UKFTT 274 (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:	19 – 30 April 2010 (sitting in public)
Date of decision:	28 June 2010

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 and Owain Draper, instructed by Agnes Shodimu-Collins, Legal Division of the Office of Fair Trading
Subject matter:	Appeal against revocation of consumer credit standard licence – Unfair business practices -- Consumer Credit Act 1974, Sections 25 - 41
Cases referred to:	Office of Fair Trading v Abbey National Plc and Ors [2009] 3 WLR 1215 Office of Fair Trading v MB Designs (Scotland) Ltd [2005] SLT 691 Inntrepeneur Pub Co (GL) v East Crown Ltd [2000] 2 Lloyds Reps. 611

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DECISION OF THE FIRST-TIER TRIBUNAL

A. The Appeal

1. We were appointed to hear an appeal by European Environmental Controls Limited ("EEC") from the determination by Elaine Rassaby the Adjudicator acting on behalf of the Office of Fair Trading ("the OFT") made on 5 January 2009 pursuant to Section 32 of the Consumer Credit Act 1974 to revoke EEC's consumer credit standard licence. The appeal was heard over a period of ten days between 19 and 30 April 2010 at the premises of the Tribunals Service, 45 Bedford Square, London WC1B 3DN.

B. The Background to the Company

2. In March 1985 Mr John Ball, who subsequently set up and became the Chairman and Chief Executive of EEC, established a company by the name of Fireguard UK Limited ("Fireguard"). That company sold fire extinguishers, fire blankets and smoke detectors to the public and operated with a team of self-employed sales agents. Mrs Gillian Fox, who later became the Commercial Director of EEC, began work for Fireguard as a sales person in May 1985.

3. After Fireguard had been trading for approximately 3½ years, the OFT wrote to the company with regard to complaints received about the sales representatives of Fireguard and alleged misrepresentations made to customers of the company. On 20 January 1989 Mr Ball and Fireguard UK Limited gave certain written assurances to the OFT as to the conduct alleged pursuant to the provisions of Part III of the Fair Trading Act 1973. It was not alleged that these assurances were breached.

4. In 1991 Mr Ball set up EEC. In March 1994 there was a transfer of the business from Fireguard to EEC, with Fireguard ceasing to trade and remaining dormant until 1 July 2003 when it was formally dissolved.

5. EEC became involved in the selling, installing and monitoring of a range of security products including burglar alarms, CCTV camera systems, video door entry systems, water filters, magnetisers, air filters, electrical testing and remedial rewiring for domestic properties. Its product range has extended to security and care systems and more recently solar heating and controllable heating systems, with a twenty-four hour monitoring centre in relation to the security and care systems.

6. Until about 2001/2002 each of the individual sales teams had their own lead generators consisting of five to six canvassers, with a canvas team leader. EEC then introduced a 120 seat call centre and telephone appointment operation where the company is based in Southport. The products of EEC are sold to the public through sales staff now employed directly by the company, with employees receiving a basic salary and commission/bonuses on sales.

7. Mr Ball remains the Chairman and Chief Executive of EEC responsible for all day to day operational matters. Mrs Gillian Fox's primary role as the Commercial Director involves administration issues relating to the company. Mr Martin Mills is the Sales Director.

8. The company now has a turnover exceeding £10m per annum, with the employment of over 150 staff and approximately 16 independent contractors. It is one of the major employers in Southport.

C. The Background to the Minded to Revoke Process

9. The company was issued with a consumer credit licence on 7 October 2000. Complaints were received about EEC's trading practices and in particular their dealings with elderly customers over a number of years. In or about December 2003 the OFT distributed an issue sheet to Trading Standards Departments throughout England and Wales. EEC became aware of this during a meeting with Wirral Trading Standards in or about July 2004. Concerns about EEC's practices were highlighted in a BBC "Watchdog" programme in October 2004.

10. The company held their first meeting with Sefton Trading Standards in or about October 2004 and established a home authority relationship with Sefton and their Principal Trading Standards Officer Mr Tony Jackson. It was during one of their meetings with Sefton that EEC were made aware that the OFT were investigating the company.

11. EEC instituted direct contact with the OFT by telephone through their Solicitors on or about 24 May 2005, being followed up by a letter from EEC's Solicitors to the OFT on 29 June 2005 which sought to address at some length the issues raised by the OFT. A warning letter dealing with the then complaints against EEC was sent by the OFT to the company's Solicitors on 26 July 2005.

12. EEC's Solicitors continued to correspond with the OFT. On 27 October 2005 the OFT replied stating that while they still had some concerns the company's licence would be renewed. The company made it clear to their Solicitors that if the OFT had continuing concerns about the company's business practices they welcomed any comments on their procedures. The OFT appears to have considered that it was not for them to give advice to the company, their role being that of a regulator.

13. On 9 October 2006 the Companies Investigation Branch ("CIB") of the then Department for Business Enterprise and Regulatory Reform (formerly known as the Department of Trade and Industry) began an investigation into EEC under Section 447 of the Companies Act 1985. The Company co-operated with the investigators. The CIB did not consider that the company was working against the public interest to the extent that the company should be wound up but they were sufficiently concerned about the company's business practices to pass the matter over to the OFT to consider further action.

D. The Minded to Revoke Process

14. On 23 April 2007 Elaine Rassaby the Adjudicator acting on behalf of the OFT issued a minded to revoke notice in relation to EEC's consumer credit licence under Section 32 of the Consumer Credit Act 1974. There were written representations from EEC and an oral hearing on 3 September 2007, at which the company were legally represented. On 23 November 2007 the Adjudicator served a supplemental minded to revoke notice, resulting in further written representations from the company.

15. On 14 February 2008 the Adjudicator wrote to the company enclosing draft undertakings for their consideration, it being said that the undertakings dealt with matters of concern to the OFT as raised in the notices issued to the company. Following some discussion as to the precise wording of the undertakings, EEC's Solicitors wrote to the Adjudicator on 10 June 2008 indicating in the last paragraph of the letter that once the undertakings were agreed and signed they would be incorporated into EEC's Code of Practice. On the same date the Adjudicator forwarded amended undertakings for signature. These were signed by Mr Ball on behalf of the company on 16 June 2008.

16. The undertakings concerned the business activities of the company and related to repeat sales, length of visits to the customers, the renewal of servicing and monitoring contracts, the installation of equipment before the expiry of the cancellation period, pre-payment for installation work, membership of the company of the Distance Selling Association ("DSA"), and EEC's Code of Conduct and the monitoring of implementation of the undertakings.

17. EEC had provided the Adjudicator with a draft Code of Conduct which it had led the Adjudicator to believe would be implemented. The company in fact decided not to proceed with the draft Code of Conduct but to implement the undertakings through a Code of Practice, which took effect on or about 26 May 2008. The company did not provide the Adjudicator with the Code of Practice, which did not go as far as the draft Code of Conduct in a number of areas. The company signed the undertakings without disabusing the Adjudicator of her understanding that the draft Code of Conduct was to become "black letter law".

18. On 18 June 2008 the Adjudicator acknowledged the signed undertakings and stated that she would proceed to determine the minded to revoke notices. On 16 July

2008 the Adjudicator wrote again stating that she was reviewing the evidence in the light of the undertakings given by EEC. Following that review, the Adjudicator on 21 August 2008 wrote to EEC's Solicitors stating that she was not satisfied that the undertakings met the detriment that arose from the unfair business practices contended in the notices and that she considered that there was evidence of further unfair business practices. The Adjudicator's letter constituted a further supplementary minded to revoke notice under Section 32 of the 1974 Act. EEC provided written representations in response to the further supplementary minded to revoke notice.

19. On 5 January 2009 the Adjudicator issued her determination revoking EEC's consumer credit licence under Section 32 of the Act. The Adjudicator concluded that EEC had been operating business practices which were unfair or oppressive in a number of respects. In paragraph 134 of her determination the Adjudicator concluded as follows:

> "Having reviewed this history, I have reached the conclusion that the undertakings which were signed by EEC in June 2008 and which I considered at the time might have addressed the detriment caused by the unfair practices, could not be relied upon and do not go far enough. EEC has repeatedly denied that its practices have caused any consumer detriment and has resisted informal attempts to address them. It took statutory action before EEC agreed to change its practices and even then, without any acceptance that its practices caused consumer harm or that the complaints were justified. In those circumstances, I do not believe that EEC would be committed to changing those practices, despite amendments to its Codes and documentation. The risk is that, without close oversight, EEC will revert to earlier unfair practices".

E. The Appeal

20. On 2 February 2009 EEC filed their notice of appeal and grounds of appeal, maintaining that the company was and always had been a fit person to carry on licensable business within the meaning of Section 25 of the Consumer Credit Act 1974. It also alleged breach of the "Chinese wall" between the Adjudicator and the OFT investigations unit. EEC sought that its appeal against the revocation of its consumer credit licence be allowed on the basis that it was a fit person to carry out licensable business activity or, if considered appropriate, that the matter be remitted to the OFT to impose such requirements on EEC under Section 33A of the Act or to take such undertakings as the Tribunal directed. EEC did not in fact seek a remission of the matter to a different Adjudicator for rehearing on the basis of any alleged breach of the "Chinese wall" between the Adjudicator and the OFT investigations unit.

21. The OFT served its statement of case dated 1 April 2009, it being the OFT's case that EEC was not a fit person to hold a licence. The OFT primarily relied upon the findings and analysis in the Adjudicator's determination and on further evidence which had become available.

22. The Tribunal gave detailed directions on 27 April 2009. It determined a number of preliminary issues and gave further directions on 23 November 2009. Further directions were given on 18 February 2010 and other evidential issues were determined on 9 March 2010.

23. The appeal was heard over a period of ten days between 19 and 30 April 2010 and was a rehearing on the merits, with the Tribunal being concerned with the issue of fitness on the basis of the evidence before the Tribunal.

F. Vulnerable Consumers

24. The OFT's principal concern was said to relate to the exploitation of and/or unfair influence over elderly, infirm and/or vulnerable consumers which led them to making an unsuitable or unnecessary purchase. It was contended by the OFT that the elderly were particularly vulnerable to the sale of security systems because of their sense of insecurity and heightened fear of crime, that certain elderly consumers might also be susceptible to the sale of care systems and monitoring services because of a particular infirmity, and that generally elderly consumers might be more easily influenced by particular selling practices using psychological and social influence principles.

25. EEC maintained that it did not specifically target elderly, infirm or vulnerable consumers. However, as the OFT pointed out EEC's canvassing calls were made during the day when the retired, elderly or infirm were more likely than other sectors of the population to be at home, EEC selected for visits customers who owned their own homes, and some of EEC's equipment was specifically designed for the elderly or infirm.

26. The OFT took the Tribunal to a number of written sources with regard to vulnerable consumers, but as the OFT accepted vulnerability is a relative concept that can change over time depending on the personal characteristics of the individual consumer and the circumstances of the relevant transaction.

27. The Tribunal heard the oral evidence of a number of complainant witnesses on behalf of the OFT. In relation to the issue of vulnerable consumers, they included the following:

> (1) Mark Ingram, who gave evidence in support of his grandmother Mrs D Hanlon. She made purchases from EEC in 2005/2006 when she was 89 years of age. She lived on her own in a two bedroomed semi-detached bungalow and was suffering from forgetfulness, the early stages of Alzheimer's disease and poor eyesight.
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> (2) John Knowles, a retired police officer, who gave evidence in support of Mrs Simpson. She made purchases from EEC in 2002 when she was about 89 years of age. She lived on her own in a two bedroomed bungalow.

(3) Sean McCarroll, who gave evidence in support of his mother Mrs M McCarroll. She made purchases from EEC in 2003 when she was 79 years of age. She lived on her own in a four bedroomed detached property and was suffering from the early stages of Alzheimer's disease.

(4) George Tsendis, a police community support officer, who gave evidence in support of Mr R Longmuir. He made purchases from EEC in the period 2001/2008 when he was 84-91 years of age. He lived on his own in a three bedroomed terraced property in poor condition and with no central heating. His appearance was neglected and he could not make decisions on his own.

(5) Lorna McRobert, who gave evidence in support of her uncle Mr R Longmuir. She said that he had begun to deteriorate in about April 2008 and needed help with his affairs.

(6) Alan Woods, who gave evidence in support of his mother Mrs Edna Woods. She made purchases from EEC in the period 2002/2009 when she was 78-85 years of age. She lived on her own in a two bedroomed terraced house, about twenty years old. She had suffered a stroke about 7 years earlier but was generally in good health for her age.

(7) Edna Woods gave evidence. She felt pressured by EEC's sales representatives into agreeing to make purchases.

(8) Eileen Downey gave evidence. She made purchases from EEC in the period 2005/2006 when she was 75 years of age. She lived on her own in a three bedroomed semi-detached property. She had been in good health, though she had now been diagnosed with diabetes. She considered that she had been persuaded by EEC's sales representatives into making purchases that were unnecessary.

(9) Judith Burnell, who gave evidence in support of her mother-in-law Mrs E Burnell. She made purchases from EEC in 2009 when she was 82 years of age. She lived on her own in a two bedroomed bungalow. It was said that Mrs Burnell's general health was fairly good but she was not a strong decision maker and was susceptible to pressure selling.

(10) Joyce Brown gave evidence. She made purchases from EEC in 2006 when she was 81-82 years of age. She was asthmatic and on the initial sales visit was suffering from bronchitis. She had lived on her own in a two bedroomed flat in the middle of a block of three flats and in May 2007 moved into sheltered housing. She considered that she had been pressured by EEC's sales representatives into agreeing to make purchases.

(11) Paul Farrell, who gave evidence in support of his aunt Marjorie Whitlow. She made purchases from EEC in the period 2005/2008 when she was in her

80's. She lived on her own in a large three bedroomed semi-detached house. She had suffered heart problems and had a hip replacement. Her mental ability had been good in 2005 though later she became confused.

(12) Muriel Ross, who gave evidence in support of her sister-in-law Mrs Audrey Ross. She made purchases from EEC in the period 2007/2009 when she was in her 70's. She lived on her own. She had multiple sclerosis and was in a wheelchair. She had subsequently begun repeating herself and suffered a stroke and heart attack.

(13) Tina Lewis, a senior consumer protection officer who gave evidence in support of Miss Elsie Simpson and Mr Bellamy and to a lesser extent Mrs G Coulson. Miss Simpson made purchases from EEC in the period 2005/2006 when she was in her 80's. She resided on her own in a two bedroomed terraced property, where she had lived with her parents. She was confused and very forgetful and was said to have had no previous experience of entering into contracts. She had been awaiting a place in a care home. Mr Bellamy made purchases from EEC in 2006 when he was in his early 70's. He lived on his own in a two bedroomed semi-detached property. He had just come out of hospital and had a heart condition. He was quite confused and hard of hearing and suffered memory loss. Mrs Coulson made purchases from EEC in 2006 when she was 84 years of age. She lived on her own in a similar property having recently lost her husband and was extremely hard of hearing.

(14) Carol Sharp, who gave evidence in support of her mother Norah Ive. She made purchases from EEC in the period 2003-2005 when she was 77-79 years of age. She had lived on her own in a two bedroomed bungalow, built in 1978. She was getting very forgetful and was beginning to suffer falls. She moved into sheltered housing in 2007.

(15) Robin Pike, who gave evidence in support of his mother Stella Pike. She made purchases from EEC in the period 1991-2004 when she was 73-86 years of age. She lived on her own in a three bedroomed detached property. She was suffering from short term memory loss by about 2005. She was then having problems with her back and walking.

(16) Raymond Turner, who gave evidence in support of his father Stanley Turner. He made purchases from EEC in the period 2003/2004 when he was 86-87 years of age. He lived on his own in a four bedroomed semi-detached property. He had become forgetful and later began falling over, with a deterioration in his health.

(17) Joan Warriner, who gave evidence in support of her mother Mrs F Allen. She made purchases from EEC in 2006 when she was 86-87 years of age. She lived on her own in a three bedroomed semi-detached property. She was very

deaf, had some difficulty with walking and was becoming forgetful. She later moved into a care home and had dementia.

28. In addition to relying on the oral evidence of complainant witnesses, the OFT relied on witness statements or correspondence from a number of further individuals in relation to the issue of vulnerable consumers. They included the following:

(1) Gwendoline Hawkins, who made two statements on behalf of her aunts, Daphne Linforth and Nancy Wooton. They made purchases from EEC in the period 2000/2002 and were in their 80's. They lived together and both had been diagnosed with Alzheimer's disease.

(2) William Spence, who made a statement on behalf of his uncle Stanley Jackson. There were supporting statements from Ernest Anscombe and Karen Miller. Mr Jackson made purchases from EEC in 2006. He was confused, forgetful and his appearance was neglected.

(3) Margaret Lees, who wrote to EEC on behalf of her mother-in-law Mrs Jean Richings. There was a supporting letter from a GP, Doctor G Gancz. Mrs Richings made purchases from EEC in 2006 when she was 80 years of age. She suffered from severe clinical depression, had breast cancer and was said to be obviously not well.

(4) Marjorie Kendrick, who made a statement. There was a supporting statement from her daughter Mrs Jean Cromwell. Mrs Kendrick made purchases from EEC in the period 2002/2004 when she was 84-85 years of age. She suffered from short term memory loss which had become progressively worse, early dementia and depression.

(5) Elsie Trowbridge, who made a statement. There was supporting correspondence from her daughter Ms J Sankey. Mrs Trowbridge made purchases from EEC in 2002 when she was 87 years of age. She was a widow living alone, became confused and felt pressured into purchasing.

(6) Graham Hellings, who made a statement on behalf of his mother-in-law Mrs Joyce Burrell-Clayton. She was an elderly lady living alone, registered as partially blind and suffering from Alzheimer's disease.

(7) Margaret Williams, who made a statement on behalf of her mother Mrs Elizabeth Northwood and her aunt Miss Julia Rowlands. They made purchases from EEC in 2003 when they were 82 and 77 years of age. Mrs Northwood suffered from dementia, was partially sighted and had arthritis. Miss Rowlands was partially sighted and had heart complications.

(8) Dr William Cottrell, who made a statement on behalf of his sister Margaret Cottrell. She made purchases from EEC in 2003 when she was 69 years of age. She lived on her own, had dementia and very probably Alzheimer's disease.

(9) Carol Henley, who made a statement on behalf of her mother Mrs A Edginton. She made purchases from EEC in the period 2003/2004 when she was in her late 60's/early 70's. She lived on her own in a purpose built block of flats. Her daughter considered that she had been duped into buying products.

(10) Anne Kettlewell, who made a statement on behalf of her parents Horace and Olive Swindell. They had agreed to make a purchase from EEC in July 2008, which was cancelled. Mr and Mrs Swindell were in their late 80's/early 90's. Mr Swindell was registered as partially sighted and had hearing problems. Mrs Swindell was diagnosed with dementia.

29. The Tribunal accept that not every elderly or infirm person is necessarily vulnerable. However, the Tribunal agree with the OFT that EEC can reasonably be expected to foresee that the elderly and infirm are likely to be particularly susceptible to the Company's sales practices and products and that particular care is needed when dealing with such class of persons.

30. The OFT maintain that EEC did not deploy any specific processes or clear guidelines for identifying vulnerable consumers at the initial canvassing stage and point of sale, with employees merely instructed to use their judgment and not to sell to customers lacking mental capacity. However, as the OFT argued, vulnerability is not the same as capacity.

31. The inadequacy of EEC's guidelines and the lack of proper precautions in place to prevent sales to the vulnerable was highlighted by the differences in the treatment of vulnerability between EEC's draft Code of Conduct which was never implemented and the Code of Practice which was introduced in May 2008 to give effect to the more limited purpose of EEC's undertakings. The draft Code of Conduct provided for a check to ensure whether the consumer wanted someone present, a vulnerability/no sales list, whether the consumer needed to talk to relatives or a carer before proceeding with a purchase with a warning that the sales adviser might have to come back the next day, customer care with how to behave in the home of a consumer, and a warning about self-generating leads in a no cold calling zone. There were no or no adequate provisions dealing with such matters in the Code of Practice.

32. As the OFT argued, the evidence showed that EEC had sold extensively to vulnerable consumers by any accepted definition of such persons.

G. The Allegations of unfair, dishonest, improper and/or oppressive practices

33. The Adjudicator considered 11 allegations of unfair business practices:

(1) Making repeat visits to elderly consumers within a short time of their first purchase in order to sell, or to try to sell, additional products and services.

(2) Obtaining, or trying to obtain, appointments to visit elderly consumers when EEC had not made it clear to them the nature of its business and/or visit.

(3) Staying in elderly consumers' homes an unreasonable length of time or after the consumer had said that they were not interested in buying the product or service in order to pressure the consumer to enter into an agreement.

(4) Supplying or trying to supply products and/or services to elderly consumers which were unnecessary for them and/or their dwellings whether by reason of design, cost or otherwise.

(5) Driving or offering to drive elderly consumers to their banks or building societies despite it apparently being against EEC's company policy.

(6) Making contact directly with elderly or vulnerable consumers after being requested not to do so.

(7) Renewing service/monitoring agreements well before the expiry dates of the customers' policies thereby tying customers into contracts which might not be appropriate for their future needs.

(8) Installing equipment before the expiry of the cancellation period thereby pressuring customers not to cancel.

(9) Using aggressive or underhand attempts to secure entry into consumers' homes when it had been made clear by the consumer that no sales presentation or visit was wanted.

(10) Requiring full payments for goods and services in advance of installation or a substantial deposit thereby pressuring consumers not to reconsider or cancel an order and removing the customer's right of set off in the event of a subsequent claim about the goods or services.

(11) Issuing service, extended warranty and monitoring agreements containing unfair terms, it being also contended that the terms of EEC's agreements contravened the Unfair Terms in Consumer Contracts Regulations 1999 and that EEC had thereby contravened an enactment regulating transactions with individuals within the meaning of Section 25(2A)(b)(iii) of the Consumer Credit Act 1974.

34. The OFT did not pursue allegations (5), (6) and (9) having regard to the Adjudicator's findings in her determination. The OFT pursued each of the 8 remaining allegations.

Allegation 1 (Repeat visits)

35. The OFT's case was that part of EEC's historic business model had been for its employees and independent engineers to make repeat unsolicited visits to existing customers within a short time of the initial sale to persuade them to upgrade or to purchase further equipment or services, with the result that many consumers had been persuaded to spend many thousands of Pounds on a wide range of security equipment and services within a relatively short period.

36. EEC did not dispute that part of its historic business model had been to make repeat sales to its customers. It was said that there was nothing wrong in encouraging brand loyalty, that there were many products where after sales were common, that warranties were often sold after a purchase and that EEC was always fully open with the consumer about the price paid.

37. EEC pointed out that as at the year 2000, before any regulatory intervention in the case of EEC, it did not permit any sales within 30 days of a previous sale and only senior members of staff could make sales before 60 days had elapsed. In 2005 it had sought to introduce a 120 day non-contact policy for all except senior security advisers. By May 2008 the 120 day non-contact policy included all sales staff. The 120 day rule was written into EEC's Code of Practice and incorporated into its Point of Sale order acceptance programme.

38. An area of contention before the Adjudicator had concerned the role of installation engineers selling further products, with the 120 day rule not excluding such sales. EEC had considered this to be a valuable service to customers. The Adjudicator disagreed and EEC had agreed to change its practice.

39. EEC stated that its current procedures were that all point of sale staff provided customers with full details and costs of goods and services including accessories, that engineers did not sell service and monitoring contracts save in exceptional circumstances where the installation engineer recognised that the sale would objectively improve the security system or replaced goods which were considered unsuitable, and that no unsolicited sales of goods and services would be made within 120 days of the date of the last sale.

40. With regard to sales by engineers, EEC had carried out a survey following the introduction of the prohibition on sales by engineers showing that only 7 sales were made by engineers out of 5,521 visits to customers by engineers, with all those sales being verified directly with the customer at the point of purchase as required by EEC's procedures.

41. The OFT argued that even when the 30 day rule or more recently the 120 day rule applied, it did not prevent the detriment of customers undergoing persistent visits, with it being said that there was a lack of supporting measures in the form of a limit on sales, checks on the total amount of equipment sold, a no sales list as a complete ban, the ability of employees to still contact customers when sales might be saved and the use of interest free credit to circumvent any lack of affordability on the part of customers. It was said that breaches were not picked up and any disciplinary action taken was inadequate.

42. The OFT and EEC had instructed experts namely Cathryn Inman and Wendy Potts. They considered that the interval of 120 days between visits or other approach by EEC other than installation and any other essential maintenance was adequate, but with Cathryn Inman suggesting that the initial contact after the 120 days had elapsed should be by letter with any visit being made at the request of the customer. The OFT sought to argue before the Tribunal that an interval of 18 months was necessary to prevent the detriment of customers undergoing persistent unsolicited visits.

43. The OFT alleged that there had been breaches of the 30 day and 120 day rules and numerous incidents of persistent visits to customers. The breaches of the 30 day and 120 day rules included the following:

> (1) Daphne Linforth and Nancy Wooton (who were in their 80's and both suffering from Alzheimer's disease) were sold a basic security system on 18 September 2000 and six year service cover and four extra sensors on 19 September 2000.
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> (2) Marjorie Kendrick (who was 84-85 years of age and suffered from short term memory loss, early dementia and depression) had agreed to purchase equipment and three year service agreements on 30 August 2002 which she then cancelled but was sold equipment and three year service agreements on 10 and 19 September 2002. She was sold a five year service agreement on a fire extinguisher on 9 February 2004, some ten days after purchasing a five year warranty for a video door entry system on 30 January 2004.
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> (3) Mrs Jean Richings (who was 80 years of age and suffered from severe clinical depression, had breast cancer and was said to be obviously not well) was sold an alarm system and three years service cover on 24 October 2006, some 69 days after purchasing a care unit with three years monitoring and service on 15/16 August 2006. On 14 November 2006 and only 18 days after the previous sale she had electrical remedial work. On 23 November 2006 and only 9 days after the previous sale she was sold further equipment.
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> (4) Mrs Coulson (who was 84 years of age) was sold a three year service agreement on 4 June 2004, some two days after agreeing to upgrade her alarm system on 2 June 2004.

(5) Miss B Beacock (who was in her 80's) was sold an alarm system on 10 November 2008 and a five year servicing agreement and four year extended monitoring on 24 November 2008, some 14 days later. She had been quoted by the installation engineer and advised to write in.

(6) Mrs Audrey Ross (who was in her 70's, suffered from multiple sclerosis and was in a wheelchair) was sold a solar hot water system on 28 August 2009 which was cancelled on 4 September 2009 and a controllable heating system and extended servicing agreement and monitoring agreement on 5 October 2009, some 38 days after the cancelled sale.

(7) Miss V Broughall (who was in her late 80's) was sold a fire extinguisher and electrical inspection on 14 November 2008 and electrical works on 5 December 2008, some 21 days later.

(8) Miss Margaret Hayes (who was in her late 70's) was sold security equipment and an electrical inspection test on 1 September 2008 and electrical works on 15 September 2008, some 14 days later.

(9) Mrs E Burnell (who was 82 years of age and not a strong decision maker) was the subject of repeated contact/visits to purchase CCTV, electrical inspection and remedial works in the period 31 January-25 February 2009.

44. The OFT's allegation of persistent visits included the following:

(1) Daphne Linforth and Nancy Wooton (in their 80's and both suffering from Alzheimer's disease) were visited four times in the period September/October 2000 and with total sales of £8,355 in the period 2000/2002.

(2) Mrs Doris Keiller was visited four times in less than two months in the period April-June 2001.

(3) Margaret Tinsley (in her late 60's) was sold to on six occasions in 18 months in the period March 2002-September 2003 and with total sales of £6,302 in that period.

(4) Marjorie Kendrick (84-85 years of age and suffering from short term memory loss, early dementia and depression) was visited ten times in 18 months in the period July 2002-February 2004. She was sold to on nine occasions and with total sales of £8,300. She was refunded £4,729.82 in August 2004.

(5) Joyce Brown (81-82 years of age, asthmatic and on the initial sales visit suffering from bronchitis) was visited four times in the period January-May 2006 and with total sales of £3,064.13.

(6) Mrs M McCarroll (79 years of age and suffering from the early stages of Alzheimer's disease) was visited five times in the period April-August 2003 and with total sales of £8,124.

(7) Mr Stanley Turner (86-87 years of age and forgetful) was visited five times in the period December 2003-June 2004 and purchased an alarm, care unit, digicom system, video door entry system, and servicing/monitoring agreements with total sales of £8,317.70.

(8) Mrs G Coulson (84 years of age and extremely hard of hearing) was visited four times in the period May-September 2006 and purchased an alarm system, smoke detectors, servicing/monitoring agreements, electrical inspection and electrical works with total sales of £6,719 excluding refunds.

(9) Miss Elsie Simpson (in her 80's, forgetful and no previous contractual experience) was visited three times in the period December 2005-February 2006 and purchased an alarm, smoke detectors, natural gas detector, security light, electrical test and extended warranties, servicing and monitoring agreements with total sales of £6,456.41.

(10) Mrs F Allen (86-87 years of age, very deaf, difficulty with walking and becoming forgetful) was visited eight times in the period May-October 2006 and was sold to on five occasions including an alarm system, CCTV system, care unit, warranties, monitoring and servicing agreements, and electrical work with total sales of £13,389.48 (£10,324 following cancellation of electrical work).

(11) Nora Ive (77-79 years of age, forgetful and beginning to suffer falls) was visited fifteen times in the period July 2003-January 2006 and made purchases on five occasions including an alarm system, smoke alarm, passive infra red detector, carbon monoxide detector and servicing agreements with total sales of £3,761.43 (or £2,827.30 following cancellation of a servicing agreement).

(12) Stella Pike (in her 70's/80's) made sixteen purchases in the period 1991-2004 including an alarm system, two alarm upgrades, numerous security lights, smoke alarm and passive infra red detectors bought on separate occasions, a digicom system, video door entry system and extended servicing/monitoring agreements with total sales of £20,315.92 (excluding refunds of £6,594.76).

(13) Mr R Longmuir (in his 80's/early 90's, property in poor condition and no central heating, appearance neglected and unable to make decisions on his own) was visited ten times in the period 2001-2008 with five visits in three months in June-August 2001. He purchased an alarm, alarm upgrade, smoke alarm, passive infra red detectors, gas detector, door entry intercom system and extended warranties, servicing and monitoring agreements with total sales of over £11,000.

(14) Marjorie Whitlow (in her 80's, heart problems and a hip replacement) was sold to on six occasions in the period November 2005-December 2008 including an alarm system, digicom, care unit, extended servicing/monitoring agreements and an electrical inspection with total sales of £5,844.65.

(15) Edna Woods (in her 70's/80's, had suffered a stroke but generally in good health for her age) purchased on twelve occasions between 2002 and 2009 including an alarm system, digicom system, smoke alarm, alarm upgrade, additional smoke alarm, electrical test, care unit, CCTV system, extended servicing/monitoring agreements, and a controllable heating system with total sales of £16,405.02 (£12,827 after cancellations).

(16) Audrey Ross (in her 70's, multiple sclerosis and in a wheelchair) was sold to on five occasions in the period April 2007-October 2009 including an alarm system, smoke alarm, CCTV system, solar hot water system, extended servicing/monitoring agreements, and a controlled heating system with total sales of £22,339.10 (£11,344.60 after cancellation).

45. The OFT sought to rely on the undertakings given by Mr Ball on behalf of the EEC on 16 June 2008, albeit that the Adjudicator had considered the undertakings could not be relied on and did not go far enough. The first undertaking relating to repeat sales was as follows:

"i. At the point of sale staff will provide customers with full details and costs of goods and/or services which are recommended as a result of the survey, including accessories, service and monitoring contracts, so that customers are informed of the full cost before agreeing to a purchase;

ii. a. Except as indicated at ii.b below, no sales of service and/or monitoring contracts will be made by installation engineers;

b. In exceptional circumstances, installation engineers may sell goods (and where those goods require monitoring contracts, such contracts) to a customer which would objectively improve the security system sold or to replace goods considered by the installation engineer to be unsuitable to the customer's requirements;

iii. No unsolicited fresh sales of goods or services (including electrical inspections and electrical works) will be made within 120 days of the date of the last sale".

46. The OFT alleged that there had been the following breaches of the undertaking in relation to repeat sales:

(1) Neither EEC's sales staff nor its contractual terms in force since 2008 made plain the true cost of the contractual obligation that the customer was entering

into in respect of after sale services. They did not provide full details of the potential disadvantages of the tie-in in respect of a longer term for after sale warranties, servicing and monitoring agreements. The OFT relied on the cases of Mrs Audrey Ross (extension of servicing and monitoring agreements on 5 October 2009) and Mr R Longmuir (sale of a three year renewal on 14 May 2008).

(2) There was evidence that in practice installation engineers had sold servicing and monitoring agreements in breach of the terms of the undertaking. The OFT relied on the case of Mr B Beacock (sale of five year servicing agreement and four year extended monitoring agreement on 24 November 2008 following recommendation and quotation from the installation engineer of the alarm on 13 November 2008).

(3) EEC's Code of Practice allowed other engineers to make sales when they carried out fault or service visits in the customer's home, with such sales able to take place both in and outside the 120 day period.

(4) The OFT alleged breaches of the 120 day rule in the cases of Mrs B Beacock, Mrs Audrey Ross, Miss V Broughall, Miss Margaret Hayes and Mrs E Burnell.

47. EEC denied that they had committed any breaches of the undertaking relating to repeat sales:

(1) EEC relied on the fact that the undertaking was headed "Repeat sales" and with the requirement being "that customers are informed of the full cost before agreeing to a purchase". It was not accepted by EEC that failure to emphasise the fact of committing to a contract for a certain period of time was a breach of the undertaking. The extensions to the contracts of Mrs Ross were solicited by the customer herself in a letter dated 24 September 2009. The transaction entered into by Mr Longmuir on 14 May 2008 was before the undertaking.

(2) The sale made to Mrs Beacock was said to have been made as a result of the customer's specific request by letter, albeit following recommendation and quotation from the installation engineer. No sale was otherwise made by installation engineers.

(3) The undertaking dealt with sales made by installation engineers. Before the undertaking sales at the point of installation were only six in 2007. The 120 day period prohibited any sales whether by an installation engineer or anyone else.

(4) EEC disputed that there had been breaches of the 120 day rule in the cases of Mrs Beacock and Mrs Ross for the reasons given, though in the case of Mrs Ross there was still the sale of the controllable heating system 38 days after the sale of her solar heating system. In the cases of Miss Broughall and Miss Hayes,

the sale of electrical remedial work subsequent to an electrical inspection was specifically excluded by the Adjudicator's letter of 10 June 2008 confirming that remedial work carried out as a result of a previous electrical inspection would not be regarded as a fresh sale, it only being now that the OFT sought to argue that the 120 day rule should apply to electrical inspections and subsequent electrical works. In the case of Mrs Burnell, EEC disputed that there had been three attempts to sell on the facts and again relied on the Adjudicator's letter of 10 June 2008 in relation to the permitted sale of electrical remedial works subsequent to an electrical inspection, albeit that no sale of electrical remedial works was actually made.

48. The OFT sought to rely on the differences in the treatment of repeat sales between EEC's draft Code of Conduct and the Code of Practice. The draft Code of Conduct dealt with courtesy calls linked to repeat sales, there was a stronger stance on the 120 day rule and repeat sales, consumers who had been inconvenienced by unnecessary repeat visits were to be placed on the no sales list, there was a prohibition on sales by electricians, and sales advisers were to assess the amount of security equipment that customers had and place them on the no sales list if they had sufficient equipment. There were no or no adequate provisions dealing with such matters in the Code of Practice.

49. The OFT contended that repeat sales of the nature and extent referred to involving the elderly, infirm and vulnerable did not reflect honest market practice, integrity or good faith. It was said that incentivisation of sales staff and engineers by commission and/or bonuses to make repeat sales within a short time period in connection with products to which the elderly and infirm were particularly susceptible abused the trust that such consumers placed in security suppliers, that repeat visits were likely to unfairly influence the vulnerable customer to buy products or services that they would otherwise not have bought and that such oppressive, unfair and improper practice rendered EEC unfit as it undermined the personal integrity of the individuals running the business.

50. The OFT maintained that EEC's long standing practice of making repeat visits to customers in their own homes, especially elderly, infirm and vulnerable consumers, with a view to making incremental sales of security equipment and after sales services was and remains unfair, that this continued despite the changes to EEC's practices and that the 120 day rule and limits on sales by installation engineers did not go far enough to address the detriment to consumers.

51. EEC placed considerable reliance on the facts that their point of sale system did not permit sales inside the 120 day period and that there had been no or no repeated breaches of the undertaking to the Adjudicator. They also relied on the fact that both the Adjudicator and the OFT's own expert had considered that 120 days was an adequate time period between sales. They contended that no unfairness could be shown in respect of EEC's current practices in relation to repeat visits.

52. It was clear to the Tribunal that historically there had been breaches of EEC's procedures in relation to repeat visits and that prior to the undertakings given to the Adjudicator on 16 June 2008 there had been persistent visits to customers who were elderly, infirm and vulnerable. The cases of complaints of persistent visits to customers subsequent to the undertakings had become less but were still unacceptable. The 120 day rule in the Tribunal's judgment does not of itself address the potential detriment to consumers who are elderly, infirm and possibly vulnerable. At the same time, the failure to implement the draft Code of Conduct has exacerbated the potential consumer detriment.

Allegation 2 (Unclear purpose)

53. The OFT's case was that EEC's telesales procedures were misleading as they did not make the purpose of the visit clear at the outset and gave the impression that the sole or predominant purpose of the visit was to provide the customer with free advice, gifts and services rather than to make a sales visit, that they tended to over-emphasise the free services on offer and use that to disguise the true purpose of the visit. The OFT did not accept that deficiencies in the appointment setting call could be offset or made up for by clarification at a subsequent stage, the appointment setting call being considered to be the critical conversation being the first contact in time leading to a decision to agree to a sales visit and making it harder especially for the elderly and other vulnerable customers to back out of the appointment.

54. The OFT contended that there were significant divergences from the script that EEC had in place from time to time, that there were cases where consumers thought they were receiving a test or service to their existing alarm but it turned into a sales visit and that there were also cases where the visit was arranged to carry out installation of a previous order that then turned into a follow on sale.

55. EEC stated that they had provided their scripts to the OFT in 2005 but had received no adverse comments until the minded to revoke process, nor had they received any adverse comments from Sefton Trading Standards. EEC now kept recordings of the telephone calls made, it being said that often the complainant's version of events did not accord with the transcript of the calls made. EEC also relied on what they considered to be the relatively small number of complaints.

56. The experts instructed had reviewed the then most up to date appointment setters and confirmers scripts and made certain recommendations in relation to amendments. It had also been agreed that in the appointment setter's script the sentence "We are a private company specialising in the sale of security and fire safety equipment" be moved to earlier in the script to immediately before the third paragraph. That had not been adopted as agreed by the experts. The OFT considered that there was still a misleading impression conveyed by the overall presentation of the appointments setters script.

57. The OFT's allegation of unclear purpose included the following:

(1) Joyce Brown (81-82 years of age, asthmatic and on the initial sales visit suffering from bronchitis) believed that EEC was connected with the fire service.

(2) Mrs G Coulson (84 years of age and extremely hard of hearing) believed that EEC was connected with the City Council, though accepting that this was not said to her.

(3) Mr and Mrs K Harris (both in their 70's and suffering from partial deafness) assumed that EEC was an official organisation having heard the words "Europe" and "Environment".

(4) Mr P McLaughlin believed he had agreed to a free home survey and assumed that it was the Council, though there was no mention of the Council in the recorded conversations.

(5) Mrs Brotherston asked in the confirmation of appointment call whether it was "a selling speak" and was told all EEC's services were free of charge.

(6) Mrs E Burnell (82 years of age and not a strong decision maker) believed that EEC was connected with the government or Council, though there was no mention of the same in the recorded conversations. Her daughter-in-law Mrs J Burnell received an appointment setter's call on 20 February 2009 with the emphasis on free services and gifts.

(7) Edna Woods (about 80 years old and having previously suffered a stroke) believed that a follow up visit on 16 December 2004 was a courtesy call rather than a sales visit.

(8) Mrs Audrey Ross (in her 80's, suffering from multiple sclerosis and in a wheelchair) was said to have believed that a visit on 20 April 2007 was for a free security inspection, though this was not supported by the statement of her sister-in-law Mrs Muriel Ross.

(9) Mrs Mary Dutton believed that EEC was offering free services not sales from the appointment setter's telephone call on 7 October 2008.

(10) Mr G Turner (83 years of age) believed that he was to have a free visit and free services. The appointment setter did not make the purpose of the visit clear in the telephone call on 15 April 2009 and did not repeat it when the customer did not hear.

58. The OFT sought to rely on the differences in the treatment of the purpose of visits between EEC's draft Code of Conduct and the Code of Practice. The draft Code of Conduct provided that when staff called on customers with a view to making a sale they

must be as clear as possible about the purpose of the visit. There was no such provision in the Code of Practice.

59. The OFT contended that the practice of failing to make the true purpose of the visit clear during the first appointment setting call at a sales visit was misleading and a breach of paragraph 4.2 of the Direct Selling Association ("DSA") Code of Practice for Consumers, that it was likely to affect the consumer's ability to make an informed decision about whether to accept a sales visit and was a dishonest and improper practice, particularly when the age and possible vulnerability of customers was taken into account. It was contended that even now the appointment setter's script did not sufficiently negate the misleading impression afforded by the overall presentation of the script, with its over emphasis on free services and lack of reference to sales. The OFT remained concerned that the presentation of the script could be adapted by individual employees so as to reduce rather than increase the clarity of purpose of the visit.

60. EEC maintained with some justification that often the complainant's version of events did not accord with the transcript of the call made and that it was emphasised in training that employees were to keep to their script, with the BBC's undercover reporter Rana Mitra being dismissed for going off the script.

61. In the Tribunal's judgment, there is an over emphasis on free services and gifts and the lack of any prominent reference to sales in the appointment setter's script. It is not surprising that this has resulted in customers of EEC focussing on the free services and gifts and being misled as to the true purpose of the visit as a sales visit. This was and continues to be a breach of paragraph 4.2 of the DSA Code of Practice for Consumers requiring that the sales process should not be misrepresented to the consumer.

Allegation 3 (Unreasonable length of visits)

62. The OFT's case was that in the past EEC's security assessments and alarm demonstrations had taken too long, particularly when regard was had to the age of the consumer, any infirmity and possible vulnerability. The unfairness of the length of visit was said to be compounded by the fact that EEC's telesales procedure did not inform the customer of the likely duration of the visit from the outset in the appointment setting call and by a lack of clarity in the appointment confirmation call referring to the visit normally taking up to a couple of hours and a further hour to complete the paperwork in the event of a purchase.

63. EEC argued that the complaint did not stand up to analysis, and that the average length of time required to carry out a survey and sale was 2 hours 33 minutes, with that depending on the customer agreeing to a product demonstration and to proceed with the purchase. EEC denied that there was any lack of clarity in the confirmer's script.

64. The experts instructed had agreed the recommendation in the report of EEC's expert Wendy Potts that the likely length of the presentation be added to the appointment setter's script but that had not been implemented.

65. The OFT alleged that visits of unreasonable length included the following:

(1) Mrs M McCarroll (79 years of age and suffering from the early stages of Alzheimer's disease) was said to have had one visit of 4½ hours, though this appears to have been an installation on 12 April 2002.

(2) Joyce Brown (81-82 years of age, asthmatic and on the initial sales visit suffering from bronchitis) had a first visit on 12 February 2006 lasting approximately four hours.

(3) Mrs G Coulson (84 years of age and extremely hard of hearing) was said to have had one visit on 12 May 2006 lasting for 3 hours until her son arrived and was sold a service agreement after the installation of her alarm on 15 May 2006 in a visit lasting 6½ hours.

(4) Mrs F Allen (86-87 years of age, very deaf, difficulty with walking and becoming forgetful) was said to have been sold a CCTV system following the installation of an alarm on 18 May 2006 in a visit lasting 8 hours 20 minutes.

(5) Margaret Weller (in her 80's) was said to have agreed to a three year monitoring agreement on 7 October 2002 after the sales representative spent all afternoon with her trying to persuade her to go ahead.

(6) Phyllis Kyte (in her 80's) was said to have received a visit on 27 July 2004 lasting 3 hours to persuade her to have a panic alarm.

(7) Mr F Bullock had a sales visit on 24 November 2005 lasting 4½ hours, it being said that he had been unable to get the sales representative to leave and that he eventually agreed to purchase an alarm.

(8) Mrs Elizabeth Northwood (82 years of age, suffering from dementia, being partially sighted and with arthritis) was sold to on two occasions, with the first visit on 26 September 2003 lasting about 1½ hours.

(9) Margaret Cottrell (69 years of age, suffering from dementia and probably Alzheimer's disease) had her first sales visit on 10 April 2003 lasting 4 hours.

(10) Mrs Jean Richings (80 years of age, suffering from severe clinical depression, breast cancer and obviously not well) had four visits of 2 hours or in excess of 2 hours in the period August-November 2006.

(11) Stanley Jackson (confused, forgetful and neglected appearance) was sold a three year service agreement following the installation of an alarm on 27 October 2006 in a visit lasting 7 hours.

66. The OFT sought to rely on the second undertaking given to the Adjudicator by Mr Ball on behalf of EEC on 16 June 2008 relating to the length of visits. The undertaking was as follows:

> "i. Sales visits, including postcode marking, survey and, where appropriate completion of paperwork, will normally take no more than three hours from the time of arrival of the adviser to the time of his/her departure;
>
> ii.. The confirmer's script will be amended in accordance with paragraph 2.i above;
>
> iii. The reason for any extended visit (those taking more than three hours) will be recorded by the sales representative and signed by the customer;
>
> iv. Written details of any extended visits will be made available for audit by Sefton Trading Standards and/or the OFT".

67. The OFT alleged the following in relation to the length of visits:

> (1) Although the undertaking provided that normally sales visits should take no more than three hours, sales visits to vulnerable consumers, especially the infirm, should not continue for such a length of time. It was said that in accordance with EEC's Code of Practice adopted in 2008 the sales representative should leave the customer's home immediately and take the matter up with customer services. The OFT stated that there was evidence that this had not been complied with in relation to the following:
>
> > (i) Horace and Olive Swindell (late 80's/early 90's, the husband being registered as partially sighted and having hearing problems, and the wife being diagnosed with dementia).
> >
> > (ii) Mr Cookson, though there was no mention of vulnerability or unreasonable length of visit in the supporting statement of Kathryn Hales, a Senior Consumer Protection Officer.
> >
> > (iii) Mrs B Beacock (in her 80's and ill at the time she was contacted by EEC).
> >
> > (iv) Mr Stanley Turner (86-87 years of age and forgetful).
> >
> > (v) Edna Woods (about 80 years old, previously suffered a stroke but generally in good health).
> >
> > (vi) Marjorie Whitlow (in her 80's, heart problems and a hip replacement).
> >
> > (vii) Mrs E Burnell (82 years of age and not a strong decision maker).

(viii) Mrs Audrey Ross (in her 80's, suffering from multiple sclerosis and in a wheelchair).

(2) The confirmer's script did not fully comply with the undertaking stating that the visit "will normally take up to a couple of hours … and if you do decide to make a purchase, a further hour will be needed to complete the paperwork". This appeared with references to the visit being free of charge and the free services provided by EEC enticing the consumer to accept the visit and with the reference to " a couple of hours" leading the consumer to believe that the visit would last up to a maximum of two hours and only longer if there was paperwork to complete. The Adjudicator had stipulated in a letter to EEC's Solicitors dated 18 June 2008 that the confirmer's script should be amended to ensure that customers were informed that the sales visit, including postcode marking, survey and, where appropriate, completion of paperwork, would normally take no more than three hours from the time of arrival of the adviser to the time of their departure.

68. EEC considered that the OFT's case that visits to vulnerable consumers should not continue for three hours was a new argument and went further than the undertaking. They denied that there had been any breaches of the Code of Practice with regard to leaving the customer's home immediately. Further they maintained that the confirmer's script was sensible to break down the totality of the hours in the way that it did.

69. The Tribunal are of the view that three hours is too long for a visit to vulnerable consumers. In some instances, it should be obvious to a sales person that they should leave the consumer's home immediately or not proceed in the absence of a relative or friend of the consumer. The length of the sales visit on EEC's own estimate of the time required should otherwise not exceed 2½ hours. There was no upfront clarification in the appointment setting script of the likely length of the sales visit even though this had been a joint recommendation of the parties' experts. Further the amendment to the confirmer's script did not go far enough and was capable of misleading consumers as to the possible length of the sales visit.

Allegation 4 (Unnecessary or unsuitable products)

70. The OFT's case was that EEC supplied equipment and/or services that were either unnecessary or unsuitable to the needs of vulnerable customers whether by reason of design, cost or otherwise and for one of various reasons:

(a) The equipment was supplied was excessive to requirements and was out of proportion to the objective security needs of the consumer or their property.

(b) The security system was not necessary, replacing an existing system that met the consumer's needs adequately or duplicated a system that was available free from the local council or similar schemes.

(c) EEC's upgrade of its own security system was premature and unnecessary.

(d) Some of the equipment sold on repeat visits duplicated functions performed by previous equipment supplied by EEC.

(e) Some of the equipment was unsuitable as being too complex for the consumer to understand or operate.

(f) The equipment was unsuitable as the consumer could not physically use it or would be advised not to do so as in the case of a fire.

(g) Prior to 2004 EEC provided separate servicing and monitoring agreements for each individual item of equipment sold when industry practice was to provide one agreement for the complete system.

(h) The cost of the equipment was unreasonable and excessive for vulnerable customers on low incomes.

(i) EEC had supplied equipment or extended after care services to customers obviously infirm or when the representative was aware that the customer's circumstances were about to change.

71. EEC argued that the OFT's concerns could only be justified in the case of vulnerable customers, that EEC had training and procedures in place in an attempt to identify vulnerable customers and did not permit sales to such persons. In addition, EEC disputed the factual basis of the allegations.

72. The experts instructed acknowledged that this was a difficult area. The experts recommended that the sales person should be aware and make potential customers aware whether the local fire service or Police provided any equipment free of charge to local residents of the customer's age such as smoke alarms, and that prior to the sale of a fire extinguisher the physical capability of the customer to use the equipment and to judge the risk to their personal safety in trying to fight a fire with the extinguisher should be assessed.

73. The OFT alleged that sales of unnecessary or unsuitable equipment or services included the following:

(1) In the case of repeat visits, it was said that the volume and value of sales were unnecessary and excessive to requirements.

(2) Mr Bellamy (in his early 70's and just out of hospital, quite confused, hard of hearing and suffering memory loss) was said to have been sold security equipment that was too sophisticated for residential premises and more suitable for commercial property.

(3) Mr Roy Baston was sold an electrical inspection and remedial work after the local fire service had conducted a safety check which did not identify any risk of fire. It was accepted that the fire service were not electricians.

(4) Hazel Rew was said to have been sold a digicom and care unit when she had an existing alarm and could have obtained a voice pendant free from the local council.

(5) Mrs Simpson (89 years of age) was said to have been sold an alarm with monitoring when she had a community care system installed free with a contact service with named keyholders.

(6) Joan Illingworth (housebound) was said to have been sold an alarm even though she had an alarm that was maintained and serviced regularly. EEC's installation report stated that she did not use the old alarm due to poor health but found EEC's alarm very easy to use.

(7) Mrs B Beacock (in her 80's) was sold on 27 March 2009 vibration sensors, passive infra red detector, pull cords, natural gas detector, fire extinguisher, extended warranty and service agreement. She cancelled three days later on 30 March 2009 saying that she did not require the extras as they would cause confusion. It was said that she was sold a fire extinguisher that she could not use as she had arthritis and which she was advised not to use in the event of a fire. EEC stated that after cancellation she went out and bought a fire extinguisher herself.

(8) Mr G Turner (83 years of age) was sold an alarm system which was said to have been too complicated and not used despite repeated explanations, the system being considered neither appropriate nor cost effective. EEC stated that they offered to cancel but with the customer's son agreeing to keep the system for a lower price, negating the suggestion that the system could not be used. It was said that he was wrongly told that the electrics did not comply with regulations, even though the property had been rewired approximately ten years earlier.

(9) Daphne Linforth and Nancy Wooton (in their 80's and both suffering from Alzheimer's disease) were sold a digicom system that they did not know how to use and was too complex for their needs.

(10) Marjorie Kendrick (84-85 years of age and suffering from short term memory loss, early dementia and depression) was said to have been sold an alarm which often seemed too complex for her to understand or difficult to use, a video door entry system that she never used and a fire extinguisher that was extremely heavy for her and which she was unable to operate.

(11) Angela Gardner (80 years of age, partially disabled and at times mentally confused) was said to have been sold a door bell when her existing door bell worked fine and an alarm which she did not understand and could not operate.

(12) Margaret Cottrell (69 years of age, dementia and probably Alzheimer's disease) was said to have been sold a video door entry system, care unit and digicom that she could not understand or operate and an alarm when she had an alarm fitted one year previously. EEC stated that she did not use the earlier alarm because she kept forgetting the number, EEC's alarm not using a key pad.

(13) Horace Swindell (90 years of age, registered as partially sighted and with a hearing problem) was said to have been sold a video door entry system contrary to EEC's draft Code of Conduct. EEC stated that his wife was not partially sighted, though she was 95 years of age and had been diagnosed with dementia.

(14) Elsie Trowbridge (87 years of age and becoming confused) was said to have been sold a fire extinguisher that she could not use because of her arthritis.

(15) Joyce Burrell-Clayton (elderly lady registered as partially blind and suffering from Alzheimer's disease) was said to have been sold a door entry system even though she was partially blind and could not see to use the system. She believed that it was a radio.

(16) Mrs Elizabeth Northwood (82 years of age, suffering from dementia, being partially sighted and with arthritis) was sold a fire safety kit which she could not use because of her disability and would not be advised to use in the event of an emergency.

(17) Mr R Longmuir (91 years of age, neglected appearance and unable to make decisions on his own) was said to have been sold unnecessary and inappropriate equipment and/or services, with warranties being extended when they had two years to run.

(18) Eileen Downey was said to have been subjected to a misleading and unnecessary sale of an electrical inspection test and remedial works being told that they were required by EU law.

74. The OFT alleged that EEC was in breach of their Code of Practice in the following respects:

(1) Selling to customers who did not have the ability to understand the purchase they were making or did not have the ability to use or operate the equipment. The OFT relied in particular on the following cases-

(i) Horace Swindell (partially sighted but sold video door entry system).

(ii) Mrs B Beacock (sold fire extinguisher when had arthritis).

(iii) Mr G Turner (alarm system too complicated despite repeated explanations). The system was kept for a lower price,

(iv) Mr E Burnell (sold CCTV system too complex for her to understand and never used).

(v) Audrey Ross (could not operate CCTV system).

(2) Misleading customers or providing incorrect information about products or services or omitting information that would help a customer to make an informed decision regarding a purchase from EEC. The OFT relied on the following by way of example –

(i) Mr G Turner (told that electrical works required by latest regulations).

(ii) Audrey Ross (misleading information about the cost savings that her solar system and controllable heating system would provide and omission of long term recoupment necessary to make the purchase worthwhile).

(iii) The failure to clarify the consequences of taking out a longer term after sales agreement.

(iv) The failure to inform customers that they could not get out of after sales agreements before the expiry of the fixed term.

75. EEC did not accept that they had sold unnecessary or unsuitable products or services to the extent alleged by the OFT or that EEC as a company had sought to mislead customers, EEC relying on their procedures, training and their Code of Practice.

76. The OFT sought to rely on the differences in the treatment of suitability between EEC's draft Code of Conduct and the Code of Practice. The draft Code of Conduct dealt with checks before exchange of an existing security system, that an exchange should not take place if the existing system had an agreement in place with more than three months left to run, and that sales advisers should assess the amount of security equipment that a customer had and put them on the no sales list if they had sufficient equipment or services. There were no or no adequate provisions dealing with suitability in the Code of Practice.

77. The OFT contended that EEC's "Seven Steps" transition was not compliant with Home Office guidance on appropriateness, proportionality or poor cost effectiveness/ affordability, that interest free credit was used to get round any lack of affordability, that

EEC's guidance was unclear and did not go far enough, that employees were unduly incentivised by the volume of sales, that there was no real suitability check with customers being asked when they had no expertise, that there was no vulnerability filter or age limit or spending limit, that there were no real checks on whether a customer understood and could operate equipment, that replacement of alarms or upgrades were premature, that there were no effective point of sale checks, or any effective disciplinary procedures in appropriate cases.

78. The OFT maintained that EEC's practice of selling to consumers security equipment and after sales services that were unnecessary or unsuitable for their needs was unfair, abusing the relationship of trust that the consumer placed in EEC. This was said to be particularly so in the case of the elderly, infirm or otherwise vulnerable. It was alleged that EEC exploited the susceptibility of vulnerable consumers for such products and that the changes that EEC had implemented did not go far enough.

79. EEC sought to rely on the acceptance of the experts that the issue of unnecessary or unsuitable products or services was a difficult area to resolve because of the subjective element of the assessment. They relied on the fact that there was no suggestion that they as a company were deliberately ignoring their own guidance or that they had introduced other practices or procedures that had the effect of circumventing their established procedures, training or Code of Practice.

80. It was clear to the Tribunal that there had been numerous instances of sales of unnecessary or unsuitable products or services as alleged by the OFT. EEC's procedures, training and Code of Practice had not been adequate to prevent such cases from occurring. The evidence showed that customers were still being sold equipment that was unnecessary or was unsuitable being too complicated for them to operate. The Tribunal accept on the evidence that there has been no real suitability check and no adequate vulnerability filter, and with there now being no spending limit in force.

Allegation 7 (Unfair renewal and tying)

81. The OFT's case was that EEC renewed servicing and monitoring agreements well before the expiry of an existing agreement and that they tied elderly customers into lengthy agreements that made no allowance for the fact that their personal circumstances were likely to change. A five year agreement was unacceptably long. It was considered unfair to tie in customers over the age of 80 into such agreements.

82. EEC argued that when a customer renewed a contract they obtained a fixed price at the time of renewal, thereby saving the cost of any future price rises. EEC permitted a customer to renew for a period of 1-5 years, with no customer having a contract lasting longer than five years and with there being a price discount the longer the renewal period. There was no obligation on a customer to renew a service or monitoring agreement or to renew for any particular period, with EEC's research suggesting that only some 28% of customers renewed for five years.

83. The experts instructed recommended that the renewal dates for all new monitoring and service contracts be brought together wherever possible to reduce customer confusion, that a sliding scale of time periods for contact prior to the expiry of the agreement be introduced so that for example a customer could not be contacted more than nine months before the expiry of a service or monitoring contract for 3-5 years and not more than 3 months before the expiry of a contract for 1-2 years, and that there should be a maximum age limit of 80 years for the sale of contracts longer than two years.

84. The OFT's allegation of unfair renewal and tying relied on the following:

(1) Graeme Dow, Security Consultant, referred to companies typically having three year contracts renewable 1-2 months before the end of the term and with the premium being paid annually.

(2) Karen Bethell-Clarke of the CIB referred to Mr Ball's estimate that 33% of sales were from maintenance agreements, that EEC sold its monitoring and service contracts in such a way as to extend the contracts forty-seven months into the future, that customers had been contacted where their agreement had twenty-two months or less remaining, that full payment was taken for these agreements at inception, and that although EEC stated that they set aside 15% of the value of each agreement for the future cost of meeting its commitments no steps had been taken to insure against the risk to customers in the event of the company ceasing to trade.

(3) The experts were concerned about the renewal of contracts and that changes should be made to the renewal period and length of agreements for elderly customers.

(4) The evidence in relation to the following customers –

(i) Mrs M McCarroll (79-80 years of age) was sold three year agreements continuing until April-May 2006. She moved into full-time care in 2004.

(ii) Mr R Longmuir (late 80's/early 90's) was sold a three year service agreement on an alarm in June 2001, renewed for a further three years in May 2002 when there was more than two years remaining and renewed again for a further three years in July 2005 where there was nearly two years remaining. He was sold a three year extended warranty on an intercom door entry system in November 2002, renewed for a further three years eight months in July 2005 and renewed again for a further three years in May 2008 when there was fourteen months remaining. He was tied into agreements into his 90's.

(iii) Edna Woods (in her 80's) was sold a four year monitoring and service agreement in respect of an alarm upgrade in February 2004, renewed for a further two years ten months in December 2004 when there was three years two months remaining and renewed again for a further three years in January 2008 when there was two years one month remaining. The three year service agreement for a care unit was renewed in 2008 when there was two years one month remaining. She was tied into agreements into her late 80's.

(iv) Stella Pike was sold a five year service agreement on an alarm in November 1993, renewed for a further three years in December 1998 Following an alarm upgrade, she was sold a three year service agreement in April 2000, renewed for a further two years in July 2002 when there was nine months remaining and renewed again for a further three years in April 2004 when there was twelve months remaining. She was sold a five year service agreement on a video door entry system in 1993, renewed for one year in December 1998, four years in April 2000, four years in July 2002 when there was one year nine months remaining and three years in April 2004 when there was four years remaining. She was sold other service agreements in respect of accessories that she purchased, the agreements being similarly renewed. She was tied into agreements which continued beyond the date of her death in July 2008.

(v) Audrey Ross (in her 70's) was sold a three year service and monitoring agreement in August 2007, renewed for a further three years in October 2009 when there was ten months remaining.

(vi) Doris Keiller was sold three year monitoring and service agreements in April 2001. She sought to cancel the agreements and to have equipment removed within the first year but was said to have been refused any refund.

(vii) Margaret Weller (in her 80's) was sold a one year monitoring agreement in November 2001, extended two days later for a further two years, renewed eleven months later for a further three years and three months later for a further two years. She was sold a three year service agreement renewed nine months later for a further two years.

(viii) Margaret Tinsley (in her late 60's) renewed a three year service agreement for a fire safety kit and video door entry system after one year when there was two years remaining.

(ix) Marjorie Kendrick (in her 80's) was sold a five year extended warranty on a video door entry system, a five year service agreement on a fire extinguisher and renewed a three year service and monitoring agreement

on an alarm system after one year when there was one year eleven months remaining.

(x) Joyce Lucas (78 years of age) was sold a two year monitoring and service agreement for a digicom, renewed after three months when there was twenty-one months remaining.

(xi) Nora Ive (in her 70's) was sold a three year service agreement on an alarm, renewed for a further three years when there was eleven months remaining.

(xii) Mr Cookson was sold a three year servicing agreement on an alarm upgrade in June 2004, renewed for a further two years eight months in June 2005 when there was two years remaining. He was sold a three year monitoring agreement, renewed after four months for a further two years when there was two years eight months remaining.

(xiii) Mrs B Beacock (in her 80's) was sold a five year service agreement and four year monitoring agreement on an alarm in November 2008.

(xiv) There were said to be many customers in their late 80's who were sold service and monitoring agreements for a term in excess of three years, including Daphne Linforth and Nancy Wooton, Margaret Clarke, Mrs Simpson, Stanley Turner and Mr R Longmuir.

85. The OFT sought to rely on the third undertaking given to the Adjudicator by Mr Ball on behalf of EEC on 16 June 2008 relating to service and monitoring contracts. The undertaking was as follows:

> "i. Service and monitoring contracts may be renewed only if they have 12 months or less to run;
>
> ii Term 4 of the terms and conditions of a service agreement and term 4 of the terms and conditions of a monitoring agreement will be amended in accordance with paragraph 3.i above".

86. The OFT alleged that the undertaking was on the basis that agreements would be for no longer than three years, whereas EEC had extended the maximum term of agreements to five years. The length of the maximum permissible term was increased from four years to five years, thereby undermining the effectiveness of the undertaking. Further the change in the renewal period had not been implemented until April 2009 and then only prospectively.

87. EEC relied on the fact that there was no suggestion of any breach of undertaking whereby contracts were renewed more than twelve months before expiry. It was said to have been agreed with the Adjudicator that the amendment of EEC's contractual terms

could wait until the contracts were reprinted. In practice, EEC had amended its procedures so that renewal did not take place more than twelve months before the expiry of a contract.

88. The OFT sought to rely on the differences in the treatment of unfair renewal and tying between EEC's draft Code of Conduct and the Code of Practice. The draft Code of Conduct provided that the age of a customer must be taken into account and that it might be more appropriate to only offer renewals for servicing and monitoring agreements one year at a time to someone over the age of 80, and that if a customer had more than six months to run to expiry on their existing servicing, monitoring and warranty agreements it was to be acceptable for any extension to those agreements to be put on EEC's Easy Payment Plan. There were no such provisions in the Code of Practice, with the Code of Practice providing that all agreements over £500 could be placed on Easy Payment Plan with the term of the Plan not to exceed the term of the agreement and no limit in relation to the time left to run.

89. The OFT contended that EEC's practice of renewing after sales agreements well in advance of expiry and tying elderly, infirm or otherwise vulnerable consumers into long term inflexible agreements where they had paid in full and without entitlement to a refund in the event of early termination or a change of circumstances was unfair and not consistent with honest practice. The OFT considered that the changes implemented by EEC were not far reaching enough and did not remove the detriment to consumers.

90. EEC did not think it necessarily appropriate for a third party to in effect dictate what contracts were acceptable and what were not for those over 80 years of age, with the possibility of such customers preferring to take a reduction in price that a longer contract gave them. They maintained that the suggestion they should offer a refund for early termination would undermine the commercial benefits of a price reduction for a longer term. With regard to renewals, they could now only be made in the last twelve months of an agreement.

91. The Tribunal accept that the evidence shows that prior to the undertakings given to the Adjudicator service and monitoring agreements had been renewed an unreasonable length of time before the expiry of an existing agreement and taking no or no adequate account of the age of the consumer. Even now, there appeared to be no adequate procedures in place to prevent an elderly and possibly vulnerable consumer being tied into an agreement of an inappropriate length having regard to the age of the consumer. The unfairness of the practice was compounded by the fact that full payment was required in advance, the absence of any satisfactory provision for early termination or refund, and the lack of any or any adequate warning that it was not possible to terminate an agreement early.

Allegation 8 (Premature installation)

92. The OFT's case was that until recently EEC's standard practice had been to install equipment as soon as possible after sale and normally within 2-3 days of purchase, and

that the practice of installing equipment before the expiry of the statutory 7 days or contractual 14 days cancellation period was likely to pressure elderly consumers not to cancel the contract and thereby frustrate the object of the cooling off period.

93. The OFT maintained that the practice of premature installation had been widespread. In relation to the period since 2008, the OFT's allegation of premature installation included the following:

> (1) Mrs B Beacock had an alarm installed in November 2008, three days after purchase.
>
> (2) Vera Croxford had a CCTV system installed two days after purchase in November 2008.
>
> (3) Mr Cookson had a CCTV system installed within six days of purchase in August 2008.
>
> (4) Mr G Turner had a security system installed the following day after purchase in April 2009.

94. The OFT accepted that since 2008 EEC had amended its procedures so that the standard policy was to arrange installation as soon as possible after the 14 day contractual cancellation period had expired, with installation only taking place within 14 days if the customer gave their consent. If equipment was installed within the cancellation period and the contract was cancelled, EEC would remove it and make good without charge.

95. EEC stated that they did not dispute that historically they had installed equipment within the cancellation period and that they would continue to do so if requested by a customer in writing. Mr Ball of EEC had carried out an analysis, on the basis of which EEC did not accept that installation during the cancellation period dissuaded customers from cancelling.

96. The experts instructed referred to the fact that Sefton Trading Standards had advised EEC that the majority of their contracts fell outside the definition of "specified contract" within the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008.

97. The OFT sought to rely on the fourth undertaking given to the Adjudicator by Mr Ball on behalf of EEC on 16 June 2008 relating to the installation of equipment or provision of services before the expiry of the cancellation period. The undertaking was as follows:

> "i. Equipment may be installed within the extended cancellation period only with the customer's written agreement and with written confirmation that his/her

cancellation rights will not be affected and that installed goods which are cancelled will be removed at no charge to the customer;

ii. Details of installations made before the expiry of the cancellation period and the reasons for early installation are to be recorded and made available for audit by Sefton Trading Standards Service and/or the OFT".

98. The OFT referred to their concern that there should be an independent request from the consumer for installation within the cancellation period and a positive written agreement on the part of the consumer that was free from influence by the sales representative. They alleged breaches of the undertaking in the case of Mr Cookson and Mr G Turner.

99. EEC denied that there had been any breach of the undertaking. They maintained that the purpose of the undertaking was to ensure that customers were aware that even if equipment was installed within the cancellation period it did not affect their right to cancel the contract and to inform the customer that any equipment would be removed at no charge, not to ensure that there was an unsolicited request for installation within the cancellation period. The Adjudicator considered that the amendment to EEC's customer purchase report implemented the undertaking.

100. The OFT sought to rely on the differences in the treatment of cancellation between EEC's draft Code of Conduct and the Code of Practice. The draft Code of Conduct provided for the situation where the installer arrived at a customer's home and the customer wish to cancel the order. There was no such provision in the Code of Practice.

101. The OFT contended that EEC's practice of installing equipment within the statutory or contractual cancellation period was unfair as it influenced consumers, especially vulnerable consumers, not to exercise their cancellation rights. Despite the changes that EEC had implemented, the OFT was concerned that EEC could circumvent their concerns. The OFT considered that the fact that EEC might be lawfully entitled to install equipment within the cancellation period did not prevent such a practice from being unfair.

102. EEC stated that they had agreed to change their practices to alleviate the concern of the Adjudicator by agreeing to only install within the cancellation period with the written agreement of the customer, with confirmation that the customer's cancellation rights would not be affected and that installed equipment would be removed at no charge to the customer.

103. In the Tribunal's view, the practice of installing equipment within the cancellation period is likely to deter a not insignificant number of elderly, infirm or otherwise vulnerable consumers from exercising their cancellation rights. The changes implemented by EEC undoubtedly do go some way to reducing consumer detriment but the only way of removing such detriment altogether is not to install equipment within the cancellation period at all.

Allegation 10 (Full payment)

104. The OFT's case was that until 2008 EEC required customers to pay in full in advance for any orders of equipment, that the practice of requesting immediate payment in full was unfair as it was likely to affect the consumer's decision whether to exercise their cancellation rights and to deny customers the right of set off for faulty or inadequately installed goods.

105. The OFT accepted that since 2008 EEC had introduced a 30% deposit for equipment, with the 70% balance payable on installation. The OFT remained concerned where the balance of the payment was made on installation occurring within the cancellation period because it undermined the customer's cancellation rights.

106. The OFT referred to EEC's practice to still require full payment in advance for warranties, servicing and monitoring agreements, even though they could be extended for up to five years so that the services would not be performed for a considerable time.

107. The OFT's allegation of consumer detriment and unfairness in relation to full payment relied on the following:

(1) Graeme Dow's evidence as to premiums being typically paid annually.

(2) Karen Bethell-Clarke's evidence as to the CIB's concern regarding EEC's full payment policy and the inadequate protection to safeguard customers in respect of their advance payments.

(3) Mrs M McCarroll paid in full for contractual services on her security equipment until April-May 2006. She went into full-time care by 2004. There was said to be no evidence of any refund from EEC.

(4) Stella Pike paid in full for a servicing agreement on a video door entry system, extended until April 2011. She died in July 2008.

(5) Doris Keiller sought to cancel three year monitoring and servicing agreements and have the equipment removed within the first year but was said to have been refused any refund.

108. EEC did not dispute that historically they had required full payment in advance in relation to sales of equipment, maintaining that there was nothing unfair or improper in such practice and indeed that it was a common business practice. They disputed that there was any evidence of customers being dissuaded from cancelling a contract or that there was any general complaint about the quality of their work or that the equipment supplied was not of merchantable quality. They had nevertheless changed their practices to introduce a 30% deposit for all orders involving installation work in accordance with the fifth undertaking given to the Adjudicator by Mr Ball on behalf of

EEC on 16 June 2008, there being no suggestion that EEC had not complied with the undertaking.

110. EEC maintained the argument in relation to warranty, servicing and monitoring contracts that the customer obtained the benefit of a fixed price and at a discount for payment in advance for a longer term.

111. The Tribunal do not see any basis for the OFT's concerns as to the balance of payment for the installation of equipment being due on completion of the installation, EEC's undertaking to the Adjudicator referring to the balance being payable only when the work had been completed to the customer's satisfaction. With regard to warranty, servicing and monitoring agreements, the Tribunal accept that payment in full in advance can work unfairly in the case of individual customers depending on the maximum permitted length of the agreement and whether or not provision is made for a refund in the event of early termination or change of circumstances.

Allegation 11 (Unfair terms in agreements)

112. Following the decision of the Supreme Court in *Office of Fair Trading v Abbey National Plc and Ors* [2009] 3 WLR 1215, all terms are susceptible to an assessment of fairness provided that the assessment is not an assessment as to the "adequacy of the price or remuneration, as against the goods or services supplied in exchange".

113. Schedule 2 to the Unfair Terms in Consumer Contracts Regulations 1999 contains an "indicative and non-exhaustive list of terms which may be regarded as unfair". Whether a term is in fact unfair depends on whether the test of unfairness in Regulation 5(1) is satisfied, the same providing that "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".

114. Pursuant to Regulation 6(1), "… 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".

115. The OFT maintained that the fairness assessment had to take into account the fact that the contract was concluded on EEC's standard written terms in the consumer's own home and with consumers that were elderly, infirm and/or vulnerable, with the requirement of good faith being harder to satisfy in the context of contractual dealings with elderly, infirm and/or vulnerable customers.

116. The OFT's case was that five of EEC's contractual terms were unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999, the terms relating to the following:

(i) Full payment in advance.

(ii) Automatic renewal of an agreement.

(iii) Retention of advance payment.

(iv) Transfer without refund.

(v) Entire agreement clause.

117. The OFT referred to three versions of EEC's terms and conditions namely December 2002, March 2008 (considered during the adjudication process) and April 2009 (revised to take the OFT's concerns into account).

(i) Full payment in advance

118. The relevant clauses were as follows:

(a) Clause 1(a) of the December 2002 service agreement provided for the customer to pay the maintenance charge detailed in the sales order in full to EEC.

(b) Clause 3(a) of the March 2008 combined servicing, extended warranty and monitoring agreement provided for payment of the service/extended warranty charge in full to EEC.

(c) Clause 3(a) of the April 2009 combined servicing, extended warranty and monitoring agreement provides for payment of the service/extended warranty charge in full to EEC.

119. The OFT submitted that EEC's contractual term requiring full payment in advance was prima facie unfair by virtue of paragraph 1(b) of Schedule 2 to the Unfair Terms in Consumer Contract Regulations 1999, it being said that it had the object or effect of inappropriately excluding or limiting the legal rights of the consumer against EEC in the event of its total or partial non-performance of any of its obligations including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer might have against it. The issue overlapped with allegation 10, both being concerned with the question of full payment.

120. The OFT maintained that the requirement of full payment was characteristic of an imbalance between the parties to the detriment of the consumer, which was contrary to Regulation 5(1) of the 1999 Regulations and that it was also contrary to good faith as the consumer was induced to pay in full up front on the basis that they received a fixed price and discount which disguised the true impact of the obligation, particularly when seen in the context of the lack of any refund in the event of early termination.

121. EEC argued that customers were fully aware that they must make full payment in advance, that this was a common term in contracts, that there was no lack of good faith in the use of such a term and no significant imbalance in the rights of the parties, the customer having to pay and EEC to make the supply. EEC denied that the term fell within paragraph 1(b) of Schedule 2 to the 1999 Regulations, it being said that the provision did not exclude any right of set off or seek to exclude any rights that the customer might have against EEC.

122. The Tribunal has already commented in relation to allegation 10 that payment in full in advance can work unfairly in the case of individual customers depending on the maximum permitted length of the agreement and whether or not provision is made for a refund in the event of early termination or change of circumstances.

123. The term requiring full payment is, in the Tribunal's judgment, prima facie unfair by virtue of paragraph 1(b) of Schedule 2 to the 1999 Regulations. The Tribunal agree with the OFT that requiring full payment in advance undermines the customer's right to set off because it prevents them from withholding payment in respect of a future period in response to non-performance or poor performance in a preceeding period: see OFT 311, Unfair Contract Terms Guidance (September 2008) at page 28, paragraph 2.5.3.

124. The term requiring full payment in advance was not individually negotiated. In the Tribunal's view, there is a lack of good faith in the case of such a term in longer agreements when dealing with elderly, infirm and/or vulnerable consumers, particularly in the absence of a provision for a refund in the event of early termination or a change of circumstances. The term does cause a significant imbalance in the rights and obligations of the parties because of its effect on the ability of the consumer to set off any claim for non-performance or poor performance of the contract and the fact that the consumer is effectively locked into the agreement having paid up front in full for the period of the agreement. The term is in these circumstances to the detriment of the consumer and is unfair.

(ii) <u>Automatic renewal of an agreement</u>

125. The relevant clauses were as follows:

> (a) Clause 1(a) of the December 2002 service agreement provided for the term of the agreement to be extended by agreement in writing between the parties. It did not contain a provision for automatic renewal of the agreement.
>
> (b) Clause 4 of the March 2008 combined servicing, extended warranty and monitoring agreement provided for the agreement to continue unless terminated by either party giving at least 60 days notice in writing to the other.
>
> (c) Clause 4 of the April 2009 combined servicing, extended warranty and monitoring agreement provides for the length of the agreement to be extended by

a further agreement in writing between the parties in the last twelve months before the expiry date. Again, there is no provision for automatic renewal of the agreement.

126. The OFT submitted that the provision for automatic renewal in the March 2008 agreement was unfair by virtue of paragraph 1(h) of Schedule 2 to the Unfair Terms in Consumer Contracts Regulations 1999, that the agreement would renew for at least a further 60 days even if the customer exercised their right of termination as soon as they were permitted to do so under the contract, that for the purpose of Regulation 5(1) this reflected a significant imbalance in the parties' rights and obligations since EEC was permitted to terminate the contract early yet the consumer could not do so, and that the effect of the automatic renewal was not in line with the requirement of good faith.

127. EEC argued that the OFT were misconstruing paragraph 1(h) of Schedule 2 to the 1999 Regulations and Clause 4 of the March 2008 agreement, it being said that Clause 4 of that agreement did not give any deadline for the customer to indicate that they did not wish to extend the contract, that they could give notice in writing at any time including before the expiry of the agreement, and that there was no subsequent minimum term.

128. The Tribunal accept that there was no restriction in Clause 4 of the March 2008 agreement as to when the customer could give notice that he did not wish to extend the agreement. However the Tribunal note that Clause 8.1(a) of the March 2008 agreement provided that the agreement might be ended by either party giving to the other not less than 60 days notice in writing "at any time after the expiry date of the agreement or the expiry date of any extended agreement". This does, in the Tribunal's view, give support for the argument that the March 2008 agreement would be considered more stringent than paragraph 1(h) of Schedule 2 to the 1999 Regulations, there being no provision on the basis of Clause 8.1(a) for the consumer to give notice of termination until after the expiry date of the initial term of the agreement.

129. The term dealing with automatic renewal in the March 2008 agreement was not individually negotiated. In the Tribunal's view, there is a lack of good faith in the case of a provision for automatic renewal when dealing with elderly, infirm and/or vulnerable customers, where they may not remember the expiry date and take steps to bring the agreement to an end. The term does cause a significant imbalance in the rights and obligations of the parties because of the effect on the consumer's ability to terminate the contract with effect from the expiry date of the initial period of the agreement. The term is in these circumstances to the detriment of the consumer and is unfair.

130. The Tribunal note that EEC has now changed the terms of its agreement so that in future it can only be extended by further agreement in writing.

(iii) Retention of advance payment

131. The relevant clauses were as follows:

(a) Clause 8.1(a) of the December 2002 service agreement provided that the agreement might be terminated by either party giving not less than 60 days notice in writing to the other party at any time after the initial period.
Clause 8.2(a) provided that if EEC terminated the agreement it should be entitled to retain any advance payment made by the customer.

(b) Clause 8.1(a) of the March 2008 combined servicing, extended warranty and monitoring agreement provided that the agreement might be ended by either party giving to the other not less than 60 days notice in writing at any time after the expiry date of the agreement or the expiry date of any extended agreement.

Clause 8.2 provided that if EEC terminated the agreement it should be entitled to retain all or part of any advance payment made by the customer as a fair and reasonable contribution towards any losses or costs they might suffer as a result of the termination.

(c) There is no such provision in the April 2009 combined servicing, extended warranty and monitoring agreement.

132. The OFT submitted that the provision for retention of the advance payment by EEC in the March 2008 agreement compounded the absence of any term allowing the customer to terminate the agreement early, it not being necessary that EEC had actually suffered any losses or costs or that the sum retained reflected the amount of any such losses or costs. It was argued that the provision for retention of any advance payment was unfair by reason of paragraphs 1(d) and (f) of Schedule 2 to the Unfair Terms in Consumer Contracts Regulations 1999, permitting EEC to retain the sums paid for services not yet supplied where it alone was responsible for dissolving the contract. There was no compensation payable to the consumer for the cancellation of a contract, in contrast with EEC's retention of payments where the consumer would like to get out of a contract. It was said that there was a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

133. EEC argued that the OFT were misconstruing paragraph 1(d) of Schedule 2 to the 1999 Regulations which was concerned with a clause that allowed a supplier to retain sums where the consumer (not the supplier) cancelled the contract, and that the provision did not fall within paragraph (f) of Schedule 2 since other than where the customer was in breach EEC could only terminate the contract after the expiry of the fixed term, when the customer would not have made payment for any services that were not being supplied.

134. The Tribunal can see the force of EEC's argument in relation to paragraphs 1(d) and (f) of Schedule 2 to the 1999 Regulations, but Schedule 2 contains an "indicative and non-exhaustive list of terms which may be regarded as unfair". Clause 8.2 of the March 2008 agreement does on its face permit EEC to retain sums paid in advance for services where EEC alone is responsible for dissolving the contract.

135. The term dealing with retention of any advance payment in the March 2008 agreement was not individually negotiated. In the Tribunal's view, there is a lack of good faith in the case of a provision entitling EEC to retain any advance payment where it is not necessary that it should have actually suffered any losses or costs or that the sum retained represented the amount of any such losses or costs, as the OFT argued. The term does cause a significant imbalance in the rights and obligations of the parties because of the absence of compensation payable to the consumer for the cancellation in appropriate circumstances. The term is in these circumstances to the detriment of the consumer and is unfair.

136. Again, the Tribunal note that EEC has now changed the terms of its agreement so that in future there is no provision entitling it to retain an advance payment if it terminates the agreement.

(iv) Transfer without refund

137. The relevant clauses were as follows:

> (a) Clause 1(g) of the December 2002 service agreement provided for the customer not to assign the benefit of the agreement without the previous written consent of EEC. Clause 12 of the agreement provided that in the event of the customer dying, then upon EEC being notified in writing the agreement would be suspended until a new occupier had moved into the property or the owners of the property obtained total ownership where the agreement would be transferred over to them with all the benefits of the agreement.
>
> (b) Clause 3(h) of the March 2008 combined servicing, extended warranty and monitoring agreement provided that the customer was not to transfer the benefit of the agreement without EEC's previous written consent which was not to be unreasonably withheld. Clause 9(a) provided that if the customer died during the time the agreement was in force and EEC were notified of the customer's death in writing they agreed to suspend the agreement for a maximum period of six months during which time they had to be informed in writing of the new registered owner of the property in which the equipment was installed and whereupon EEC agreed to transfer the balance of the life of the agreement to the new registered owner. Clause 9(b) provided that should the customer wish to transfer or assign the agreement to another person other than at the customer's death they would agree, subject to payment to EEC of an administration fee of £100 including VAT, as long as the equipment was to remain in the United Kingdom and all other terms of the agreement had been honoured by the customer.
>
> (c) Clauses 3(h), 9(a) and 9(b) of the April 2009 combined servicing, extended warranty and monitoring agreement contain similar provisions to those in the March 2008 agreement.

138. The OFT observed that Clause 9 of the March 2008/April 2009 agreements made no provision for termination of the agreement and refund of advance payments where the customer died or went into a care home during the life of the agreement, that the consumer's predicament was not helped by a right to transfer the agreement to a different property or person in contrast to a refund of the balance of the advance payment, that the only possibility was for EEC to box up the equipment or remove it but with the contract remaining in force, and that the terms and conditions otherwise provided that the customer had to pay £100 for the right to transfer the contract other than at death. It was argued that Clause 9 was prima facie unfair as falling within paragraphs 1(e) and (i) of Schedule 2 to the Unfair Terms in Consumer Contracts Regulations 1999, it being said to mean that the customer was required to pay a disproportionately high sum as compensation for their inability to fulfil their obligations and that the effect of the provisions were not brought to the consumer's attention in an open and transparent way so they were irrevocably bound to terms with which they had no real opportunity of becoming acquainted before the conclusion of the contract. It was also argued that a provision for transfer within six months of death was too inflexible and short where the estate had to deal with probate.

139. The OFT maintained that the provisions were unfair pursuant to Regulation 5(1) of the 1999 Regulations as representing a significant imbalance in the parties' rights and obligations to the detriment of the consumer and were contrary to good faith, particularly in the context of dealings with elderly, infirm and/or vulnerable customers.

140. EEC argued that there was no detriment to the consumer by virtue of Clause 9 which allow the customer to transfer the agreement to a third party and there was no lack of good faith, no significant imbalance in the rights of the parties and no detriment to the consumer. EEC considered that the OFT were misconstruing paragraphs 1(e) and (i) of Schedule 2 to the 1999 Regulations.

141. The Tribunal see nothing inherently unfair in Clauses 3(h), 9(a) or 9(b) of the March 2008/April 2009 agreements, with Clause 9 giving the consumer additional rights by way of transfer rather than seeking to unreasonably restrict transfer under the agreement. However, the Tribunal does accept that the provision permitting transfer within six months of death is too inflexible and short where the estate has to deal with probate.

(v) Entire agreement

142. The relevant clauses were as follows:

> (a) Clause 5 of the December 2002 service agreement contained no entire agreement clause, though there were broad limitations of liability under Clause 5 of the agreement.
>
> (b) Clause 10.1 of the March 2008 combined servicing, extended warranty and monitoring agreement provided that the terms and conditions together with

EEC's sales order/invoice set out the whole of the agreement relating to EEC's servicing of the customer's equipment, that nothing said by any security adviser on EEC's behalf should be understood as a variation of the agreement or as an authorised representation about the nature or quality of the services provided, and that except for fraud or fraudulent misrepresentation EEC should have no liability for any such representation being untrue or misleading. Clause 10.2 provided that no change to or amendment of the agreement should bind either party unless it was in writing and signed by the customer and a director of EEC.

(c) Clause 10(a) of the April 2009 combined servicing, extended warranty and monitoring agreement provides that EEC intended to rely upon the written terms and conditions, that when the customer signed the agreement they accepted the terms and conditions, that they were therefore to read the agreement carefully and that if there was anything they did not understand or did not agree with they should ask a member of staff before signing. Clause 10(b) contains a similar provision to Clause 10.2 of the March 2008 agreement.

143. The OFT submitted that Clause 10.1 of the March 2008 agreement fell within paragraph 1(n) of Schedule 2 to the Unfair Terms in Consumer Contract Regulations 1999, which related to terms having the object or effect of limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making the commitments subject to compliance with a particular formality. It was said that both the OFT and the Court regarded such terms as unfair: see OFT 311, Unfair Contract Terms Guidance (September 2008) at pages 61-62, paragraphs 14.1.1-14.1.8; and *Office of Fair Trading v MB Designs (Scotland) Limited* [2005] SLT 691 at paragraphs 43 and 46 per Lord Drummond Young. The OFT maintained that a similar analogy should apply to the fairness of EEC's sales terms under Regulation 5(1) of the 1999 Regulations, particularly in the context of direct selling of security equipment to elderly, infirm and/or vulnerable customers in their own home.

144. EEC argued that entire agreement clauses were common place in contracts, relying on *Inntrepeneur Pub Co (GL) v East Crown Limited* [2000] 2 Lloyds Reps. 611 at page 614, paragraph 7 per Lightman J. It was said that such clauses did not seek to take advantage of the customer and were not contrary to the requirement of good faith in that it was not hidden away but was included with the other terms and conditions, and that the term could not be regarded as unfair.

145. The Tribunal accept the OFT's argument that Clause 10.1 of the March 2008 agreement falls within paragraph 1(n) of Schedule 2 to the 1999 Regulations. The entire agreement clause in the March 2008 agreement was not individually negotiated. In the Tribunal's view, there is a lack of good faith in a clause which seeks to exclude liability for anything said by a security adviser otherwise acting on behalf of EEC about the nature or quality of the services provided other than in the case of fraud or fraudulent misrepresentation particularly when dealing with elderly, infirm and/or vulnerable customers in their own home. The term does cause a significant imbalance in the rights and obligations of the parties because of the attempt to exclude liability for

such statements. The term is in these circumstances to the detriment of the consumer and is unfair.

146. Again, the Tribunal note that EEC has now changed the terms of its agreement so that there is now the very much watered down provision in Clause 10(a) of the April 2009 agreement.

G. Proposed remedial action

147. The OFT's position was that although EEC had offered undertakings to the Adjudicator, those undertakings were not sufficient and did not go far enough. The undertakings had in any event not been incorporated into EEC's Code of Conduct in accordance with EEC's seventh undertaking to the Adjudicator, with the draft Code of Conduct having never been implemented. The OFT considered that both EEC's previous practices and current practices were relevant to the issue of fitness and that there was continuing unfitness on the part of EEC.

148. EEC's case was that they had amended their practices and contractual terms even where they saw no unfairness, they had sought advice from their home authority Sefton Trading Standards, they had endeavoured to obtain guidance from the OFT, and they remained willing to abide by any reasonable request from the OFT. They submitted a document entitled "Revised proposed remedial action", setting out proposed remedial action that EEC would take to ensure that it was fit to hold a consumer credit licence. The document had been revised to take into account matters raised in the hearing, including criticism of previous changes. A copy of the document is annexed to this decision.

149. It was said on behalf of EEC that they were willing to offer further undertakings or comply with such reasonable requirements as might be imposed by the OFT under Section 33A of the Consumer Credit Act 1974. EEC invited the Tribunal to find on the evidence that they were fit to hold a licence, to quash the determination of the Adjudicator revoking EEC's consumer credit standard licence and, if considered appropriate, to remit the matter to the OFT with a view to the imposition of such requirements on EEC as might be necessary. The OFT sought that the Adjudicator's decision be confirmed and EEC's appeal dismissed.

H. The relevant statutory regime

150. Section 25 of the Consumer Credit Act 1974 deals with the requirement that the licensee is to be a fit person. It provides insofar as material that –

> "(1) 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 …

(2) In determining whether an applicant for a licence is a fit person for the purposes of this section the OFT shall have regard to any matters appearing to it to be relevant including (amongst other things) –

(a) the applicant's skills, knowledge and experience in relation to consumer credit businesses, consumer hired businesses or ancillary credit businesses;
(b) such skills, knowledge and experience of other persons who the applicant proposes will participate in any business that would be carried on by him under the licence;
(c) practices and procedures that the applicant proposes to implement in connection with any such business;
(d) evidence of the kind mentioned in sub-section (2A).

(2A) That evidence is evidence tending to show that the applicant, or any of the applicant's employees, agents or associates (whether past or present) or, where the applicant is a body corporate, any person appearing to the OFT to be a controller of the body corporate or an associate of any such person, has –

(a) committed any offence involving fraud or other dishonesty or violence;
(b) contravened any provision made by or under –
(i) this Act;
(ii) Part 16 of the Financial Services and Markets Act 2000 so far as it relates to the consumer credit jurisdiction under that Part;
(iii) any other enactment regulating the provision of credit to individuals or other transactions with individuals;
(c) contravened any provision in force in an EEA State which corresponds to a provision of the kind mentioned in paragraph (b);
(d) practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business; or
(e) engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not) …".

151. Section 25A deals with guidance on the fitness test and provides that –

"(1) The OFT shall prepare and publish guidelines in relation to how it determines, or how it proposes to determine, whether persons are fit persons as mentioned in section 25.

(2) If the OFT revises the guidance at any time after it has been published, the OFT shall publish it as revised.

(3) The guidance shall be published in such manner as the OFT thinks fit for the purpose of bringing it to the attention of those likely to be affected by it.

(4) In preparing or revising the guidance the OFT shall consult such persons as it thinks fit.

(5) In carrying out its functions under this Part the OFT shall have regard to the guidance as most recently published".

152. Section 32 of the Act deals with suspension and revocation. It provides that –

"(1) 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.

(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 …".

153. Section 33A of the Act deals with the power of the OFT to impose requirements on licensees. It provides that –

"(1) This section applies where the OFT is dissatisfied with any matter in connection with –

(a) a business being carried on, or which has been carried on, by a licensee or by an associate or a former associate of a licensee;
(b) a proposal to carry on a business which has been made by a licensee or by an associate or a former associate of a licensee; or
(c) any conduct not covered by paragraph (a) or (b) of a licensee or of an associate or a former associate of a licensee.

(2) The OFT may by notice to the licensee require him to do or not to do (or to cease doing) anything specified in the notice for purposes connected with –

(a) addressing the matter with which the OFT is dissatisfied; or
(b) securing that matters of the same or a similar kind do not arise.

(3) A requirement imposed under this section on a licensee shall only relate to a business which the licensee is carrying on or is proposing to carry on, under the licence under which he is a licensee.

(4) Such a requirement may be framed by reference to a named person other than the licensee.

(5) For the purposes of subsection (1) it is immaterial whether the matter with which the OFT is dissatisfied arose before or after the licensee became a licensee.

(6) If –

(a) a person makes an application for a standard licence, and
(b) while dealing with that application the OFT forms the opinion that, if such a licence were to be issued to that person, it would be minded to impose on him a requirement under this section,

the OFT may, before issuing such a licence to that person, do (in whole or in part) anything that it must do under section 33D or 34(1) or (2) in relation to the imposing of the requirement.

(7) In this section "associate", in addition to the persons specified in section 184, includes a business associate".

Section 33C of the Act contains supplementary provisions relating to requirements, Section 33D deals with the procedure in relation to requirements and Section 33E with guidance on requirements.

154. Section 41ZB of the Act deals with disposal of appeals. It provides insofar as material that –

"(1) The First-tier Tribunal shall decide an appeal under section 41 by way of a rehearing of the determination appealed against.

(2) In disposing of an appeal under section 41 the First-tier Tribunal may do one or more of the following –

(a) confirm the determination appealed against;
(b) quash that determination;
(c) vary that determination ;
(d) remit the matter to the OFT for reconsideration and determination in accordance with the directions (if any) given to it by the Tribunal;

(e) give the OFT directions for the purpose of giving effect to its decision".

155. On 23 November 2009 the Tribunal determined a number of preliminary issues in relation to the appeal, including the following:

(1) The legal burden of proof in a revocation case is on the OFT. However it was accepted by EEC that there was evidence on all of the issues relied on by the OFT, giving support to the OFT's alternative argument that the evidential burden passed to EEC to rebut the objections that the OFT raised to EEC retaining its licence. The standard of proof on any issues was the usual civil standard of a balance of probability: see pages 4-6, paragraphs 5-16 of the Tribunal's decision dated 23 November 2009.

(2) The question to be decided by the Tribunal was not whether on the evidence adduced before the Adjudicator EEC was a fit person to hold a licence but whether they were fit to hold such licence on the evidence adduced before the Tribunal, with the time at which EEC'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. While the reasons given in the minded to revoke notices remained the touchstone for the appeal, the Tribunal was entitled to entertain any further matter which had a bearing on EEC's fitness so long as EEC had been given due notice of such matter: see pages 7-9, paragraphs 19-27 of the Tribunal's decision dated 23 November 2009.

156. The OFT submitted that:

(1) The OFT had a broad subjective discretion in assessing fitness and was able to have regard to any matter that appeared to it to be relevant: see Section 25 (2) of the 1974 Act.

(2) The OFT could take account of evidence tending to show that EEC or its employees had contravened the provisions of consumer protection or consumer credit legislation or had engaged in practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper: see Section 25(2A) of the Act.

(3) OFT Guidance 969 dealing with consumer credit licensing and the general guidance for licensees and applicants on fitness and requirements (January 2008) adopted a risk based approach focussing on –

(i) Evidence that raised doubts about the personal integrity of individuals running the business, including previous misconduct such as breaches of consumer protection law, or oppressive, unfair or improper business practices.

(ii) Business activities with high levels of complaints and greater potential for consumer detriment.

(iii) Positive factors such as membership of OFT approved schemes, records of fair dealing over a significant period with no serious complaints or active policy of addressing complaints and a record of cooperating with trading standards.

157. It was said for the OFT that they exercised a broad margin of appreciation in the assessment of the fairness or otherwise of business practices, with one useful guide as to the test of unfairness being found in Article 5(1) of the Unfair Commercial Practices Directive 2005/29. This provides that a commercial practice must be prohibited if it passes a two-stage test for unfairness namely that it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour of the average consumer (or of the average member of a clearly identifiable group of particularly vulnerable consumers) with regard to the product. Examples of unfair practices prohibited by the Directive are misleading practices within the meaning of Articles 6 and 7, aggressive practices within the meaning of Articles 8 and 9 or practices prohibited by Annex 1 of the Directive.

158. For EEC it was said that the test under the Directive for fairness was in fact more restrictive than the wide discretion that the Tribunal had when considering the provisions of the Consumer Credit Act 1974, with the Directive not simply about consumer protection but the harmonisation of European markets. The Tribunal accept that their primary concern is with the application of the relevant provisions of the Consumer Credit Act 1974.

I. The Tribunal's conclusions

159. The Tribunal accept that EEC is a substantial company with a turnover exceeding £10m per annum and employing over 150 staff. Mr John Ball and Mrs Gillian Fox are the principal directors, with Mr Ball having overall responsibility for the company and with Mrs Fox having more administrative responsibility in particular for company documentation. The company is the successor of Fireguard UK Limited, a company run by Mr Ball which historically gave certain written assurances to the OFT as to its conduct, it not being alleged that these assurances were breached.

160. The Tribunal find that there has been a laxity in EEC's procedures in the past with the result that there were repeated instances of unfair practices on the part of EEC in relation to individual customers, as the Tribunal has found.

161. The Tribunal accept that there is nothing to suggest that EEC has sought to directly target the elderly, infirm or vulnerable in terms of sales of their equipment and agreements. However, as Mr Ball told the Adjudicator it is a fact that some 75% of EEC's customers are elderly.

162. The Tribunal find that the laxity in EEC's procedures resulted in the lack of a "moral barometer" in dealing with the more vulnerable sectors of the public, in particular the elderly, as the OFT contended.

163. The OFT became actively involved with the company in or about May 2005, there then being a telephone call and follow up letter from the company's Solicitors. EEC appear to have considered that it was for the OFT to advise them where changes were needed, which reveals a misunderstanding of the role of the OFT as a regulator.

164. The Tribunal accept the OFT's argument that EEC had the opportunity to change its practices as a result of the minded to revoke procedure and that it was for the company to obtain such advice as they were able to do, including advice from their home authority Sefton Trading Standards. However, as the evidence showed Mr Jackson of Sefton Trading Standards was primarily concerned with the criminal side of regulatory enforcement.

165. EEC attached considerable significance to the fact that the Adjudicator drafted undertakings indicating that she was then minded to go down the route of undertakings and that those undertakings were signed on behalf of EEC on 16 June 2008. However the fact is that a further minded to revoke notice was served on 21 August 2008 in the light of the evidence that the Adjudicator had heard, with the Adjudicator finding that the undertakings could not be relied on and did not go far enough.

166. The Tribunal note that in giving the undertakings which it did to the Adjudicator, and as the seventh undertaking made clear, EEC had been relying on a Code of Conduct which had been supplied to the Adjudicator. The Adjudicator had clearly been led to believe by or on behalf of the company that the Code of Conduct had been or was going to be implemented, with the company's representations to the Adjudicator having been to the effect that the laxity in the company's procedures was to be replaced by "black letter law" in the form of the Code of Conduct.

167. The Code of Conduct was in fact never implemented. It only remained a draft document, with EEC having decided in about March 2008 to implement the undertakings by a Code of Practice rather than a Code of Conduct. The company does not appear to have appreciated or attached any significance to the fact that the undertakings were being viewed by the Adjudicator as ancillary to the implementation of the Code of Conduct, in the light of the seventh undertaking that EEC's undertakings to the Adjudicator would be incorporated into EEC's Code of Conduct. The company never sent the Adjudicator a copy of the Code of Practice.

168. The Code of Practice was adopted by EEC with effect from on or about 26 May 2008, some three weeks before the undertakings were signed on behalf of the company. The Code of Practice did not incorporate a number of important matters or deal as extensively with a number of areas in the draft Code of Conduct, as the OFT pointed out in their comparison of the differences between the draft Code of Conduct and the Code of Practice.

169. The Tribunal view the adoption of the Code of Practice and the abandonment of the Code of Conduct as indicative of EEC's attitude evidenced throughout these proceedings to try and do the minimum in terms of alteration of its business practices to satisfy the concerns of the OFT and the Adjudicator. The Tribunal was not given any cogent explanation by EEC for the failure to implement the Code of Conduct or for the failure to inform the Adjudicator of the fact that the company had not implemented and had no intention then of implementing the Code of Conduct.

170. The Tribunal was also concerned that:

(1) EEC's expert Mrs Wendy Potts had backtracked on a number of matters previously agreed with the OFT's expert by way of proposed remedial action during the appeal process.

(2) The company's position in relation to proposed remedial action continually shifted during the hearing before the Tribunal, being indicative in the Tribunal's view of the company's inability or unwillingness to take responsibility for its business practices or to take a proactive approach in that regard. The company has been generally reactive rather than proactive.

171. EEC's response to the omissions from the Code of Practice that had appeared in the Code of Conduct was in part to the effect that such matters were dealt with in the company's training. There was some evidence before the Tribunal, for example in the case of Kilianne Corr's evidence, that matters such as vulnerability were covered in training. However, such training materials as there were did not constitute a comprehensive training manual in the sense of incorporating all those matters contained in the Code of Conduct, which should have been carried through into the Code of Practice. The company's documentation as supplied to its sales force should have formed the touchstone or reference point for the sales staff. Again, this is in the Tribunal's view indicative of a laxity in approach by the company to ensure that what it taught in training was implemented and continued to be implemented in practice.

172. The Tribunal has made its findings in relation to each of the allegations of unfair, dishonest, improper and/or oppressive practices. The number of complaints against the company has undoubtedly reduced, being no doubt in large measure due to the minded to revoke process. However, as the Tribunal's findings in relation to more recent allegations show, EEC has been continuing bad practices of the past and there have been breaches of the June 2008 undertakings and of the company's Code of Practice.

173. EEC has undoubtedly developed skills, knowledge and experience in relation to consumer credit and this applies to their staff. The company has altered its practices and procedures and has submitted a revised set of proposals for further remedial action on its part in the light of matters raised in the hearing, including criticisms of previous changes. It is said that they remain willing to consider alternative suggestions for remedial action.

174. However, there is substantial evidence before the Tribunal to show that EEC has engaged in business practices which are deceitful or oppressive or otherwise unfair or improper and that it has also contravened the Unfair Terms in Consumer Contracts Regulations 1999, as the Tribunal has found in this decision.

175. The Tribunal, as the Adjudicator, finds it a particularly worrying feature of this case that the company has been and continues to be slow to recognise that their business practices have caused and continue to cause consumer detriment, albeit that the number of complaints has considerably reduced. It is mainly as a result of the statutory action that EEC has changed some of its practices and has agreed to change others. The company otherwise largely remains in denial as to the unfairness of past and continuing business practices.

176. The Tribunal finds that EEC's revised proposed remedial action does not go far enough. In particular –

(1) EEC should have changed its procedures to fully comply with the DSA Code.

(2) They should have incorporated into the Code of Practice all matters identified in the draft Code of Conduct that never made it into the Code of Practice.

(3) Bearing in the mind the preponderance of elderly, infirm and/or vulnerable customers, the maximum length of the servicing and monitoring agreements should be no more than one year.

(4) The earliest renewal date of a servicing or monitoring agreement should be no longer than three months before the expiry of a contract.

(5) Refunds on a pro-rata basis should be given in the event of death or moving home where full payment has been made in advance.

177. However, as the OFT submitted, EEC's practices of visiting vulnerable customers repeatedly (allegation 1), not making clear the purpose of its visit to customers (allegation 2), staying in elderly consumers' homes an unreasonable length of time (allegation 3), selling unsuitable or unnecessary products (allegation 4), tying vulnerable customers into lengthy contracts (allegation 7), installing products within the cancellation period (allegation 8), requiring full payment in advance for after sales agreements (allegation 10) and imposing unfair terms, in particular allowing EEC to retain advance payments when it terminates the agreement (allegation 11), suggest that it is inherent in EEC's business model to deal unfairly with elderly or otherwise vulnerable customers, especially customers who might be susceptible to their methods.

178. The Tribunal accepts that EEC has modified its practices and has offered to make further changes. However, the Tribunal shares the view of the OFT that on the evidence there can be no confidence in EEC effectively dealing with consumer

detriment in practice, as shown by the breaches of the June 2008 undertakings given to the Adjudicator and of EEC's Code of Practice.

179. The Tribunal acknowledges that EEC is entitled to credit to the extent that it has responded to the minded to revoke process and the OFT's concerns, but in considering consumer detriment it has to bear in mind the entire history of the matter and the likelihood of continuing consumer detriment in the future.

180. The Tribunal considers for the reasons given that EEC is unfit to hold a consumer credit licence and that it is not appropriate in the circumstances to remit the matter to the OFT for the purpose of service by the OFT of a minded to impose requirements notice under Section 33A of the 1974 Act.

181. In the result, the Tribunal unanimously find that EEC is unfit to retain its licence, it confirms the determination of the Adjudicator to revoke EEC's consumer credit standard licence and dismisses EEC's appeal against that determination.

182. Any application for costs must be made not later than 14 days after the date on which the Tribunal sends to the parties this decision, in accordance with Rule 10 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

HH Judge Peter Wulwik (Chairman)
28 June 2010

IN THE FIRST-TIER TRIBUNAL **CASE NO. CCA/2009/0002**
(CONSUMER CREDIT)
GENERAL REGULATORY CHAMBER

BETWEEN

EUROPEAN ENVIRONMENTAL CONTROLS LIMITED ("*EEC*")

Appellant

-and-

THE OFFICE OF FAIR TRADING ("*OFT*")

Respondent

REVISED PROPOSED REMEDIAL ACTION

This document sets out proposed remedial action that EEC will take to ensure that it is fit to hold a consumer credit licence. It has been revised to take into account matters raised recently in the hearing (including criticism of the previous changes). As always EEC is willing to consider alternative suggestions for remedial action.

1. EEC will incorporate the matters identified by the OFT as contained in the draft code of conduct but not contained into EEC's code of practice into EEC's code of practice (with suitable updating to take into account changes to the business since 2007). No changes will alter the "spirit" of the draft code of conduct.

2. EEC will reduce the maximum length of its visits without customer approval from 3 hours to 2 ½ hours.

3. (a) EEC will add details of the length of visit into the Appointment Setter's script and "Does a third party need to be present when someone calls on you"?.

   (b) EEC will add the above details to the Appointment Setter's script by adding the

words “This visit may take up to 2 ½ hours”.

(c) EEC will add suitable time estimates to any scripts setting appointments for other products. No visit for any product will last, without customer approval, in excess of 2 ½ hours and no time estimate in a script will exceed this duration[1].

4. Legaleyes Ltd to audit EEC once a month and produce a report on compliance. These reports will be available on request to Sefton Trading Standards & the OFT.

5. Add into the POS script that within the 14-day cancellation period, the customer should check to see if equivalent equipment can be obtained free of charge from their local fire brigade, the police or their local authority . The script will include “Your purchase is covered by a 14 day cancellation period which will give you the chance to see if you can obtain equivalent equipment free of charge from your local fire service, police or your local authority”. This call is recorded and kept for auditing purposes.

6. Add a sentence into the POS script stating that the customer should not attempt to control a fire and their main priority is getting themselves out of the property and to safety.

7. A procedure will be introduced whereby 30 days after installation the customer is contacted to check that they are using their equipment. The customer will be made aware of this through EEC's Installation Completion & Balance Collection Script. As part of this procedure a diary action will be put forward to the Service Department for 30 days forward to ensure that this is carried out... A customised set of scripting will be introduced per product and the member of staff in the Service Department will choose the appropriate script, which will run through a series of questions designed to ensure that the customer is using the equipment

[1] Sales of other equipment, for example solar systems, take less than 2 ½ hours.

they have purchased / are getting the full benefit of it. This scripting will be designed for all customers. The call will be recorded and kept on file. Should there be a query about the usage, a member of EEC staff who visits the customer will check it and if it is found the customer can't use the equipment, the equipment will be removed and a refund will be given even if outside of the cancellation period.

8. Renewal dates be brought together and where ever feasible agreements will run to a common date.

9. (a) The maximum contract period will be 3 years.

(b) EEC will introduce into its code of practice the requirement that sales advisors inform all customers that for those customers who are over 80 EEC advises that no longer than 2 years should be taken out for any contract.

(c) EEC will add a procedure to its POS check so that the customer is asked if the above procedure has been followed. In line with current procedures this call will be recorded.

(d) All current sales staff and POS staff will be retrained on these new procedures.

10. (a) The terms and conditions will be amended so that a customer can cancel their extended agreement at any time before commencement and obtain a full refund.

(b) In addition EEC will reduce the period before expiry of a contract in which that contract can be renewed from 12 months to 9 months.

11. EEC will give a refund of the unexpired portion of the agreement less

reasonable costs to any customer who is reasonably deemed vulnerable during the agreement period or who moves into a care home or dies. This is in addition to the transfer provision.

12. In respect of length of visit; the procedure will be that when 2 ½ hours has elapsed the advisor will have to leave the property and ring Head Office to get permission to continue the visit. Before giving permission Head Office will telephone the customer to determine if the customer is willing for the visit to continue. Permission will only be given for the visit to continue if the customer agrees[2]. The Advisor cannot go back into the property until this permission has been given. This call with the customer will be recorded and be maintained for access for 6 months (this would be put in as part of the standard scripting process and would show on the customer's computerised record).

13. The following changes will be made to the Appointment setter's[3] script.

i. change "advisor/security advisor" to "representative" in s.3 of the script
ii. remove "although" from the beginning of s4
iii. in s.6 substitute "place an order" with "purchase"
iv. The suggestion at paragraph B4 of the Joint Expert's report of the meeting of the 18.9.08 of the experts will be adopted.

13. The Appointment Confirmer's script will be amended so that there is reference to EEC being "a private company specialising in the sale of security and fire safety equipment".Appointment confirmers scripts for sales of other equipment will be similarly amended.

14. Prior to the sale of fire extinguishers the physical capability of the customer of using the equipment and their ability to judge the risk to their personal safety of trying to fight the fire with the extinguisher must be assessed.

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2 This was the intention of the previous draft but has been amended for clarification.
3 This was the intention of the previous draft but has been amended for clarification.

15. New procedures will be implemented as follows:

    a. During visits at the same time as customers are currently asked whether the customer requires a third party present the customer will be informed that the customer is free to ask the representative to leave the customer's home at any time. This will also go into the customer purchase report and the customer will sign to say that they have understood this[4]. This procedure must be followed before any security survey is carried out or any sales presentation made;

    b. The above procedure will be checked as part of the POS check;

16. The code of practice will be amended to make it a requirement that if any person visiting a customer's home is of the opinion that that person is too tired for a visit to continue the advisor must inform the customer that in the advisor's opinion the customer is too tired for the visit to continue, and the advisor will arrange for the customer to be called to see if the customer wishes any further visit to take place, and if so when. If this occurs the advisor must leave the customer's premises without making any sale, and must not revisit until the customer has confirmed in a telephone call that they are happy to proceed with another visit.

17. All staff will be retrained on the issue of vulnerability. In particular there will be emphasis that it is necessary to have regard to vulnerability not only at the time of the purchase of equipment but also at the time of any renewal of any contract. Staff will receive refresher training at no less than 6 monthly intervals on the subject of vulnerability.

18. If the above is implemented, a maximum period of 90 days will be needed to revise and reprint procedures and terms and conditions, amend training delivery and introduce monitoring of adherence to these.

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[4] This is the same procedure as currently in place for checking that the customer knows that they can have third parties present.