Neutral Citation Number: [2024] EWCA Civ 185

Case No: CA-2023-00791

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mr Justice Jay
[2023] EWHC 800 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2024

Before :

LORD JUSTICE GREEN
LADY JUSTICE ANDREWS
and
LORD JUSTICE WILLIAM DAVIS

- -

Between :

JOAN PARKER-GRENNAN	**Claimant and Appellant**
- and -	
CAMELOT UK LOTTERIES LIMITED	**Defendant and Respondent**

- -
- -

James Couser (instructed by **Coyle White Devine Limited**) for the **Appellant**
Philip Hinks (instructed by **Browne Jacobson LLP**) for the **Respondent**

Hearing date: 12 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1st March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

INTRODUCTION

1. Whether we like it or not, we are living in a digital era. Online shopping, which was a novelty not so many years ago, has become the norm rather than the exception. Indeed, it has been blamed for the demise of several well-known High Street retailers. Consumers like the speed, convenience, and ease with which they can conduct transactions online, and other advantages such as being able to have goods delivered directly to their door, and not being tied to normal shop opening hours.

2. However, for the trader providing goods or services online, there is one big dilemma. 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? 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"?

3. The rules derived from the leading authorities concerning the incorporation of standard terms into a contract pre-date the digital era. They are helpfully summarised in a passage in *Chitty on Contracts* (at 15-010 of the current, 34th edition) which Mr Justice Jay ("the Judge") quoted at paragraph 43 of the judgment in the court below, and is worth setting out again here:

> "It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it or that they should have been made subjectively aware of their import or effect. The rules which have been laid down by the courts regarding notice in such circumstances are three in number:
>
> (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);
>
> (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."

4. Those rules can operate to the disadvantage of parties who have less bargaining power than the person whose terms and conditions are incorporated in the contract. In practice, irrespective of whether they have read them, they have no choice but to accept those terms and conditions if they wish to continue with the transaction.

5. In recognition of this, the law has developed over time with the aim of eliminating any unfairness to the weaker party. Initially this was done by introducing a requirement that steps must be taken to bring "onerous or unusual" clauses specifically to the attention of the other contracting party (in general, the more outlandish the clause, the greater the notice required - see e.g. *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433, per Bingham LJ at 443C-D). Subsequently Parliament has enacted consumer protection legislation which has enabled the courts to find that unfair terms, even if they have been incorporated in the contract, are unenforceable against a consumer. At the time of the events with which this appeal is concerned, the relevant powers were contained in the Unfair Terms in Consumer Contracts Regulations 1999 (1999 S.I. No. 2083) ("the UTCCR"). They have since been superseded by the Consumer Rights Act 2015, although the provisions of that Act that would have applied had the relevant transaction taken place after it came into effect are essentially the same.

6. This case is not about online retail but about online gambling, but it has squarely raised the issue of what needs to be done to incorporate standard terms and conditions into a contract for goods or services which is made online. So far as we are aware, this is the first case in which that issue has been considered by this Court.

7. On behalf of the Appellant, Mr Couser invited the Court to consider whether the rules of incorporation, as summarised above, required adaptation to meet the demands and dangers of online trading, and to use this opportunity to lay down principles of general application, or at least to give some guidance as to what will and will not suffice to bring standard terms and conditions to the attention of the consumer.

8. In this context Mr Couser drew the attention of the Court to a report of the Law Commission and the Scottish Law Commission of March 2013 entitled: "Unfair Terms in Consumer Contracts: Advice to the Department for Business Innovation and Skills". That report, though little more than a decade old, reflected a digital environment far removed from that which operates today. It was, itself, an exercise in which the Commission revisited a report it had published, in conjunction with the Scottish Law Commission, in 2005. Even in 2013 the Law Commission recognised that consumers rarely read "small print", a concept which, as it stated, is not just about font size, but also "marked by poor layout, densely phrased paragraphs and legal jargon". The paper recommended that all small print terms should be assessable for fairness, including those which related to the main subject-matter of the contract or the price.

9. The present case concerns a large consumer-facing company operating in a regulated environment, whose terms and conditions, standing back, are not unduly complex or controversial and are written in plain, comprehensible English. However, the Court is well aware that there 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. These may contain, lurking within their hidden depths, many pitfalls highly disadvantageous to the consumer. The advice of the Law Commission could well be very different if tendered today.

10. Nevertheless, this judgment is not the place in which to lay down principles of general application or to consider how the law might apply in other circumstances. The Court is not equipped with the evidential material to embark upon such an exercise. It was noteworthy that, in response to a question from the Court, Mr Hinks, counsel for the

Respondent, informed us on instructions that his client did not keep statistics as to the number of consumers who click on the drop-down menus or hyperlinks to access its various sets of terms and conditions.

FACTUAL BACKGROUND

11. The Appellant, Mrs Parker-Grennan, had an online National Lottery Account which she first opened in February 2009. The Respondent, Camelot, was at all material times the licensed operator of the National Lottery. When the Appellant opened the account the following appeared on the screen:

> " **Terms and Conditions**
>
> Required fields are marked with an asterix (*)
>
> By ticking the box below you confirm that if you play the National Lottery Games interactively you have read, accept and agree to be bound by the Interactive Account Terms and Conditions, Rules for Interactive Instant Win Games and Rules for Draw-Based Games Played Interactively.
>
> In addition, when you play a particular game you agree to be bound by the relevant Game Procedures and any Game Specific Rules that apply to that game and confirm your acceptance of the Privacy Policy.
>
> **I have read, accept and agree to be bound by the relevant Terms and Conditions and Rules of this website and the Privacy Policy of this website."**

To the right was a box marked with an asterisk next to which appeared the words "Accept terms and conditions" and a button marked "confirm". To the left was a button marked "quit". The Appellant clicked to tick the box and clicked "confirm" (a procedure known as "click-wrap"). At the bottom of the page was a box with a link to the Account Terms, which then ran to many pages of very small print and contained hyperlinks to the other terms and conditions mentioned in the text on the screen.

12. In August 2015, Camelot introduced a new Interactive Instant Win Game ("IWG") entitled "£20 Million Cash Spectacular" ("the Game"). IWGs are games of chance which are available to play on the National Lottery Website, in which registered players like the Appellant have a chance to win a cash prize. The screen on the Website displaying the details of a particular IWG is known as the "Game Details Screen" (sometimes referred to as the "Game Play Window" – nothing turns on this difference in nomenclature). The entry by a player into an IWG by the purchase of a ticket online is termed a "Play" and each ticket is allocated a unique Play Number. To play the Game the player would click a button marked "Play" displayed on the Game Details Screen.

13. The prizes in the Game ranged from £5 to £1 million. Players were told that there was a 1 in 2.86 overall chance of winning a prize in each Play. The software included animations intended to make playing the Game more fun, but a player could elect to disable them, in which case they would simply receive a message which revealed whether they had won a prize, and if so, how much money they had won.

14. Assuming that the animations were enabled, when the player clicked the “Play” button, the upper section of the screen display showed a green box labelled “WINNING NUMBERS” appearing above a blue background with five circles in it, each displaying a large gold £ motif. The lower section of the screen display showed a green box labelled “YOUR NUMBERS” appearing above a blue background displaying fifteen “wads of cash” motifs, eight on the top line and seven on the bottom line, each with the word “PRIZE” underneath it in gold letters. The player had to click on the £ motifs and the cash motifs (or the word “PRIZE”) until all of them had been used up. Each click would reveal a number in a circle in place of the £ motif, or a number in place of the cash motif together with the prize attached to that number, as the case may be.

15. All this was illustrated in two pictures displayed on the Game Details Screen, captured in paragraph 10 of the Judgment. In a green box which appears below the lower blue screen are the words in white (against a black background) “match any of the WINNING NUMBERS to any of “YOUR NUMBERS” to win PRIZE”. (A further sentence, immaterial for present purposes, explains that additional prizes may be won if a symbol with a £ or ££ in the middle appears.)

16. As this indicates, the aim of the Game was to match any number in the “YOUR NUMBERS” section with a number in the “WINNING NUMBERS” section. If there was a match, the two matching numbers would turn white and flash in a green circle, indicating that the player had won a prize for the matched “YOUR NUMBERS” corresponding with the prize amount shown under that number. When all numbers and prizes were revealed, the Game would be completed and a message would appear at the top of the Game Details Screen indicating the amount the player had won, if any. The player would then have to click on the “Finish” button to end the Game and claim their prize.

17. Players could click on the numbers in whatever sequence they wished until all the numbers were used up. However, the sequence chosen had no impact on the outcome of the Game, which was predetermined by Camelot’s computer system at the point of Play. As soon as the player pressed the “Play” button on the Game Details Screen, the random number generator in Camelot’s interactive platform would select a number corresponding with a specific prize tier. That number, which would be automatically associated with the Play Number, determined the outcome of the Game for that Play. As the Judge found, this happened a nanosecond before the animation files were selected by the computer.

18. The Appellant played the Game on her laptop, with the animations enabled, on 25 August 2015, coincidentally the day on which it was launched by Camelot. Her stake of £5 was debited from an online “wallet” at the time of Play. When she pressed the “Play” button, the random number generator selected a number corresponding with prize tier 27, which meant that her ticket had won her £10. After the final number was clicked, her screen came up with an image with two flashing number 15s (the bottom one displayed a prize of £10 underneath it) and a message at the top of the screen saying “CONGRATULATIONS! You have won £10”.

19. However, the Appellant noticed that there also appeared to be two matching number 1s in the upper and lower sections of the screen (though they were not flashing) - and 1 was the number to which the top prize of £1 million was ascribed. She astutely took a screenshot of that page, which is replicated in paragraph 14 of the Judgment. She then

rang Camelot without clicking the "Finish" button. She was informed that the Game was not over until she clicked that button. She told Camelot that she believed she had won £1 million. However, when she did click the "Finish" button her prize, according to Camelot's computer, was £10 and that was the amount credited to her account.

20. It transpired that the reason why the Appellant saw what she did was a coding issue which had generated an error in the Java software responsible for the animations. Depending on what device was used to play the Game, this resulted in different graphical animations being displayed on the player's screen – in the Appellant's case, because she was playing on a PC, the two matching number 1s which had neither turned white nor flashed. If she had been playing on a mobile device, there would have been a blank. This software error, which affected only 0.24% of the Plays during the 36-hour period before it was detected by Camelot, did not affect the outcome of the Appellant's Play. Camelot's database recorded that the Appellant had won £10. Camelot therefore explained to her that she had not won £1 million.

21. Dissatisfied with that outcome, the Appellant brought proceedings against Camelot, and applied for summary judgment (or alternatively to strike out Camelot's defence). She contended that she had done exactly what it said on the Game Details Screen, i.e. "Match any of the WINNING NUMBERS to any of YOUR NUMBERS to win PRIZE" and that this language did not negate the possibility of two sets of matching numbers and thus two prizes being won in a single Play. If a software error had led to a situation in which she had won a prize when it was not intended that she should, that was Camelot's problem. They would have a claim against their software suppliers, but they should not be allowed to rely on their terms and conditions to avoid their liability to pay her the prize money.

22. In a careful and closely-reasoned judgment, in which all the potentially relevant contractual terms and conditions are set out in detail, Mr Justice Jay found in favour of Camelot. The Appellant appealed to this Court, with the permission of the Judge himself. The appeal raises three broad issues:

    i) Were Camelot's terms incorporated in the contract between Camelot and Mrs Parker-Grennan? ("the incorporation issue.")

    ii) If so, were certain of those terms rendered unenforceable by the UTCCR? ("the enforceability issue.")

    iii) As a matter of construction of the contract between Camelot and Mrs Parker-Grennan, did she win £1 million or only £10? ("the construction issue.")

23. For reasons that I shall explain, in my judgment the short answer to this appeal is that, even as a matter of construction of those terms which she *did* accept were applicable and binding upon her, the Appellant had won only £10, not £1 million, and accordingly the Judge was right. Thus the answer to the construction issue obviates the necessity to answer either of the other questions.

24. However, in recognition of the fact that the issue of incorporation of standard terms and conditions into contracts made online has not previously been considered by the Court of Appeal, and in deference to the legal arguments presented to us by Counsel, I will address the three issues in the same order as the Judge.

THE INCORPORATION ISSUE

25. There were three relevant sets of Terms and Conditions:

    i) the Interactive Account Terms and Conditions ("the Account Terms") which set out the various rules and procedures that applied when someone opened an online account and use it to play National Lottery Games online;

    ii) the Rules for IWGs, which applied to Instant Win Games generally; and

    iii) The Game Procedures for the specific game(s) the player wished to play. There were Game Procedures applicable to each IWG, and in some cases (though not for this Game) there were also specific rules for a particular IWG.

    In this case, nothing of any particular relevance appears in the Account Terms. There are provisions in the Game Procedures and the IWG Rules that set out the hierarchy of the rules in case of any conflict between them. These make it clear that in such event, the Game Procedures take priority.

26. As I have already explained, in order to open the online National Lottery Account, the Appellant was required to perform a click-wrap procedure confirming that she had read and agreed to be bound by all these different sets of terms which, one way or another, were accessible via a series of hyperlinks or drop-down menus. However, as one might expect, Camelot's terms and conditions were updated from time to time. Whenever such changes were made, the next time the Appellant accessed her National Lottery Account she would either be presented with a notification page stating that updates to the Account Terms and IWG Rules had been made, along with a hyperlink to those amended Terms and Rules, or required to manually accept the changes. Any significant updates had to be accepted by the Appellant clicking a button marked "Accept".

27. In such event, the Appellant would see an "Update Written Statement" explaining that she would need to read about and accept the changes, and to confirm that she agreed to be bound by the revised terms. She would be told that if she chose to decline, she would be signed out of the site and unable to play online. The Update Written Statement would display a drop-down menu which would give her access to a summary of the changes as well as to complete versions of the updated sets of provisions, and again she would be required to perform a click-wrap procedure to signify her acceptance. That is what happened in the present case.

28. The Account Terms which were effective at the time the Appellant played the Game (the 19th edition effective as from 2 July 2015) and the IWG Rules (Edition 12.1 effective from 10 August 2015) were much more legible than those effective in 2009. Each contained a provision which stated:

    > "You can view all National Lottery Rules and Procedures, and the Account Terms and Privacy Policy, on the National Lottery website. You can also get copies of these documents by calling the Customer Care Team on 0845 278 8000 or by writing to the National Lottery at PO Box 251, Watford WD18 9BR. Please note that calls from a BT line are charged at your calling plan's standard network rate. Charges for mobile or other providers might vary."

29. Likewise, the Introduction section of the Game Procedures applicable to the Game stated:

> "These are the Game Procedures ("the Procedures") for £20 million cash spectacular ("the Game"). When you play the Game, these Procedures, the Rules for Interactive Instant Win Games ("the Rules") and the Account Terms apply. All these documents can be found on the National Lottery website.

The phrases appearing in blue typeface (namely, "Rules for Interactive Instant Win Games" and "Account Terms") designated a hyperlink to those rules.

30. In order to see the full Game Procedures for the Game, the Appellant would have had to click on to a drop-down menu which appeared at the bottom of the Game Display Screen, below the "PLAY" button, and was clearly labelled "Game Procedures including how to play". The Introduction section to the Game Procedures in turn would have taken her to the hyperlinks to the IWG rules and the Account Terms. As the Judge noted in paragraph 12 of the Judgment, it is unknown whether the Appellant did in fact click on the drop-down menu or simply used her intuition or past experience to guide her through the processes of the Game.

31. So far as incorporation is concerned, the legal test to be applied is whether Camelot did what was reasonably sufficient to bring the various Terms and Conditions to the notice of a player of the Game. The trader is generally required to signpost "onerous or unusual" terms if he wishes to incorporate them, but as Hale LJ observed in *O'Brien v MGN Ltd* [2001] EWCA Civ 1279; [2002] CLC 33 at [23]:

> "… the words "onerous or unusual" are not terms of art. They are simply one way of putting the general proposition that 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."

32. There was nothing on the screen which highlighted or otherwise drew specific attention to particular terms within each relevant set of terms and conditions. However, I agree with the Judge, essentially for the reasons which he gave, that there was nothing onerous or unusual about the various contractual provisions on which Camelot sought to rely.

33. As he pointed out, anyone playing an IWG would expect there to be some rules governing how the particular game was played and what you needed to do in order to win. The Game Procedures set out those rules. They explained what would happen if the Game was played with the animations enabled, in particular:

    i) If there was a match, "the two matching numbers will turn white and flash in a green circle indicating that you have won the Prize";

    ii) The Game would only be completed when all the numbers had been revealed;

    iii) At that point a message would appear indicating the winning amount and the FINISH button would have to be pressed to complete the Game;

iv) The player could only win one Prize Amount per Play "as detailed in the Prize Amounts and Odds table";

v) That table indicated that the odds of winning £1 million were 1 in 4,990,000 whereas the odds of winning £10 were 1 in 31;

vi) In the event of conflict or inconsistency with other terms, the Games Procedures would prevail unless Camelot stated otherwise.

34. As the Judge said in paragraph 61, a stipulation to the effect that a player can only win one Prize per play is entirely reasonable and commonplace, particularly when it is understood that the odds are calculated on that basis and that the expected payout percentage for the game is 74%. I also agree with him that a requirement that the player must finish the Game and that the outcome is as it appears on the screen after the "FINISH" button is pressed, is neither onerous nor unusual.

35. The Game Procedures also indicated that the outcome of a Play in the Game is pre-determined by Camelot's Computer System at the point of purchase and that a player is not required to exercise any skill or judgment to win a Prize. There is a similar provision in Clause 3.1 of the IWG Rules. As the Judge explained in paragraphs 64 and 65, if one reads that clause in conjunction with the definition of "Winning Play" ("A Play which entitles You to a Prize and which meets all the Validation Requirements") and Clause 6.2 of the IWG Rules (which sets out the Validation Requirements) it is clear that the outcome is computer generated, and is as it appears on Camelot's official list of winning plays. For example, Clause 6.2(d) makes it clear that Camelot will declare a Play invalid if the Play Number for the Play is not on Camelot's official list of Winning Plays or the relevant Prize for the Winning Play with that Play Number has been paid previously. These clauses are explanatory in nature; they merely set out what is required in order to achieve the entitlement to be paid the prize money. They do not impose any burden on the player, nor do they deprive them of a prize to which they would otherwise be entitled. They are rules which ensure that money is only paid out for valid prize wins. There is nothing onerous, let alone unfair, about that.

36. If one looks more specifically at Clause 6 of the IWG Rules, it contains the sort of provisions that one would reasonably expect to be there to safeguard Camelot against fraud, and allows them to check for themselves that the player has indeed won a prize. These provisions are designed to ensure that someone does not succeed in making Camelot pay them a prize which they have not in fact won. The only provision which gave the Judge pause for thought about whether it was onerous was Clause 6.3(e), which would entitle Camelot to declare a Play invalid if the outcome as displayed on the screen did not match the result as predetermined by the computer system.

37. I agree with the Judge that in certain hypothetical circumstances, questions might arise as to whether Camelot would be entitled to rely on that Clause, e.g. if in consequence of a major software error the final screen had signified (with flashing lights) that the player had won £1 million and that result was confirmed when they clicked the "Finish" button. That would be much closer to the situation in *Green v Petfre (Gibraltar) t/a Betfred* [2021] EWHC 842 (QB), ("*Green*") where a betting company claimed to be entitled to rely on an exclusion clause so as to deprive the player of a sum he had won,

even if he was otherwise contractually entitled to payment and the win was recorded on the company's own computer system.

38. However, I anticipate that a court faced with a situation of that type would not necessarily need to resort either to the principles of incorporation or to the provisions of the Consumer Rights Act 2015 to resolve it. The answer may lie in the proper construction of the relevant contractual terms, as it did in *Green*. Those kinds of issues do not arise for consideration in the present case, because the outcome on the screen display and the result recorded on the computer were consistent.

39. The final sentence of Clause 6.1 states that Camelot's decision about whether the Play is valid will be final and binding. Clause 11.1 gives Camelot a discretion (which it is expressly stipulated must be exercised reasonably) to declare that a Play or an Instant Win Game is defective, and either refund the player the amount of their stake or give them the opportunity to play another Play of equivalent price. Clause 12.1 (which is subject to a complaints handling procedure specified in Clause 12.4) likewise provides that Camelot's decision about whether or not a Play is a Winning Play, or in relation to any other matter or dispute arising from the payment or non-payment of Prizes, will be final and binding provided that it is reasonable.

40. As the Judge said, it is not unusual to find clauses of this nature in contracts relating to games and prizes, whether available online or elsewhere. As to whether they are onerous, the built-in safeguard, here expressly spelled out, is that the decision must be reasonable, and since the Court will be the final arbiter of that, it cannot be said that the term is unduly burdensome on the player. I agree with the Judge that such clauses did not need to be specifically highlighted or drawn to the attention of players in order to be incorporated with the other terms and conditions. If they were unfair, the remedy lay in the application of the UTCCR to preclude Camelot from relying on them. In any event, as the Judge recognised, Camelot had no need to rely on Clause 6.3(e) or Clauses 11.1 or 12.1 in the present case.

41. It follows that the Judge was right to find that there was no requirement for Camelot to specifically signpost any of the relevant terms in order to incorporate them into the contract as a matter of common law.

42. The question whether Camelot had done enough to reasonably draw the Terms and Conditions, as a whole, to the notice of the Appellant before she played the Game, was quintessentially one of fact. The Update Written Statement which the Appellant would have seen when she accessed her online Account before she played the Game featured a drop down menu setting out summaries of the changes to each set of terms and rules, and finally a hyperlinked statement "Read full Account Terms & Rules". Immediately below the menu were two buttons marked "I Decline" and "I Accept". The Appellant must have been aware that had she not clicked "I Accept," she would have been unable to play any further IWGs, including the Game.

43. Mr Couser very fairly accepted that the updated terms at the time of the Game were far more legible than those displayed on the website when the Appellant originally followed the click-wrap procedure in 2009. However he contended that Camelot had not done enough to draw the relevant Terms and Conditions to her notice. In his skeleton argument Mr Couser contended that "a consumer could not reasonably be expected to read numerous pages of contractual documentation before being allowed to

play what is effectively a fruit machine." But when it was pointed out to Mr Couser that if it were correct, his submission led to the inexorable conclusion that Camelot would never be able to incorporate their standard terms into an online contract, he modified it, and submitted that the reason that Camelot had not done enough to draw the Terms and Conditions to his client's attention was that there was nothing on the website to force an account holder to look at the Terms and Conditions before clicking the "I Accept" button.

44. Mr Couser pointed out that where someone signs a physical document, the standard terms and conditions will commonly appear above the space for signature. The online equivalent, he submitted, was a structure which requires the individual to click on the link to the Terms and Conditions first, and places the acceptance button or box to be ticked below those terms, or afterwards, so that the consumer must at least scroll through them before engaging in the click-wrap exercise. That would have involved the Appellant scrolling through at least two, and possibly three, different sets of terms and either clicking a different box or button to signify her acceptance of each set, or clicking one box or button to signify her acceptance of all the terms after scrolling through all of them.

45. I do not accept that forcing a consumer to go through that exercise would make it any more likely that they would read the Terms and Conditions. Being forced to scroll through several pages of "small print" before it is possible to click the box or button accepting the terms, is more likely to cause them to become fed up and quit the website. If they were to scroll through the terms and conditions, this would be simply to reach the point at which they could accept them. In neither event would the terms and conditions actually be read.

46. Besides, the question is not whether the trader has done everything in its power to try to make the other contracting party read the terms. One cannot force someone to read the terms and conditions if they cannot be troubled to do so. The trader only needs to take reasonable steps to bring the terms and conditions to their attention, which in my judgment necessarily involves giving them a sufficient opportunity to read them. Depending on the facts and circumstances of the particular case, a sufficient opportunity may be afforded by providing a hyperlink to the terms or a drop down menu which the consumer can click (or not) as they choose. The fact that the trader might have taken different or further steps to bring the terms and conditions to their attention, does not mean that the steps that he did take were insufficient or unreasonable. As Mr Hinks submitted, Mr Couser's suggestion that there was in effect only one way to conclude a contract online involved drawing an unprincipled distinction between contracts made online, and contracts made in other ways.

47. That does not mean that following the "click-wrap" procedure would be sufficient to incorporate all the standard terms and conditions in every case of an online contract for goods or services. If and insofar as the Judge intended to convey that it would, in paragraph 45 of his Judgment, I respectfully disagree. I can envisage situations in which, for example, the website remains open for a transaction for such a limited period of time that in practice the consumer would not have a sufficient opportunity to read and digest all the standard terms and conditions (if they desired to do so) as well as to conduct the transaction; or 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. That is not this case, however.

48. It was evident from the first screen that the Appellant would see when she opened her online account that there were overarching terms and conditions relating to the account, as well as specific terms relating to IWGs, and Game Procedures applicable to any game that she wished to play. Camelot did not simply rely on the original click-wrap procedure which signified acceptance of the terms and conditions applicable in 2009. The Update Written Statement specifically invited the Appellant to read the changes and to confirm her acceptance of the updated terms. All those terms were readily accessible via a hyperlink or a drop down menu. They were written in plain English and there was a simple glossary of the terms used in the IWG Rules. Important changes were highlighted in summaries which would not have taken her an unreasonable period of time to read and digest.

49. If the Appellant wished to see the full text of any of the updated terms, the drop-down menu enabled her to do so with one click of a mouse. There was no pressure of time other than any caused by the Appellant's own eagerness to get on with the Game. Moreover, the Appellant, like all other account holders, was specifically informed that the Terms and Conditions were not just available on the National Lottery website, but that hard copies could be obtained by making a phone call or writing to the relevant address.

50. The existence of the terms could not have come as a surprise to the Appellant. One would expect a game to have rules. Moreover, as the Judge held in paragraph 76, no reasonable player could have expected that the Game Procedures were the totality of the contractual terms – most obviously, anyone looking at them would note the absence of any information about how to make a claim and about what to do in the event of a dispute.

51. In those circumstances, I agree with the Judge that in the circumstances of this case, enough was done to incorporate into the contract between Camelot and the Appellant the specific provisions in the Game Procedures and the IWG Rules upon which Camelot relies, and that by adopting the click-wrap procedure the Appellant was bound by those terms, subject only to the question whether any of them was "unfair" within the meaning of the UTCCR.

THE ENFORCEABILITY ISSUE

52. None of these terms was individually negotiated and so the issue was whether, contrary to the requirement of good faith, any particular term caused "a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" (see Reg 5(1) of the UTCCR). If so, that term would be regarded as unfair, and unenforceable against the consumer by virtue of Reg 8(1). However, if the contract is capable of continuing in existence without that term, it will continue to bind the parties (Reg 8(2)).

53. In paragraph 79 of his judgment, the Judge correctly directed himself as to the general principles governing the application of the UTCCR and the meaning of "significant imbalance" by reference to the speech of Lord Bingham in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52; [2002] 1 AC 481 at [17]. In paragraph 88, he also correctly held that a step by step analysis is required to determine whether each clause under scrutiny survives the application of the UTCCR.

54. Schedule 2 to the UTCCR sets out a non-exhaustive list of the types of terms which may be regarded as unfair. By Reg 6(1) unfairness is to be assessed by taking into account the nature of the goods or services for which the contract is concluded and by referring, at the time of its conclusion, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

55. Reg 7(2) is a statutory enactment of the *contra proferentem* rule of construction. It provides that "if there is any doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail".

56. The Judge rightly accepted Mr Hinks's submission that the network of contractual provisions on which Camelot relied were clearly drafted and well signposted through the various hyperlinks (unlike the case of *Green*, which he rightly described as "an example of an egregious case of bad drafting and unfairness at all relevant stages"). As he said in paragraph 87, the Game Procedures were very readily accessible, and these provided hyperlinks to the other contractual provisions (including the IWG Rules). I would add that in this case, the Appellant had a real opportunity of becoming acquainted with the terms of the contract before she clicked the "I Accept" button. Thus the Judge was right to find, at paragraph 92 of the Judgment, that she could not rely on paragraph 1(i) of the indicative and non-binding list of unfair terms set out in Schedule 2.

57. Clause 13.3 of the IWG Rules sets out the hierarchy of the different sets of applicable rules and provides the order in which they apply in case of conflict between them. There is no doubt as to its meaning. It makes it clear that in case of any inconsistency between them, the Game Procedures take priority over the IWG Rules, the Account Terms and any statements and explanations appearing on the Game Details Screen. Mr Couser complained that in rejecting his submission that Reg 7(2) of the UTCCR operated so as to elevate the explanation on the Game Details Screen to the top of the hierarchy, the Judge failed to consider how Reg 6.1 interacted with Reg 7(2). He submitted that those regulations displace hierarchy provisions within consumer contracts and replace them with a rule that where there is ambiguity, either on the words of a particular contractual clause *or as between competing contractual clauses*, it is the meaning most favourable to the consumer that should prevail.

58. Mr Hinks disagreed that Reg 6(1) and Reg 7(2) should be read together in the manner contended for. He submitted, in my judgment correctly, that they were distinct and separate consumer protection tools, and that the Judge was right to reject the contention that Reg 7(2) re-wrote Clause 13.3. Reg 7(2) is concerned with the construction of individual clauses and not with the re-ordering or disapplication of contractual provisions. He relied on the approach to section 69 (1) of the Consumer Rights Act – the identical provision to Reg 7(2) UTCCR – which was taken by Bourne J in *R (Doneghan and others)* v *Financial Services Compensation Scheme Ltd* [2021] EWHC 760 (Admin) at [149] to [151]. In that case, Bourne J rejected a submission that section 69(1) could be used to resolve a conflict between two different contractual terms. It is simply a rule of interpretation which favours the consumer if a particular term could have different meanings.

59. I agree with that characterisation. The Judge was right to find that Reg 7(2) did not affect Clause 13.3 and could certainly not re-write it in the manner suggested. Reg 6(1) adds nothing to the submission; it is a separate provision and the two provisions do not

operate together in the manner suggested by Mr Couser. Clause 13.3 does not conflict with any other provisions of the rules; indeed it is expressly reflected in the Game Procedures themselves, under the heading "General". If the Game Display Screen is silent about what should happen in the event of a software error, that is not an inconsistency with another rule, it is simply an omission, and the answer lies elsewhere. In any event, it is difficult to see how a Clause which explains that the specific rules applicable to the Game which is being played take precedence over more general rules and high-level explanations could possibly be regarded as creating a significant imbalance in the contracting parties' rights, let alone that its introduction into the contract is contrary to the requirement of good faith.

60. So far as the dispute resolution Clause, Clause 12.1, is concerned, I agree with the Judge's analysis in paragraphs 94 to 96 and with his reasons for finding that it would not be struck down by the UTCCR. On the face of it, a clause which enables one party to the contract to determine in a final and binding way a dispute arising between itself and the other contracting party undoubtedly creates a significant imbalance between them; and although the decision must be reasonable, in the *Wednesbury* sense, that does not completely ameliorate the unfairness, because demonstrating that it is unreasonable is a high hurdle for the consumer to surmount. However, as the Judge found, the imbalance was not contrary to the requirement of good faith. There was no want of fair and transparent dealing by Camelot, which was entitled to have a validation process which it could control.

61. A similar conclusion was reached by Ellenbogen J in *Longley v PPB Entertainment Ltd* [2022] EWHC 977(QB) in respect of a clause which reserved to a betting company "the right to correct any obvious errors and to void any bets placed where such have occurred." In the present case, as in that case, there was a legitimate interest in ensuring that payment was made only if there was a valid win, and that the win was commensurate with the odds that were advertised on the face of the Game Procedures.

62. As the Judge observed at paragraph 95, on the facts of the present case, the question whether a player had won or lost was straightforward and binary, because what was crucial was what appeared on Camelot's official list, as Clause 6(2)(d) of the IWG Rules made plain. In any event, as the Judge pointed out, it was unnecessary for Camelot to rely on Clause 12.1 (or the final sentence of Clause 6.1 of the IWG Rules). Even if they had both been struck down under the UTCCR, Camelot was still right about the issue of construction, to which I now turn.

THE CONSTRUCTION ISSUE

63. The Appellant defined as "the Relevant Contractual Term" the phrase "Match any of the WINNING NUMBERS to any of YOUR NUMBERS to win PRIZE". That phrase appeared in small print below the pictures of the two illustrative screens on the Game Display Screen before the "PLAY" button was pressed. However the fundamental error in the Appellant's approach lay in treating this as the only contractual term, when plainly it was not.

64. The Game Procedures, under the section entitled "How to Play and Win", describe that phrase as "the instructions", but they then go on to explain, very clearly, that "if You match a number from the WINNING NUMBERS Section to a number in the YOUR NUMBERS Section, the two matching numbers will turn white and flash in a green

circle indicating that you have won the Prize for the matched YOUR NUMBERS". They then state that "When You have revealed all numbers and Prizes a message will appear at the top of the Game Play Window indicating the amount You have won, if any. The word "FINISH" will appear underneath the message. You must select "FINISH" to complete the Game."

65. Thus it would have been clear to the Appellant, had she read the Game Procedures, that in order to win the Prize, it was not enough for a number in the lower section to correspond with a number in the upper section; the two matching numbers would have to turn white and flash, the amount of the win would have to appear in the message at the top of the Game Display Screen, and the screenshot that she took prior to clicking "FINISH" did not represent the end of the Game. When she did click "FINISH" the outcome, consistently with what she had already seen, and the flashing images, was that she had won £10. Indeed I consider that all of this should have been obvious to any reasonable player of the Game even if they did not read the Game Procedures.

66. Moreover, even if the use of the singular "PRIZE" in the so-called "Relevant Term" were not enough to signify that only one prize could be won per Play (as I consider it does) the Game Procedures spell this out, and do so by reference to the stated odds. So, as the Judge held, the application of the rules in the Game Procedures make it clear that the outcome of the Play was that the Appellant had won £10 and nothing else. That outcome was consistent with the IWG Rules, because the application of Clause 6(2)(d) meant that the Appellant was bound by the outcome recorded on Camelot's official list of Winning Plays - a win of £10. That was not the result of any computer error. As the Judge found, the random number generator was operating properly. The software error affected the animations, not the allocation of the prize tier level which corresponded with the random number generated by the computer and associated with the Appellant's unique Play Number.

67. It follows that the Judge was right to reject Mr Couser's submission that Camelot may have subjectively intended an outcome of £10 but the actual outcome was £1 million. As he said, that submission entirely ignores (a) what the Appellant saw after she pressed the FINISH button; (b) the Game Procedures; (c) the relevant parts of clause 6 of the IWG Rules; and (d) Camelot's evidence about how its computer system worked. However one looks at the matter, on the true construction of the contract, the Appellant did not win £1 million.

CONCLUSION

68. For all the above reasons, I would dismiss this appeal. I would simply add this by way of postscript. Although we have declined the Appellant's invitation to lay down principles of more general application, the issues in this case have highlighted 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. Given 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.

Lord Justice William Davis:

69. I agree.

Lord Justice Green:

70. I also agree.