

Insights

DIGITAL SPEAKS - DON'T GAMBLE ON YOUR CONSUMER T&CS

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Online terms and conditions have long been a challenge for businesses. How can you simultaneously ensure a consumer is made aware of the key terms of an online contract (so they are incorporated into the contract) whilst also not testing a consumer's patience with a dense thicket of online terms / website pages which must be navigated before a purchase can be made? Creating a frictionless customer 'journey' (in website architecture parlance) is the holy grail for consumer-facing businesses. The Court of Appeal decision in *Parker-Grennan v Camelot* is the first time the English courts have considered how you might incorporate standard T&Cs into online contracts for goods or services.

Whilst the Court was invited to lay down some principles of general application (or at least give some guidance as to how businesses can bring T&Cs to the attention of consumers), it declined to do so, considering it lacked the evidential material to do so. This was notwithstanding the fact that Court identified that the issue was considered most recently by the English and Scottish Law Commissions in a 2013 report and the European Commission's equivalent 2016 study, which both considered how consumers interact with contract terms online (and the likelihood that consumers skim or skip over online terms). On Ms Parker-Grennan's appeal, the Court only considered the narrower question of whether Camelot's T&Cs had been incorporated into its online contract with Ms Parker-Grennan.

FACTS

Ms Parker-Grennan had an online National Lottery account, first opened in 2009. In 2015, she played a new instant win game ("IWG") on the National Lottery website. When the winning numbers (generated by a random number generator) were matched with the player's numbers, the player would win a prize between £5 to £1 million. Ms Parker-Grennan matched the number 15 and was notified that she had won £10. However, she noticed that the number 1 had also been matched, which was supposed to attract a prize amount of £1 million prize. She took a screenshot showing two sets of matching numbers, before clicking the 'Finish' button and rang Camelot to notify them that she believed she had won the higher amount.

Camelot refused to pay the £1 million, claiming that the matching 1 occurred as a result of a coding error affecting the way the animations displayed in the game when it was played on a PC as opposed to a mobile device and that, when she had pressed the play button, Camelot's random number generator had already determined the outcome of the game, a £10 prize. She was referred to the T&Cs, which were easily accessible and which she had previously accepted by clicking 'accept' (this is referred to as the 'click-wrap' procedure). It also argued that only one win was possible during a single gameplay and that this was made clear in the T&Cs. Ms Parker-Grennan argued that the screen stated "Match any of the Winning Numbers" during gameplay and that this language did not negate the possibility of two prizes being won in a single gameplay.

To decide the appeal, the Court had to consider a number of issues. We have focused solely on the issue of the incorporation of Camelot's standard terms into its online contract with the consumer.

HAD THE T&CS BEEN INCORPORATED?

The legal test is whether what Camelot did was *reasonably sufficient* to bring its various T&Cs to the notice of a player of the game (as well as signposting any onerous or unusual terms to the player – although in this case, none of the Camelot T&Cs were held to be so). The Court identified that players would expect there to be rules governing how the IWG was played and how a player could win and that the T&Cs clearly stated that only one prize amount per play could be won, with the game only concluded when the 'finish' button was pressed. The T&Cs ensured that money was only paid out for valid prize wins and were explanatory in nature. There was no requirement for Camelot to specifically signpost any of the relevant terms to incorporate them into the contract – with the question of whether enough had been done to draw these terms to the notice of the claimant being a question of fact.

The Court considered how contracting online differs from signature of a physical document (where the standard terms are typically above the signature block) and whether an online model which requires the consumer to scroll through the relevant sets of terms, before then clicking to accept the terms would make it more likely the consumer would read the relevant T&Cs. The Court noted that this process was more likely to cause the consumer to give up and if they did scroll through, it would only be to reach the point at which they could accept them (and would not be a guarantee the T&Cs had actually been read). The Court made clear it is not the task of a business to do everything in its power to try to make the consumer read the terms: "*one cannot force someone to read the terms and conditions if they cannot be troubled to do so*" emphasising that they just need to be given a sufficient opportunity to read them.

The Court identified that there may, therefore, be a variety of means a business can use to bring its T&Cs to a consumer's attention and that using the click-wrap procedure will not be sufficient in every case to incorporate all standard terms in every online contract (for example, if the website is only open for the transaction for such a limited time that a consumer would not have sufficient

opportunity to read and understand the terms, or if a consumer is required to click onto so many different hyperlinks that it cannot be said the T&Cs are readily or easily accessible).

The Court agreed with the trial judge that Camelot had done enough to ensure that its terms were incorporated into the contract, namely: the terms were readily accessible to Ms Parker-Grennan via hyperlink or drop down menu (which would give access to a summary of changes as well as complete versions of the updated terms); they were written in plain English; there was a simple glossary of terms used; any important updates or changes were highlighted in summaries for the benefit of the player; and there was no time pressure on the consumer to accept the changes. So, despite the fact that there had been a glitch causing some game animations to display in error, the online T&Cs terms meant Camelot was not required to pay out a £1million prize and Mrs Parker-Grennan had therefore only won the £10 prize.

KEY TAKEAWAYS

When devising the content, layout and structure of online terms and the customer journey, businesses should be mindful about the need to ensure consumers: (i) are afforded sufficient opportunity to examine them pre-contract; (ii) are alerted to changes to online T&Cs; and (iii) can refer back to them during the lifespan of a contractual relationship. In particular:

- consider how consumers are afforded sufficient opportunity to examine the terms pre-contract (for example is the click-wrap procedure is sufficient to bring the terms to the attention of the consumer in the context of the particular transaction?);
- identify any onerous or unusual terms that need to be signposted to the consumer (for example any exclusion clauses functioning to the detriment of the player);
- ensure that:
 - the terms are in plain English and easily legible; and
 - any changes are clearly highlighted (e.g. by summarising key changes);
 - (specifically those businesses in the gaming and betting sector) review how players can actively and easily access, read and accept terms before continuing gameplay - the user experience should be front of mind;
- track how consumers engage with websites and contract online, potentially keeping statistics of interactions with consumer T&Cs, to show how consumers are engaging with your T&Cs.

For advice on how to approach consumer online terms and conditions, in light of upcoming consumer law reform in the Digital Markets, Competition and Consumers Bill (which provides for increased penalties for non-compliance with consumer law), please speak to Richard Shaw.

RELATED PRACTICE AREAS

- Commercial Contracts
- Technology Transactions

MEET THE TEAM



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