Neutral Citation Number: [2009] EWCA Civ 288

Case No: A3/2008/1939

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr Justice Morgan
[2008] EWHC 1662 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2009

Before :

LORD JUSTICE WALLER
Vice-President of the Court of Appeal, Civil Division

LADY JUSTICE ARDEN
and
LORD JUSTICE MOORE-BICK

- -

Between :

The Office of Fair Trading	**Appellant**
- and -	
Foxtons Limited	**Respondent**

Nicholas Green QC and Helen Davies QC (instructed by **The Office of Fair Trading**) for the **Appellant**
Michael Kent QC and Andrew Davis (instructed by **Mishcon de Reya**) for the **Respondents**

Hearing dates : 9th, 10th February 2009

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Approved Judgment

Lord Justice Waller :

1. This appeal raises an important point relating to the scope of the relief that the court can grant in proceedings brought by the Office of Fair Trading ("the OFT"), under the Unfair Terms in Consumers Contracts Regulations 1999 ("the UTCCRs"). The UTCCRs implemented Directive 93/13/EEC on Unfair Terms in Consumer Contracts.

2. Morgan J in a judgment handed down on 17th July 2008 has struck out from the prayer for relief sought by the OFT (claimed on the basis that it establishes the unfairness of certain standard terms) words which would otherwise injunct the respondents Foxtons Ltd ("Foxtons") from enforcing those terms in current contracts. The judge distinguished between the general challenge, which a body such as the OFT can make, and the challenge that an individual can make if sued. He has held that Foxtons should not be prevented from enforcing individual contracts already entered into, since the circumstances of those individual contracts might establish that in that individual contract the term was fair, even if, on the general challenge, the term has been held unfair. This is the OFT's appeal from that decision.

3. There is also a cross-appeal by Foxtons, whereby they wish to challenge the jurisdiction of the court to grant declarations in a case where the parties before the court are not the parties to the contracts in which the terms appear. This challenge failed before the judge and in the result he awarded Foxtons only 40% of their costs.

4. The judge sets out the statutory provisions by which the functions of the Director of Fair Trading were transferred to the OFT. There is no need to repeat that paragraph but it is necessary to note that where in the UTCCRs Director of Fair Trading is used, it must be understood to refer to the OFT.

Foxtons' terms

5. Foxtons are a large and well known estate agent. They have a set of standard terms which record the terms on which they act for landlords. Many of those landlords are consumers. The judge sets out in some detail the terms handed to the OFT in 2007 as Foxtons' standard terms in paragraph 6, but for the purposes of this appeal it is sufficient to say that amongst those terms were the following:-

   i) Terms which purport to entitle Foxtons to charge a renewal commission if a tenant introduced by Foxtons renews or extends his tenancy, even where Foxtons have not negotiated the renewal or extension ("the renewal commission");

   ii) A term which purports to entitle Foxtons to charge a sales commission where a landlord sells to a tenant introduced by Foxtons, even though Foxtons neither negotiates nor assists in any way with the sale ("the sales commission");

   iii) A term which purports to entitle Foxtons to recover a commission from a landlord where that landlord has transferred the property to another and it is the other landlord that has renewed again, without any intervention from Foxtons ("third party renewal commission") .

OFT's Claim

6. As will be apparent from the Directive and the UTCCRs, which I will have to set out in some detail below, there are two processes whereby a challenge can be made to the fairness of standard terms in a consumer contract. A consumer may assert unfairness when sued ("an individual challenge"); alternatively a challenge can be brought by a body such as the OFT ("a general challenge"). It was under the procedure set out in the regulations for a general challenge that the OFT commenced proceedings against Foxtons challenging the fairness of the above terms in their standard form of contract.

7. They brought the proceedings under Part 8. The claim form appended the standard conditions. In the body of the claim form the pleader set out the regulations providing the jurisdiction for a general challenge. The pleading then set out in some detail Foxtons' standard terms. It then asserted that the OFT had received complaints from consumers and itself took the view that (i) the renewal commission terms (ii) the sales commission clause and (iii) the third party renewal commission clause, were unfair.

8. It also asserted that the clauses were not in plain and intelligible language.

9. The final paragraphs and relief I should quote in full:-

> "13. All of these clauses are not individually negotiated and are unfair in that, contrary to the requirement of good faith, they cause a significant imbalance in the parties' rights and obligations, to the detriment of Foxtons' consumer landlord customers.
>
> 14. The Claimant has raised the unfairness of these clauses with Foxtons in correspondence. However, to the date hereof, Foxtons has not removed these clauses from its standard residential letting terms.
>
> **Relief sought**
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> 15. In the premises, and in order to prevent harm to the interests of consumers, the Claimant seeks:
>
> (a) A declaration that the renewal commission clause, the sales commission clause and/or the third party renewal commission clause of Foxtons standard residential lettings terms, or any similar terms or terms having like effect, are unfair terms in contracts concluded with consumers and, accordingly, that these clauses are contrary to Regulation 5(1) of the UTCCRs and are not binding on consumers pursuant to Regulation 8(1) of the UTCCRs; and/or
>
> (b) a declaration that contrary to the requirements of Regulation 7(1) of the UTCCRs the renewal commission clause, the sales commission clause and/or

> the third party renewal commission clause are not expressed in plain or intelligible language; and/or
>
> (c) an injunction pursuant to Regulation 12 of the UTCCRs, restraining Foxtons (whether by itself, its agents or howsoever) from infringing the UTCCRs in the respects identified in paragraph 10 and/or 14 above or any of them and/or from using, recommending for use, enforcing, attempting to enforce or otherwise relying on any such terms and/or similar terms and/or terms having like effect in contracts concluded with consumers.
>
> (d) costs.
>
> (e) such further or other relief as the court may direct."

10. The claim form is supported by a statement from Mr Allen of the OFT. All it is necessary to say in relation to that statement is that although he gives examples of complaints by reference to individual contracts he recognises that the court will not be dealing with any specific contract.

The application

11. On 17th March 2008, Foxtons applied to strike out parts of the relief as claimed. The application originally related to paragraphs 15(a) and (b) and (e) (i.e. as to whether it was permissible for the court to make declarations) and to preventing relief being given in relation to "previous equivalent terms and/or superseded contractual terms". But during the hearing the application was amended to seek to strike out "15(c) (insofar as it seeks to restrain enforcement of terms in existing contracts)". It is on this amendment that the judge concentrated the main part of his judgment, ultimately ruling in favour of Foxtons and striking out certain words. It is this issue on which the main arguments in the court of appeal were concentrated.

The Directive

12. It is common ground that since the United Kingdom intended by the UTCCRs to implement the Directive, the starting point for any consideration of the scope of the UTCCRs is the Directive itself. It is for that reason I will almost invariably refer to the Directive rather than the terms of the UTCCRs.

13. The recitals are important as the judge recognised. They include the following:-

> "4. Whereas it is the responsibility of the Member States to ensure that contracts concluded with consumers do not contain unfair terms;
>
> 6. Whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than

his own, it is essential to remove unfair terms from those contracts;

8. Whereas the two Community programmes for a consumer protection and information policy (4) underlined the importance of safeguarding consumers in the matter of unfair terms of contract; whereas this protection ought to be provided by laws and regulations which are either harmonized at Community level or adopted directly at that level;

14. Whereas Member States must however ensure that unfair terms are not included, particularly because this Directive also applies to trades, business or professions of a public nature;

15. Whereas it is necessary to fix in a general way the criteria for assessing the unfair character of contract terms;

16. 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;

20. Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail;

23. Whereas persons or organizations, if regarded under the law of a Member State as having a legitimate interest in the matter, must have facilities for initiating proceedings concerning terms of contract drawn up for general use in contracts concluded with consumers, and in particular unfair terms, either before a court or before an administrative authority competent to decide upon complaints or to initiate appropriate legal proceedings; whereas this possibility does not, however, entail prior verification of the general conditions obtaining in individual economic sectors;

24. Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and

effective means of preventing the continued application of unfair terms in consumer contracts, . . ."

14. The relevant Articles of the Directive are the following:-

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.
2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.
The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.
Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.
3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Article 4

1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
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.

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).

Article 6

1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall

continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.
2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

Article 7

1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.
2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.
3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.

The regulations

15. The relevant Regulations are set out in the judge's judgment at [20]. Since they reflect in almost all respects the Directive and since it is by reference to the Directive one can address the arguments I will only quote those regulations relating to enforcement:-

"**Complaints - consideration by Director**

10. - (1) It shall be the duty of the Director to consider any complaint made to him that any contract term drawn up for general use is unfair, unless-

(a) the complaint appears to the Director to be frivolous or vexatious; or

(b) a qualifying body has notified the Director that it agrees to consider the complaint.

(2) The Director shall give reasons for his decision to apply or not to apply, as the case may be, for an injunction under regulation 12 in relation to any complaint which these Regulations require him to consider.

(3) In deciding whether or not to apply for an injunction in

respect of a term which the Director considers to be unfair, he may, if he considers it appropriate to do so, have regard to any undertakings given to him by or on behalf of any person as to the continued use of such a term in contracts concluded with consumers.

...

Injunctions to prevent continued use of unfair terms

12. - (1) The Director or, subject to paragraph (2), any qualifying body may apply for an injunction (including an interim injunction) against any person appearing to the Director or that body to be using, or recommending use of, an unfair term drawn up for general use in contracts concluded with consumers.

(2) A qualifying body may apply for an injunction only where-

(a) it has notified the Director of its intention to apply at least fourteen days before the date on which the application is made, beginning with the date on which the notification was given; or

(b) the Director consents to the application being made within a shorter period.

(3) The court on an application under this regulation may grant an injunction on such terms as it thinks fit.

(4) An injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any person.

Powers of the Director and qualifying bodies to obtain documents and information

13. - (1) The Director may exercise the power conferred by this regulation for the purpose of-

(a) facilitating his consideration of a complaint that a contract term drawn up for general use is unfair; or

(b) ascertaining whether a person has complied with an undertaking or court order as to the continued use, or recommendation for use, of a term in contracts concluded with consumers.

...

Publication, information and advice

15. - (1) The Director shall arrange for the publication in such form and manner as he considers appropriate, of-

(a) details of any undertaking or order notified to him under regulation 14;

(b) details of any undertaking given to him by or on behalf of any person as to the continued use of a term which the Director considers to be unfair in contracts concluded with consumers;

(c) details of any application made by him under regulation 12, and of the terms of any undertaking given to, or order made by, the court;

(d) details of any application made by the Director to enforce a previous order of the court.

(2) The Director shall inform any person on request whether a particular term to which these Regulations apply has been-

(a) the subject of an undertaking given to the Director or notified to him by a qualifying body; or

(b) the subject of an order of the court made upon application by him or notified to him by a qualifying body;

and shall give that person details of the undertaking or a copy of the order, as the case may be, together with a copy of any amendments which the person giving the undertaking has agreed to make to the term in question.

(3) The Director may arrange for the dissemination in such form and manner as he considers appropriate of such information and advice concerning the operation of these Regulations as may appear to him to be expedient to give to the public and to all persons likely to be affected by these Regulations. "

The judge's judgment

16. The judge reasoned in the following way. The Directive and the Regulations envisaged two different types of challenge – the individual and the general. There is a distinction between an individual challenge and a general challenge. Under an individual challenge the court assesses the unfairness of the term by referring, "at the time of the conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all other terms of the contract or of another contract on which it is dependent" [see Article 4 first paragraph of the Directive reflected in Regulation 6(1) of UTCCRs]. In the general challenge it is not possible to have regard

to all circumstances attending the conclusion of any particular contract nor to have regard to other terms of a particular contract and all the court can do in order "to make the regulations work" as per Lord Steyn in *Director of Fair Trading v First National Bank plc* [2002] 1 AC 481 at [33] is to assess the position by reference to the typical consumer.

17. The judge rejected Mr Green QC's argument that in the individual consumer case the test of unfairness was still by reference to the "typical" consumer. He pointed out that that would mean that if a general challenge failed an individual consumer who might have a better individual case could not succeed.

18. Thus he reasoned if it were right that an individual consumer should be entitled to challenge the fairness of a term on an individual challenge when a general challenge had failed, the converse should also be true. It is in this context that he postulated "a fairly shrewd and sophisticated landlord (albeit still a consumer)" who "discussed the term in detail" and obtained a reduction in the amount of the commission.

19. He appreciated that if the OFT succeeded there would be some impact on existing contracts because a court who had to deal with the claim against the individual would have the precedent of the general challenge decision and thus Foxtons in such a case would have to show that the particular case was non-typical [41]. But he reasoned that the scheme of the Directive and the Regulations intended that if a general challenge succeeded there might still be room for an individual challenge to fail and that thus an injunction should not be granted which in any way prevented Foxtons pursuing existing customers because otherwise Foxtons would be in contempt even if they intended to submit to the court that in the particular circumstances the term was fair in relation to a particular individual [42].

20. The judge concluded in this way:-

> "46. In my judgment, what the court should do in the case of a collective challenge is to assess the fairness of the term having regard to a typical consumer and typical circumstances. The court cannot be expected to assess whether, on the facts of cases not disclosed to the court, there is or is not a possibility that there might be a case where the term would not be considered to be unfair. The court may well feel that an exceptional case was unlikely but the court would be reluctant in the extreme to say that such a case could never arise. Even if there were a remote possibility of one such exceptional case, that would disentitle the OFT from the injunction it seeks, which makes no exceptions.
>
> 47. Mr Green then submitted that if the court were able to conclude that Foxtons would fail in the vast majority of cases where, in the past, they had used the relevant term, then that would justify the grant of the injunction sought. I disagree. In those circumstances, the injunction would unjustifiably override Foxtons' rights in the minority of individual cases which were different from the vast majority.

48. Mr Green then submitted that the injunction sought was justified by the word "use" in Regulation 12. He submitted that Foxtons were "using" the relevant term if they sought to rely upon it in relation to a contract previously entered into. He submitted that "use" was not confined to putting forward the term in a draft contract in the future. It does not seem to me to be necessary to consider what precisely is involved in the word "use" in this context. Even if Mr Green were right, he still cannot overcome the difficulty that the exercise which will be conducted by the court in these proceedings will involve assessing the fairness of the relevant term on the basis of a typical consumer in typical circumstances, whereas the injunction sought purports to cover all individual contracts entered into in the past, where the characteristics of the consumers and the circumstances, in one or more cases, might have been different.

49. I now turn to consider what the court should do at this early stage in these proceedings in relation to the claim to an injunction. At one time, I could see the force of a submission that I should do nothing. The court could allow the claim to go forward and be determined. The court would have to decide on the basis of a collective challenge whether the relevant terms were unfair. At that stage the court could decide what relief to grant. If the OFT succeeded in its collective challenge and persisted in seeking the injunction as claimed, and if the trial judge took the same view as I take of the scope of Regulation 12, then the trial judge could refuse to grant the full width of the injunction claimed. I have however decided not to take the approach of doing nothing, for two reasons.

50. The first reason is that I have heard the OFT's submissions as to the basis of their claim to the wider injunction and I am able to come to the clear conclusion that it is wrong in a number of its submissions. There is therefore some utility in deciding those points at this stage.

51. My second reason relates to the arguments presented by the OFT on this application. When Mr Green presented the OFT's case, he suggested that there was some sort of evidential burden on Foxtons to show that there was no individual case (or possibly, not many such cases) in existence where the position would be different on an individual challenge from this collective challenge. He referred to Foxtons not having produced evidence of any such circumstances. He also was prepared to contemplate disclosure by the OFT of documents in their possession, relating to individual complaints where the complainant had wanted the complaint to remain confidential. He seemed to contemplate that the court would be asked to address the specific facts of individual cases so that, perhaps,

> the court would take the view that there could not be an individual case which was different from the typical case or that such individual cases would be few and far between and could be ignored.
>
> 52. In my judgment, it is desirable for both parties to know the scope of the investigation which will be undertaken in this collective challenge. In accordance with authority, this collective challenge will proceed on the basis of a typical consumer and typical circumstances. This collective challenge will not determine all the issues which might arise in individual cases. The injunction sought is too wide and could not be granted in these proceedings. To give effect to this ruling, I will strike out the words " ... enforcing, attempting to enforce or otherwise relying on ..." in paragraph 15(c) of the endorsement on the Claim Form. I have considered whether to make other amendments to the injunction sought in paragraph 15(c). I have decided not to do so. First of all, the OFT did not put forward any alternative draft of an injunction. Further, if I had been asked to cut down the injunction sought so that it referred only to "typical consumers" or "typical circumstances", I would not have regarded an injunction expressed in those terms as having the necessary clarity for the purposes of an injunction."

Submissions on behalf of the OFT

21. Mr Green QC appeared with Miss Helen Davies QC for the OFT. Mr Green submitted that it was clear that the language of the Directive supported the view that general challenges were directed not only to future contracts but to existing contracts. He pointed to the language of Article 7(1) obliging Member States to "ensure . . . that effective means exist to prevent continued use of unfair contract terms in contracts concluded with consumers. . .". Article 7(2) identifies one of the means by which a Member State should fulfil that obligation i.e. by enabling bodies such as the OFT to take action in the courts "so that they can apply appropriate and effective means to prevent the continued use of such terms". He submitted the language of "concluded", "used" and "continued use" were apposite to refer to contracts in existence or "concluded"; he submitted that "continued use" encompassed both inserting into contracts in the future and enforcing contracts already entered into. He submitted the recitals supported the construction he placed on the Directive in particular because of their emphasis on the obligation "to ensure that contracts concluded with consumers do not contain unfair terms"; it being "essential to remove unfair contract terms from [consumer] contracts"; and "the importance of safeguarding consumers in the matter of unfair terms".

22. He took us to various authorities from the European Court of Justice which he submitted supported the submission that a general challenge was intended to cover and provide a remedy in relation to current contracts and supported the submission that consumer protection was a key objective. For example *Commission of the European Communities v Italian Republic* [2002] ECR I-819. The issue in that case related to the extent of the obligation of a Member State under Article 7(3). The Italian Government was arguing by reference to Article 7(1) that the Directive was

targeted at terms in actual use rather than terms which had been merely recommended (almost the converse of Foxtons' argument in this case). The opinion of the Advocate General rejected the Republic of Italy's argument [see paragraphs 21 to 23] but the trenchant terms of the court's judgment was something on which Mr Green particularly relied:-

> "12. The Commission submits that Article 7 of the Directive regulates one of the fundamental aspects of protection introduced by that act, that is to say the procedure intended to 'prevent' the use of unfair terms in contracts concluded between sellers and suppliers and consumers. It is a requirement of that objective that it should be possible to initiate that procedure not only against sellers or suppliers using such clauses, but also against professional bodies or other traders who recommend the use of such clauses. It is not necessary to wait until clauses drawn up with a view to general use are actually inserted in a particular contract.
>
> 13. The Italian Government disputes this interpretation. It maintains that the procedure provided for in Article 7 of the Directive is designed to prevent the 'use' of unfair terms. Actual, and not merely potential, use is therefore an essential condition.
>
> 14. It should be noted that in its judgment in Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial et Salvat Editores* [2000] ECR I-4941, paragraph 27) the Court held that the system of protection laid down by the Directive is based on the notion that the imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract. That is why Article 7 of the Directive, paragraph 1 of which requires Member States to implement adequate and effective means to prevent the continued use of unfair terms, specifies in paragraph 2 that those means are to include allowing authorised consumer associations to take action in order to obtain a decision as to whether contract terms drawn up for general use are unfair and, where appropriate, to have them prohibited.
>
> 15. The deterrent nature and dissuasive purpose of the measures to be adopted, together with their independence from any particular dispute mean, as the Court held, that such actions may be brought even though the terms which it is sought to have prohibited have not been used in specific contracts, but have only been recommended by suppliers and sellers or their associations (*Océano Grupo Editorial*, cited above, paragraph 27)."

23. He took us to the Opinion of the Advocate General in *Océano Grupo Editorial SA v Rocio Murciano Quintero* [2000] ECR I-4941 where the A-G made some general

observations as to the importance of the general procedure under Article 7. He said at paragraph 24:-

> "Furthermore, it is of undoubted importance that, in order to remedy a situation of significant imbalance between the two parties to the contract, the Directive requires Member States to introduce a system of protection which involves – and actively so – persons unconnected with the individual contractual relationship. On the basis of the obvious premiss that the reaction of consumers to terms that are harmful to their interests is not an effective remedy because of the cost of bringing an individual action and the disinclination of consumers to venture into complex proceedings against sellers or suppliers who are more powerful and better organised, the Directive requires that 'Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers' (Article 7). Assessment of whether the means of protection which the Directive requires Member States to provide are 'adequate and 'effective' is linked to a specific assessment of the question whether the means are appropriate to the objective pursued, which, I repeat, is to ensure that unfair terms are not binding upon the consumer."

24. It is that paragraph that the court in its judgment approved in passages again on which Mr Green particularly relied:-

> "27. Moreover, as the Advocate General pointed out in paragraph 24 of his Opinion, the system of protection laid down by the Directive is based on the notion that the imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract. That is why Article 7 of the Directive, paragraph 1 of which requires Member States to implement adequate and effective means to prevent the continued use of unfair terms, specifies in paragraph 2 that those means are to include allowing authorised consumer associations to take action in order to obtain a decision as to whether contractual terms drawn up for general use are unfair and, if need be, to have them prohibited, even if they have not been used in specific contracts.
>
> 28. As the French Government has pointed out, it is hardly conceivable that, in a system requiring the implementation of specific group actions of a preventive nature intended to put a stop to unfair terms detrimental to consumers' interests, a court hearing a dispute on a specific contract containing an unfair term should not be able to set aside application of the relevant term solely because the consumer has not raised the fact that it is unfair. On the contrary, the court's power to determine of its

> own motion whether a term is unfair must be regarded as constituting a proper means both of achieving the result sought by Article 6 of the Directive, namely, preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers."

25. Mr Green placed particular emphasis on the language used in paragraph 28 of "putting a stop to unfair terms".

26. He also referred us to a decision of what we understood to be the Italian Supreme Court di Cassazione of 21st March 2008. We only had one chapter of the judgment. The translation of paragraph 5.2.2 of that judgment Mr Green suggested was absolutely in point. It said:-

> "With reference to contracts existing at the time of the ruling, the injunction on the use of unfair terms does not conflict with the preventive function of such a protection tool. The prevention requirement not only concerns the insertion of clauses in forms or paperwork used for concluding contracts after adoption of the injunctive measures but also, the post-injunction effects brought about by these clauses or the effects which are likely to come about over time, through the exercise of powers deriving from those terms."

27. He also referred us to certain domestic authorities, the most important of which was *The First National Bank* case. There he relied in particular on the statement of Lord Steyn where he said at [33] :

> "The purpose of the Directive is twofold, viz the promotion of fair standard contract forms to improve the functioning of the European market place and protection of consumers throughout the European Community. The Directive is aimed at contracts of adhesion, viz "take it or leave it" contracts. It treats consumers as presumptively weaker parties and therefore fit for protection from abuses by the stronger contracting parties. This is an objective which must throughout guide the interpretation of the Directive as well as the implementing Regulations."

28. Mr Green at the conclusion of his opening summarised his submissions in this way. (1) The obligation on a Member State under the Directive is to "put a stop" to the use of unfair terms in consumer contracts; (2) The only conclusion as to the proper interpretation of the Directive and the regulations consistent with the protection of consumers involves being able to injunct the continued reliance on unfair terms in existing contracts; (3) There is simply no support for the view that the general action by the OFT should be subject to leaving a supplier free to contend in individual actions that the term in the particular circumstances of that case was fair; (4) The emphasis in the authorities on individual actions being ineffective to protect

consumers and the general action being the "only" effective protection supports the view that it is the individual action which will be subject to the general action rather than the other way round; (5) There is nothing in any of the legislation or the authorities that supports the concept of a "shrewd consumer" or the right of a supplier in the consumer context being entitled to litigate with a "shrewd consumer" once a term has been declared unfair in an action by the OFT; (6) The judge's result fails to take account of the consequences severely detrimental to the consumer e.g. that it encourages foot dragging so that more current contracts can be entered into before any declaration that a term is unfair has been obtained; it allows a supplier to continue to enforce unfair terms by threatening letters or obtaining judgments in default, because the practical benefit of a judgment being binding on a court in relation to current contracts is only there if the matter gets to court but consumers are very likely to give in before that happens.

Submissions on behalf of Foxtons

29. Mr Kent QC and Mr Andrew Davis appeared for Foxtons. Mr Kent's submissions started from the position first that it was unlikely that, in giving the power to pursue a general challenge to the fairness of standard terms, it was intended to interfere with existing contractual rights. This was the foundation of the argument that there was no power to grant a declaration but it informed the debate as to the extent of the powers to interfere by injunction with existing rights. He accepted that in typical cases, by reference to which a general challenge would be judged, the effect of a finding by the court that the term was unfair would be binding as a precedent on any court that then had to consider the individual challenge. But he did not accept that there was any power to prevent Foxtons seeking to enforce a term found unfair in a typical contract by writing letters or obtaining judgment in default. It was up to the consumer to take the point. He furthermore submitted it was important to recognise that not all cases would be typical and it was thus he submitted not surprising that the Directive distinguished between individual challenges and the general challenge.

30. The language of the Directive he submitted supported the view that the distinction was a real one and supported the view that a finding in proceedings brought by a body such as the OFT would not bind generally, and in particular would not bind in non-typical cases. He pointed out first that Article 4 is "without prejudice to Article 7" and provides for "all the circumstances attending the conclusion of the contract and all the other terms of the contract or of another contract on which it is dependent". He submitted that the reason for the without prejudice provision is because the "all circumstances" and "all other terms" provisions cannot apply in the Article 7 general challenge.

31. He also pointed out that in an individual challenge Article 5 applies which provides for a term being construed in the way most favourable to a consumer, and that Article 5 expressly disapplies that rule of construction to Article 7 challenges. Thus, Mr Kent submitted, by applying the most favourable construction in an individual challenge the term may be found to be fair, whereas not applying that rule of construction in the Article 7 general challenge may lead to a ruling that it is unfair. Mr Kent did not quite go so far as to suggest that it followed that where there had been a general challenge and the term had been found unfair, it must follow that such a decision is in no way binding on a court considering the same term in an individual context because a different rule of construction applied.

32. Mr Kent placed particular reliance on the fact that in the individual context "other terms" might be important. Other terms if agreed orally might render a standard term fair in the individual context and would be something that could not be taken into account on an Article 7 challenge.

33. Mr Kent argued that, if one looked at the Directive including its recitals as a whole, albeit two methods of challenge were provided for, it was the individual challenge that came first and was the dominant form of challenge. It was that challenge which was tested by reference to the factors in Article 4. Article 7 was grafted on and secondary, and intentionally secondary because it could not take into account those factors relevant to a particular contract. Since Article 7 could not relate to a particular contract, it was, he submitted, concerned only with future contracts. The language "concluded" and "continued use" relied on by Mr Green was actually apposite to describe insertion of terms in future contracts and did not point inevitably to contracts already in existence.

34. Mr Kent submitted that none of the authorities to which Mr Green had referred were concerned with the point he was arguing and that although consumer protection was important, so was the right of a supplier to establish in an individual context concerned with existing contractual rights that a term was in fact fair.

35. Mr Kent's secondary argument was that, even if Article 7 was dealing with both future and existing contracts, a court when it considered what remedy to grant should not condemn all existing contracts containing the term as held to be unfair on the Article 7 challenge. It should allow for the possibility that in atypical cases Foxtons might be able to establish that the term was in fact fair either because of other terms agreed or for whatever reason. This secondary argument led him to submit thus that no injunction should be granted. In the alternative, his submission was that if an injunction was granted there should be a provision allowing for enforcement of a term in an existing contract with the leave of the court.

OFT's response

36. Mr Green in his reply appreciated that even if the OFT was right in saying that Article 7 was concerned with both future and existing contracts, that did not necessarily deal with the question whether once a court had found a term unfair under a general challenge, Foxtons should be free to argue that in an individual atypical case the term was fair; and if so, how that should be dealt with. Mr Green's preferred position on behalf of the OFT was that a finding of unfairness in a general challenge was a finding of unfairness in all consumer contracts and that thus an injunction would be granted to prevent both use in future contracts and enforcement in all current contracts. Indeed he submitted that the cases to which he had referred in his opening supported that position. He submitted that in fact in a general challenge (per Lord Steyn) the court did its best in order to make the Directive and the Regulations work to apply the Article 4 criteria. He submitted that the bright line, as sought to be drawn by Mr Kent, between a procedure under Article 4 and a procedure under Article 7, was not justified or at least more theoretical than real. Furthermore he submitted that the European cases showed that it was most unlikely that it was intended to expose any consumers to the possibility of litigation following a successful Article 7 challenge.

37. But he submitted that, if that preferred position was not acceptable to the court, then at the very least the onus ought to be on Foxtons to demonstrate the existence of the atypical individual contracts and, if they did so, then the right form of injunction would be to restrain the use or enforcement of terms found to be unfair save with leave of the court.

Submissions on *Abbey National PLC v The Office of Fair Trading* [2009] EWCA Civ 116 ("*the Bank Charges* case")

38. Following the hearing in this appeal the judgment in the *Bank Charges* case was handed down and the parties were given the opportunity of making written submissions. The primary submission made on behalf of Foxtons suggested that the judgment supported the view that Reg 6(2) might apply to preclude an assessment of fairness in an individual case, notwithstanding a conclusion in a generic challenge that it is not so excluded in the typical consumer context. In their submissions in response the OFT suggest that the above is a misreading of the court of appeal judgment.

39. Foxtons also seek to gain some support from the *travaux preparatoires* quoted in paragraph 66 of the *Bank Charges* case as supporting their construction of Article 7 as only applying to the insertion of unfair terms in future contracts. The response from the OFT is that the quotation could equally support the view that the Article is concerned with the enforcement of terms in existing contracts.

Discussion and conclusion

40. Dealing first with the written submissions on the *Bank Charges* case. The short answer to the primary point taken by Foxtons is that the point being argued by Foxtons in this appeal was never a point considered at any stage during the *Bank Charges* case and it would thus in any event be unsafe to rely on the language of certain extracts to provide support for Foxtons' submissions. In any event as Mr Green points out in the response on behalf of the OFT, Foxtons' suggested interpretation of the language is hardly consistent with the court's approval of Andrew Smith J's conclusions approved at [91] to[92]. Furthermore having regard to the fact that the Banks were making a peremptory challenge in order to seek to have decided a point which would be relevant in the many hundreds of cases relating to current contracts pending in the County Courts and stayed while that challenge took place, it would have come as some surprise for anyone to be suggesting that what the court was being asked to decide did not relate to current contracts.

41. As to the second point I do not accept that the quotation from the *travaux preparatoires* relied on by Foxtons helps one way or another in deciding the point at issue on this appeal.

42. I thus return to the competing submissions made at the hearing before us. It will be noted that in summarising their submissions I used the Directive rather than the regulations as indeed did counsel where possible. The regulations implement the Directive and it is thus the proper construction of the Directive with which the court is primarily concerned [see the *First National* case and *Bank Charges* case]. Regulation 12 is, of course, not a provision taken directly from the Directive but it must be construed as a provision by which the United Kingdom is seeking to fulfil its obligations under the Directive. That does not mean it can provide a "free standing"

right to grant an injunction. It could only be construed as providing the power to grant an injunction in respect of current contracts if the fairness of a term in current contracts can be an issue for decision as between the OFT and Foxtons on a general challenge.

43. I am quite clear that Article 7 was intended to cover existing as well as future contracts, and that thus an issue on a general challenge could be the fairness of a term in a current contract. I would accept that the language "concluded" or "continued use" is capable of being construed so as to refer to contracts to be made or terms inserted into future contracts. They are also however well capable of being construed as Mr Green submits as applying to existing contracts. Contracts "concluded" could well mean contracts to be concluded and already concluded. "Continued use" could well mean continue to insert in future contracts and use in the sense of rely on to enforce in existing contracts.

44. It would be quite inadequate protection to consumers if a court on a general challenge, having found a term as used in current contracts to be unfair, had no power to prevent the supplier or seller from continuing to enforce that term in current contracts. As the ECJ, and indeed Lord Steyn in the *First National* at [33], recognised "the system of pre-emptive challenges is a more effective way of preventing the continuing use of unfair terms…than ex casu actions". It is therefore most unlikely that the Directive intended that a general challenge should not relate to a standard term in current contracts and did not intend the courts of Member States to have power to prevent continued reliance on that term by a supplier or service provider against a consumer.

45. I am unimpressed with the argument which seeks to draw a complete distinction between individual actions under Article 4 and proceedings under Article 7. The circumstances that Article 4 requires to be taken into account are also to the best of the court's ability taken into account under an Article 7 challenge. I am also unimpressed by the point taken on Article 5. The Directive's aim is to protect consumers and thus a construction in favour of the consumer is provided for when an individual is being sued. An individual consumer does not need that protection when a general challenge under Article 7 is made.

46. The Article 5 point does however help in considering whether it was ever intended that, if a general challenge succeeded, it was intended to leave open the possibility that the supplier could produce a different result in an atypical situation. I would accept that if a general challenge has failed, a consumer could not be precluded from asserting unfairness relying on the particular circumstances of the individual case. The consumer would have to demonstrate how in his case the findings of the general challenge were not apposite. In such a case the consumer would also have the term construed in the way most favourable to him thus possibly making it more difficult to establish unfairness. It does not follow that a supplier must have the right to continue to enforce a term in an individual case where a general challenge has succeeded. I accept that as between an individual and Foxtons one of the reasons why if the general challenge has failed an individual can still challenge the fairness in proceedings brought against that individual is that the decision on the general challenge is not *res judicata*. It must follow that if a general challenge has succeeded the matter is not *res judicata* as between the individual and Foxtons and that must be as true for future contracts as current contracts. But once the issue has been decided as between the OFT and Foxtons, it is that decision that entitles the OFT to seek an

injunction preventing continued use by Foxtons of that term in future contracts and in existing contracts.

47. The object of providing for a general challenge is to provide an effective way of protecting consumers who may be reluctant to resist letters from or proceedings taken by the more powerful suppliers. If the general challenge succeeds in relation to standard terms being used in current contracts, the court will have found that those particular terms in use in a standard form of contract with consumers was unfair. It is a mischaracterisation of the court's finding that it has simply found a term to be unfair in a "typical case". The true position is that it has found those terms to be unfair in a consumer contract using as its touchstone the typical consumer so as to apply the Article 4 criteria as best it can.

48. Prima facie, in a situation where on a general challenge a court has found a term or terms in a set of standard conditions in use in current contracts unfair, it must be a proper exercise of its power to grant an injunction to prevent enforcement of that term or terms in existing contracts. It follows that in my view it was wrong of Morgan J to strike out the words he did from the terms of the injunction sought.

49. It is, however, important to add this rider so that there is no misunderstanding. What injunction is granted must await the decision. If all that the court has considered are the particular terms contained amongst the particular standard terms before it, consideration will have to be given as to whether the injunction granted should relate to those terms alone or to like terms or something different. Regulation 12(4) gives the power to grant an injunction wide enough to include "like" terms. But all will depend on what the court has found. For example, if it found that all renewal commissions were unfair whatever their size where an estate agent had had nothing to do with obtaining the renewal, that would be one thing. If on the other hand it found that a renewal commission was fair, but where the estate agent had nothing to do with it something much less than Foxtons charged would be fair, that would be another.

50. Morgan J was concerned about a situation in which the consumer (whom he describes as shrewd) had negotiated a different rate for the renewal commission. An injunction relating to the particular terms appended to the claim form, with their particular size of commission, would not apply to such a case unless the court had found that any charge of a renewal commission was unfair. But if it found that any charge of renewal commission was unfair the injunction would have to be framed to make that expressly clear.

51. What I am seeking to clarify is that it was, in my view, wrong to strike out the words Morgan J did, on the basis that existing contracts on any view could not be the subject of an injunction. But ultimately what the court decides will dictate what form of injunction or declaration (see below) is appropriate. The terms of the injunction (or declaration) can only ultimately be worked out against the background of precisely what the court has found to be unfair, and that is fully provided for by Regulation 12 particularly Regulation 12(4).

Declarations

52. The judge struck out paragraph 15(a) on the same basis as he had struck out the words of the injunction. Otherwise he rejected Foxtons' argument that declarations could not be granted.

53. In my view the judge was right in his view that declarations could be granted by the court and (for the reason I have given in relation to the form of injunction) wrong to strike out paragraph 15(a).

54. The argument on behalf of Foxtons rests on the following authorities. *Gouriet v Union of Post Office Workers* [1978] AC 435 where Mr Gouriet had sought declarations as a mere member of the public as to the law where he had no cause of action of any kind against the Union of Post Office Workers. The House of Lords held there was no jurisdiction to "declare the law generally or give advisory opinions" [see Lord Diplock at 501 D-G]. *Meadows Indemnity v Insurance Corporation of Ireland and International Bank plc* [1989] 2 Lloyd's Reports 298 was a case where Meadows in addition to claiming a declaration as to the validity of a reinsurance contract to which they were party claimed a declaration as to the invalidity of the underlying insurance contract between ICI and International Bank. Hirst J held that the reasoning in *Gouriet* did not prevent the granting of such a declaration. The Court of Appeal disagreed.

55. In *Re S (Hospital Patient : Court's Jurisdiction)* [1996] Fam 1 CA Millett LJ said:-

> "51. In my judgment, the passage which I have cited from Lord Diplock's speech in the Gouriet case [1978] AC 435, 501, can no longer be taken to be an exhaustive description of the circumstances in which declaratory relief can be granted today. It is to be regarded rather as a reminder that the jurisdiction is limited to the resolution of justiciable issues; that the only kind of rights with which the court is concerned are legal rights; and that accordingly there must be a real and present dispute between the parties as to the existence or extent of a legal right. Provided that the legal right in question is contested by the parties, however, and that each of them would be affected by the determination of the issue, I do not consider that the court should be astute to impose the further requirement that the legal right in question should be claimed by either of the parties to be a right which is vested in itself." (emphasis added)

56. In *Feetum v Levy* [2006] Ch 585 at 606D Jonathan Parker LJ noted "things have moved on since the *Meadows* case was decided" in reliance on the above statement of Millett LJ.

57. Mr Green in his skeleton argument referred us to a decision of Neuberger J (as he then was) in *Financial Services Authority v Rourke* [2002] C.P. Rep 14. In that case the FSA were claiming summary judgment including declarations that Mr Rourke had made false statements to certain individuals and that in making the statements he had contravened section 35 of the Banking Act 1987. The Judge relied on CPR 40.20 which provides that the court "may make binding declarations whether or not any

other remedy is claimed". *Gouriet* and indeed none of the above authorities appear to have been cited. Neuberger J simply stated that "It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration".

58. In the Notes under CPR 40.20 in the Annual Practice 2008 there is no mention of *Gouriet* or any of the cases relied on by Foxtons. That may be some indication that the Editors felt that things had moved on since *Meadows.* Neuberger J's decision in the *FSA* case is however noted under the comment "As between the parties to a claim, the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law" with the above dictum of Neuberger J quoted thereafter.

59. It seems to me that Foxtons' argument fails to take account of the fact that the OFT are given the power to make a general challenge the whole object of which is to affect the rights of the service provider and consumers with which he deals. That is the whole aim of the Directive in its pursuit of protection for consumers. In the result there is, as between the OFT and Foxtons, an issue as to the fairness or otherwise of terms included in their standard terms. If the OFT succeed in establishing unfairness of certain terms or one or other of the terms, they will be entitled to a declaration of that which they have been given the right to prove.

60. That, in my view, does not conflict with *Gouriet* or *Meadows.* In any event as it seems to me things may well, as Jonathan Parker LJ said, have "moved on". The proceedings brought by the FSA before Neuberger J and the granting of declarations in that case in relation to statements said to be misleading to non-parties would suggest that, where a regulatory body at least is bringing the proceedings, the court is not prevented from granting a declaration simply because it might have an effect on the rights of parties not joined in the action. If it is just and useful that a declaration should be granted, the court will grant one.

61. In cases such as the present it seems to me very likely to be useful and just to both parties to grant a declaration in that if unfairness is found, it will be important to identify which term and what aspect of it is unfair, and it will be better to have that in declaration form rather than forcing persons to analyse the judgment in order to assess precisely what it decides.

62. I would accordingly allow the appeal and dismiss the cross-appeal.

Lady Justice Arden:

63. I too would allow the appeal and dismiss the cross appeal for the reasons given by Waller LJ, subject to the further reasons given in this judgment.

An injunction granted in a collective challenge can extend to the use of unfair terms in existing contracts

64. Regulation 12 of the UTCCRs (as defined by Waller LJ) confers a preventive power on the OFT to:

> " apply for an injunction (including an interim injunction) against any person appearing to the Director ... to be using, or recommending use of, an unfair term drawn up for general use in contracts concluded with consumers."

65. This provision, by using the word "concluded", is plainly susceptible of the interpretation that it applies to injunctions in respect of existing contracts. Regulation 12 further provides that on any such application, the court may:

> "grant an injunction on such terms as it thinks fit. "

66. Regulation 12(1) and (3) are designed to implement article 7 of directive 93/13/EEC on Unfair Terms in Consumer Contracts. This obliged Member States to ensure that:

> "in the interests of consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers."

67. Article 7 thus invokes the principle of effectiveness in Community law. Under this principle, domestic courts must ensure that their own rules permit the grant of remedies necessary to achieve the object of Community legislation. Their own procedural autonomy takes effect subject to this principle. Accordingly, domestic rules must be disapplied if they are inconsistent with the requirements of Community law.

68. In this case, the judge held that the investigation on a collective challenge would be limited to the case of a typical consumer and would not lead to an injunction against future reliance on an existing contract. In my judgment this conclusion is inconsistent with Community law, which by virtue of the directive requires that in an appropriate case an injunction should extend to the use of unfair terms in existing contracts.

69. While none of the jurisprudence shown to us has in terms considered the question whether the remedy granted in a collective challenge can extend to the future use of an unfair term in contracts already concluded, in my judgment the jurisprudence clearly gives priority to the protection of the interests of consumers over freedom of contract and emphasises the importance of the collective challenge as the means of protecting consumers against unfair contract terms. On that basis, there cannot sensibly be a distinction between a remedy against use of a contract term in (or in connection with) future contracts and a remedy against the future use of a contract term in (or in connection with) an existing contract. The policy which justifies the availability in an appropriate case of a remedy in the former case equally justifies the availability in an appropriate case of a remedy in the latter case. Accordingly I conclude that the remedies available on a collective challenge must include the power to grant an injunction against future use of an unfair term in an existing contract.

70. In the circumstances, there is no case for restricting the wide and general language of regulation 12(1) or (3) so that it does not include an existing contract. Regulation 12 extends only to collective challenges and accordingly does not extend to individual challenges. The court could not in an individual challenge properly grant an injunction against the future use of an unfair term in an existing contract not made between the parties to the individual challenge because the right parties are not before the court.

Effect of an injunction against use of an unfair term in an existing contract

71. I thus conclude that, on a collective challenge, the judge will have power to grant an interim or final injunction preventing the continued use of an unfair term in an existing contract. Further, as I see it, it is the terms of that injunction which will regulate the ability of the supplier to enforce an existing contract. There is no question of the findings in a collective challenge being binding in a subsequent individual challenge in proceedings between the supplier and an individual consumer: the parties to those proceedings are different. The issue decided as between the parties to a collective challenge can thus be revisited in an individual challenge. But, if there is an injunction which extends to existing contracts, the ability of the supplier to initiate or participate in such proceedings will be governed by the terms of that injunction. Indeed, it is the fact that the findings on a collective challenge are not binding in an individual dispute which makes it necessary in order to protect consumers in a meaningful way for the court to be able to grant an injunction in the case of an existing contract. I do not read the judgment of Waller LJ as inconsistent with my conclusions on this point.

72. The critical matter, therefore, is whether on the collective challenge the court grants an injunction preventing the supplier from continuing to enforce a term in an existing contract. The supplier is not prejudiced because he has the opportunity to adduce evidence and to address the court on the terms of the injunction and (subject to the terms of any injunction) on a subsequent individual challenge he will have the opportunity to show that the term is not unfair: there is no suggestion that he is prevented from doing this by regulation 8 or any other rule.

Discretion to grant an injunction in a collective challenge against use of an unfair term in an existing contract

73. The decision whether or not to grant an injunction in a collective challenge against the continued use of an unfair term in an existing contract will depend on the circumstances of the case. Thus far this court is in agreement, and in fact it is unnecessary to go further than that. Provisionally it seems to me that under general principles of Community law, the grant of the injunction will have to be proportionate, that is to say the interference with the rights of the supplier by the grant of the injunction will have to be justified by the need to protect consumer interests. In addition, Community law requires that the remedy should be sufficiently effective. In respectful disagreement with Moore-Bick LJ (whose judgment I have read in draft), I would not wish to lay down a categoric rule that it would never be right to grant an injunction in unqualified terms if there was any possibility that the term in question could be regarded as fair in the light of all the circumstances surrounding an individual contract. The trial judge is unlikely to know whether the term could be regarded as fair in the light of all the circumstances surrounding an individual contract

since he will only have been dealing with a collective challenge and may not therefore know precisely what individual contracts have been made, still less the circumstances surrounding them. In my judgment, the terms of any injunction should be left to the discretion and good sense of the trial judge. He will have full power to fashion any injunction in appropriate terms.

74. Accordingly, in my judgment, in this case the judge was in error in holding that the question of the availability of an injunction extending to existing contracts should not be left to trial.

75. Regulation 12(3) gives the court a very wide discretion as to the form of any injunction. In an appropriate case, the court could, for example, "carve out" contracts fulfilling a particular description. Alternatively, the court could give the supplier leave to seek the permission of the court to bring claims to enforce existing contracts in particular circumstances. The supplier is not therefore on an application for an injunction in a collective challenge prevented from showing that there are good reasons why existing contracts, or particular existing contracts, should be excluded from any injunction. It is moreover implicit in any order granting the injunction that the supplier can always return to the court to apply for a variation or discharge of the injunction if new circumstances emerge which justify its variation or discharge.

Article 5 point

76. Under Article 5 of the Directive, where there is ambiguity, the court must on an individual challenge adopt the interpretation most favourable to the consumer in an individual challenge but this rule does not apply on a collective challenge. It is possible therefore that the result in an individual challenge may be different from that in a collective challenge. In my judgment, this does not mean that relief in collective challenges must be limited to the use of unfair terms in future contracts. In reality there are likely to be few cases where the result in individual and collective challenges is different simply because of the availability of this presumption in an individual challenge. The exclusion of the presumption in a collective challenge is explained by the fact that the regulator will be in a stronger position than an individual consumer to show that a term is unfair.

77. Accordingly I would allow the appeal and dismiss the cross-appeal.

Lord Justice Moore-Bick :

78. The circumstances giving rise to this appeal are set out fully in the judgment of Waller L.J. and need not be repeated here. In formal terms the question raised by the appeal is whether, on an application by the Office of Fair Trading ("the OFT") under regulation 12(1) of the Unfair Terms in Consumer Contracts Regulations 1999 ("the Regulations") in relation to certain terms in Foxtons' standard conditions, the court has jurisdiction to grant an injunction restraining Foxtons from seeking to enforce those terms in existing contracts (and declaratory relief in corresponding terms), and if so, whether in the exercise of its discretion it should do so. In substance, however, as Waller L.J. points out, it raises a question of the interpretation and effect of Council

Directive 93/13/EEC on unfair terms in consumer contracts, which the Regulations are intended to implement.

79. It was common ground that the Regulations must be construed to give effect to the Directive, but whereas regulations 5 to 9 reproduce almost word for word the English language text of articles 3 to 6 of the Directive which contain substantive provisions rendering unfair contract terms unenforceable against a consumer, regulations 10 to 12 provide the procedure by which the OFT can take steps to enforce the Directive for the benefit of the public at large. These regulations (and regulations 13 to 15 which contain ancillary powers designed to assist in the prosecution of such proceedings) are intended to implement the United Kingdom's obligation under article 7 of the Directive to ensure that adequate and effective means exist to prevent the continued use of unfair terms, in particular by enabling persons or organisations which have a legitimate interest in protecting consumers' interests to take proceedings with a view to achieving that result.

80. Regulation 12 is drawn in broad terms. It gives the OFT power to apply for an injunction against any person appearing to be using, or recommending the use of, an unfair term drawn up for general use in contracts concluded with consumers and empowers the court on such an application to grant an injunction on such terms as it thinks fit. I do not think there can be any doubt, therefore, that if the court were to find that any of Foxtons' standard terms is unfair it would have the power to grant an injunction to prevent Foxtons from seeking to enforce it in existing contracts. The real question is whether it would be right to do so.

81. The judge's initial inclination was to leave that question to the trial judge, who, having presided over the trial, would be the person best placed to decide what was the appropriate remedy. In the end, however, he decided not to do so and struck out that part of the prayer in which the OFT sought relief in unqualified terms on the grounds that the court had no power to grant it. I think he was wrong to take that course and should have left the matter to the trial judge, but I sympathise with his desire to reach a decision on a matter that was thought to have a significant bearing on the scope of the trial.

82. The judge's decision was based on his view that, although on a generic or "collective" challenge to the fairness of a particular term under regulation 12 the court might have found it to be unfair, it would still be open to it to take a different view of the same term in an individual case, depending on the circumstances surrounding the particular contract. In order to decide whether that is correct it is necessary to examine the provisions of the Directive itself.

83. In paragraphs 13 and 14 of his judgment Waller L.J. has set out those paragraphs of the recitals that are most material to this appeal together with articles 3 to 7 of the Directive. I shall not repeat them here, but it is important to note that whereas article 3 sets out the criteria of unfairness, article 4 provides (without prejudice to article 7) that the unfairness of a contractual term is to be assessed at the time of conclusion of the contract, taking into account the nature of the goods or services to which it relates and "all the circumstances attending the conclusion of the contract, including all the other terms of the contract or of another contract on which it is dependent". That is a clear requirement that the term is not to be considered in isolation but in the context of the rest of the contractual relationship and the surrounding circumstances. Mr. Kent

Q.C. submitted that the case of *Bryen & Langley Ltd v Boston* [2005] EWCA Civ 973 demonstrates the point, but since the terms of the contract in that case had been put forward by the consumer himself, I do not think that it really bears on the question under consideration in the present case.

84. Article 7 of the Directive falls into two parts. The first paragraph imposes on Member States a general obligation to ensure that there are adequate and effective means of preventing the continued use of unfair terms in contracts concluded between consumers and sellers or suppliers. The second imposes a specific obligation on Member States to put in place procedures that will enable bodies with a sufficient interest in consumer protection to obtain a decision from a court or tribunal on the fairness of particular terms and, if they are found to be unfair, a remedy of a kind that will prevent their continued use. The object of any such procedure is to enable challenges to unfair terms to be made on behalf of consumers as a whole so that such terms can be "squeezed out of the system" (to use an expression favoured by Mr. Nicholas Green Q.C.). There are many reasons why collective action of that kind is likely to be more effective in protecting consumers than decisions in individual cases. In general, because the amount at stake is often comparatively small, individual consumers have neither the will, the knowledge nor the resources to challenge the fairness of terms by litigation, whereas sellers or suppliers, who generally trade on standard terms, have a far greater interest in seeking to have them upheld as well as far greater resources at their disposal with which to do so. It is hardly surprising, therefore, that the European Court of Justice has consistently described proceedings under article 7 as the primary method of giving effect to the Directive. Nonetheless, it remains the case that article 7 is concerned not with the criteria of unfairness, nor with the factors that are to be applied when assessing unfairness, but with the introduction of a particular form of procedure. It is for that reason that the Regulations do not attempt to reproduce the words of article 7 but instead provide a domestic procedure which is intended to fulfil its requirements.

85. The judge considered, correctly in my view, that this case raises, among other things, a question as to the relationship between article 4 and article 7. On the face of it, article 7 is concerned only with the provision of machinery for effective collective action, but as soon as one moves from an individual challenge to a collective challenge certain strains begin to appear, if only because on a collective challenge it is not possible to take into account the circumstances surrounding any particular contract. In this context there was some debate about the significance to be attached to the words "Without prejudice to article 7 . . ." with which article 4 opens. Mr. Green submitted that they are an indication that article 7 is intended to override article 4, so that any decision reached pursuant to a collective challenge governs the position in every individual case, but in my view that is somewhat simplistic since article 4 and article 7 are not talking about the same thing. In my view those words involve no more than a recognition that the collective procedure envisaged by article 7 cannot take into account all the factors which article 4 requires to be taken into account in an individual case. In other words, they are making room for the collective challenge procedure in which some of the factors which article 4 requires the court to consider will have to be dispensed with.

86. During the hearing of the appeal there was some debate about whether a decision made on a collective challenge applies to past contracts as well as future contracts.

For my own part, however, I do not think that that is a particularly helpful way in which to characterise the question that lies at the heart of the judge's decision. As Lord Steyn observed in *Director of Fair Trading v First National Bank plc* [2002] 1 A.C. 481, in order to make the Regulations and the Directive work in the context of a collective challenge, it is necessary to assess the fairness of the term in question by reference to the typical case. In practice that means that the relevant public body, in this case the OFT, will identify a standard form, usually, but not necessarily, in current use, which it considers contains one or more unfair terms. If the court decides that a term is unfair (either in all circumstances or in the typical case) it can, and no doubt usually will, grant an injunction prohibiting its use in the future. To the extent that the form is in current use the decision will inevitably affect existing contracts by virtue of the fact that the court's decision will, at the very least, provide persuasive authority for the view that the term is unfair and therefore unenforceable. In practical terms no court would contemplate enforcing it without cogent evidence that the case before it is for some reason atypical. That is not the same, however, as saying that a decision reached on a collective challenge is necessarily determinative of the issue of fairness if it subsequently arises in proceedings between individual litigants.

87. Mr. Green submitted that the language of the Directive, as interpreted by the European Court of Justice, points to the conclusion that a finding of unfairness made in collective proceedings is binding as between all parties to existing contracts which contain the same terms. In support of that argument he relied heavily on the use of the particular words and phrases to which Waller L.J. refers in paragraph 21 of his judgment and to passages in the cases to which he also refers, including *Océano Grupo Editorial S.A. v Rocío Murciano Quintero* [2000] ECR I-4941, *Commission of the European Communities v Italian Republic* [2002] ECR I-819.

88. For my own part I do not find the choice of words in the Directive very helpful in resolving this question, since the expressions on which Mr. Green relied are capable of referring either to the future alone or to both the future and the past, as the sense requires. Indeed, in my view the expression "continued use" (and other similar expressions) looks more to the future than the past. In *Commission of the European Communities v Kingdom of Spain* [2004] ECR I-7999 the court drew an interesting comparison between individual and collective challenges in the following terms:

> " [16] The distinction made in Article 5 of the directive concerning the applicable rule of interpretation, as between actions involving an individual consumer and actions for cessation which involve persons or organisations representative of the collective interest of consumers may be accounted for by the different aims pursued by those actions. In the former case, the courts or competent bodies are required to make an assessment *in concreto* of the unfair character of a term contained in a contract which has already been concluded, while in the latter case it is their task to assess *in abstracto* the unfair character of a term which may be incorporated into contracts which have not yet been concluded. . . . ." (Emphasis added.)

89. The distinction drawn in that paragraph between contracts that have already been concluded and contracts which have not yet been concluded suggests that collective

challenges under Article 7(2) are directed primarily, if not solely, to preventing the use of unfair terms in the future. Similarly, although I accept that the case law makes it clear that the policy of the Directive is to provide effective protection to consumers and that in the view of the Court collective challenges are the only effective means of achieving that objective, in none of those cases was the question with which we are concerned before the court. In my view, therefore, the expressions of opinion on which Mr. Green relied are of little more than general assistance.

90. In paragraph 44 of his judgment Waller L.J. concludes that, since "the system of pre-emptive challenges is a more effective way of preventing the continuing use of unfair terms . . . than ex casu actions" (quoting from the speech of Lord Steyn in *Director of Fair Trading v First National Bank plc* [2002] 1 AC 481), a finding on a collective challenge that a term is unfair must have been intended to apply equally to contracts already in existence. As I have already indicated, I accept that a decision reached as a result of a collective challenge will inevitably affect the position of parties to existing contracts and may well affect the relief that the court should grant. That is a matter to which I shall return in a moment. However, it does not necessarily follow that the issue cannot be re-visited in proceedings between the supplier and an individual consumer. That will be the case only if on the true interpretation of the Directive such a decision is binding as a matter of law in relation to all existing contracts, but I can find nothing in the Directive itself, the decisions of the European Court of Justice or the Regulations to suggest that it is.

91. Much reliance was placed in argument on the fact that it is the policy of the Directive to protect consumers, but there is a limit to how far broad considerations of policy can determine the interpretation of the Directive. A high degree of consumer protection can be achieved in any given case by means of a collective challenge coupled with appropriate relief without the need for the court's decision to be determinative of the issue in every case. Articles 3 to 6 of the Directive do not touch on this question and in my view Article 7 is concerned only with ensuring that Member States put in place procedures that will enable collective action to be taken to prevent the use of unfair terms in the future. That is why the European Court of Justice in paragraph 16 of its judgment in *Commission v Spain* speaks of such proceedings as "actions for cessation" which it contrasts with actions involving an individual consumer. I can see no indication that the purpose of such proceedings is to produce a decision that is determinative in relation to all existing contracts, rather than an order preventing the use of the unfair term in the future. Regulation 12 fulfils that obligation by giving the OFT the right to make collective challenges and the court the power to restrain the use of offending terms by injunction. Such orders represent the most effective form of protection for the body of consumers as a whole and it is no doubt for that reason that the European Court of Justice regards the procedure under Article 7(2) as the primary method of protecting the interests of consumers.

92. Nor do I find Article 5 to be of any real assistance in answering this question. It provides as follows:

> "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)."

93. The article is concerned with clarity of expression and is of general application. It would be a mistake, in my view, to regard it as being directed only to exclusion clauses, though experience suggests that they are the kind of term most likely to fall within its second sentence. The second sentence reflects a canon of construction well known to English law, the so-called contra proferentem rule, which in this context invariably operates in favour of the consumer. The exclusion of the rule in proceedings under Article 7(2) is likewise intended to favour consumers by reading the term in question in the way that is most likely to lead to its being declared unfair. However, I do not find anything in Article 5 which suggests that in individual proceedings between supplier and consumer either side is bound as a matter of law by a finding made on a collective challenge. A finding that a term is unfair when interpreted in a neutral way will lead to an order prohibiting its use in future. In proceedings between the supplier and a consumer the term will be interpreted in a way more favourable to the consumer. It might then be considered fair, but if so, it will by definition not create a significant imbalance in the parties' rights and obligations contrary to the requirement of good faith. Similarly, if the term is found to be fair when interpreted neutrally in collective proceedings, the consumer can attempt to persuade a court to take a different view in proceedings against him personally, but is unlikely to succeed.

94. For all these reasons I am unable to accept that a decision on the fairness of a term reached in collective challenge proceedings is binding in law as between parties to existing contracts. On this question I think the judge reached the right conclusion. I note that in paragraph 46 of his judgment Waller L.J. also accepts that if a collective challenge to the fairness of a term has failed, a consumer could not be prevented from arguing in proceedings against him that the term was nonetheless unfair in his case having regard to all the circumstances attending the conclusion of the contract and vice versa.

95. This is the legal background against which a judge who finds a term unfair following a collective challenge has to decide what form of relief is appropriate. If he finds that the term is irredeemably unfair whatever the circumstances in which it may be used, there can be no objection to his granting an injunction in terms wide enough to restrain the seller or supplier from seeking to enforce it in existing contracts. In those circumstances there could be no infringement of private rights. However, Mr. Kent Q.C. submitted that, unless the court is satisfied that the term in question is unfair whatever the circumstances, an injunction which restrained the seller or supplier from seeking to enforce it in existing contracts might well infringe such rights. The proper course in such a case, he submitted, is to make no order that affects existing contracts and to leave the question to be determined in proceedings between the parties if and when they arise.

96. In my view there are strong objections to leaving the matter wholly open for individual decision at a later date. The policy of the Directive is to protect consumers from unfair terms and the European Court of Justice has recognised on many occasions that consumers require protection in practical as well as legal terms. A collective challenge procedure, the outcome of which allowed a seller or supplier the freedom to pursue existing customers without any restriction, whether in

correspondence or by litigation, in order to enforce a term that had been found to be unfair in the ordinary run of cases would signally fail to implement the policy of the Directive. Once the court has found a term to be unfair in a typical case it must be taken to be unfair in every case, unless the party seeking to rely on it can show that, having regard to all the circumstances surrounding the particular contract, that is not the case. If there are grounds for thinking that the term in question might be enforceable in some cases, the court should tailor its order in an appropriate way to provide the protection which consumers are entitled to receive while at the same time avoiding interference with existing rights. That may easily be achieved by prohibiting any attempt to rely on or enforce the term in question without the permission of the court.

97. Although he accepts in paragraph 46 of his judgment that a finding of unfairness made on a collective challenge does not determine the issue once and for all as between the supplier and any individual consumer, Waller L.J. nonetheless concludes in paragraph 48 that it is a proper use of the court's power to grant an injunction (presumably in unqualified terms) prohibiting the supplier or service provider from seeking to rely on the term in question in any existing contracts. I am unable to agree with that conclusion because the effect of such an injunction would be to shut out any argument as to the meaning and effect of that term and any reliance on it. If the issue is not finally determined by the principles of estoppel by record, I am unable to accept that it is proper to achieve the same result by the exercise of the court's discretionary powers. Nor do I think that it is appropriate in such cases to grant an injunction in unqualified terms on the grounds that the supplier can apply at a later date to have it varied. People need to know where they stand.

98. In the present case the judge struck out those parts of the OFT's claim by which it sought relief in unqualified terms capable of extending to existing contracts. For reasons given earlier, I do not think he should have taken that course, both because he should have left it to the trial judge to decide what relief was appropriate in the light of his findings, and because, insofar as the terms are found to be unfair, it would not in any event be appropriate to allow Foxtons a completely free hand to enforce them. However, the judge was right in my view to recognise that it might not be appropriate to grant relief in unqualified terms and would not be right to do so if there were any possibility that the terms in question could be regarded as fair in the light of all the circumstances surrounding an individual contract.

99. As far as the cross-appeal is concerned, I agree with Waller L.J. for the reasons he gives in paragraph 59 of his judgment that the court is not prevented from granting a declaration in proceedings under the Regulation simply by reason of the fact that individual consumers are not before the court. However, I think the court should exercise a considerable degree of caution before granting relief in that form. The real difficulty lies in framing a declaration in terms which reflect the court's decision and are of some practical utility without extending too far. If the court is satisfied that a term is unfair whatever the circumstances in which it may be used (see paragraph 23 of the European Court's judgment in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter* [2004] ECR I-3403), it can no doubt grant relief simply declaring it to be unfair and unenforceable, although whether that will add anything to the force of its decision may be doubted. If, however, the court considers that there may be some cases in which, having regard to the circumstances

in which the contracts were made, the term may be enforceable, a declaration, if granted at all, would have to be framed in qualified terms. In my view that is likely to prove difficult and, although it would be a matter for the trial judge, I think that in those circumstances the court should generally refrain from granting declaratory relief of any kind.

100. For these reasons I would allow the appeal, dismiss the cross-appeal, set aside the judge's order and leave it to the trial judge to decide what relief, if any, is appropriate in the light of his findings.