KEY POINTS

- There has been recent recognition and application of the Interfoto principle to contracts which are signed but incorporate onerous or unusual clauses by reference, contrary to the generally previously understood position that the principle could only be engaged in signature cases in "extreme cases".
- The jurisprudence may be rationalised by reference to historic recognition of a limited duty of good faith in relation to notice of onerous or unusual clauses.
- Generally, including in the lending and derivatives contracts context, consideration might need to be given to providing a greater degree of notice in relation to onerous or unusual clauses which are intended to be incorporated by reference.

Feature

Authors Hugh Sims QC and Jay Jagasia

Blu-sky thinking: the *Interfoto* principle and terms incorporated by reference

In this article the authors consider the implications of *Blu-Sky Solutions v Be Caring* [2021] EWHC 2619, including in the lending and derivatives contracts context, which suggest that a party provides to its counterparty a greater degree of notice in relation to onerous or unusual clauses which are intended to be incorporated by reference.

INTRODUCTION AND THE DECISION IN *BLU-SKY*

Many contracts in the banking and financial services industry are signed off on the basis of incorporation, by reference, of additional standard terms and conditions. Typical examples are Loan Market Association (LMA) standard terms in relation to lending facilities and the International Swaps and Derivatives Association Inc (ISDA) Master Agreement used in relation to over-the-counter derivatives transactions. The borrower or customer may not sign a document containing those terms, though may sign a document which incorporates those terms by reference. It has generally been thought that in such signature cases the *Interfoto* principle, requiring a greater degree of notice in relation to onerous or unusual clauses before the court will accept they have been incorporated, does not apply, or is insufficient, and instead that it is only in "extreme cases" – for instance where the party signed under pressure without any real opportunity to read the document, such as a customer signing a car rental agreement at an airport for example – that the court may conclude the customer is not bound. However, in the recent first instance decision of HHJ Stephen Davies in *Blu-Sky Solutions v Be Caring* [2021] EWHC 2619, it was held that the *Interfoto* principle does apply where the customer signs a contract which does not itself contain the terms in question, and which are only incorporated by reference.

Whilst the *Blu-Sky* decision may be said to represent an extension, or relaxation, of the cases where the *Interfoto* principle may be said to apply, it is consistent with the earlier first instance decision of Fraser J in *Bates v Post Office (No 3)* [2019] EWHC 606 (QB), and it may be said to reflect the same underlying principle which was recognised in the judgment of Bingham LJ (as he then was) in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433. It may be questioned, however, whether such an extension is strictly speaking required given the ability to control unreasonable terms using the Unfair Contract Terms Act 1977 (UCTA), and also to decline to enforce penalty clauses, and it does give rise to a tension with the principle that a person who signs a document is generally bound by its terms. It may be thought however that this is a tension worth accepting to enable a just outcome where the circumstances of the case warrant it.

THE *INTERFOTO* PRINCIPLE

Where a contract document has not been signed then problems may arise in demonstrating what the contract terms were. Typically, the provider seeks to rely on terms contained or referred to in a notice, ticket or similar document. The courts have developed principles which govern whether sufficient notice of such terms has been given. In *Chitty on Contracts* (34 ed) at 15-010 it is stated that there are three basic rules regarding notice: (i) if the person receiving the document did not know there was writing or printing on it then they are not bound (though it is rare for this to arise); (ii) if they did know then they are bound; and (iii) if the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract. It is this third rule, reasonable sufficiency of notice, which is then subject to an additional layer, where there are onerous or unusual terms.

The principle, deriving initially from the ticket cases such as *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, is summarised in *Chitty* above at 15-012 as follows:

> "Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention."

The decision in *Interfoto* concerned a delivery ticket which provided for charges for holding certain photographic transparencies. The standard condition in question, printed on the delivery ticket, imposing a holding fee of £5 per day for each transparency that was retained beyond a period of 14 days, was found by the court to be "a very onerous clause".

Dillon LJ ([1989] QB 433 at 438) said that "the defendants could not conceivably have known, if their attention was not drawn to the clause, that the plaintiffs were proposing

to charge a 'holding fee' for the retention of the transparencies at such a very high and exorbitant rate". The first instance judge had found that if a quantum meruit had applied then a reasonable charge would have been £3.50 per transparency per week, not £5 per day. There was therefore a factor of 10 difference between a reasonable rate and the rate sought to be charged.

As to whether this condition was fairly and reasonably drawn to the defendants' attention, the offending condition was described as being "merely one of four columns' width of conditions printed across the foot of the delivery note" (see at 433 and at 439 per Dillon LJ). The underlying reasoning of Dillon LJ was based on the fact that, like in the ticket cases, the customer generally tends to assume that the conditions are only concerned with ancillary matters of form and are not of importance, and it was a reasonable and logical development of those principles to require onerous or unusual conditions to be "fairly brought to the attention of the other party" (Dillon LJ at 438G-439A).

Bingham LJ, concurring, noted that English law, unlike civil law jurisdictions, recognised no general obligation on contracting parties to act in good faith, but that the cases on sufficiency of notice should be read in the context of English law developing piecemeal solutions in response to demonstrated problems of unfairness (see at 439). He noted that on one level cases concerning sufficiency of notice were simply one of pure, objective, contractual analysis – whether one party had done enough to give the other notice of incorporation of a term. He went on to say, however:

> "At another level they are concerned with a somewhat different question, whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions or by a particular condition of an unusual and stringent nature".

He analysed the ticket cases and noted (at 433C) that this was not a one-size fits all principle, that "what would be good notice of one condition would not be notice of another" explaining that, "The reason is that 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".

He concluded (at 445B-C) by observing that:

> "The tendency of the English authorities has, I think, been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular condition said to bind him; and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question. This may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract is concerned."

Turning on to the facts of the case he noted (at 445G) that:

> "The defendants are not to be relieved of that liability because they did not read the condition, although doubtless they did not but in my judgment they are to be relieved because the plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention."

30 YEARS ON: *DO-BUY*

Fast forward 30 years, in *Do-Buy 925 Limited v National Westminster Bank Plc* [2010] EWHC 2862 (QB) Andrew Popplewell QC, then sitting as a Deputy Judge of the High Court, was required to analyse one of the contracts in the processing of credit card payments, and in particular the contract entered into between the merchant and merchant acquirer. The facts were highly unusual, involving a claim concerning the alleged sale of certain jewellery by Do-Buy in a transaction which the judge ultimately found was not genuine. The contract was formed by a signature on an application form and immediately below the signature box was reference to the fact that the signatory had read the general terms and conditions. The relevant witness accepted that she had been provided the general terms and conditions and had an opportunity to read them and that the bank was entitled to assume she had done so. In those circumstances it was concluded that the *Interfoto* principle should not apply, "even were it capable of applying to some signed contracts" (see at [92]).

As to whether or not it was so capable, the position was summarised at [91] in the following terms:

> "… it remains an undecided question whether the Interfoto principle can ever apply to a signed contract. In that case the Defendant was held not to be bound by a term in a printed set of conditions which had been provided to him in the form of a delivery note, but which he had neither signed nor read. In *Ocean Chemical Transport v Exnor Crags Ltd* [2000] 1 Lloyd's Rep 446, [2000] 1 All ER (Comm) 519, Evans LJ, with whom Henry and Waller LLJ agreed, was prepared to assume that the principle might apply to onerous and unusual clauses in a signed contract 'in an extreme case where a signature was obtained under pressure of time or other circumstances'. In *HIH v New Hampshire* [2001] EWCA Civ 735, [2001] 2 All ER (Comm) 39, [2001] 2 Lloyd's Rep 161, Rix LJ doubted whether the principle was properly applicable outside the context of incorporation by notice (see para 209). In *Amiri Flight Authority v BAE Systems plc* [2003] EWCA Civ 1447, [2004] 1 All ER (Comm) 385, 392, [2003] 2 Lloyd's Rep 767, Mance LJ, with whom Rix and Potter LLJ agreed, noted the doubts of Rix LJ in *HIH v New Hampshire* and stated that it was unnecessary to decide whether the principle could ever apply to signed contracts. He envisaged that it might do so where for example a car owner was asked to sign a ticket on entering a car park or a holiday maker asked to sign a long small print document when hiring a car which in either case proved to have a provision of 'an extraneous or wholly unusual nature'; but that such cases might be ones where the application of the provision was precluded by an implied representation as to the nature of the document. He reiterated the normal rule that in the absence of any misrepresentation, the

> signature of a contractual document must operate as an incorporation and acceptance of all its terms. This is a reflection of the well-known principle whose existence and importance was recently emphasised by Moore-Bick LJ in *Peekay v Australia and New Zealand Banking Group* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511, 520 at para 43: 'It was accepted that a person who signs a document knowing that it is intended to have legal effect is generally bound by its terms, whether he has actually read them or not. The classic example of this is to be found in *L'Estrange v Graucob* [1934] 2 KB 394. It is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community.' "

Whilst it may be said that those observations were strictly obiter, they appeared to confirm that the *Interfoto* principle did not apply, or was not sufficient, where the contract had been signed, and instead the case would need to fit into the category of an "extreme case" where the signature was obtained under pressure of time or other circumstances, if the principle applied at all.

THE BUSES PHENOMENA: TWO COURT OF APPEAL DECISIONS IN 2018

The *Interfoto* principle was subsequently considered in two Court of Appeal decisions in 2018. In the first, *Woodeson v Credit Suisse (UK) Ltd* [2018] EWCA Civ 1103 the borrowers sought to contend that a no-set off clause was an onerous clause which should have been drawn to their attention under the *Interfoto* principle. It was noted (at [41], per Longmore LJ, with whom Leggatt LJ (as he then was) agreed) that Mr Woodeson had signed the relevant documentation containing both the mortgage offer, accepting the accompanying general terms and conditions, and the private banking terms and conditions. It was also noted that Mr Woodeson had been advised to take independent advice and indeed had solicitors at the time who he "no doubt consulted" (see at [45]). At [46] Longmore LJ stated,"In any event, when the contractual documentation is signed, the Interfoto principle has no, or extremely limited, application" and referred back to the same passage in *Peekay* (at [43]) noted in *Do-Buy* and as quoted above. It would appear that this case may be said to be a case where the contractual documentation containing the terms in question were signed. This approach, in relation to a signed CFA contract, was followed by Saini J in *Higgins & Co Lawyers v Evans* [2019] EWHC 2809 (QB). It was also followed by Bryan J in *Cargill International Trading PTE Ltd v Uttam Galva Steels Ltd* [2019] EWHC 476 (Comm) (see at [91]).

The second Court of Appeal case to consider the *Interfoto* principle in 2018 was *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371. This was not a case where the contract was formed by signature, but instead through the delivery of terms on a quotation and a later acceptance by the placing of an order. It is noteworthy however for the fact that it contains a recent endorsement by the Court of Appeal (Coulson LJ giving the leading judgment) of the fact that the degree of notice required will depend on the degree of onerousness (see at [32]), and thus is a modern recognition that in this area the court may be viewing the matter more as something of a "sliding scale".

THE SIGNS OF RECOGNITION OF AN INTERMEDIATE CATEGORY OF CASE: *BATES*

The Post Office litigation has yielded new insights into a number of different areas of law. In *Bates v Post Office (No 3)* [2019] EWHC 606 (QB) Fraser J was required to consider, amongst other things, the application of the *Interfoto* principle. The litigation before him concerned two different types of contract. One, called the "Network Transformation Contract" (NTC), involved a contract signing process which placed this contract in the category of "signed contracts" where it was found by Fraser J that the *Interfoto* principle does not apply. There was another category of contract however, called the "Sub-postmaster Contract" or "SPMC" for short, where the contract signed was an appointment contract. The procedures for bringing to the attention of the sub-postmaster the terms and conditions set out in the SPMC varied, but did not amount to requiring the incoming sub-postmaster to sign the actual SPMC itself (or at least that did not occur in some cases). It may be said therefore that it could be said to constitute an intermediate category of case. In relation to this category of contract Fraser J concluded that the *Interfoto* principle could be said to apply. Moreover, he went on to find (at [1060] for example) that certain of the terms (imposing full liability on the sub-postmaster for any loss or damage regardless of how it occurred and whether that person was at fault or otherwise) were unduly onerous, and most unusual, and that clear and conspicuous notice should have been given of such terms to incoming sub-postmasters, but was not.

BLU-SKY THINKING

The issue came to the fore in the subsequent case of *Blu-Sky* (cited above), a decision of HHJ Stephen Davies, which concerned the supply of mobile phones and telecommunication services to a defendant social care provider. The claim was for an administration cancellation charge of £225 per connection in relation to the supply of 800 mobile phones, which contract was in the event cancelled triggering a claim for £180,000. The contract was formed by the customer signing the order form which contained reference to the standard terms and conditions which were available for viewing on the Blu Sky website. The judge found that this was sufficient, but for the question of onerous or unusual clauses, to result in the standard terms and conditions being incorporated (see at [84]-[88] and [89]-[92]). The question was therefore whether or not the *Interfoto* principle applied.

On behalf of the claimant, it was argued 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. The defendant argued that this qualification, or removal, of the *Interfoto* principle, only applied in cases where the

Feature

Biog box
Hugh Sims QC and Jay Jagasia are barristers practising from Guildhall Chambers, based in Bristol and London. Email: hugh.sims@guildhallchambers.co.uk and jay.jagasia@guildhallchambers.co.uk

relevant clause was to be found in the signed contract itself. The judge ultimately accepted the defendant's submissions, noting at [98] that in doing so he was following the reasoning of Fraser J in *Bates*, where a clear distinction was being drawn between the two different types of contract. He concluded that if there was any tension between this and the approach taken in *Do-Buy* he preferred the approach of Fraser J in *Bates*. He observed at [98] that:

> "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."

He went on to observe at [100] that:

> "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."

Whilst it may be said that this creates tension with the general principle that where a contract is signed then, short of other vitiating factors, the person is bound by what they have signed, including anything incorporated by reference, it may also be said to be consistent with the principles which were articulated over 40 years ago by the Court of Appeal in *Interfoto*. Indeed, it may be traced back to the same underlying principle which was recognised by Bingham LJ in *Inferfoto* at 445B-C, as quoted above.

A TENSION WITH DISCLAIMER CASES?

It might also be argued that the recognition of the moderating influence of the common law in this context sits somewhat at odds with cases such as *Taberna Europe v Saskabet* [2016] EWCA 1262, which recognises as legitimate attempts to limit primary obligations in "the small print". Whilst cases such as *First Tower Trustees Ltd v CDS (Superstores International) Limited* [2018] EWCA Civ 1396, [2019] 1 WLR 637 may be said to provide a moderating influence in relation to non-reliance clauses, the juridical route to doing so is by recognising the true reach of UCTA in relation to exclusion of liability for misrepresentation. It may be said therefore that the historic recognition of control over onerous or unusual clauses should be confined to those cases where there is no signature, and any safety valve restricted to the potential "extreme" case only.

There is however some validity to the observation by HHJ Stephen Davies that it may be said to be odd to approach the matter in a binary way. Why, it might be said, should the court adopt a stricter role to a person who signs a contract than one who is handed a notice, in circumstances where the court considers, objectively, there was reasonably sufficient notice of the terms given for those terms to be said to form part of the contract? It may be said that as soon as the contract which is signed is separated from the terms and conditions relied on then there is no logical distinction to be drawn, and instead the better approach is the "sliding scale" approach based on the degree of "onerousness", having due regard to the nature of the transaction, and the characteristics of the parties to it, notwithstanding this may be said to lead to some erosion of the principle of certainty and party autonomy.

CONCLUDING OBSERVATIONS

Subject to any further case law developments, it may now be said there are three categories of case. The first, where the contract which is signed contains the alleged onerous or unusual term/s, where (save perhaps for the "extreme case") the *Interfoto* principle does not apply. The second is where nothing is signed, in which case the *Interfoto* principle does apply. The third category of case is where the terms containing the alleged onerous or unusual term/s are incorporated by reference, but are sufficiently divorced or separated from the document which is signed, such that, having regard to the nature of the transaction in question and the parties to it, the court still retains the ability to conclude that it would not be fair in all the circumstances to hold the counter-party to the term, even if the case is not an "extreme one" where the contract is signed in a rush or under pressure. The implications of this recognition, extension or relaxation remain to be seen. Generally, and also in the banking and derivatives contracts context where LMA and ISDA terms are widely incorporated by reference, consideration might need to be given to providing a greater degree of notice in relation to onerous or unusual clauses found in those terms. Further, *Blu-Sky* may well encourage incorporation challenges in relation to onerous or unusual clauses in those terms, in circumstances where the generally prevailing view, until the decision, was that such challenges would fail save in "extreme cases". ■

Further Reading:

- Are English courts still hostile to a doctrine of good faith? (2017) 1 JIBFL 19.
- Secondary obligations and disguised penalties: where does the law stand following *Makdessi*? (2022) 2 JIBFL 81.
- LexisPSL: Dispute Resolution: Practice Note: Jurisdiction agreements by incorporation.