

August/September
2009



Newsletter

We are property specialists for:

- Lettings
- Short Let Apartments
- Sales
- Block Management

We operate in:

- South Kensington
- Gloucester Road
- Earls Court
- Knightsbridge

AGENTS COMMISSION ON RENEWALS - DO YOU HAVE TO PAY ?

Last month the High Court published its judgment in the case of *The Office of Fair Trading v Foxtons*. In our June/July newsletter [go to www.astberrys.co.uk and click on newsletter] we highlighted what the case was about. What does the decision now mean for you as a landlord using the services of a letting agent?

Do I have to pay second or subsequent year commission to my letting agent?

The simple answer is that it all depends upon the terms and circumstances of the agreement you signed with the letting agent. The Court did not decide that all clauses in all letting agreements providing for renewal commission were either valid or invalid. The case only concerned the renewal terms in Foxtons' former letting agreements - which were invalid.

However the Court set out some useful guidelines. If an agent provides a landlord with his standard contract which includes a clause that renewal commission is payable, then that clause will not be enforceable if it is "unfair". A clause will be unfair if it does not satisfy the test set out in the Unfair Terms in Consumer Contracts Regulations 1999. This is a piece of legislation, which has its origins in Brussels and is designed to protect "consumers". Most landlords are likely to be considered consumers for the purposes of these Regulations.

How do you know if a term is unfair? There are a number of basic questions that must be answered:

- Is the term relating to renewal commission part of the "core" of the letting agreement? For example, is the obligation to pay renewal commission flagged up and placed alongside the obligation to pay first year commission if the letting agent finds you a tenant? Or is it tucked away in small lettering in a paragraph on page 2 or 3 of the agreement?
- Even if it is part of the "core" or heart of the agreement, is the term relating to renewal commission expressed in clear and intelligible language? Or is it hard to understand, written in legal jargon and difficult to follow without first referring to other parts of the agreement?

- If the term potentially making you liable to pay renewal commission is clearly set out and given proper prominence so as to be at the centre or core of the agreement then you will probably have to pay renewal commission.
- If however the term is obscure, unclear, not given prominence or expressed in difficult language so that it might be considered a “trap” or “time bomb” then a Court may well decide that the term is unfair. Whether it finally does or not will depend on the view the Court takes of the “imbalance” the term causes between your rights and obligations under the agreement and those of the letting agent. In the Foxtons case the Judge performed this balancing exercise and noted as far as Foxtons former terms were concerned:

renewal commission payments involve significant sums of money;

they operate adversely to the landlord the more time passes, because he pays more and more as time goes by;

no commensurate service is provided by the letting agent [of course the position would be different if the agent “managed” the property];

the typical consumer/landlord, who has paid a commission up front in year 1 would not expect to receive a repeat bill in year 2 and unless it is clearly spelt out the obligation becomes a “trap” or “time bomb” and so unfair;

Many of these factors could also be relevant when considering the nature of the renewal commission term in any agreement you may have signed with a letting agent.

Can I claim back renewal commission which I paid to my letting agent in the past?

Again, the answer is that it all depends. First you would have to prove that the renewal commission term in the letting agent’s agreement was “unfair”, see above. You will want to do this in any event in a case where an agent is suing you for renewal commission, which you claim falls foul of the Regulations. However if you are not being pursued by a letting agent for renewal commission then you would have to go to Court and establish that the term under which you paid renewal commission was unfair. Only then could you go on to claim back commission paid pursuant to that term. Can you?

The Foxtons case did not deal with the question of the repayment of commission wrongly paid out to a letting agent pursuant to an unfair renewal commission term. However this does not mean that a claim could not be made.

- There have been a number of cases in the last 10 years or so dealing with the situation where payments were made under an agreement and where both parties believed that those payments were due, when in fact they were not.
- Where payments are made, as above, by mistake the Court may order them to be repaid.
- If the renewal commission clause is unfair now then it was unfair when all past payments were made to the letting agent in the mistaken belief that the commission was owing.

- The position may become clearer if there is further litigation relating to the charges some banks have deducted from customers for unauthorised overdrafts. This dispute also concerned the OFT and the 1999 Regulations and the question of repayment of wrongly deducted charges may also arise.

Please bear in mind that your case will always depend on its own facts, but **we can help you establish whether your renewal commission clause is likely to be considered fair or not and whether you should consider suing for repayment of commission.** At Astberrys we will examine carefully any contract that you may have signed and look at all the surrounding circumstances. We may give you preliminary advice and/or instruct a barrister on your behalf to advise you locally in our offices. **For further information go to www.astberrys.co.uk and click on Legal Services or telephone 0207 370 0123.**

ASTBERRYS TERMS AND CONDITIONS

At Astberrys we do not and have never charged renewal commission if you take our letting only service. Our terms are and always have been clear, precise and easy to follow. At the head of any contract you sign with us we state and have always stated

Astberrys offers three levels of letting services:

- *Letting only at 10% of the rent plus Vat for the first year. Thereafter we charge a flat fee of £375 plus Vat, for subsequent lettings of the same property to the same tenant, if we are involved in renegotiating and amending the terms of the tenancy agreement.*
- *Managed at 15% of the rent plus Vat for the first year and 10% of the rent plus Vat thereafter for subsequent managed lettings of the same property to the same tenant.*
- *Short Lets at 20% of the rent plus Vat for the first letting and 15% of the rent plus Vat thereafter for subsequent lettings of the same property to the same tenant.*

Whether you want our letting only or managed letting service at Astberrys what you see is what you get. There are no “traps” or “time bombs” and no commission charges when no commensurate service is offered. To talk to us about letting your property telephone 0207 370 0123 or email us at business@astberrys.co.uk

You can also visit our website at www.astberrys.co.uk

thirty three
**Bedford
Row** Barristers'
Chambers
33 Bedford Row
London WC1R 4JH
t: 020 7242 6476
f: 020 7831 6065
LDE 75
www.33bedfordrow.co.uk

Our specialist property law team deals with
...leasehold enfranchisement...service charges...
residential and commercial tenancies

We are delighted to accept instructions from Astberrys and their clients and will be pleased to advise in relation to all areas of property and landlord and tenant law.

Clients of Astberrys, who wish to keep up with recent property law developments are welcome at

The *Property Law* Website

www.propertylawuk.net

'The online property law updating service'

MARKET UPDATE

SALES

What is happening in the housing market? There are generally encouraging signs both nationwide and in Kensington and Chelsea. One interesting statistic concerns the discount that a buyer at auction can expect relative to a buyer purchasing through an estate agent, in the more usual way. In May 09 this discount was 11%. In December 08/January 09 it was 40%. This is good news because as the gap between the open market and auction price narrows [and many re possessed properties are sold at auction] so lenders' confidence grows. This narrowing of the auction discount fits in with recent statistics showing some increased mortgage lending and modest recent rises in house prices nationally, for example 1.3% recorded for this July according to the Nationwide and 1.1% according to the Halifax for the same month. In Kensington and Chelsea, especially for houses, price rises have been greater. Looked at as an investment a rental property in the Borough with a yield of about 4%, but see below, and with some prospect of capital growth in the long term is also attractive. This will tend to support property prices within the Borough along with foreign demand in the super prime areas.

However to **put the "revival" in context, prices in Kensington and Chelsea are still down** around 20% from their peak of about 2 years ago with SW5 recently faring worse than W8, SW7 or SW3. We are not optimistic in the short term. Prices may drift up for part of this year but we think they still have some way to fall, even in Kensington and Chelsea. The nation must pay for the recent fiscal stimulus in higher interest rates, higher taxation and increased unemployment. The economic conditions leading to the crisis of 2007/8 were far more serious and require far more unorthodox measures to combat than the downturn of the early 1990s or the bursting of the dot.com bubble of 2003. **We have yet to feel all the pain. When we do, it is bound to affect the property market in the Borough - some people will have to sell, volume will increase and prices will fall.**

RENTALS

Rental yields [the relationship between the value of the property and the receivable rent - if a property is worth £500,000 and rents for £20,000 p.a. the yield would be 4%] have fallen below 4% in prime central London according to recent figures. This is partly because rents have been falling - although they are now stabilising and partly because there have been some modest recent price rises, which may well peter out, see above. **In our view rents in Kensington and Chelsea are likely to rise over the medium term as more property is sold (this will decrease supply) and employment in the City stabilises (this will increase demand).** Unless there is a sustained price rise - and we doubt this, yields will also rise as a result.

Small units at around £300 per week continue to be in great demand and short supply.

Whether you are buying or selling, renting or letting talk to Astberrys.



ASTBERRYS
36a Kenway Rd, London SW5 0RA
0207 370 0123
business@astberrys.co.uk
www.astberrys.co.uk

