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Court Ruling Means Letting Agents Need to Review their Terms of Business

The recent *OFT –v– Foxtons* decision has attracted much press interest. The High Court ruled that commission fees being charged to landlord clients by Foxtons were unfair.

The case was brought by the Office of Fair Trading against the letting agents, Foxtons. The OFT will now seek to obtain injunctions preventing Foxtons charging commission on this basis. Foxtons could also face expensive compensation claims for the recovery of commission charged.

The basis of the decision was that Foxtons' terms and conditions to landlords were not clear. The court's drew attention to Foxtons' failure to flag up rather onerous terms to clients at the outset. The Court also criticised Foxtons for using language that was unintelligible.

Letting agents (and other businesses which deal with consumers) need to ensure their standard terms of business are clear and readily understood. Potentially disadvantageous terms, which are not drawn to the attention of clients before the contract is entered into, may be struck down.

The OFT commenced legal action against Foxtons in February 2008 after receiving complaints about the amount of commission Foxtons was charging its landlord clients. The OFT contended that Foxtons' letting agreement included terms that were unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999. In particular, Foxtons' terms of business included the following provisions:

- Charging renewal commission at 11 per cent if a tenant remained in occupation of the let property after the expiry of the fixed term—regardless of whether Foxtons had any involvement in the tenant's decision to stay
- Charging commission at 2.5 per cent if a tenant purchased the freehold from the landlord

The Unfair Terms in Consumer Contracts Regulations provide that any terms which result in a significant imbalance in the parties' rights and obligations to the detriment of consumers will be unfair and ultimately unenforceable.



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Tenancy Deposit Schemes: A Reminder

Landlord and Letting Agents alike are generally aware of the need to protect deposits paid in relation to residential ASTs created on or after 6 April 2007.

Charles Lucas and Marshall are increasingly being instructed by clients in relation to possession claims where the deposit has not been paid into a TDS. The Housing Act provides that a Section 21 notice will not be valid if at the relevant time the deposit is not being held

in a TDS. This prevents the Landlord recovering possession.

Recently we have acted in a situation where an AST initially granted before 6 April 2007 was subsequently varied post 6 April 2007. The defendant tenant argued that the variation amounted to the grant of a new tenancy and because the tenancy had not placed into a TDS at the relevant time the section 21 notice served was invalid.

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New Rules for Chasing Unpaid Rent

Landlords who have engaged solicitors to pursue unpaid rent often assume that proceedings can be issued straight away. The Court rules (known as the Civil Procedure Rules) contain guidance as to how the Court expects the parties to behave in the run-up to any Court action. These guidelines are contained within Practice Directions or Pre-Action Protocols. If either party has failed to comply with the relevant protocols the Court has power to impose sanctions once proceedings have been issued – usually by way of a costs penalty. Potentially, even if a Landlord's claim for unpaid rent has been successful he may be prevented from recovering a contribution towards his legal fees from the Defendant if he has not complied with the protocols.

Recently the Civil Procedure Rules have been updated and a new Practice Direction on Pre-Action Conduct introduced. The new Practice Direction introduces new requirements in respect of debt claims (including unpaid rent). It details information which should be provided to the Defendant in pre-action

correspondence before the Claimant resorts to Court action. Notably, the Defendant should be given a period of time to come up with payment before proceedings are issued. Where the Claimant is a business (e.g. a Landlord company) and the Defendant is an individual (e.g. a non-corporate Tenant) additional requirements apply.

Often a Landlord will have already issued written demands for unpaid rent before we have been instructed. It is unlikely that those written demands will have complied with the protocol requirements, in which case we would need to serve a further written demand in the form of a pre-action 'Letter of Claim'. Ideally we should be instructed as soon as the tenant defaults on rent. That way we can ensure that the correct steps are taken at an early stage and time will be saved in the long-run. In addition, we shall also be able to bear in mind other important considerations, such as whether there may be any notice requirements in relation to deposits or guarantors and whether the Tenant's default has triggered a forfeiture clause.

Agent's Loss of Commission

In the recent case of *Estafnous v London and Leeds Business Centres Limited* the High Court decided that an agent was not due his commission of £2m.

The Court accepted that the agent had introduced a purchaser of a property. However, during the course of the negotiations it was decided that the purchaser would buy the company that held the property rather than the property itself because this gave stamp duty savings. The Court held that the terms of the agent's agreement was such that, although the purchaser acquired control of the property through purchase of the company, it was not, as such, a sale of the property and therefore the commission was not due.

Agents should review their terms to ensure that the restructuring of a transaction will not lose them their commission.

Particular care should be taken where the client is a PLC as the company paying commission on the sale of itself could be contrary to the company's legislation and the agreement to pay commission void.



How are Tenants Responding to the Recession?

In a declining market collecting rent from tenants is proving ever more problematic. Many tenants whose lease requires them to pay rent quarterly are asking to pay on a monthly basis instead to assist cashflow. Many landlords would be happy to accept such an arrangement, but legal advice should be sought. Any such provision may amount to a variation of the terms and may affect the landlord's entitlement to certain remedies.

Business tenants are proving increasingly reluctant to renew their tenancies. Many are choosing to protract renewal negotiations in the hope that market rents will continue to fall. This leads to uncertainty for the landlord. Landlords of commercial property should be reminded of the need to serve a Section 25 notice within the relevant timeframes and

then issue proceedings if necessary to put pressure on the tenant to agree terms.

Where rent remains unpaid, Landlords are considering the rather draconian remedy of distress. This enables a landlord to instruct bailiffs to seize property belonging to the tenant to the value of arrears outstanding. Caution should be exercised however, and the High Court has previously been raised concerns about the extent to which the remedy interferes with rights enjoyed under the European Convention on Human Rights. The government has been considering introducing a new Commercial Rent Arrears Recovery regime to effectively abolish the remedy of distress. However, the regime has been delayed until April 2012, which means that distress is still available as a last resort remedy.