly. I do not consider that the difference in wording produces a different result. Again, the wording, when properly approached as a matter of pure construction, creates one commission. (This is actually less clear on this wording, but I will deal with the detail of this in the section on plain and intelligible language.) Taken by itself, that might be thought to make the commission part of the overall price or core bargain. However, that is not the entire picture. The effect of the other relevant factors remains the same, and in my view they combine to diminish the weight of the wording. The reality is that the matter is presented otherwise, and this difference of wording produces no different result from that resulting from the old wording.

Core bargain – plain and intelligible language – general

58. The wording of Regulation 6(2) provides that the exclusion applies only "In so far as it is in plain intelligible language …". The OFT takes the point that the relevant provisions do not fall within this qualification even if they would otherwise be core terms. Although I have decided that the renewal commission does not fall within the core of the contract for these purposes, I shall nonetheless consider whether or not this qualification is fulfilled in this case.

59. The standard required was expressed thus by Andrew Smith J in *Bank Charges 1* at paragraph 119:

> "The question of plain intelligible language is, as it seems to me, directed to whether the contractual terms put forward by

> the seller or supplier are sufficiently clear to enable the typical consumer to have a proper understanding of them for sensible and practical purposes."

This understanding does not extend merely to the words used.

> "Regulation 6(2), as the OFT submits and as I accept, requires not only that the actual wording of individual clauses or conditions be comprehensible to consumers, but that the typical customer can understand how the term affects the rights and obligations that he and the seller or supplier have under the contract … the Regulation does not exclude an assessment of fairness unless not only can the typical consumer understand the actual wording used in the contractual documentation but also its effect." (paragraph 103)

In the Court of Appeal there was no particular challenge to those formulations and I respectfully agree and adopt them.

Plain and intelligible – old terms

60. The renewal commission provisions are to be found in two parts of the old terms – clauses 1 and 2.14. There is a cross-reference from the former to the latter.

61. Mr Green's submissions for OFT focussed on clause 2.14, though he made other submissions about the presentation of the terms. So far as clause 2.14 is concerned, he relied on the vague and undefined notions of persons "associated or connected" with the original tenant in clause 2.14.3 and said that this meant that the renewal commission clause was not phrased in plain and intelligible language. "Occupation" is said to be a similarly vague word. He also prayed in aid the fact that the clauses were "dotted around" the document so that they were "obscured from view", and further relied on the fact the reference to page 1 in clause 2.14.4 is a misplaced reference because the relevant "scale" is actually referred to on page 2.

62. Mr Kent had some difficulty in defending the intelligibility of clause 2.14 in its use of the words "associated" and "connected", and in my view understandably so. In their context their scope would puzzle even lawyers. They are broad terms of uncertain meaning in this context. When similar words are used in statutes they are closely defined (see for example the Insolvency Act 1986), and rightly so. Without some form of definition they are vague words. That is not to say that a court could not give them a meaning or apply them if it had to. The point is not that they are void for legal uncertainty. The point is that they are too vague to be classed as plain and intelligible. How far do they go? A spouse almost certainly; but a spouse's relative? How far up, down or sideways in a family chain does the expression take one? A company of which the tenant is the sole shareholder may well be connected or associated, but what about a lesser shareholding? What of a company by whom he has long been employed? On one reading of the clause the link is capable of being forged by more removed connections – it would cover the situation where X is connected with company C which is connected to tenant T. I do not think that the typical consumer looking at this clause would understand how far the obligation was said to go, and that is enough to render clause 2.14 as being one not in plain and intelligible language.

63. The same does not apply to "occupation". Mr Green said it was a vague term which also offended against the "plain and intelligible language" condition. I do not accept that. I think that the word is normally likely to be plain enough. Mr Green's difficulties with it were somewhat contrived – elsewhere in this judgment I make the point that that just because a highly skilled lawyer can find (or contrive) some equivocation in a word, that does not make the language lacking in plainness or intelligibility. However, that does not matter in this context because clause 2.14.3 is already flawed in this respect.

64. Clause 2.14.4 does not suffer the same fate as clause 2.14.3, in my view. I think that the error would not, by itself, render an otherwise plainly worded and intelligible clause one which was not intelligible (or plainly worded). It is not every mistake in expression that is going to have that quality. The consumer protection purposes of Regulation 6(2) (and Regulation 7, which also has a requirement for plain and intelligible language) does not require an absolute and pedantic rigour. That error seems to me to be one which will be obvious to the consumer, which does not, by itself, lead to a failure to fulfil the plain intelligible language requirement.

65. Nonetheless clause 2.14.3 does fail the test. It is therefore necessary to consider the effect of that. The OFT's case is that that failure renders the "renewal commission clause" assessable for fairness. It defines that clause as being clause 2.14.3, 2.14.4 and "the relevant parts of 1.1, 1.2 and 1.5", and its submission rather glides over the possible difficulty that arises from the renewal commission obligation being derived from several clauses. Foxtons' submission is that renewal commission is payable under clause 1 and if clause 2.14.3 is somehow objectionable then it can be severed from clause 1, leaving an obligation to pay renewal commission intact. Mr Kent effectively conceded that if clause 2.14.3 failed the test, and if severance was not possible, then the whole of the renewal commission obligation was tainted.

66. In my view severance is neither necessary nor appropriate. This is not because the English law concept of severance is somehow inimical to the Regulation – I express no view on that. It is because the proper application of the Regulation requires that an appropriately overall view be taken of what is meant by "term" in Regulation 6(2). In his judgment in *Bank Charges 1* Andrew Smith J set out two differing ways of looking at the word (at paragraph 103):

> "It might be said that in Regulation 6(2) the expression 'term' does not refer to a particular clause or condition in the seller's or supplier's documentation, but is directed to how the contract sets out a particular obligation or right, whether that obligation or right is contained in a single clause or condition or whether it is to be found by drawing together elements of it found in different places in the contractual documentation; and so that if the Regulation is to exclude an assessment of the fairness of that right or obligation, it is that which must be set out in plain, intelligible language. Or it might be said that in Regulation 6(2) the expression 'term' connotes the wording of a particular clause or condition, and that the wording cannot be said to be 'intelligible' unless the consumer can understand from the contract both what the clause and condition actually says and now it affects the parties' rights and obligations."

He considered he did not have to choose between those alternatives. However, for my part I unhesitatingly adopt the former, at least for the purposes of considering Mr Kent's submission, and I do so for the following reasons.

67. First, bearing in mind the consumer protection purpose of the legislation, it would make little sense to adopt the view that one adopts a strict view of the word "term". It will often be a matter of drafting choice whether the provisions which relate to the same underlying obligation or benefit are gathered together in what, as a matter of form, is one single term, one term with sub-terms, or various separate terms (clauses) scattered throughout the contract. It can hardly have been the intention of the legislators to produce different results (for the purposes of Regulation 6(2)) depending on which of those stylistic preferences was adopted.

68. Second, in terms of drafting, the cross-reference from clause 1.1 to clause 2.14 makes the two provisions virtually one, even in pure drafting terms.

69. Third, it fits in with the wording and apparent scheme of the Directive. Article 4(2) of the Directive refers to "terms" in the plural. By itself this does not take the point much further, but the plural appears in Article 3(3) which cross-refers to the Annex. The Annex sets out "Terms which have the object or effect of [various results]". This suggests that the emphasis is not so much on looking narrowly on things which are created as discrete terms in terms of drafting, but more looking at the overall effect of combinations, so far as may be necessary. This plainly justifies treating clauses 1 and 2.14 of the old terms as being parts of an overall whole so far as renewal commission is concerned.

70. The effect of this analysis is that the term (or terms) relating to renewal commission are not drafted in plain and intelligible language, with the result that even if the renewal commission might otherwise have been part of the core bargain between the parties, it does not escape a fairness inquiry on that basis.

Plain and intelligible – new terms

71. These terms are differently structured so far as renewal commission is concerned. Everything is wrapped up in clause 1, and in fact in clauses 1.1.1 and 1.1.2. As a matter of legal analysis, they provide for commission on renewals. Clause 1.1.4 uses the expression 'nominee' to extend the liability to pay commission to the case of renewals in favour of persons other than the tenant himself/herself.

72. Mr Green said that this fared no better in the intelligibility stakes than the old term because the word 'nominee' was no better than 'associated' or 'connected'. It was not sufficiently clear what was intended. Mr Kent said it was plain enough – it was part of an anti-avoidance provision and it could only mean "one who held for another".

73. 'Nominee' is capable of having the clear meaning which Mr Kent ascribed to it. If it plainly has that meaning then its use in that sense is plain and intelligible in the sense of bearing a single legal meaning, describing a legal relationship, intelligible to lawyers and to any consumer who was interested enough to go and see what the law means by such a person. However, in the context of this agreement I think that it is not plain or intelligible enough. A consumer might well be in some doubt as to what

it meant, because in more everyday parlance "nominate" (the verb) can mean "choose someone". Thus in the mind of the consumer it might cover switching a tenancy on a renewal from a bankrupt to his spouse. It might cover a renewal in place of a temporarily travelling tenant – the tenant 'nominates' his friend to take the tenancy for a year, or 6 months, while the tenant is out of the country. It might be thought to cover a replacement tenant, identified by an outgoing tenant who wishes to recommend the property to his friend, and his friend to his landlord. It is not clear whether those situations are to be covered. The language is not plain or intelligible enough. To reach this conclusion is not to indulge in legalistic nit-picking over the meaning of words. This is a problem of substance. Any lawyer worth his salt can usually contrive possible alternative meanings of contractual words, and the fact that this can be done does not of itself make any given language insufficiently plain and intelligible. For that to result the alternative wording, or uncertain effect, must be one of substance or significance, and not merely of legal contrivance. But in my view the possible alternatives for 'nominee' have that substance and significance.

74. However, the "plain and intelligible" point does not rest there. Foxtons' new wording removes all reference to renewal commission, and removes the old clause 2.14. The legal effect of the wording of clause 1, taken as a whole and interpreted as a matter of contract law, is that commission would be payable on renewal, because of the link with occupation in clause 1.1.2 and the definition of the term (and its derivatives) in clause 1.1.6. However, the overall result of the clause is to introduce a lack of clarity that was not present in its predecessor because, looked at from the point of view of the typical consumer, the obligation to pay renewal commission is not couched in plain and intelligible language. Indeed, the impression given to a lawyer, after due consideration of the matter, is that the obligation has become somewhat buried. The obligation to pay commission in relation to the original tenancy is plain enough, but the obligation to pay renewal commission is not. This is not a point arising out of a comparison of the old and the new terms. It arises out of the new terms by themselves. The point is that the obligation is one which requires some legal mining to bring it to the surface, and the typical consumer is not a miner for these purposes.

75. For that reason, too, therefore, the obligation to pay renewal commission under the new terms does not escape a fairness inquiry.

Fairness

76. I therefore turn to that fairness inquiry.

77. The relevant provisions of the Regulations are Regulation 5(1) and Regulation 6(1). They are set out above so far as relevant. Neither the old nor the new Foxtons terms about renewal commission were individually negotiated for these purposes. So the relevant inquiry is whether:

> "contrary to the requirement of good faith, [the term] causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

Regulation 6(1) requires me to have regard to all the circumstances and all the terms of the contract as well as the goods and services for which the contract was concluded.

78. The question of fairness in the context of the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159) was addressed in the *First National Bank* case (*Director-General of Fair Trading v First National Bank plc* [2002] 1 AC 481). Notwithstanding the fact that those are not the Regulations which apply in this case, both parties before me acknowledged that what was said there was relevant to the debate before me. This is obviously right, not least because both regulations stem from the same Directive. Recital 16 of the Directive, set out elsewhere in this judgment, is of relevance because of the linking of "good faith" (as elaborated there) with the question of fairness.

79. Lord Bingham elaborated the test of fairness as follows (at paragraph 17):

> "A term falling within the scope of the Regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. … But the imbalance must be to the detriment of the consumer … The requirement of good faith in this context 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 consciously, 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 to 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. Regulation 4(1) [which is the practical equivalent of Regulation 5(1) of the 1999 Regulations] lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the Regulations are designed to achieve."

80. Lord Millett provided the following guidance (at paragraph 54):

> "It is obviously useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the inquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if it were

> drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion."

As will appear, I find this analysis is particularly applicable in the present case.

81. Foxtons submits that there is nothing unfair about the renewal commission provisions in either form of contract. It makes the following points:

i) The terms and conditions are used interchangeably for consumer and non-consumer landlords, and the difference between those two will not be obvious at the time of the contract. In those circumstances no landlord (of either variety) is taken advantage of, deliberately or non-deliberately. Non-consumer landlords with greater bargaining power could require that the term be removed if they thought that it was unfair. I am asked to infer that no surprise was expressed by those landlords, and I suppose that the point is that if it is not perceived by those landlords as being unfair or oppressive, then why should it be unfair for the consumer landlords?

ii) In good faith terms, the renewal commission is "obvious" and easy to understand; there is no hidden surprise or "time bomb", and the consequences are easy to understand.

iii) Commission arrangements are common and familiar. They should not be condemned as unfair in a consumer contract such as the one in question in this case.

iv) To hold the renewal commission to be unfair would actually be to tilt the balance against Foxtons. The current terms distribute the burden of paying for Foxtons' work across those who benefit from it. That work includes cases were no tenant is found. To restrict the commission to a percentage of the rent payable in the initial term would skew the burden in favour of those landlords who got a subsequent renewal. It is said that just over 34% of tenants stayed in a property for more than 18 months. There is a suggestion in correspondence from Foxtons that initial letting fees would have to be increased by 4.4% to make up for lost renewal commission and Mr Kent submitted that the typical consumer would realise the principles underlying this (though he did not submit that the actual figure would be apparent).

v) If a tenant stays for a second or subsequent term, then the landlord avoids a void in the occupancy and is saved from having to find a new tenant and go through the whole letting process again.

vi) This being a case of a challenge by a regulator (as opposed to cases turning on the individual circumstances of an individual consumer) all the court has to go on is the promotional material and the terms themselves. Whether or not that

leads to a finding of unfairness, there should be no finding of general unfairness in relation to all renewal commission. (I have already indicated I am not making a finding about all renewal commission).

vii) It was not possible to rely on any analogy with a selling agent so as to equate the selling agent's one off commission with the commission based on the first year's rent, and thereby hold that commission in relation to renewed terms was unfair.

viii) In substance the renewal commission was part of the price of the introduction. What the landlord gets is an income stream, which has been introduced by the agent.

ix) Clause 1 of the old terms is clear enough so far as the charging of renewal commission is concerned.

82. Mr Green's submissions for the OFT relied on the following points, which tended to be closely aligned to some of the factors identified by the House of Lords in the *First National Bank* case.

i) The landlord was substantially worse off with the renewal clause than without it. I consider that as a matter of fact that must be correct and is obvious. This is particularly so where the commission is payable on the same basis as the original term if the renewal is not for a fixed term.

ii) The renewal commission is payable even if another agent manages the property in the renewed period. This would leave the landlord paying double commission, and the landlord cannot extract himself from that unless he buys Foxtons out.

iii) There is no temporal limitation on the payment of the renewal commission.

iv) If the renewal commission were drawn to the attention of the landlord, he would be surprised by it; and his (notional) lawyer would require its removal from the transaction.

v) The obligation is not given sufficient prominence in the literature, and could be regarded as a concealed trap.

vi) Foxtons does not deal openly and fairly and equitably with the landlords; it takes advantage of the landlord's position and fails to take his interests into account. On analysis, the OFT's case on this point boils down to a claim that Foxtons has a superior bargaining position.

vii) A comparison of the price/services ratio demonstrates an imbalance. The client pays 11% of the rental value on a renewal, yet gets very little in exchange. Foxtons only intervenes to fix rent if required to do so, and does little else. It even charges separately (again) for the tenancy agreement (though less than the original fee). Furthermore if (as has happened in the market until recently) the rent on the renewal is an increased rent, the value of

the commission increases proportionately. In short, there is no real renewal service, and if there is it is not worth what is paid for it.

Fairness – conclusions

83. There are two points that one side or the other considered very significant and which I will dispose of at this stage, since I do not consider that they support the party raising them.

84. The first is the argument of Foxtons that the renewal commission is justified because it is part of the payment for an income stream that has been introduced to the landlord (and allied points). It is not plain that that is the correct way of looking at the matter because it is not at all apparent that the landlord views the matter in that way, and the evidence of Foxtons' subjective view of the point is neither strong nor plain. There is no evidence that landlords generally (let alone consumer landlords) would view the commission in that way, and nothing in the way in which the matter is presented to them in publicity or otherwise which would bring the point home to the landlord. The landlords in question are not sophisticated economists, or even sophisticated businessmen, and would be unlikely independently to think in those sort of terms. They are likely to see themselves as paying 11% for getting a tenant into the property for the agreed first term. I doubt if many of them will think beyond that on that occasion, and unless they do then they will not be thinking in terms of an income stream coming from that initial introduction. I think it more likely that they do not think into the renewal phase. Certainly Foxtons do not really do much to encourage them to do so. These factors are obviously closely related to those relevant to the "core bargain" point above.

85. Nor is it apparent how far Foxtons take that view. I would be prepared to accept that it is likely that Foxtons have business plans which show their hopes for renewal commission in terms of projection of future income, but there is no real evidence that they have costed their activities in such a way as to suggest that they have assessed the cost to them of providing the functions and then worked out an income which covered those costs and gave a reasonable profit or return, and then divided up that income between commission on projected first-term lettings and renewal commission. In the absence of some decent evidence along those lines, it is just as likely that Foxtons rely on renewal commissions as an adventitious benefit. If and insofar as that is the case (and I do not need to make a finding about it) then the "payment for an income stream" analysis fails on their side of the line as well. The correspondence that took place over the two years before the hearing in front of me contained a suggestion from Foxtons that it had a business model which demonstrated that it could not make a profit from the initial letting commission alone. The OFT invited Foxtons to disclose its business model or charging methodology which demonstrated that to be the case. Foxtons responded on a couple of occasions to the effect that it was looking into the possibility of providing such information but there were difficulties in disentangling this element from the rest of its business. It never did provide that evidence. In the absence of such evidence this point cannot be maintained as one of economics from Foxtons' side.

86. Furthermore, Foxtons' ultimate position suggested something of a retreat from the position taken in correspondence. As referred to above, a letter from Foxtons suggested that if renewal commission was not chargeable, then at a rough calculation

the initial commission might have to rise by over 4% to make up for lost income. However, when Mr Budden (Foxtons' chief operations officer) came to put in a witness statement on behalf of Foxtons in October 2008 he said:

> "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."

That is a highly qualified expression of view, which does not support an economic analysis of a spread of commission over initial and renewal commissions in a calculated way.

87. For those reasons, therefore, the submissions of Foxtons which rely on the "income stream" argument carry no real weight.

88. On the other side of coin I also reject the OFT's submissions which rely on an explicit or implicit analysis of the renewal commission as being an almost legally severable separate commission in the sense that it is an identifiable commission payable for virtually no service, and which is for these purposes divorced almost entirely from the initial commission. This point surfaced from time to time in Mr Green's submissions. It must be handled with care. As a matter of analysis it seems to me to invite me to accept an economic analysis which is of the same nature, but to the opposite factual effect, as that of Foxtons which I have just rejected. It assumes that the initial 11% is properly attributable to, and proper remuneration for, the initial introduction of the tenant to the landlord, and that there is a separate commission, properly attributable to, and to be treated as remuneration for, the renewal. As a legal analysis that fails – as a matter of contract they are not divided up in that way. And as an economic analysis depending on 11% of the initial period rental being an appropriate economic return in respect of those activities, it is not made out on any evidence at all. So I do not go down any route which depends on that sort of analysis.

89. Having got those points out of the way, I therefore turn to consider the other fairness points. Ultimately I consider that the answer to this question lies in points which have links to those germane to the "core bargain" point referred to above. I shall consider the old terms first, and then the new terms.

90. It seems to me that the question of "significant imbalance" is capable of shading over into the question of good faith, with some factors being relevant to both. But I shall start by taking it as a separate factor. I suppose that in some cases the question of imbalance might depend (at least partially) on economic arguments of the kind that I have rejected as having been established above, but since neither side advanced an evidential case on that basis I cannot use such arguments to decide this point in this case (see above). I decide the overall point against Foxtons. The commission amounts in question are significant, and operate adversely to the client the more time goes on. Commensurate services are not provided as time goes on. That, in my view (and coupled with the points made below) gives rise to the significant imbalance referred to in the legislation.

91. So far as fairness is concerned, I start from this point – the renewal commission, from the point of view of the landlord, is capable of operating onerously. 11% of the rent over an extended period of time is a significant sum and a very significant part of the rent. I do not think that the typical consumer would realise that it is there. True it is that it is referred to in the old terms, and in terms of actual terminology it is not deeply buried. For someone actually looking for it, or reading all the words carefully, the words are there indicating that it is payable. However, that state of affairs has to be measured against expectations and manner of presentation. So far as expectations are concerned, I think it unlikely that the typical consumer who has got a tenant for (say) a year's tenancy, and paid 11% of the rent up-front, would expect a repeat bill in year 2 (and all years thereafter) unless that point is spelled out to him in some way. In the absence of that it becomes a trap, or a time bomb. It is certainly not spelled out to him, on the evidence that I have seen. There is no reference to it in Foxtons' glossy publicity, and no reference to it on the first two pages of the old form (or the first and last of the new terms) which are the ones that are most likely to be read (and which are most readable in terms of typeface). There is no suggestion that any oral explanation is offered. No particularly burdensome services are part of the package for years 2 and onwards (or at least nothing like the services involved in advertising the property and getting the tenant in in first place) and it would not readily occur to the landlord that the same sum would be payable in the future for years where that distinction remains true. The typical consumer landlord may well be familiar with the concept of commission, but the real question is: commission on what? His experience could be informed by that operating when he acquired his house, or the house to be let, in which the vendor pays commission to an estate agent, but that is generally a fixed one-off fee. So that experience will not forewarn him of the future commission which might arise on renewals into the future.

92. So the only indication available to the typical consumer and which might shift his expectations is the wording in the standard terms. As I have said, that wording in the old terms is sufficient to convey the idea and nature of a renewal commission, but in my view that is not enough for these purposes. It is in very small print with nothing to distinguish it from the "initial" commission, and in my view not enough is done to draw it to the attention of the typical consumer who would not be expecting it. Of course the theory is that the typical consumer, and particularly the circumspect one, will read all the standard terms. But the practice is that even the circumspect one will be unlikely to do so with a great degree of attention. I think that such a consumer will expect a lot of detail be dealt with in what is frequently labelled the "small print", but the whole point of that expression (which is used in everyday language in a somewhat pejorative sense) is that it contains things which are not of everyday concern to the consumer – it contains various clauses which are thought by the supplier to be necessary but which are not usually relied on even though they might, on odd occasions, turn round and bite one party or the other (usually the consumer). The consumer would not expect important obligations of this nature with likely and significant impact to be tucked away in the "small print" only, with no prior flagging, notice or discussion. I think that that is what has happened here. This important obligation is in the small print only, in the sense that it has not been flagged or referred to in any part of the dealings between the parties. Bearing in mind what I have found to be the usual expectation of the typical consumer landlord (which is consistent with some at least of the complaints that were in evidence in these

proceedings) that is not a fair way to bring the point to the attention of the consumer, and is not adequate.

93. These are factors which particularly relate to the sort of points made by Lord Millett in the *First National Bank* case. They demonstrate that the consumer would be surprised by the effect of the clause in relation to renewals; the consumer's notional lawyer would be likely to object to it and press for its deletion. These factors demonstrate the unfairness of it. Yet again they are, as will have appeared, closely related to "core bargain" considerations.

94. I have not ignored Foxtons' counter-arguments, but I consider that they do not sufficiently mitigate the unfair imbalance against the consumer landlord. It is true that the renewal avoids a void, and that that is a good thing from the point of view of the landlord. But the real question is whether the consumer knows that he is paying for that, and, even more to the point, knows how much he is paying for it. I do not consider that he is likely to. In fact, if the typical consumer did know and understand that, then that would be more likely to make the renewal commission part of the core bargain – thus are the arguments all inter-related. But my finding is that he does not sufficiently appreciate these things. Similarly, the argument that the landlord gets an income stream would require that perception to be shared by both parties. There is no evidence that it is, and there are good reasons to suppose that it does not represent a view held by the consumer landlord. There is no evidence as to the acceptability or otherwise of the terms so far as commercial landlords are concerned. All in all, Foxtons' arguments do not carry the day.

95. Foxtons have sought to argue that a finding against renewal commissions would operate against the interests of tenants or landlords because it would lead to higher initial commissions, which would be passed into higher rents, or would lead to increased pressure on prospective tenants to enter into longer initial tenancies or not to renew shorter tenancies. I do not accept these, or similar, arguments for various reasons. First, I am not ruling against renewal commissions per se. I am not even ruling on renewal commissions at a particular level. I am ruling on the manner in which Foxtons seeks to charge them. Second, the argument requires levels of economic analysis which were not reached in the material before me. Third, some of the arguments are predicated on an unspoken assumption that letting agents would adjust their behaviour and make recommendations to their clients in order to maximise the commission for themselves. In other words, otherwise unfair transactions should be characterised as fair because otherwise letting agents will act in breach of duty to their clients. I do not think that that argument can be described as attractive.

96. In all those circumstances I find that the renewal commission element of Foxtons' old terms should be characterised as an unfair term for the purposes of the Regulations. There is one additional point that I would make at this juncture. The discussion above assumes a situation in which the renewing landlord is the same landlord as engaged Foxtons as letting agent and as entered into the first tenancy generating the first commission liability. The old terms also impose a renewal commission obligation on the same landlord where there has been a disposal by that landlord and his successor renews the tenancy. There was a desultory debate before me as to whether or not that liability arose from the renewal commission provisions which I have been considering hitherto, or whether it arose as a result of the third party renewal provision (clause

5.2) which I deal with below. If the analysis is that third party renewal commission arises under the general provisions (and clause 5.2 is no more than a reminder) then it is even more strongly the case that the term is one which requires proper exposition and explanation somewhere in the documents or other pre-contract dealings. However, I do not need to go further into that point.

97. I turn next to the renewal commission element in Foxtons' new terms. The circumstances in which these terms become the terms of the contractual relationship are no different from the circumstances of the old terms. So the only difference is the terms themselves.

98. I have already pointed out that under these terms renewal commission is not separately referred to. The letting commission arrangements are more generally phrased, though that phraseology is capable of imposing letting commission (and Foxtons does not allege otherwise). In my view these terms are incapable of altering the fairness conclusions which I have already reached in relation to the old terms. In fact they make the position worse, that is to say the unfairness is clearer. At least under the old terms there was a reference to renewal commissions which stood some chance of being a flag to the consumer (though not enough to remove the unfairness of the term). In the new terms even that flag is not there. The renewal commission is severely camouflaged. The risk of ambush, or time-bombs, or any other similarly graphic surprise metaphor, is even greater and the term more clearly unfair.

99. I confess to finding this behaviour on the part of Foxtons surprising in the circumstances. The OFT has been complaining about renewal commission for over 2 years, and there have been discussions in correspondence during that time in which Foxtons was expressing a willingness to try to meet the OFT's concerns. It has to be said that the OFT's main focus was in arguing that any renewal commission was objectionable where no real valuable services were provided – that is to say, the focus was on the concept of renewal commission rather than Foxtons' particular implementation of them. However, "transparency" did figure in the correspondence, and on 5th April 2007 Foxtons proposed that all terms regarding what was to be termed "Introductory Commission" be brought together in one clause and that:

> "2. It is made clear and transparent that Foxtons charges an Introductory Commission which extends beyond the initial term of the tenancy agreement. The Introductory Commission is charged up to a maximum of three renewals of tenancy."

Those proposals were never agreed as a way out of the dispute between the parties, and were never implemented by Foxtons. What seems odd to my eyes is that an apparent recognition of the need for transparency is simply not reflected in the latest terms where there is no reference to renewal at all. Of course, whether the eventual transparency mechanisms would have been sufficient to get Foxtons out of the difficulty that it now finds itself in would depend on what they were (amongst other things), and I do not take what is said in that letter as an admission that there was insufficient transparency at the time; but that letter does acknowledge the appropriateness of transparency which makes it very odd that neither the current terms, nor Foxtons' current publicity, nor (on the evidence before me) Foxtons' current procedures, have apparently achieved that. But be all that as it may, I have to assess the term against its background, and I find it to be unfair.

Third party renewal commission

100. This clause (clause 5.2) no longer appears in Foxtons' terms, but was present in the old terms. It deals with the situation where an already let property is sold and provides, or points out, that renewal commission is still payable and (according to Mr Kent) performs the useful function of reminding the selling landlord that he must take steps to make sure the incoming landlord shoulders the ultimate burden of renewal commission. There was a debate as to whether this clause imposed a liability which would not otherwise exist, or reminded the consumer landlord of one that he was already under by virtue of the other renewal commission provisions.

101. None of this matters in the light of the conclusions I have already reached as to renewal commission generally. If the renewal commissions for the typical consumer landlord are unfair in relation to his own renewals, then this clause is a fortiori unfair, as Mr Kent conceded. These commission terms are therefore unfair.

Sales Commission

102. Under clause 5.1 the landlord is obliged to pay commission of 2.5% to the landlord on the sale price if the landlord agrees to sell the property to the tenant, occupant or licensee. The commission is payable on exchange, but Foxtons "reserves the right" (which is a curious way of putting it) to defer payment of the commission until completion. Again, this is a term appearing in the old terms only; it makes no appearance in the new terms. Nonetheless, the OFT attacks it, and Foxtons defends it as fair. No question of core terms arises in relation to this term.

103. In the fairness inquiry no serious question can arise in relation to significant imbalance. This is a clause which imposes a potentially large financial liability on the landlord in relation to a transaction in which Foxtons have played no material part. The introduction of the tenant as a tenant hardly counts for those purposes. The liability arises before the landlord receives any sale money, and exists even if the contract for sale is not completed. There is an obvious imbalance.

104. This is not the sort of clause a consumer landlord would expect when he goes to a letting agent to get a tenant for his property. He is not thinking about selling the property, whether to the tenant or to anyone else. He has agreed to pay a commission to Foxtons for their services in getting him his tenant. In Lord Millett's terms, I think that the typical consumer would not merely be surprised by it if it were pointed out before he signed up; he would be astonished. It is so far from what he would expect in a document whose opening words thank him "for instructing Foxtons to act on your behalf in marketing your property for rental", and which thereafter is solely concerned with the consequences and effect of rental, that he would think it had nothing to do with the transaction at all. If invoked against him he would, entirely understandably, think he had been ambushed. It is plainly unfair for the purposes of the Regulations.

105. Mr Kent sought to argue that it was sufficiently flagged. I disagree – tucking something like this away in clause 5.1 of the small print, albeit under a heading "Sales Provisions", is not flagging it at all. He also sought to justify the provision on the footing that it would be unobjectionable to have such a provision to cover a case where the prospective tenant changes his mind and decides to buy and not to rent, and it does not materially change that situation if the tenant decides to buy after being in

the property for a short while. This was said to demonstrate fairness. In my view it does not. It does not actually cover the case of the would-be tenant who changes his mind, because that person is not yet a "tenant, occupant or licensee", so Foxtons would not get any commission in that event. Once the tenant has signed up, Foxtons gets its letting commission. Clause 5.1 then gives it another commission. If there were a case for saying that a clause like this operated to compensate Foxtons for loss of some other commission that they might otherwise have a justifiable case for claiming or retaining, and of which a sale would deprive them, then that might begin to shift the balance. But that is not this case, and in any event a potentially draconian provision like this would normally require more focus to begin to make it fair.

106. I therefore find the sales commission clause to be unfair for the purposes of the Regulations.

Conclusions and consequences

107. I therefore find all the relevant provisions to be unfair for the purposes of the Regulations. The parties are agreed that the consequences of that in terms of the relief to be granted should be the subject of further debate when my decision was known. There will be a further hearing for that purpose if the parties cannot agree on the point.