Wragge Lawrence Graham & Co

Queries on NTC and DCP181

1 Can terms contained in a bilateral contract be enforced against a third party? Is there a publicly available example of situations where this has occurred?

1.1 The English common law principle of privity of contract means that only the parties to a contract have rights or obligations under the contract.

1.2 This has been varied by statute so that (under the Contract (Rights of Third Parties) Act 1999) a party (or class of party) that is expressed to have the benefit of a contract can enforce that contract (unless the parties expressly exclude the application of the Act). However, a person cannot be bound by the obligations under a contract unless that person agrees to be bound by the contract.

1.3 None of this is relevant to the scenario currently under consideration though. The NTC form a bilateral contract between the distributor and the connectee. The NTC contract is entered into by the connectee when it enters into the supply contract (or PPA) with its electricity supplier.

1.4 When a connectee enters into a supply contract (or PPA) the connectee is entering into two contracts – one with its electricity supplier; and one with the distributor. In respect of the second contract, the electricity supplier has been appointed as the distributor's agent.

1.5 This agreement between the connectee and the distributor differs from what one might consider to be a 'normal' contract in two ways, as follows:

(a) the electricity supplier is acting on the distributor's behalf in agreeing the contract – but that isn't really very unusual; the distributor is a company (rather than an individual) so everything it does is done by agents on its behalf (and, in this case, that agent is the person in the supplier's call centre, or the supplier acting via its website or the supplier's manager signing a more significant supply contract or PPA); and

(b) the wording in the contract that the connectee agrees to is only six sentences long, and the NTC are incorporated by reference.

1.6 Regarding the second point, terms are commonly incorporated into agreements by reference. The example that was often quoted at the time that the NTC were created was the National Rail Conditions of Carriage. The National Rail Conditions of Carriage can be found at - www.nationalrail.co.uk/static/documents/content/NRCOC.pdf. When a person buys a train ticket, they don't sign a 10-page document; instead they are given notice that by buying a ticket they are agreeing to be bound by the National Rail Conditions of Carriage.

1.7 Of course, the concept of the NTC applying by reference is not being introduced by DCP181; the NTC already exist and are already incorporated by reference. DCP181 proposes that some of the terms that apply under the NTC are not the ones that can be found at www.connectionterms.co.uk, but (instead) the ones that a previous connectee agreed with the distributor (the pre-existing bespoke terms).

1.8 In effect, DCP181 provides for the pre-existing bespoke terms to be incorporated by reference into the NTC (in circumstances where the NTC are already incorporated by reference into the six sentences referred to in paragraph 1.5(b) above). See paragraph 10 below for our further thoughts on this point.

2 Would the proposal in DCP181, if approved by Ofgem, conflict with contract law?

2.1 No. Incorporation by reference is a longstanding and accepted concept of English contract law.

2.2 Note, however, our comments in paragraph 10 as to whether or not the incorporation by reference will be effective in practice, and also on Scottish law.

3 Does contract law always apply given the NTC have been approved by Ofgem as being statutory in the absence of an agreement?

3.1 There is no detail in section 21 of the EA1989 regarding how the terms that a connectee is required to accept are intended to apply.

3.2 There is no formal role under the EA1989 for Ofgem to approve the section 21 terms. Ofgem has, of course, approved the NTC via the DCUSA modification process.

3.3 Contract law principles do not necessarily apply to the section 21 terms to the extent that they apply by operation of statute. The deemed contract scheme created by schedule 6 to the EA1989 deems a contract to exist. No such deeming is expressly provided for in section 21.

3.4 There is nothing in the EA1989 to prevent the terms that apply via section 21 comprising a combination of the terms set out at www.connectionterms.co.uk and the pre-existing bespoke terms (if those terms were stated to apply).

3.5 To the extent that section 21 applies the NTC via operation of statute (rather than via a contract or deemed contract), the contract law concept of incorporation by reference will not apply. However, the contract law concept of incorporation by reference is really just a sensible set of rules to apply when judging whether or not it is reasonable to apply terms from a separate document. So a court that came to consider the issue would be likely to apply the same or similar tests.

4 Could the NTC be varied to place an obligation on the connectee to advise any prospective buyer/new tenant if there is an existing bilateral or existing terms and to disclose them?

4.1 The NTC could be varied in this way. This would allow distributors to sue connectees who did not make this disclosure. It is not immediately apparent to us that this would help.

4.2 As previously advised, distributors could be permitted (by a change to the DCUSA) to disclose to persons purporting to be prospective purchasers whether or not there is a bespoke connection agreement in place. This (relatively uncontroversial) piece of information would then enable bona fide prospective purchasers to obtain a copy of the bespoke

connection agreement from the current connectee.

5 How could standard enquiries used on sales of premises (whether domestic or commercial) be extended to asking about connection agreements/terms? Is there a standard process among solicitors?

5.1 The Law Society publishes pro-forma pre-contract enquiries – see form TA06 at http://www.lawsociety.org.uk/support-services/advice/articles/ta-form-specimens/.

5.2 However, these are really for domestic premises and bespoke connection agreements are not really relevant to domestic premises.

5.3 To the extent it helps, the 'usual' legal due diligence on the purchase of a generation station, or energy intensive industry, or a data centre or similar would involve a request to see the connection agreement.

6 Under s16-s21 of the Electricity Act, can capacity agreed with (the first?) connectee transfer to a third party without any associated terms? Can a benefit be transferred in this way without associated burden?

6.1 Under section 16, the distributor has a statutory duty to make a connection between a premises and the distributor's distribution system, where required by the owner or occupier of the premises from time to time.

6.2 Furthermore, this duty is said to encompass maintaining the connection. This is achieved by stating that a reference to making a connection includes a reference to maintaining the connection. This appears very neat on first glance, but becomes quite difficult to interpret in certain cases. For example, on first making a connection, an owner/occupier must serve a written notice requesting the connection, and the distributor is able to specify the terms that are to apply. How is this to be interpreted in the context of maintaining a connection for a new occupier? Is the distributor's duty to maintain the connection conditional on the new occupier first requesting maintenance of the connection in writing?

6.3 The generally accepted interpretation of sections 16-22 of the EA1989 is that a distributor has a continuing statutory duty to maintain the connection for each successive owner or occupier of the premises (albeit that the distributor also has an ongoing right to require the connectee to accept terms of connection under section 21, and to disconnect where reasonable under section 17). However, we are not aware of any case law in which the interpretation of sections 16-22 is considered in detail.

6.4 The question of whether the benefit can transfer without the burden really goes to the heart of DCP181. The current regulatory framework provides for the benefit of the connection to be preserved, but for the burden (the terms) to always be the standard terms (and not necessarily the bespoke terms that are appropriate to the benefit).

7 Under s22 of the Electricity Act, does the vacation of premises by the connectee cause an agreement to fall away and so the entitlement to use of the connection terminates? Alternatively can capacity agreed with the first connectee transfer to a third party

without any associated terms?

7.1 As set out in paragraph 6, the interpretation of sections 16-22 of the EA1989 is not entirely straightforward. One could interpret section 16A as requiring each new connectee to apply again for the connection. However, this is not what happens in practice, as distributors are often not notified of the change of owner/occupier and (even where they are notified) the regulatory framework operates to automatically apply the standard terms under the NTC.

7.2 Distributors do always retain the right to disconnect the premises under section 17 where it is reasonable to do so (and a refusal by the connectee to accept reasonable terms is likely to justify the use of section 17). However, in practice, distributors are (naturally) reluctant to disconnect premises.

8 Does the Act oblige the DNO to maintain the connection (the assets) or also its ability to be used (the capacity)? If the latter what happens to associated agreements or terms under the Act?

8.1 As set out in paragraph 6, the interpretation of sections 16-22 of the EA1989 is not entirely straightforward.

8.2 The duty to maintain the connection clearly exists separately to the right to impose the terms. However, it is difficult to say precisely what is inherent in the connection, as compared to what is a term to be complied with in respect of the connection.

8.3 On a natural interpretation of a duty to make and maintain a thing, we would say that the right to use that thing is inherent in the duty. The duty owed to the occupier/owner to maintain the connection would be hollow if the duty didn't also confer a right for the owner/occupier to use the connection. The language of section 21 suggests terms that constrain and obligate connectees (rather than bestowing substantive rights upon them).

8.4 So, the capacity (including the right to us the capacity) enures for the benefit of the owner/occupier from time to time, but the current regulatory regime does not necessarily apply the correct terms/burden concerning the use of the capacity. The current regulatory framework automatically causes distributors to notify the standard connection terms (via the NTC), rather than the bespoke connection terms. This is the point of DCP181.

9 How might customers vacating or entering premises be compelled to advise the DNO of this fact and in practice would it be effective/enforceable?

9.1 Such an obligation could be added to the NTC and all bespoke connection agreements. This would allow distributors to sue connectees who did not make this disclosure. It is not immediately apparent to us that this would help. It would (in theory) allow distributors to sue old occupiers for the costs of undertaking any reinforcement work necessary to allow the distributor to maintain the connection on the standard terms. In practice, it seems unlikely that distributors would want to make such claims.

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10 Are there any other factors the group needs to consider?

10.1 We thought it would be useful to summarise the key aspects of our previous advice on this topic.

10.2 The incorporation of terms by reference is perfectly legitimate in terms of contract law. However, it will only work in practice if the following three things are achieved:

(a) the fact that legal terms are to apply needs to be drawn to the connectee's attention;

(b) this needs to be done prior to contract formation; and

(c) the actual terms need to 'fairly and reasonably' be brought to the connectee's attention.

10.3 The NTC regime is already designed to achieve these things where it is incorporated via contracts with suppliers. These contracts are themselves understood by connectees to be legal documents, and suppliers have an obligation to bring the application of the NTC to the attention of customers.

10.4 However, the case law provides that the more onerous and unusual the terms are, the more that must be done to bring them to the attention of counterparties.

10.5 The NTC are (by definition) the 'normal' terms of connection for electricity distribution connections in Great Britain. It follows that they cannot be unusual, and so there is a relatively low hurdle to be overcome in terms of bringing them to the connectee's attention. In contrast, any existing bespoke agreements are (by definition) bespoke and therefore unusual. Without knowing what each bespoke connection agreement provides for, it is impossible to say how unusual the provisions are, and how important it is that particular provisions are flagged to the connectees.

10.6 The following could be considered as a means to assist bringing the bespoke terms 'fairly and reasonably' to the connectee's attention:

(a) changing the wording that suppliers include in their contracts with connectees to refer expressly to the possibility of bespoke terms applying via the NTC (i.e. changing the six sentences referred to in paragraph 1.5(b), which are set out in schedule 2A of the DCUSA);

(b) ensuring that the process by which prospective owners or occupiers can obtain copies of the bespoke terms is as simple as possible (balancing against this the confidentiality problem) – see paragraph 4.2 above;

(c) making sure the interaction between the standard NTC and the pre-existing bespoke terms is as clear as possible – previous formulations of DCP181 have sought to apply both terms simultaneously, which seemed confusing.

10.7 We have also discussed previously that it may be possible to achieve the aims of DCP181 via

a more limited and proportionate amendment to the NTC. The NTC are 'standard' but even now they attempt to apply an element of premises specificity. For example, the NTC refer to a Maximum Import Capacity and a Maximum Export Capacity, which are stated to be the capacities agreed by the distributor (without prescribing how this agreement might have arisen). This approach could be expanded by referring to other 'Technical Requirements' agreed by the distributor in previous connection agreements, and providing in the NTC that the rights under the NTC are subject to such Technical Requirements. These Technical Requirements could be stated to include constraints, characteristics, non-firm connection rights and whatever other terms distributors are most keen to preserve. This would be a less substantive change and would ensure that new connectees must only consider the technical differences (rather than, for example, the legal differences) as compared to the NTC.

10.8 Please note that our advice is on the position under English law. When we originally created the NTC, a Scottish firm (Burness, now known as Burness Paul LLP) confirmed the position under Scottish law to be substantively the same. The position is unlikely to have changed in the past 10 years, and the DNOs in Scotland may feel comfortable confirming this thinking for themselves. However, please let us know if you want us to help in procuring any Scottish law advice. Such Scottish law advice would be needed only to confirm the contract law position (rather than the application of the EA1989).

Wragge Lawrence Graham & Co LLP
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