Unfair terms: when am I dealing on another's standard terms of business?

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THE *SHEBAH EXPLORATION* DECISION.

1. In African Export-Import Bank & Another v Shebah Exploration & Production Company [2016] EWHC 311 (Comm) Phillips J. held that the Claimants' use of an industry model form could not constitute "*deal[ing] on [the offeror's] written terms of business*" so as to engage section 3 of the Unfair Contract Terms Act 1977 ("UCTA").

2. The decision helps to answer two questions of concern to Commercial lawyers. First, what element of negotiation is needed before another's standard terms cease to be 'standard'? Secondly, can an industry model form ever amount to another's standard terms?

3PB'S ANALYSIS.

3. **The relevant facts.** This case concerned the terms of a syndicate loan agreement ("the Agreement") under which the Claimants had lent the First Defendant $150 million. The First Defendant failed to make the contractual repayments and the Claimants issued proceedings and sought summary judgment.

4. The Defendants had counterclaimed for breaches relating to the arrangement of the loan. That in itself did not provide an answer to summary judgment because the Agreement contained a no-set-off clause.[1] If UCTA applied to the Agreement the clause might be challenged because it unreasonably "*excluded or restricted any liability*" of the Claimants: **UCTA, ss.3(2), 13**.

5. **Did the Agreement constitute the Claimants' written standard terms of business so as to engage UCTA, s.3?** The Agreement was based on the form of syndicated facility agreement recommended by the Loan Market Association ("the LMA"), which had been amended to a certain extent by negotiation between the parties' lawyers. Phillips J. held that it was not arguable that UCTA applied.

6. **"*Dealing on [another's] written standard terms of business*".** The decision (at [17]-[19],[22]) helpfully reviews previous case-law. 'Standard' indicates that the offeror has a stock of conditions that he uses for all, or nearly all, of its contracts of a particular type. Further, the essence of the concept is that such terms are not varied from transaction to transaction; some negotiation is permissible so long as the stock terms remain "*effectively untouched*". Neither requirement was satisfied on the facts.

7. **Model forms as "written standard terms".** There is nothing *per se* to prevent UCTA applying to a model form (see at [20]-[21]). The court referred to British Fermentation Products Ltd v Compair Reavell Ltd [1998] TCC 577 in which it was suggested that to succeed in such an argument it would be necessary to show that the contracting party had *invariably or usually* adopted the model form as its standard terms by practice or by express statement.

8. Interestingly, Phillips J. went further and made a more general observation that a party seeking to argue that the use of a model form amounted to written standard terms under UCTA faced an upward struggle. Such party "*will require cogent evidence to raise even an arguable case*" that the use of a 'neutral' model form as the basis of an agreement could constitute a party's written standard terms (at [27]).

IMPACT OF THE DECISION

9. Ultimately, whether a party has contracted on standard written terms, within the definition of section 3 of UCTA, will turn on the specific facts of a case. The present matter was no different. Phillips J. relied upon the lack of evidence to suggest the Claimants, collectively or otherwise, had used the LMA model form before and the evidence of significant negotiation, which included negotiation of commercially significant terms.

[1] On established authority rights of set-off (both legal and equitable) can be excluded by agreement: HSBC v Kloeckner & Co AG [1990] 2 QB 514; Coca-Cola Financial Corp v Finsat International Ltd [1998] QB 43 CA and Newcastle Buildings Society v Mills [2009] 2 BCLC 137. Further, such agreement also precludes the grant of a stay of execution of judgment pending a counterclaim: Continental Illinois National Bank & Trust Company of Chicago v Papanicolaou [1986] 2 Lloyd's Rep 441 CA.

10. It remains to be seen whether the use of an industry model form as the basis of an agreement will be held to be a party's written standard terms pursuant to section 3 of UCTA. Here and in British Fermentation the court indicated that the presumption is that the use of model forms as a starting point for negotiation will not constitute a party's written standard terms. Given the extensive use of model forms across numerous industries this judgment will come as a relief to many. However, if it can be shown that a party habitually uses the model form and refuses to negotiate meaningfully, the contract still may be caught by UCTA.

11. **Consumer contracts.** Of course, it is worth recalling that "*dealing on [another's] written standard terms of business*" is only one of two available gateways to UCTA applying under section 3. The other (not applicable in Shebah Exploration but not to be overlooked) is dealing as a consumer. For contracts entered into before 1 October 2015,[2] section 3 will apply where the party relying on UCTA "*deals as a consumer*". Contracts entered into thereafter which are "*consumer contracts*" will be regulated by the Consumer Rights Act 2015, and its regime for challenging unfair terms (see ss.61-62).

[2] **Consumer Rights Act 2015, s.75, Sch. 4**; subject to transitional provisions in the **Consumer Rights Act 2015 (Commencement No 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015, art. 3(c), 6**.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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