Browne Jacobson

Onerous terms: the devil is in the detail!

This article set out 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.

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Often suppliers bury their onerous clauses deep within their terms and conditions (T&Cs) to not spook potential customers from entering into the contract. Unsuspectingly, many organisations assume that because they signed up to the contract they are, therefore, obliged to accept the liability of the onerous terms. However, those terms may not have been successfully incorporated into the contract by the supplier, meaning they do not form part of the contract and are not binding.

The recent judgment of HHJ Davies' in the case of *Blu-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm)*, which concerned 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, provides useful guidance on the incorporation of onerous terms and conditions into a contract.

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 public sector organisations 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.

It is worth noting at this point that the onerous T&Cs incorporation threshold does not necessarily require a supplier to overtly draw their onerous T&Cs to the counter-party's attention, for example, by listing its onerous T&Cs in an email. Public sector organisations cannot confidently rely on the fact that the supplier has not overtly drawn such terms to its attention to argue that they are not binding.

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 supplier'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.

Key take-aways for the public sector

If a supplier is seeking to enforce onerous terms, the factors listed at (1) - (6) above provide a useful basis to assess if there are grounds to argue that those terms were not incorporated and, if there are such grounds, you can then use them to push back on the supplier.

Ultimately, prevention is better than cure and so the safest route is to ensure that contracts are thoroughly reviewed and negotiated prior to agreement.

Contact

Mark Hickson

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

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