

Neutral Citation Number: [2021] EWHC 2619 (Comm)

Case No: CC-2020-MAN-000097

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (OBD)
SHORTER TRIALS SCHEME

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date: 30 September 2021

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

Between:

BLU-SKY SOLUTIONS LIMITED

Claimant

- and -

BE CARING LIMITED

Defendant

Richard Selwyn Sharpe (instructed by **Tebbits & Co, Crewe**) for the **claimant**

James McKean (instructed by **Weightmans LLP, Manchester**) for the **defendant**

Hearing dates: 7-8 September 2021

Draft judgment circulated: 27 September 2021

APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The date and time for hand-down is deemed to be 10 a.m. on Thursday 30 September 2021.

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

Summary

1. This is a claim by the claimant, a supplier of mobile phones and telecommunication services, against the defendant, a social care provider, in which it claims the sum of £180,000 plus VAT. The claim is made under a contract relating to the supply to the defendant of a mobile network service (**MNS**) by the well-known MNS provider, EE. The contract involved the provision of connections for 800 mobile phones for a minimum period of 48 months for a monthly rental of £9,600.
2. In summary, the claimant contends that the contract was concluded by the defendant's signature of its order form (**the order form**), that the contract incorporated its standard terms and conditions for mobile services (**STCs**) and that, pursuant to clause 4.6 of those STCs, in the event of cancellation before connection it was entitled to what was described as an "administration charge" of £225 per connection. It is common ground that the defendant cancelled before connection, thus the claimant contends that it is entitled to £180,000, being a £225 administration charges for each of the 800 connections.
3. In summary, the defendant denies that there was a binding contract between the parties, denies the incorporation of the STCs into any contract, denies that clause 4.6 was incorporated as an unusual or onerous term, asserts that clause 4.6 is a penalty clause and thus void, and denies that the claimant has suffered any loss because of the cancellation of its order.
4. Pursuant to case management directions given by me on 21 April 2021 the claim was entered into and tried in the Shorter Trials Scheme over 2 days on 7-8 September 2021, during which time I heard from 5 witnesses: 1 from the claimant, 3 from the defendant and 1 from a third party. I also had excellent written and oral submissions from counsel for each party, including supplemental written submissions on matters of law arising during the course of oral closing submissions.
5. The following significant issues arise for determination:
 - 5.1 Did the order form create legal relations between the claimant and the defendant?
 - 5.2 Were the STCs incorporated into the contract?
 - 5.3 Were clauses 4.6 and 4.8 of the STCs sufficiently incorporated into the contract as allegedly unusual and onerous terms?
 - 5.4 Are the charge provisions payable on cancellation of the contract in clause 4.6 and/or the charge provisions payable on non-provision of PAC codes in clause 4.8 void as penalties?
 - 5.5 If they are void, what, if any, recoverable loss has the claimant suffered as a result of the defendant's cancellation of the contract and/or the non-provision of PAC codes?
6. In reaching my decision I make the necessary factual findings and apply the law dispassionately. I say this because the defendant has emphasised the difference between the claimant (which Mr McKean described in his skeleton as a "ruthless commercial operator") and itself as "the UK's largest employee-owned not for profit social care provider".
7. In her witness statement Ms Lowrie, its CEO, expanded, saying that the claimant's "800 carers are responsible for providing various levels of care to over 1,000 vulnerable people in their own homes across the North of England. The care that is provided ranges from care for children and young people, daily visits to disabled or elderly clients which allows them to continue living in their own homes and providing palliative and end of life care". She said that the

damage to the defendant from a successful claim “would be catastrophic” and highly likely to result in redundancies having to be made.

8. Moreover, it became apparent during the course of the evidence that due to a series of misunderstandings none of the individuals with the defendant who dealt with this contract had appreciated that Ms Lowrie might, by signing the order form, be committing the defendant to a contract which could not be cancelled and which had the effect of potentially landing it with a six figure liability should it attempt to do so.
9. Whilst I do not doubt Ms Lowrie’s evidence, and have sympathy for the defendant for the unfortunate position it finds itself in, that cannot and should not affect my decision. It is a statement of the obvious, I hope, that it is not my function to decide the case on the basis of a general sympathy for one party or of the potentially harsh consequences should judgment be entered against it. If, on a proper application of the facts and the law, the claimant is entitled to judgment, then that is what I must enter.
10. However, applying the law to the facts, I am satisfied that the claim fails, on the basis that: (a) the clauses relied upon were not incorporated into the contract, since they were unduly onerous clauses which were not fairly and reasonably drawn to the defendant’s attention; (b) even if they were incorporated they are penal clauses and thus void; and (c) the claimant cannot succeed on any fallback claim to recover its - much more modest - actual loss on the cancellation.

Reasons

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A. [The witnesses](#)

12. I begin by referring briefly and in what is now fairly conventional terms to my approach to the evidence. Where there are key factual disputes between witnesses which must be resolved then I shall resolve them. In resolving such disputes and in gaining an informed understanding of the factual background it is necessary to have careful regard to the relevant contemporaneous documentary evidence. In this case, as in many such cases, it is a surer guide than the retrospective recollections of the witnesses. I also have regard where appropriate to my

assessment of the inherent probabilities. In a case such as the present it is particularly important not to be swayed by what the witnesses now assert that they believed the relevant contractual arrangements were, as opposed to what is demonstrated by an objective analysis of what they said to each other and what they did as regards each other at the time.

13. I shall refer briefly to the witnesses from whom I heard.
14. Mr Jones is the managing director of the claimant company. He is every inch a salesman. He was unreliable in his evidence on a number of occasions and I am not prepared to accept his evidence save where corroborated by other reliable evidence or where I am otherwise satisfied I can rely on it.
15. As a separate point it became apparent during the course of the hearing that the claimant's solicitor was present in the room from which Mr Jones was giving evidence. It was apparent to me that the solicitor was only present to assist Mr Jones to obtain relevant documents in the trial bundle. When the point was raised I asked him to confirm as much, and he did. In closing submissions Mr McKean suggested that he may have assisted in locating documents and that this went beyond what was permitted. He referred me to the observations of Andrew Baker J in *Navigator Equities Ltd v Deripaska* [2020] EWHC 1798 (Comm) at [9]. I agree that I should have been told at the outset of Mr Jones' evidence that the solicitor was going to be present and for what purpose, so that I could have made sure that the parameters were clearly understood. I also agree that it would not generally be acceptable for the solicitor to locate documents other than those which were expressly identified by Mr Jones but who did not know where in the bundle they were located. However, I am satisfied that nothing happened which cast any doubt upon the integrity of the solicitor in question.
16. Each of the defendant's employees who gave evidence was generally reliable. In order, they were: (a) Mr Bowles, the business support manager for the defendant who had the most direct dealings with the claimant; (b) Mr Booth, the head of performance for the defendant who was responsible for procurement and who undertook a more strategic role behind Mr Bowles; and (c) Ms Lowrie, the CEO of the defendant company.
17. Mr Ross is a senior business manager with Midland Communications Distribution Ltd (trading as and known as **Mdee**). Mdee is an authorised distributor for a joint venture between BT and EE (for convenience I shall simply refer to the joint venture simply as **EE**). It has a network of independent dealers (known as "stockists") including, in early 2020, the claimant. Mr Ross was generally reliable, and although he had not provided documentary evidence to support his evidence as to the profit which the claimant could have achieved had the defendant not cancelled the order form I was satisfied that he had personal knowledge of the figures and that his evidence was reliable.

B. [The market in MNS and the relationship between those involved](#)

18. It is useful to begin by saying something about the operation of the market in MNS as relevant to this case and the position of the parties involved as at early 2020.
19. Whilst the defendant did not have the same knowledge of the market as did the claimant, it had a general knowledge and understanding from previous dealings. In particular, as at early 2020 it had an existing contract for a MNS with O2 which was sourced through an independent dealer and competitor of the claimant, known as Barclays Communications (**Barclays**) and, thus, had a general familiarity with the process and the commercial terms offered, albeit little knowledge as to the finer details of the process and virtually no knowledge of the detailed terms and conditions (**T&Cs**) on which the MNS operators and independent dealers operated.
20. It is neither possible from the evidence in this case nor necessary for me to attempt some general explanation of the market in MNS. It is sufficient for me to say that an end user, such as the

defendant, who needs mobile phones and connections for its employees to use in its business, may decide to use the services of an independent dealer such as the claimant to source its needs. The dealer will put together a package which may include the supply of both mobile phones and a contract for MNS or only one or other. Whilst it will supply the mobile phones itself, it cannot provide the MNS itself. Instead, the end user will enter into a contract for MNS with a network operator such as EE or O2. However it is the dealer which puts together the package. This will typically provide for a fixed monthly fee for a connection for a specified minimum number of months, and will also specify what is included in terms of monthly call time and data usage and the like. It may also, as it did in this case, include both a cash incentive, which may be used by the end user to buy mobile phones or may just be used in its general business, and a fund to “buy out” the remaining unexpired minimum term of the existing MNS contract. The end user will decide whether to proceed based on an assessment of the value of the total package.

21. In this case there was also Mdee acting - as Mr Ross explained - as an intermediate entity acting as a conduit between EE on the one hand and the dealer and end user on the other. It is referred to as a “distributor”, by which I think it is meant that it distributes the MNS offered by EE to the market. Mdee is in fact part owned by EE, but nothing turns on that. A dealer such as the claimant will not normally deal directly with EE, and typically does so through Mdee or some other distributor. A dealer such as the claimant will have a contract with the distributor which sets out the terms on which they do business with each other. The evidence indicates that neither the claimant nor Mr Ross (who was present at a meeting on 12 February 2020) felt it necessary to explain to the defendant that there was a difference between Mdee and EE, so that the defendant believed that Mr Ross was from EE, but nothing of any significance turns on that.
22. The claimant had disclosed both the application form which it completed and returned to Mdee and what it said were the T&Cs of the contract between them. Neither side asked for them to be put in the trial bundle, and it was only after both Mr Jones and Mr Ross had given evidence that they were provided to me.
23. The application form, known as a stockist nomination form, was in the nature of an application by the claimant, supported by Mdee, to become an authorised dealer to “market and promote EE’s business to business service and procure business customers for such services”.
24. The T&Cs as produced to me is a standalone document. It is clearly intended to be incorporated into the contract between dealer and distributor by reference to some further document which would identify the claimant as being the relevant “Business Partner”. The T&Cs themselves identify Mdee as the Supplier and the end users as the Customers.
25. No document has been disclosed or produced by either party which would conclusively demonstrate that these T&Cs were incorporated into and governed the contract between the claimant and Mdee.
26. However, the contract is useful in a more general sense in showing how, through the medium of this or a similar contract, the claimant was able to market itself as a selling representative for EE and to place orders with Mdee for the supply of network services to its customers. The contract provided for the claimant to receive commission from EE, passed through Mdee, on sales achieved. It also provided for the commission to be clawed back, in whole or in part, in certain circumstances. This is consistent with the evidence of Mr Ross, which confirms the position as it appears from the documents, which is that the claimant would - having agreed the terms of the deal in advance with Mdee - propose a deal to the customer who, if it accepted it, would complete information on a form which would be submitted to Mdee, which would then issue a MNS contract on behalf of EE to the customer. This contract is referred to as an **EEBA**

(where EE is the supplier and BA is short for Business Agreement) and enables the connection to be made by the customer to the MSN through the sim card in each mobile phone.

C. [Relevant events](#)

27. As I have already indicated, the defendant's position as at early 2020 was that it had an existing contract for MNS for 790 handsets with O2, concluded through Barclays, which was due to expire in December 2020. (There was also a separate contract for a further 60 about which no more need be said.) Mr Bowles was concerned that there was no spend cap on this contract (i.e. to prevent employees from incurring additional charges which the defendant would then have to pay) and he was in discussions with Barclays both about putting one in place and about the potential for negotiating an improved deal. It was because of this that when he was cold called by a representative of the claimant, offering a cheaper monthly line rental, he gave his email address to allow something to be put in writing.
28. The claimant's initial offer was made by Mr Jones in an email dated 23 January 2020. The offer, in short, was for a 36 month contract for 870 connections with EE at a monthly line rental of £10,440 (i.e. £12 per handset), with a cash incentive of £100,000, and various other terms.
29. In a further email sent on 27 January 2020 Mr Jones provided more details of the transfer process, assuming the defendant decided to proceed. The first step was that "contract is agreed / signed for electronically and along with the customer details form sent back to us". The next steps related to the transfer process, from which it was apparent that there would need to be replacement sim cards. Mr Jones reassured the defendant that "the full schedule of works will be agreed between yourself and BT/EE at the start so that there is no stress or downtime to your service". It was not made clear in this, or any subsequent email, that the "contract to be agreed and signed for" was not a contract with EE, but a contract with the claimant itself.
30. Mr Bowles raised a number of questions in subsequent emails which were answered by Mr Jones. Most relevantly on 29 January 2020 he asked who would be billing the defendant and explained that the existing contract with O2 for 790 connections had 10 months to run, so that he assumed there would be an early termination charge if the defendant switched now and asked whether that had been factored in to the proposal. Mr Jones confirmed that EE would be billing and said that he would see if EE would be willing to pay the early termination fee, which he calculated would be £94,800 based on the number of connections, the monthly rental and the months left to run.
31. There followed a discussion about what the early termination fee actually would be and whether EE would agree to pay it, as well as a fear expressed by the defendant, scoffed at by Mr Jones, that Barclays might also be entitled to its own early termination charges because it would face penalties from O2 in such an event. That is relevant because it is now apparent, both from Mr Jones evidence and the Mdee T&Cs, that if Barclays' T&Cs were anything like the claimant's and if the O2 contract was anything like the EE contract there was indeed a clear risk that this might be the case.
32. By 10 February 2020 Mr Jones had confirmed that EE would contribute to the O2 contract buyout and a meeting had been arranged for 12 February 2020. Mr Jones' email of this date first stated, erroneously, that the existing sim cards could be kept. I accept this was erroneous because it is clear that this would not have been possible on a switch from O2 to EE, since each has their own sim cards for connection to their own networks. There is a dispute as to whether or not this was a misrepresentation on which the defendant relied in entering into the contract. Mr Jones said that he explained the error at the meeting and that it was accepted as such by those present. In cross-examination Mr Bowles fairly agreed that this was the case. Mr Booth and Ms Lowrie however both disputed this, contending that retaining the sims was a major part

of the attraction of the deal for them, because it saved the worry of having to get all their staff to change sim cards. I do not dispute that this is what they now genuinely believe, based on the contemporaneous documents. However, since Mr Bowles was the initial contact, who knew from the outset that there would have to be new sim cards, I am satisfied that he is more likely to have recalled that this was an error and accepted it as such at the meeting. Thus I prefer his evidence and that of Mr Jones to that of Ms Lowrie and Mr Booth on this point. In any event, I am satisfied that even if it was not mentioned at the meeting it was known to Mr Bowles at around this time, so that the defendant cannot complain of any misrepresentation.

33. The claimant's final proposal before the meeting was sent on 11 February 2020. What was now described as a "hardware fund / cashback" had been reduced to £70,000, but there was also a commitment to buy out the O2 contract up to £109,315.80, based on a termination fee of £15.38 per month per 790 handsets over 9 months assuming a "port" in March 2020. The defendant complains that there was a discrepancy in that the proposal referred to, because the total monthly fee was calculated on the basis of 800 connections and not the 790 requested, however I accept Mr Jones' explanation that this followed a request for an additional 10. Even if it was an error there is no reason to think that it could not have been remedied had it been identified as such, because the monthly fee was plainly based on the number of connections and there is no reason to think that both the claimant and EE would not have been prepared to vary the number down to 790 if there had been a genuine error. In any event it forms no basis for invalidating any contract since the subsequent order form was signed on the basis of 800 and here is no basis for alleging any misrepresentation or other invalidating factor.
34. The witness evidence about the meeting which took place on 12 February 2020 at the defendant's premises, at which Mr Jones and Mr Ross presented the claimant's proposal to Ms Lowrie, Mr Bowles and Mr Booth, demonstrates in my view that nothing of any significance to this case was said by anyone at the meeting. I am prepared to accept that Mr Jones left the meeting thinking that it had been a good presentation and that the defendant was ready, willing and able to sign up. I am also prepared to accept that the defendant's representatives left the meeting feeling reasonably impressed with the proposal and with Mr Jones and Mr Ross but, because they were instinctively a cautious organisation and because they wanted to see who would offer the best deal, would not have signed a contract had one been placed before them there and then. I do not however think that this difference in their beliefs was made explicit at the meeting.
35. I accept that there was a discussion of the process, including a likely transfer date of around early April 2020, but nothing specific was agreed. There is no suggestion that the precise timing was said to be a matter of real concern to the defendant.
36. I also accept that there was a discussion about the quality of the EE network coverage, with Mr Ross saying that if the defendant provided the relevant postcodes a check could be undertaken by EE. I do not however accept that the defendant said that this would have to be done and satisfactory results obtained before the defendant committed to a move. I accept Mr Jones' frank evidence that he would have explained that all of the network services could be bad in certain places at certain times.
37. Finally, I accept Mr Ross' evidence that there was little or no detailed discussion about the detail of the contracts or documentation. No-one suggests that any mention was made by Mr Jones as to what, if any, charges the defendant would face should it sign up to a contract and not proceed with it or switch provider before the 48 month period was ended.
38. The next and perhaps the most important event occurred the next day on 13 February 2020, when Mr Jones emailed Mr Bowles as follows:

“It was fantastic to meet you all yesterday and great news to bring you onboard with us and BT/EE we are looking forward to working with you.

Next actions for Be Caring Ltd:

- Please sign the order form with Blu Sky – sent to you via Esign.
- EEBA Request for completed (attached)...only tick boxes that apply.
- Please can you send me the user name and login for the O2 online billing so we can pull off a couple of reports.

We will then come back to you with a schedule of works that suit your business for the transfer.”

39. The email contained a footer at the bottom, which read as follows:

“This message and any files transmitted with it are confidential and intended solely for the use of the individual or entity to which they are addressed. If you have received this message in error please delete it and any files transmitted with it. Any opinions expressed in this message may be those of the author and not necessarily those of the company. The company accepts no responsibility for the accuracy or completeness of any information contained herein. This message is not intended to create legal relations between the company and the recipient. Although we have taken steps to minimise the risk of transmitting software viruses, Blu Sky Solutions accepts no liability for any loss or damage caused by computer viruses and would advise you to carry out your own virus checks.”

40. The order form, being the order form itself, was indeed sent by email at the same time using the Esign application which is designed to allow documents to be executed remotely. It is on the claimant’s headed form and is worth setting out in full.

“Order Details: EE - 48 Month Agreement

Tariff: EE

800 x Inclusive Cross Network Minutes & Texts

5 GB data each

20GB Shored Data

Mobile Iron Bronze (MDM Software)

UK Based Customer Service

Free Online Billing Portal

Buyout of O2 contract up to £109'209.60 inc vat paid by EE

Hardware fund of £70'000 ex vat

Total monthly rental £9'600.00 monthly ex vat

Note. Please note that all calls are recorded for quality and training purposes. All orders and contracts are subject to and incorporate our standard terms and conditions by signing this document I agree I have logged on to the Blu Sky website at www.bluskysolutions.co.uk, have read agree and fully understand all terms and conditions regarding the contract and the policy protection scheme & free trial (*where applicable) and am bound by the same. I give Blu Sky permission to have third party access to my account. I am duly authorised to sign on the company’s behalf.”

41. Underneath there was a signature box which required the details to be entered of the signer, their position and date. It is common ground that the order form was signed by Ms Lowrie on 14 February 2020 and returned to the claimant.

42. I accept the evidence of Mr Bowles that he did not review the terms of the order form before forwarding it to Ms Lowrie and nor did he note, let alone seek to log onto, the claimant’s website to read the STCs, in the belief that this was something which would be done by Ms Lowrie before she signed anything. His email to Mr Jones of 13 February 2020, in which he said that he had forwarded “the contract” to them and that he thought she would be “signing

stuff tomorrow”, is consistent with this although, as Mr Selwyn Sharpe submitted, the reference to “the contract” does rather indicate that he at least was aware that this was a contractual document.

43. It is common ground that Ms Lowrie did indeed sign and return the order form the following day, 14 February 2020. Although I accept her evidence at [13] that she believed she was signing the equivalent of a heads of terms rather than an immediately binding agreement, in the absence of evidence that she communicated this belief to the claimant that understanding is irrelevant as a matter of law. The same is true of her evidence that this mistaken belief explained why she did not review any T&Cs on the website.
44. The EEBA request form attached to the claimant’s email of 13 February 2020 was headed with the details of Mdee and EE. It required the defendant to provide details including its name and address and payment details as well as to tick which options (for example access to international calls) it wished to select. Although it would not have been completely clear to the defendant what the purpose and status of this document was, it would have been reasonably apparent that it reflected the first stage in the process of entering into an agreement with EE for the supply of its MNS. This is confirmed by Mr Jones’ subsequent email of 15 February 2020 where he said that “we are pulling through the relevant details through to the EE contract which is bespoke and will be populated and emailed to you to review / sign”.
45. The defendant did not complete and return this form at the same time as the order form. Instead, on 15 February 2020 Mr Booth emailed Mr Jones saying that “I can't seem to locate the terms and conditions for the purchase order that was sent through”. Mr Jones replied, saying that “my T&Cs I will send you know they are on the bottom page of my website”.
46. The evidence as to the STCs from both parties is most unsatisfactory.
47. The claimant has produced the version on which it relies, however it is undated and there is no documentary evidence either as to the date it was produced or the date when it was uploaded onto its website. There is no documentary evidence that the version relied upon was actually uploaded onto its website as at February 2020. There is no documentary evidence as to what appeared on the website as at that time to enable anyone accessing it to be directed to the STCs.
48. In his witness statement Mr Jones said that these were the terms displayed on the website at the time, identified as “terms and conditions - mobile”, and had been placed there by an external website management company in February 2019. Since the defendant had specifically put the claimant to proof that the STCs in their present form were provided on the website at the time, the failure to provide some more detail or documentary or other confirmation was unimpressive.
49. In cross-examination Mr Jones expanded, saying that the link to the mobile STCs was at the bottom of the website, as was a link to separate T&Cs under the link “terms and conditions - landline”. He said that if the website company had been asked they could have confirmed that they had uploaded the STCs and might have been able to produce both a copy of the STCs thus up-loaded and a copy of the website as it then appeared, without explaining why they had not been asked to do so beforehand. He admitted that the website now used is a different version, changed in January 2021, with the stated purposes being better navigation and clearer information. Even if the claimant may have been excused for not having a copy of the website as it existed as at February 2020, it ought at the very latest to have obtained and disclosed a copy of the website as it existed before it was changed in January 2021.
50. The defendant has not suggested that after the dispute arose, which it did by the end of February 2020, it undertook an investigation as to what was available to be seen by accessing the website. In his witness statement Mr Booth states that having reviewed a copy of the order form he noted that a copy of the STCs had not been provided, emailed Mr Jones to request one, and

received his reply. He says nothing at all about whether he had attempted to obtain a copy of the STCs from the website and, if so, with what result. In cross-examination he said that he had done so and it was because he couldn't find them, having attempted to do so on multiple occasions, that he emailed Mr Jones and, having received them, simply put them into a folder for later review without reading them. It follows that the defendant ought to have been able to disclose a copy of the pdf version emailed over on 15 February 2021 from which it could be seen whether or not there was any difference between that version and the version disclosed and relied upon by the claimant.

51. In my judgment the claimant has, albeit only by a small margin, discharged the burden of proving that the STCs upon which it relies were accessible by navigating to the bottom of the website home page and clicking the link marked "terms and conditions - mobile". First, there is no reasonable basis on the evidence for contesting that the STCs relied upon by the claimant were not the same as those sent by pdf to Mr Booth on 15 February 2020. Second, there is no reasonable basis on the evidence for considering that prior to February 2020 the claimant ever used any different T&Cs for its mobile contracts which might have been uploaded on the website and not replaced with the STCs. Third, the defendant did not until the unconvincing evidence of Mr Booth in cross-examination, contradict Mr Jones' statement in his email dated 15 February 2020 that the STCs were on the bottom page of the website. Given that the dispute within 2 weeks of this, when the claimant made further express reference to the particular clause 4.6 now relied upon, one might have expected Mr Booth or someone else within the defendant or instructed by it to have re-checked this point, but there is no evidence that they did or if so with what result. Fourth, whilst I accept that the website now is not the same as it was in February 2020, and appears to have been improved in terms of navigation and clarity, there is no good reason to think that if one accessed the website and scrolled to the bottom of the homepage one would not find links to the "terms and conditions - mobile" and the "terms and conditions - landline" which would have taken one to the separate T&Cs. I acknowledge that there is further and better evidence which the claimant could, and should, have adduced to buttress its case on this point, but since I do not consider that the claimant has deliberately held back evidence, and given that both parties have not covered themselves with glory on their evidence on this point, if I have to - as I must - decide the case on the evidence which is before me I am satisfied that the claimant has done enough to persuade me.
52. The STCs as relied upon by the claimant have the claimant's logo at the top right hand side but no heading. They begin with the following statement: "These Terms and Conditions of Business are between Blu-Sky-Solutions Ltd and you (from now on referred to as 'the customer') and are deemed to be accepted by virtue of a signed purchase order." It is completely unclear from this opening statement that they are intended to apply only to the supply of mobile handsets and/or to the supply of MNS. Although it can be discerned from a very careful examination of the body of the T&Cs that any physical supply would relate to handsets, there is no clear explanation as to what is meant by the "services" also referred to.
53. The STCs were divided into 8 sections, respectively headed warranties, dispatch, accessories/handsets, new connections/upgrades, cancellation and returns policy, privacy policy, responsibilities, contract returns and general. The headings were in bold type. The majority of such clauses each had a number of sub-clauses and sub-sub-clauses. They run in total to just over a page of detailed text, in closely spaced small type and with no separate clause headings. It is quite clear that they are not in any way user-friendly to any reader, let alone a non-legal reader.
54. The same lack of clarity appears from the claimant's T&Cs said to be applicable to landline contracts. This contains no claimant logo and the opening statement simply reads: "Blue-Sky Solutions Ltd Terms & Conditions". A careful examination of the body of these T&Cs would

show that they relate to equipment (which is defined as including mobile telephones) and to services (which is widely defined but does not exclude mobile services). It is only by reading clause 2.7 that it would be seen that these terms are not intended to include mobile services, where it says that the “relevant Blu-Sky Solutions agreement” is available on the website.

D. [The STCs](#)

55. As I have said above, there is no explanation in the heading to the STCs what their purpose is.
56. As I have also said above, the first section, headed Warranties, contains 5 separate sub-clauses, all to do with the situation where the claimant is supplying handsets. A less diligent reader might assume from this section and the link, assuming it read “terms and conditions - mobile”, that this was the sole purpose of the STCs. The sixth sub-clause, headed “dispatch”, refers to the dispatch of “hardware and sim cards”, but otherwise offers no elucidation. The second section, headed “Accessories / handsets”, also refers only refers to supply of handsets.
57. Section 3, headed New Connections/Upgrades”, states baldly that: “3.1 By agreeing to a new connection or upgrades you, the customer (from now on referred to as 'the customer') agrees to be bound by the networks terms and conditions for the minimum contractual period”. This has no obvious connection with the previous sections and appears to be an attempt to incorporate by reference the terms and conditions of the network supplier, in this case EE. This is in circumstances where the email referring to the order form also referred to and attached the EEBA form which, as I have said, would have appeared to have been the first step along the road to entering into a NMS contract with EE. Read literally, therefore, it would appear that by signing the order form and agreeing to new connections the customer was agreeing in advance to be bound by EE’s terms and conditions, which had not been provided or even identified at this point.
58. Section 4, although headed cancellation and returns policy, in fact contains no clauses dealing with returns. Moreover, clauses 4.1 to 4.5 and clause 4.7 deal only with payment of subsidy. These clauses contain detailed terms as to how and when such payment is to be made by the claimant and, further, contains a provision (clause 4.5) which allows the claimant to reclaim the subsidy (or part of it) in certain circumstances, including where the network provider reclaims any connection commission or advance payable to the claimant.
59. Clause 4.6, which is not separately headed and which is buried within the body of section 4, reads as follows:
“4.6 In the event that a customer cancels an order prior to connection following a purchase order is sent, disconnects a connections prior to the expiry of the minimum term (without consent from Blu-Sky-Solutions Ltd) or a connection is downward migrated during the minimum term without written consent from Blu-Sky-Solutions Ltd), then Blu-Sky-Solutions Ltd shall be entitled to charge the customer an administration charge of £225 per connection. This £225 will also be applied to each connection if the customer upgrades with another supplier but on the same mobile network within the minimum contractual term agreed. For the avoidance of doubt if you are a business customer there is no 14 day cooling off period unlike consumer regulations.”
60. Clause 4.8, upon which reliance is also pleaded by the claimant, but which seems to me to be largely irrelevant since it is clause 4.6 which directly applies to the factual circumstances of this case, reads as follows:
“4.8 The customer will use their best endeavours to assist Blu-5ky-Solutions Ltd in obtaining PAC codes If necessary from their existing supplier/network. Should Blu-Sky-Solutions Ltd not receive the PAC codes to complete the porting process for whatever reason, including

change of mind, the customer agrees to pay Blu-Sky-Solutions Ltd the sum of £225 per connection not completed.”

61. I should explain to the uninitiated that where the customer wishes to keep the same handset number it will need to obtain a PAC code for each handset from its existing provider to enable this to be done.

E. [Termination and subsequent events](#)

62. Mr Jones repeatedly chased the return of the completed the EEBA request and the defendant repeatedly delayed in so doing. As it now appears that is because there were a number of issues which it wanted to confirm first, such as EE coverage and clarification of the O2 early termination fee. Also, and most importantly, and although it did not share this with the claimant at the time, it wanted to delay whilst it made a final decision as to whether to proceed with the claimant or stay with Barclays for the time being.
63. Ultimately, the defendant emailed the claimant on 26 February 2020, saying that it was cancelling to “to ensure that the organisation fully understands all the particulars of any contract before we sign it”.
64. This provoked a strong and immediate response from Mr Jones, who emailed: “What seems to be the problem, you have signed and agreed the contract with Blu Sky Solutions, just to make it clear that the cancelation fees are £225.00 per connection x 800 = £180,000.00 ex vat as per the contract your CEO has signed. Let’s not get that far, what is the issue..?”
65. Mr Booth responded, asserting - as he now accepts incorrectly given the STCs and the fact that no statutory cooling-off right applies - that: “we are cancelling within the standard 14 day cooling off period. Also as no connections have been made then no cancellation fees would be payable”.
66. Mr Jones replied, making this point, setting out the terms of clause 4.6, and threatening immediate legal action should the defendant maintain its position. On 27 February 2020 the claimant submitted an invoice for the sum claimed.
67. The claimant’s insistence on enforcing what it considered were its strict legal rights led the defendant to involve Mdee, who sought to persuade the claimant not to do so. The claimant was not willing to drop its claim and instructed its solicitors to send a letter of claim on 24 March 2020.
68. Mdee was sufficiently annoyed to terminate its agreement with the claimant on one day’s notice by email dated 15 April 2020, alleging that the claimant’s conduct in including the cancellation fees in its contract with the defendant and threatening to sue the defendant to enforce its claim amounted to a breach of its obligations under that agreement.
69. On 22 April 2020 EE wrote to Mdee with reference to the claimant, saying that: “Following an investigation into several customer complaints, I am writing to inform you that the [claimant’s] codes are being immediately terminated by EE”. Reference was made to 9 significant complaints. EE asked Mdee to inform the defendant of its decision immediately, Mdee did so by letter sent on the same date, attaching a copy of the letter and reminding the claimant that under the terms of its agreement the claimant was obliged to return, destroy or delete all EE confidential information.
70. Although the claimant challenges this, and contends that this decision would not have been made but for Mdee’s unwarranted interference with its dispute with the defendant, it has not sought to contest the termination nor sought third party disclosure against EE. Nonetheless, whilst I am satisfied that EE did indeed receive these complaints, I am also satisfied that EE’s decision would not have happened when it did had it not been for Mdee’s dissatisfaction with

the claimant's conduct vis-à-vis the defendant. The coincidence in timing and the absence of any previous correspondence regarding these complaints is compelling in my judgment.

71. The above evidence is relevant to the defendant's argument that even if the defendant was in breach in cancelling the contract the claimant suffered no loss because it could not have performed the contract in any event, given the consequences of the terminations by EE and Mdee. I consider this further below.
72. The instant proceedings were commenced in July 2020 in the County Court Money Claims Centre but were ultimately transferred to the County Court at Manchester and subsequently transferred to the Circuit Commercial Court on the basis that the complexity of the issues raised justified case management and trial by a specialist commercial circuit judge.

F. [Issue 1 - Does the signed order form have contractual force?](#)

73. The defendant raises three separate but connected arguments.
74. First, the parties did not intend that the order form should create legal relations between them.
75. Second, the order form was not sufficiently complete or certain to have contractual force.
76. Third, any contract was subject to a condition precedent that the defendant and EE enter into a MNS contract.
77. The defendant contends that on an objective reading the email of 13 February 2020, which effectively introduced and explained the next steps, including the order form, made plain that signing and returning the order form was simply a step along the way to a completed contract. This was because in addition to the signed order form what was required was: (a) for the defendant to complete and return the EEBA request form, which would enable the claimant to present that to EE for its confirmation that it was willing to enter into a contract with the defendant as a customer and provide a contract for the defendant to sign; (b) for the defendant to be provided with access details for the defendant's O2 account to obtain more information (including, presumably, confirmation of the cancellation fee entitlement); (c) for the claimant, having obtained EE's confirmation and the information from O2, to provide the defendant with a schedule of works for the transfer. The defendant contends that unless and until all of these events occurred and, in particular, that until the defendant entered into a contract with EE and the parties reached agreement on a schedule of works, there was no concluded contract.
78. The defendant also contends that a number of matters had not been agreed either at all or with sufficient certainty. These are identified in paragraph 40 of Mr Booth's witness statement as follows:

“Further, having reviewed the order form which was signed by Sharon, there were various omissions from this document, which if it were a contract, I would have expected to be present. This included the contract start date or the SIM card ‘go-live’ date, details regarding the 18-month renewal for a lower monthly line rental, clarity on the technology hardware fund including when and how this would be paid to Be Caring and from which party and confirmation and clarity on the buy-out fee, including when and how this would be paid and confirmation of what would happen if there was a shortfall.”
79. The claimant's position, in short, is that the defendant's case fundamentally misunderstands the process, which is that as at the point of signing and returning the order form the parties were not entering into a contract for the provision of a MNS. That would, it agrees, have been a contract which the defendant would have entered into with EE once the EEBA had been completed and returned and the contract with EE produced and sent to the defendant. Instead, the defendant was entering into a contract with the claimant which regulated the terms of an agreement between the claimant as an independent dealer and itself as the customer. It

contends that on any objective analysis there was an intention to create legal relations by signing and returning the order form, that the order form was sufficiently complete and certain to have contractual force and that it was not subject to a condition precedent that the defendant and EE enter into a MNS contract.

80. As regards the first point, Mr McKean advances a standalone argument, which is that any intention to create legal relations was negated by the wording of the footer referred to at [39] above. Although Mr McKean argued that this prevented the order form from having any legal effect this argument ignores in my judgment the distinction between the email itself and the order form which, in fact, was sent by separate email. The statement cannot on its express wording have been effective as regards a document referred to in the email, especially when that document was not even sent with the email.
81. In any event, it seems to me that the most that the footer could do, which can be seen from its wording to have been its intention, would be to enable the claimant to argue that the sending of this email could not result in a contract being created by that email being sent (or in any other form of legal relationship arising in that way). It could not have prevented the email operating, for example, as an offer by the claimant to enter into a contract which was subsequently concluded by an acceptance by the other party.
82. Turning then to the key issues argued, it is common ground that the relevant principles are to be found in the decision of the Supreme Court in *RTS Flexible Systems Limited v Molkerei Alois Müller GmbH & Company KG (UK Production)* [2010] UKSC 14, in particular the summary by Lord Clarke at [45]:
- “The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.”
83. Reference was also made by Mr McKean to the very helpful summary of the key principles which appears in the judgment of Mr Martin Chamberlain QC, sitting as a Deputy High Court Judge, in *Edge Tools & Equipment Ltd v Greatstar Europe Ltd* [2018] EWHC 170 (QB) at [18] to [22].
84. The claimant’s email to the defendant of 13 February 2020 asked the defendant to “sign the order form with Blu Sky”. The order form itself identified, I accept, the “order details” as being primarily the details of the contract for MNS which it was envisaged would be entered into with EE. However, whilst they also provided that the funds to buy out the existing O2 contract would be “paid by EE”, that was not the case as regards the payment of the “hardware fund of £70,000”. Underneath the statement of the total monthly rental and the reference in bold to calls being recorded appeared, as I have recorded at [40] above, the clear statements to the effect that: (a) all orders and contracts were subject to and incorporated the STCs; (b) the defendant agreed that it had logged on to the Blu Sky website and that it had read, agreed and fully understood the STCs and was bound by them.
85. At this stage in the discussion it is not necessary for me to determine whether or not the STCs were incorporated into the contract, although as I find below I am satisfied that they were. The point is that by signing the order form the defendant was - on an objective analysis - accepting that it had entered into a contractual relationship with the claimant which was separate and distinct from the envisaged contractual relationship with EE. I accept that a person in the position of the defendant may not necessarily have fully or precisely have understood the difference between the roles of the claimant and EE or that there would be these two separate

and distinct contracts dealing with separate and distinct things. However, a person in the position of the defendant would have known enough, by the time they signed and returned the order form, that: (a) what they were doing was entering into a contractual relationship with the claimant; (b) specific T&Cs applied to that contractual relationship; (c) this was separate and distinct from the conclusion of the contract which they would be entering into with EE.

86. It follows that I am satisfied that the claimant's submissions are to be preferred and that the defendant's submissions are founded on the misunderstanding that the order form amounted to the first stage in the eventual contract which would be entered into between the defendant and EE. It did not. It only governed the relationship between the claimant and the defendant. As I observed during closing submissions, this is not substantially different to the position where a business employs the services of an intermediary such as an insurance or mortgage or car broker to obtain a business insurance policy or a business mortgage or a car. Whilst the precise mechanics may not be fully understood, the business knows that in general terms it may end up in a contractual relationship with the broker and with the provider.
87. It also follows that it is irrelevant that the order form did not contain all of the detailed terms which would have been necessary to have been included in the contract for MNS with EE. The simple answer is that it did not need to do so.
88. In the circumstances, and given my conclusions on issues 3 and 4 below, I do not need to address further the detailed arguments raised on the assumption, which I have found wrong, that the subject matter of the order form was the provision of MNS.

G. [Issue 2 - Were the STCs incorporated into the contract?](#)

89. It is common ground that where, as here, the T&Cs are not contained in the contract signed by the accepting party, but are referred to in the signed contract, the question is whether those T&Cs were sufficiently brought to the attention of that party. Both parties also referred me to the decision of Teare J in *Impala Warehousing and Logistics (Shanghai) Co. Ltd v Wanxiang Resources (Singapore) PTE Ltd* [2015] EWHC 25 (Comm) for the propositions that: (a) in modern times, when standard terms are frequently to be found on websites, reference to the website in a contractual document may well be a sufficient incorporation of the standard terms to be found on that website; (b) where the website contains reference to more than one set of T&Cs, the T&Cs which the party relying on them seeks to rely upon must have been those which were clearly applicable to the contract being entered into (in that case the distinction was between warehousing terms and freight terms).
90. Given the findings which I have already made to the effect that the STCs were indeed accessible from the website by navigating to and clicking on the "terms and conditions - mobile" link, the remaining question is whether the claimant has discharged the burden of showing that the STCs were sufficiently clearly identified as applicable to the contract which the defendant was entering into by signing the order form.
91. In my judgment the starting point must be my finding that had the defendant accessed the website before signing the order form it would have seen the two links, one to "terms and conditions - mobile" and the other to "terms and conditions - landline". That is important because, without even needing to open the links, it would have been reasonably clear to the defendant that it was the former which would most obviously be applicable since this was an order form relating to a mobile network service and had nothing to do with landlines. If the defendant had then accessed the former it would have seen from clause 1.1 that they did indeed relate to mobile phones. By scrolling down and looking at the section headings it would have been reasonably easy without undue effort to see from the heading to sections 3 and from clauses 3.1 and 4.1 that reference was also made to connections, networks and airtime

agreements. Similar references could also be seen from relatively brief reference to sections 5, 6 and 7. It follows in my judgment that the defendant, had it accessed and had a reasonably quick look at the STCs would have had no reason to think that they were not indeed applicable.

92. I am prepared to accept, as I have said, that if a careful representative of the defendant had decided to click on the landline link just to be sure, they would have struggled to be clear that these were only applicable to landline contracts until they had read, painstakingly, through to clause 2.7. However, given that on my findings this would have been a secondary and unnecessary exercise for the reasonably careful person, I do not think that this consideration is sufficient to detract from the primary conclusion that overall sufficient was done to incorporate the STCs.

H. [Issue 3 - Were clauses 4.6 and 4.8 of the STCs incorporated into the contract as allegedly unusual and onerous terms?](#)

93. The principle is summarised and discussed in the judgment of Coulson LJ in *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371 at paragraphs 29 - 38. The summary is at [29]:

“It is a well-established principle of common law that, even if A knows that there are standard conditions provided as part of B’s tender, a condition which is “particularly onerous or unusual” will not be incorporated into the contract, unless it has been fairly and reasonably brought to A’s attention.”

94. By reference to the earlier decision of the Court of Appeal in *Interfoto Picture Library Limited v Stiletto Visual Programmes Limited* [1989] 1 QB 433 it can be seen that: (a) it was not that the claimant was charging a fee for retaining the transparency, but the “very high and exorbitant rate” charged, which rendered it very onerous; (b) there is a sliding scale - “the more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given”.

95. Mr Selwyn Sharpe submitted that where the term in question is contained in standard conditions incorporated under a signed contract it is undecided whether or not the principle will apply, but in any event it is settled that it is only in an extreme case that the court will depart from the usual principle that a person who signs a document is bound by its terms (including those incorporated by reference) whether he has actually read them or not.

96. This submission is founded upon the detailed analysis conducted by Mr Andrew Popplewell QC sitting as a deputy High Court Judge in *Do-Buy 925 Ltd v National Westminster Bank plc* [2010] EWHC 2862 (QB), adopted by Saini J in *Higgins & Co Lawyers v Evans* [2019] EWHC 2809 at [77]. I note that in *Do-Buy* the term in question was not contained in the signed contract document, but referred to in it and a copy handed to the claimant at the meeting when the contract was signed. Here, of course, the signed order form expressly referred to and incorporated the STCs and the defendant agreed that it was bound by them, but the defendant was not actually provided with a copy.

97. Mr McKean submitted that this qualification to the principle only applies in cases where the relevant clause is to be found in the signed contract itself.

98. In supplemental written closing submissions on this issue both counsel referred me to the decision of Fraser J in *Bates v Post Office (No 3)* [2019] EWHC 606 (QB). Both counsel contended that it supported their case. In my judgment it does support Mr McKean’s submission, in that Fraser J did draw a clear distinction between the two iterations of the sub-postmaster contract, the first where the terms were not actually contained in the signed contract and the second where they were. He accepted that the principle applied to the former, but not the latter: see paragraph 1055. As regards the latter, he also made the point at (6) that “specific

notice of the terms I have found to be onerous and unusual is required. It is not enough, to use the phrase of Moore-Bick LJ in *Peekay v Australia and New Zealand Bank* for them to be “buried in the small print”. A similar expression was used by Coulson LJ in *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371, who said “buried away in the middle of a raft of small print”. It does not appear however that Fraser J was referred to *Do-Buy*, so that I should exercise some caution before concluding that I should follow this later decision unless satisfied that it is plainly wrong.

99. In my judgment, and with great respect, I conclude that the approach of Fraser J is to be preferred. If the principle is all about the incorporation and the adequacy of notice, then it is reasonably straightforward to understand why a term included in a signed contract will have been adequately brought to the signing party’s notice in all but extreme cases. Where, however, the signed contract simply incorporates by reference T&Cs, one of which is unduly onerous, it is difficult to see why as a matter of principle the same extremely restrictive approach should follow, unless the signed contract itself drew attention to the unduly onerous clause.
100. Even if I was wrong about this, I consider that, with the same great respect, saying that it must be an extreme case to apply the principle leads to a false binary classification. In my view it would be preferable for me simply to have due regard, when making my decision, that the fact that the defendant was prepared to sign a contractual document must always be a powerful factor against a conclusion that terms expressly incorporated into it were not sufficiently brought to its attention. I would suggest that the weight to be given to that factor in an individual case will be fact-sensitive and that adopting the sliding scale approach may also be useful. It is likely to be very strong if there is a short form signed contract which refers to the term itself, and likely to be relatively weak if the order form is signed but the term is “buried away” in detailed T&Cs, which are incorporated as a matter of law but which are neither found in the signed contract nor provided with the signed contract.
101. In his witness statement at [33] - [36] Mr Jones contended that cancellation fees were standard in the industry. He refers to Barclays’ terms from March 2017 which he says he obtained from its website in July 2020. These do include in clause 9 a provision for payment of an administration fee of £100 payable on termination or breach, although it is also fair to say that this is included in a clause which is prominently headed in bold and capitals “Liquidated Damages - Your attention is particularly drawn to this clause”. He also refers to a number of similar provisions in other independent dealers’ contracts. I am prepared to accept that it is probable that similar provisions are widespread, since it is clearly in the interests of independent dealers such as the claimant to seek to protect themselves from the risk that if no contract for MNS is signed up to they will receive no rewards for their efforts.
102. However, the fact that such clauses are not unusual does not of itself mean that they are not onerous. Mr McKean referred me to the Code of Practice for the sales and marketing of subscriptions to mobile networks, subscribed to by a number of network service providers, which although applicable to consumer as well as business contracts, contained the following general provisions:
- “[B]ecause of the intensity of the competition, it is also necessary to guard against the risk of customers being confused or misled during the sales process. A customer must be clear as to which network and tariff he or she is being signed up to and what his/her obligations will be under the terms of the contract with the mobile operator and, if applicable, the reseller.”
- “Before accepting an order, the reseller must take all reasonable steps to ensure that the contacted person understands that he/she is entering into a contract, the key features of that contract and the names of the contracting parties.”

“Once the contacted person has agreed to place an order, he or she must be furnished with the appropriate information, which, at a minimum, should include:

(a) A clear statement that a contract is being entered into, and the key features of that contract including; i. any minimum period of contract, ii. minimum contract charges, and iii. any early termination charges.”

103. In my judgment it is plain that the claimant failed to comply with any of these obligations. In signing the defendant up to the order form incorporating the STCs the claimant made no attempt to explain to the defendant what its obligations would be vis-à-vis the claimant under that contract. Nor did it take any steps to ensure that the defendant understood the key features of the contract. Nor, once the defendant had agreed to place an order - but by definition before the order is signed and thus becomes a contract - was the defendant furnished with the minimum information to include details of any early termination charges.
104. The claimant made no attempt to argue that this “administration charge” did in fact reflect the cost incurred by the claimant in having to administer the consequences of the customer deciding not to proceed with a connection. Indeed, it is obvious that the costs of such administration as may have been required would have been minimal, if any.
105. In his witness statement Mr Ross explained that the net profit which would have been earned by the claimant on the deal was only £23,168. By net profit, he meant the payment which the claimant would have received from Mdee, less the cost of the termination fee payment to O2, the £70,000 subsidy and the modest charges of £813.50 levied by Mdee. Mr Jones had not made any attempt in his witness statement to state or explain what profit would have been earned by the claimant had the deal gone through. Nor had any particularised claim for damages for breach of contract been pleaded and nor had the claimant disclosed any documents which would have allowed its profit to be calculated. Although Mr Ross was cross-examined on the basis that Mdee had disclosed no documents to support these figures, it was plainly open to the claimant to give evidence as to and to disclose the commercial agreement reached which would have showed what Mdee had agreed to pay the claimant, and the two substantial deductions appear from the order form itself. I therefore have no hesitation in accepting his evidence on this point, and reject Mr Selwyn Sharpe’s case that the profit is laughably low - given that the claimant’s only input was brokering a deal, and given that it would also have hoped to make additional profit on handset sales it does not seem to me to be obviously too low.
106. In cross-examination Mr Jones suggested that his actual profit could and would have been much greater, because he could and would have been able to “shop around” and managed to get the same MNS contract with EE but at better commercial terms for the claimant. However, none of this was either in his witness statement or properly disclosed and it seems to me that this was little more than wishful thinking. In any event, as Mr McKean said, the transaction contemplated at the time the contract was formed was one with Mdee, so that the possibility that the claimant might have been able to extract more profit elsewhere is not strictly relevant.
107. It follows that the actual loss of profit suffered by the claimant as a result of the cancellation is less than 13% of the claim for £180,000, based on 800 administration charges of £125. On the available evidence before me I am satisfied that this was at the top end of the profits which the claimant might have expected to secure on such transactions. As Mr Jones accepted, this was a relatively big deal for the claimant. Moreover, although I refused to allow Mr McKean to cross-examine Mr Jones on the claimant’s filed accounts, because they had only been recently produced and it would have been unfair to permit detailed cross-examination in such circumstances, it is nonetheless true that the claimant has failed to disclose any documentary

evidence which would show that as at 2019-20 the claimant was routinely achieving a higher margin on its contracts.

108. In my judgment clause 4.6 is particularly onerous and was not fairly and reasonably brought to the defendant's attention, for the following reasons:
109. The clause is particularly onerous because:
 - (i) The amount of the "administration charge" bears no relationship to any actual administration costs incurred or likely to be incurred.
 - (ii) Even if it is reasonable to read it as a disguised entitlement to a loss of profit, the amount to which the claimant is entitled under the clause is out of all proportion to any reasonable estimate of its loss resulting from a cancellation.
 - (iii) Even though such clauses may not be unusual in the industry, the fact that other independent dealers seek to protect their profit by inserting such clauses, which are nonetheless particularly onerous in my judgment, cannot hold much weight.
110. The clause was not fairly and reasonably brought to the defendant's attention because:
 - (i) The claimant made no real attempt to comply with the Code of Practice.
 - (ii) Prior to receiving the order form the defendant was not told and had no reason to expect that it would be exposed to a very substantial contractual liability from the claimant should it decide not to enter into a contract for MNS.
 - (iii) The order form did not make clear and, to the contrary, positively obfuscated the nature of the contract which the claimant was putting forward to the defendant. It is not surprising that the defendant was misled into believing that it was simply signing an order form as a precursor to entering into a contract with EE rather than entering into a contract with the claimant which made it liable to pay a very substantial cancellation charge if it did not do so.
 - (iv) Although the order form did make express and reasonably clear reference to the claimant's STCs, it did not explain their essential purpose or give any warning that they imposed potentially substantial obligations on the defendant in favour of the claimant if it did not proceed with the MNS contract or cancelled it early.
 - (v) It would have been perfectly feasible to include the STCs as part of the order form. This would have illustrated that they are in fact voluminous and complex terms and would almost undoubtedly have taken up more than one page, in paper or electronic form, thus bringing home to the defendant the need to read them carefully before signing the order form if they did not want to take the risk. At the very least they could and in my judgment should have been sent with the orders, with a prominent heading explaining that in addition to dealing with the terms of supply of handsets they set out the customer's obligations to the claimant in relation to the network services contract to be entered into with the network operator and imposed financial penalties upon the customer if that contract did not proceed or if it was terminated early.
 - (vi) No attempt whatsoever was made to highlight either clauses 4.4 to 4.8 generally, which imposed a considerable number of separate substantial financial obligations upon the customer, or the pre-connection cancellation provision of clause 4.6 in particular, which imposed a very substantial financial obligation if it chose not to proceed to contract with EE. To the contrary, these clauses were buried within section 4 as a whole, innocuously titled "cancellation and returns policy", which itself was buried in the middle of the lengthy STCs which themselves were not clearly identified as making provision for the contractual relationship between the claimant and the defendant in respect of what was then only a contingent contract between the claimant and EE.

111. Whilst I accept that the STCs were reasonably clearly brought to the defendant's attention in the order form, the offending clause itself was not and was cunningly concealed in the middle of a dense thicket which none but the most dedicated could have been expected to discover and extricate, so that in my judgment this case does not fall foul of the restrictive approach to the application of the principle suggested by the analysis in *Do-Buy*.
112. I accept that this was a contract between two commercial entities and that the defendant had every opportunity to access and read the STCs before signing the order form. However, in my view this case comes very close to a misrepresentation case, in that the offending terms are concealed within detailed T&Cs, making it very hard to see the important from the unimportant, and introduced by reference to an order form which gives the impression that it is the first step to entering into a commercial relationship with EE. In my judgment that is a very powerful reason for holding that the clauses were onerous and that not only were they not fairly and reasonably drawn to the defendant's attention but that on an objective analysis they were positively concealed.
113. Given those conclusions, the claim under clause 4.6 (and, if relevant, for the same reasons, clause 4.8) fails.
- I. [Issue 4 - Are clauses 4.6 and 4.8 void penalty clauses?](#)
114. Given my conclusion under issue 3 this issue does not strictly arise, but because it was argued and in case the matter goes to appeal I will address it.
115. Again, I do not propose to lengthen this judgment by extensive reference to authority. The fundamental question to be answered was succinctly stated by Lord Neuberger and Lord Sumption in *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67 at [32] to be 'whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation'.
116. I was also referred to and gratefully adopt, without needing to set it out in this judgment, the helpful summary of Mr Timothy Fancourt QC (sitting as a Deputy Judge of the High Court) in *Vivienne Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 350 (Ch) at [38]. He makes the point, which is relevant here, that the question as to whether a clause imposes a secondary liability upon a breach of contract is a question of substance and not of form, and is to be distinguished from a conditional primary obligation, which depends on events that are not breaches of contract.
117. That judgment is also helpful in answering a question which was posed in oral closing submissions, on which I permitted supplementary written submissions, which is whether clause 4.6 stands or falls as a penalty, or whether the individual obligations within it can and should be considered separately. As Mr Fancourt QC held at [66]-[71], in his judgment they can be considered separately and, if appropriate, severed in the following circumstances:
- (i) The unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains (the "blue pencil" test);
 - (ii) The remaining terms continue to be supported by adequate consideration;
 - (iii) The removal of the unenforceable provision does not so change the character of the contract that it becomes "not the sort of contract that the parties entered into at all", and possibly also
 - (iv) The severance must be consistent with the public policy underlying the avoidance of the offending part.

118. Notwithstanding the doubts expressed by the learned editors of *Chitty on Contracts (33rd edition)* at [26-242] in my view the views expressed by Mr Fancourt QC are right and should be followed so far as this case is concerned. Clause 4.6 seeks to impose a liability for the same administration charge in four different factual situations. It could quite easily be broken down into four separate sub-clauses, each dealing with the different factual situation (cancellation, disconnection, downwards migration and upgrading) without difficulty. It follows that it would make no sense for the court to ask whether the clause as a whole is penal, as opposed to asking whether the clause as it applies to each specified situation is penal, since if it is then it can be severed from the remainder of the clause.
119. In any event, and to correct an apparent confusion which I may have inadvertently sowed, in this case I am not concerned with an attack on the other three factual situations (disconnection, downwards migration and upgrading) where the claimant is seeking to persuade me to sever those parts if penal but allowing reliance on the one in issue (cancellation). Instead, all I am doing is considering whether or not the clause is penal in its application to the specified situation which is the subject of this case, namely cancellation, rather than considering whether or not it is penal by reference to the three other specified situations which do not arise.
120. The claimant's primary submission is that clauses 4.6 and 4.8 are conditional primary obligations, not secondary obligations imposed upon a breach of a primary obligation owed by one party to the other, so that the question of penalty does not arise.
121. The defendant argues that both are secondary obligations. As regards the cancellation provision of clause 4.6 it argues that it is secondary upon the primary obligation upon the defendant, implicit in clause 3.1, to enter into a contract for MNS. As regards the no PAC codes provision of clause 4.8, that is secondary upon the primary obligation upon the defendant in that clause to use its best endeavours to assist the claimant in obtaining PAC codes. The claimant disputes both arguments.
122. As regards clause 3,1, it is a particularly badly drafted clause. It is, however, possible to make sense of it. The words "by agreeing to a new connection" must, in context, refer to entering into the purchase order with the claimant. The reference to the "network terms and conditions" must be a reference to the terms and conditions of the EE contract for MNS which, as explained, it was envisaged should be entered into after completion of the EEBA. It is impossible to "agree to be bound" by these T&Cs without entering into a contractual relationship with EE. It follows, I accept, that for this clause to make sense, it must be implicit in this that the defendant will enter into the EE contract for MNS and thus secure the connections the subject of the MNS and thereafter comply with the network T&Cs. This then makes sense of clauses 4.4 and 4.5, under which the subsidy is conditional upon compliance with the key terms of the MNS contract and repayable upon non-compliance and, relevantly, makes sense of clause 4.6, under which failure to enter into the MNS contract and thus secure the connections and/or failure to comply with its key terms allows the claimant to levy the administration charges.
123. It follows, I agree with the defendant, that the cancellation provision of clause 4.6 is a secondary obligation, since it applies in the event of breach of the primary obligation in clause 3.1. Even were it not possible to construe clause 3.1 in this way it is still reasonably clear in my judgment that it is in substance a secondary obligation. The reality is that the claimant only gets paid if the defendant enters into the MNS contract with EE. The wording of the order form itself makes clear this is the contract which the claimant has procured for the defendant and which the defendant is to enter into by completing and returning the EEBA. If the defendant does not do so, then the claimant does not make a profit. The obligation to pay the administration charge, which is in reality no such thing but in fact a hugely inflated compensation for loss of profit, cannot in any meaningful way be described as a conditional primary obligation. It is payable in circumstances where, through the claimant's refusal to enter into the EE contract and take up the

connections thereby secured, the essential commercial purpose of being of the contract between the claimant and the defendant has disappeared.

124. I also agree with the defendant that as regards clause 4.8 the first sentence, which imposes the best endeavours obligation upon the claimant, controls the second sentence upon which the defendant relies. In short, the obligation to pay the non-completion fee of £225 per connection only applies where, due to the defendant's breach of its best endeavours obligation, the PAC codes are not obtained from the existing supplier. The words "for whatever reason" in the second sentence are there to explain that even if the defendant has what it may think is a genuine reason for not proceeding, if it has not used its best endeavours to obtain PAC codes it is still liable. Again, and in any event, I agree that in substance it is a secondary obligation. Again, it is payable in circumstances where, through the claimant's refusal to assist in securing the PAC codes and thus take up the connections using the existing handset numbers, the essential commercial purpose of being of the contract between the claimant and the defendant has disappeared.
125. I am satisfied that the charges of £225 per connection impose on the defendant a detriment out of all proportion to any legitimate interest of the claimant in the performance of the primary obligation. It is not to recover its actual costs. It is almost 8 times the amount of any actual loss of profit suffered by the claimant. Its only purposes are either to frighten the defendant into entering into the MNS contract with EE and doing what was necessary to secure the PAC codes and take up the connections if it was to think of changing its mind (so that the claimant can obtain its profit) or to obtain compensation out of all proportion to its only actual loss if not. I bear in mind that the court ought not to be too willing to hold a clause in a commercial contract to be a penalty clause. However, on the facts of this case I am also satisfied that to allow the claimant to recover such sums in such circumstances would be unconscionable. Insofar as relevant, the fact that the clauses in question were hidden away in the middle of the STCs rather than prominently positioned and explained supports me in my conclusion on this point.

J. [Issue 5 - If clauses 4.6 and 4.8 are void penalty clauses, what, if any, loss has the claimant suffered as a result of the defendant's cancellation of the contract?](#)

126. I have found that clauses 4.6 and 4.8 are not incorporated into the contract. The claimant did not in any event plead a particularised claim for damages for breach of either clause. On my analysis clause 4.6 did not impose any express obligation upon the defendant anyway and there is no evidence to support any argument that the defendant was in breach of the best endeavours obligation in clause 4.8 above and beyond the fact that it decided not to proceed with the contract with EE for MNS. The claimant has not pleaded or advanced a claim, particularised or otherwise, for damages for breach of clause 3.1. Indeed when Mr Jones was asked under cross-examination why the claimant had not disclosed documents relevant to the claimant's actual loss he said that it was because he believed that the claimant's claim was a debt claim and not a damages claim and, hence, there was no need to do so.
127. In the circumstances the claimant is not entitled to damages for breach of contract on any pleaded basis. I do not regard this conclusion as unjust. If the claimant chooses to rely solely upon the claim for administration charges and does not seek to plead or to advance a properly particularised or evidenced claim for damages as an alternative then it cannot expect to be allowed to recover damages simply because it might be possible for the judge to award damages on the basis of the evidence which has emerged and the findings which have been made.
128. If, contrary to my conclusions, the claimant was in some way entitled to advance a claim for damages for breach of some primary obligation as regards the connections and/or as regards the PAC codes, I would have had to consider what damages the claimant could recover for loss of profits.

129. Given that I have accepted Mr Ross' evidence, the most that I could have awarded the claimant for loss of profits would have been £23,168.
130. What about the defendant's case that the claimant could not even have obtained this because it could not have performed the contract due to the do not deal notice served by EE? For the reasons I have given, I am satisfied that this notice would not have been sent but for the unfavourable view taken by EE and Mdee about the claimant seeking to hold the defendant to the contract. On this counter-factual hypothesis this would never have happened, thus I am satisfied that this would afford the defendant no defence. In any event, there is no reason to think that the claimant would not have been able to sign the defendant up to a contract for MNS with EE before the do not deal notice sent on 22 April 2020, and there is insufficient evidence to allow me to conclude that the effect of the do not deal notice would have had the effect of preventing the claimant from administering the contract and retaining the net profit received from Mdee.
131. In the circumstances, it is unnecessary for me to consider the interesting arguments which were raised as to whether in such hypothetical circumstances it would have been possible for the claimant to have serviced the deal through an alternative means.
132. The defendant also contends that in any event the defendant would have been entitled to and would have rescinded the agreement for misrepresentation on three alternative bases, such that again the claimant would not have been able to complete the deal. I would have rejected the first two of these arguments, but accepted the third, in summary for the following reasons.
133. First, the defendant contends that the claimant misrepresented its ability and authority to administer a 48-month agreement with EE. There is no basis for this argument, since at the time the contract was entered into Mdee through Mr Ross had agreed and authorised the deal and there was no impediment to it.
134. Second, the defendant contends that the claimant misrepresented that no new sim cards would be needed. I have, however, already rejected this complaint on the facts and also am simply not persuaded that this would have been a "deal-breaker" such as would have persuaded the defendant not to continue with the EE agreement given the attractive financial terms on offer.
135. Third, the defendant contends that the claimant misrepresented the buy-out liability faced by the defendant. Mr McKean pointed to the email from Barclays dated 30 January 2020 which referred to the charge from O2 and also to the "termination charges of our own for breaking contract early due to churn penalties O2 would impose on us". I have already mentioned at [32] above that when the defendant raised this as a concern Mr Jones said that this was incorrect. However, based on Barclays' T&Cs (which the claimant itself obtained and disclosed to buttress its case on the unusual terms issue) it would appear that Barclays certainly included such a clause (clause 5) which was in similar terms to the claimant's clause 4.5.
136. In cross-examination Mr Jones contended that these charges would not have been levied because O2 would have been paid up in full and, hence, there would have been no basis for Barclays making any such claim. However, it is not immediately apparent to me from the Barclays agreement that such is the case and, in any event, it would depend on the contract between Barclays and O2, as to which there has been no evidence. In my judgment it was simply not possible for the claimant to have made the confident representation which it did to the effect that the defendant would not have to pay any additional charges to Barclays, and that such representation was made negligently. I am satisfied on the balance of probabilities that all this would have come out once the defendant notified Barclays of its decision to move and that the defendant, being understandably unwilling to proceed if taking that risk, would have justifiably been entitled to terminate the contract with the claimant as a result.
137. For that reason as well, the claim for damages would have failed.