



Précis Paper

Incorporating Onerous Terms and Conditions in Consumer Contracts

Chris Wood and Justin Brown discuss the recent NSW Court of Appeal decision *National Australia Bank Limited v Dionys as Trustee for the Angel Family Trust* [2016] NSWCA 242 which raises interesting issues regarding terms and conditions incorporated into contracts and the obligations to bring onerous terms to the attention of the consumer.

Discussion Includes

- Incorporation of terms and conditions into contracts
- Exclusion clauses and onerous terms: Requirement to bring to the consumer's attention
- Allegations of fraud in banking cases
- Ratification of unauthorised acts
- Broader implications of the decision: Terms and conditions for internet services and on invoices
- Evidentiary issues

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Incorporating Onerous Terms and Conditions into Consumer Contracts

1. In this edition of BenchTV, Christopher Wood (Barrister, 13th Floor Wentworth Chambers – Sydney) and Justin Brown (Barrister, 13th Floor Wentworth Chambers – Sydney) discuss the recent NSW Court of Appeal decision *National Australia Bank Limited v Dionys as Trustee for the Angel Family Trust* [2016] NSWCA 242 and the considerations that arise when incorporating onerous terms and conditions into consumer contracts.

Background and Material Facts

2. Mrs Dionys received a sum of approximately \$500,000 in a family law settlement. After discussions with a family friend, Mr Dimaris, Mrs Dionys deposited the money at the National Australia Bank ("NAB").
3. At the time that Mrs Dionys opened her bank account with NAB, she signed an Account Authority Card recording her as the only person who could authorize transactions on the account. After signing the authority card, she was given a copy of NAB's Terms and Conditions.
4. Subsequently, Mr Dimaris withdrew the money in two separate transactions, and deposited it into an investment company with which he was involved. The construction investment in question failed, and the money was lost.
5. Mrs Dionys commenced proceedings against NAB, claiming that she had not withdrawn the money, nor had she authorized Mr Dimaris to withdraw it.

Evidentiary issues

6. An issue arose at trial because certain affidavits were read at the start of the trial, but when the time came to call the witnesses, they did not appear. In particular, Mr Dimaris provided an affidavit, and that affidavit was formally read. However at the relevant time, Mr Dimaris failed to appear at court.
7. Mr Wood suggests that it may have been neater to read each affidavit when it was time to call each witness, to avoid the situation that arose.
8. A second evidentiary issue arose in relation to the counter clerk from NAB who allowed the transactions to occur. The clerk was no longer an employee by the time of trial, and NAB

did not call him to testify. As a consequence, the trial judge was able to make credit-based findings relying on Mrs Dionys' evidence.

Grounds of Appeal

9. In the District Court, the trial judge found for Mrs Dionys. On appeal, NAB raised the following issues, which were also the main issues at trial:
- Whether or not Mrs Dionys authorised the transactions;
 - Whether Mrs Dionys ratified the transactions by her subsequent conduct; and
 - Whether NAB could rely on its terms and conditions.

The Terms and Conditions

10. The Terms and Conditions relied upon by NAB contained cl 5.18 which contained an obligation on customers to notify the bank if they thought that there was something wrong with their account. The clause provided:

You must check your statements

Without limiting any part of these terms and conditions for your account, you must promptly review your statement of account to check for and tell NAB of any transaction recorded on your statement that you suspect for any reason that you did not authorise or for which the information recorded is incorrect. If you do not, then subject to any applicable law, you do not have any right to make a claim against NAB in respect of such a matter (for example, a forged cheque).

11. The trial judge found that the booklet containing this clause was handed to Mrs Dionys after signing the authority card. This finding of fact became important because the bank had the onus of proving that the terms were incorporated into the contract. Although the authority card contained Mrs Dionys' signature, it did not make express reference to the Terms & Conditions.
12. The Court of Appeal found that because the Terms & Conditions were given to Mrs Dionys' subsequent to her signing the authority card, they were not incorporated into the contract.
13. Furthermore, the Court of Appeal was persuaded that cl 5.19 effectively operated as an exclusion clause. This was significant because exclusion clauses have traditionally received particular treatment by the courts, such that the party seeking to rely on the clause must take particular steps to bring the clause to the attention of the customer. In the classic ticket cases, such as *Thornton v Shoe Lane Parking Ltd* (1970) EWCA Civ 2, courts have

found that there is an expectation that onerous clauses will be brought to the attention of the customer more so than other clauses.

14. Here, there was no evidence that NAB had drawn Mrs Dionys' attention to any of the clauses.

Whose Signatures were on the Withdrawal Slips? The Onus of Proof

15. NAB alleged that Mrs Dionys had signed both of the withdrawal slips that had allowed Mr Dimaris to withdraw the money. NAB contended that Ms Dionys had never put her case on the basis that her signature had been forged, and therefore that it was procedurally unfair for her to be permitted to dispute her signature on the cards.
16. The Court of Appeal dismissed this argument. Mrs Dionys had simply put her case that NAB had the onus of showing that the signatures on the withdrawal slips were hers. NAB was unable to prove this, as they did not call the counter clerk responsible for authorising the transactions.
17. Mr Wood therefore cautioned to always be careful when pleading fraud. Lawyers should ensure that there is a proper basis to establish the fraud, and if so, make sure that it is explicitly pleaded. However the fundamental principle, that the person who alleges must prove, should not be forgotten.

Ratification of Unauthorised Acts

18. Ratification usually arises in an agency context, where an agent who is acting beyond his or her authority commits the principal to a deal, and the principal retrospectively gives authority to the actions of the agent.
19. In the circumstances of this case, NAB argued that Mrs Dionys had ratified the unauthorised transactions conducted by Mr Dimaris by virtue of the fact that it took her a considerable period of time to alert the bank to the missing money. Their argument was founded on the premise that she wished to take the benefit of any upside of the investment entered into by Mr Dimaris. NAB submitted that by not doing anything, or by her silence, Mrs Dionys adopted the benefit of the transactions.
20. The Court of Appeal rejected this submission. Ratification must occur with full knowledge of the facts, and must consist of acts which are unequivocally consistent with the adoption of the unauthorised acts, and NAB was not able to establish either of these points.

21. Moreover, as Sackville AJA made clear, there is a heavy burden to discharge when a party attempts to rely on ratification by silence. In order to establish silence by ratification, the party seeking to establish the ratification must point to some form of detriment which the principal allowed to occur by reason of his or her inaction. Here, all that NAB could point to as detriment suffered by the late notification by Mrs Dionys was CCTV footage that it may have been able to access. However, there was no evidence that Mrs Dionys was aware that a delay in notifying NAB of the unauthorised withdrawals would have the result that the CCTV footage would be deleted.

Implications of the Decision

22. One important lesson to be learnt from this case is that although NAB obtained Mrs Dionys' signature on the authority card, it did not expressly sign her up to the Terms & Conditions. This stands in contrast to mortgage cases, for example, which usually contain explicit references to the Terms & Conditions. In those circumstances, the party will be bound by what they sign, regardless of whether or not they have read the clause in question: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165.
23. In order to ensure that a customer is bound by Terms & Conditions, it is therefore essential to draw their attention to any terms and conditions before they sign. Moreover, where possible, expressly incorporate the terms by the customer's signature.
24. Second, where the Terms & Conditions have onerous terms, those should be marked in bold or brought to the attention of the consumer in some way.
25. This case may also have implications outside of the banking sector. The Court of Appeal reiterated long-standing legal principles established in the ticket cases such as *Thornton v Shoe Lane Parking Ltd* (1970) EWCA Civ 2, namely that onerous terms must be brought to the specific attention of the customer. This principle has not received considerable attention in recent years, and may have significance going forward. There is a strong argument that where a consumer agrees to lengthy terms and conditions, for example for internet services, a company must do something particular to draw onerous terms to the consumer's attention before they sign up.
26. Mr Wood also considered that there are implications for cases where people trade on an invoice, and where an invoice, which is sent subsequent to the formation of the contract, may contain the terms and conditions. Where terms and conditions are attached to a quote or an email, a contracting party should consider any onerous terms or exclusion clauses, and what steps should be taken to draw those clauses to the customer's attention. In

particular, where a clause purports to forfeit a customer's rights, that clause should be brought to the attention of the customer before signing up to the contract.

27. In order to draw a customer's attention to a particularly onerous clause, Mr Wood pointed to two scenarios. The first involves establishing an invariable practice whereby staff are trained to point to specific clauses. However, a better system would be a permanent method of alerting the customer, such as putting the onerous clauses in bold. Where there is a board where the terms are physically available (such as occurred in the early ticket cases), use arrows, bolding or a different colour to draw attention to the clause in question. These latter suggestions are preferable as if the practice relies on a particular individual who is involved in many transactions on a daily basis, it will be difficult for them to give evidence as to a specific transaction.
28. It is useful to have regard to the early ticket cases, which give examples of how to draw the customer's attention to a particular clause: see, for example, *Robertson v Balmain New Ferry Co Ltd* [1906] HCA 83; 4 CLR 379; *Council of the City of Sydney v West* [1965] HCA 68; 114 CLR 481. Those cases also emphasise that it is also important that the customer had a reasonable opportunity to look at the terms and either withdraw from the transaction or proceed.
29. Finally, when seeking to assert that the terms and conditions or a particular exclusion clause do not apply, it is prudent to specifically plead those issues at the outset.

BIOGRAPHY

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Christopher was admitted as a solicitor in 1998 and called to the Bar in 2001. He specialises in bankruptcy and insolvency, commercial law, equity and trusts and intellectual property. He is co-author of Equity Practice and Precedents (Thomson Lawbook Co, 2008), as well as several other publications

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Justin was admitted as a solicitor in 2011 and called to the Bar two years later. His practice focuses on administrative law, commercial law, equity and trusts, real property, and wills and probate. He has a Masters of Applied Law (Wills & Estates) and regularly lectures in succession law at the University of Sydney.

BIBLIOGRAPHY

Focus Case

National Australia Bank Limited v Dionys as Trustee for the Angel Family Trust [2016] NSWCA 242

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_06-09-2016_insurance_banking_construction_government.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/57c787foe4b058596cb9f0c5>

Cases

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