Cambridge Law Review (2024) Vol 9, Issue 2, 38–46

Terms and Conditions Apply? Online Incorporation of Contract Terms in *Parker-Grennan v Camelot UK Lotteries Ltd* [2024] EWCA Civ 185

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ABSTRACT

The Court of Appeal has for the first time considered the rules applicable to incorporation of contract terms for online contracts in *Parker-Grennan v Camelot UK Lotteries Ltd* [2024] EWCA Civ 185. The Respondent gambling company successfully argued that a set of terms and conditions which the Appellant had accepted when opening an online account had been incorporated into the contract to play a particular game. As a result, the Appellant had in fact won only £10, as per the computer-generated outcome, rather than the £10 million that she believed she had won. The judgment explicitly recommends further consideration of the law's approach to contract terms in online contracts and thus highlights the open question of whether principles of contract law developed in a pre-internet age must continue to adapt to take account of shifting modes of contracting. This case note suggests that the case represents an orthodox application of the rules on incorporation of terms and that the Court's reasoning is consistent with previous lower court decisions. The note further argues, however, that the judgment proceeds on the basis of several assumptions which required further exploration, running the risk of deciding the case after insufficient assessment of the differences between online and physical contracts, as the judgment itself acknowledges.

Keywords: contract law, incorporation of terms, online contracts, differences between online and physical contracts, fairness of contract terms

I. INTRODUCTION

All students of contract law know that some contractual clauses 'would need to be printed in red ink on the face of the document with a red hand pointing to [them] before the notice could be held to be sufficient'.[1] In the modern world, however, contracts are more often presented for consideration in digital form rather than in ink, and it is those online contracts which *Parker-Grennan v Camelot UK Lotteries Ltd* [2] concerns. Private law has often had to

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[1] *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461 (CA) 466 (Denning LJ), repeated in similar terms in *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 (CA) 170D.

[2] [2024] EWCA Civ 185, [2024] ECC 11 ('*Parker-Grennan* (CA)').

adapt in the face of new technology, and the law of contract is no exception. Offer and acceptance, typified in judgments on the 'battle of the forms' and the postal rule, has been one area where contract law doctrines have had to accommodate shifts in the speed of communication.[3] The law on incorporation of terms may end up being another such area, and the judgment in *Parker-Grennan* is sensitive to the difficulties posed by online contracts to orthodox incorporation rules. Although by no means heralding a radical change, *Parker-Grennan* is a case as important for the questions that it asks as for the answers that it supplies.

The Appellant, Ms Parker-Grennan, alleged that she was owed £10 million by the Respondent gambling company, Camelot UK Lotteries Ltd ('Camelot'), as winnings from a gambling game on a website run by the Respondent. The Respondent argued that the Appellant had won only £10. The questions for the Court were, first, whether the contract was sufficiently clear on the basis of the terms commonly recognised by the parties as binding, such that the Appellant had only won £10; second, if not, whether terms and conditions relied on by the Respondent had been incorporated; and third, whether those terms and conditions were unfair. Andrews LJ, with whom Green and William Davis LJJ agreed, held that the Appellant had in any event only won £10 on the basis of the first question, but nonetheless discussed the incorporation and fairness questions and found for the Respondent on both points.

Whilst it is perhaps surprising that it has taken this long for a case concerning the incorporation of terms in the online context to reach an appellate court, the Court of Appeal declined to issue general interpretive guidance. However, the Court strongly suggested that the time was ripe for a more detailed and evidence-based review of the current law. This case note highlights some gaps that such a future review might need to address and briefly outlines the position in other common law jurisdictions.

II. Facts and Appeal

Notwithstanding many technical details, the facts are straightforward. The Respondent, Camelot, is the licensed operator of the National Lottery. The Appellant, Ms Parker-Grennan, opened a National Lottery account in 2009 and agreed to the Terms and Conditions of Use. She did this by clicking a 'click-wrap' button, that is, a button marked 'Confirm' beneath text which informed the user that by clicking the button they acknowledged that they had read and accepted 'the relevant Terms and Conditions and Rules of this website'.[4]

In 2015, the Appellant played a new game provided by Camelot. On purchasing a £5 ticket, she was able to play one of Camelot's 'Instant Win Games' ('IWGs'), with prizes ranging from £5 to £20 million. On clicking 'Play', the lower half of the screen would show a series of numbers labelled 'YOUR NUMBERS', and the upper half would show a series of 'WINNING NUMBERS'. A green box at the bottom of the screen contained the words, 'match any of the WINNING NUMBERS to any of "YOUR NUMBERS" to win PRIZE'. In the event of a match, the numbers would flash, and the player would have to click 'FINISH' to claim the prize.[5]

[3] See for example *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327 (CA); *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401 (CA); *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-Gesellschaft mbH* [1983] 2 AC 34 (CA).

[4] *Parker-Grennan* (CA) (n 2) [11].

[5] ibid [12]–[15].

As the Appellant suggested, the game was 'effectively a fruit machine',[6] but using a range of numbers which the player hoped would match. The results, however, were predetermined by the Camelot computer system at the moment when the player pressed the 'Play' button. At that moment, a random number generator would allocate to the player a number corresponding to a prize tier. That number would determine the result of the game; this number allocation happened a nanosecond before the animation files (that is, the images that the player would see on their screen) were selected and played by the computer.[7]

The game was governed by three relevant sets of terms: (a) the Account Terms and Conditions, which are accepted before creating an account; (b) the IWG Rules, applicable to all IWGs; and (c) the Game Procedures, applicable to the specific game played by the Appellant. The Account Terms specified that players are bound by the other two sets of Rules. The IWG Rules and the Game Procedures could be found by accessing a hyperlink next to the 'Play' button on the game instruction screen. It is not known whether the Appellant did in fact read these terms. The Game Procedures are stated to take priority in the event of conflict, and they provided that '[t]he outcome of a Play in the Game is pre-determined by Camelot's Computer System at the point of purchase.'

The Appellant's screen indicated that she had won £10, by matching the number 15 twice. However, the Appellant noted that the number 1 had also matched and that this was the number that was supposed to result in a £1 million win. She took a screenshot of the matched numbers and telephoned Camelot. Camelot informed the Appellant that there had been an animation software error and refused to pay out. Camelot claimed that whether or not the Appellant had won was determined by the system and that the animation effectively bore no relation to the outcome.

The Appellant's case was dismissed by Jay J at first instance.[8] The Appellant appealed to the Court of Appeal on three grounds: first, whether the terms contained in the IWG and Game Procedures were incorporated into the contract; second, whether they were excluded by reason of unfairness; and third, on the construction of such terms as both parties agreed had been accepted in any case, which sum the Appellant had won. Andrews LJ made it clear that, on the basis of the answer to the third question, the appeal should be dismissed, but nonetheless discussed the first incorporation question, the analysis of which deserves discussion.

III. JUDGMENT AND COMMENT

A. THE COURT'S INCORPORATION ANALYSIS

Andrews LJ quoted the position of the current law from *Chitty on Contracts*,[9] namely that, whilst the person receiving a contract need not have read the terms to be bound by them, there are three rules as to the notice requirements of terms to be incorporated:

> (1) If the person receiving the document did not know that there was writing or printing on it they are not bound (although the likelihood that a person will not know of the existence of writing or printing is now probably very low);

[6] ibid [43].
[7] ibid [17].
[8] *Parker-Grennan v Camelot UK Lotteries Ltd* [2023] EWHC 800 (KB).
[9] Hugh Beale (ed), *Chitty on Contracts* (34th edn, Sweet & Maxwell 2022) para 15-010.

> (2) If they knew that the writing or printing contained or referred to conditions, they are bound;
> (3) If the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document but did not know it contained conditions, then the conditions will become the terms of the contract between them.[10]

Item (2) in the above list must be read subject to the caveat that, broadly speaking, onerous or unusual conditions require explicit knowledge of the condition's content, rather than merely its existence.[11] In any case, Andrews LJ provided the correct test, namely 'whether Camelot did what was reasonably sufficient to bring the various Terms and Conditions to the notice of a player of the Game',[12] subject to the requirement that, in the case of 'onerous or unusual' terms, 'reasonable steps must be taken to draw the particular term in question to the notice of those who are to be bound by it and that more is required in relation to certain terms than to others depending on their effect'.[13]

In this case, 'nothing on the screen... highlighted or otherwise drew specific attention to particular terms'.[14] However, Andrews LJ considered that there was nothing particularly onerous about the terms in question; they simply constituted the rules of the game, and any reasonable player must have expected rules to be provided and articulated.[15] The judgment dismissed the Appellant's submission that, because 'there was nothing on the website to force an account holder to look at the Terms and Conditions before clicking the "I Accept" button', 'Camelot had not done enough to draw the Terms and Conditions to [the Appellant's] attention'.[16] Counsel for the Appellant further submitted that, in physical documents, the signature traditionally comes at the end of the terms and conditions, rather than at the beginning. Andrews LJ rejected this submission on two grounds. First, her Ladyship held that forcing a consumer to scroll through the terms and conditions would not increase the likelihood that they will be read. Second, her Ladyship explained that the relevant question is 'not whether the trader has done everything in its power to try to make the other contracting party read the terms', but whether the trader has done enough to bring the terms to the attention of the counterparty.[17]

There are two possible gaps in the above analysis, neither of which necessarily changes the conclusion to the incorporation ground of appeal, but each of which arguably required some discussion by the court. First, as noted above, the Court declined to issue general guidance on the incorporation of terms in online contracts. It seems, however, that the answer to the Appellant's submission as to whether a consumer must have to scroll through the terms and conditions before agreeing to them might require a consideration of what constitutes 'sufficient notice' in an *online* context. Andrews LJ stated that '[t]he trader only needs to take reasonable steps to bring the terms and conditions to their attention', which

[10] *Parker-Grennan* (CA) (n 2) [3].
[11] See for example *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371, [2018] CTLC 265 [29] (Coulson LJ).
[12] *Parker-Grennan* (CA) (n 2) [31].
[13] *O'Brien v MGN Ltd* [2001] EWCA Civ 1279, [2002] CLC 33 [23] (Hale LJ); *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA) 437 (Dillon LJ).
[14] *Parker-Grennan* (CA) (n 2) [32] (Andrews LJ).
[15] ibid [35].
[16] ibid [43].
[17] ibid [45]–[46].

in her Ladyship's judgment 'necessarily involves giving them a sufficient opportunity to read them'.[18] Her Ladyship did not, however, discuss whether sufficiency in an online context is inherently different from that in a physical contract, but assumed that making the details *available* in some form still constituted sufficiency. The point may seem minor, but a key difference between a paper contract and a digital one is that, when a consumer clicks 'Accept' in an online context, without reading the terms and conditions, even though they may read the terms, they remain at all relevant times unaware of how much they are choosing to ignore. Conversely, when a consumer skips to the end of a paper contract without reading the contents, they are at least aware of the approximate amount that they are accepting without reading. The point as to how much the consumer believes they are choosing to accept without reading was considered relevant in the similar case, although on stronger facts for the consumer, by David Donaldson QC sitting as a Deputy High Court Judge in *Spreadex Ltd v Cochrane*.[19] In that case, a bookmaker sought to enforce a claim against a consumer whose online betting account had been interfered with by a child without his knowledge or consent. The claim was based on a 'click-wrap' agreement to a set of terms and conditions. Mr Donaldson QC observed that 'the potential customer was told that four documents, including the customer agreement, could be viewed elsewhere online by clicking "View"... [If the defendant had done so] he would have been faced in the customer agreement alone with 49 pages'. Mr Donaldson QC found that this discrepancy between the representation and the reality was '[a] further, and compounding factor'.[20]

The fact that online contracts may not reveal the length of terms and conditions that the consumer is going to ignore may not be a sufficiently persuasive consideration to mean that online contracts cannot incorporate terms located behind a hyperlink. Nonetheless, the Court of Appeal in *Parker-Grennan* arguably should not have dismissed the Appellant's argument on this ground without a greater analysis of the digital/physical contract distinction. Future cases or research might consider the bearing of the distinction between a physical signature and an online button, given how important a signature has been in English and Australian caselaw.[21] These questions show that whether the incorporation analysis is different in an online context remains unsettled. The judgment nonetheless proceeded to offer an answer to the third ground of appeal, based on assumptions as to the meaning of 'sufficiency'. Whilst the court, having decided the case on another ground, was under no duty to articulate general principles, its explicit refusal to consider whether the test for incorporation should be different in this context whilst nonetheless choosing to find that the test for incorporation was met perhaps opens the reasoning to some challenge.

Even if future courts uphold this analysis, the Court did open the door to future arguments based on the relative complexity of accessing hyperlinked terms. Andrews LJ acknowledged that, when 'the consumer is required to click onto so many different hyperlinks in order to find the relevant terms that it cannot truly be said that they are readily or easily accessible' or if a website was live for such a limited time that no consumer could ever read all the terms, then they could not be incorporated.[22] Although not explicitly stated, this raises the question of whether there is a certain number of pages of terms that would be too much

[18] ibid [46].
[19] [2012] EWHC 1290 (Comm), [2012] LLR 742.
[20] ibid [21].
[21] See for example *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 (KB); *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 1 CLC 582 [43] (Moore-Bick LJ); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52, (2004) 211 ALR 342 (HC Australia).
[22] *Parker-Grennan* (CA) (n 2) [47].

for a reasonable consumer to read without greater attention being drawn to the length of the online contract. One page of 'hidden' terms might be very different to 30,000 pages. A court articulating general principles applicable in the online context ought to acknowledge that both the length of that which is hidden, and the fact that the consumer may not know how much is hidden, are relevant factors in determining whether reasonable notice has been given to one receiving contract terms.

The second, perhaps similarly minor, potential gap in the Court's analysis concerns the onerousness of the IWG Rules and Game Procedures. Andrews LJ dismissed succinctly the argument that the terms were particularly onerous on the basis that games require rules, as players must expect, and the terms governing the outcome of the game imposed no obligation on the player. Andrews LJ explained that the rules do not 'deprive [players] of a prize to which they would otherwise be entitled'; instead, her Ladyship explained that '[t]hey are rules which ensure that money is only paid out for valid prize wins' and that '[t]here is nothing onerous, let alone unfair, about that'.[23] This is clearly true; however, the test is not merely whether the term is onerous, but whether it is *unusual*.[24] The game details screen on which the 'Play' button and the link to the Game Procedures were located contained instructional pictures for the game. They suggest an obvious and intuitive game format, which as the Appellant argued is analogous to an advanced fruit machine. Many reasonable consumers might assume that the outcome as shown on the screen would constitute the mechanism by which a win or loss would be determined, even if they considered the necessary fact that the outcome must be determined electronically at some point. That the Game Procedures fix the moment determining whether the Respondent is bound to pay out, or not, at an alternative point to that which the face of the game presents to the player is in some sense 'unusual' from the perspective of a reasonable consumer. Although a set of game rules must be particular to an individual game, and therefore not inherently unusual, the terms that the Respondent attempted to incorporate may have been unusual relative to the expectation created by the highly intuitive game format seen by the Appellant.

As with the sufficiency analysis, this might not change the answer to the incorporation question and, admittedly, it is a minor point. In *Parker-Grennan* the terms providing how the game outcome was determined were probably not so unusual that they required more on the part of the Respondent to bring them sufficiently to the notice of the Appellant, especially as they were merely rules rather than additional burdens on the player. They were not terms creating a wholly different set of rules which are incongruous with the game format; the Respondent was not trying to incorporate the rules of chess to govern a game which looked to a player like Cluedo. However, they are in any case purported terms which create a different winning system than that which a fruit machine player might expect, and a consideration of these factors and conclusion on this part of the incorporation analysis might have been appropriate.

[23] ibid [35].
[24] Beale (n 9).

B. REFUSAL TO PROVIDE GENERAL PRINCIPLES

The Court noted that the latest Law Commission and Scottish Law Commission report on this subject dates from 2013. The report is entitled 'Unfair Terms in Consumer Contracts: Advice to the Department for Business Innovation and Skills'.[25] The Court observed that, as a report, it 'reflected a digital environment far removed from that which operates today'.[26] Andrews LJ considered that Camelot was a company whose terms and conditions were at the more consumer-friendly end of a spectrum, given that they operate 'in a regulated environment, [and their] terms and conditions, standing back, are not unduly complex or controversial and are written in plain, comprehensible English'.[27] Undoubtedly this was a further factor contributing to the conclusion as to onerousness reached by the Court. However, Andrews LJ continued to observe that:

> [T]here are many companies, organisations and entities which operate at the other end of the spectrum from Camelot, and whose terms and conditions are complex and opaque and not, in truth, designed to be read or understood... The advice of the Law Commission could well be very different if tendered today.[28]

The Court further noted that, '[g]iven that a decade has passed since the last report of the Law Commission the time might be ripe for another, evidence based, review of this area of law'.[29] The Court implied that evidence as to how often consumers actually click on hyperlinked terms and conditions might be important, noting that Camelot does not keep such statistics.[30] The fact that the Court did not know the prevalence of consumers choosing to access the terms and conditions is at odds with Andrews LJ's assertion that forcing consumers to scroll through such terms—rather than hyperlinking them—would not *improve* the odds of consumers reading them, given that it remains uncertain how often they do in fact read them *currently*. Whether such data would be useful requires an answer to a prior question forming part of the analysis that the Court refused to undertake as discussed above. That question is whether the 'sufficiency' of drawing attention to a term can be influenced by the rate at which consumers choose to heed the notice, or whether sufficiency is to be assessed purely by reference to the options open to a hypothetical consumer. Put another way, does the simplicity of the step required to take an opportunity mean that, even if almost no consumer ever executes such a step and takes the opportunity, they have still *had* sufficient opportunity to read a term? Only through answering this question can the legitimacy of using empirical data as to consumer behaviour be determined. In any case, the Court's call for greater attention to this area should be taken seriously given, as Andrews LJ notes in her opening words, '[w]hether we like it or not, we are living in a digital era'.[31]

[25] Law Commission and Scottish Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (March 2013) <https://www.scotlawcom.gov.uk/files/3313/7095/4984/Unfair_Terms_in_Consumer_Contracts_Advice_Summary.pdf> accessed 29 September 2024.
[26] *Parker-Grennan* (CA) (n 2) [8] (Andrews LJ).
[27] ibid [9].
[28] ibid.
[29] ibid [68].
[30] ibid [10].
[31] ibid [1].

C. Relationship with other domestic and international caselaw

The Court made a brief comparison with a 2021 High Court case on similar facts, *Green v Petfre (Gibraltar) Ltd t/a Betfred*.[32] In that case, a software error led Mr Green to win £1.7 million via an online gambling website. The case differed from Ms Parker-Grennan's in that Mr Green 'was otherwise contractually entitled to payment and the win was recorded on the company's own computer system'.[33] Amongst other arguments, Betfred attempted to argue that an exclusion clause was incorporated into the contact. The following *dicta* from that case appear significant. First, the terms in that case were in an 'unhelpful, often iterative presentation in closely typed lower-case or numerous paragraphs of capital letters [which] meant that the relevant clauses were buried in other materials'.[34] Second, the terms relied upon were agreed several years before Mr Green played the game, which, whilst not sufficient to exclude them, rendered 'the commensurate burden upon the trader who wishes to exclude liability... all the greater'.[35] Third, the clause on which Betfred relied operated to the direct disadvantage of the consumer, rather than constituting neutral or descriptive game procedures as in this case. Fourth, Foster J noted that the context of the contract is relevant, and an online gambling scenario decreases the likelihood of a consumer 'trawling through documentation, particularly if it is repetitive and not clearly relevant'.[36]

Green was decided on different facts and involved an exclusion clause. Nonetheless, such general principles as to online incorporation as can be extracted are not in tension with the Court of Appeal's judgment in *Parker-Grennan*. In fact, *Parker-Grennan* reinforces the principle that incorporation of onerous or unusual terms must be clearly signposted and acts as a clear warning to companies. The distinctions between *Parker-Grennan* and *Green* serve to highlight the unambiguous principle that the more complex the terms and the more onerous they are for the consumer, the more a company must do to draw them sufficiently to the consumer's attention.

Future courts addressing this question may struggle to draw on the work of other jurisdictions. Most caselaw from the courts of Australia and the United States addresses the question of whether a contract is enforceable at all on the basis of accepting online terms and conditions that have been insufficiently drawn to the attention of the parties. In *Meyer v Kalanick*, the US District Court for the Southern District of New York held that the plaintiff 'did not have "[r]easonably conspicuous notice" of Uber's User Agreement', as the 'placement, color, size and other qualities' of the hyperlinked Terms of Service were inadequately distinctive 'relative to the [Uber app screen's] overall design'.[37] A similar analysis of the link relative to the rest of the contract was undertaken by the US District Court for the District of Nevada in *In re Zappos, Inc*.[38] The Federal Court of Australia in *eBay International AG v Creative Festival Entertainment Pty Ltd*[39] held that tickets bought online were not subject to an updated form of a non-resale condition that was not adequately brought to the attention of

[32] [2021] EWHC 842 (QB).
[33] *Parker-Grennan* (CA) (n 2) [37] (Andrews LJ).
[34] *Green* (n 32) [167] (Foster J).
[35] ibid [168].
[36] ibid [172].
[37] 200 F Supp 3d 408, 420 (SDNY 2016).
[38] 893 F Supp 2d 1058 (D Nev 2012).
[39] [2006] FCA 1768, (2006) 170 FCR 450.

the purchasers. Rares J in that case held that a 'vague and general reference... to terms being on tickets, cannot substitute for the necessity to draw specifically to someone's attention unusual or significant terms'.[40] Whilst not on all fours with *Parker-Grennan*, these cases point to a tendency to apply the same principles used to determine the effect of terms and conditions in paper contracts to online contracts. Whilst orthodox in the light of prevailing views as to the relative position of consumers and businesses, they suggest that the need for consideration of the distinctive context of online contracts highlighted by Andrews LJ in *Parker-Grennan* is not unique to England and Wales.

IV. Conclusion

In 2024, the internet continues to raise questions for legal rules developed in an age of paper. Whilst the continuing lack of certainty as to what precisely is required to bring online consumers' attention to new terms may pose problems for both said consumers and companies, *Parker-Grennan* is nonetheless important in several respects. First, as Andrews LJ notes, it highlights again 'the complexity of balancing the needs of traders to publicise their terms and conditions with the needs of consumers to access and understand those terms'[41] and thus provides companies that trade online with continued clarity as to what is required to enforce their terms. Second, it provides a further example of the application of the existing law to an online contract, whilst calling for greater research and consideration. Third, in drawing a distinction with *Green*, it reasserts the principles established in that case, and does so for the first time at the appellate level. Whilst attempting to refrain from engaging in overambitious interpretation, the assumptions on which the judgment rests highlight the need for continued analysis, as the judgment itself recognises.

[40] ibid [52].
[41] *Parker-Grennan* (CA) (n 2) [68].