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Terms and Conditions: Formation, Incorporation and Invalidity

In *Blu-Sky Solutions Limited -v- Be Caring Limited* [2021], the Commercial Court considered contract formation, incorporation of terms and conditions, and invalidity of onerous provisions.

Contractual Background:

Blu-Sky Solutions Limited (the **"Claimant"**), a supplier of telecommunication services, claimed c£180,000 from Be Caring Limited (the **"Defendant"**), a social care provider, under a contract relating to the supply of a mobile network service (the "**Contract**"). The Contract involved the provision of connections for 800 mobile phones for a minimum rental period.

The mobile network service was to be supplied by a third-party network operator ("**EE**"), who the Defendant was to enter into a subsequent contract with (the "**EE Contract**"). The Defendant, however, cancelled its order prior to connection and did not enter into the EE Contract.

Parties' Positions:

The Claimant contended that the Contract was formed when the Defendant signed its order form (the **"Order Form"**) and that the Contract incorporated its standard terms and conditions (the **"Terms"**). Under clause 4.6 of the Terms, the Claimant was entitled to a £225 charge per connection (i.e. for 800 mobile phones) in the event of cancellation before connection.

The Defendant contended there was no binding contract and refuted incorporation of the Terms. Alternatively, clause 4.6 was not incorporated as it was unusual and onerous and/or it was a penalty clause and therefore void. The Defendant also denied that the Claimant suffered any loss due to its cancellation.

Issues before the Court:

Did the signed Order Form create legal relations?

The Defendant argued as follows:

(a) the parties did not intend the Order Form to create legal relations, and it was not sufficiently complete/certain; and

(b) the formation of any contract was subject to a condition precedent that the Defendant and EE contracted subsequently.

The issue depended upon whether the parties' words/conduct lead *"objectively to a conclusion that they intended to create legal relations…"* The Court held that, by signing the Order Form, the Defendant entered into contract with the Claimant. Whilst the Defendant may not have fully appreciated the distinct roles of the Claimant and EE, a party in the Defendant's position would have known:

(a) it was contracting with the Claimant;
(b) terms and conditions would apply; and
(c) the Contract was separate from the EE Contract.

Were the Terms incorporated into the Contract?

Where terms are merely referenced in a contract, the question is whether those terms were brought to the attention of the party accepting those terms. The Court reiterated that reference within a contract to a website containing terms and conditions can be sufficient incorporation. Where a website contains reference to more than one set of terms and conditions, those that a party seeks to rely upon must be those that are clearly applicable to the contract being entered into.

In this case, there were two sets of terms and conditions (*mobile* and *landline*). It would have been clear to the Defendant that the *mobile* terms applied to the Contract as landline services had no relevance. Notwithstanding that the Defendant did not click on the website link to the Terms, the contents of the Terms were such that the Defendant would have no reason to believe that they did not apply.

Was clause 4.6 unusual/onerous?

Even if a contracting party knows that standard terms are incorporated into a contract, a term which is *"particularly onerous or unusual"* will not be incorporated into that contract, unless it has been

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fairly and reasonably brought to that party's attention. Whilst terms as to cancellation charges are standard in this industry, the fact that a clause is not unusual does not of itself mean that it is not onerous.

In the case of clause 4.6, the Claimant made no attempt to explain the Defendant's obligations, nor did it take any steps to ensure that the Defendant understood key features of the Contract or details of early termination charges. The Court's view was that clause 4.6 was particularly onerous as:

(a) the charge per connection (£255) bore no relationship to actual costs and was disproportionate to any reasonable estimate of the Claimant's loss; and
(b) the fact that other dealers sought to protect profit by including such clauses could not hold weight.

In addition, clause 4.6 was not fairly and reasonably brought to the Defendant's attention as:

(a) the Claimant had failed to comply with a relevant Code of Practice, which advised transparency;
(b) the Defendant was not informed/had no reason to expect exposure to very significant liability;
(c) whilst the Order Form referred to the Terms, it did not explain their essential purpose or give any warning as to potentially serious liability; and
(d) the Claimant could have included the Terms as part of the Order Form (rather than a mere website reference), thus emphasising the need to read them carefully prior to signature.

The Court held that whilst the Terms in general were brought to the Defendant's attention, the offending clause was *"cunningly concealed in the middle of a dense thicket which none but the most dedicated could have been expected to discover…"* As the clause was so onerous and "*positively concealed*" the Court concluded the same was not incorporated.

Would the clause be void as a penalty clause?

Given the above finding, the Court was not strictly obliged to address whether clause 4.6 was a penalty. Nonetheless, the Court commented as follows. The question is whether the term "*is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.*"

The Court found that clause 4.6 *was* a secondary obligation, as it only applied if there was a breach of a primary obligation; namely, the obligation to enter into the purchase order with the Claimant.

The Court viewed £225 per connection as a *"detriment out of all proportion to any legitimate interest of the Claimant"* and was satisfied that clause 4.6 was not intended to recover actual costs. To recover such disproportionate sums would be "*unconscionable*," especially given clause 4.6 was hidden away in the Terms rather than *"prominently positioned and explained."* Clause 4.6 would therefore have been a penalty.

What loss did the Claimant suffer due to cancellation?

The Claimant did not disclose documents relevant to its actual losses and, when cross-examined, it stated the claim was one of debt, rather than damages. Indeed, the Claimant did not plead a claim for damages for breach of the relevant clauses. The Court concluded that the Claimant was not entitled to damages when it relied solely upon a claim for charges and did not plead a particularised claim for damages as an alternative.

Analysis:

This case serves as a reminder to parties to be transparent in negotiations and highlights the importance of bringing particularly onerous terms to the attention of the other party. Failure to do so can be fatal to a party's later claim.