Browne Jacobson

Safeguarding the incorporation of onerous terms into a contract

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Useful guidance on the incorporation of onerous terms and conditions into a contract has been provided by HHJ Davies' judgment in the recent case of **Blu-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm)**, which concerns a claim for cancellation fees of £180,000 plus VAT for a mobile phone contract terminated by the defendant before the claimant had even begun to perform it.

Whilst HHJ Davies makes clear that his judgment is based on the facts of the case, there are many useful lessons contracting parties can take from his decision, particularly those who use a standalone terms and conditions (**T&Cs**) document (whether physical or online).

This article sets out the legal position on the incorporation of both standard and onerous T&Cs into a contract before exploring HHJ Davies' conclusion that the claimant's onerous T&Cs had not been successfully incorporated. Key take-aways for contracting parties appear in the conclusion.

The established position

It is commonly accepted that where a party's T&Cs are not contained in the contract document that is to be signed by the accepting party, they are only incorporated into the contract if they are brought sufficiently to the attention of the accepting party.

In respect of onerous T&Cs the incorporation threshold is elevated. Particularly onerous or unusual terms will only be incorporated into the contract if they have been fairly and reasonably brought to the accepting party's attention. Otherwise, irrespective of whether the standard T&Cs have been successfully incorporated, onerous terms will not.

Determination of how onerous a clause is can never be an exact science. The following are examples of clauses that the Courts have held to be onerous:

1. A clause that requires a purchaser of defective goods to return them at its own expense; and

2. The imposition of excessive transfer and cancellation fees for customers seeking to switch contracts with mobile network suppliers.

The incorporation of a party's standard T&Cs

It is now common – approaching universal - for T&Cs to be located on a party's website. Generally, if the contractual document refers to that website, the T&Cs will be successfully incorporated. In *Blu-Sky* HHJ Davies found it determinative that:

1. The claimant's T&Cs were accessible at the website cited in the contractual document that the accepting party was signing (HHJ Davies noted that whether the accepting party does, in fact, follow the link is not relevant).

2. As the claimant had two sets of T&Cs on its website, the link on the website to the relevant T&Cs clearly stated that it related to the contract that the defendant was signing. In *Blu-Sky*, for example, the claimant operated contracts relating to both mobile phones and landlines. The respective links to the two sets of T&Cs read as follows: "*terms and conditions - mobile*" and "*terms and conditions -*

landline".

3. The body of text within the applicable T&Cs further referred to the contract that the defendant was to sign. For example, clause 1.1 of the applicable T&Cs in *Blu-Sky* expressly stated that they related to mobile phones.

HHJ Davies' view, therefore, was that the "*defendant, had it accessed and had a reasonably quick look"* at the applicable T&Cs *"would have had no reason to think that they were not indeed applicable*".

The incorporation of onerous terms

In determining that the contested clauses were indeed onerous, HHJ Davies said that "*there is a sliding scale - the more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given*". He drew a clear distinction between contracts in which the T&Cs are enclosed and contracts in which they stand alone. In respect of the former, the principle remains that only in extreme cases will the Courts depart from the usual principle that a party that signs a document is bound by its terms. However, in respect of the latter, that principle is not applicable and specific notice of any onerous terms is required for their incorporation.

The judge went on to explain that when deciding upon the incorporation of onerous terms, the weight given to the fact that the accepting party signed the contract "*is likely to be very strong if there is a short form signed contract which refers to the term itself, and likely to be relatively weak if the order form is signed but the term is "buried away" in detailed T&Cs…which are neither found in the signed contract nor provided with the signed contract.*"

HHJ Davies considered that the onerous terms had not been fairly and reasonably incorporated because:

1. The claimant had made no attempt to comply with what he found was the relevant industry's code of practice.

2. Prior to receiving the order form the defendant was not told (and had no reason to expect) that it would be exposed to a very substantial contractual liability from the claimant.

3. The order form did not make clear and, in fact, positively clouded the nature of the deal which the claimant was offering.

4. Although the order form made express and reasonably clear reference to the claimant's T&Cs, it did not explain their essential purpose or give any warning that they imposed potentially substantial obligations on the defendant – especially for early cancellation.

5. It would have been perfectly feasible to include the T&Cs as part of the order form. This would have illustrated that they were in fact voluminous and complex terms.

6. No attempt was made to highlight the onerous terms.

Industry-wide clauses

The claimant sought to argue that as the contested clauses were widespread in contracts across the mobile phone industry, they were neither unusual or onerous and were therefore immune from the elevated incorporation threshold. The judge disagreed, deciding that "*the fact that such clauses are not unusual does not of itself mean that they are not onerous*".

Key tips for contracting parties

Blu-Sky serves as a critical reminder to commercial enterprises that the Courts will not look favourably upon parties that seek to bury onerous clauses within discrete T&Cs. Consequently, contracting parties must do their upmost to bring such clauses to the counter-party's attention, despite the risk of the agreement falling through.

HHJ Davies' judgment provides helpful guidance on the measures that enterprises should adopt to increase the likelihood of both standard and onerous T&Cs being incorporated into the contract. The key message is one of **transparency**. Contracting parties are expected to be upfront about the extent of the liabilities imposed by their T&Cs, particularly those that use T&Cs that are separate to the contract. Whilst there is no fool-proof guide to ensuring onerous terms are incorporated, steps such as highlighting and explaining them in pre-signing communication; underlining and emboldening the text of them in the T&Cs or, better still, referencing them expressly in the

actual signing document, will all substantially help ensure that onerous terms are incorporated. Perhaps most effective of all would be to always enclose the T&Cs with the contract itself.

Contact

Mark Hickson

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

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