

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

BIRMINGHAM DISTRICT REGISTRY

Before Mr Justice Kitchin on 24 June 2011

**B E T W E E N:**

**THE OFFICE OF FAIR TRADING**

and

**(1) ASHBOURNE MANAGEMENT SERVICES LIMITED**

**(2) JOHN CLAYTON-WRIGHT**

**(3) DAWNE CLAYTON-WRIGHT**

Defendants



~~Draft Order~~

**PENAL NOTICE**

**IF YOU, ASHBOURNE MANAGEMENT SERVICES LIMITED, JOHN CLAYTON-WRIGHT, OR DAWNE CLAYTON-WRIGHT, DISOBEY THIS ORDER YOU MAY BE HELD IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED. ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS THE DEFENDANTS, OR ANY OF THEM, TO BREACH THE TERMS OF THIS ORDER MAY ALSO BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.**

Upon hearing Counsel for the Claimant and Counsel for the Defendants at the trial of this claim on 8, 9, 10 and 11 March 2011;

AND Upon the Court having handed down judgment on 27 May 2011;

AND Upon hearing Counsel for the Claimant and Counsel for the Defendants on 24 June 2011,



**It is hereby declared that:**

1. An agreement made between an individual member and the owner or operator of a gym or health and fitness club ("gym club") upon any of the standard gym membership agreement forms of which copies are annexed to this order ("Agreements 1 to 13"), did not and does not give rise, at the date when it was or is made, to an obligation to pay the total amount payable for the minimum period of membership; but rather it gave rise or gives rise to an obligation to pay monthly as the agreement is performed, and so it is not a regulated consumer credit agreement within section 8 of the Consumer Credit Act 1974.
2. The terms of each of Agreements 1 to 10 which prevent an individual gym member from terminating an agreement before the end of a minimum period, though expressed in plain intelligible language, are unfair terms within regulation 5(1) of the UTCCR and so are not binding upon consumers.
3. The terms of each of Agreements 11 to 13 which prevent an individual gym member from terminating an agreement before the end of a minimum period which exceeds 12 months, though expressed in plain intelligible language, are unfair terms within regulation 5(1) of the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR") and so are not binding upon consumers.
4. The terms of Agreements 1 to 10 which have the effect of requiring an individual gym member to pay the balance of the monthly payments that would otherwise have fallen due up until the end of a minimum period in the event of termination before the end of such a period, either without any discount, or with a discount of 1%, or with a discount of 5%, are penalties and unfair terms within regulation 5(1) of the UTCCR and so are not binding upon consumers.
5. None of the terms of Agreements 1 to 13 has the effect of making prompt payment by an individual gym member a condition of his gym membership agreement, the breach of which would entitle the other contracting party to terminate the agreement and/or to be paid any sum in respect of any period after termination of the agreement.

6. None of the terms of Agreements 1 to 13 has the effect of requiring an individual gym member to pay any sum in respect of any period after termination in the event that the gym member terminates the agreement before the end of any minimum period by reason of the other contracting party's breach.

**AND it is ordered under regulation 12 of the UTCCR that:**

7. The Defendants shall not, whether by themselves, their agents or otherwise, use or recommend for use any of the terms which are referred to in paragraphs 2, 3, and 4 above, or any terms that have like effect. For the avoidance of doubt, in this order the meaning of "use" in relation to contract terms includes the conduct of entering into contracts upon such terms and the conduct of relying upon such terms as entitling any contracting party to be paid any sum of money or enforcing such terms.
8. The Defendants shall not, whether by themselves, their agents or otherwise, use or recommend for use terms which have the effect of preventing a consumer from giving notice to terminate an agreement directly to the other contracting party.
9. The Defendants shall not, whether by themselves, their agents or otherwise, use or recommend for use terms which have the effect of permitting payment to be recovered from an individual without regard to any representation made to that individual, in connection with the individual's liability to make such payment, by or on behalf of the party with whom he or she has contracted.

**AND it is ordered, under sections 217 and 222 of the Enterprise Act 2002, that:**

10. The Defendants shall not, whether by themselves, their agents or otherwise, continue or repeat the conduct described in paragraphs 12 to 15 and 17 to 25 below.

11. The Defendants shall not, whether by themselves, their agents or otherwise, consent to or connive in such conduct as is described in paragraphs 12 to 15 and 17 to 25 below by any body corporate with which they have a special relationship as defined in section 222(3) of the Enterprise Act 2002.
12. The Defendants shall not use or recommend for use gym membership agreement forms which do not state in plain, intelligible language the responsibility of a clearly identified supplier to provide the gym club facilities and/or services.
13. The Defendants shall not rely upon the terms of any agreement made on any of Agreements 1 to 13, or any gym membership agreement form, as enabling the other contracting party, in the event of an individual gym member's failure to make a monthly payment on time, to terminate the agreement and to claim damages, or any sum, in respect of the loss of the opportunity to receive payments under the agreement after the date of termination.
14. The Defendants shall not demand, by letter or otherwise, that any individual make any payment under or in connection with an agreement made on any of Agreements 1 to 10 in respect of any period after the date when the agreement has been terminated by or on behalf of either party to the agreement.
15. The Defendants shall not demand, by letter or otherwise, that any individual make any payment under or in connection with an agreement which has been or is made on any of Agreements 11 to 13 and which provided or provides for a minimum period of more than 12 months, in respect of any period after the date when the agreement has been terminated by or on behalf of either party to the agreement.
16. For the avoidance of doubt:
  - (i) this order shall not prohibit the First Defendant from demanding payment of a monthly payment that has become payable before an agreement has been terminated in respect of a period before the agreement was terminated; and

- (ii) an individual gym member may terminate an agreement by giving a gym club, or the First Defendant or any other agent or employee of the gym club, notice by words or conduct that he or she (a) has ended the agreement (b) intends to end it or (c) believes that it ought to be ended, whether by a written statement in a letter or an e-mail, by an oral statement made during a meeting or a phone call, by cancellation of a direct debit mandate, or otherwise.
- 17. In the event that, and whenever, a consumer advances a reason for non-payment to the First Defendant, the Defendants shall use their best endeavours not to repeat a demand for payment without giving reasonable consideration and a reasonable response to the reason, or reasons, advanced by the consumer for non-payment.
- 18. The Defendants shall not report or threaten to report to any credit reference agency the fact that a consumer has not paid an amount when the amount in question is a claim for unliquidated damages. For the avoidance of doubt, the Court has not determined whether or not it may be lawful for the Defendants to report or threaten to report to a credit reference agency a consumer's non-payment of an amount to which a gym club is entitled under a fair and enforceable contractual provision for liquidated damages.
- 19. The Defendants shall not report or threaten to report to any credit reference agency the fact that a consumer has not paid an amount which, for any reason, is not owed by the consumer.
- 20. The Defendants shall not report or threaten to report to any credit reference agency the fact that a consumer has not paid an amount when the consumer's liability to pay a sum is disputed by reference to representations made by the Defendants or by the gym club or by reference to express contract terms.
- 21. The Defendants shall not exaggerate the significance or consequences of the reporting of information to a credit reference agency in any way, whether by

making any of the following assertions, or any assertions to a like effect, to individuals or otherwise:

- (i) "We have received confirmation that the bad debt registered against you with a Credit Reference Agency has already affected your financial status, showing Financial Institutions that you are a Bad Risk";
- (ii) "This situation will continue to get worse as more searches are conducted";
- (iii) "If you continue to do nothing, the bad debt will remain registered against you for the next six years, affecting every aspect of your financial life".

22. The Defendants shall not threaten to report information to a credit reference agency at any time when

- (i) whether by reason of the fact that no credit reference agency is willing to record and publish the information in question, or for any other reason, the Defendants do not intend to report it to a credit reference agency; or
- (ii) the Defendants do not believe, on reasonable grounds, that a credit reference agency will publish the information in question.

23. The Defendants shall not inform consumers that they have reported information to a credit reference agency when they have not done so or when they have done so but the agency has indicated that it will not record such information.

24. The Defendants shall not threaten to inform or inform any credit reference agency that individuals have failed to make payments without informing the individuals of their rights to access records kept about them by credit reference agencies and to have incorrect entries corrected.

25. The Defendants shall not themselves or through the agency of any other party put pressure upon individuals to make payments in respect of gym membership agreements by sending letters which purport to be sent by a "litigation

department", or otherwise threatening legal proceedings in respect of such payments, when there is no intention to issue proceedings.

26. The Defendants shall, by 4.00pm on 12 August 2011 send a letter by their solicitors, in the form annexed to this order to every business entity on whose behalf the First Defendant has collected a payment or with whom the First Defendant has entered into a contract to collect a payment within the 6 years immediately preceding 24 June 2011.
27. The Defendants shall, by 4.00pm on 26 August 2011, provide the Claimants with:
  - (i) the name and address of each of the business entities with which the First Defendant currently has a contract to collect payments or with which the First Defendant has previously had a contract and to which the First Defendant has recommended a gym membership contract within the 6 years immediately preceding 24 June 2011, and which has not expressed an objection to being contacted by the Claimant directly; and
  - (ii) the objections, if any, which have been advanced by any such business to being contacted by the Claimant directly.
28. The Defendants shall, by 4.00pm on 5 August 2011, inform the Claimant in writing:
  - (i) whether, and if so the dates between which, the First Defendant has recommended to businesses that they use Agreement 11;
  - (ii) whether, and if so the dates between which, the First Defendant has recommended to businesses that they use Agreement 12;
  - (iii) whether, and if so the dates between which, the First Defendant has recommended to businesses that they use Agreement 13.
29. There is permission for either party to apply in relation to paragraphs 26 to 28 above.

30. The Claimants' claims for declaratory relief under paragraphs 1, 2, and 6 of the Claim Form be dismissed.
31. The Claimant's claims for orders under paragraphs 13(1), (2), (7), (13), (14) and (17) be dismissed.
32. The Defendants shall pay 65% of the Claimant's costs of the claim, to be assessed on the standard basis if not agreed.



## **AMS - Draft Letter to Gyms**

Dear [ ]

### **Ashbourne Management Services Limited (“AMS”)**

As you may be aware, the OFT has asked the High Court to determine whether contract terms recommended for use by AMS are unfair and binding and whether a number of AMS’ commercial practices are unfair and lawful.

The purpose of this letter is to inform you of the outcome of the case.

The High Court considered 13 standard form contracts which have been recommended to gym and health and fitness clubs by AMS (“contracts 1 to 13”). Copies of all of these contracts, together with more information about this case, can be seen on the OFT website at

<http://www.of.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-current/ashbourne/>. As a club which has agreements with members on one or more of these contracts, it is important that you understand what the High Court has decided about your rights and obligations.

The court’s main findings are as follows:

1. Minimum membership periods under contracts 1 to 10 are unfair and therefore not binding on gym members, who are free to bring their agreements to an end at any time, without giving any reason.
2. Minimum membership periods of more than 12 months under contracts 11 to 13 are unfair and therefore not binding on members, who are free to bring their agreements to an end at any time, without giving any reason.
3. If a member has signed up to membership on contract 11, 12 or 13, and the contract they signed specified a minimum membership period of 12 months or less, that is fair and binding on the member.
4. The contracts are not regulated consumer credit agreements. The member is agreeing to make a monthly payment for each month of membership.
5. Each contract must clearly set out the identity of the gym club with which the member is contracting, so that the member understands who is responsible for providing the gym club facilities and services.
6. Members can always give notice to terminate their contract to the gym club and do not have to give notice to AMS, although notice to AMS, as agent of the gym club, is also acceptable.
7. AMS has been engaging in a number of unfair commercial practices, including recommending and enforcing unfair contract terms and reporting information to Credit Reference Agencies about payments that are not owed (because the terms providing for such payments are unfair).

A full copy of the judgment can be found on the internet at <http://www.bailii.org/ew/cases/EWHC/Ch/2011/1237.html>. A copy of the order made by the court is available on the OFT website at [ ]. Questions and Answers on the effect of the judgment are available on the OFT website at <http://www.of.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-current/ashbourne/ams-qanda>.

Please note that:

- If you assist or permit AMS to breach the order, you will be in contempt of Court, for which the Court may fine or imprison you, and you may also be committing a criminal offence.
- You may contract with new members using the contract that AMS currently recommends, a copy of which is enclosed with this letter, provided that your identity is set out clearly on the front. Minimum terms in new contracts should not exceed 12 months; if they do, the member will not be bound by any minimum membership period and will be free to bring the agreement to an end at any time.
- If you have any member who has tried (whether before or after the High Court's judgment) to bring their agreement to an end and the agreement was made on any of contracts 1 to 10 or was made on any of contracts 11 to 13 and was for a minimum membership period of more than 12 months, you must not try to collect any payment from that member in respect of any period after he tried to bring the agreement to an end.

Please confirm whether you have any objection to being contacted by the OFT directly to ensure that you understand the effect of the judgment. If you do object to being contacted by the OFT directly, please explain the nature of your objection. We should be grateful if you could provide this confirmation or explanation within 7 days of the date of this letter.

Yours faithfully