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Claim No: HT-11-444

TN THE HTGH COURT OF JUSTICE
QUEENS BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Date: 1 August 2012

B e f o r e :
HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

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Between:

ALLEN FABRICATIONS LIMITED	**Claimant**
and	
ASD LIMITED	
(t/a ASD METAL SERVICES AND/OR KLOCKNER & CO MULTI METAL DISTRIBUTION)	**Defendant**

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Jeffrey Terry (instructed by DWF Solicitors) for the Claimant
Ben Quiney (instructed by DAC Beachcroft LLP Solicitors) for the Defendant

Hearing dates: 10-12 July 2012

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Judgment

INTRODUCTION

1. This is the trial of a number of preliminary issues arising in proceedings between the Claimant ("Allen") and the Defendant ("ASD"). They are but two of the parties in much wider litigation where the main trial is to take place in November 2012. The claims between Allen and ASD arise in this way: Bembridge Marine Limited ("Bembridge") carries out boat repairs and maintenance in Bembridge, Isle of Wight. In 2004 it decided to commission the design and construction of a new two-storey workshop ("the Workshop"). In addition there was to be a rigid steel platform at first floor level to be located next to the upper entrance to the Workshop ("the Platform"). The purpose of the Platform was to enable boats to be moved on a trolley into the Workshop at first floor level. The boats would have first been placed upon the Platform by fork-lift trucks. A useful 3D representation of the Workshop and Platform is at 2/602.

2. The sub-contractor for the supply and construction of the Platform was Paul Bennett trading as PB Structures ("PB"). He in turn sub-contracted the supply of the constituent elements of the Platform (in "kit" form as it were) to Allen. The Platform required sections of steel grating to be placed over its steel members, on which, according to Bembridge, the trolley holding a boat would stand, together with whoever was attending to the boat while on the Platform or pushing it into, or out of, the Workshop itself. The grating was to be fixed to the steel members by clips. Allen sub-contracted the supply of the grating and clips to ASD. Subsequently, the Workshop and Platform were erected and used by Bembridge.

3. On 18 September 2006 one of Bembridge's employees, Kevin Cleightonhills ("KC"), was standing on the Platform pushing a boat into the Workshop when a section of grating gave way and he fell through the Platform about 3.4m to the ground below. The piece of grating fell to the ground also. Unfortunately KC sustained extremely serious head injuries which left him severely incapacitated. He sued Bembridge through his father as next friend. There was no defence to the claim and judgment was duly entered against Bembridge on 30 November 2006. Damages were subsequently agreed in the region of £7m.

4. Bembridge in turn brought various claims against a total of 6 different parties. As against PB, it alleged that the grating had been insecurely and/or inadequately fixed and a failure to comply with BS 4592:1995 so that PB was negligent as against it and KC. Bembridge therefore sought damages and/or a contribution under the Civil Liability (Contribution) Act 1978 ("the 1978 Act"). As against Allen, Bembridge alleged negligence and/or a right to contribution on the basis that it failed to specify the appropriate method of fixing the grating to the Platform. PB in turn claimed damages for breach of contract from its sub-contractor, Allen and/or a contribution.

ALLEN'S CLAIM AGAINST ASD

5. It is common ground that the contract between Allen and ASD ("the Agreement") was made by 28 January 2005 and that ASD delivered the grating and clips to Allen by 10 February 2005.

6. Paragraphs 18-20 of the Particulars of Claim allege various terms of the Agreement as follows:

(1) Implied terms that the grating and fixings would be of satisfactory quality and fit for the purpose of securing the grating to the floor beams of the Platform;

(2) ASD would supply a quantity of fixings sufficient to comply with BS 4592;

(3) The goods supplied would conform to their description as shown on the supplied drawing and so as to include the standard clips and fixings;

(4) Although not stated expressly, the first and third terms were implied by the Sale of Goods Act 1979.

7. Paragraphs 21 and 22 allege that ASD owed a duty of care to supply the correct number of fixings so as to secure the grating properly in accordance with BS 4592 and/or to advise Allen if more fixings were needed. Paragraph 24 then alleged negligence on the basis that the number of fixings was inadequate and ASD did not advise Allen to procure more of them ("the Negligence Claim").

8. Paragraph 25 alleged breach of all or any of the terms referred to in paragraph 6 above on the basis that "standard" fixings had not been supplied because there were too few, there was no compliance with description nor were the goods supplied of satisfactory quality or fit for their purpose. Moreover there was non-compliance with BS 4592 ("the Contract Claim").

9. I should add that in recent Further Information, Bembridge alleges that only 24 clips were provided along with the 8 sections of grating. If the "wings" of the clips were used to secure two sections of grating together, a total of 26 would have been necessary, otherwise 32, in order to comply with BS 4592. ASD says that it supplied 26 clips.

10. Paragraph 26 of Allen's Particulars of Claim reads as follows:

> "If the claims of Bembridge and/or PB succeed against Allen by reason of an inadequate number of fixings having been supplied by Allen to PB, Allen has suffered loss and damage resulting from the Defendant's said breaches of contract and/or duty by being exposed to the claims of Bembridge and/or PB [- not Allen as typed] and will seek an indemnity against the same and/or damages in a sum equivalent to the sum required to defend and/or meet the claims of Bembridge and/or PB [- not Allen as typed]..."

11. In its Defence, ASD denies the substance of the claims. It also denies that there were the contractual or tortious duties alleged by Allen. Furthermore it seeks to rely upon various exclusion or limitation clauses to be found in paragraph 8 of its standard terms and conditions ("the Terms") which it says were incorporated in the Agreement.

THE PRELIMINARY ISSUES

12. The issues to be determined by me, as refined in the course of the hearing, are as follows:

(1) Issue 1: When was the Agreement between Allen and ASD made? (The answer to this question is now agreed).

(2) Issue 2: Were the Terms incorporated into the Agreement?

(3) Issue 3: If they were, what is the effect of clauses 8.6 and 8.8, in particular, as properly construed, upon Allen's claim?

(4) Issue 4: Are clauses 8.6 and/or 8.8 reasonable for the purposes of the Unfair Contract Terms Act 1977 ("UCTA")?

13. It is common ground that there was no express incorporation of the Terms at the time by virtue of the admitted contractual documents. However, ASD contends that they were nonetheless incorporated in one or both of the following ways:

(1) By virtue of Allen's written application to ASD for a credit facility in 2002 which required specific agreement to the Terms;

(2) By virtue of a course of dealing between the parties. In that regard reliance is placed on the fact that by February 2005 there had been over 250 transactions between the parties which in each case involved the sending to Allen of an advice note and an invoice. Allen now accepts that there was a course of dealing sufficient in the ordinary way to entail the incorporation of ASD's standard terms because of the numerous invoices, but denies that this is entailed in any other way. Moreover, ASD still denies any effective incorporation of paragraph 8 of the Terms because of what has been referred to as "the *Interfoto* Point". Because of their interrelationship with other issues it is necessary for me to make factual findings on both alleged routes to incorporation.

THE EVIDENCE

14. For Allen I heard from Craig Sharp, its present Managing Director, Brian Sharp, the present Chairman of Allen and Craig Sharp's father, Alison Berryman, an Administrator for Allen since August 2006, Jonathon Miller who works in Allen's yard and workshop, and Kevin Parkin who runs a fabrication company. Allen also submitted as a hearsay statement and without objection, the witness statement of Richard Corbett who also works in Allen's yard and workshop but who could not attend to give evidence due to ill-health. For ASD I heard from Neil Everstead, its Senior Finance Manager for Working Capital since January 2012, David Tonks who works in ASD's sales department and Nick Wilson, the Senior Finance Manager for Financial Planning and Analysis.

THE FACTS

Formation of the Agreement

15. I begin with the facts concerning the making of the Agreement because the answer to Issue 1 is now agreed in the following terms:

> "The contract between Allen and ASD was formed on 28 January 2005 when Allen sent to ASD its fax of that date, requesting the supply of goods and thereby accepting ASD's offer constituted by its typed quotation dated 25 January 2005 which itself responded to Allen's enquiry dated 19 January 2005 and which enclosed drawings A6156/GF1 and A6156/FP1."

Delivery of the goods and invoicing

16. The fax of 19 January 2005 sought a quotation for grating as shown on attached drawing A6156/GF1. Clips and fixings to suit the floor beams as shown on attached drawing A6156/FP1 were also requested. On 25 January 2005, ASD quoted £705 to include "Open Steel Flooring & clips to suit". This offer was accepted by the fax of 28 January from Allen. ASD in fact purchased the material necessary for it to fulfill this order from Lichgitter (UK) Limited which was sent the drawings on which it later marked where the clips should go. According to its documents its supplied 25 clips plus one spare.

17. None of those contractual documents make reference to either party's standard terms and conditions.

18. According to ASD, when the goods were delivered to Allen, they would have been accompanied by an Advice Note. There would have been 3 copies of this: a warehouse copy which would stay with ASD, a second, driver's copy to be signed by the consignee as proof of delivery ("POD"), which the driver would retain and return and a third which would be kept by the customer. Allen's evidence was that it would generally retain such advice notes for about 3 months. It no longer has the Advice Note for this delivery and neither does ASD.

19. However, the subsequent invoice has been retained electronically ("the Invoice"). It would be actioned once there was POD. The Invoice is dated 21 February and refers to the delivery date of 10 February 2005. An account number is given (which it is common ground is Allen's account) of ALLE07. The date for payment was 31 March 2005 ie the end of the month following the month of delivery.

20. I find that there must have been, and was, at the time, an advice note for this transaction. ASD would not have rendered an invoice without POD which required a signed copy.

ASD's Standard Terms and Conditions

21. So far as is material to the issues before me, the April 2003 version (being that current in 2005) provided as follows:

> **"Clause 5 Application for credit and payment terms**
>
> 5.2 If you have an approved credit account, payment is due no later than the end of the month following the month of delivery unless otherwise agreed in writing.

5.3 We will only consider an application for a credit account subject to the satisfactory completion of our 'Application to Open a Credit Account' ("Application Form").

5.4 By completing and returning the Application Form, you:

5.4.1 consent to us carrying out such credit referencing as we shall consider appropriate; and

5.4.2 accept that all business transacted with us shall be on and subject to these Conditions..

Clause 8 Warranties

8.1 Except where otherwise provided, we warrant that the goods:

8.1.1 comply with their description on our advice note; and

8.1.2 are free from material defect at the time of delivery.

8.2 We give no other warranty (and exclude any warranty, term or condition that would otherwise be implied) as to the quality of our goods or their fitness for any purpose and in particular (although without limitation) for any goods which we have prepared in accordance with your specification or instructions...

8.4 If you believe that we have delivered goods that, though undamaged are defective you must:

8.4.1 inform us (in writing), with full details, within three days of discovering the alleged defect; and

8.4.2 allow us to investigate in terms of condition 6.4 (we may need access to your premises and the goods.

8.5 If the goods are found to be 'defective in material or workmanship (following our investigations, and you have complied with those conditions (in condition 7.3 and 8.4) in full, we will at our option) replace the goods or refund the price.

8.6 We are not liable for any other loss or damage (including indirect or consequential loss, financial loss, loss of profits or loss of use) arising from the contract or the supply of goods or their use, even if we are negligent.

8.7 Our total liability to you (from one single cause) for damage to property caused by our negligence is limited to one million pounds.

8.8 For all other liabilities not referred to elsewhere in these conditions our liability is limited in damages to the price of the goods.

8.9 Nothing in these conditions restricts or limits our liability for death or personal injury resulting from negligence."

ASD's invoices and advice notes generally

22. It is common ground that at all material times ASD's invoices stated at the bottom: "All material sold subject to our Standard Conditions of Sale as notified and as modified from time to time." At first it was suggested that the Terms were printed on the reverse of each invoice. However that was withdrawn once it transpired from Allen's examination of its retained ASD invoices that this was not so. ASD uses an external company to print its invoices and it was thought that it did put them on the reverse but this is not the case.

23. The advice notes, however, did contain a set of the Terms on the reverse. Just below the box where the customer must sign for the goods is a line reading "Please refer to the Terms and Conditions on reverse of this document." A sample of an advice note from February 2006 shows this. There is really no evidence to suggest that advice notes did not, consistently from 2002, have the relevant terms on the reverse which is what they expressly say. The fact that a mistake was made by ASD's witnesses in relation to the invoices does not lead to any doubt about the advice notes, in my mind.

24. Mr Corbetts and Mr Miller's evidence was to the same effect. The advice notes would be used to check that the correct goods had been delivered to Allen. They would not have examined the terms printed on the reverse. Craig Sharp stated that he would not usually look at the advice notes retained in his office (he might if there was a query over the order) but agreed that the sample from February 2006 looked typical. He agreed that it was not unusual for supplier's advice notes to have terms and conditions on the reverse and if one turned over the advice note for this transaction one would have seen such terms.

25. As for invoices, the Invoice here was actually signed off by Geoffrey Martin after it came in. A fabricator formerly employed by Allen, as at February 2005 he was working for Allen on a self-employed basis. According to Craig Sharp, he would (and did here) do the specification for a particular job and get it assembled once the main contract (to Allen) had come in. He had authority to enter into purchase contracts for materials and did so on this occasion. According to Brian Sharp the purpose of Mr Martin signing off the invoice was to confirm that the materials had indeed been delivered so that payment could be made. He would then pass it to Brian Sharp for that purpose. There is no reason to think that this did not happen here even though Mr Sharp has no recollection of seeing this particular Invoice. Once the invoice was approved by Mr Sharp it would go to Ms Berryman for filing.

26. Craig Sharp said that he had seen invoices from ASD although he probably did not read the words referring to terms and conditions. But he accepted that had he wanted to see them he could have asked and in hindsight should have asked.

Allen's general awareness of standard terms and conditions and exclusion and limitation clauses

27. Allen has its own standard terms which include the following exclusion or limitation clauses:

"8 Warranties and liability

> 8.1 Subject to the conditions set out below the Seller gives no warranty that the goods will correspond with their specification or will be free be free from defects in material and workmanship...
>
> 8.3 Subject as expressly provided in these Conditions.....
>
> All warranties conditions or other terms implied by statute or common law are excluded to the fullest extent permitted by law.
>
> 8.4 Where goods are sold under a consumer transaction..the statutory rights of the Buyer are not affected.
>
> 8.6 Where any valid claim ..based on any defect in the quality or condition of the Goods or their failure to meet specification is notified .the Seller shall be entitled to replace the Goods.. .[or] refund the Price ..but the Seller shall have no further liability to the Buyer..
>
> 8.7 Except in respect of death or personal injury caused by the Seller's negligence, the Seller shall not liable to the Buyer ..for any indirect, special or consequential loss or..other claims for compensation whatsoever."

28. Craig Sharp accepted that Allen's own clause 8.7 of its terms was similar to ASD's clauses 8.6, 8.8 and 8.9, although he said that the former were stated on tender documents before the contract was made. But he accepted that by using such terms Allen was limiting the risk of being exposed to potentially unlimited liability. Allen also limited that risk by taking out relevant insurance. Allen's insurers would want it to have such terms when it underwrote the risk. From his perspective it was not unusual in the industry to rely on such terms, to avoid claims and increased premiums.

29. He said that if he saw a reference to some other party's terms and conditions he would assume that there were limitation clauses in them. He would contract to buy on behalf of Allen, not having seen or read the other party's terms and conditions but knowing that they would be used to reduce the risk to that party. It was in the interest of a party like ASD to have such terms and conditions. For Mr Sharp the priority on a purchase of materials was the price and if Allen wanted a low price it would take the risk of terms and conditions containing limitation clauses. He felt no need to enquire what the terms were because they would be like Allen's. He agreed that in such a case he would not engage a lawyer to negotiate over the terms because it would not be fruitful or sensible.

30. Although in paragraph 17 of his witness statement ("WS") he said that clauses like those relied upon by ASD did not make commercial sense he accepted in evidence that they did. That evidence cannot be discounted by saying that he was only talking from the seller's perspective and not the buyer's. The whole thrust of his patently honest evidence was that he well understood the existence of such terms and why they were there, why they were needed and why a buyer in the position of Allen would take the risk of being bound by them. To the extent relevant it was about as close as one could get to agreeing that such terms were reasonable.

31. For his part Mr Brian Sharp, who has been out of running the business for about 23 years, said that he knew that Allen had such terms and while they made sense so as to limit the risk, there was no time to read them on any particular transaction and agreed with his son that the main thing was price.

32. Although paragraph 10 of his WS asserts that no-one in the industry considered that they were bound by exclusions and limitations, he said in evidence that this was his impression when running the business 23 years ago and was aware that terms were tighter now and there was a greater concern about the need for such terms especially in the face of a claim like this one. Indeed he actually said that it was clear to him that such clauses were reasonable.

33. There is other evidence about the extent to which exclusions and limitations are relied upon by those in this industry but I will deal with this in the context of UCTA, below. The evidence of both Mr Sharps is important here because it is relevant to other issues.

Allen's credit facility with ASD

34. There is no doubt that Allen has (and had in 2005) a credit facility with ASD and an account number. Without such a facility it would have to pay before or at the time of the order. Instead it has until the end of the following month. But ASD's Credit Management Policy 2006 defined the procedures applicable when a credit account was opened. This required completion of a written application form which, among other things, contained an acknowledgement and acceptance by the applicant of ASD's terms of trading which would be the only ones governing sales contracts with ASD. It is not in issue that if Allen signed such a form it was thereby agreeing expressly to such terms. But the factual issue is whether it signed the form.

35. No completed form has been located. ASD's file for Allen has gone missing. The witnesses did not give evidence about why, although Mr Tonks did say that ASD moved depot from Tividale in 2009. However ASD's disclosure statement at 1/377 explains that the hard copy documents relating to Allen (which included the credit application form, advice note and paper invoice) were disposed of after 6 years, or lost or disposed of in the move from Tividale or on relocation in April 2010 to Stoke on Trent. Mr Terry makes the point that such evidence should have been elicited from the witnesses at trial but on the other hand it is clearly set out in that statement and this explanation for the lack of the paper documents does not appear to have been challenged at the time when it was made in January 2012.

36. But in any event, Mr Everstead's very clear evidence is that the 2006 policy represented previous practice which would have been carried out by ASD's credit control department. Indeed clause 5 of the Terms supports that - see paragraph 21 above. Moreover, he said that ASD's own credit insurers required such a policy. He did not believe that there was any basis for saying that procedures before 2006 were more lax so as to permit the possibility that Allen somehow obtained a credit account without signing such a form. Indeed in his 15 years' experience Mr Everstead had never known that to happen. Nor would an insurer be satisfied by a simple credit check on the new customer without any form.

37. That Allen did in fact have a formal credit account is supported by records from the computer system and software running in 2002 and later until 2006. The relevant spreadsheet extracted from that legacy system (Series 39) records that credit account ALLE07 was first opened on 28 February 2002, it gave a contact name Stuart Edwards and a credit limit of £40,000 (later increased to £100,000.). Stuart Edwards was the person who replaced Mr Martin as an employed fabricator. Of course this record does not prove that Allen signed a form - but it does show that a formal procedure of recording was in place which runs against the notion of a lax system.

38. From Allen's perspective the person who would have signed such a form was Craig Sharp. His WS says that he does not remember ever having signed or seen the application form. But in oral evidence he accepted that Allen had a credit agreement with ASD and that such agreements normally involved paperwork. He was simply unable to say one way or the other if he signed a form here. That is not very surprising given that it would have been signed some ten years ago and would not have been considered unusual. So in truth there is no positive evidence that he did not sign it.

39. In my judgment the clear likelihood is that Mr Sharp did sign such a form. It would of course have been put beyond doubt had the signed form remained but the documents and evidence above are more than sufficient for that conclusion. It follows that Allen expressly agreed to be bound by the Terms in 2002. It was not suggested that the April 2003 version was materially different.

40. The remaining facts, whether disputed or not, are best dealt with in the context of the particular issues.

THE CONSTRUCTION OF CLAUSES 8.6 AND 8.8

41. There are significant differences of approach between the parties as to the construction of the relevant clauses, set out at paragraph 21 above. They need to be resolved at this point.

42. The construction advanced by Mr Terry for Allen was as follows. Clause 8.1.1 creates an express warranty as to description by reference to the advice note, which it obviously does. Then clause 8.1.2 creates an express warranty that there are no material defects. Again, that is clear. Mr Terry then says that this warranty is probably the same as the implied term as to satisfactory quality and that it would encompass the sort of complaint made here albeit as to the number of fixings. I tend to agree but it is not necessary for me to decide the point.

43. One then turns to clauses 8.5 and 8.6. As to clause 8.5 Mr Terry argues that this limitation of remedy, to replacement or refund only, applies to defects in workmanship or materials (which is not this case) and not to a breach of clause 8.1.2 (which is). I disagree. Clause 8.5's reference to such defects is clearly a hark back to the warranty in clause 8.1.2, as is the preceding clause 8.4.

44. Mr Terry also contends that in truth clause 8.5 must be read with 8.6 so that the non-liability for "other damage" is really just a further limb of clause 8.6, applying only to the case of defects in materials or workmanship, themselves narrower than clause 8.1.2. There is no warrant for reading clauses 8.5 and 8.6 together like this. They are quite separate and in my judgment clause 8.6 is general in its terms. It is saying that the only kind of loss which is recoverable is that which is limited to the price.

45. That said, one then has to deal with clause 8.7. This actually provides for up to £1m in the specific case of damage to property due to ASD's negligence. That must be read as a qualification to clause 8.6 which would have read more easily if clause 8.7 came before it. But the sense is nonetheless clear. Unless provided for specifically in paragraph 8 losses are limited to the price.

46. The next step in Mr Terry's argument was to say that because clause 8.6 had to be read down so as to be no more than a part of clause 8.5 and because the latter was also to be read down, Allen's claim for breach of warranty as to description or lack of defects fell outwith clause 8.5 and thus 8.6. But given my construction above, that argument cannot be sustained.

47. Mr Terry then contended that clause 8.8 did not affect any of Allen's claims either. This is because:

(1) It only applies to other liabilities not referred to elsewhere in the conditions;

(2) A claim for breach of clause 8.1.2 albeit (on Mr Terry's unsuccessful argument) not caught by clause 8.6, is referred to in the conditions;

(3) So is a claim for breach of description because it is referred to in clause 8.1.1 and/or there remains the statutory implied term as to condition;

(4) Clause 8.8 does not limit any claim in negligence because (unlike clause 8.6) negligence is not expressly excluded.

48. Ingenious though this construction is, it must be rejected. This is because part of it depends on the construction of clauses 8.5 and 8.6 already rejected. So clause 8.6 already limits claims for defects, breach of description and negligence. And to the extent that clause 8.8. were needed, it would be apt to exclude negligence (subject to clause 8.7) because its words are sufficiently wide. Losses from any other liability which might otherwise be established are excluded. In reaching this conclusion I have not overlooked the injunction to interpret such clauses strictly. But Mr Terry's construction goes beyond this - it is in my view one which strains and distorts the language used.

49. On that footing, Mr Terry agreed (as is inevitable) that if I were against him in respect of clause 8.6 (which I am), it must follow that the purely financial claims effectively for an indemnity as set out in paragraph 26 of the Particulars of Claim (see paragraph 10 above) are excluded by that provision. To the extent that it was necessary they would be caught by clause 8.8 also.

50. But the effect of this is that taken together, the provisions of paragraph 8 limit any claim to the price of the goods or a refund subject to the usual unrestricted liability for death or personal injury (which cannot be excluded) and £1m for damage to property due to negligence (which otherwise could).

51. Against that construction and the facts referred to above, I consider the issues.

ISSUE 2: WERE THE TERMS INCORPORATED INTO THE AGREEMENT?

Introduction

52. The short answer is "Yes" because of my finding of express incorporation due to the form for the credit facility. See paragraphs 35 to 39 above.

Course of Dealing

Introduction

53. However, because the facts relevant to the course of dealing may be relevant to Issue 4 I consider also whether incorporation via a course of dealing would have been made out in any event.

54. Mr Terry agrees it would (because of the passing between the parties of the invoices on some 250 prior occasions) save that paragraph 8 would not be so incorporated because the exclusions in clauses 8.6 and 8.8 (as construed above) constitute "onerous" or "unusual" terms or ones which abrogate statutory rights, so that unless they have been brought specifically to the buyer's attention, they will not form part of any course of dealing. And according to Mr Terry, they have not. This is the *Interfoto* point, named after the decision of the Court of Appeal in *Interfoto Picture Library v Stiletto Visual* [1989] QB 433. (Mr Terry accepts that the *Interfoto* point does not arise in relation to incorporation via the signed application for credit, discussed above).

The Law

55. A 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 or at the time when the contract is made (leaving aside "battle of the forms" cases); or
>
> (2) They may be on or referred to in a document not itself contractual but post- contractual, like the advice notes and invoices here, but which are nonetheless held to have been incorporated because of a prior course of dealing between the parties using those documents from which it can be inferred, objectively, that the parties must have intended to contract on those terms.

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 the terms on its face or clearly refers to them as being on the reverse or being available elsewhere, is likely to be sufficient.

57. A refinement of those principles occurs where there is an "onerous or unusual" clause. Here, even if the other party knew that the document contained or referred to conditions generally, he will not be bound unless it has fairly and reasonably been brought to his attention. This was the effect of "ticket" cases such as *Thornton v Shoe Lane Parking* [1971] 2 QB 164. In *Interfoto* itself, the relevant clause in a one-off contract for the hire of transparencies imposed a penal rate when they were not returned on time. Having reviewed the authorities Dillon LJ stated at p439A that if one condition was particularly onerous or unusual the party seeking to enforce it must show that it (and not merely the standard terms generally) was fairly brought to the attention of the other party. Bingham LJ put it this way at p445B:

> "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."

58. That broad way of looking at the position was endorsed by the Court of Appeal in *Amiri v BAE* [2003] EWCA Civ 1447 - see paragraph 15 of the judgment of Mance LJ.

59. I would however add two observations here. First, it is not always clear what amounts to an "onerous" clause. In *Interfoto* itself Bingham LJ understandably said that the clause in question was "unreasonable and extortionate" and as noted above Dillon LJ referred to "particularly" onerous clauses. In *Circle Freight v Mideast Gulf Exports* [1988] 2 Lloyds Rep 427, there were IFF standard terms which limited the carrier's liability to cases of willful neglect and which provided a ceiling on the amount paid by reference to the lowest of three different formulae. In the case itself this meant that only £192 would be payable against a claim for £6,371. These clauses were certainly not unusual because there were in common use. But they were not held to be onerous either. Bingham LJ said that they were not "Draconian". So the mere fact that the clause is a limitation or exclusion clause does not seem to me to render it onerous without more. Much will depend on the context. It might be said that if in very common use it is less likely properly to be regarded as onerous especially between two commercial parties since that is the business in which they knowingly operate. Furthermore, where the terms, if incorporated, would be subject to scrutiny under UCTA it can be argued that a somewhat more flexible approach to what is truly "onerous" could be taken. Be that as it may, however, it was not suggested before me that clauses 8.6 and 8.8 should not be regarded as "onerous" for these purposes and I proceed below on that basis.

60. Second, in Chitty Vol 1 paragraph 12-015 it is suggested that this class of terms extends to ones which, whether onerous or unusual, abrogate statutory rights. That appears to be drawn from cases such as *Thornton* where the abrogation was serious and onerous - exclusion of liability for damages for personal injury under the Occupiers Liability Act 1957. For my part, I would caution against holding that <u>every</u> abrogation of a statutory right must fall within this special class. It seems to me that the expression "onerous or unusual" is more than sufficient and this would have covered the offending clause in *Thornton* in any event. Indeed, Dillon LJ in *Interfoto* saw the clause in *Thornton* as (simply) an onerous clause. But again, this point does not affect the present case because I shall consider the clauses under the "onerous" basis in any event.

61. The assessment of fairness and reasonableness here is clearly fact-sensitive and regard must be had in particular to (a) the nature of the clause (b) what actual steps were taken to draw it to the other party's attention (c) the character of the parties and (d) their particular dealings.

62. Moreover some adjustment of the principle must be called for where the other party already knows not merely that the document contains terms but also that it contains, or is likely to contain terms, of the type complained of even though they have not read this actual clause. The whole concept of reasonably bringing it to the attention of the other party is to avoid the mischief of their ignorance of it. In many of the reported cases it was common ground that not only had the terms not been read, the other party did not know the onerous term was there. But if the other party is in general terms aware that it was, then notice is not necessary. Put another way, the requirement in paragraph (2) above can be rephrased for onerous terms:

> " If he knew that the writing or printing on it contained or referred to the onerous condition relied upon or conditions of the same type, he is bound."

63. If that requirement is met one does not get to the third stage. The alternative way to put it is to say that in such a case, what will constitute bringing the clause fairly and reasonably to the attention of the other party is likely to be little more than what is necessary in respect of the conditions as a whole.

Application to the facts

64. In my judgment, Allen's *Interfoto* point fails. The relevant terms here were not unusual in this industry. And Craig Sharp knew that suppliers like ASD would (like his own company) have exclusion clauses in respect of which buyers like Allen would have to protect themselves by insurance and using such terms themselves. On that footing it is impossible to see what further steps were required of ASD other than to satisfy the normal "notice" test for incorporation and course of dealing which, it is conceded, they did. See also the evidence recounted in paragraphs 28 - 32 above.

65. Also, unlike other cases, this was not a single dealing between the parties, nor was the party affected an individual consumer. This was a commercial customer who had already dealt with ASD on over 250 occasions usually 3-4 times a month. It had had the actual terms on numerous occasions albeit on advice notes normally only seen by those working in the yard. It had a clear reference to the terms on invoices which would be seen by Mr Martin (who was in a position of responsibility at Allen) as well Mr Brian Sharp.

Conclusion

66. Accordingly whether by express acceptance (under the credit facility application) or by a course of dealing, the Terms were incorporated.

ISSUE 3: WHAT IS THE EFFECT OF CLAUSES 8.6 AND 8.8, IN PARTICULAR, AS PROPERLY CONSTRUED, UPON ALLEN'S CLAIM?

67. These clauses have been construed in paragraphs 42- 50 above. Assuming for the purposes of this trial that Allen makes out its present case on one or more of the pleaded claims described above, it must follow that clause 8.6 applies. This is because the nature of the loss claimed is "other" than replacement of the goods or a refund or damages for damage to property or for personal injury or death due to negligence. Mr Terry correctly conceded this outcome if I were against him on construction of the clause.

68. There is therefore no need for ASD to rely upon clause 8.8. But as it happens I consider that clause 8.8 would also operate to limit any liability for breach of an implied term for fitness for purpose (if not captured within clause 8.1.2), or for breach of the term as to quantity pleaded in paragraph 19 of the Particulars of Claim along with breach of the term as to description pleaded in paragraph 20, assuming that the latter is not encompassed by clause 8.1.1. Clause 8.8 covers the Negligence Claim as well.

69. It follows that unless these clauses are rendered invalid because unreasonable under UCTA, their effect is to limit Allen's claim to the price of the goods.

ISSUE 4: ARE CLAUSES 8.6 AND/OR 8.8 REASONABLE FOR THE PURPOSES OF THE UNFAIR CONTRACT TERMS ACT 1977?

The Law

70. The question here is whether clauses 8.6 and 8.8 were fair and reasonable terms to have been included in this particular contract, having regard to the circumstances known, or which ought reasonably to have been known to or in the contemplation of the parties when the contract was made. The burden of showing reasonableness rests on ASD. See s11 (1) and (5).

71. Useful guidance is provided by Schedule 2 even though strictly, it applies only to cases under ss6 and 7 of UCTA. The relevant parts are as follows:

> "(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;...
>
> (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);....
>
> (e) whether the goods were manufactured, processed or adapted to the special order of the customer."

Analysis

72. I consider that the matters referred to below are relevant to the question of reasonableness here.

The Respective Position of the Parties

73. Allen has a turnover of around £4-5m each year. ASD is very much larger being part of the Klockner international group of companies and the largest independent metal stockholder in the UK. But this is not simply a "numbers" game. The fact is that both parties were and are substantial commercial entities. See in this regard paragraph 59 of the judgment of Stanley Burnton LJ in *AXA Sun Life v Campbell Martin* [2011] Lloyds Rep 1.

74. Secondly and critically, in my judgment, Allen (as well as ASD) has appropriate insurance in place with regard to claims such as that made by Bembridge and/or PB and which it seeks to pass on to ASD. It is clear from the judgment of Christopher Clarke J in *Balmoral v Borealis* [2006] EWHC 1900 (Comm) that the lack of any such insurance on the part of the buyer faced with the exclusion clause was one important matter which helped to tip the balance against the seller, who was insured. See in particular, paragraphs 418 and 422. As Craig Sharp said himself, insurance was one of the ways (together with Allen's own exclusion clauses) in which Allen protected itself against the recognised risk of buying goods from suppliers like ASD who had such clauses.

75. In terms of relative strength of bargaining power, it may well be that Allen would not have been able to negotiate different terms with ASD at least not without a significant increase in price but this is a somewhat artificial point when Allen's commercial imperative was to source the goods at the cheapest cost. It did of course have choice as to which supplier to use albeit that there would have been similar terms there as well. But it is not as if ASD was the only supplier. Allen could have gone to a different one. In this regard I agree with the observations of the Sheriff Principal in the Scottish case of *Denholm Fishselling v Anderson* [1991] SLT 24 who stressed that even if all sellers had the same terms the fact remained that the buyer could choose not to deal with the particular seller he did deal with. It is sometimes said that the fact that all sellers have the same terms counts against reasonableness because the buyer then has no real choice but to deal on those terms. That may be so but where the context is one commercial party dealing with another in a market where such terms are commonly used by sellers up and down the line (as Allen did itself when acting as seller) and where price is the determining factor, the prevalence of such terms is if anything a factor in favour of reasonableness.

Knowledge of the Terms

76. Allen may not have known of clauses 8.6 and 8.8 in their precise formulation but Craig Sharp was certainly aware that there would be terms of such import not only because they were commonplace in the industry but also given Allen's own terms which in fact appear to be somewhat more restrictive. That is actual knowledge. This is not a case where an unacceptable amount of "guesswork" would have been needed on the part of the buyer to appreciate the import of the term involved. (cf *Gill v Mayer* [1992] 1 QB 600, 608F).

77. Guideline (c) speaks of constrictive knowledge, too. Though less important given actual knowledge Allen in any event should have known of such terms given the extensive course of dealing between the parties and its express acceptance of the Terms when opening the credit facility (although my findings here would be the same even if Allen had not signed the application form for the credit). To the extent that Craig Sharp did not read the precise terms because he knew broadly what they would say and was more interested in price, that counts in favour of reasonableness. Indeed, as already noted not only did Craig Sharp and his father know of such terms, they agreed that they made sense or were reasonable. I do not agree that these were simply comments limited to a consideration of the commercial interests of ASD. They were looking at the question in the round and of course while Allen was a buyer from ASD, it was a seller to PB. Moreover there was a conscious acceptance of the risks inherent in buying on such terms in order to get the best price. There was, therefore, "real consent" on the part of Allen to these clauses - see paragraph 10 (5) of the judgment of Potter LJ in *Overseas Medical v Orient Transport* [1999] 2 Lloyds Rep 273. In terms of the important concessions made by Craig and Brian Sharp in their evidence Mr

Terry invited me to dismiss them on the basis that they were simply suggestible and gullible witnesses like Ms Chotalia in that case whose evidence was rejected by the judge at first instance - see paragraphs 11 and 12 in *Overseas Medical*. I see no reason to take that course. What Craig and Brian Sharp were doing was giving an honest account of the commercial realities as they saw them and they were commendably frank in recognising the prevalence of the terms, why they were needed and why they would routinely take the risk.

The nature of the goods supplied

78. As noted above, the gratings and clips were not actually made by ASD but purchased from Lichtgitter (UK) Limited, although Allen would not have been aware of that. The gratings themselves are a commonplace product. All that had to be done was to make them to the right dimensions. In that sense they were not really made or altered to the "special order" of Allen. It is not always clear whether this factor is to redound in favour or against the customer. Certainly it cannot be said that this was some unusual modification to the product required by the customer which might not work so that the customer should take the risk. On the other hand Allen had a clearer picture of the particular role of this grating because it was supplying the entire platform not just one component as ASD was. Overall I consider that the nature of the goods supplied here is neutral on the question of reasonableness.

The width of the clause

79. Mr Terry submits that clauses 8.6 and 8.8 amount to a "blanket exclusion". I would not go that far. They do not exclude all liability *per se* - on any view there are express terms as to description and lack of defects and apart from the (mandatory) acceptance of liability for personal injury or death, negligence causing damage to property up to £1m is accepted. So is liability to replace or refund the price. This should not be underestimated. While the contrast between the claim in this case - £7m - and the financial limit - £705 - may seem vast, ASD supplies a wide range of products some for much more than £705 and it must be that in many cases claims based on non-conformity with description or for defects may not exceed, or be for much more than the price. And as already noted, the Terms are more generous than Allen's.

80. In this regard Mr Terry relies upon the decisions of the Court of Appeal in the related cases of *Messer v Britvic* [2002] EWCA Civ 548 and *Messer v Thomas Hardy* [2002] EWCA Civ 548. Here, Messer had supplied to the Defendant sparkling drink manufacturers, carbon dioxide which had been contaminated with benzene, which in high enough quantities acts as a carcinogen. Once this became known the Defendants withdrew substantial quantities of unsold drinks due to public health concerns albeit that the actual benzene levels present did not pose a risk. Messer had purchased the carbon dioxide from a company called Terra. Messer's terms included an exclusion of liability for breach of the statutory implied terms.

81. In *Britvic* the Court of Appeal held that such exclusion was unreasonable because there was no basis on which the buyer could be expected to check that there were no extraneous elements in the carbon dioxide supplied which could only have resulted in a mishap during manufacture, and the buyer was entitled to assume that there were no such extraneous elements. The case before me differs. First, while I do not in any way seek to trespass on matters which may arise at trial, Allen is at least in a different position to the buyer in *Britvic* with regard to the problem underlying the claim. It would at least be possible to check if the correct number of clips for the job had been supplied either on delivery or later. Second, the carbon dioxide was supplied expressly for public consumption so one can understand that the Court would baulk at an exclusion of liability for, among other things the presence of extraneous elements causing a perceived health hazard and mass product withdrawal. In that context the Court of Appeal held that the fact that Messer was only the supplier and not the manufacturer did not assist it. See paragraphs 24-26 of the judgment of Mance LJ (as he then was).

82. In *Thomas Hardy* the Court of Appeal considered Messer's limitation of liability clause, having ruled in *Britvic* that its prior exclusion of any liability was unreasonable. Mance LJ held that a clause not dissimilar to clauses 8.6 and 8.8 was unreasonable also. He described it as a "blanket exemption" which is obviously true in relation to the type of loss it sought to exclude but this appellation needs to be seen in context. In paragraph 26 Mance LJ first held that when considering the reasonableness of the clause generally, it could not be regarded as referring to (ie only likely to be invoked in) relatively uncommon or unlikely situations. Since no-one could expect the customer to test even for basic compliance with BS 4105 (and inferentially) let alone the presence of extraneous elements, there was a blanket exemption in respect of matters fundamental to each supply. And again, the context is supply of something intended for public consumption.

83. I do not therefore consider that the decisions in *Messer* give any significant support to Allen's contentions here.

Non-reliance upon such clauses in the industry

84. In the well-known case of *Mitchell v Finney-Lock* [1983] 2 AC 802 the House of Lords had to consider the reasonableness of a clause limiting liability for defects in the seeds sold to the Claimant to their price under (the modified) s55 of the Supply of Goods (Implied Terms) Act 1973 ("the 1973 Act"). Under the 1973 Act, the test of reasonableness was not the same as that under UCTA. The term would be void if "it would not be fair or reasonable to allow reliance on the term". In other words the assessment of reasonableness is tied to the particular case before the Court.

85. The seed supplied here was defective and once grown was commercially useless. It had cost £201 but the claim was for over £61,000. The Claimant knew of the condition concerned and would have had no difficulty in understanding it. This and the magnitude of the claim as against the price paid, went in favour of the Defendant's case on reasonableness. Such limitations of liability appeared also to be universal as between seedsmen and farmers. But what Lord Bridge considered decisive (against reasonableness) was the fact that 4 witnesses called by the Defendant (two of whom were independent seedsmen) said that it had always been their practice to negotiate settlements of claims they considered to be genuine (ie not rely on the clause). Lord Bridge then stated that "This evidence indicated a clear recognition by seedsmen in general and the appellants in particular that reliance on the limitation of liability imposed by the relevant condition would not be fair or reasonable."

86. I make two observations in respect of that conclusion. First, and obviously, it is one made on the particular facts of that case after an assessment of the evidence. Second, there was a particular resonance between the stated effect of that evidence and the then-applicable statutory test ie the industry would answer the very question posed ("is it fair or reasonable to rely upon it?") in the negative. I do not go so far as to say that established non-reliance by the industry cannot be relevant under the UCTA test of reasonableness but the different test under the 1973 Act is part of the context of the decision in *Finney Lock.*

87. Allen, in the case before me, has attempted to mount a similar exercise to show industry non-reliance on clauses such as 8.6 and 8.8.

88. The principal evidence relied upon was that given by Kevin Parkin of Parkin Limited who has worked for 25 years in the fabrication industry. Much of his WS concerned general observations which could not possibly be accepted without qualification for example in paragraph 17 that "trade is undertaken on mutual trust and a comfort that a large supplier will have a reasonable approach to the execution of the contract and the transaction will be based on fairness." Other points about the inability of small fabricators to understand the implications of terms were in fact contradicted (at least for this case) by Craig Sharp's own evidence. So Mr Parkin's evidence needs to be approached with a degree of caution.

89. I do not regard Mr Parkin as an expert witness and indeed he was not proferred as such. But he was entitled to put himself forward as a witness of fact, namely as to his own experience. In one case, when working for another company which had standard terms and conditions he recalled that the company settled a claim and the product was replaced. More detail could not be given because of confidentiality. Not much can be drawn from this except to note that ASD does actually accept the principle of product replacement in the Terms. Equally, in another case, all that we are told is that replacement product was supplied although this was not allowed for in the standard terms. He then recalled other instances where suppliers agreed to replace product despite their terms. See further paragraphs 15 - 16 of his WS. In paragraph 17 he says that he cannot recall an instance where a supplier has attempted to rely upon clauses such as 8.6 and 8.8 but in fact the examples he gave all concerned a claim to have replacement product not the kind of losses alleged here. In paragraph 18 he makes what seems to me from the experience of one person to be an impossibly ambitious statement to the effect that "the industry would simply not regard it as reasonable for a supplier to decline liability by enforcing the types of clauses [at issue here] .because they routinely pay appropriate compensation in legitimate cases and, as a matter of accepted practice do not invoke these clauses as protection." It is quite impossible to take that statement at face value given the nature of the examples Mr Parkin gave and the very generalised nature of his evidence. Moreover it is qualified by reference to "appropriate compensation" and "legitimate cases".

90. In cross-examination Mr Parkin somewhat reluctantly conceded that in a case like this one could not say that a supplier facing a claim for £7m would never rely upon terms to limit or exclude liability even though in my judgment it would be absurd to suggest otherwise at least without extremely powerful industry evidence not present here. The fact that according to Mr Parkin a supplier would go out of business if it <u>always</u> relied on the terms is not to the point. He also said that the supplier would check whether the component was critical at the outset ie consider what the risk of a claim might be and try to avoid the riskier transactions. I follow that but it does not deal with the issue as to some universal non-reliance by the industry if a claim is made. He later agreed that it would be commercially sensible to rely on a clause in a claim like this but then again went back to saying that the best course would be to go to a trustworthy supplier where the product sold would work anyway. Ultimately he accepted that every situation involving a claim and an available clause had to be looked at on its own merits.

91. Overall I did not find Mr Parkin a very impressive witness and what he could properly derive from his own experience was very limited and of little real assistance. It cannot possibly support a conclusion of the kind reached by Lord Bridge in *Finney Lock.* Moreover Craig Sharp accepted that reliance on such terms was not unusual - see paragraph 28 above.

92. An additional point sought to be made by Allen was that a record of how ASD had dealt with customer complaints could be relevant because it might show routine settlement of claims without any recourse to the Terms. It appears that there was some database of such complaints although at least at the Tividale depot there was no complaints department as such despite an e-mail address referring to "customer care". However, since the non-reliance point had been first raised by Allen on 1 June 2012, it has not sought any disclosure of documents relating to complaints, insofar as they are available. It could have done so. All one is left with is the speculative point that such records might perhaps throw light on this issue. In my judgment this takes the matter no further.

Conclusion

93. Having considered all of those factors and in particular the evidence of Craig and Brian Sharp and the fact that Allen is appropriately insured, I have no hesitation at all in concluding that ASD has discharged the burden of showing that clauses 8.6 and 8.8 are reasonable. Accordingly, the answer to Issue 4 is "Yes".

Overall Conclusion

94. I have therefore found in favour of ASD and against Allen on the three live issues, 2 - 4. I am grateful to counsel for their excellent oral and written submissions and will hear them following handing-down of judgment on all post-judgment matters.