

Dispute Resolution
Case Law Update
Rosling King LLP



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The Consumer Rights Act 2015 (“the Act”) was introduced as part of the government’s reform of consumer law and has been described as the biggest overhaul of consumer rights in a generation. The Act aims to rectify the traditional complexities of consumer law by consolidating eight pieces of separate legislation in this area into a single piece of legislation.

The scope of the Act is extensive and the legislation is split into three parts. Part 1 deals with consumer contracts for goods, digital content and services, part 2 covers unfair terms and part 3 contains miscellaneous and general provisions. The purpose of this note is to specifically focus on the parts of the Act that relate to, or affect, property transactions.

Consumer Law and Property Transactions

Anyone who deals with property transactions, whether that be conveyancers, letting agents, mortgagees or large commercial/residential landlords, will historically have had to consider the impact of the Unfair Contract Terms Act 1977 (“UCTA”) and the Unfair Terms in Consumer Contract Regulations 1999 (“UTCCR”) on any specific transaction, or property contract that was entered into.

Briefly, UCTA is principally concerned with attempts to limit liability for breach of contract, or to exclude liability completely, whereas UTCCR is concerned with contract terms which are unfair in a more general way.

Whilst this legislation is still relevant for contracts that were entered into prior to 1 October 2015, the landscape for contracts entered into post 1 October 2015 is now governed by the Act. The Act, which was given royal assent on 26 March 2015, seeks to create a single regime out of these two pieces of legislation, which will take effect from 1 October 2015.

Under the Act, UTCCR has been revoked in its entirety. The Act therefore is the governing legislation for unfair terms in consumer contracts in relation to any contract entered into post 1 October 2015. The Act has also incorporated and amended parts of UCTA. These amendments are detailed, and considered, below.

Unfair Contract Terms

The Act applies to contracts, and consumer notices, between traders and consumers and states that an unfair term in a consumer contract is not binding on the consumer. In order to ascertain whether a term is fair, the following test is applied:

“A term is unfair if contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.”

When assessing the fairness of terms, the Act makes clear that it is important to take into account those circumstances which existed at the time the contract was agreed. As such, what consumers were told prior to signing contracts is likely to have a significant role in deciding fairness. Further, in addition to fairness, transparency of terms is a key requirement under the Act. Consumers must be placed in a position where they are fully informed as to whether to enter into contracts and what their obligations, and rights, are under the contract. Where a term could be deemed to have more than one meaning, the meaning most

favourable to the consumer will be adopted.

In addition, the Act sets out certain terms that will be exempt from the test of fairness as well as supplying an indicative, and non-exhaustive, list of terms of consumer contracts that will be regarded as unfair. This list is known as "the grey list".

The Act applies to all contracts and therefore all terms in property contracts, or consumer notices, must be scrutinized to ensure they comply with the above test. In relation to terms contained on "the grey list", the Competitions & Markets Authority has adopted the guidance, prepared by the Office of Fair Trading, on unfair terms in tenancy agreements. Whilst this has not been updated since the introduction of the Act, it remains useful guidance on the application of the Act, and the interpretation of the terms contained in "the grey list" when negotiating residential tenancy agreements. Of particular note, terms which are overly biased towards landlords in leases are likely to be deemed unfair, as are excessive entry rights and blanket bans on things such as assignment, the keeping of pets and a refusal to set off of rents.

It is important to ensure that property contracts are considered, and negotiated, carefully as the consequence of a term being deemed unfair is that it will not be binding on the consumer.

Excluding or restricting negligent liability

The Act also deals with excluding or restricting negligent liability in a contract. On the whole, this reflects the position in UCTA.

Under the Act, a trader cannot, by a term of a consumer contract or by a consumer notice, exclude or restrict liability for death or personal injury resulting from negligence. That said, and as with UCTA, this provision does not apply to any contract so far as it relates to the creation or transfer of an interest in land. Whilst this is similar to the position previously provided in UCTA, the Act omits the wording previously applied in UCTA which reads "or to the termination of such an interest, whether by extinction, merger, surrender, forfeiture or otherwise". Despite this, the consensus is that it is difficult to see that this will affect property transactions as it would be unusual, for example, for a Section 146 notice to exclude or restrict liability for death or personal injury resulting from negligence.

Property Management

The Act has brought in specific requirements for property management companies and those dealing the letting of accommodation under assured tenancy agreements. These requirements came into effect on 27 May 2015.

Under the Act, firms need to ensure that fees, charges and any penalties payable are clearly displayed to consumers and clients. This includes being displayed in both their business premises as well as on a readily accessible section of their website. As part of this displaying requirement, firms are required to provide consumers with an adequate description of the fee as well as its purpose and when these will become payable. Failure to comply with these rules can result in fines of up to £5,000.



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Conclusion

The Act provides a degree of clarity in what was previously a sprawling, and complex, area of law. In relation to property law, it does not introduce any substantive changes to procedure, nor does it alter the documentation that will be caught under the regime. Despite this, it does make clear that it is an area of law that is to be taken seriously and therefore each term, of every contract, between a trader and consumer must be considered to ensure that it would withstand the fairness test detailed in the Act. A failure to do so could result in the term, or in certain circumstances, the whole contract being unenforceable.

For further information, please contact [Ann Ebberson](#) or the Partner with whom you usually deal.