



[2009] UKFTT 316 (GRC)

**IN THE FIRST-TIER TRIBUNAL
(CONSUMER CREDIT)
GENERAL REGULATORY CHAMBER**

Case No. CCA/2009/0002

On appeal from:

Office of Fair Trading's

Decision reference: ADJ/1775-493867

Dated: 5 January 2009

Appellant: European Environmental Controls Limited

Respondent: The Office of Fair Trading

Heard at: The Tribunals Service, 45 Bedford Square
London WC1B 3DN

Date of hearing: 16 November 2009 (sitting in public)

Date of decision: 23 November 2009

Before

HH Judge Peter Wulwik (Chairman)

Nicholas Paul Baxter

Joan Stone

Attendances:

For the Appellant: Fred Philpot and Simon Popplewell,
instructed by Hodge Halsall LLP

For the Respondent: Anneli Howard,
instructed by Agnes Shodimu-Collins, Legal Division
of Office of Fair Trading

Subject matter: Appeal against revocation of consumer credit standard licence – determination of preliminary issues including burden of proof and admissibility of new allegations and arguments – Consumer Credit Act 1974, Sections 25 – 41.

Cases referred to: Sharpe v Wakefield [1891] AC 173
Evans v Conway Justices [1900] 2 QB 224

**DECISION OF THE FIRST-TIER TRIBUNAL ON PRELIMINARY
ISSUES**

A. The Hearing

1. This was the hearing of preliminary issues in an appeal by European Environmental Controls Limited (“the Appellant”) from the determination by Elaine Rassaby the Adjudicator acting on behalf of the Office of Fair Trading (“the Respondent”) made on 5 January 2009 pursuant to Section 34(3) of the Consumer Credit Act 1974 to revoke a consumer credit standard licence.
2. The matter was listed for the determination of preliminary issues pursuant to paragraph 1 of the directions order made on 2 October 2009, the parties having prepared a list of preliminary issues to be determined in accordance with paragraph 2 of the directions order. It was agreed by the parties’ legal representatives prior to or in the course of the hearing that a number of the preliminary issues no longer required determination.
3. The list of preliminary issues agreed by the parties did not comprise true preliminary issues in the sense of issues capable of being determinative of the appeal depending on the decision of the Tribunal on these matters. Rather the list of preliminary issues was intended by the parties to achieve a saving in time and therefore costs in relation to the main hearing of the appeal, which is currently listed for 10 days commencing 19 April 2010. The Tribunal consider that the parties’ approach in seeking the determination of the preliminary issues is consistent with the furtherance of the overriding objective under Rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

B. The Preliminary Issues

4. The first four issues identified by the parties were said to relate to the conduct of an appeal on the merits, there being an overlap between issues 3 and 4 and issues 12 – 16 relating to the admissibility of alleged new allegations and arguments by the Respondent.

Issue 1

5. Issue 1 related to the legal and evidential burden of proof in a case where as here the Respondent was seeking to revoke an existing consumer credit licence.
6. The Respondent submitted that the starting point was the construction of the legislative scheme under the Consumer Credit Act 1974 and in the event of any ambiguity the underlying policy considerations. The Respondent's case was that the revocation provisions in Section 32 of the Act applied the same test as for renewal of a licence under Section 29, which it was said in turn incorporated the burden of proof under Section 25. Consequently it was argued that the burden was on the Appellant to establish that they were fit to hold a licence, which was a privilege and not a right. In the alternative, the Respondent submitted that if the legal burden rested on the Respondent then it might be appropriate to place the evidential burden on the Appellant to rebut the prima facie objections that the Respondent had raised.
7. The Appellant submitted that the question of the burden of proof generally only arose if there was no evidence on a particular issue and that having regard to the material which will be before the Tribunal on the main hearing of the appeal this was highly unlikely to arise. However, to the extent that a determination on the burden of proof was necessary the Appellant argued that there was no justification for departing from the approach previously adopted by Panels in relation to appeals to the Secretary of State where the legal burden in revocation cases was considered to be on the Respondent. The Appellant argued that the normal rule in civil cases should apply namely that a party who raised an issue should bear the onus of proving that issue.
8. The starting point is the legislative scheme under Part III of the Consumer Credit Act 1974.

Section 25 of the Act ("Licensee to be a fit person") provides in subsection (1) that "If an applicant for a standard licence –

(a) makes an application within section 24A(1)(a) in relation to a type of business, and

(b) satisfies the OFT that he is a fit person to carry on that type of business with no limitation,

he shall be entitled to be issued with a standard licence covering the carrying on of that type of business with no limitation".

Section 29 of the Act ("Renewal") provides in subsection (3) that "The preceding provisions of this Part apply to the renewal of a licence as they apply to the issue of a licence, except that section 28 does not apply to a person who was already excluded in the licence up for renewal".

Section 32 of the Act (“Suspension and revocation”) provides in subsection (1) that “Where at a time during the currency of a licence the OFT is of the opinion that if the licence had expired at that time (assuming, in the case of a licence which has effect indefinitely, that it were a licence of limited duration) it would have been minded not to renew it, and that therefore it should be revoked or suspended, it shall proceed as follows”. By Section 32(2), “In the case of a standard licence the OFT shall, by notice –

- (a) inform the licensee that, as the case may be, the OFT is minded to revoke the licence, or suspend it until a specified date or indefinitely, stating its reasons, and
- (b) invite him to submit to the OFT in accordance with section 34 representations –
 - (i) as to the proposed revocation or suspension

Section 34 of the Act (“Representations to OFT”) provides in subsection (1) that “Where this section applies to an invitation by the OFT to any person to submit representations, the OFT shall invite that person, within 21 days after the notice containing the invitation is given to him or published, or such longer period as the OFT may allow:

- (a) to submit his representations in writing to the OFT, and
 - (b) to give notice to the OFT, if he thinks fit, that he wishes to make representations orally,
- and where notice is given under paragraph (b) the OFT shall arrange for the oral representations to be heard”.

By Section 34(2), “In reaching its determination the OFT shall take into account any representations submitted or made under this section”.

9. On the initial application for the grant of a licence, the effect of Section 25(1)(b) of the Consumer Credit Act 1974 is clearly to place the legal burden of proof on the applicant to show that he is a fit person to hold a licence. In the case of renewal of a licence, it appears that the effect of Section 29(3) of the Act (incorporating the preceding provisions of the relevant Part of the Act in the case of the renewal of a licence as they apply to the issue of a licence) is that again the legal burden is on the applicant to show that he is fit to hold a licence. However, in the case of revocation of a licence there is no provision in Section 32 of the Act similar to Section 29(3) in the case of a renewal.
10. The Respondent argued that the revocation provisions in Section 32 of the Act apply the test as for renewal of a licence. However, in the Tribunal’s view that is not the case with Section 32(1) simply saying how the OFT should proceed in a revocation case.
11. The Respondent argued that in the event of any ambiguity in the statutory provisions the Tribunal should have regard to the underlying policy considerations with the preamble to the 1974 Act referring to it being “An Act for the protection of consumers”. The Tribunal do not find any ambiguity in the statutory provisions. Had Parliament wished to place the legal burden of proof in revocation cases on the licensee then it could have expressly provided for the same. However, there is no provision in the case of

revocation of a licence similar to that in Section 29(3) in the case of a renewal. Further the Tribunal are unable to see why the underlying policy considerations of the Act relating to the protection of consumers mean that it is necessary to impose the legal burden of showing fitness in a revocation case on the existing licensee, bearing in mind that the OFT have previously determined that the licensee is fit to hold a licence.

12. The Tribunal's view on the burden of proof in a revocation case is consistent with the approach previously adopted by Panels in relation to appeals to the Secretary of State where the legal burden in revocation cases was considered to be on the OFT: see, for example, paragraphs 78 – 81 of the report dated 18 December 2007 by the Panel of appointed persons to the Secretary of State in relation to the appeal of Gerard McGrane.
13. Further the Tribunal's view is supported by passages relating to the onus of proof in the authoritative looseleaf work by Professor Goode on Consumer Credit Law and Practice, Volume 1, paragraph 27.541 at page 1C/919 and paragraph 27A.081 at page 1C/956, to which the Tribunal referred the parties during the course of the hearing. Professor Goode makes reference to the liquor licensing decision of the House of Lords in *Sharpe v Wakefield* [1891] AC 173 at p.184 (per Lord Bramwell) in support of the proposition that once a licence has been granted then prima facie the holder has a right to have it continued in force and in the form in which it was granted, the decision being cited and applied in *Evans v Conway Justices* [1900] 2 QB 224 at p.229. The Respondent sought to argue that different policy considerations should apply when considering the provisions of the Consumer Credit Act 1974 but it is difficult to see why in the case of revocation of an existing licence, even allowing for the fact that the argument in relation to renewals appears to be affected by the provisions of Section 29(3).
14. In reality, as the Appellant accepted in its submissions the issue of the legal burden of proof will only be significant if in any case there is no evidence on a particular issue relied on by the OFT or if the Tribunal does not accept any evidence on any particular issue. The Appellant accepts here that on any reading of the final issues as they currently stand there is evidence on all of them.
15. The Respondent's fallback position on the burden of proof was that if the legal burden rested on the Respondent in a revocation case then it might be appropriate to place the evidential burden on the Appellant to rebut the prima facie objections that the Respondent had raised. In this respect, the Tribunal did not see that there was any real difference to what was being said by the Appellant in a case where as here it was accepted that there was evidence on all of the issues relied on by the Respondent.
16. The Appellant accepts that in relation to the standard of proof on any issues, the usual civil standard will apply namely on a balance of probabilities.

Issue 2

17. Issue 2 was to the effect that to the extent it was possible to answer the question without consideration of the evidence what comparative weight was to be given to the Appellant's practices at the time of the events giving rise to the complaints compared to the weight given to the subsequent change in the Appellant's practices.
18. The parties accepted that the question of comparative weight to be given to different parts of the evidence depends on consideration of the evidence as a whole, it not being possible for the Tribunal to determine the issue in a vacuum without consideration of all the evidence.

Issue 3

19. Issue 3 related to whether the Respondent could rely on allegations, arguments or facts that were not set out in the minded to revoke notices notwithstanding the fact that these matters are raised in the determination of the Adjudicator or elsewhere.
20. The Respondent submitted that in the vast majority of cases the issues were fully set out in the three minded to revoke notices. In other cases, it was said that the allegations, arguments or facts concerned were set out in the determination of the Adjudicator and that it would be unrealistic to have bound the Adjudicator to the understanding of the facts or their legal interpretation as set out in the minded to revoke notices. Further it was argued that in any event the Appellant had had and would have an ample opportunity to respond to matters raised in the determination of the Adjudicator, the Respondent's statement of case or the Scott schedule during the course of the appeal.
21. At the hearing, the Respondent relied on three principal arguments. First, it was said that the Respondent had set out its reasons for revoking the Appellant's licence in the three minded to revoke notices, as it was obliged to do in accordance with the statutory framework. The Respondent's primary position was that it was not seeking to go beyond the issue heads in the minded to revoke notices but only to develop its arguments and rely on any further evidence in support, the case having evolved during the adjudication process and with new matters having been thrown up. In this respect, the Respondent relied on Rule 15(2)(a)(ii) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 which enables the Tribunal to admit evidence whether or not it was available to a previous decision maker. Secondly, the Respondent argued that the Tribunal were entitled to assess the arguments and come to their own view on the evidence before the Tribunal, this being a rehearing of the determination appealed against. And thirdly, it was said that there had to be a balance between the policy considerations behind the Act relating to the protection of consumers and the rights of the licensee under Article 6 ECHR, with the Appellant having full opportunity to respond to matters raised by the Respondent. The Respondent argued that if there was a new allegation not available to it at the

date of the hearing before the Adjudicator the Respondent should in fact be able to put forward that matter on an appeal.

22. The Appellant submitted that the starting point was Section 32(2)(a) of the Consumer Credit Act 1974 which provides that where the OFT is minded to revoke a licence it shall by notice “inform the licensee that the OFT is minded to revoke the licence stating its reasons”. There then follow the provisions for the licensee to submit representations under Section 34. It was the Appellant’s submission that a determination by the Adjudicator and a decision on an appeal from a determination by the Adjudicator can only be in respect of the reasons given in the minded to revoke notice or notices. That said, the Appellant then went on to make it clear that it was not submitting that the Respondent should not be permitted to advance further, different, alternative or additional evidence or arguments in support of the reasons set out in the minded to revoke notices.
23. The Appellant argued that there were strong policy considerations for requiring an appeal to be confined to the reasons set out in the minded to revoke notices, with the revocation of a consumer credit licence being obviously a very serious matter with potentially serious consequences for the business concerned and with licensees being entitled to be aware of the case which they had to meet. It was said that the licensing system itself built in a number of protections for licensees that would be by-passed were the Respondent to be entitled to raise new reasons on appeal, the Adjudicator having to be satisfied that there is a case to meet before a minded to revoke notice is issued and with it having been open to the Adjudicator to issue a further supplementary minded to revoke notice if they had wished to raise any new allegations or issues.
24. Again, the Tribunal accept that the starting point must be the statutory framework set out in Sections 32 and 34 of the Consumer Credit Act 1974, with the obligation being on the OFT in the case of revocation of a standard licence to serve notice stating its reasons and with the licensee then having the opportunity to make both written and oral representations to the Adjudicator acting on behalf of the OFT. The Adjudicator is concerned with the question of fitness to hold a licence at the date of the hearing before the Adjudicator. The OFT is entitled to add to its reasons for revoking a licence by serving supplementary minded to revoke notices prior to any hearing before the Adjudicator, as happened in the present case. It is the reasons given in the minded to revoke notice or notices that are to be the subject of consideration by the Adjudicator in determining the question of fitness to hold a licence.
25. The position is somewhat different on an appeal to the Tribunal. An appeal to the Tribunal is by way of a rehearing of the determination appealed against: see Section 41ZB(1) of the Consumer Credit Act 1974. The question to be decided by the Tribunal is not whether on the evidence adduced before the Adjudicator the Appellant was a fit person to hold the licence but whether he is fit to hold such licence on the evidence adduced before the Tribunal and with the time at which the Appellant’s fitness to hold a licence is to be

determined being not the time of the hearing before the Adjudicator but at the time the appeal comes before the Tribunal.

26. Accordingly, it seems to the Tribunal that while the reasons given in the minded to revoke notice or notices remain the touchstone for an appeal the Tribunal may entertain any further matter which has a bearing on the Appellant's fitness to hold a licence so long as the Appellant has been given due notice of such matter. In the Tribunal's view, this approach is supported by the policy behind the 1974 Act namely the protection of consumers. It is also supported by the provisions of Rule 15(2)(a)(ii) of the Tribunal's Rules enabling the Tribunal to admit evidence whether or not the evidence was available to a previous decision maker. The approach contended for by the Appellant would, in effect, mean tying the Tribunal on a rehearing to the reasons given in the minded to revoke notice or notices notwithstanding that matters may have moved on or evolved in the adjudication or appeal process. The Tribunal consider that there is no justification for such a potentially blinkered approach where the protection of consumers is concerned and where the issue of fitness is to be determined in the light of the evidence at the time of the appeal hearing and not at some earlier date.
27. Again, the Tribunal's view is supported by Professor Goode in his work Consumer Credit Law and Practice, Volume 1, paragraph 27A.47 at page 1C/949 where he considers the nature of an appeal from the Adjudicator, albeit that he is there considering the position under the former regime of an appeal lying to the Secretary of State rather than as now to the First-tier Tribunal. The essential nature of an appeal from an Adjudicator did not change with the establishment of the Consumer Credit Appeals Tribunal nor following the abolition of that short-lived Tribunal with the establishment of the First-tier Tribunal (Consumer Credit) of the General Regulatory Chamber. The First-tier Tribunal (Consumer Credit) and not the Secretary of State is now the arbiter of an appeal from the Adjudicator and with onward appeals lying to the Upper Tribunal instead of to the Court of Appeal. However, the essential nature of an appeal from an Adjudicator remains the same.

Issue 4

28. Issue 4 was whether the Respondent could develop its arguments to rebut the Appellant's new arguments and evidence, including alleged changes to the Appellant's practices.
29. As previously stated, the Appellant made it clear that it was not submitting that the Respondent should not be permitted to advance further, different, alternative or additional evidence or arguments in support of the reasons set out in the minded to revoke notices. Nor was it in dispute that the Respondent could challenge assertions that there had been changes to the Appellant's practices or that the Respondent could allege that changes made did not cure any alleged unfairness.

30. The next five issues identified by the parties were said to relate to evidential matters.

Issue 5

31. Issue 5 related to reliance on and weight to be attributed to witness statements and contemporaneous documents if the relevant witness was unable to attend the hearing.

32. The parties were agreed that witness statements and contemporaneous documents were admissible if a relevant witness was unable to attend the hearing. Rule 15 (2)(a)(i) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 entitles the Tribunal to admit evidence whether or not the evidence would be admissible in a civil trial in England or Wales. The question of weight to be given to any particular statement or document is to be a matter for the main hearing of the appeal in the light of all the evidence and arguments then before the Tribunal, as the parties agreed.

Issue 6

33. Issue 6 was concerned with arrangements for video link evidence.

34. The Tribunal were told that there will be three witnesses who might give evidence by video link. The Respondent suggested setting aside a half day namely the afternoon of day 3 of the main hearing on 21 April 2010 for this purpose, with the Respondent to make the necessary arrangements and with CPR PD 32 paragraph 31 Annex 3 being a useful guide for dealing with such evidence in the absence of any express provision in the Tribunal's Rules. The Appellant agreed that the Respondent should provide its proposals for dealing with video link evidence, with the Appellant stating that they would give their full co-operation.

Issue 7

35. Issue 7 as amended at the hearing related to the admissibility and relevance of the following items of evidence:

- (a) The BBC "Old Dogs New Tricks" and "Watchdog" programmes transmitted on 24 August 2006 and 19 October 2004 respectively or in the alternative relevant extracts and/or the written transcripts of such programmes.
- (b) The Ofcom decisions of 11 September 2007 relating to the BBC "Old Dogs New Tricks" programme.
- (c) The schedule of Consumer Direct complaints.

36. The Tribunal shared the concern of the Appellant as to the objectivity of the presentation of the BBC programmes and the usefulness of such evidence.

After some discussion with the Respondent, the position was arrived at where the Respondent indicated that they would endeavour to obtain witness statements from the persons appearing in the BBC programmes on whose evidence they wish to rely and in the event that they were unable to obtain a statement or statements they would prepare a sanitised extract of the written transcript of what such persons said in the programmes, free from any unnecessary comments of the interviewer. The Tribunal reminded the parties at the hearing of their ability to apply for a witness summons if necessary under Rule 16 of the Tribunal's Rules.

37. The Ofcom decisions resulted from complaints by the Appellant and others relating to the BBC's "Old Dogs New Tricks" programme. The Respondent submitted that there was no basis for not admitting this evidence, which it was said was a matter of public record and with the same corroborating the Adjudicator's findings. It was said that the Tribunal were able to assess the weight to be given to such evidence.
38. The Appellant submitted that the evidence had the status of a quasi-judicial decision which could not in any way influence another decision-making body. Further it was argued that the Ofcom decision relating to the Appellant did not amount to an adverse finding against the Appellant by a regulatory body in any event, the Ofcom decision being only a refusal or part refusal to uphold a complaint by the Appellant against the fairness of the treatment they had received in relation to the "Old Dogs New Tricks" programme.
39. The Tribunal accept the Appellant's submissions relating to the Ofcom decisions. They related to the question of unfair treatment of the Appellant and others in relation to the "Old Dogs New Tricks" programme. The Tribunal cannot see that the Ofcom decisions are relevant to or will assist the Tribunal in deciding the question of the Appellant's fitness to hold a licence. The Tribunal has to arrive at its own conclusions on that issue on the evidence before the Tribunal.
40. The Respondent relied on the so-called schedule of Consumer Direct complaints to show that complaints had continued about the Appellant's practices since the Adjudicator's determination and moreover since the Appellant offered its undertakings in June 2008. The schedule was attached to the witness statement of Mr Paul Hosier of the Respondent dated 31 March 2009, it being said that the evidence of Mr Hosier was intended to show the approximate number of complaints that had been received. The Respondent accepted that Mr Hosier did not attempt to analyse the substance of the complaints or significantly rely on them in support of the Respondent's central allegations in the case. However, it was said that the summary of these complaints highlighted similar types of concerns about the Appellant's practices which had already been investigated by the OFT and others and therefore corroborated the Adjudicator's findings.
41. The Appellant argued that the records of Consumer Direct were of poor quality, contained no significant information, generally did not differentiate between enquiries and complaints and did not enable the Appellant in the vast

majority of cases to put forward any form of rebuttal to whatever the contact was about, albeit that an attempt had been made by the Appellant to deal with the Consumer Direct schedule in the witness statement of Mrs Gillian Fox dated 21 August 2009.

42. As the Tribunal made clear at the hearing, they were concerned as to the usefulness of the Consumer Direct schedule and the question of fairness to the Appellant if the Respondent was allowed to rely upon it. It seems to the Tribunal that to the extent that the identity of individual complainants can be ascertained from the schedule or otherwise, the proper course would be for the Respondent to take statements and to call such persons to give evidence. As the schedule stands, it is likely to be of very limited assistance to the Tribunal if at all unless details of complaints can be verified and tested in evidence. If details of complaints cannot be verified and tested in evidence, then it does not appear to be fair to the Appellant to rely upon the schedule.
43. Again, the Tribunal's view is supported by Professor Goode's work *Consumer Credit Law and Practice*, Volume 1, paragraph 27A.82 at pages 1C/956 – 957. He refers to a previous case where Counsel for the OFT sought to adduce evidence of complaints against the appellant recorded by numerous Citizens' Advice Bureaux as having been made by their clients, whose names were suppressed for reasons of confidentiality, it being said that the appellant was thereby unable to identify either the complaints or its files relating to the complaints and could not effectively challenge the allegations made. The Panel in that case ruled the evidence inadmissible, with the fact that similar evidence came from numerous Citizens' Advice Bureaux in different parts of the country suggesting that the complaints were justified not answering the requirements of natural justice.

Issue 8

44. Issue 8 related to any matters arising from the Notice to Admit Facts served by the Respondent dated 14 October 2009.
45. The Appellant had served a response to the Notice to Admit Facts on 28 October 2009. No issue arose from the Notice to Admit Facts.

Issue 9

46. Issue 9 referred to any matters arising from the experts' joint memorandum.
47. The Tribunal were informed by the parties that no issues arose out of the joint memorandum of the experts for preliminary determination by the Tribunal. It was likely that both experts would be called to give evidence at the main hearing.
48. The next two issues were said to relate to fairness.

Issue 10

49. Issue 10 was to the effect that to the extent it was possible to answer the question without consideration of the evidence what are the characteristics for identifying customers that are elderly, infirm and/or vulnerable.
50. The Tribunal were informed by the parties that a joint bundle of research material and a reading list would be provided to the Tribunal in due course. This was not something for the consideration of the Tribunal prior to the main hearing. The question posed in the agreed list of issues does appear to the Tribunal to be something in the nature of a search for the holy grail in any event, as the Appellant says.

Issue 11

51. Issue 11 was a related matter and was to the effect that to the extent it was possible to answer the question without consideration of the evidence what was the standard for determining unfairness in the context of sales to elderly, infirm and/or vulnerable customers in their own home.
52. This was subject to the same comments as in relation to issue 10 and was not something where the Tribunal was asked to give a preliminary decision.
53. Issues 12 – 16 were five issues relating to the admissibility of individual arguments by the Respondent which were said by the Appellant not to have been raised in the minded to revoke notices. To some extent, there is an overlap with issues 3 and 4 which have been dealt with earlier in this decision, but for the sake of completeness the Tribunal will consider each of these issues individually.

Issue 12

54. Issue 12 related to the admissibility of the Respondent's argument in relation to the alleged over-emphasis of free services in allegation 2 (not making the purpose of the visit clear).
55. The Respondent submitted that the aspect of free services was simply part of the allegation that the Appellant's sales practices lacked the required transparency, that the first and third minded to revoke notices raised the allegation that the Appellant had not made it sufficiently clear to customers about the nature of its business and/or visit and with Part 1 of the third minded to revoke notice alleging that the Appellant's sales scripts did not make clear that the company was engaging in the sale of security products or that the visits would include a sales presentation. The Respondent relied on

paragraphs 91 – 92 of the determination of the Adjudicator referring to the fact that the Appellant over-emphasised free services which confused customers. It was said that the Adjudicator's findings were corroborated by the additional evidence that the Respondent had filed since the determination of the Adjudicator and which was relied on in the Respondent's statement of case and in the Scott schedule.

56. The Appellant submitted that there was no allegation in the minded to revoke notices relating to free services and that effectively it was being raised as a new issue.
57. The Tribunal consider that the allegation of over-emphasis of free services by the Appellant is part of the allegation that the Appellant's sales practices lack the required transparency in not making the purpose of the visit clear. However, even were it to be a new allegation it would still be admissible in the light of the Tribunal's determination on issue 3 and/or possibly through the gateway afforded by issue 4.

Issue 13

58. Issue 13 related to the admissibility of the Respondent's allegation 3 (unreasonable length of visits).
59. The Respondent submitted that the allegation that sales visits were of unreasonable length was set out in the warning letter of 26 July 2005 and the first minded to revoke notice, that it was repeated in the third minded to revoke notice and was developed to include the fact that potential customers were not informed by telesales staff of the length of the visit in advance as referred to in Part 1 of the third minded to revoke notice. It was said that the Appellant also addressed the point in its written representations, with both of these aspects being considered in paragraphs 98 – 105 of the determination of the Adjudicator.
60. The Appellant submitted that the allegation in the first minded to revoke notice had been that staying in elderly consumers' homes over 60 minutes (or after the customer stated that he was not interested in buying the product) was an unfair business practice and that in paragraph 98 of the determination the Adjudicator actually found that 60 minutes was not a sufficient amount of time to carry out the Appellant's demonstration and to arrange a purchase, it being argued that the Adjudicator looking at the reasons for revocation in the first minded to revoke notice should not have upheld the allegation. The Appellant submitted that the Adjudicator incorrectly went on to find that the fact that the length of the visit was not made clear to the consumer was an unfair business practice, this not having been a reason for which the Respondent had stated that it was minded to revoke the Appellant's licence.
61. The Appellant argued that the Respondent was now seeking to go further than both the minded to revoke notice and the determination of the Adjudicator, the Respondent in allegation 3 of the amended Scott schedule seeking to argue

that visits to elderly, infirm and/or vulnerable customers in excess of 3 hours were oppressive or unfair and that the failure to inform customers of the length of the visit was oppressive and a misleading omission. It was said for the Appellant that the first argument was not made in either the minded to revoke notices or the determination and was therefore a new allegation, and that the second argument was contained in the determination of the Adjudicator (albeit without mention of misleading omissions) but not in the minded to revoke notices.

62. The Tribunal are of the view that the length of visits was a matter that the Adjudicator had to consider in any event, albeit that the Respondent has now sought to increase the period from 60 minutes to 3 hours in the light of the Adjudicator's determination and to now include the allegation that the failure to inform customers of the length of the visit was oppressive and a misleading omission, with part of the support for that allegation coming from the Adjudicator's determination. Again, even were these to be new allegations they would still be admissible in the light of the Tribunal's determination on issue 3 and/or through the gateway afforded by issue 4.

Issue 14

63. Issue 14 related to the admissibility of the second part of the Respondent's allegation 7 (tying elderly customers into lengthy and inflexible contracts).
64. The Respondent submitted that there were two related aspects to allegation 7 namely the renewal of servicing and monitoring agreements well ahead of their expiry (linked to repeat sales in allegation 1) and the tying of elderly consumers into lengthy agreements that made no allowance for and/or did not provide for a refund in the event of a change in their personal circumstances (these allegations overlapping with the matters raised in allegation 11). The Respondent argued that the first minded to revoke notice explicitly raised the tying in point and inappropriateness of the contracts for future needs as part of the other unfair business practices identified in that notice and that the third minded to revoke notice referred to the inflexibility of the contracts to deal with future events such as death, transfer or cancellation, with reliance being placed on terms 7.2 and 8(a) of the Appellant's agreement. It was said that the Appellant had made written representations on this matter in a letter dated 29 October 2008, and that paragraphs 113 and 125 of the determination by the Adjudicator had reached conclusions with regard to the tying in point. The Respondent set out this aspect of the allegation in paragraphs 68 – 71 of their statement of case and also relied on additional evidence to corroborate the Adjudicator's findings.
65. The Appellant submitted that the allegation in the first minded to revoke notice was that the practice of renewing service or monitoring agreements well before the expiry date of the customers' policies, thereby tying customers into contracts which might not be appropriate to their future needs, was an unfair business practice. It was said that this was a single allegation but that in the amended Scott schedule the Respondent had sought to separate out the two

strands of the allegation namely renewing servicing and monitoring contracts well before the expiry of existing contracts and the practice of tying elderly customers into lengthy agreements that made no allowance for the fact that their personal circumstances were likely to change. The Appellant did not object to the first limb but objected to the second limb as a separate argument or reason for revocation of the Appellant's licence not contained in the minded to revoke notices.

66. The Tribunal consider that the allegation of tying elderly customers into lengthy agreements that made no allowance for the fact that their circumstances were likely to change was ground effectively covered in the first and third minded to revoke notices and the determination by the Adjudicator, albeit that it has now evolved into a separate allegation. Again, even were it to be a new allegation it would still be admissible in the light of the Tribunal's determination on issue 3 and/or through the gateway afforded by issue 4.

Issue 15

67. Issue 15 related to the admissibility of the second part of the Respondent's allegation 10 (requiring full payment for equipment prior to expiry of the cancellation period).
68. The Respondent submitted that in the second minded to revoke notice it alleged that the Appellant's policy of requiring full payment in advance was unfair and noted the Appellant's refusal to accept a deposit arrangement, with the fact that full payment was taken in advance for maintenance and service contracts without the possibility of any refund being raised in the third minded to revoke notice. It was said that at the oral hearing before the Adjudicator the Appellant made submissions with regard to advance payments and offered to introduce a deposit scheme in response to the Respondent's concerns. The Adjudicator in paragraphs 113 – 125 of the determination dealt with the fact of full payment in respect of security and electrical equipment and with up front payments for servicing and monitoring agreements. It was pointed out that since the determination the Appellant had introduced a 30% deposit arrangement payable when the contract was signed and with the balance payable on the installation of security equipment, the Appellant saying that the amended procedures would have addressed the Adjudicator's concerns.
69. The Respondent argued that the draft undertaking proposed by the Appellant in June 2008 would not have fully addressed the consumer detriment because in respect of the sale of security equipment the balance of full payment was still required on installation of the equipment with it being installed in the majority of cases within the cancellation period and potentially undermining the consumer's cancellation rights, and with the deposit arrangement not applying to servicing and monitoring agreements. It was said that the amended procedures did not meet the concern that elderly or vulnerable customers had to pay for the contracts in full up front and were deprived of a pro rata refund in the event of early termination or death. The Respondent

argued that it should be able to develop its arguments and to respond to arguments put forward by the Appellant on the issue on unfairness or fitness.

70. The Appellant submitted that the Respondent's argument that the practice of requiring full payment in advance for servicing and monitoring contracts was an unfair business practice was not an allegation made in the minded to revoke notices and was not referred to in the determination. It was said that the Respondent's argument that the Appellant's practice of providing for a deposit only arose after the determination of the Adjudicator was factually incorrect, the practice having been provided for in the Appellant's undertakings and being in place since May 2008, some 8 months before the determination.
71. The Tribunal consider that the allegation that the practice of requiring full payment in advance for servicing and monitoring contracts is an unfair business practice is part of the allegation that it is an unfair business practice to require full payment or a substantial deposit in advance, albeit that that allegation was raised in the minded to revoke notices in the context of the original installation or delivery of goods or specific work under the contract such as electrical wiring. Again, even were it to be a new allegation it would still be admissible in the light of the Tribunal's determination on issue 3 and/or through the gateway afforded by issue 4.

Issue 16

72. Issue 16 related to the admissibility and clarification of the Respondent's various arguments under allegation 11 (unfair contract terms).
73. The Appellant accepted that the Respondent could in the amended Scott schedule refer to matters contained in the minded to revoke notices which were not previously addressed in the original Scott schedule, the Appellant intending to argue at the main hearing of the appeal that the fact that the Respondent did not include the alleged unfair contractual terms set out in the third minded to revoke notice in the original Scott schedule was indicative of the insignificant nature of the allegations in question. This was not something where the Tribunal was asked to give a preliminary decision.

C. Directions

74. There is attached to this decision a directions order to give effect to the further directions discussed and agreed at the hearing.

.....

HH Judge Peter Wulwik (Chairman)

23 November 2009



**In the First-tier Tribunal
(Consumer Credit)
General Regulatory Chamber**

Case No. CCA/2009/0002

Between:

European Environmental Controls Limited Appellant

and

The Office of Fair Trading Respondent

DIRECTIONS

Before His Honour Judge Peter Wulwik (Chairman), Nicholas Paul Baxter and Joan Stone on 23 November 2009

Upon hearing Counsel for the parties

And upon reading the bundles and skeleton arguments for the determination of the preliminary issues agreed by the parties

And upon the Tribunal determining the agreed preliminary issues in accordance with the decision of the Tribunal accompanying these directions

It is ordered that:

Location and timing of hearings

1. The directions hearing currently fixed for Friday 4 December 2009 be vacated and relisted for Thursday 4 February 2010 at 10am at 45 Bedford Square, London WC1 with a time estimate of 3 hours.

2. The parties are to be at liberty to apply to vacate the directions hearing on lodging written confirmation that no further directions are necessary and that the existing directions have been complied with or on lodging further agreed directions, subject to the approval of the Tribunal. In the event that any matters are not agreed by the parties, they shall not later than 7 days before the directions hearing lodge (a) a list of any further directions which are agreed, (b) a list of any further directions which are sought by the parties and are not agreed and (c) a skeleton argument dealing with the directions which are not agreed. The Appellant not later than 7 days before the directions hearing shall lodge with the Tribunal three indexed and paginated sets of bundles for use at the directions hearing to be prepared in consultation with the Respondent and shall serve two further sets on the Respondent's legal representatives.
3. For the avoidance of doubt, the main hearing of the appeal shall remain listed for 10 days commencing Monday 19 April 2010 at 10.30am at 45 Bedford Square, London WC1 (Court Room 1).

Scott schedule and list of issues

4. Permission to the Respondent to file with the Tribunal and serve on the Appellant a re-amended Scott schedule by 4pm on 7 December 2009, any such re-amendments to be consequential on the determination of the agreed preliminary issues.
5. The parties shall agree and submit to the Tribunal by the same date any revised list of issues consequential on the determination of the agreed preliminary issues.

Further witness statements

6. Permission to the Respondent by 4pm on 15 January 2010 to file and serve any further witness statements to be relied on by them consequential on the determination of the agreed preliminary issues.

Requests for documentation/information made by the OFT

7. The Appellant by 4pm on 30 November 2009 shall file and serve a witness statement dealing with the tables summarising the cancellation statistics from 2005 to date previously provided to the Respondent, such witness statement to explain the types of situation covered by each category and whether cancellation occurred after the appointment setting call, the confirmation call, after quality control or at some later stage.

8. The Appellant by 4pm on 18 December 2009 shall provide to the Respondent and to the Tribunal copies of its retail price lists for 2004, 2005, 2006, 2007, 2008 and 2009 if available and an indication of the average value of orders placed with the Appellant for security products for each of the years 2005 to 2009 inclusive in so far as such information is readily available, it being recorded that the Respondent will not seek to rely on any retail price lists produced for the purpose of any argument based on mark-up.

Trial bundles

9. The Appellant in consultation with the Respondent shall prepare and lodge four indexed and paginated sets of bundles with the Tribunal (the same including one set of bundles for the use of witnesses at the main hearing) and serve two further sets on the Respondent's legal representatives by 4pm on 30 January 2010.
10. The sets of bundles to be prepared by the Appellant shall include a separate bundle to be agreed by the parties containing material relating to the issue of vulnerability of customers and consumer detriment and the standard of fairness alleged to be applicable when considering the same, the parties to provide an agreed reading list with that bundle.
11. For the avoidance of doubt, the costs of production of the bundles for any hearing in these proceedings before the Tribunal shall in the first instance continue to be shared equally between the parties and shall be subject to any determination by the Tribunal as to costs at the conclusion of the appeal in accordance with paragraph 25 of the directions order dated 27 April 2009.

Liberty to apply

12. All parties have liberty to apply for further directions, including any further directions that may be necessary consequential on the determination of the agreed preliminary issues or upon this order.

HH Judge Peter Wulwik (Chairman)
Principal Judge– First-tier Tribunal (Consumer Credit)