



Neutral Citation Number: [2020] EWHC 2499 (QB)

Case No: QB-2019-002613

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/09/2020

**Before :**

**SENIOR MASTER FONTAINE**

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**Between :**

<b>Mark Goodram (1)</b>	<b><u>Claimants</u></b>
<b>Jon-Ross Watson (2)</b>	
<b>- and -</b>	
<b>Camelot UK Lotteries Limited</b>	<b><u>Defendant</u></b>

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**Henry Hendron** (Direct Access) for the **Claimants**

**Philip Hinks** (instructed by **Camelot UK Lotteries Limited Legal Services**) for the  
**Defendant**

Hearing date: 20 July 2020  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 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.

.....  
**SENIOR MASTER FONTAINE**

## **Senior Master Fontaine :**

1. This was the hearing of an application by the Defendant (“Camelot”) by application notice dated 15 April 2020 for summary judgment of the Claimants’ claim. The application is supported by the following witness statements:
  - i) Philip David Neville dated 14 April 2020 (“Neville 1”);
  - ii) Stephen Long dated 14 April 2020 (“Long 1”);
  - iii) Sarah Webb dated 14 April 2020 (“Webb 1”);
  - iv) Philip David Neville dated 30 June 2020 (“Neville 2”);
  - v) Philip David Neville dated 16 July 2020 (“Neville 3”).
2. The application is opposed by the Claimants. The Claimants rely upon witness statements exchanged for trial as follows:
  - i) Mark Goodram dated 21 June 2020 (“Goodram 1”);
  - ii) Marcus Kain dated 29 June 2020 (“Kain 1”);
  - iii) Chloe Dobbs dated 10 July 2020 (“Dobbs 1”).
3. Documents are referred to in this judgment by reference to the bundle filed as follows:  
tab no./page no.

## **The Claim**

4. The Claimants’ claim is made in breach of contract and for an order for specific performance in respect of a scratch card purchased from Camelot. It is not in dispute that a scratch card purchased by the Claimants on 22 April 2019 was a “winning” scratch card with a prize of £4 million, nor that Camelot refused to make payment of the said sum to either Claimant.

## **The Factual Background**

5. In most respects the facts underlying the claim are not in dispute, and I summarise them from the statements of case and witness statements filed.
6. Camelot is licensed by the Gambling Commission to operate the National Lottery, including all National Lottery scratch card games. One such game at the relevant time was called ‘£4 million Red’ and had a top prize of £4 million. On 22 April 2020 the Claimants bought 5 scratch cards and some cigarettes from a Waitrose store in London for a sum of £71.78. The payment was made using a debit card with a long card number ending in – 8785 (“the debit card”), and the electronic journal data acquired from Waitrose shows that it was a “key” transaction i.e., one where the card details are manually keyed into the card reader and the receipt is signed by the customer, as opposed to a standard PIN transaction. The till receipt was signed with the letters “MG”, the initials of the First Claimant (“Mr Goodram”). The Claimants accept that neither of them were the cardholder on the debit card but claim that the

cardholder had authorised them to use the debit card. Mr Goodram explains the circumstances of this in Goodram 1 at paragraphs 2- 3 and 10 [13/1-3] as follows:

“2. On the 22.04.2020 [*sic*] Jon-Ross Watson (“JRW”) gave me £25 towards the purchase of 5 scratch cards at £10 each; it being agreed with JRW and myself that we would buy 5 scratch cards together and share jointly any winnings; I agreed with JRW that I would purchase the 5 tickets using the card details that someone I met at a Soho brothel gave me when I came to his rescue, since he was trying to pay his bill with a card and that particular establishment only took cash. I paid cash to cover his bill and he gave me the card details in return, thanking me for coming to his rescue and saying to me that I should use the card details to reimburse myself what I had given him in cash to pay his bill at the Soho brothel; I accept that this is a little bit out of the ordinary but this is what happened.

3. On the 22.04.19 in line with the authorisation I had received from the man the Soho brothel to use his card up to the value of (if I recall correctly) hundred pounds (though it might have been £80, though I can’t recall exactly now with all that has happened which one of those sums it was) I jointly purchased (jointly with JRW) 5 scratch cards from Waitrose in Clapham High Street. Out of those 5 scratch cards 2 of them won, the first won £10 and the other winning scratch card won £4m.

.....

10. I am asked by my lawyer why I overrode the Chip and Pin device at Waitrose so that the transaction was a “cardholder not present” transaction; the answer to this is that after I left the brothel I tried to use the card details at a few local shops, however each of the shops said the cardholder would need to be present (I did not appreciate when the man in the brothel gave me his card details to use to recover my monies from helping him out that I would have this difficulty as I do not have a bank account do not properly understand how they work), it was only when I was in Clapham and told my mate of the situation that he said you can just key into the pad cardholder not present in the keypad and then punch in the details. I fully accept that I knew it was likely that Waitrose would also require the cardholder to be present (from what I was told the earlier shops), and thinking that I had been done over by the guy in the brothel who gave me his card details knowing that I would not be able to use them, I decided that I would try and secretly key in the card details as a ‘cardholder not present’ transaction so as to get my money back from the cardholder. I appreciate that this looks bad but I can only reiterate that I have the cardholder’s full authorisation to use the card details for the purchase.”

7. Further details are provided in the Claimants' Reply to the Defendant's Request for Further Information dated 22 October 2019 [19/2-3]. The owner of the debit card is referred to as "Cheung" in that reply, and it is stated that Mr Goodram met that person on one occasion only in a Chinatown brothel, has not corresponded with him since 24 April 2019 and is unaware of his whereabouts (Replies to Request For Information under paragraph 22 of the Particulars of Claim) [19/2 - 4].
8. One of the scratch cards purchased was identified by serial number 1135 – 032 4206 – 008 ("the Scratch Card"). The Scratch Card entitled the rightful owner to the top prize of £4 million in the £4 Million Red Game. Another scratch card had won a £10 prize. After purchasing the Scratch Card, Mr Goodram and Mr Watson went into a small Newsagents shop which was a Camelot retailer which paid out the sum of £10 for the other winning scratch card: Goodram 1 para. 4 [13/2] Particulars of Claim paragraph 20.3 [17/6]. Mr Neville states that Mr Goodram would have been advised by the retailer to call the National Lottery Line in respect of the Scratch Card, as retailers are not permitted to pay out prizes of more than £500 (Neville 1 para 12) [3/4].
9. Mr Goodram then called the National Lottery Line and received confirmation that the Scratch Card was a winning scratch card. Later that day one of Camelot's Winner Advisers, Andy Carter, called Mr Goodram (Neville 1, paras. 17-19) [3/5]; the notes of that call are exhibited at PN1[10/1]. Mr Carter went through the security form which he had to complete with Mr Goodram, because the address given by Mr Goodram was a friend's address, as Mr Goodram was homeless and there was concern as to how proper identification could be given. The note also states: "*The tickets were purchased using a debit card of a friend that owed Mark money.*" Because of the latter information the prize claim was deemed to be 'suspicious' in accordance with Camelot's "High Tier Security Check" provisions dated 4 January 2018, which sets out Camelot's validation procedures in respect of High Tier Prize claims. The claim was accordingly escalated to Camelot's Security Operations Team: Neville 1 paras 19-21 [3/5].
10. This led to an investigation being undertaken by that team as described in Long 1. Mr Long spoke to Mr Goodram by telephone on 23 April 2019, and gives his account of that telephone conversation in paragraphs 5 and 6 of his witness statement [5/2]:

"6. I explained my role at Camelot and asked him to confirm how he purchased the winning scratchcard. He told me he used the debit card friend who owed him some money. I asked Mr Goodram if he was still in possession of the debit card, and he told me he had since given it back to his friend, who he named as "John" (without providing any surname). I asked if I could speak with "John", and Mr Goodram told me that he had since returned to Bolton. I asked Mr Goodram if he could provide me with any contact details for "John", or his surname. However, he told me he did not know where he lived, and had no other details or information about him....."
11. Mr Long then describes how he made investigations at the Waitrose store at which the Scratch Card was purchased [5/2-3]. The Assistant Manager, Mark Gilbert, produced a store copy of the sales receipt, exhibited to Mr Long's witness statement (SL 1) [6/2]. The receipt refers to the transaction as being a 'Signature Sale', with the

signature being the letters ‘M.G.’, Mr Goodram’s initials. Mr Long states that Mr Gilbert informed him that a signature sale transaction was very unusual and that he would need to investigate internally within the store. Mr Gilbert also provided the in-store CCTV footage for the transaction for Mr Long to view. Mr Long states that:

“8. The footage shows two men (namely Mr Goodram and the Second Claimant, John Ross Watson) entering the store, one of whom appears to distract the cashier whilst the other inserts a bankcard into the chip and PIN reader. After a few minutes, the cashier appears to ask one of the men to key a number into the reader; however, he later signs a sales receipt before quickly showing a bankcard to her.” [5/3]

That account of the CCTV footage has not been disputed by the Claimants.

12. Mr Long states that on 26 April 2019 he spoke with Sarah Webb, a Partner and Fraud Investigator in the Profit Protection Department of Waitrose, and explained Camelot’s concern that the debit card transaction by which the Scratch Card was purchased may have been fraudulent. Ms Webb said that she would investigate the transaction with the bank whose funds were used to purchase the Scratch Card, being NatWest Bank; later that day Ms Webb contacted Mr Long and told him that she had made enquiries with the bank, and the owner of the debit card used to purchase the scratch card had not authorised the transaction (Long 1 paras. 8-10) [5/3]. That information is confirmed by Webb 1 at paragraphs 5 to 10 [7/2-3]. Ms Webb states that she received confirmation by telephone from a Kirsten Kilday in the Fraud Notification Team of NatWest that contact had been made with the account holder of the debit card, who had confirmed that the transaction was fraudulent. Ms Webb also states that on 30 July 2019 she reported the transaction to Action Fraud and arranged for the Waitrose CCTV footage of the transaction to be passed to Camelot. On 14 May 2019 Waitrose received a chargeback letter from Barclaycard. A copy of that letter is exhibited to her witness statement SW1 [8/7]. After providing details of the transaction the correspondence states:

“Reference is made to the above transaction. Unfortunately the card issuer has rejected this transaction, as the card details were key entered. They claim that their cardholder did not authorise or participate in the transaction.”

13. Waitrose then refunded the full amount of £71.78 to the cardholder. (Webb 1 Paragraphs 11 to 12) [7/2-3].
14. Mr Neville explains the circumstances that led to Mr Goodram’s claim to the £4 million prize being rejected by Camelot, following a meeting of Camelot’s Prize Claim Panel. He explains that where an investigation into a prize claim reveals concerns as to whether or not a prize should be paid in accordance with the rules, the Price Claim Panel is convened to make that decision. The decision of the Prize Claim Panel was that the prize claim should be rejected. That decision was communicated to Mr Goodram in Camelot’s letter of 20 May 2019 (PN1) [4/48], and also in response to Mr Hendron’s email of 30 May 2019 [4/57] in Camelot’s letter of 12 June 2019 [4/50]. The decision was stated to be because confirmation had been received from NatWest Bank, to which the debit card was registered, that the transaction pursuant to

which the Scratch Card had been purchased was fraudulent because it had been made with a debit card without the consent or authority of the account holder (Neville 1 para. 22) [3/6].

15. Following a meeting between Counsel for the Claimants with his clients, also attended by Mr Marcus Kain from Mr Hendron's chambers, (Court House legal) a cheque for £50 was sent by Mr Hendron to Camelot under cover of a letter dated 24 July 2019. (Kain 1 para 8) [14/2-3]. The letter was addressed to "Finance Department Camelot UK Lotteries Ltd" and stated:

"Please find attached a cheque on behalf of my client, which is offered on a 'without admission' and strictly without prejudice basis." [14/5]

16. The cheque was cashed by Camelot on 29 August 2019. Mr Neville in his third witness statement explains the circumstances, namely that because the cover letter was addressed to the Finance Department the cheque was cashed by the Accounts Receivable team, responsible for receiving and processing payments received from Camelot's approximately 44,000 retailers in the UK. Mr Neville says that the Accounts Receivable team receives a number of cheques from retailers as well as from solicitors acting on their behalf, such as when the retailers in question have entered into an insolvency procedure. Some retailers use their personal names rather than the company name or a trading style. He states that the Accounts Receivable team would have assumed that the cheque had been sent to Camelot in satisfaction of a debt owed by a retailer to Camelot, as they had no knowledge of the proceedings or the issues arising in them at the time when the cheque was cashed, and did not have Camelot's authority to enter into any agreement with the Claimants or their representative. Mr Neville also explains that those in Camelot dealing with these proceedings only became aware of the sending and cashing of the cheque in July 2020 (Neville 3 paras 5 to 7) [11/2-3].
17. On 14 July 2020 Counsel representing the Claimants was notified by Greater Manchester Police that the Crown Prosecution Service had taken the decision to prosecute both Claimants in connection with an alleged fraud over the purchase of the Scratch Card on 22 April 2019. The Claimants are due to appear before the Bolton Magistrates Court on 25 August 2019. The court was informed that the Claimants will be entering a not guilty plea and it is envisaged that the criminal proceedings will be transferred to the Crown Court for trial.

### **The Legal Bases for the Claim and the Defence**

18. The Claim Form and Particulars of Claim allege that Camelot has purported to rescind the contract between it and the Claimants in breach of contract by its refusal to pay out the £4 million prize to the Claimants. At paragraphs 10 to 12 of the Particulars of Claim [17/3] it is alleged that it is an express and or implied term of the contract that the terms of the Licence issued by the Gambling Commission to Camelot pursuant to section 6 of the National Lottery Act 1993 were incorporated into the contract between the Claimants and Camelot. At paragraph 19 of the Particulars of Claim it is stated that:

“It is an express and or in the alternative an implied term of the contract between the Purchaser of a Camelot sold Scratchcard and Camelot that in the event that the purchaser becomes a Prizewinner, Camelot will pay out to the Prizewinner the sums Scratchcard specifies as the prize.” [17/6]

19. The Claimants assert that funds used to purchase the five scratchcards, including the Scratch Card, were legitimate funds and that the Claimants had the full authority and authorisation of the account holder to use those funds in the purchase of the five scratchcards: (POC paragraph 22) [17/8].
20. At paragraphs 20.3 to 20.6 of the Particulars of Claim the Claimants claim that by making payment to the Claimants in respect of the first winning scratch card, which won a prize of £10, Camelot is estopped from denying the validity of the contract between Camelot and the Claimants in respect of any of the purchased scratchcards or from any act or omission which purports to constitute rescission of that contract.
21. At paragraph 20.9 of the Particulars of Claim, it is stated that:

“The Claimants have, on a no admission basis and without prejudice to the Claimant’s *[sic]* primary position, sent to the Defendant a cheque dated 19.07.2019 for the sum of £50 to make good any, if any, issues in respect of the purchase price of the five Scratchcards.” [17/8]
22. In the Defence it is denied that terms of the Scratchcard Promotion Licence, which contain the terms pursuant to which Camelot is licensed by the Gambling Commission to promote Scratchcard Games, are either expressly or impliedly incorporated into the rules that apply when a National Lottery Scratchcard Game is played; it is noted that no particulars have been given in the Particulars of Claim as to how it is alleged such terms are expressly incorporated, and that the basis for implying such terms has not been identified (Paragraph 9) [18/3]. Paragraphs 10 to 19 of the Defence [18/3-6] set out the express terms of the contract which are stated to be the “Rules for Scratchcard Games” (“the Rules”). It is stated that the Rules were incorporated as terms of the contract by reference to them on the reverse side of the scratch card, and/or apply by reason of Rule 13.1 of the Rules which states:

“Any person who obtains a Scratchcard or submits a Scratchcard for validation or who claims a Prize in whatever capacity, agrees to be bound by the provisions of any applicable legislation, these Rules, the relevant Game Procedures and any Game Specific Rules that apply, and any information on the relevant Scratchcard, (all as amended from time to time) and any other rules or procedures Camelot may issue in respect of that Game.”
23. The Rules are stated to have been available for viewing at all times on the National Lottery Website.
24. At paragraphs 23 to 26 of the Defence [18/7] the circumstances which led to Camelot’s decision to withhold payment of the prize pursuant to Rule 7.1 (b) and (c)

are set out. It is noted that the Claimants do not allege in the Particulars of Claim that Camelot's decision in this respect, which was final and binding pursuant to rule 12.1 of the Rules, was unreasonable. In the alternative it is stated at paragraphs 27.2 to 27.3 that to the extent there was an effective transaction to purchase the Scratchcard and/or to play the Game at the time of the transaction the Claimants impliedly represented, by their conduct in presenting the debit card to the cashier of the Waitrose Clapham store, that they were authorised to use the debit card and/or draw upon funds standing to the credit of the account holder's account, and that such representation was false.

25. In fact it has since become apparent from the Replies to 3.3. and 3.4 of the Defendant's Part 18 Request, and the Claimants' evidence, that they were never in possession of the debit card, only the card number, and that the debit card briefly shown to the Waitrose cashier was not the debit card used to pay for the scratchcards.
26. At Paragraph 35.1 of the Defence it was denied that the cheque for £50 had been received, although as I have mentioned in paragraph 16 above the cashing of that cheque was subsequently discovered by Camelot in July 2020.

## **Discussion**

27. The following issues arise on the application:
  - i) The applicable terms of the Contract between the Claimants and Camelot;
  - ii) Whether Camelot's decision to reject the Claimants' claim to the prize and rescind the contract with the Claimants with regard to the Scratchcard was reasonable;
  - iii) Whether Camelot is estopped from rejecting the Claimants' claim to the £4m prize by reason of its payment out of £10 by the retailer for the other winning scratch card;
  - iv) The effect of the payment of £50 by the Claimants' Legal Advisors for the scratchcards in July 2019.
28. Although the Claimants' counsel's skeleton argument relies on the Unfair Terms in Consumer Contract Regulations 1999 as a ground for opposing Camelot's application, Mr Hinks, counsel for Camelot, referred the court to the Consumer Rights Act 2015 which revoked those Regulations. Mr Hendron, counsel for the Claimants, did not pursue this point in his oral submissions in response, so this point is no longer in issue.
29. CPR 24.2 provides that the court may give summary judgment against a claimant on the whole of a claim on a particular issue if it considers that "the claimant has no real prospect of successfully defending the claim or issue" and "there is no other compelling reason why the case or issue should be disposed of at trial". A summary of the relevant principles is in *Easyair Limited v Opal Telecom* [2009] EWHC 339 (Ch). The burden of proof in a summary judgment application rests with the applicant: *EDF Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472.



**(i) The Applicable Terms of the Contract between the Claimants and Camelot**

30. Although paragraphs 9 to 12 of the Particulars of Claim [17/3] allege that the licence issued to Camelot by the Gambling Commission is incorporated as an express and/or implied term of the contract between the purchaser of a scratchcard and Camelot, that point was not pursued in either written or oral submissions by Mr Hendron. I therefore assume that this ground is no longer relied upon.
31. For completeness I note that I have concluded that such an argument would have no real prospect of success for the following reasons:
- i) there is no identification of which terms of which licence issued to Camelot are said to be incorporated;
  - ii) there is no express term identified in the Particulars of Claim or the evidence;
  - iii) there is no basis stated in the Particulars of Claim or the evidence for the implication of such a term.

Incorporation of the Rules into the Contract

32. Camelot's case is as set out at paragraphs 22 and 23 above. A copy of a specimen £4 Million Red scratchcard is exhibited at PN1 [4/19-20]. The reverse side says: "National Lottery Rules for Scratchcard Games and the Procedures for this Game apply". The rules were available for viewing on the National Lottery website ([www.national-lottery.co.uk](http://www.national-lottery.co.uk)) (Neville 1 paragraph 6 [3/2]).
33. Camelot relies on the well known principle that contractual terms may be incorporated by notice. The court was referred to the decision in *Impala Warehousing and Logistics (Shanghai) Co. Ltd v Wanxiang Resources (Singapore) PTE Ltd* [2015] EWHC 25 (Comm) at [16] per Teare J. where the court held:
- "In this day and age when standard terms are frequently to be found on websites I consider that reference to the website is a sufficient incorporation of the warehousing terms to be found on the website."
34. The Claimants' case, made in written and oral submissions, although not addressed in the Particulars of Claim nor in any Reply, is that the Rules have not been incorporated into the contract between the Claimants and Camelot.
35. The Claimants accept that terms and conditions which are not immediately visible to the other contracting party will be effectively incorporated into the relevant contract as long as reasonable steps are taken to bring the existence of the terms and conditions to the notice of the other party before the transaction is concluded. It is submitted that terms, if they are to be incorporated, must be clearly brought to the attention of the other party: *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) at [55] to [62]. The Claimants refer to the fact there is no reference on the front of the scratchcard to the Rules or to any terms and conditions. Reference to the Rules on the reverse of the scratchcard is towards the bottom of the scratchcard and in very small

font which, it is submitted, is barely legible. It is submitted that this reference for that reason fails to incorporate the Rules into the contract.

36. Paragraph 56 of *Allen Fabrications* refers to the basic principles governing the incorporation of terms and conditions not actually read by the other party, or where that party was not aware of their import or effect, as set out in Chitty Vol. 1 at 12 – 13, and referred to in *Allen Fabrications* at paragraphs 55 to 56:

“55. The party’s standard terms could be incorporated into a contract in two principal ways other than where they are expressly agreed to for example by being signed:

(1) they may be on or referred to in a document which is “contractual” that is to say, provided to the other party prior to at the time when the contract is made...; or

(2) ..... [not relevant]

56. But either way, where such terms have not actually been read by the other party or where that party was not aware of their import or effect, the basic principles governing their incorporation are as set out in Chitty Vol. 1 at 12 – 13:

(1) If the person receiving the document did not know there was writing or printing on it, he is not bound;

(2) If he knew that the writing or printing on it contained or referred to conditions, he is bound;

(3) (If the answer to question 1 is Yes but the answer to question 2 is No) that party will be bound by the conditions if the tendering party did what was reasonably sufficient to give the other party notice of the conditions. Note that if this requirement is satisfied it matters not that the party in question was (still) not subjectively aware of them. In the normal course the fact that the document contains terms on its face or clearly refers to them as being on the reverse or being available elsewhere, is likely to be sufficient.”

37. It is submitted that the Rules were not sufficiently brought to the attention of the Claimants.

38. In the alternative, even if the court found that the Rules were incorporated into the contract, it is alleged that Rule 12.1 is so onerous that it ought to have been printed on the Scratch Card in big bold letters. Rule 12.1 reads as follows:

“Camelot’s decision about whether or not a Scratchcard is a Winning Scratchcard (or in relation to any other matter or dispute that arises out of the payment or non-payment of

Prizes) will be final and binding, provided it is a reasonable decision.”

39. In my judgment the reasoning applied by Teare J in *Impala* applies with equal force here. The Claimants clearly knew that there was writing or printing on the lottery ticket. If they had wished to refer to the terms and conditions applicable to the sales and purchase of the ticket they would have read the ticket and seen the reference to the rules on the reverse side of the ticket. The words “National Lottery Rules for Scratchcard Games and the Procedure for this Game apply” are in small print, but even on a reduced sized photocopy they are clearly legible, and they are in bold. There is also a further reference under a heading “How to Claim” namely, “See the Rules for Scratchcard Games for more info.” Although there is no statement that the Rules can be found on the National Lottery website, the address of that website is on the reverse of the ticket. That satisfies the test set out in *Chitty*, as recorded in *Allen Fabrications* at [56 (3)], in my view. It is therefore not an argument with a real prospect of success that the Rules were not incorporated as a term of the contract.

Whether there is an express or implied term of the contract as alleged in Paragraph 19 of the Particulars of Claim

40. Paragraph 19 of the Particulars of Claim states:

“It is an express and or in the alternative an implied term of the contract between the Purchaser of a Camelot sold scratchcard and Camelot, that in the event that the Purchaser becomes a Prizewinner, Camelot will pay out to the Prizewinner the sum scratchcard specifies as the prize.”

41. Again, this point was not pursued in either written or oral submissions but for completeness I address it. I accept Mr Hinks’ written submissions on this issue. There is no identification of how this is alleged to be an express term. It is not included in either the Scratchcards Promotion Licence or the Rules. Further, there is no basis identified for the implication of such term into the contract but in any event there is no real prospect of successfully arguing that there is scope for the implication of such term into the contract for the following reasons:

- i) the alleged implied term would require Camelot to pay a prize to any purchaser of a winning scratchcard even if the scratchcard was purchased using a stolen bank card, or it was purchased by a player who is prohibited to play, e.g. a Camelot employee. It would entirely contradict the contractual discretion that is afforded to Camelot under the Rules to reject a prize claim in specified circumstances. The implication of the alleged term would therefore offend what was expressed by Lord Neuberger in the leading case on implied terms, *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] A.C. 742 at [28], to be the “cardinal rule that no term can be implied into a contract if it contradicts an express term.”
- ii) The implication of the alleged term is precluded by the entire agreement clause in Rule 13.3 which states that the Rules “set out the full extent of Camelot’s obligations and liabilities to You in relation to the Games and for the contract between Camelot and You for each Game.”

Whether Clause 12.1 of the Rules is unduly onerous

42. Again, this is not a point addressed in the Particulars of Claim, nor in any Reply, but I accept that it could be raised in a Reply if one were permitted to be served out of time.

43. Rule 12.1 states:

“Camelot’s decision about whether or not a Scratchcard Is a Winning Scratchcard (or in relation to any other matter or dispute that arises out of the payment or non-payment of Prizes) will be final and binding, provided that it is a reasonable decision (and subject to Rule 12.4). Without limiting the effect of the previous sentence, following any such decision made by Camelot, Camelot may (at its discretion) reimburse the cost of the Scratchcard or replace the disputed Scratchcard with a Scratchcard for any current Game of the same price.”

Rule 12.2 states:

“The remedy in Rule 12.1 will be the Player’s sole and exclusive remedy, and any reimbursement or replacement will fully discharge Camelot from any liability in respect of such a dispute .....

44. Mr Hendron on behalf of the Claimant submits that rule 12.1 is so onerous or unusual that it falls within what was referred to by HHJ Waksman QC (as he then was) in *Allen Fabrications* at [57] as “A refinement of those principles” i.e. the principles outlined in Chitty Vol I at 12 -13, namely that even if the party knew that the document contained or referred to conditions generally, he will not be bound by such a condition unless it is fairly and reasonably brought to his attention. HHJ Waksman QC referred to this being the effect of various authorities and having been endorsed by the Court of Appeal in *Amiri v BAE* [2003] EWCA Civ 1447 at [15] per Mance LJ.

45. HHJ Waksman QC at [59] also referred to the difficulty of deciding what amounts to an onerous clause, and refers to Chitty Vol 1 paragraph 12-015 where it is suggested that this class of terms extends to ones which, whether onerous or unusual, abrogate statutory rights. The Claimants submit that the clause does abrogate their statutory rights to participate in the statutory ADR scheme set up by Camelot and is inconsistent with the licensing objectives under section 1 of the Gambling Act 2005, as s.1 (b) states that one of the objectives is “ensuring that gambling is conducted in a fair and open way...”. The Claimants also submit that it has the effect of obliterating Camelot’s need to have a complaints procedure, and deprives the consumer of redress against Camelot

46. In my judgment, the fact that Clause 12.1 subjects Camelot’s decision to a requirement of reasonableness, means that it could not be described as onerous. If Camelot’s decision was unreasonable, in *Wednesbury*<sup>1</sup> terms, then the Claimants could successfully challenge it, and would not be bound by it. Such clauses are not unusual and there is considerable jurisprudence in relation to how the reasonableness

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<sup>1</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1KB 223 at 233-234

of any decision should be assessed. It does not abrogate any statutory rights. A consumer who disagreed with a decision taken by Camelot would still be able to pursue that dispute by the statutory ADR scheme, as well as by litigation, but would have to demonstrate that Camelot's decision was unreasonable to a *Wednesbury* standard. The evidence submitted on this application is that the Rules have been approved by the Gambling Commission, which would presumably not have done so if it considered that these were in any way inconsistent with the licensing objectives under the Gambling Act 2005. There could be no real prospect of success in challenging clause 12.1 on such ground, in my view.

**(ii) Whether Camelot's decision to reject the Claimants' claim to the prize was reasonable**

47. As noted in Paragraph 24 above, it is not alleged in the Particulars of Claim that Camelot's decision in this respect, which was final and binding pursuant to Rule 12.1 of the Rules, was unreasonable, but Mr Hendron in written and oral submissions stated that it was in fact the Claimants' case that Camelot's decision to reject the Claimants' claim to the prize was unreasonable.
48. The Claimants challenge Camelot's decision not to pay out on the winning ticket on two grounds:
  - i) Camelot acted unreasonably in making a decision when it did not have all the necessary material before to make an informed decision; and
  - ii) the decision not to pay was itself unreasonable.
49. In respect of the first ground the Claimants rely on the following:
  - i) Camelot should have waited until the police investigation was concluded before making a decision;
  - ii) Claire Swindell of Camelot advised the Prize Claim Panel that without further clarification as to the facts the Panel was unable to make a final decision, but nevertheless it went ahead and made that decision in the same meeting (Minutes of Prize Claim Panel dated 10 May 2019) [10/14];
  - iii) the decision not to pay was based on incorrect information that the purchase of the Scratchcard was made with a stolen debit card (Minutes of Prize Claim Panel dated 10 May 2019) [10/13], whereas it had never been asserted by the Bank the debit card been stolen;
  - iv) Camelot have relied on clause 7.1 (b) in stating that the claim was not made in good faith, which can only be a reference to events following the purchase e.g. the bank confirming that the use of the debit card was not authorised, rather than to events at the time when the claim was made;
50. In respect of the second ground, the Claimants rely on the following:
  - i) it is not disputed that the Claimants had a winning £4m scratchcard, nor that the Claimants were the holders of the winning ticket;

- ii) the cardholder did not report the transaction as fraudulent, but only stated that it was not authorised in response to being contacted by Nat West Bank who had been asked by Camelot to contact the cardholder (email from Sarah Webb) [8/3];
  - iii) the transaction was only marked as fraudulent when NatWest contacted the cardholder, so that assertion of fraud was reactive and not proactive;
  - iv) Mr Goodram has been consistent throughout that the card used belonged to a friend who owed him money.
51. Further it is submitted that Camelot relied on irrelevant considerations such as the Claimants' homelessness, their previous criminal history, the fact that they had both been in prison on numerous occasions, and considerations as to how Camelot's reputation might be affected by the awarding of a substantial prize awarded to individuals with a record of numerous criminal convictions.
52. In order for a decision to be reasonable in the *Wednesbury* sense, it must be a decision that is not irrational, arbitrary or capricious: see *Fondazione Enasarco v Lehman Brothers Finance SA* [2015] EWHC 1307(Ch) at [53] per David Richards J. (as he then was). However, "*It is not for the courts to rewrite the parties' bargain for them, still less to substitute themselves for the contractually agreed decision maker*": *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [18]. In determining the approach to be taken a helpful analysis is given by Popplewell J (as he then was) in *Super-Max Offshore Holdings v Malhotra* [2017] EWHC 3246 (Comm) at [144] as follows:
- "It is important to keep in mind to considerations which inform the answer to this question. The first is the scope of the limitation imposed on [*the defendant*] by the implied term. The court is not concerned to apply its own views of what would or would not have been reasonable. Reasonableness the current context is not an objective standard to be applied by the court, but a criterion applied to the decision-making process of the decision-maker. Apart from challenges to the procedural manner in which the decision comes to be made, or challenges to the relevance or irrelevance of considerations which were or were not taken into account,... The test focuses on the outcome of the process; and in order for there to be a breach of the term, the decision-maker must have reached a decision which is so outside the range which any decision-maker could reasonably have reached that it is properly categorised as irrational or perverse....It is a high threshold, as the public law cases make clear"
53. Thus, the court at trial would have to consider whether Camelot acted unreasonably, i.e. irrationally, arbitrarily or capriciously at the time when it made the decision to reject the claim. At the time the decision was made when the Prize Claim Panel met on 10 May 2019 it had the following information:

- i) the purchase of the Scratch Card had been made using a debit card although neither of the Claimants had a UK bank account;
  - ii) the Scratch Card was purchased using a bank card that belonged to someone other than the Claimants;
  - iii) the Claimants were unable to provide Camelot with the identity or whereabouts of the owner of the debit card used;
  - iv) Waitrose had confirmed in writing to Camelot that the Bank had advised that the purchase of the Scratch Card had been made without the authority or consent of the cardholder;
  - v) the CCTV evidence received from Waitrose showed the Claimants distracting Waitrose staff whilst tampering with the chip and pin machine prior to making the purchase;
  - vi) the purchase have been made using a signature marked with “MG” rather than via chip and pin;
  - vii) the debit card holder was unaware that their card had been used in the purchase;
  - viii) purchase of the Scratch Card was not signed for by the holder of the debit card or by any authorised signatory for the bank account in question;
  - ix) the Claimants’ account as to how and why authority to use the cardholder’s bank details was given to them was not reasonably credible, namely that a complete stranger who owed them money, would write his bank details on a piece of paper as a way of enabling them to recover the money owed;
  - x) on 26 April 2019 Ms Webb of Waitrose’s Profits Protection Department had been informed by a representative of the Fraud Notification Team of NatWest that contact had been made with the account holder of the debit card who had confirmed that the transaction was fraudulent (Webb 1 para 9) [7/3];
  - xi) the Panel assumed from the circumstances described above that the Scratch Card was purchased with a stolen debit card;
  - xii) the facts surrounding the purchase of the Scratch Card raised suspicions of fraud which it agreed must be reported to the police.
54. I accept the submissions on behalf of Camelot that in such circumstances the decision to reject the claim was reasonable to a *Wednesbury* standard. Even if Camelot was under a mistaken belief that the debit card had been stolen, this does not affect the decision made before it was told by the Claimants that the purchase was made using bank details only, and without using the debit card itself.
55. I note that the rules expressly envisaged that Camelot may decide to reject a claim and withhold a prize where:

- i) the prize claim has not been successfully validated in line with Camelot's reasonable validation procedures (rule 6.1) [4/9] including where the claim fails to pass Camelot's validation and security tests (rule 6.2 (c));
  - ii) Camelot is not entirely satisfied that the prize claim has been made in good faith (rule 7.1 (b)) [4/10]; or
  - iii) Camelot believes, on reasonable grounds, that the scratch card holder is not lawfully entitled to claim the prize, or where there is any other reason for Camelot (acting reasonably) to question the scratch card holder's entitlement to the prize (rule 7.1 (c)) [4/9].
56. There is no evidence before the court that Camelot was affected in the decision-making process by the Claimants' previous criminal records or their homelessness or lack of a bank account, save as to verifying Mr Goodram's identity. The circumstances known to Camelot in relation to the purchase of the Scratch Card would on an objectively reasonable view have raised suspicions more than sufficient to justify a refusal to the prize to the Claimants. There is no reasonable prospect of success, in my judgment, in the Claimants being able to demonstrate that Camelot's decision was unreasonable.

**(iii) Whether Camelot is estopped from rejecting the Claimants' claim to the £4 million prize by reason of the payment of the £10 prize.**

57. Mr Neville's evidence is that under the Rules, scratchcard prizes of up to £500 can be claimed in cash at any of Camelot's retailers and retailers are required to make payment of such prizes. The process adopted is entirely automated, namely that the retailer scans the scratchcard and receives by return a message from Camelot's central computer system confirming whether the scratchcard is a winner or not (Neville 1 para.27.3) [3/7].
58. Camelot submits that the Claimants are unable to claim that by reason of such payment it is estopped from rejecting the claim to payment on the Scratchcard because the requirements for a plea of estoppel by representation to succeed are not established. It is submitted that there was no representation by the person to be estopped (here Camelot) or by someone acting on their behalf with actual or ostensible authority to do so. Such representation may be made by conduct but only if the conduct in question is clear and unambiguous: *Halsbury's Laws of England* Vol 47 para.370. There is no pleading or evidence of a representation, but in any event the newsagents where the £10 prize was claimed and paid, Londis, had no authority to make any representation on Camelot's behalf, as is clear from rule 11.1: "*Retailers are not authorised by Camelot to carry out any other acts or make any statements, representations or admissions whatsoever (unless agreed in writing with Camelot).*"[4/12].
59. There will be no estoppel by representation unless the alleged representor (Camelot) has said or done something with the result that their action has produced some belief or expectation in the mind of the alleged representee (the claimants) was a consequence that the representee's conduct is in some way influenced by the representation: *Halsbury's Laws of England* Vol 47 para.371. No specific acts of reliance or change of position are alleged in the Particulars of Claim. Logically the



only relevant act which would need to have been done in reliance on Camelot's alleged representation could be the purchase of the Scratch Card. That act would necessarily have preceded the any alleged representation, being the payment of the £10 prize. The Claimants cannot have relied upon the payment of the £10 prize when purchasing the Scratch Card because they purchased the Scratch Card before the £10 prize was paid.

60. The third requirement for an estoppel by representation to be made out requires that the representee (here the Claimants), in acting upon the representation, change their position to their detriment. It follows that a representation made to a person after they have changed their position cannot give rise to an estoppel: *Halsbury's Laws of England* Vol 47 para.376. There was no detrimental reliance by the Claimants on any alleged representation by Camelot.
61. No written or oral submissions were made by Mr Hendron in relation to this point.
62. I accept the submissions made on behalf of Camelot in relation to this issue. The claim based on an estoppel has no real prospect of success.

**(iv)The effect of the payment of £50 by the Claimants' Legal Advisors for the scratchcards in July 2020**

63. Mr Hinks for Camelot correctly points out that it is unclear in the Particulars of Claim what the Claimants' case is as to the effect of this payment (see Paragraphs 20 -21 above). The only other reference is in correspondence from Mr Hendron to Mr Harris, the Head of Legal Services at Camelot, dated 8 July 2020. At paragraphs 5 and 6 of that letter it is stated:

“5. Camelot in banking the Cheque has waived any issue(s) arising from either the initial purchase of the five scratchcards and or the winning scratchcards subsequent presentation to Camelot for payment; in banking the Cheque Camelot are irrevocably bound in contract with my clients and must now honour the winning £4m ticket; put another way, the banking of the Cheque is wholly inconsistent with Camelot claiming that the contract is either void or voidable; see *Pellant v Boosey* (1862) 31 LJCP 281.

6. In the circumstances Camelot's position is as a matter of law untenable; Camelot have been paid for the winning scratchcards, Camelot do not dispute that my clients have a winning 4 million scratchcard, as a matter of law Camelot now have no defence for not paying out my clients.”[24/1-2]

64. Camelot submit that a payment by the Claimants after Camelot decided to reject their claim to the £4 million prize cannot affect the reasonableness or otherwise of its decision at the time it was made. Accordingly it is submitted that this payment can have no bearing on the issue of whether Camelot was entitled to make the decision that it made under rule 12.1.

65. Secondly, it is submitted that the assertion in the letter dated 8 July 2020 misses the point in stating that the contract between Camelot and the Claimants cannot be void or voidable, (which is not what Camelot asserts) because it was under the terms of that contract that Camelot rejected the Claimants' claim to the prize.
66. In the Claimants' skeleton argument it is submitted that because Camelot have banked the cheque, they "*have treated the contract as an ongoing and are unable as a matter of law to hide behind any guise of 'mistake'*". In oral submissions it was accepted that when Camelot made its decision it was not in receipt of the cheque for £50, but it is submitted that Camelot should have reversed its previous decision when it received and cashed the cheque for £50. It is submitted that Camelot cannot seek summary judgment on the contract on grounds that it repudiated the contract because their acceptance of the cheque is inconsistent with that position.
67. In my judgment, leaving aside the facts that:
- i) there is no basis pleaded in the Particulars of Claim to support a submission that the cashing of the £50 cheque meant that Camelot was unable to rely on the terms of the contract between it and the Claimants;
  - ii) there was no reference in the letter enclosing the cheque to it being intended as payment for the five scratchcards purchased by the Claimants on 22 April 2019;

the arguments advanced as summarised above have no real prospect of success for the following reasons.

68. Prior to the time the cheque was sent and cashed, Camelot had:
- i) made and communicated their decision to reject the Claimants' claim to the £4 million prize. They were entitled to make that decision under rule 12.1 of the terms of the contract, provided it was a reasonable decision.
  - ii) given notice to the Claimants to rescind any effective transaction that was entered into to purchase the Scratch Card.

Accordingly the cashing of the cheque had no bearing on the decision that was made by Camelot and communicated to the Claimants on 20 May 2019.

**Any other compelling reason why the claim should be disposed of at trial**

69. It is submitted on behalf of the Claimants that there are other compelling reasons why the claim should proceed to trial namely:
- i) to allow the Claimants the opportunity to obtain details of the cardholder and obtain evidence from him to support the circumstances of Mr Goodram obtaining the details of the cardholder's debit card, and the alleged agreement of the cardholder for him to use those details to reimburse himself for the payment made on behalf of the cardholder;

- ii) it is inappropriate for a claim involving allegations of fraud to be determined without hearing oral evidence, particularly in circumstances where the criminal trial may demonstrate that the Claimants are not guilty of fraud.
70. In my judgment neither of these grounds satisfy the requirements of CPR 24.2 (b). It misses the point to suggest that further evidence, either from the cardholder or revealed in a criminal trial, would assist the Claimants. It is clear from the decisions in *Fondazione Enasarco*, *Braganza and Super-Max* (see Paragraph 52 above) that the decision made pursuant to rule 12.1 can only be overturned if it is irrational on an objective basis, and the decision made would be considered in the light of the information known to Camelot at the time, including whether it should have waited until more information was available. I have concluded that a claim that Camelot's decision could be impugned on that basis has no prospect of success, and in any event I note that the Particulars of Claim do not plead that such decision was unreasonable.
71. Further, there are no allegations of fraud made against the Claimants in these proceedings.
72. Accordingly, the application of Camelot for summary judgment succeeds and judgment will be entered in its favour.

## ADDENDUM

### Costs of the Application and the Proceedings

73. The parties agreed that I should deal with the costs consequential upon the decision made on the basis of written submissions and without a hearing.
74. There are two issues of costs, the costs of Camelot's application for summary judgment and the costs of the proceedings. The Claimants have conceded that Camelot is entitled as a matter of principle to its costs of both the application and of the proceedings. The Claimants submitted that both these sets of costs should be summarily assessed under CPR 44.6 and Camelot is content for the court to proceed on this basis, provided the court is content that it has the material before it to do so.
75. The court's attention was drawn to para 2.7.17 of the QB Guide, which provides that:
- “The Court shall consider in all cases where fixed costs do not arise whether to make a summary assessment. It should do so at the conclusion of a hearing which has lasted not more than one day, in which case the assessment will deal with the costs of the application. If the hearing disposes of the whole claim the Court may make an assessment of the costs of the whole claim.”
76. This echoes Practice Direction 44 at para 9.1:
- “When the court should consider whether to make a summary assessment*
- Whenever the court makes an order about costs which does not provide only for fixed costs to be paid the court should consider whether to make a summary assessment of costs.”
77. I am satisfied that I have sufficient material to enable me to summarily assess both the costs of the application and costs of the proceedings, and accordingly will do so.

### The costs of the application

78. The total costs claimed by Camelot in its statement of costs for the application amount to £15,255 plus VAT (i.e., £18,255 inclusive of VAT), comprising Counsel's brief fee (£15,000) and the application issue fee (£255). No costs are sought in respect of Camelot's inhouse legal team.
79. The Claimants submit that the costs are too high. It is noted that the costs are Counsel's fees and the court fees alone, and the fact that Camelot has chosen not to claim for any of its own in-house legal costs is not a relevant factor to justify the high level of Counsel's fees. Camelot's anticipated costs for the application as approved in its Precedent H is £10,000 and it is submitted that ought to be the maximum allowed on summary assessment.

80. Camelot has noted that the costs of the summary judgment application include the costs of the hearing on 9 July 2020, not anticipated in the approved amount in the budget.

### **The costs of the proceedings**

81. The Claimants note that Camelot's approved costs in its Precedent H are £68,000 in total and that when the costs of a case management conference, pre-trial review, trial preparation and trial are deducted, this leaves a balance of approximately £28,000. Camelot reach a similar figure, £27,006, by adding incurred costs (pre-action costs of £8,025 and statements of case costs of £11,475) and estimated costs of the case management conference of £5,000, disclosure of £1,000 and witness statements of £7,500.
82. The Claimants submit that the pre-action costs of £8,025 are irrecoverable because these relate to time spent, or general advice taken, which Camelot is duty bound to do under the terms of its licence to operate the National Lottery. The Claimants also submit that Camelot's costs relating to statements of case at £11,475 are excessive for a defence and Part 18 questions with neither document being particularly lengthy or complicated. The Claimants submit that the court should adopt a broad brush approach to assessing the costs of the claim and that the most appropriate figure for the cost of the claim would be in the region of £10,000.
83. Camelot submits that it is not correct that its pre-action costs are irrecoverable, and that no authority is cited by the Claimants for that submission. These are costs which relate to the proceedings and which may therefore be properly claimed from the Claimants.

### **Discussion**

84. CPR 44.4 (1) states that
- “The court will have regard to all the circumstances deciding whether costs were –
- (a) if it is assessing costs on the standard basis –
- (i) proportionally and reasonably incurred; or
- (ii) proportionate and reasonable in amount,”
85. CPR 44.4 (3) also sets out a list of factors which the court will also have regard to:
- the conduct of the parties
  - the amount or value of any money or property involved;
  - the importance of the matter to all the parties;
  - the particular complexity of the matter of difficulty or novelty of the questions raised;

- the time spent on the case;
  - the place where the circumstances in which work or any part of it was done;
  - the receiving party's last approved or agreed budget.
86. The Guide to the Summary Assessment of Costs para 14 (White Book Vol 1 44 SC.5) states that:
- “Costs will be proportionate if they bear a reasonable relationship to: (a) the sums in issuing proceedings; (b) the value of any known monetary relief in issuing the proceedings; (c) the complexity of the litigation; (d) any additional work generated by the conduct of the paying party and; (e) any wider factors involved in the proceedings, such as reputational public importance.”
87. This was a high value claim for £4 million. It was of considerable importance to both parties. The issue of whether they had won £4 million would have been of considerable importance to both Claimants, who it appears are largely without means. It would also have been of considerable importance to Camelot as to whether they would be contractually bound to pay out such a large sum in such circumstances. It was not a straightforward claim, as is apparent from this judgment. It was further complicated by the manner in which the claim was pleaded, and the fact that issues were raised on the application which had not been pleaded.
88. With regard to the costs of the application, the fact that Counsel's fees are higher than might be allowed if solicitors' costs were also included, does not necessarily mean that they are not reasonable and proportionate. It is also correct that the sum approved for the contingency of a summary judgment application in the budget of £10,000 relates only to the anticipated substantive hearing. The fees of £15,000 relate to two hearings, one in July 2020 of approximately one hour or slightly longer, and the other a half day hearing for the substantive application. That total amount is entirely reasonable and proportionate for the work involved, taking into account all the factors listed above. Accordingly I summarily assess the Defendant's costs of the application in the sum claimed of £18,255, inclusive of VAT and the court fee.
89. With regard to the costs of the proceedings, I am content to follow the approach of both parties to assess these by reference to the budgeted costs. I do not accept the submissions on behalf of the Claimants that Camelot is not entitled to claim pre-action costs. These are costs related to the proceedings and a successful party is entitled to recover these costs. The sum of £8,025 for pre-action costs is reasonable and proportionate.
90. The sum of £11,475 for statements of case relates to consideration of the Claim Form and Particulars of Claim as well as drafting of the defence. The inadequate drafting of the Particulars of Claim necessitated drafting a request for Part 18 information and considering the replies to the request. The sum claimed is reasonable and proportionate for the work done, taking into account the value of the claim and the complexity of the legal issues raised.

91. Accordingly, I summarily assess the costs of the proceedings in the sum of £27,006 plus VAT of £5,401.20 giving a total of £32,407.20.