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1st Appellate Ruling On Digital Terms Sets Tone For Disputes

By **Eddy Eccles** (March 25, 2024, 2:21 PM GMT)


Eddy Eccles

"Whether we like it or not, we are living in a digital era."[1] This is how the Court of Appeal of England and Wales opened its judgment in Joan Parker-Grennan v. Camelot UK Lotteries Ltd., handed down on March 1.

As openings go, there is less foreshadowing here than in Justice Tom Denning's famous words in the Court of Appeal's 1977 judgment Miller v. Jackson, dropping a heavy hint as to his views on the liability for errant cricket balls with the line, "In summertime village cricket is the delight of everyone."[2]

It is nonetheless an eye-catching starting point for a judgment that addresses the issue of what needs to be done to incorporate terms and conditions, or T&Cs, into a contract for goods or services made online, and one that similarly sets out its stall for the reasoning that follows.

Parker-Grennan is, by its own account, the first decision of the Court of Appeal to address this issue, although it is one that has recently generated considerable litigation at the first instance level.

The Court of Appeal's decision ultimately affirms some fairly well-established principles of contract law, but that, by itself, provides an invaluable guide for how future disputes in this space will need to be approached. Above all, handling future disputes means accepting the realities of the digital era in which we now live and the ways that businesses and consumers interact are changing — and the courts are applying long-standing principles of contract law with that in mind.

The Facts of the Dispute

Joan Parker-Grennan had an online account with the National Lottery that allowed her to play National Lottery games on her laptop. In August 2015, she played an "Instant Win Game" — similar in design to many physical scratch card games — that offered prizes for players who revealed a match between their numbers and the game's winning numbers, which were also displayed on screen.

Players could also disable the graphics for the game, in which case they would simply be told whether and what they had won.

In this case, Parker-Grennan's game display declared that she had matched two 15s, winning her £10 ($13). However, she saw that the numbers displayed on screen also included two 1s, which, when matched, should mean a £1 million jackpot.

With an instinct to preserve the evidence of her claim that would make any lawyer proud, she took a screenshot of the display. Then, after calling Camelot for advice on what she was seeing, Parker-Grennan clicked the button to finish the game. When she did so, the game confirmed that she had won only £10.

Later investigations by Camelot suggested that the appearance of the other jackpot numbers on the Parker-Grennan's screen was due to a coding error in the Java software responsible for the game graphics. Camelot explained that, on its database, she was only ever recorded as winning £10.

Parker-Grennan sued for the additional £1 million, arguing that she had done exactly what the game had required, namely matching her numbers to winning numbers, and that Camelot should not be able to rely on a software error to avoid paying out the value of her second, higher matching pair.

Camelot relied on the contents of various T&Cs in order to defend its position. These included the overarching T&Cs that govern National Lottery games online, specific terms and rules applicable to instant win games, and additional game procedures.

Those T&Cs included detailed provisions about how the prizes for this game would be determined, including to the effect that the prize was the amount displayed as the winning amount when the game was completed — in this case, the lower £10 figure.

Camelot's position was that Parker-Grennan had agreed to be bound by those terms when she had ticked boxes online to confirm her consent to the T&Cs — both when originally opening her account and when those terms were then updated over time — with the relevant T&Cs accessible via hyperlinks or by drop-down menus on the National Lottery website. This well-known form of click-and-accept transaction is called a "click-wrap" agreement.

Parker-Grennan disputed numerous aspects of Camelot's position, with the result that the court was ultimately required to address three issues:

- An issue of incorporation as to whether the T&Cs formed part of the contract between the parties;
- An issue of enforceability, regarding the application of the unfair terms in consumer contract regulations to those T&Cs; and
- An issue of construction as to whether the prize amount was determined simply by the appearance of matching numbers on the game display, as argued by Parker-Grennan.

Ultimately, the court's verdict on the third of these points was sufficient to dismiss the appeal, regardless of its findings on the incorporation and enforceability of the T&Cs.

However, the court also considered the other points as well, and it is its verdict on the issue of incorporation, which is addressed in this article, that will be of greatest interest to other market participants.

The Long History of Neglect for T&Cs

The real-world challenge for the applicability of online T&Cs is that most people simply do not seem to read them.

Back in 2013, the Law Commission was already noting that "simply labelling a hyper-link as 'terms and conditions' is sufficient to ensure that most consumers do not read the document."[3] Judges have approached these terms with a similarly worldly perspective.

Thus, in the November 2022 Commercial Court, King's Bench Division, decision in Ebury Partners Belgium SA/NV v. Technical Touch BV, Judge Richard Jacobs noted that, while it was commonplace for businesses to present customers with click-wraps to agree T&Cs, it is "[e]qually commonplace, at least speaking personally, ... for a person fail to do so and to receive a reminder that the box must be ticked in order for the transaction to proceed."[4]

In the same court, in the April 2021 decision in Green v. Petfre (Gibraltar) Ltd., Judge Alison Foster described a scenario where a customer was given an option to view various contractual documents via a hyperlink labeled as "view," observing that "Many, one might suspect most, would have passed up on that invitation and proceeded directly to click on 'Agree', even though it was suggested that they should do so only when they had read and understood the documents."[5]

And, in Parker-Grennan, the Court of Appeal itself queried "Is it ever going to be possible to overcome the fact of life that most people (dare I say it, even lawyers) will not bother to read the 'small print' before clicking on the box or button which states 'I [have read and] accept the terms and conditions'?"

Despite the widely recognized neglect of T&Cs in practice, it is well settled that reference to online T&Cs can suffice to ensure that those terms are incorporated into both physical agreements and agreements made entirely online.

To determine whether they do in fact suffice in any particular case, the courts have applied standard principles of contract law that predate the digital era.

First, the key consideration is whether the party seeking to rely on the T&Cs has done what is reasonably sufficient to give the other party notice of them, and, second, further signposting is generally required for onerous or unusual terms before those will be incorporated.

Together with a third principle — that the potential applicability of statutory provisions that can render contractual terms unenforceable even where those are incorporated — these form the standard trio of arguments by which online T&Cs are disputed in the consumer space, as indeed they did once more in Parker-Grennan.

The Decision In Parker-Grennan

The Court of Appeal's judgment, upholding the 2023 High Court decision of Judge Robert Jay,[6] swiftly concluded that Camelot's T&Cs had been incorporated into its agreement with Parker-Grennan, with its click-wraps providing reasonably sufficient notice of the various T&Cs on which Camelot relied.

But what does the Court of Appeal decision in Parker-Grennan add to the body of first-instance judgments, which have already, among other things, upheld the use of click-wraps to incorporate online T&Cs into contracts agreed online, and are providing a growing body of case law on the identification of onerous or unusual terms in this area?

Certainly, the confirmation of that prior reasoning at appellate level is important and helpful. But, beyond that, it is the attitude of the Court of Appeal that will be most relevant to the future direction of disputes in this space.

Notably, when the Court of Appeal introduces the issue of incorporating T&Cs at the start of its judgment, this is presented as not simply a legal test, but rather a "big dilemma" confronting businesses online:

> How do they bring their standard terms and conditions of trading sufficiently to the attention of their prospective customer to incorporate them in the contract of sale or contract for services, without testing their patience so much that they decide to take their custom elsewhere, and without impeding the rapid turnover which may be the key to the profitability of their trade?

In the digital era, this balancing act is seen in all sorts of online transactions every single day. Customers know to expect that contracts may be supplemented by T&Cs located online, and the test of whether terms are incorporated needs to be understood in that context.

Having framed the debate in those terms, it is perhaps no surprise that the court then robustly rejected an argument from Parker-Grennan that customers should be required to scroll through all T&Cs before these could be agreed in what is known as a "scroll-wrap" agreement.

The court did not think that this would make consumers any more likely to read T&Cs, only more likely "to become fed up and quit the website." But, in any case, the legally relevant question was whether there had been reasonably sufficient notice, and the fact that Camelot could have done more to bring its T&Cs to the attention of customers did not mean that it needed to have done so.

The court was careful to disavow that it was laying down principles of general application. It expressly noted that its judgment did not mean that click-wraps will inevitably satisfy the requirements of reasonably sufficient notice in other cases, even in the absence of onerous or unusual terms. But its conclusions, and its overall approach, nonetheless provides helpful confirmation of the general utility of these tools.

Looking Ahead

The continuing application of well-established legal principles in support of sensible and widespread business practices is the message from Parker-Grennan on the incorporation of online T&Cs. For that reason, its immediate impact may be limited.

We can expect this to encourage further the adoption of click-wraps over other methods for the incorporation of T&Cs, including more burdensome options like scroll-wraps. The scope of future disputes in this space should also narrow, although the disputes themselves will doubtless continue in what is invariably a fact-sensitive area of law.

Less clear is how matters will progress as the market embraces ever greater levels of technological innovation. That ongoing innovation is perhaps the defining characteristic of the Court of Appeal's digital era, and it is already driving newer and more radical changes in the ways contracts are being agreed to, and performed, online — most notably in the area of smart contracts.

It remains to be seen how disputes over incorporation will arise and be resolved in an era characterized by increasing levels of automation in contract formation.

At the end of its judgment in Parker-Grennan, the Court of Appeal expressly invited the Law Commission to consider a new evidence-based review of the digital environment for consumer contracts. If done, it is to be hoped that this will grapple seriously with the implications of the future business landscape, as well as with the increasingly well-mapped topography of the past.

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[1] Parker-Grennan v. Camelot UK Lotteries Limited [2024] EWCA Civ 185.

[2] Miller v. Jackson [1977] 1 QB 966.

[3] Law Commission and the Scottish Law Commission, Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills, at S.16.

[4] Ebury Partners Belgium SA/NV v. Technical Touch BV [2022] EWHC 2927 (Comm).

[5] Green v. Petfre (Gibraltar) Ltd. (t/a Betfred) [2021] EWHC 842 (QB).

[6] Parker-Grennan v. Camelot UK Lotteries Limited [2023] EWHC 800 (KB).