



“Terms, Tips & Traps”

A Commercial Law Seminar

Silverman Sherliker LLP – 14 April 2011

Shane Morris, Commercial Law Solicitor

Terms & Conditions of Business explained including Key
Protections & "The Battle Of The Forms"

Fiona Rodgers, Commercial Law Associate

Tips & Traps relating to negotiating points on your Terms &
Conditions of Business

James Robertson, Litigation Partner

The key to enforcing your rights in the Civil Courts



**Terms & Conditions of
Business explained including
Key Protections & "The Battle
Of The Forms"**

Shane C Morris

Commercial Law Solicitor



Topics

1. Why use Standard Terms of Business
2. The Key Provisions and Protections
3. The Relevant Legislation
4. Effective Incorporation of Terms of Business



Why Use Standard Terms

Benefits

- Avoid time & expense of negotiating
- Introduce clauses in your favour
- Certainty in trade

Limitations

- Enforceability
- Compliance
- Effective incorporation



Key Provisions & Protections

Supply of Services Terms of Business

- Offer & Acceptance
- Supply of Services
- Customer's Obligations
- Charges and Payment
- Intellectual Property
- Confidentiality
- Limitation of Liability
- Termination



Key Provisions & Protections

Supply of Goods Terms of Business

- Description and Specification of Goods
- Delivery and Risk
- Title and Retention of Title



Relevant Legislation

Supply of Goods and Services Act 1982 & Sale of Goods Act 1979

Implies certain terms into contracts, including:

- That the goods will be of satisfactory quality and fit for purpose.
- Goods must correspond with their description or sample.
- That the services will be performed with reasonable care and skill.
- Goods are transferred with good title and a free from encumbrances.



Relevant Legislation

Unfair Contract Terms Act 1977

- Examples of the types of clauses that are subject to UCTA are exclusions or limitations for:
 - Negligence
 - Breach of contract
 - Implied terms
 - Indemnities
 - Liability to Third Parties



Effective Incorporation of Terms

- Businesses should establish procedures in relation to three areas:
 1. The formation of the contract.
 2. Incorporation of the standard terms into the contract.
 3. To ensure that their standard terms prevail over the other party's standard terms – the battle of the forms.



Formation of the Contract

- Printing standard terms on the back of an invoice is usually ineffective.
- The customer should make the offer on the supplier's standard order form, which the supplier then accepts in writing.
- All pre-contractual discussions should be, either:
 - On the supplier's standard terms
 - Subject to contract



Incorporation – Practical Tips

- Should include standard terms on as much pre-contract documentation as possible:
 - Brochures, catalogues, websites and other publications
 - Quotation forms
 - Acknowledgement and confirmation of orders
 - Delivery notes
 - Invoices – To establish a course of dealing over time



Battle of the Forms

- Whoever fires the last shot wins.
- Practical tips:
 - Take direct approach to variation and negotiate
 - Ensure yours are the last terms sent
 - Prevail clause
 - Delay performing services until terms are agreed
 - Confirm order in writing & state that contract is now formed



Battle of the Forms

Cases:

- *British Road Services Ltd v Arthur Crutchley & Co Ltd*
[1968] 1 All ER 811
- *GHSP Inc v AB Electronics Limited* [2010] EWHC 1828



Tips & Traps

*Negotiating Points on your Terms &
Conditions of Business*

Fiona C Rodgers

Commercial Law Associate



The next 15 minutes

AGENDA

- Using Standard Terms & Conditions of Business
- Relevant Legislation
- Negotiating Main Terms
- Limiting or Excluding Liability in Standard Terms & Conditions of Business
- UCTA 1977
- Supplier's Perspective
- Customer's Perspective



Using Standard Terms & Conditions of Business

- B2B Standard Terms & Conditions
- Discourages heavy negotiation

BUT

- Greater restrictions on the extent to which a Supplier is allowed to exclude or limit its liability
cf. bespoke Terms and Conditions of Business



Relevant Legislation

- Supply of Goods & Services Act 1982 (SGSA 1982)
- The Unfair Contract Terms Act 1977 (UCTA 1977)
- The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006)
- The Provision of Services Regulations 2009 (POS Regulations)
- The Sale of Goods Act 1979 (SGA 1979)
- The Misrepresentation Act 1967
- The Consumer Protection Act 1987
- The Consumer Protection (Distance Selling) Regulations 2000



Negotiating Main Terms for the Supply of Services



Negotiating Main Terms

- B2B on standard terms and Conditions of Business
- Description of Services
- Obligation to Provide Services
- Standard of Services
- Deliverables
- Time for Performance of the Services



Negotiating Main Terms

- Charges
- Payment
- Interest
- Termination
- Boilerplate Terms



Negotiating Main Terms

- **Limiting or Excluding Liability**
- A balancing game
- Cf. Bespoke B2B Terms & Conditions
- Cf. B2C Terms & Conditions



UCTA 1977

- The principal statute regulating exclusions and limitations of liability in supply contracts
- Also common law controls



UCTA 1977

- **Liability that cannot be excluded or restricted**
- Death or Personal Injury caused by negligence;
- Good title, quiet possession and no encumbrances in a contract for sale of goods and in contracts for the transfer of goods
- Defective Products
- Fraud or Fraudulent Misrepresentation



UCTA 1977

- **Liability that can only be excluded or restricted to a certain extent.**
- Negligence
- Misrepresentation
- Breach of Contract.
- Correspondence with Description, Satisfactory Quality, Fitness for Purpose and Correspondence with Sample
- **the UCTA reasonableness test.**



THE UCTA REASONABLENESS TEST

- In order to pass the reasonableness test a contract term must have been:
“a fair and reasonable one to be included having regard to the circumstances which were, or ought to have been, known to or in the contemplation of the parties when the contract was made” s 11(1) UCTA



Assessing Reasonableness

- Schedule 2 of UCTA 1977 sets out a non-exhaustive list of guidelines in assessing reasonableness:
 - Bargaining positions of parties
 - Extent to which insurance cover is available
 - Any inducements or similar contracts
 - Customer knowledge of existence of the term (trade custom, previous course of dealing)



Supplier's Perspective

- When drafting Standard Terms and Conditions for the supply of services (and sale of goods) a supplier's objective is to exclude or limit its liability under the contract as far as possible while avoiding crossing the line of what is acceptable.
- Where liability can be restricted or limited to a certain extent the supplier should consider the amount of the cap to put on its liability.
- The Supplier should carry insurance and often capping its liability at the level of insurance cover is seen as reasonable.



Customer's Perspective

- Objective is to protect itself as far as possible by extending the supplier's liability and maximising the extent of recoverable losses if the Supplier fails to perform
- Consider:
 - Express terms re quality of services
 - Express contractual remedies
 - Indemnities



The key to enforcing your rights in the civil courts

James Robertson
Litigation Partner



The next 15 minutes

- **1. Pre-action**
- **2. Litigation**
- **3. The future**



1. Pre-action



What are the civil courts?



- Two main categories: County Court and High Court. Cases such as divorce, consumer disputes, bankruptcy, contract disputes and personal injury
- Small claims £0k-£5k
- Fast track £5k-£25k
- Multi-track (anything more complex or above £25k).



How do you establish your rights?



Key points for litigators?

- Ts and Cs exist? Solidly drafted?
- Properly incorporated into contract?
- Signed?
- Strong paper trail?
- Has the debt been admitted?
- Is the company liquid?
- Have you mitigated your loss?



Pre-action conduct

- Civil Procedure Rules and Practice Direction Protocols for pre-action conduct.
- Court's approach: Don't litigate unless absolutely necessary.
- Be careful as potential costs consequences for incorrect approach pre-action.
- Don't be deliberately obstructive or aggressive



Letter of Claim

- Set out claim in full
- Attach all relevant documents
- Summarise the facts, the breach and what you want
- Ask for copies of documents you don't have
- Suggest ADR
- Tell them not to ignore letter
- Threaten winding up if undisputed debt



Defendant's response

- Acknowledge letter within 14 days, substantive response 14 days thereafter
- If undisputed or simple debt, substantive response within 14 days



Claimant's reply and taking stock

- Have you attempted mediation?
- How far apart are the parties?
- Commence proceedings now?
- Remember: Is it worth it?



2. Litigation



Small claim, fast track or multi-track?



Small Claim/Money Claim online?

- Remember: up to £5k
- Court fee: £100 up to £5k for Money Claim online, £120 otherwise



Fast track and multi-track



- **Particulars of Claim/Claim Form**
 - Sets out case – Damages amount/Money claim
 - Give solicitor as much information and documentation as possible concerning the dispute
 - Provide a chronology of events
 - Is interest payable? Under Ts and Cs? LPCD
 - Mitigated loss? Reasonable steps taken?
 - The measure of compensation that a Claimant is entitled to recover is the loss naturally flowing from the legal wrong. This measure of damage is offset by a duty to mitigate – or minimize – losses suffered by them by taking all reasonable steps to mitigate the loss consequent on the breach.



- Strong POC = Weak Defendant = potential quick, early, cost effective and favourable resolution



Acknowledgment of Service (14 days)

- Judgment in default?



Defence

- 28 days from date of service if acknowledged
- Check for inaccuracies



Allocation questionnaires and Reply

- Who are your witnesses?
- Are there any misstatements of fact in the Defence?



*Case management
conference/directions*



Mediation?



Disclosure

- Standard search
- Docs which help and harm your case
- Power possession and control
- Ongoing duty



Witness Statements

- Give as much information as possible
- Full history of dealings between the parties
- Be honest



Trial

- Witness evidence
- Make sure your story is straight
- Keep calm and carry on



Summary

- 1) Have you kept all of your documentation and handed it on to your solicitor?
- 2) Have you established your rights?
- 3) Have you tried to negotiate settlement?
- 4) Is your story straight?



3. The future

- Jackson review/Clarke's proposals
- End of recoverability of CFA success fee
- Raising small claims from £5k-£15k
- Access to justice?



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