

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV-2018-404-1775
[2019] NZHC 2943**

UNDER Part 5 of the Fair Trading Act 1986
BETWEEN COMMERCE COMMISSION
Plaintiff
AND HOME DIRECT LIMITED
Defendant

Hearing: 29 October 2019
Appearances: S M Hunter and A D Luck for the Plaintiff
T Cleary for the Defendant
Judgment: 12 November 2019

JUDGMENT OF MUIR J

*This judgment was delivered by me on 12 November 2019 at 3.00 pm
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Counsel:
S M Hunter, Barrister, Auckland

Solicitors:
Meredith Connell, Auckland
Chapman Tripp, Auckland

Introduction

[1] In these proceedings the Commerce Commission applies for a declaration that terms in a standard form consumer contract are unfair. It does so pursuant to recently introduced provisions in the Fair Trading Act 1986 (the FTA).¹ A term declared to be unfair may no longer be used, enforced or relied upon.² It is said by counsel for the Commission that this is the first case to be determined under the section.

[2] The terms at issue in the proceeding were used in a standard form consumer contract by the defendant, Home Direct Ltd. Home Direct Ltd is New Zealand's largest mobile trader. It employs over 250 staff and operates nationwide selling consumer goods online, over the phone and via mobile shops. The types of goods sold by Home Direct Ltd include clothing, toys, electronics, furniture and whiteware.

[3] Home Direct Ltd sells goods on credit by way of a credit facility known as a "Lifestyle Account". The facility provides for regular weekly or fortnightly debits from a consumer's bank account. Home Direct Ltd charges interest (currently 25.5 per cent) and monthly account management fees on all Lifestyle Accounts.

[4] During the period relevant to this litigation, Home Direct Ltd operated what it called a "Voucher Entitlement Scheme" (the Scheme). Under the Scheme, when a Lifestyle Account customer had repaid what they owed to Home Direct Ltd for previous purchases and interest, Home Direct Ltd continued to debit regular amounts from the customer's bank account, with each of those payments converted into a separate "voucher entitlement". Customers could use their voucher entitlements to make future purchases from Home Direct Ltd.

[5] The Scheme contained two terms, which in combination the Commission submits were unfair.

- (a) Customers could not have their voucher entitlements refunded or exchanged for cash (the No Refunds Term).

¹ Fair Trading Act 1986, ss 46H and 46I. The relevant sections were inserted as from 17 March 2015 by the Fair Trading Amendment Act 2013.

² Fair Trading Act 1986, s 26A(1)(b).

- (b) The voucher entitlements expired after 12 months (the 12-month Expiry Term).

[6] The combined effect of these terms was that once sums were debited from the customer's bank account and not used to purchase goods from Home Direct Ltd within 12 months those sums were forfeited to Home Direct Ltd. In total \$644,000 was forfeited in this way over several years of the Scheme's operation.

[7] Home Direct Ltd accepts that, in combination, these terms were unfair within the terms of s 46L(1) of the FTA. It further consents to declarations in the terms sought by the Commission. Nevertheless, in terms of s 46I a declaration may only be made if the Court is itself satisfied in respect of the statutory criteria in s 46I(2). In the result, the judgment of this Court is required.

[8] I am grateful to counsel for the Commission for its comprehensive written submissions, which were provided to Home Direct Ltd in advance of the hearing and with which Home Direct Ltd agrees. They have greatly assisted in the preparation of this judgment. I note also that the form of declaration appearing at the conclusion of the judgment is again by consent.

Agreed facts

The contract

[9] In order to purchase goods on credit using Home Direct Ltd's Lifestyle Account, customers were required to enter into a written contract. This consisted of:

- (a) a purchase agreement;
- (b) a disclosure statement; and
- (c) a set of standard "Master" terms and conditions (together, the Home Direct Contract).

[10] Customers were at all times given a hard copy of the purchase agreement and the disclosure statement (which appeared on the back of the purchase agreement). Two

different iterations of these documents are relevant. The first (version 6.0) had a publication date of 05/2016. The second (version 7.0) had a publication date of 06/2017 but the parties agree was not in regular usage until September 2017. Until mid-May 2017 customers were also given a hard copy of the standard terms and conditions. Thereafter this was only the case on request, but the conditions could be reviewed on Home Direct Ltd's website.

[11] The standard terms and conditions changed from time to time. The Commission's claim covers the conditions effective from 1 April 2017 to 6 July 2017 and those effective from 7 July 2017 to 14 December 2017 (together the Terms and Conditions).

[12] Pursuant to the Home Direct Ltd Contract, customers who purchased goods on credit under a Lifestyle Account were required to sign a direct debit authority. The authority allowed Home Direct Ltd to debit the customers' bank account weekly or fortnightly. Customers could opt into the Scheme by initialling a box on the purchase agreement. If they did so, Home Direct Ltd would continue to debit the weekly or fortnightly sum from the customer's bank account after previous purchases and charges had been paid crediting "voucher entitlements" with individually assigned numbers. However, no physical vouchers were issued. The cumulative value of the customer's voucher entitlements represented the total amount the customer could apply to subsequent purchases. Under the Terms and Conditions Home Direct Ltd was entitled to continue to debit a customer's account until the voucher entitlements reached a predetermined maximum. This was \$1,500 under the terms and conditions applying 1 April 2017 to 6 July 2017 and \$500 under the latter terms. A large number of customers participated in the scheme. In 2017, 8,049 people were involved in the scheme representing 28 per cent of Home Direct Ltd's customers at that time.

The vouchers

[13] The total value of a customer's credit was represented by vouchers held in the customers Lifestyle Account. Customers did not earn interest on this balance. The funds were not held on trust or secured. The terms and conditions allowed Home Direct Ltd to use customers' voucher monies as part of its general funds.

[14] The two critical provisions in the Terms and Conditions were clauses 70 and 74. These provided:

Redemption

70. Your voucher entitlements cannot be refunded or exchanged for cash (the No Refunds Term).

Expiration of Voucher Entitlements

74. Voucher entitlements last for 12 months from the date of purchase. Any voucher entitlement not used by you in the 12 months from the date you purchased the voucher entitlement will expire and become our property. You will not have a right to a cash refund for any expired vouchers. We will endeavour to notify you before the expiry of any voucher entitlement. However, we will not incur any liability if we fail to do so (the expiry term).

[15] The calculation of the voucher's expiration date from the "date of purchase" meant that each voucher had its own expiry date calculated from the date that the voucher was created.

Indefinite debiting

[16] The terms of the Scheme created the potential for a customer's bank account to be debited indefinitely. If the customer's voucher entitlements expired after 12 months and the customer's balance remained below the permitted maximum, then Home Direct Ltd could continue to debit the customer's bank account. As vouchers expired at the end of the 12-month period new vouchers would be purchased automatically at the same time. Although Home Direct Ltd admits that its terms allowed for indefinite billing, there is no allegation and consequently no admission that it occurred in any particular case.

Disclosure

[17] As indicated above the Home Direct Contract included what is termed a "disclosure statement" under s 17 of the Credit and Consumer Finance Act 2013. This contained (both relevant iterations) the following provision, among others:

IMPORTANT INFORMATION – HOME DIRECT’S VOUCHER ENTITLEMENT SCHEME

In relation to Home Direct’s voucher entitlement scheme, your attention is particularly drawn to the following important information:

- Any payments received by Home Direct once all monies outstanding under your credit limit(s) have been paid in full will be regarded as the purchase price of voucher entitlements and you will be treated as having purchased voucher entitlements with a face value equal to the amount of the payments received by Home Direct.
- Any voucher entitlements that you purchase cannot be refunded or exchanges for cash and can only be redeemed in exchange for goods purchased from Home Direct.

[18] Neither iteration of the disclosure statement included reference to the expiry term nor, until September 2017, was there any reference to the expiry term in the purchase agreement itself. Until that date the opt-in provision in the purchase agreement was in the following terms:

VOUCHER ENTITLEMENT SCHEME

By initialling here I agree to participate in Home Direct’s voucher entitlement scheme. I acknowledge that I have read and understand the important information regarding Home Direct’s voucher entitlement scheme on the back of this agreement and the terms and conditions which sets out the terms of the voucher entitlement scheme.

[19] From September 2017, the relevant provision was in the following terms:³

VOUCHER ENTITLEMENT SCHEME

By initialling here I agree to participate in Home Direct’s voucher entitlement scheme. I understand that (1) vouchers have a 12 month expiry from the date of issue, and (2) vouchers are not refundable. Please contact us if you will not be able to use your voucher. I acknowledge that I have read and understand the important information regarding Home Direct’s voucher entitlement scheme on the back of this agreement and the terms and conditions which set out the terms of the voucher entitlement scheme.

The FTA provisions

[20] Section 46H(1) of the FTA provides that the Commission may seek a declaration that a term in a standard form consumer contract is an unfair contract term. Section 46I(2) in turn provides:

³ Version 7.0 of the Agreement published 06/2017. Not in consistent use until September 2017.

The Court may make the declaration only if it is satisfied that:

- (a) the term is in a contract that is a consumer contract; and
- (b) the consumer contract is a standard form contract (as determined in accordance with section 46J); and
- (c) the declaration is not prohibited by section 46K(1); and
- (d) the term is unfair in the sense described in section 46L.

[21] It is common ground in these proceedings that the Home Direct Contract is both a consumer contract and standard form contract. It is accepted that the contract was presented on what was effectively a “take it or leave it basis”. It is also common ground that s 46K(1) does not apply.

[22] Section 46L(1) provides that a term in a consumer contract is unfair if three criteria are satisfied, namely if the term:

- (a) would cause a significant imbalance in the parties’ rights and obligations arising under the contract;⁴ and
- (b) is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term;⁵ and
- (c) would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on.⁶

[23] Section 46L(2) provides that the court may take into account any matters it considers relevant in determining whether a term is unfair but must take into account:

- (a) the extent to which the term is transparent;⁷ and
- (b) the contract as a whole.⁸

[24] Section 46L(3) in turn provides that a term in a consumer contract must be presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

⁴ Fair Trading Act 1986, s 46L(1)(a).

⁵ Fair Trading Act 1986, s 46L(1)(b).

⁶ Fair Trading Act 1986, s 46L(1)(c).

⁷ Fair Trading Act 1986, s 46L(2)(a).

⁸ Fair Trading Act 1986, s 46L(2)(b).

[25] These provisions closely mirror the provisions of the Australian Consumer Law (the ACL) which is set out in Schedule 2 of the Competition Consumer Act 2010. In particular ss 46L(1), (2) and (3) of the FTA are in near identical terms to ss 24(1), (2) and (4) of the ACL. These Australian provisions have been the subject of a number of cases which, in the absence of any New Zealand authority, provide a useful guide to interpretation and application of the sections.

The Chrisco Decision

[26] In *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd (No 1) (Chrisco)*,⁹ the Federal Court of Australia considered a broadly analogous case in relation to contracts for the purchase of Christmas hampers by way of relatively small regular payments made in advance. The unfair term in *Chrisco* was known as the HeadStart term. It provided for consumer payments to Chrisco to continue even after the customer had paid in full for existing orders. A credit balance accruing in a customer's favour could be used to pay for future orders, but the customer did not receive interest on any amounts held. In contrast to the present case, the amounts so held were refundable and there was no expiry provision. However, in similar contrast, the *Chrisco* provision applied on an opt-out basis as opposed to Home Direct Ltd's opt-in arrangements.

[27] The decision was that of Justice Edelman, now of the High Court of Australia. He noted that the statutory concept of unfairness created "broadly evaluative criteria to be developed incrementally".¹⁰ He also noted that where a statute uses a word as open as "unfair" it is not possible or desirable to state a precise or universal test for its application.¹¹

[28] The case focused almost exclusively on whether the HeadStart term would cause a "significant imbalance in the parties' rights and obligations arising under the contract" – that is the same criteria as reflected in s 46L(1)(a). The Court concluded

⁹ *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd (No 1)* [2015] FCA 1204.

¹⁰ At [39].

¹¹ Citing the judgment of Lord Sumption in *Plevin v Dragon Personal Finance Limited* [2014] UKSC 61 at [10].

that it did and accordingly found the term was an unfair contract term. The following principles emerged from the decision.

(1) *The Court must scrutinise purported “benefits” closely.*

[29] A close analysis will be required where a respondent asserts that an impugned term provides a benefit to consumers. The Court found that the HeadStart term gave Chrisco the right to withdraw money from a customer’s account without any substantial corresponding right to the consumer. In doing so the Court rejected as “no right at all”, a customer’s power to use his or her balance to purchase further products.¹² It said a customer could do that in any event and on exactly the same terms whether they used their HeadStart balance or not. In particular, no discount was applicable. It also rejected the proposition that the ability to make contributions over a potentially longer period of time towards the purchase price of the hamper could amount to a corresponding right, noting that when the time value of money is taken into account, such an alleged right results in the customer actually paying more.¹³

[30] Chrisco also argued that unsophisticated or ill-disciplined customers’ benefitted from what was in effect a compulsory savings scheme.¹⁴ The Court dismissed that argument, observing that because the account balances were not interest bearing and customers may have other interest bearing debt they were accordingly prejudiced.¹⁵

(2) *Imbalance is not necessarily negated by the fact small sums are involved.*

[31] The Court rejected the argument that imbalances in rights and obligations were not significant because relatively small sums of money were involved. The Court took the hypothetical example of a customer paying \$3.60 per week over a year to purchase a \$185.00 hamper. Counsel for Chrisco acknowledged that such a customer might also have credit card debt incurring interest in excess of 20 per cent per annum. On this example, a customer who paid his or her money to Chrisco over a year rather than

¹² At [56].

¹³ At [57].

¹⁴ At [63].

¹⁵ At [69].

repaying credit card debt would incur an additional cost of around \$25.00. The Court did not consider this insignificant in the context of a \$185.00 purchase.¹⁶

(3) *A “significant imbalance” will exist where a party’s obligations and rights are not broadly equivalent*

[32] The Court held that there will be an imbalance in the parties’ rights where one party is under a significant detriment which is not balanced by a corresponding right.¹⁷ In assessing whether there was a significant imbalance Edelman J endorsed the approach taken by Lord Bingham in *Director General of Fair Trading v First National Bank Plc*,¹⁸ where his Lordship stated:

The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty.

(4) *Transparency will be relevant in determining whether any imbalance is significant.*

[33] Edelman J held that whether a balance is significant in the context of the whole of the contract may be influenced by “the extent to which the term is transparent”.¹⁹ In other words, an imbalance in the parties’ rights and obligations may be exacerbated in cases where the term giving rise to the imbalance is also difficult to understand or the consumer may not know how the term affects their position until the trader attempts to rely on it.

[34] He considered that in assessing whether a term is transparent, consideration must be given to whether it is “expressed in reasonably plain language; legible; presented clearly; and readily available to the customer”.²⁰ The layout of the

¹⁶ At [65].

¹⁷ At [69] – [70].

¹⁸ *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 AC 481 at [17]. Cited in *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd (No 1)* [2015] FCA 1204 at [47].

¹⁹ At [74].

²⁰ At [75].

documents,²¹ the language used,²² and readability,²³ were all regarded as relevant considerations in that assessment.

[35] The Court concluded that the HeadStart term lacked transparency because:

- (a) The amounts charged were not clearly identifiable.²⁴
- (b) The term was ambiguous (for example it did not clearly identify the amounts that would be direct debited or the means for calculating these amounts, instead simply stating that payments would “continue accordingly”).²⁵
- (c) The means of cancellation were not explained.²⁶
- (d) The font was very small and there was nothing about it that would draw the term to the customer’s attention beyond the rest of the text on the page.²⁷
- (e) The term and the opt-out provision did not refer to each other.²⁸
- (f) Part of the term was not in the terms and conditions and was instead in the order form sent to Chrisco by the consumer (who on sending the form would not have a copy of the terms and conditions to refer to).²⁹

Other Australian cases

[36] Subsequent Australian cases have provided further guidance on application of the unfairness test. The most important of these are:

²¹ At [76] – [78] and [89] – [90].

²² At [81]- [88].

²³ At [91] – [92].

²⁴ At [81].

²⁵ At [82].

²⁶ At [88].

²⁷ At [89].

²⁸ At [91].

²⁹ At [92].

- (a) *ACCC v CLA Trading Pty Limited*,³⁰ where unlimited liability clauses in a car rental contract were found to be unfair.
- (b) *ACCC v JJ Richards & Sons Pty Limited*,³¹ where an automatic renewal clause in a waste management contract was found to be unfair.
- (c) *Jetstar Airways Pty Limited v Free*,³² which considered the fairness of terms requiring passengers to pay fees to transfer airline tickets to others.
- (d) *Paciocco v Australia & New Zealand Banking Group Limited*,³³ where the High Court of Australia considered that terms providing for late payment fees were not unfair.
- (e) *ACCC v TPG Internet Pty Limited*,³⁴ where telephone rental top-up provisions, which automatically debited a customer's credit card, and could see a consumer who changed providers forfeiting a credit balance of between \$10 and \$20, were not considered unfair.³⁵

[37] The following principles emerge from these cases:

- (a) In assessing whether there is a significant imbalance, it is useful to assess the impact of the impugned term on the parties' rights and

³⁰ *ACCC v CLA Trading Pty Limited* [2016] FCA 377.

³¹ *ACCC v JJ Richards & Sons Pty Limited* [2017] FCA 1224.

³² *Jetstar Airways Pty Limited v Free* [2008] VSC 539.

³³ *Paciocco v Australia & New Zealand Banking Group Limited* [2016] HCA 28, (2016) 258 CLR 525.

³⁴ *ACCC v TPG Internet Pty Limited* [2019] FCA 1677.

³⁵ The Commission distinguishes this case from the present on the grounds that:

- (1) The terms in *TPG* were part of an exchange of obligations which included very low monthly charges. By contrast consumers received no countervailing benefits from participation in the Home Direct Scheme.
- (2) The Court in *TPG* was satisfied that the terms were transparent unlike the position in the present case. (Refer later discussion).
- (3) The *TPG* terms reduced exposure to bad debt (in turn facilitating a cheaper service). By contrast the No Refunds and 12-month Expiry Term served only to increase the profitability of Home Direct's Scheme.
- (4) The sums involved were small (between \$10 and \$20) whereas in the present case they could be up to \$1,500.

obligations by comparing the effect of the contract with the term and the effect it would have without it.³⁶

- (b) The significant imbalance assessment requires the court to compare the trader's rights and liabilities as a result of the impugned term, with the rights and liabilities of the consumer as the result of that term, to see whether there is a significant imbalance between the two. The requirement of a "significant imbalance" directs attention to the substantive unfairness of the contract, which needs to be considered in the context of the contract as a whole.³⁷
- (c) The significant imbalance requirement will be met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in its favour.³⁸ In this context, "significant" means "significantly large to be important".³⁹
- (d) A term is less likely to give rise to a significant imbalance if there is a meaningful relationship between the term and the protection of a party, and that the relationship is reasonably foreseeable at the time of contracting.⁴⁰
- (e) A significant imbalance may be created by a clause which allows a party to charge customers for services it has not rendered for reasons beyond the customer's control.⁴¹
- (f) In considering the contract as a whole, not each and every term of the contract is equally relevant, or necessarily relevant at all. The main

³⁶ *Director General of Fair Trading v First National Plc* [2001] UKHL 52, [2002] 1 AC 481 at [54], cited in *ACCC v CLA Trading Pty Limited* [2016] FCA 377 at [54](c).

³⁷ *ACCC v CLA Trading Pty Limited* [2016] FCA 377 at [54](b), [57].

³⁸ *ACCC v CLA Trading Pty Limited* [2016] FCA 377 at [54](d), *ACC v ACN 117 372 915 Pty Limited (in liq)* [2015] FCA 368 at [950].

³⁹ *ACCC v CLA Trading Pty Limited* [2016] FCA 377 at [54](e), *Jetstar Airways Pty Limited v Free* [2008] VSC 539 at [104]-[105].

⁴⁰ *Paciocco v Australia & New Zealand Banking Group Ltd* [2016] HCA 28, (2016) 258 CLR 525 at [201], *ACCC v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 at [56]. *ACCC v TPG Internet Pty Limited* [2019] FCA 1677.

⁴¹ *ACCC v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 at [31].

requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question.⁴²

Discussion

Summary

[38] I am satisfied that the No Refunds and 12-month Expiry Terms when operating in combination amounted to unfair contract terms. I do so by reference to the criteria in s 46L(1)(a)-(c) and having regard to the mandatory assessment criteria in s 46L(2). I address each in turn.

The terms would cause a significant imbalance in the parties' rights and obligations

[39] The No Refunds Term conferred two significant benefits on Home Direct Ltd. Firstly, because customers could not call for a refund of monies paid into the scheme, the vouchers had to be spent on Home Direct Ltd's products or alternatively forfeited. This gave Home Direct Ltd guaranteed future income. Secondly, Home Direct Ltd obtained the interest free use of the money until a purchase was made.

[40] In addition, the 12-month Expiry Term gave rise to the prospect (ultimately realised) of a windfall benefit in respect of vouchers not spent within that period.

[41] Operating together, the two clauses had the result that customers whose accounts were debited for vouchers had to purchase further products from Home Direct Ltd to avoid forfeiting the value of those vouchers in their entirety. This was in circumstances where the consumers' credit balances could, as a result, for example, of a change of circumstances, been better directed to other purchases or debt reduction with the ability to call for a refund. There was no capacity for this to occur. In the result there was the potential for significant financial disadvantage, particularly given that balances could accrue to \$1,500 or, latterly \$500.

⁴² *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at [128], cited in *ACCC v CLA Trading Pty Ltd* [2016] FCA 377 at [54](g).

[42] The scheme did not provide any corresponding benefit to customers. They did not, for example, receive any discount on subsequent purchases using the vouchers, nor did the vouchers attract interest. Indeed, I accept the Commission's proposition that taking into account the time value of money, participants in the scheme in fact paid more for their purchases than other customers.⁴³

[43] It is not contended by Home Direct Ltd, nor would I have accepted, that customers benefitted from what was in effect a compulsory savings scheme. That argument was in my view correctly dismissed in *Chrisco* for the reasons previously discussed.

[44] I am satisfied therefore that the significant benefits Home Direct Ltd obtained from the No Refunds Term and 12-month Expiry Terms and the absence of any countervailing benefit to consumers resulted in a significant imbalance to the parties' rights and obligations arising under the Home Direct Contract.

The terms were not reasonably necessary to protect Home Direct Ltd's legitimate interests

[45] In terms of s 46L(3) the onus was on Home Direct Ltd in this respect. It does not contend that the terms were reasonably necessary to protect its legitimate interests nor could it. It had no legitimate interest in holding its customers' funds interest free against potential future purchases and with no option for them to be refunded. Nor did it have a legitimate interest in forfeiting such funds if a customer did not purchase goods within 12 months of having acquired the relevant voucher.

The terms would cause detriment if applied, enforced or relied on

[46] I accept the Commission's submission that the No Refunds Term caused detriment to consumers in the two respects already discussed. Firstly, voucher entitlements were non-interest bearing. Secondly, consumers were effectively locked in to purchasing goods from Home Direct Ltd when their circumstances may have

⁴³ See also *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd (No 1)* [2015] FCA 1204 at [57].

dictated more efficient application of their savings and whether or not more favourable terms of purchase were available from other suppliers.

[47] The 12-month Expiry Term had the potential to cause obvious detriment in the event vouchers were not applied to new purchases within the relevant period. It effectively forced consumers into the purchase of products that they may or may not have needed. The detriment was in turn exacerbated by the No Refunds Term because of the inability of customers to withdraw their funds as an alternative to spending them with Home Direct Ltd.

The terms were not transparent having regard to their content and how they were presented in the purchase agreement, disclosure statement and Terms and Conditions

[48] The first reference to the scheme was in the purchase agreement under the heading “Voucher Entitlement Scheme”. I have set out the relevant provisions above. Significantly there was nothing in the initial reference to the Scheme explaining that the customer’s account would continue to be regularly debited, the amounts of such debits or indeed what the vouchers actually entitled customers to. Although initialling the relevant box carried with it an acknowledgment the customer has read and understood the “important information” referred to on the reverse of the form (in the disclosure section), a person who did not proceed to this section may well have considered the “Voucher Entitlement Scheme” a bonus to which they were entitled on their initial purchase. Indeed, this may have accounted for the high rate of participation in the Scheme. Moreover, the reference to a “Voucher Entitlement” referred to the receipt of something tangible, not simply a non-interest bearing credit with Home Direct Ltd.

[49] Turning to the “important information” on the reverse of the form, I agree with the Commission that a customer might reasonably have considered that this set out all the essential elements of the Scheme. However, it did not do so in two material respects. Firstly, although the paragraph refers to “payments received by Home Direct Ltd once all monies outstanding under your credit limits have been paid in full” it did not alert the consumer to the prospect of indefinite debiting. Secondly, while the paragraph referred to the No Refund Term it did not refer to the 12-month Expiry

Term.⁴⁴ This was a significant omission, even though the term could be found in paragraph 74 of the Terms and Conditions.

[50] The Terms and Conditions themselves were also insufficiently clear. They referred (cl 74) to the fact that voucher entitlements lasted for “12 months from the date of purchase”. A possible interpretation was that this period ran from the date of purchase of the original goods, albeit that the next sentence identified that the period related to purchase of “the voucher entitlement”. I accept the Commission’s position that consumers may have been led to believe that vouchers were something to be acquired through positive action rather than as a result of their accounts being passively debited. Customers may also have thought that only positively acquired vouchers would expire and may not have appreciated that the 12-month expiry applied to any voucher balance in their Lifestyle Account.

[51] I accept that this lack of transparency related in part to the Scheme itself rather than specifically to the No Refunds Term or the 12-month Expiry Term. It is nevertheless relevant because s 46L(2)(b) directs the Court to consider the contract as a whole. The Court can, in my view, properly have regard to the overall opacity of the Scheme in determining that the No Refund Term and 12-month Expiry Term were unfair.

[52] The problems I have identified above with clarity of the language were then further compounded by the way in which the No Refunds and 12-month Expiry Terms were presented in the documents.

[53] The references in the purchase agreement to the expiry and non-refundability of vouchers were in small font in a condensed box towards the bottom of the page and then only from September 2017. The box for the customer’s initials confirming participation in the Scheme followed closely after other boxes the customer was required to initial or tick. I accept the Commission’s submission that presenting information in this way created a risk of a customer signing on to the scheme without realising it and without seeing the information about expiry and refunds. Again, this may have accounted for the high participation rate.

⁴⁴ There was such a reference in the purchase agreement but only from September 2017.

[54] Similarly, although the relevant provision is in the disclosure statement, which had a bold capitalised heading, the information itself was in very small font and the provision was at the bottom of the page following a large number of other closely typed clauses. Moreover, the font used for the heading was the same as 14 other headings on the same page, the first of which likewise used the word “important”. I agree with the Commission that the way the material was presented was not commensurate with its effect on the consumer’s rights and obligations under the Scheme and it could very easily have been missed. In addition, and as I have already observed, the “important information” did not refer to the 12-month Expiry Term.

[55] As to the Terms and Conditions, the no refunds and 12-month Expiry Terms were presented on the ninth page of a 12 page document as the 70th and 74th terms respectively. Again, no particular attention was drawn to them. In addition, from 18 May 2017, customers were not routinely given a hard copy of the terms and conditions at all, with the result that they were required to download them from Home Direct Ltd’s website. Many consumers would not have done so.

[56] In combination, these considerations meant the relevant terms were in my view far from transparent. The requirement of the Court to have regard to this issue reflects both the purposes of the FTA in protecting the interests of consumers and allows courts to draw reasonable inferences regarding how consumers might be expected to engage with the relevant standard form of contract. In the present case I accept as a reasonable inference, that many of those who opted into the Scheme would not, as a result of the inadequacies in presentation and content, as discussed above, have been aware of the full implications of their decision. As such, the absence of transparency adds a further layer of unfairness to the overall analysis.

[57] In the present case I am not required to decide whether the terms could have been saved by a greater transparency. The Commission’s position is that s 46L(1) enacts a “substantive concept of unfairness that may well arise notwithstanding plain language drafting” and better presentation. I am broadly sympathetic with that proposition. Although s 46L(2) requires the Court to take into account the extent to which the impugned term is transparent, transparency is not itself identified as

decisive. It will always, however, be a factor (and potentially an important factor) in the overall assessment.

Terms unfair taking into account the contract as a whole

[58] Section 46L(2)(b) requires that the assessment take place in the context of the contract as a whole. The preceding discussion identifies why the 12-month Expiry Term and No Refunds Term were unfair in that context. This was not, for example, a case where the terms were balanced by a right to interest on accrued balances or discounts on future purchases. There were no countervailing obligations on Home Direct Ltd. It was in that sense “one-way traffic”.

[59] I record the Commission’s position that, although its case was advanced on the basis of the combined effect of the two terms, it should not be taken to accept that each of the terms would have been fair in isolation. In that respect the Commission relies on the *Chrisco* case as an example of where a “savings” scheme might contain unfair contract terms even if (for example) a refund was available, or the rights were not expressed to expire.

Result

[60] The formal declaration which follows is by consent of the parties. It is in its terms directed to the statutory requirements identified in s 46I(3) of the Act and is informed by the terms of the declaration granted in *Chrisco*.

[61] The Court accordingly declares that:

- (1) the defendant, Home Direct Ltd, entered into standard form consumer contracts on terms as set out in the Home Direct Master Terms and Conditions (the **Terms and Conditions**), dated 1 April 2017 and 7 July 2017. The contracts allowed customers to buy goods on deferred payment terms. The contracts also provided for borrowers to opt-in to a “voucher entitlement” scheme. Under the scheme, the defendant would continue to debit customers’ bank accounts after they had paid

in full for their goods, with those monies converted into “voucher entitlements” to be used for future purchases from the defendant.

- (2) The Terms and Conditions included two terms (the **Particular Terms**) as follows:

The No Refunds Term

Your voucher entitlements cannot be refunded or exchanged for cash.

The 12-Month Expiry Term

Voucher entitlements last for 12 months from the date of purchase. Any voucher entitlement not used by you in the 12 months from the date you purchased the voucher entitlement will expire and become our property. You will not have a right to a cash refund for any expired vouchers. We will endeavour to notify you before the expiry of any voucher entitlement. However, we will not incur any liability if we fail to do so.

- (3) The Particular Terms, when operated in combination with one another, and taking into account the contract as a whole and the extent to which the terms were transparent, are unfair contract terms within the meaning of s 46L(1) of the Fair Trading Act 1986 (**FTA**). This is because the Particular Terms:

- (a) cause a significant imbalance in the parties’ rights and obligations arising under the contract which was not balanced by any substantial corresponding right in favour of the consumer;
- (b) are not reasonably necessary to protect the legitimate interests of the defendant, as the party who would be advantaged by the terms; and

- (c) would cause a detriment to customers if they were applied, enforced, or relied on.
- (4) Accordingly, pursuant to s 26A of the FTA:
- (a) a person must not:
 - (i) include the Particular Terms in a standard form contract; or
 - (ii) apply, enforce, or rely on the Particular Terms in a standard form contract; and
 - (b) given the effect of paragraph (a)(ii) above, the defendant cannot rely on the Particular Terms in the event customers seek to use, or request refunds of, their voucher entitlements.

Costs

[62] The parties do not seek any order in respect of costs.

Publication of decision

[63] My declaration at [61](4)(b) directs that the defendant cannot rely on the Particular Terms in the event customers seek to use or request refunds of their voucher entitlements. Mr Hunter advises that it is the intention of the Commission to broadly publicise this decision with the object of alerting as many consumers as possible of their rights to seek refunds. I intend also to publish the decision on the site “Judicial Decisions of Public Interest”.

Muir J

