RADIUS LAW

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RADIUS LAW

Corporate & Commercial

Terms and Blu-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm).

Previous case law has confirmed that in business-to-business contracts, it is acceptable to incorporate terms by referring to them on a website[1], but a recent High Court decision[2] has flagged that this *may not be sufficient for onerous terms*.

In this case, Blu-Sky, a mobile network provider contracted with a care home for mobile phones. Amongst the terms was an onerous term obliging the care home to pay a fee of £225 per connection if it cancelled. The charge to cancel all of the connections would be £180,000.

The Court ruled that Blu-Sky could not enforce its right to charge the cancellation fee, because:

- a clause which is '***particularly onerous or unusual'*** will not be incorporated into the contract unless it has been fairly and reasonably brought to the other party's attention;
- the cancellation clause in this case was particularly onerous because it did not bear any relationship to the actual costs incurred by Blu-Sky;
- the offending clause was ***'buried'*** within the body of the T&Cs and was ***'cunningly concealed'***
- even if it had been incorporated, the cancellation clause would have been void because it was a penalty clause.

Is acceptance needed for a contract?

All law students are taught that there are five key elements for any contract to exist:

- offer;
- acceptance;
- consideration;
- intention to create legal relations; and
- certainty of terms

Two recent cases, however, have shown that the Courts may take a relaxed view on whether there has been acceptance.

In Premia Marketing v Regis Mutual Management[3], Premia sought remuneration for introducing a client to Regis. There was no written contract and they had not even agreed the basis for calculating any fees due. Nevertheless, the judge found that 'there was a sufficient meeting of minds between the parties to constitute a contract'. Since this was a contract for the supply of services, a clause could therefore be implied into the contract under the Supply of Goods and Services Act 1982 that Regis would pay a reasonable charge for Premia's services.

In another case that concerned a longstanding supply contract which had never been in writing, the Court decided that although exclusivity had never been formally agreed there had been a common understanding of exclusivity which had then become a contractual term for some of the sales contracts.

Terminating contracts

In Digital Capital v Genesis Mining Iceland[5], Genesis terminated its contract with Digital claiming that Digital had failed to perform but did not follow the contract termination provisions that required it to first give notice to Digital and allow Digital the opportunity to remedy. Having failed to follow the termination notice provisions, Genesis's only option was to argue that Digital's failure was so serious that it should be considered a repudiatory breach allowing Genesis to not need to follow the contract termination provisions.

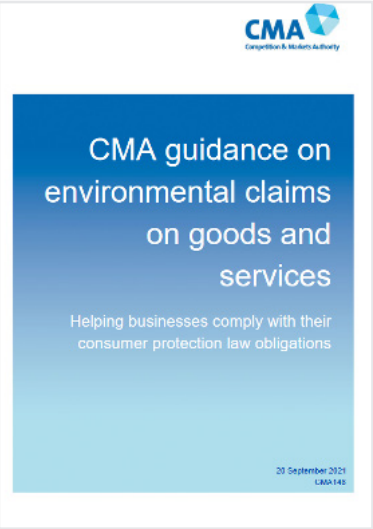
The Court noted that the contract had allowed for 'any other right or remedy of either party in respect of the breach concerned' and without these words it's doubtful that Genesis would have even been able to progress a repudiatory breach argument.

Ultimately, in this case Genesis failed. The Court found that whilst Digital had breached the contract the breaches were not so serious to deem them repudiatory breaches. As Genesis had not followed the termination provisions in the contract, the termination was not valid.

Green Claims Code

The UK Competition and Markets Authority ('CMA') published the Green Claims Code on 20 September 2021. There are six core principles:

1. Claims must be truthful and accurate.
2. Claims must be clear and unambiguous.
3. Claims must not omit or hide important information.
4. Claims must only make fair and meaningful comparisons.
5. Claims must consider the full life cycle of the product
6. Claims must be substantiated.



The Code is available on the Government website together with guidance and a checklist.

Radius contract automation and management services

Radius Law enters partnership with Legito, expanding client services to include contract management and contract automation solutions, both 'stand-alone' and as an integral part of its Law as a Service product.

Request a Demo

The Legito platform provides a web-based application allowing businesses to **automate, negotiate, manage, sign, store and analyse** contracts.

Data Security

Data sharing code.

The UK Information Commissioner's Office ('ICO') Data Sharing Code came into force on the 5th October. It's a statutory code for sharing personal data between data controllers.

Key points include:

- a recommendation that a Data Protection Impact Assessment (DPIA) is carried out, even where there is no legal requirement to do so;
- to have a data sharing agreement in place (this is mandatory for joint controllers i.e. where they jointly decide how to control the personal data is used);
- a data sharing arrangement, must contain policies and procedures that allow data subjects to exercise their individual rights easily;
- extra care must be taken when sharing children's data.

'Trivial' case struck out

The High Court has provided a welcome judgment dismissing a trivial data protection claim[6].

The claim related to a single email concerning a debt that was accidently sent to the wrong person. The person that received the letter confirmed it was promptly deleted, but the correct recipient threw in 'everything but the kitchen sink' with a multitude of claims.

The Court dismissed the claim stating 'there is no credible case that distress or damage over a de minimis threshold will be proved.... for breaches of this sort which are, frankly, trivial."

Employment

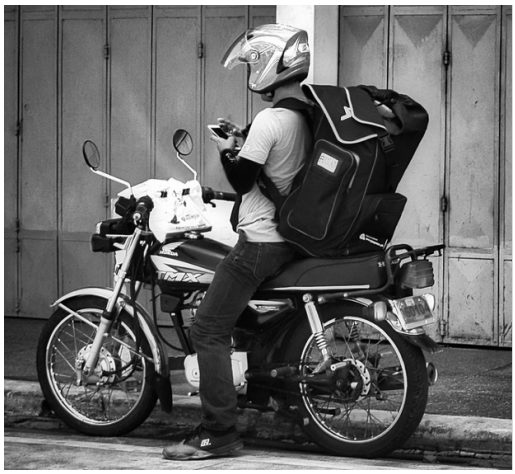
Direct offer to employees was an unlawful inducement

The UK Supreme Court found in Kostal UK Ltd v Dunkley[7] that it was unlawful for an employer to offer a pay deal to employees 'over the head' of its recognised trade union, but it may have been acceptable if the employer had exhausted the collective bargaining process with the union first.

Court of Appeal upholds decision that a courier had worker status

In October the Court of Appeal ruled on the Stuart Delivery Ltd v Augustine case[8] confirming that its couriers had worker status and so entitled to minimum wage and holiday pay amongst other

statutory benefits. Unlike the Deliveroo case[9], the Stuart Delivery couriers had only a limited right of substitution. If the courier wanted to substitute him or herself, they had to apply through the company's app and if no substitute was found then the courier had to fulfil it or suffer the consequences of failing to do so. This limited right of substitution meant that Stuart Delivery was unable to convince the Court that the couriers were self-employed.



Employment tribunal criticised on menopause case

A Claimant that had suffered from the menopause with serious effects that limited her ability to carry out day to day tasks and who had been prescribed hormone replacement therapy resigned from her work after male colleagues had dismissed the fact she suffered from menopausal symptoms. She subsequently brought a claim for constructive dismissal.

The Tribunal dismissed the case, but the Employment Appeal Tribunal (EAT)[10] allowed her appeal and ***criticised the tribunal for concluding that her symptoms only had a minor or trivial effect.*** The claim has now been remitted back to a fresh ET to determine the issues of the case.

Separately, the Women and Equalities Committee have held an inquiry into Menopause and the workplace but their recommendations are yet to be published.

Failure to consider flexible working.

The case of Thompson v Scancrown Ltd[11] concerned Mrs Thompson's, claim for indirect sex discrimination, after her request for flexible working was refused.

The Tribunal decided that her ***flexible working request, following her return from maternity leave, had not been properly considered*** and that the team could have effectively operated covering the periods when she was not working.

As it is generally accepted that childcare still falls predominantly on women, Mrs Thompson was able to successfully argue that given the imbalance of childcare responsibilities the requirement to work full time puts women at a particular disadvantage

General Counsel Event – 8 December 2021

The fight against modern slavery

Register Now

Join us as we welcome guest speakers and senior counsel to discuss the critical role you can play as senior counsel in helping in the fight against modern slavery. This is not only a moral obligation it is a regulatory obligation.

Cases, laws, decisions referred to in this Bulletin

1	Impala Warehousing & Logistics (Shanghai) CO. LTD v Wanxiang Resources (Singapore) PTE LTD [2015] EWHC 25 (Comm)
2	Blu-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm)
3	Premia Marketing Ltd v Regis Mutual Management [2021] EWHC 2329 (QB)UCTA
4	Zymurgorium v Hammonds of Knutsford [2021] EWHC 2295 (Ch)
5	Digital Capital Ltd v Genesis Mining Iceland EHF [2021] EWHC 2462 (Comm)
6	Rolfe & Others -v- Veale Wasbrough Vizards LLP [2021] EWHC 2809 (QB)
7	Kostal UK Ltd v Dunkley and others [2021] UKSC 47
8	Stuart Delivery Ltd V Warren Augustine [2021] Ewca Civ 1514
9	R (IWGB) v CAC: Interested Party Roofoods Ltd [2021] EWCA Civ 952
10	Rooney v Leicester City Council EA-2020-000070-DA and EA-2021-000256-DA
11	Mrs A Thompson v Scancrown Ltd T/a Manors: 2205199/2019