Case No: C50MA004

Neutral Citation Number: [2017] EWHC 767 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

TECHONOLOGY AND CONSTRUCTION COURT

Manchester Civil Justice Centre,

1 Bridge Street West, Manchester M60 9DJ

Date: 7 April 2017

Before:

HIS HONOUR JUDGE STEPHEN DAVIES

SITTING AS A JUDGE OF THE HIGH COURT

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Between :

GOODLIFE FOODS LIMITED	**Cla**
- and -	
HALL FIRE PROTECTION LIMITED	**Defe**

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Aidan Christie QC & Martyn Naylor (instructed by **Clyde & Co LLP, Manchester M2**) for the **Claimant**

Leigh-Ann Mulcahy QC & Katherine Del Mar (instructed by **Plexus Law, London EC3R**) for the **Defendant**

Hearing dates: 6, 7, 8 March 2017

Draft judgment circulated: 23 March 2017

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JUDGMENT

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

Contents

A. Introduction and summary of my decision

1. The claimant ("Goodlife") claims that the defendant ("Hall Fire") is liable for a fire which occurred in an industrial frying machine at its factory premises in Warrington on 25 May 2012 and which it says led to property damage and business interruption losses in excess of £6 million. It claims that the cause of the fire was a failure or malfunction of a fire suppression system supplied and installed by Hall Fire some 10 years earlier in 2002. Its principal case is that there was a defect in the installation of a compression joint on a dog-leg section of pipework on the top of the hood of the frying machine which should have carried suppressant media to extinguish or suppress the fire but which did not do so because the joint failed and separated.

2. The claim was issued in 2016, so that it is common ground that the pleaded claim for breach of contract is statute barred under the Limitation Act 1980. The existing pleaded claim also pleads negligence, and it is common ground that if there is a valid claim in negligence the 6 year limitation period would not begin to run until the date of the fire, with the result that the negligence claim would not be statute barred. However Hall Fire contends that clause 11 of its standard terms and conditions, which it pleads was incorporated into the contract with Goodlife, and which it pleads was reasonable under the Unfair Contract Terms Act 1977 ("UCTA 1977"), validly excludes any claim in negligence. This issue was ordered to be tried as a preliminary issue and is the subject of the first part of this judgment.

3. Prior to the hearing of the preliminary issue Goodlife identified an alternative claim for breach of statutory duty under s.41(1) of the Consumer Protection Act 1987 ("CPA 1987") and paragraph 14 of the Electrical Equipment (Safety) Regulations 1994 ("the 1994 Regulations"). By s. 41(4) of the CPA 1987 the exclusion or limitation of liability under s. 41(1) by any contract term or notice is prohibited, so that it is common ground that if there is a valid claim under s. 41(1) Hall Fire cannot rely on clause 11 to defeat it. However Hall Fire did not accept that the proposed claim under s. 41(1) had a real prospect of succeed and, hence was not willing to agree to Goodlife amending its claim to plead it. Accordingly, Goodlife issued an application for permission to amend, which by agreement was dealt with at the same time as the trial of the preliminary issue.

4. The particular points which were argued by Hall Fire as demonstrating that the proposed new claim has no real prospect of success were:

(a) Goodlife has no real prospect of proving that the fire suppression system was “electrical equipment” falling within the scope of the 1994 Regulations.

(b) Goodlife has no real prospect of establishing that the limitation period applicable to its s. 41(1) CPA 1987 is not subject to a longstop limitation period of 10 years from the date of the supply of the fire suppression system.

5. It is agreed that issue (b) is a pure point of law. I am told that there is no authority on the point. Hall Fire submits that the applicable limitation period is that which applies to product liability claims under Part 1 of the CPA 1987, which includes a 10-year longstop period from the date of supply of the relevant product. Goodlife accepts that if that was so then the claim would undoubtedly be statute-barred. However Goodlife submits that the applicable limitation period is the general limitation period for claims for breach of statutory duty causing damage to property, which is 6 years from the date of accrual of the cause of action, which here is the date of the fire. If so, then it is accepted by Hall Fire that the claim is still within the limitation period. In the circumstances, and since Hall Fire would not be prejudiced by the amended claim, if allowed, being treated as having been issued as at the date this action was begun, Hall Fire did not submit that the proper course was for me to refuse the application and require Goodlife to issue a new claim. Furthermore, Hall Fire did not contend that if I concluded that the claim was properly arguable permission to amend should be refused on discretionary grounds.

6. Issue (a) involves the application of the 1994 Regulations, on their proper construction, to the facts of this case. Again, I am told that there is no authority directly on point as to the definition of electrical equipment under the 1994 Regulations. The issue cannot be determined without reference to the detail of the fire suppression system and the respects in which it is alleged that it failed or malfunctioned. Mr Christie QC leading Mr Naylor for Goodlife properly reminded me that it was inappropriate to conduct a mini-trial insofar as there was any dispute as to these matters. He also reminded me that this is so, even where there is no obvious conflict of fact at the time of the application, if reasonable grounds exist for believing that a fuller investigation into the facts would add to or alter the evidence available to the trial judge and so affect the outcome of the case: see the summary by Lewison J of the applicable principles in Easyair v Opal[2009] EWHC 339 (Ch) at [15]. I accept that I can and should only determine this issue against Goodlife if I am satisfied that this is not the case and if, on that basis, I am satisfied that the proposed amended claim has no real prospect of success.

7. I must express my gratitude at the outset for the efficient preparation for this hearing and for the excellence of the written and oral submissions I have received.

8. In short, I have decided that: (a) clause 11 of Hall Fire’s standard terms and conditions was incorporated and was reasonable and, thus, is effective to exclude any liability for negligence; and (b) Goodlife has no real prospect of proving that the fire suppression system as a whole, or the pipework about which primary complaint is made, comprised electrical equipment within the Regulations. It follows that this claim in its existing form cannot succeed and must be dismissed. It also follows that the proposed amended claim cannot succeed and the application to amend must be dismissed. I cannot however completely discount the possibility that some more limited and more focussed claim based on breach of the 1994 Regulations may properly be made, and my provisional view is that Goodlife should at least be given the opportunity to see if that is something which it can and does wish to do by means of a draft substituted Particulars of Claim. I am satisfied that it is at least

reasonably arguable that any proposed claim under the CPA 1987 and the 1994 Regulations is not limitation barred.

B. The preliminary issue – the exclusion clause

B.1 The evidence in relation to incorporation of clause 11 and its reasonableness

9. I heard evidence from Mr Foster for Goodlife, who was unable to say anything of direct relevance on this topic, since he was only employed by Goodlife from 2003. No explanation was offered for the failure to call Mr Hamlett, the managing director of Goodlife both now and in 2001-2002. Nor was any explanation offered for the apparent failure to make contact with, seek to obtain a statement from, or to call Mr Brady, who dealt with Hall Fire in relation to the original quotation. Whilst I do not consider that I should draw adverse inferences against Goodlife in relation to any specific matters about which these men might have given evidence, equally I am satisfied that there is no proper basis for drawing inferences favourable to Goodlife in relation to matters about which those witnesses might have been able to assist had they provided witness statements and been called. I should also say that due to the passage of time and the way in which it operated its document retention policy Goodlife has been unable to disclose anything in relation to the formation or performance of this contract other than a copy of the quotation or to assert with any confidence what – if any – further documents accompanied the quotation, or what – if any – further documents were sent or received by it which might have been relevant to this case.

10. I also heard evidence from Mr Green, the managing director of Hall Fire then and now. Whilst he could not give direct evidence about what had been said and done as regards the formation of the contract, he could give direct evidence about the standard terms and conditions in use at the relevant time and the instructions he gave to Mr Bartle about the procedure for submitting quotations. Whilst his witness statement was perhaps a little overstated in some respects, in his oral evidence he was plainly honest, answering questions openly and fairly even where his answers were unfavourable to Hall Fire's case. Since Hall Fire is insured and its insurers are defending this case on its behalf, there is no indication that he has any direct financial motive to slant his evidence in favour of Hall Fire's case and nor did he in my view. I entirely accept that he was giving evidence of events going back to 2001 – 2002, about which he could have little unaided detailed recollection, but I do accept that his evidence in its essential gist, buttressed as it was in my view with such documentation as was available to him, was reliable and I accept it. Hall Fire had also not retained all of the documents which it says would have been, generated and provided to Goodlife, and whilst Mr Green's evidence was to that extent of a reconstructive nature, i.e. what Hall Fire would have done rather than what he could say it actually did, nonetheless I accept it.

11. I reach broadly the same conclusions as regards the evidence of Mr Bartle, who was at the time the senior employee in charge of Hall Fire Solutions, the division of Hall Fire which contracted with and undertook the work for Goodlife. Again, he was plainly honest and non-partisan, having no continuing connection with Hall Fire. Again, I am satisfied that all that he could really speak to was the procedure he was expected to follow and believed that he followed, as opposed to whether or not the process had actually been followed in relation to this particular contract. Accordingly I will have to make my decision on that point by an evaluation of all of the relevant available evidence, oral and documentary, drawing such inferences as appear appropriate, but I do so on the basis that I accept Mr Bartle's evidence as reliable.

12. My findings are as follows.

General matters

13. Hall Fire had been trading as Hall Fire Protection since 1972 in the business of automatic fire sprinkler systems used in a variety of commercial, industrial and retail developments, with projects ranging in value from £1,000 to £1,000,000, and with some taking up to 6 months or more to design, install and commission. It had produced a standard form specification to accompany its quotations, an example of which was produced by Mr Green with his second witness statement. It comprised 12 separate sections, of which section 1 was the general description of the system, section 2 the details of the equipment supplied, and section 4 was entitled "conditions of contract". The latter was produced with the benefit of legal advice. It included a clause 20 which is similar, but not identical, to the clause 11 relied upon by Hall Fire in this case.

14. In early 2000 Hall Fire took over the business of Fire Solutions Ltd, which in around June 2000 became a trading division of Hall Fire and was named Hall Fire Solutions. The business was acquired to enable Hall Fire to offer a specialist fire suppressant system. Mr Bartle and Mr Shaw, who became the general manager and the technical manager of Hall Fire Solutions respectively, brought with them their technical knowledge of the system, whilst the contract management expertise came from the existing Hall Fire management team. Mr Green's evidence was that before Hall Fire Solutions stated trading he revised Hall Fire Protection's standard terms and conditions, so as to make them compatible with Hall Fire Solutions' business. Attached to his first witness statement was a version which, as revealed by closer scrutiny, could not have been produced until September 2001 because clause 19 referred to a standard form of warranty bearing that date. Unsurprisingly Goodlife's lawyers queried this. In his second witness statement Mr Green explained that the standard terms and conditions were revised in September 2001 to refer to an updated form of warranty produced at that time. He produced the original and the revised warranty to confirm his evidence on that point. His evidence was that the version produced in around June 2000 was the same as that produced in September 2001, save for the updated reference to the revised warranty in the later version.

15. Under cross-examination Mr Green said that Fire Solutions Limited also had its own pre-existing standard terms and conditions. He said that whilst he could not recall their detail, in particular whether or not they contained an exclusion or limitation clause or if so in what terms, he accepted that he wanted to introduce Hall Fire Protection's standard terms and conditions because in his view they were "tight".

16. Mr Christie suggested that Mr Green had not in fact drafted the Hall Fire Solutions' standard terms and conditions until September 2001, which he suggested would be consistent with Mr Green obtaining legal advice in relation to the revised warranty at that time, and also including provisions in the standard terms and conditions in relation to such legal matters as statutory interest, excluding third party rights and a provision for arbitration. Mr Green did not agree. He explained that the warranty had simply been adapted from a standard JCT form, which I accept, and it did not strike me that the drafting of the new provisions relating to interest, third party rights and arbitration was such as one would expect from a contract lawyer.

17. I do accept that Mr Green did not give a full account in his witness statements. I also accept that he made no reference to the standard terms and conditions previously used by Fire Solutions Limited in his witness statements. However I am satisfied that this was not because he did not in fact have any recollection of these matters but because – for whatever reason – he was not asked to explain the detail of this in his witness statements. I also note that the quotation refers to "standard HFS terms and conditions". This wording would only make sense if what was in existence at the time were

bespoke Hall Fire Solutions standard terms and conditions which were not the pre-existing standard terms and conditions of Fire Solutions Limited nor the pre-existing standard terms and conditions of Hall Fire Protection. Thus I am satisfied on the balance of probabilities that by the time that Hall Fire Solutions sent its quotation in January 2001 he had produced new standard terms and conditions for Hall Fire Solutions and that they were in the form of the September 2001 version save for the updated warranty reference.

18. I am also satisfied that he did provide Hall Fire Solutions with the new standard terms and conditions and gave clear instructions to Mr Bartle and the Hall Fire Solutions' team that they were to be sent with all quotations in future. I am also satisfied that Mr Bartle fully understood the importance of complying with these new procedures and that he did comply. This was not a hostile takeover, where Mr Bartle and the team were resistant to the new way of doing business. It was an amicable arrangement, whereby Hall Fire Protection would provide its contract management expertise and Hall Fire Solutions would provide its technical expertise, for the mutual benefit of the new division.

19. Goodlife produced frozen food products at its factory in Warrington. It had a multi-purpose fryer which it used to produce the food products which were frozen before being sold to customers such as supermarkets. At the time of the quotation sent in January 2001 its annual turnover (for the year to 31 December 2000) was in the region of £2.7 million with a profit before tax of around £103,000, and it employed around 40 people. Hall Fire was a company of a similar size, with an annual turnover (for the year to 30 June 2000) of around £4.8 million with a pre-tax profit of around £150,000, and employing around 60 people.

20. Although I have not received formal evidence about this, it is common ground that at the time of the fire Goodlife was insured against property damage and business interruption, since this is an adjusted claim pursued by subrogation by its insurers. As I have said Hall Fire is insured against this claim, although no details have been provided. Whilst there is no hard evidence that both parties carried similar insurance in 2001 – 2002, in the absence of evidence to the contrary I consider that I am entitled to and do infer that both parties carried the same or similar insurance at this time. Perhaps more importantly, I am satisfied that this is precisely what would have been expected to be the position had attention been given to the question at the time. It would be most surprising in my judgment if a company such as Goodlife, engaged in a commercial food production operation and using an industrial fryer to do so, had not carried insurance against property damage and business interruption, with the limit of cover being decided upon no doubt in consultation with its insurance brokers. It would also be most surprising if a specialist fire protection company such as Hall Fire had not carried public liability insurance and product liability insurance, with the limit of cover decided on in consultation with its insurance brokers. Neither party has tendered evidence that they were, or would have been, uninsurable in 2001 – 2002 in relation to such risks, whether absolutely or at any premium which they were reasonably able to afford.

The quotation and what was sent with it

21. It is apparent from the quotation from Hall Fire Solutions dated 30 January 2001 that Mr Bartle visited Goodlife's factory earlier that day and discussed the provision of a fire detection and fire suppression system. There is no evidence as to whether or not there was an existing system, or why Goodlife had decided it wanted to obtain such a system at this point in time, nor as to why Goodlife had only approached Hall Fire or whether it had also approached other suppliers. There is no evidence at all about whether anything was discussed at the meeting of any relevance to the issues in this case.

22. The quotation provided a summary of the proposed fire system. It also said that a full description could be seen from the “accompanying system details”. This is a reference to a document described as a “K system manual issue 1 amendment 06/02/2001”, which features more in relation to the amendment application, ans which is a 14 page document providing a detailed description of the fire suppression system in question. The quotation concluded as follows:

“To design, supply, install and commission … £7,950 net.

Prices are quoted net.

Delivery 4-5 weeks ARO.

Standard HFS terms and conditions apply.”

It was then signed by Mr Bartle.

23. The key issue between the parties is whether or not Hall Fire Solutions’ standard terms and conditions were sent with the quotation. I am satisfied that they were. Mr Bartle said that he would have sent the quotation by email or fax, together with the system details and the standard terms and conditions. I am satisfied on balance that they were sent by fax, which explains why the version disclosed by Goodlife has a “received” stamp on it. Mr Christie makes the point that the quotation referred specifically to the “accompanying system details” but not to the standard terms and conditions also “accompanying” the quotation. However I do not accept, as Mr Christie submitted, that this was because Mr Green and Mr Bartle believed that it was necessary only to refer to, without physically attaching, the standard terms and conditions, simply in order to avoid losing the “battle of the forms”. Both Mr Green and Mr Bartle said, I am satisfied genuinely, that they believed it was necessary to send the standard terms and conditions as well, and there is no real basis for thinking that their aspiration was not to incorporate the Hall Fire Solutions standard terms and conditions rather than simply being stuck with Goodlife’s standard terms, if indeed there were any.

24. Although Goodlife has only disclosed the quotation itself, which might be said to support an argument that it did not receive the standard terms and conditions, the strength of that argument is undermined by the fact that it has not even been able to disclose the system details or the subsequent invoice or, indeed, its purchase order dated 2 April 2012 referred to in the invoice dated 16 May 2012 which Hall Fire has disclosed. It is clear from Goodlife’s answer to Hall Fire’s Request for Further Information that it adopted a document retention and storage policy which meant that it is now unable to advance a positive case to the effect that it did not receive the standard terms and conditions with the quotation. As I have said, in the absence of evidence from Mr Hamlett or Mr Brady as to what happened, or more realistically perhaps as to the company practice in 2001 – 2002 as to what would have been done with any documents sent with the quotation and subsequent contract documents, and how and why the quotation has been retained but nothing else, it is simply not possible in my view to make a positive finding in its favour that its inability to disclose any other document is evidence to show that that was the only document which was sent.

25. I accept, as Mr Christie submitted, that mistakes do happen and that it is possible, through human error or otherwise, that the standard terms and conditions were not sent with the quotation. However in the absence of any positive evidence or reason to believe that this happened in this case, in my view it is more likely on the balance of probabilities that the prescribed procedure was followed. I do accept Mr Christie’s submission that Hall Fire’s evidence as to its documented quality management system and its auditing procedure was a little confused and confusing, and in particular that Mr

Bartle's evidence was to the effect that he was not aware that any written procedure requiring the standard terms and conditions to accompany all quotations had been provided to the Hall Fire Solutions' office. However I do accept his evidence that he was aware of the procedure, and of the importance of following it, so that he had no reason to think that he had not done so on this occasion.

The standard terms and conditions

26. I turn now to the standard terms and conditions which I have found were sent.

27. They are headed: "Section 4 CONDITIONS OF CONTRACT (HALL FIRE SOLUTIONS)"

28. There is then an opening paragraph which reads as follows:

"We draw your particular attention to the following specific conditions and assumptions on which the tender is based, unless qualified in our covering letter. Any contract would be based on our tender and these supplementary conditions Sections 4-12 which do not provide for the imposition of any form of damages whatsoever and are based on English Law."

29. There are then 22 separate conditions of which the first 19 are on the first page, in relatively small but by no means illegible type. The individual clauses do not have headings. The clause in question, clause 11, appears approximately two thirds of the way down the page. It reads:

"(11) We exclude all liability, loss, damage or expense consequential or otherwise caused to your property, goods, persons or the like, directly or indirectly resulting from our negligence or delay or failure or malfunction of the systems or components provided by HFS for whatever reason. In the case of faulty components, we include only for the replacement, free of charge, of those defective parts. As an alternative to our basic tender, we can provide insurance to cover the above risks. Please ask for the extra cost of the provision of this cover if required."

30. I should also refer to clause (19), at the bottom of the page, which provides as follows:

"(19) We exclude any costs associated with the provision of Performance Bonds, Design/Collateral Warranties, or any other special insurance. Please refer to the enclosed letter from our insurance brokers which details the extent of insurance cover provided by us. Please note that HFS do not provide Professional Indemnity Insurance. Any subsequent warranties provided (at extra cost) will be as our standard HFP/Wa: Sept 2001."

31. It is not suggested that any letter from Hall Fire's insurance brokers was in fact enclosed, and there is no evidence about what – if anything – it may have said.

32. So far as the references to insurance are concerned, Mr Green's evidence was that he had not in fact had any specific discussions with Hall Fire's insurance brokers or its insurers about providing insurance to its customers to "cover the above risks", nor had any previous customer ever asked for it. Whatever its relevance to this case in terms of the true construction and/or the reasonableness of clause 11, it is quite clear that if Goodlife had in fact responded to ask about the possibility of taking out such insurance all that Hall Fire would have been able to do would have been to refer it to its own insurance brokers to see what insurance might be available and at what cost. There is no evidence that there was any such conversation, and of course the likelihood in my view is that Goodlife would have had no reason to want to do so anyway, since it would have had its own insurance which it would have regarded as perfectly adequate for its own purposes.

33. Finally I should refer to section 9, entitled "WARRANTY", which provided as follows:

“Major plant items supplied under this contract will carry out [sic] suppliers’ guarantees which will normally apply from the date of delivery to site of the plant item in question. Excepting these items, the 12 month defects liability period will start from the date of practical completion, which is the date on which the system is available for the beneficial use of the customer, even though on this date, minor snagging items may still be outstanding. The guarantee is only valid if you have carried out the necessary and preventative maintenance fully in accordance with the recognised standards and our recommendations, manufacturers’ detail, insurance companies recommendations etc.”

34. As I have already said, although the quotation was produced in January 2001 it appears that nothing concrete happened until over a year later when Goodlife submitted a purchase order on 2 April 2002. Neither party has been able to produce a copy of this purchase order; it can only be inferred that one was sent because it was referred to on Hall Fire’s subsequent invoice. No-one has been able to explain why it took so long for the quotation to be taken up. There is no suggestion or evidence that a further quotation was provided in the meantime. There is no evidence from Goodlife as to what its standard form of purchase order (if indeed there was one) would have provided. Thus there is no suggestion or evidence that the purchase order amounted to a counter-offer [1] .

35. Mr Green’s evidence was that at the stage when an order, whether written or oral, was received the papers would be passed from Hall Fire Solutions’ office to the Hall Fire Protection office, some 20 miles away, from where an acknowledgement of order would be generated and submitted to the customer together with a further copy of the standard terms and conditions. Hall Fire has been unable to produce a copy of any written acknowledgement of order in relation to this contract. Nonetheless I accept Mr Green’s explanation as to why this cannot now be produced, and also accept that on the balance of probabilities an acknowledgement of order was produced in the same terms as the sample version he has been able to locate, making it clear that the order was accepted “strictly on the terms and conditions contained within our quotation, in particular sections 4-12 which are enclosed”, and I also accept that it was sent with the standard terms and conditions. At this stage I am satisfied that the standard terms and conditions would have been the September 2001 version, although as I have said this was not materially different from the previous version.

36. I accept that since there is no basis for finding that the purchase order was a counter-offer there is also no basis for finding that the acknowledgement of order was a contractual, as opposed to a post-contractual, document. It might have been argued that since the original quotation had lapsed the subsequent purchase offer might have taken effect as a new offer, which was accepted by the acknowledgement of order, but that is not a case which has been pleaded or advanced, nor is it supported by evidence. Nonetheless I mention it because it may be a factor relevant to the question of incorporation of clause 11 and/or to its reasonableness that a further copy of the standard terms and conditions was sent on any view relatively shortly after the contract appears to have been concluded.

B.2. <u>Incorporation of Hall Fire Solutions’ standard terms and conditions</u>

37. It is necessary to deal separately with the question of the incorporation of Hall Fire Solutions’ standard terms and conditions in general and the incorporation of clause 11 in particular. The latter question cannot be determined according to Mr Christie without first determining the proper construction of clause 11 and considering the law in relation to the incorporation of what are said to be unusual and onerous conditions. The former question can, however, be determined very simply given the factual findings which I have now made. In short, is quite clear that by sending its quotation, which stated on its face that Hall Fire Solutions’ standard terms and conditions would apply, and by attaching a copy of those conditions to the quotation, Hall Fire had done sufficient to

incorporate the standard terms and conditions as a whole into the resultant contract, and Mr Christie did not nor could he seriously have contended to the contrary.

38. In the circumstances I do not need to decide the rather more difficult question which would have arisen had I not found that the standard terms and conditions were in fact sent to Goodlife with its quotation. The proffering party needs to give reasonable notice of the standard terms and conditions in circumstances which make clear to the other party that it intends to rely on them: see [44] of the judgment of Edwards-Stuart J in Transformers and Rectifiers Ltd v Needs Ltd[2015] EWHC 269 (TCC). If I had found that the standard terms and conditions were not sent with the quotation I would have decided that they were not incorporated. That is because: (a) there was no previous contact of any kind between the parties, let alone contact in the course of which Hall Fire had made it clear that it would only deal on its standard terms and conditions or provided a copy to Goodlife; (b) Goodlife was not engaged in the fire protection business; (c) the standard terms and conditions referred to are not industry standard terms; (d) the standard terms and conditions are lengthy and wide-ranging in their subject matter, and include a widely-drafted exclusion clause to which no express reference was made in the quotation. Whilst I accept that Hall Fire had made it clear that it intended to rely on the standard terms and conditions by stating at the end of the quotation that "standard HFS terms and conditions apply", in my view that by itself was not sufficient notice of those standard terms and conditions. At the very minimum the quotation should have made it clear that the standard terms and conditions contained important terms and conditions and either that Goodlife could obtain a copy upon request or a copy was available for view on Hall Fire's company website.

B.3 The proper construction of clause 11

39. I have had the benefit of detailed submissions as to the proper construction of clause 11. For ease of reference I repeat it here, separated - by adding notional part numbers - into its 3 separate parts:

"(1) We exclude all liability, loss, damage or expense consequential or otherwise caused to your property, goods, persons or the like, directly or indirectly resulting from our negligence or delay or failure or malfunction of the systems or components provided by HFS for whatever reason.

(2) In the case of faulty components, we include only for the replacement, free of charge, of those defective parts.

(3) As an alternative to our basic tender, we can provide insurance to cover the above risks. Please ask for the extra cost of the provision of this cover if required."

40. In summary, it is Goodlife's case that this is an extremely widely drafted exclusion clause which operates so as to attempt to exclude all liability for negligence and breach of contract and every other conceivable type of liability, including civil liability for fraud in all its forms, and so as to attempt to exclude all kinds of loss, including loss for personal injury or death. Moreover if, says Goodlife, the court was to accept Hall Fire's submission that it does not simply exclude liability for negligence, but prevent any duty of care for negligence from arising in the first place, it is wider still.

41. In contrast, it is Hall Fire's case that it operates to exclude liability for negligence (but not in relation to personal injury or death) and to exclude liability for certain breaches of contract, but in both cases subject to a warranty, and that it does not purport to exclude liability for fraud of any kind. It says that in the context of this case there is no difference between preventing a duty of care for negligence from arising and excluding any liability for negligence.

42. There was some question as to the reliance which Hall Fire was seeking to place on part 3 of the clause relating to insurance. Mr Christie had come prepared to meet an argument that Hall Fire was advancing a case that this was an insuring clause which itself had the effect of excluding liability for the risks to be covered by such insurance and/or which had the effect of excluding any right on the part of Goodlife's insurers to bring a subrogated claim for risks covered by such insurance. He submitted, relying on well-known cases such as Mark Rowlands Limited v. Berni Inns Limited [1986] QB 211, Co-operative Retail Services v Taylor Young Ltd[2002] 1 WLR 1419 and Rathbone Brothers Plc v Novae Corporate Underwriting Ltd [2015] Lloyd's Rep IR 95 that this was an impossible argument to run in the absence of an express contractual obligation to insure taken out by one party for the benefit of the other or for both of them. However Ms Mulcahy clarified that this was not the argument which she was advancing, and that her argument was that clause 11 as a whole made it clear that the risks referred to in part 1 were allocated to Goodlife in the expectation that it would insure against those risks, and that Goodlife's insurers could not be in any better position than Goodlife would be to seek to hold Hall Fire legally responsible for such risks. It follows that it is not necessary for me to venture into that territory in this judgment, and I do not do so.

43. Does part 1 of clause 11 purport to exclude liability for personal injury or death? Mr Christie submitted that the reference to "… damage … caused to your … persons" made it clear that this was its intended effect. Ms Mulcahy disagreed, submitted that it was telling that there was no express reference to excluding liability for personal injury or death. She submitted that it was intrinsically unlikely that the clause could have been intended on an objective analysis to seek to exclude such liabilities, given that to do so is expressly prohibited by s. 2(1) UCTA 1977. She submitted that part 1 was clearly intended to be limited to financial losses. She submitted that the reference to damage caused to persons was a reference to financial loss suffered by the customer as a natural or legal person, whether consequential upon physical damage to property or direct damage to its profitability, and might also include reputational damage.

44. There is no dispute that a clause such as this is to be construed by reference to the principles applicable to the construction of exemption clauses generally, which are well-known and are set out in some detail both in Chitty on Contracts and Lewison on the Interpretation of Contacts, to which authoritative textbooks I was referred. By reference to these principles, and without seeking to adopt a strained or artificial interpretation to the words used, I am satisfied that Mr Christie's construction is to be preferred. I acknowledge that Ms Mulcahy's submissions have considerable force. Indeed I also note that this clause could never have operated so as to exclude liability for personal injury or death to anyone other than the other contracting party. It is not as if it was a notice affixed to the fire suppression system seeking to exclude liability for personal injury or death suffered by any employees of the customer or visitors to its premises. It follows that the only circumstance in which it could have been thought to apply was if the customer had been a sole proprietor (or a member of a partnership) who had been injured or killed due to Hall Fire's negligence. I accept that it might be thought to be intrinsically unlikely that this clause could be thought to have been intended to have such a draconian and legally impermissible effect in relation to such a narrow class of persons. Nonetheless, the words "damage caused to your persons" seem to me to be in no way unclear or ambiguous. The surrounding words do not make it clear that only financial loss, whether direct or contingent upon physical damage to property or goods, is covered. There is no need to adopt a strained or artificial interpretation to this clause, as might have been done in the past, since it would be of no legal effect anyway due to s. 2(1) UCTA 1977.

45. This conclusion means that I shall have to grapple later in this judgment with the argument that there is a divergence between two decisions of the Court of Appeal as to whether or not this renders the whole clause unreasonable and of no effect, or only the offending reference to “persons”. Although Mr Christie also submits that it means that I should approach the incorporation of the clause on the basis that this by itself renders it an unusual and onerous clause, I do not accept that submission, because I am satisfied that on any view this element of the clause is deprived of effect by s. 2(1) UCTA 1977.

46. Does part 1 purport to exclude civil liability for fraud in all its forms? Mr Christie submits that it does, and relies upon the closing words “for whatever reason”. Ms Mulcahy submits that it does not. She submits that these closing words are intended to refer only to the immediately preceding circumstances, so as to make it clear that the exclusion operates whatever the reason for the (1) delay, (2) failure, or (3) malfunction of the systems or components provided by HFS. She submits that the words “for whatsoever reason” cannot sensibly be read so that the clause reads “resulting from our negligence or delay or failure or malfunction of the systems or components provided by Hall Fire Solutions or whatever other reason” (emphasis added), where “reason” is a shorthand for other basis of legal liability, and hence embracing civil liability for fraud.

47. In support of this argument she submitted that the law was clear that it would require very clear words for a party to exclude liability for fraud. She referred me to the decision of the Court of Appeal in Regus (UK) Ltd v Epcot Solutions Ltd[2008] EWCA Civ 361. I would refer to and respectfully adopt what was said about this by Sir Kim Lewison in The Interpretation of Contracts at 12:13:

“On grounds of public policy a party may not exempt himself for liability for his own fraud. It is probable that there is no absolute rule of law that precludes a contract from excluding liability for the fraud of a party’s agent. However, if a contract purports to do so “such intention must be expressed in clear and unmistakable terms on the face of the contract.” General words, however comprehensive the legal analyst might find them to be, will not serve: the language used must be such as will alert a commercial party to the extraordinary bargain he is invited to make. Thus a clause purporting to exempt one party from loss or damage “howsoever caused”, “or otherwise howsoever” and “arising or resulting from … any other cause whatsoever” will not exempt that party from liability for his own dishonesty.

In Regus (UK) Ltd v Epcot Solutions Ltd an exemption clause in a licence of offices stated:

“We will not in any circumstances have any liability for loss of business, loss of profits, loss of anticipated savings, loss of or damage to data, third party claims or any consequential loss.”

It was argued (as a prelude to a submission that the clause was invalid under the Unfair Contract Terms Act 1977) that the clause excluded liability for fraud. Rix L.J. rejected that argument. He said:

“Clause 23 as a whole does not purport to exclude liability (in the case of the losses identified in clause 23(3)) for fraud or wilful, reckless or malicious damage. Nor would any such clause naturally be construed as purporting to exclude liability for fraud or wilful damage.”

48. In my view there can be no question of this clause being construed so as to purport to exclude liability for civil fraud, both by reference to the clear words used and also – insofar as unclear - by the application of the principles referred to above.

49. Under part 2 of clause 11 Hall Fire Solutions did “in the case of faulty components include for the replacement free of charge of those defective parts”. This is clearly an effective, although limited,

warranty. Ms Mulcahy made a submission that the “defective parts” would include any parts themselves damaged by a faulty component, but I have no hesitation in rejecting that argument. She did however place reliance on the further warranty in section 9 (see [33] above). Although it does not say so expressly, I am satisfied that this includes an undertaking by Hall Fire Solutions, insofar as necessary, to take reasonable steps to secure the benefit of any supplier’s guarantee for major plant items. It is also the case that there is no definition of what Hall Fire Solutions undertakes to do within the “12 months defects liability period”. However again I consider it reasonable to construe this as meaning that Hall Fire Solutions undertook to make good free of charge defects appearing within 12 months from the date of practical completion, so long as the pre-conditions referred to in the final sentence had been complied with. I accept therefore that this was something of real value which was being offered to the customer under the standard terms and conditions.

50. Finally I turn to part 3 of clause 11. As a matter of construction there is no particular difficulty about this. It does not impose any obligation to insure on anyone let alone to do so on any particular basis. It simply makes clear that Hall Fire Solutions would be willing to provide insurance to cover the excluded risks if required. It clearly could not amount to an undertaking that Hall Fire Solutions would provide insurance, and of course it was being proffered on the basis that the “extra cost” would be added to the “basic tender”.

51. Insofar as relevant, it seems to me that clause 11 was not seeking to prevent any liability from negligence from arising, as opposed to excluding any liability, loss, damage or expense suffered as a result of such negligence. I do not consider that it would have made any difference if it had. As noted by Sir Kim Lewison at paragraph 12.01 of The Interpretation of Contracts, there is little theoretical difference between the two. I would venture to suggest that there is no practical difference either.

B.4 Was clause 11 an unusual and onerous clause and if so was it effectively incorporated?

52. As a fall-back argument Mr Christie submitted that, even if the standard terms and conditions as a whole were incorporated, clause 11 was an unusual and onerous terms which was not incorporated.

53. The principle is succinctly summarised in Chitty on Contracts 32nd edition at [13-015] 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. “Some clauses which I have seen,” said Denning L.J.:

“ … would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.” [Spurling v Bradshaw[1956] 1 WLR 461, 466]

54. As Judge Waksman QC observed in Allen Fabrications v ASD[2012] EWHC 2213 (TCC), this question needs to be approached in a broad way. As he said:

“59. …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.”

“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.”

55. Here, the clause amounts to a wide-ranging exclusion of liability, qualified to some extent by reference to the fact that by clause 11 and section 9 a limited warranty is also provided.

56. Both parties have adduced evidence before me as to the nature and ambit of exclusion and limitation clauses promulgated by other companies also operating within the fire protection industry. Neither party suggests that their evidence in this regard is comprehensive or anything like it. Nor do they suggest that the companies whose standard terms and conditions they have produced represent a limited but reliable sample of the companies operating nationally or locally which Goodlife might have gone to for alternative quotations in 2001-02, or even that the standard terms and conditions which they have produced were also being used by the companies in question at that time. Counsel on each side have produced a very helpful summary of the evidence in this regard. In my view the most which can be gained from this evidence is that:

(1)
All of the companies seek to rely upon some form of exclusion or limitation clause.

(2)
There is, as one would expect, a wide variety of such clauses.

(3)
That promulgated by Hall Fire Solutions is at the most far-reaching end of the spectrum and, it might be said, also at the least sophisticated end of the spectrum.

(4)
In broad terms the most common type of provision, as exemplified by the clauses promulgated by the UK arm of the substantial concern, Tyco, with whom Goodlife dealt after the fire, seek to limit liability to the contract price and to exclude consequential loss, but to proffer some form of warranty and to make clear that liability for death, personal injury and fraud is not affected.

(5)
One of the more sophisticated provisions seeks to exclude liability for consequential loss and to limit any other liability (save for death, personal injury and fraud) to £1 million or the actual insurance proceeds received by the supplier for the liability in question, on the basis that otherwise insurance should be taken out by the customer.

57. Whilst there is no express reference to clause 11 or to its effect in the body of the quotation, and whilst clause 11 is not highlighted in any way as being an exclusion clause, the opening words of section 4 do alert the reader to the fact that the standard terms and conditions “do not provide for the imposition of any form of damages whatsoever”. Whilst that may be a slightly unusual way of putting it which, indeed, is not strictly accurate on my interpretation of clause 11, it is nonetheless something which would alert even the non-legally qualified reader to the fact that the standard terms and conditions do seek to exclude in a significant way the redress which the other party would have against Hall Fire Solutions in the event that something went wrong with the fire suppression system.

58. In my view there is nothing in particular about the character of the parties or their particular dealings which differentiates this case from any other in which one small or medium enterprise (SME) supply company provides a one off supply of goods and/or services to another SME production company, where both would be expected to have access to the usual insurance cover which suppliers and producers take out. Mr Christie says, and I agree, that it would have been known that a failure of the fire suppression system had the potential to lead to a catastrophic fire and significant losses.

However I suspect that in many if not most cases it may be foreseen that if goods and/or services supplied fail there is the potential for a substantial loss, whether due to physical damage or purely economic.

59. Mr Christie points to the wide-ranging ambit of the Hall Fire Solutions exclusion clause. I accept that it is wide-ranging, but I also consider that in commercial reality there is little substantial difference – at least in this type of case - between the total exclusion subject to the limited warranty and defects liability cover offered by Hall Fire Solutions and the more typical limitation of liability to the contract price and the warranty offered by others. That is because in reality there are only two likely causes of loss which a customer such as Goodlife will suffer due to the failure of the fire suppression system offered by Hall Fire Solutions and its competitors. The first is that a problem with the system is discovered before it leads to a fire not being suppressed. Insofar as that is not covered by the warranty, since the cost of the system is – as here – likely to be relatively modest then so will any remedial costs. The second is that a problem with the system leads to a fire not being suppressed in which case it will, if of any significance, likely cause losses which will far exceed the contract price. I appreciate that there may be systems which are far more expensive that that supplied and installed in this case – only £7,490 – and that there may be fires which are far less damaging than that which occurred here, so that there is a range of likely losses and limitations. Nonetheless it does seem to me that in broad terms the types of loss which a customer in this type of case might have contemplated at the time of entering into a contract of this nature would be either the relatively limited cost of rectifying a problem with the system which did not lead to other loss or damage or a potentially catastrophic fire potentially leading to very substantial loss. Limiting the liability to the contract price is unlikely to give the customer very much in the event of the latter occurrence.

60. Mr Christie also points to the failure to carve out liability for death or personal injury. (He made the same submission in relation to fraud, but I have found above that liability for fraud was not excluded by clause 11 on its true interpretation anyway.) Whilst – as already noted – I will have to address the implications of this in relation to the assessment of reasonableness of clause 11 as a whole under UCTA 1977 later, what is clear in my view is that this has no bearing in relation to the point I am now considering, because on any view clause 11 could never be relied upon as effectively excluding liability for death or personal injury anyway, by reason of s. 2(1) UCTA 1977. Whatever its attempted ambit, therefore, in reality it was not an onerous or unusual clause in that respect.

61. In all the circumstances I am not satisfied that this clause 11 is either particularly unusual or particularly onerous. Insofar as contrary to my view it might be said that as an exclusion clause of wide ambit it was by definition unusual and/or onerous, nonetheless I am satisfied that it was fairly and reasonably drawn to Goodlife's attention, because: (a) the standard terms and conditions were expressly referred to on the face of and sent with the quotation; (b) the impact in legal and commercial terms of the exclusion was referred to at the top of the standard terms and conditions. I am also influenced in this case by the fact that Goodlife had ample opportunity to read and consider the standard terms and conditions before concluding a contract, and the fact that there is no evidence that it did not have the commercial acumen and access to legal and/or insurance advice which one would normally expect a SME to have to decide what to do about the proffered standard terms and conditions before concluding a contract.

62. In the circumstances I am satisfied that clause 11 was incorporated into the contract made between the parties. I must therefore now proceed to determine whether or not clause 11 is reasonable under UCTA 1977.

B.5. Does the purported exclusion of liability for death and personal injuries render clause 11 as a whole unreasonable?

63. The starting point is to resolve the argument about the consequence of my finding that the effect of the reference to "damage … to persons" in clause 11 is to purport to exclude liability for death and personal injury. Although it is common ground that this is of no effect, since s. 2(1) UCTA 1977 provides that:

"A person **cannot** by reference to any contract term or notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence" (emphasis added),

There is a disagreement as to whether or not this renders the whole clause unreasonable and of no effect, or only the offending reference to "persons".

64. Chitty addresses the question of severance of exclusion clauses as follows:

"**15-112**

Although the 1977 Act uses the words "except in so far as the term satisfies the requirement of reasonableness", it is the term as a whole that has to be reasonable and not merely some part of it. Thus if the term as a whole is unreasonable, a party cannot be heard to say that the part of the term on which he relies is reasonable. However, where a single provision in a contract consists of several sub-clauses or sentences, it may be difficult to identify what is "the term" for the purposes of the Act.

15-113

There is little doubt that the court's powers under the Act are limited to declaring the term either to be reasonable or unreasonable. The court could not rewrite the term by (say) increasing the amount specified in a limitation of liability clause to a sum which it considered to be fair and reasonable. Nor, it seems, could the court sever words which made the term unreasonable so as to render the term reasonable or limit the application of an unreasonable clause so as to produce a reasonable result.

15-114

If a single term purports to exclude or restrict liability which by the Act cannot in any circumstances be excluded or restricted (for example, liability for death and personal injury resulting from negligence) and also liability which can be excluded or restricted subject to the test of reasonableness (for example, liability in negligence for other loss or damage), it would appear that the term, while being ineffective to exclude or restrict the former liability, could nevertheless be upheld as reasonable in respect of the restriction or exclusion of the latter liability. But it could be argued that the term as a whole is rendered unreasonable by purporting to exclude or restrict the former liability as well as the latter."

65. The case cited in support of the proposition that severance is not permissible is the decision of the Court of Appeal in Stewart Gill Ltd v Horatio Myer & Co Ltd [1992] QB 600. The case referred to in paragraph 15-114 of Chitty is the decision of Parker J at first instance in George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1981] 1 Lloyd's Rep 476, 480, where he left the point open. Chitty does not however refer to a further unreported decision of the Court of Appeal in Trolex Products Limited v Merrol Fire Protection Engineers Ltd (20 November 1991). This decision pre-dated the decision in Stewart Gill by just over 2 months. It was not referred to or cited in Stewart Gill, although it is possible that the argument in Stewart Gill pre-dated the judgment in Trolex. Trolex is referred to by

the Law Commission in their 2002 consultation paper no 166 on unfair terms in contracts as "seeming to disagree to some extent" with the approach in Stewart Gill. I shall need to consider whether there is a conflict between the two cases and, if so, whether either case is binding on me and, if not, which I should follow.

66. In short, and happily for me, I am satisfied that there is no conflict between the two cases, at least as regards the point I need to decide. I am satisfied that I should follow Trolex and hold that the purported exclusion of liability for death or personal injuries is prohibited by s. 1(1) UCTA 1977 and hence of no effect with the result that the relevant words can be treated as being of no effect and the question of the reasonableness of the remaining part of the clause decided on that basis.

67. Trolex was a case where the relevant exclusion clause sought to exclude liability for "consequential loss, damage, personal injury or accident arising from the use of our goods". It was argued by the buyer that the infringement of s. 2(1) UCTA 1977 meant that no part of the clause could be relied upon. Staughton LJ, delivering the first judgment, referred to the passages in the then current version of Chitty which are now to be found in paragraphs 15-113 and 15-114 in substantially the same terms (see above). He held that:

"I agree with the second part of that passage, and hold that if part of a term is ineffective by reason of section 2(1), the remainder can nevertheless be upheld as reasonable. That is all that we need to decide in this case. The wider question, whether one can sever words when only reasonableness is in issue, does not arise, and I express no opinion upon it."

68. Sir Michael Kerr agreed, without addressing this particular question separately. Nourse LJ said that if Staughton LJ was correct in analysing the relevant clause as a single contract term he agreed with his reasoning. He went on to say that in his view however it contained more than one contract term, with that one of them being the exclusion of liability for personal injury arising from the use of the goods, with the result that there was no need to consider whether or not it was possible to sever component parts of a single contract term. He expressed the view that this was the preferable basis for the decision of the point, which he thought to be the correct application of the Act.

69. It follows in my view that the ratio of the decision was that where a case seeks to exclude liability for death or personal injury and also liability for other kinds of loss or damage, the former can simply be excised and the remainder upheld as reasonable if appropriate to do so.

70. Stewart Gill was a case where the relevant clause sought to prohibit the customer from withholding payment of any sum due to the supplier by reason of "any payment, credit, set off or for any other reason whatsoever". The issue was whether the customer was entitled to rely upon a set off. It was held by the Court of Appeal that the clause engaged UCTA 1977, that the supplier had to show that the requirement of reasonableness was satisfied in relation to the term as a whole and not just – as the supplier contended - in relation to the no set off provision, and that it had failed to do so. Lord Donaldson, MR, held that the "contract term" meant "the whole term and nothing but the term" and that the question had to be decided at the time the contract was made rather than by reference to the particular part of it upon which the party was relying in the subsequent dispute. The judgment of Stuart-Smith LJ was to like effect, and Balcombe LJ agreed with both judgments. Thus the point at issue there did not turn on whether or not it was possible to excise that part of the clause which excluded liability for death or personal injuries. Indeed the argument advanced by the supplier was not that the clause could be severed by reference to the position at the time the contract was made, but that only that part of the clause which needed to be relied upon in relation to the actual dispute

needed to be shown to be reasonable. It follows that it could be said that the further observation of Stuart-Smith LJ, where he said that

"Nor does it appear to me to be consistent with the policy and purpose of the Act to permit a contract or to impose a contract term, which taken as a whole is completely unreasonable to put a blue pencil through the most offensive parts and say that what is left is reasonable and sufficient to exclude or restrict his liability in the manner relied upon"

was purely obiter.

71. However that is not an argument for me to decide, since it is clear that Stewart Gill is not in any way inconsistent with the judgment in Trolex, which is binding on me and which, with great respect, I consider to be correct in any event. If I had needed to decide the issue I would have decided that it would not have been possible, on the construction and effect of clause 11, to treat it as containing a number of different contract terms, one of which was the exclusion of liability for death or personal injury, which could therefore be effectively severed from the remainder of the clause. In such circumstances I would have been in no doubt but that the clause as a whole was unreasonable and ineffective. I would also have reached the same conclusion if I had decided that clause 11, on its true construction, did seek to exclude liability for civil fraud.

B.6. Is clause 11, even disregarding the purported exclusion of liability for death and personal injuries, unreasonable?

72. The terms of UCTA 1977 are well known. I have already referred to s. 2(1). Section 2(2) provide as follows:

"In the case of other loss or damage [i.e. other than death or personal injury], a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness."

73. Section 3 also requires the requirement of reasonableness to be satisfied as between contracting parties where one of them deals on the other's written standard terms of business and seeks, by reference to any contract term –

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled –

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all.

74. The requirement of reasonableness is defined by s. 11 as follows:

(1)
In relation to a contract term, the requirement of reasonableness … is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

(2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act …

…

(4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises … whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to—

(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and

(b) how far it was open to him to cover himself by insurance.

(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

75. Schedule 2 provides that:

'The matters to which regard is to be had in particular for the purposes of sections 6(1A), 7(1A) and (4), 20 and 21 are any of the following which appear to be relevant—

(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;

(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

(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);

(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) whether the goods were manufactured, processed or adapted to the special order of the customer.'

76. I have been referred to a number of decided cases in relation to the question of reasonableness. However, as the editors of Chitty observe at [15-101], whilst there are a large body of reported cases which illustrate in general terms the way in which the courts may approach the question of reasonableness, they are of limited value as precedents since the position of the parties and the circumstances surrounding the transaction and the precise wording of the clause in question will necessarily differ in each particular situation. Unsurprisingly, neither party has been able to refer me to any decided case which bears such a strong similarity to the present case as to afford me real value in deciding this case. There are however some points of principle to which I should refer:

(1)
The time for determining the reasonableness of the term is the time at which the contract was made. That determination is therefore not affected by the nature or seriousness of the loss or damage

caused, or the way in which the term is in fact operated or relied on except to the extent to which such events were or ought reasonably to have been in the contemplation of the parties at that time. Further, it would appear that circumstances known only to the party seeking to allege that the term is reasonable are irrelevant if they were not known, and could not reasonably have been known, to the other party at the time the contract was made: see Chitty 15-096.

(2)
Although the guidelines in Schedule 2 are only made expressly applicable for the purposes of s.6 (sale of goods and hire-purchase) and s.7 (other contracts for the supply of goods), they are frequently regarded as being of general application: see Chitty 15-097. This is common ground in this case, but since it seems to me that this is a contract falling within s.7 anyway the Sch. 2 factors are relevant on that basis, even though the claim for breach of contract cannot be pursued in this action due to the limitation period for such a claim having expired.

(3)
The guidelines set out in Sch. 2 to the Act are not, however, exhaustive and in Overseas Medical Supplies Ltd v Orient Transport Services Ltd [1999] 2 Lloyd's Rep. 273 Potter LJ identified no fewer than seven further factors going to the question of reasonableness which, in his view, had been regarded as relevant by the courts in previous cases. This list is obviously not a closed one.

(4)
Two factors mentioned by Potter LJ are of some relevance in this case:

"(8) While the availability of insurance to the supplier is relevant, it is by no means a decisive factor: see Singer v Tees [1988] 2 Lloyd's Rep. 164 at p. 170 and Flamar Interocean Ltd v Denmac Ltd ('The Flamar Pride') [1990] 1 Lloyd's Rep. 434 at p. 439.

(9) The presence of a term allowing for an option to contract without the limitation clause but with a price increase in lieu is important: see Singer v Tees at p. 170. However, as suggested in Yates, Contracts for the Carriage of Goods, para. 7.2.25.13, if the condition works in such a way as to leave little time to put such option into effect, this may effectively eliminate the option as a factor indicating reasonableness, cf. Phillips Products Ltd v Hyland [1987] 1 WLR 659.

(5)
Mr Christie reminded me that s. 11(4), which requires the court to have particular regard to the parties' respective expected resources and to the availability of insurance, is only applicable in cases of limitation, rather than exclusion, clauses. As Chitty says at 15-099, this provision was clearly designed to provide some alleviation to the small business and to professional persons, who may not have the resources available to meet unlimited liability or who may not be able to obtain insurance or who may be exposed to claims in excess of the sums for which insurance cover can be obtained. At fn. 515 Chitty refers to a number of authorities, beginning with George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd, where it was held that the availability of insurance may be a relevant consideration in assessing the test of reasonableness under s.11(1), although the actual insurance position of the parties at the time is normally irrelevant. It therefore seems to me that the matters referred to in s.11(4) are, therefore, of potential relevance in all cases, although the court is not required to have regard to them in exclusion as opposed to limitation clause cases.

(6)
The burden of proof lies fairly and squarely upon Hall Fire.

77. The essence of Mr Christie's submission is that clause 11 is an extremely widely drafted exclusion clause, where there is no evidence that it was specifically drawn to Goodlife's attention at the time. He submits that it deprives Goodlife of all the protection to which it would otherwise be entitled under law in the event of a failure of the fire suppression system due to Hall Fire's breach and leading to very considerable losses, both by way of direct property damage and indirect business losses, and gives Goodlife very little in return under the warranty. He submits that it follows that Hall Fire has failed to establish that it is reasonable.

78. The essence of Ms Mulcahy's submission is that the exclusion of liability was necessary and reasonable to protect Hall Fire from unlimited claims in circumstances where: (a) the contract price agreed (£7,490) was modest but the potential liability was unlimited; (b) insurance was available to cover the risk (albeit at extra cost) at Goodlife's option; (c) other suppliers also limited or excluded liability in a similar manner.

79. As regards the Sch. 2 matters, in my view the following points are relevant. First, the parties seem to me to have been in a roughly equal bargaining position. Goodlife could, I have no doubt, have gone elsewhere for a fire suppression system and could, I have no doubt, have found a supplier who was prepared to contract on the basis of a less stringent exclusion or limitation clause, had it wished to do so. I am satisfied on the evidence adduced that Goodlife's attention was not specifically drawn to the clause in question. I am equally satisfied that any reasonably careful SME in the position of Goodlife with some interest in understanding how the contract would work would have seen the reference to the standard terms and conditions at the end of the quotation, immediately below the price and delivery time as it was, and could have seen from a quick glance at the introduction to section 4, to which attention was expressly drawn, that no damages whatsoever would be imposed on Hall Fire Solutions. If that was of concern to the SME, then it could without undue difficulty have located clause 11 and realised that Hall Fire Solutions was indeed seeking to exclude all liability for the consequences of any failure of the fire suppression system, but was able to offer insurance to cover these risks at extra cost if required.

80. This brings me on to what in my view is the crux of this particular case. What clause 11 referred to explicitly, and what the parties could reasonably have anticipated to be the position anyway, was that what Goodlife undoubtedly needed was protection against the financial risk of the fire suppression system not working – whether due to the fault of Hall Fire Solutions or not – with the result that a fire caused substantial damage and loss to its property or business. Whilst it would have a right to sue Hall Fire Solutions to recover damages for such loss in the event that it could prove breach, that would not avail it if the fire suppression system failed other than due to Hall Fire's breach nor if Hall Fire Solutions did not carry adequate insurance or have assets sufficient to meet any award of damages. What clause 11 referred to explicitly, and what the parties could reasonably have anticipated to be the position anyway, was that if in the unlikely event that Goodlife did not already have property damage and business interruption insurance cover which was sufficient to cover itself against such an eventuality, it should think about obtaining such cover, and Hall Fire Solutions was stating its willingness to arrange this for an extra payment.

81. Mr Christie objects that in fact this offer by Hall Fire was an empty offer, in that it had never investigated what insurance cover could in fact be offered or at what premium. He also objects that if one were to analyse this offer in the way that an insurance broker or lawyer would do, it would readily be seen that either Hall Fire would have to procure cover in its name or on behalf of Goodlife or in joint names. He submits that if the former, then if – as appears was the case – Hall Fire already had third party and product liability insurance anyway, questions would arise as to: (a) what its obligation

was in terms of the precise ambit of such cover; (b) what its obligation was to maintain cover if the policy was written on a claims made basis; (c) what if any additional premium might it be entitled to pass on to Goodlife. I accept these criticisms. I have no real doubt that if any customer had ever taken up this invitation he would simply have been passed on to Hall Fire's insurance brokers who probably would have started out by enquiring whether the customer had adequate property damage and business interruption cover anyway and, if so, advising there was no need for any further cover. However in my view these criticisms do not meet the important point which is that the offer in clause 11 drew the attention of the hypothetical prudent concerned SME potential customer to the need to ensure that it was suitably protected against loss and damage in the event that the fire suppression system failed for whatever reason to prevent a serious fire. By taking suitable steps to protect itself by insurance, insofar as it was not already covered, that hypothetical SME would be ensuring that it would not be prejudiced in the event that there was a serious fire due to the failure of the fire suppression system, even if due to Hall Fire's default, with the result that it would not be concerned if it could not bring an action for damages against Hall Fire.

82. I do not consider that the interests of Goodlife's insurers have any or any real relevance to this issue. There is no evidence that property damage or business interruption insurers in this market at this time routinely included provisions whereby cover could be refused or limited if the insured allowed suppliers to incorporate exclusion or limitation clauses which prejudiced the insurer's rights of subrogated recovery.

83. Mr Christie relied on cases such as Charlotte Thirty Limited v. Croker Limited (1977) 24 Con LR 46 and Balmoral Group Limited v. Borealis (UK) Limited[2006] 2 Lloyd's Rep. 629 for his proposition that excluding liability for the consequences of defective provision of the work or goods the subject of the contract was in itself fundamentally unreasonable. He submitted that clause 11 would "annihilate the expectations of the parties". However in my judgment the crucial difference between this case and those cases is that in this case, apart from the risk of the need for repair or replacement of some or all of the fire suppression system if defective, which would be a relatively modest cost even if not covered by the warranty, the only likely loss would result from a fire not being prevented by the fire suppression system, in respect of which the customer almost certainly would and certainly should be covered by insurance anyway. In the other cases the customer was being required to abandon its right of recourse in circumstances where the nature and extent of any loss and damage was infinitely variable in terms of cause, effect and amount, and where that loss and damage could not sensibly all be covered by insurance.

84. Mr Christie is entitled to point to the fact that Hall Fire was not even prepared to accept liability up to the contract value of the fire suppression system. In a case where the contract value was high, for example a complicated computer system, and where the customer could not adequately cover itself by insurance, that would in my view be a very material consideration. However that is not this case.

85. Mr Christie is also entitled to point to the fact that direct as well as indirect loss and damage was excluded. Again however that is of far less significance in this case than it would be in others.

86. Mr Christie is also entitled to point to the fact that Hall Fire was able, as indeed it appears to have done, to obtain its own insurance against claims of this kind. However in the absence of any evidence that Hall Fire sent, as intimated by clause 19, any evidence of its insurance cover upon which Goodlife might reasonably have relied, this is a point of less significance in my view than the point about Goodlife's cover. Whilst the question as to the hypothetical potential inadequacy of Goodlife's cover

was raised during the hearing, the answer must surely be that Goodlife was in the best position to know what level of cover it reasonably needed.

87. Overall, it seems to me that this represents a perfectly sensible allocation of the risk of loss and damage as between two commercial concerns of broadly equal size and bargaining power, contained in a clause which Hall Fire took reasonable steps to draw to Goodlife's attention, both at the time of sending the quotation and shortly after the contract was concluded.

88. In my view this approach is consistent with the approaches adopted and applied by the Court of Appeal in two cases to which my attention was drawn, namely Watford Electronics Ltd v Sanderson CFL Ltd[2001] EWCA Civ 317 and Regus (UK) Ltd v Epcot Solutions Ltd[2008] EWCA Civ 361. Whilst of course the facts of each case were very different to the facts of the present case, the approaches that: (a) the court should be very cautious before concluding that commercial concerns of equal bargaining power are not the best judges of the commercial fairness and reasonableness of the terms of the agreement they have struck; (b) insofar as the price agreed may be taken to reflect the allocation of the risk of loss against which the parties are able to insure, the party which will suffer the loss is generally better placed to secure the appropriate insurance cover, apply with equal force here.

89. In the former case Chadwick LJ (with whom Buckley J and Peter Gibson LJ agreed) said this:

"54. It seems to me that the starting point in an enquiry whether, in the present case, the term excluding indirect loss was a fair and reasonable one to include in the contract which these parties made is to recognise (i) that there is a significant risk that a non-standard software product, 'customised' to meet the particular marketing, accounting or record-keeping needs of a substantial and relatively complex business (such as that carried on by Watford), may not perform to the customer's satisfaction, (ii) that, if it does not do so, there is a significant risk that the customer may not make the profits or savings which it had hoped to make (and may incur consequential losses arising from the product's failure to perform), (iii) that those risks were, or ought reasonably to have been, known to or in the contemplation of both Sanderson and Watford at the time when the contract was made, (iv) that Sanderson was in the better position to assess the risk that the product would fail to perform but (v) that Watford was in the better position to assess the amount of the potential loss if the product failed to perform, (vi) that the risk of loss was likely to be capable of being covered by insurance, but at a cost, and (vii) that both Sanderson and Watford would have known, or ought reasonably to have known, at the time when the contract was made, that the identity of the party who was to bear the risk of loss (or to bear the cost of insurance) was a factor which would be taken into account in determining the price at which the supplier was willing to supply the product and the price at which the customer was willing to purchase. With those considerations in mind, it is reasonable to expect that the contract will make provision for the risk of indirect or consequential loss to fall on one party or the other. In circumstances in which parties of equal bargaining power negotiate a price for the supply of product under an agreement which provides for the person on whom the risk of loss will fall, it seems to me that the court should be very cautious before reaching the conclusion that the agreement which they have reached is not a fair and reasonable one.

55. Where experienced businessmen representing substantial companies of equal bargaining power negotiate an agreement, they may be taken to have had regard to the matters known to them. They should, in my view be taken to be the best judge of the commercial fairness of the agreement which they have made; including the fairness of each of the terms in that agreement. They should be taken to be the best judge on the question whether the terms of the agreement are reasonable. The court

should not assume that either is likely to commit his company to an agreement which he thinks is unfair, or which he thinks includes unreasonable terms. Unless satisfied that one party has, in effect, taken unfair advantage of the other – or that a term is so unreasonable that it cannot properly have been understood or considered - the court should not interfere."

90. In the latter case Rix LJ, delivering the judgment of the court (Sir Mark Potter P, Rix LJ and Keene LJ) said this:

"41. … As Lord Diplock observed in Photo Production Ltd v. Securicor Transport Ltd[1980] 1 AC 827 at 851:

"Either party can insure against it. It is generally more economical for the person by whom the loss will be directly sustained to do so rather than that it should be covered by the other party by liability insurance."

42. The "it" there being discussed by Lord Diplock was the misfortune of a customer's own premises being destroyed, eg by fire. Ours is an a fortiori case, for what we are concerned with is not something reasonably obvious such as property insurance, but forms of business loss insurance, which needs to be tailored to the business of each assured …."

91. In the circumstances, I am satisfied that Hall Fire has discharged the burden of proving that clause 11 is reasonable under UCTA 1977, with the result that this claim as presently pleaded cannot succeed.

C. The application to amend to plead the claim for breach of statutory duty

92. The case which Goodlife seeks to advance is as follows (without setting out in full those detailed allegations which are not relevant to the arguments advanced by Hall Fire):

"Breach of Statutory Duty

24. Further or in the alternative, the fire-fighting system and/or the components of the fire-fighting system supplied by the Defendant constituted electrical equipment for the purposes of the Electrical Equipment (Safety) Regulations 1994 ("the 1994 Regulations").

25. The Defendant was obliged by the 1994 Regulations, including Regulations 5 and/or 14 thereof, to ensure that all electrical equipment which it supplied to the Claimant, including the fire-fighting system and/or each of its components, was:

(a) "safe" within the meaning of section 19(1) of the Consumer Protection Act 1987 ("the 1987 Act"), as modified by Regulation 3 of the 1994 Regulations; and

(b) in conformity with the principal elements of the safety objectives for electrical equipment set out in Schedule 3 to the 1994 Regulations.

26. [Particulars of breach of s. 19(1) and Regulation 3]

27. By virtue of section 41(1) of the 1987 Act, the Defendant owed the Claimant a duty to comply with all obligations imposed by safety regulations (as defined by section 11(1) of the 1987 Act), including the 1994 Regulations, and any contravention of those obligations was actionable by the Claimant accordingly.

28. The Claimant was affected by the Defendant's contravention(s) of its obligations under the 1994 Regulations, as set out in paragraph 26 above, when the fire occurred on 25 May 2012 because it caused loss and damage to the Claimant as set out in paragraphs 21 to 22 above.

29. Accordingly, the Claimant seeks damages for breach of the statutory duty …"

93. As I said in paragraph 3 above the two issues which were identified by Hall Fire as issues which were fatal to the proposed new claim and where Goodlife has no real prospect of success are:

(a) whether or not the fire suppression system was "electrical equipment" falling within the scope of the 1994 Regulations.

(b) whether or not the limitation period applicable to its s. 41(1) CPA 1987 is 6 years from the date of the fire.

C.1. Was the fire suppression system "electrical equipment" falling within the scope of the 1994 Regulations?

94. Goodlife's case is that: (a) the definition of electrical equipment is sufficiently wide to include a system which – as here – comprises a combination of electrical and mechanical components; (b) a claimant in its position can make a claim under the 1994 Regulations even where the defect alleged relates exclusively to one or more of the mechanical components within the electrical equipment.

95. Hall Fire does not challenge these two propositions as such. Its case is that, regardless of the width of the definition of electrical equipment, the 1994 Regulations can have no application to this case, which involves the design and installation of a number of separate items which combine together to comprise a fire suppression system. That is because on its case there is a clear demarcation line between the electrical items and the mechanical items which together form the fire suppression system, and the mechanical item which is said to have failed here cannot on any proper view be regarded either as electrical equipment or as falling within one system which can compendiously be identified as electrical equipment within the 1994 Regulations.

96. Goodlife's pleaded case [6] is that the fire-fighting system failed to operate properly, or at all, because of a defect in the installation by Hall Fire of a compression joint on a dog-leg section of pipework on the top of the hood of the frying machine, which should have carried suppressant media to extinguish or suppress the fire but did not because the joint failed and separated. Its case [16] is that the fire suppression system ought to have been actuated, either automatically following the detection of temperatures above the prescribed level or manually by the activating of a manual call point release system, and that the actuation of the system (whether automatically or manually) should have activated gas generators which should have caused suppressant media to be discharged from two different media reservoirs into the fryer and the extraction system respectively. As regards the fryer – which is said to have been the seat of the fire in this case - the suppressant media should have been discharged by gas pressure along a system of stainless steel pipework mounted, inter alia, along the top of the hood of the fryer and the suppressant should have been discharged into the fryer through nozzles placed within the hood of the fryer. Its case [17] is that:

"(a) following the fire it was observed that the discharge pipework running along the outside of the hood of the fryer had separated where it dog-legged around the vertical extract ductwork and at that point the compression joint had failed ('the failed compression joint') and the union had completely separated;

(b) examination of the failed compression joint and other compression fittings on the same pipework revealed that the failed compression joint connection had not been made correctly at the time of installation of the system;

(c) on the other compression fittings the olive of the compression fitting had been clamped firmly on to the pipe and did not move when the compression fittings were unscrewed whereas examination of the olive and pipe of the failed compression joint revealed markings that indicated that the end of the pipe was under the olive when the fitting was tightened, rather than having passed through it completely;

(d) it is very likely that the failed compression joint was incorrectly made when the stainless steel pipework was installed on the hood of the fryer;

(e) there is no evidence that the failed compression joint was altered after installation;

(f) once the union in the pipework failed as set out above, the fire-suppression media could not reach the discharge nozzles at the outlet side of the fryer hood and discharge media is likely to have been released either through the discharge nozzles on the inlet side of the fryer's hood or at the open end of the pipework where the union failed;

(g) in either event the fire suppression media would not have reached the surface of the fryer and is unlikely to have produced the air-tight layer which would either extinguish burning oil or prevent heated oil from igniting."

97. There is a final pleaded allegation in [17], which is that:

"(h) there is no evidence that the fire-fighting systems were interlocked such that the extraction (or ventilation) system, the motive equipment (the conveyor) and the sources of energy (the burners) were de-energised when the level of oil dropped and/or the temperature reached the prescribed level."

98. It appears from the specification that the fire suppression system was designed to incorporate shut downs to the gas supply, the extract fan and the conveyor on actuation of the fire system. There is no indication from the specification or elsewhere that the fire suppression system was designed to incorporate automatic actuation if the level of oil within the fryer dropped. This is significant, because it is Goodlife's pleaded case [15] that this event led to the heating tubes within the fryer continuing to heat and eventually igniting oil within the fryer, and that a low-level alarm sensor – which it is not said formed any part of the fire suppression system designed and installed by Hall Fire – failed to operate correctly and respond to the low level of oil within the fryer. The pleaded allegations at [19] are thus, effectively, divided into allegations in relation to the failure of the failed compression joint in the fire suppressant discharge pipework and allegations in relation to the design of the fire suppression system including an allegation that it ought to have been designed to interlock with the oil level switch.

99. I have already referred in paragraph 22 to the document described as a "K system manual issue 1 amendment 06/02/2001" which accompanied the quotation and which provided a detailed description of the proposed fire suppression system in question. It is not suggested by Goodlife that it is not an accurate description of the fire suppression system as designed and installed by Hall Fire Solutions. It is very useful because it contains at p. 3 a diagram of the fire suppression system, from which it can be seen that the control box – which is electrically operated - is connected by electrical wiring to the manual operating system, to the fuel shut down, and also to the cylinder containing the suppressant

media. The cylinder is then connected by pipework to the discharge nozzles, and there is no electrical wiring serving either the pipework or the discharge nozzles. If the fire suppression system is actuated a gas generator within the cylinder is activated by means of the electrical signal from the control box, and it is this which causes the suppressant to be discharged in a controlled manner from the cylinder through the pipework to the nozzles. It can be seen from p.6 of this document that it is the electrically controlled gas generator which is said to be a key element of the system.

100. In short, in my view what can be said about this fire suppression system is that it is comprised of a number of different components, some of which operate electronically or are powered electronically, such as the control box and the gas generator, whereas others – such as the pipework and the discharge nozzles are neither operated electronically nor powered electronically. However the discharge of the suppressant from the cylinder into and through the pipework and out from the discharge nozzles is instigated by an electronically operated and powered gas generator. The essential question is whether it is all to be regarded as one item of electrical equipment, including the pipework and discharge nozzles as mechanical components of that whole, or whether the electrical equipment is limited to those parts of the fire suppression system which are electronically operated or powered. This question is effectively dispositive of the pleaded case regarding the allegedly defective installation of the failed compression joint, which is very clearly a “workmanship” allegation. There is also however a separate question, not addressed in any detail in submissions, which is whether or not the “design” allegations are also concerned with electrical equipment.

101. There is little by way of explicit guidance to be found within the 1994 Regulations themselves. I summarise those parts which are, or may be said to be, relevant. Reg. 3 defines electrical equipment as “any electrical equipment to which these Regulations apply by virtue of reg. 4 below”. Reg. 4 provides that the 1994 Regulations apply to “any electrical equipment (including any electrical apparatus or device) designed or adapted for use with” specified voltages of between 50 and 1.500 volts; thus the focus of reg. 4 is on the voltage of the equipment rather than its nature. Reg. 5 sets out the 3 requirements which all electrical equipment must meet, which is that it should be: (a) safe; (b) constructed in accordance with good engineering practice in relation to safety matters, in particular in relation to protection against electric shock; (c) in conformity with the safety objectives in Schedule 3. These include: (1) general conditions of design and manufacture including ensuring safe assembly and connection, and general marking requirements; (2) protection requirements against both electrical and non-electrical dangers caused by the electrical equipment; (3) protection against hazards caused by external influences on the electrical equipment.

102. There are then marking and enforcement provisions, including reg. 9 which requires the manufacturer (or authorised representative) of applicable electrical equipment to apply CE marking to the equipment or its packaging, and prohibits the use of deceptive CE marking, and regs. 10, 11, which identify further obligations on the manufacturer in terms of declarations of conformity and internal production control.

103. It is reg. 14 which imposes a prohibition on the supply of any electrical equipment in respect of which the requirements of regs. 5 and 9 are not satisfied. Reg. 17 provides that the 1994 Regulations are to be treated as if they were safety regulations within the 1987 Act, but modifies the penal consequences of certain supplies of electrical equipment in contravention of regs. 5 and 14.

104. The researches of counsel have uncovered only two cases of any relevance and even those, in my view, are of little real assistance.

105. The first is the case of Howmet Ltd v Economy Devices Ltd, both the first instance decision of Edwards-Stuart J [2014] EWHC 3933 (TCC) and the Court of Appeal [2016] EWCA Civ 847. The case has some initial similarity to the present case, in that it was a fire damage case where the allegation was that the fire was caused by the failure of a probe intended to detect a loss of liquid in a hot water tank, and the claim proceeded to trial against the supplier of the probe. It appears to have been the first (and perhaps so far the only) case in which a claim was made under the 1994 Regulations and the 1987 Act. However in that case it appears to have been conceded that the probe was electrical equipment, unsurprisingly when one considers the description of the probe at [25-28] of the judgment at first instance, which shows that it was both powered and operated by electricity, and operated by detecting differences in the voltage produced by the probe when in and out of water. The appeal to the Court of Appeal proceeded on the basis of a challenge to the conclusion by Edwards-Stuart J that although the claimant had established breach it had failed to establish causation, and that challenge was rejected by the Court of Appeal.

106. The second is the decision of the European Court of Justice of 13 March 2014 in Zentrale zur Bekämpfung unlauteren Wettbewerbs eV Frankfurt am Main v ILME GmbH (Case C-132/13) ("Zentrale"). That case concerned the application of Directive 2006/95, which is the successor to the Directives which were the genesis of the 1994 Regulations, but there is no material difference for present purposes between the wording of the 1994 Regulations and Directive 2006/95.

107. The ECJ in Zentrale made reference to the Guidelines drafted by the European Commission for the application of Directive 2006/95, footnote 8 of which stated:

'The term "electrical equipment" is not defined in the Directive. Therefore it is to be interpreted according to the internationally recognised meaning of this term. The definition of electric equipment in the "International Electro[tech]nical Vocabulary" of the International Electrotechnical Commission (IEC) is: "[an] item used for such purposes as generation, conversion, transmission, distribution or utilisation of electrical energy, such as machines, transformers, switchgear and control gear, measuring instruments, protective devices, wiring material, current-using equipment".'

They also referred to point 9 of the Guidelines which noted that basic components of electrical equipment could also fall within the scope of Directive 2006/95 and that footnote 13 identified a number of active and passive components and other items fell into the category of electrical devices.

108. The issue in the case was whether or not the CE marking ought to be applied to the housing of multipole electrical connectors intended for use for industrial purposes. It was not contested that the connectors themselves constituted electrical equipment, but the question was whether the housing itself also did so. The question was referred by the domestic court to the ECJ for a preliminary ruling.

109. The ECJ noted that "the housing fulfils one main function, namely to ensure the physical and electrical isolation of the various cables from each other and with the exterior by grounding" and held, at [28] that "having regard to those characteristics, it must be held that the housing at issue in the main proceedings falls within the definition of 'electrical equipment' for the purposes of Directive 2006/95, since, far from having purely aesthetic and protective functions, it ensures a safe grounding of electrical components and thereby contributes to the transmission of electrical energy".

110. In short, it seems clear that the ECJ place reliance upon the Guidance of the European Commission, and also adopted a purposive as opposed to a literal interpretation to the Directive; since one of its functions was to provide a safe grounding, and since it was part of equipment used to transmit electricity, the housing fell within the definition of electrical equipment.

111. To similar effect is the guidance produced by the DTI in the UK, which acknowledges that it has no legal force, but which observes that: “The term electrical equipment is not defined in the regulations and should therefore be given the ordinary dictionary meaning. Electrical is defined as “operated by means of electricity” or “of pertaining to electricity”. Equipment is defined as “apparatus” which is in turn defined as “the things collectively necessary for the performance of some activity or function”. An item is only subject to the requirements of the regulations if it is electrical equipment so defined.” It continues as follows:

“Electrical components

Certain components of electrical equipment may in themselves be considered to be electrical equipment. In such cases, steps should be taken to ensure that they satisfy the requirements of the regulations - if they are to be supplied as separate items. This includes supply for retail sales and to other manufacturers for incorporation into other electrical equipment.

Non-electrical components

Components which are not in themselves electrical equipment do not fall within the scope of the regulations. However, the regulations do require electrical equipment to be safe and therefore the components in it should not render it unsafe.”

Discussion

112. It is clear beyond argument, and Goodlife did not seek to argue to the contrary, that the pipework itself was not itself an electrical component which fell within the definition of electrical equipment. It cannot be said that the pipework performed an electrical function, whether direct or contributory, in the same way as the connector housing did in the Zentrale case.

113. Thus the essential question is whether or not the entire fire suppression system falls within the definition of electrical equipment.

114. Mr Christie submits that it does or, more pertinently for present purposes, that it at least arguably does. He submits that it is an apparatus which performs the purpose of fire suppression. It is operated by electricity or utilises electricity. There is no basis for dividing it into electrical and non-electrical elements. The pipework is itself connected to the cylinder which contains within it an electronically operated gas generator, which feeds the suppressant through the pipework. That process is actuated by an electronic control box.

115. Ms Mulcahy submits that there is no real prospect of successfully arguing that it does. She submits that the fire suppression system is not one apparatus, whether considering the question by reference to its physical state or by reference to its intended purpose. She submits that it is an apparatus made up of a number of separate items, which are physically separated from each other and not contained within one structure, each of which perform separate functions, and where some are electrically operated but others are not. She submits that the 1994 Regulations, where obligations are imposed upon manufacturers and their authorised representatives both in relation to safety but also in relation to CE marking, could never have been intended to apply to an apparatus such as this fire suppression system, which cannot be regarded in its completed state as being one manufactured unit.

116. She also submitted orally that since: (a) the claim in relation to the alleged defective pipework joint is plainly a claim “arising from the improper installation” of the pipework; (b) by reg. 3(1) of the

1994 Regulations any risk “arising from the improper installation … of the electrical equipment” is excluded from the definition of “safe” contained in s. 19(1) of the CPA 1987, then even if the fire suppression system does amount to electrical equipment the claim cannot succeed in relation to Goodlife’s fundamental complaint as to why the fire suppression system did not work on the day of the fire.

117. I have given anxious thought as to whether or not this is a question which I can conclusively determine on an amendment application. I am conscious of the warning against conducting a mini-trial. It may be said that this warning is particularly apposite where the question in issue is of a technical nature, and where the legal framework is far from clearly established. However as against that it is difficult to see how a trial judge would be in any better position to decide this question as I am now. The essential facts as to the composition of the fire suppression system, and of the pipework in particular, are well known and not the subject of any dispute. There is no basis for thinking that any more information relevant to the determination of the issue will emerge between now and trial, and Goodlife has not suggested any basis for thinking to the contrary. The legal guidance, such as it is, is clear. If this case had been pleaded from the outset this issue would almost certainly have been included in the list of preliminary issues in any event, and there is no reason to consider that I would have had any different or better evidence.

118. In short, I have come to the conclusion that I can and should determine this issue, albeit on the basis as to whether or not Goodlife has a real prospect of successfully arguing at trial that the fire suppression system as a whole constitutes electrical equipment. I am satisfied that there is no reasonably arguable basis for considering that the fire suppression system as a whole amounts to electrical equipment.

119. It is not intended to, nor does it, fulfil a purpose relating to or connected with electricity. Nor, taken as a whole, can it be said that it “uses” electricity, in the same way as a machine does. Parts of it are operated or powered by electricity, such as the control box, whereas other parts of it, such as the discharge nozzles and the pipework leading to them, do not. It cannot be said that these parts are merely ancillary to the parts which are operated or powered by electricity. It may fall within the dictionary definition of “apparatus” but it does not and cannot in my view fall within the definition of “electrical apparatus” because the activity or function which it is intended to perform is not electrical and it is not wholly or predominantly operated or powered by electricity.

120. Moreover, adopting a purposive view of the 1994 Regulations, there is no obvious reason why such a system should be regarded as electrical equipment. The twin aims of the 1994 Regulations are safety and safety certification in relation to the manufacture and supply of the electrical product. The obligations are directed at manufacturers or their authorised representatives. Electrical components or devices which are intended for incorporation within or are actually incorporated within a larger product, whether electrical or not, are not exempt from the Regulations, unless - per Zentrale at [34] – it can be said that their safety depends essentially upon the manner in which they are incorporated into the finished product. It follows that no useful purpose in relation to the aim of the Regulations is to be served by regarding an apparatus such as this fire suppression system as one electrical apparatus. The electrical components or devices forming part of it must still comply with the Regulations. The responsibility is cast upon those who manufacture the control panel. It would not make sense to regard Hall Fire Solutions as having “manufactured” the whole fire suppression system, so as to be obliged to apply a CE marking to the whole system and so as to be obliged to comply with the obligations in relation to declarations of conformity and internal production control imposed by regs. 10 and 11 of the Regulations.

121. It follows that the proposed claim as currently pleaded has no real prospect of success.

122. For completeness, although I accept that the point made about improper installation means that the pleaded case based on a breach of the first requirement of reg. 5 (electrical equipment must be safe) cannot succeed, that does not necessarily mean that the pleaded case based on a breach of the third requirement (electrical equipment shall conform with the principal elements of the safety objectives in Schedule 3) cannot succeed.

123. Nonetheless, the conclusion which I have reached about whether or not the fire suppression system as a whole is electrical equipment means that the heart of the case advanced by Goodlife, namely the alleged defective pipework joint, can never succeed on any view. Nor could any design allegations as regards the fire suppression system as a whole. However, on the basis of: (a) the evidence and submissions before me; (b) the draft amended Particulars of Claim which does not seek to differentiate between the defective pipework joint and any design allegations in the context of the 1994 Regulations claim; (c) my findings as set out above, I do not feel able to conclude with absolute confidence at this point that it would never be possible to advance a claim under the 1994 Regulations on the basis that: (i) there was a design flaw or design flaws in a part or in parts of the fire suppression system; (ii) that part or those parts did fall within the definition of electrical equipment; (iii) that design flaw or those design flaws led to a breach of regulation 14 by reason of a non-compliance with regulation 5 in relation to that part or those parts. However, any such claim would have to be particularised in sufficient detail to enable Hall Fire's advisers and the court to see that it was a claim which could at least arguably fall within the scope of the 1994 Regulations. That is not the case as regards the current draft.

124. Whilst Hall Fire might argue that the current position is that both the existing pleaded case has been shown to be unsustainable and the existing proposed amended claim unarguable, so that the claim as a whole must fail and there is no basis for giving Goodlife any further opportunity to save it, it seems to me that by reference to the overriding objective Goodlife should be permitted to have at least an opportunity of considering whether they wish to proceed on the basis of a re-drafted amended Particulars of Claim which does contain a case which is reasonably arguable. What I would propose is that I should make an order striking out the existing Particulars of Claim and dismissing the application to amend which is before me, but giving Goodlife permission within a specified time to make and issue a further application for permission to substitute a new Particulars of Claim. However this is only a provisional view, and subject to further argument if thought appropriate once this judgment is formally handed down.

C.2. Is the limitation period applicable to claims under s. 41(1) CPA 1987 6 years from the date of the fire?

125. Hall Fire's case depends on satisfying me that the limitation period applicable to this claim is that which applies to claims under Part 1 of the 1987 Act, which is the part of the 1987 Act which gives effect to the product liability Directive No. 85/374/EEC and which imposes civil liability for defective products upon their producers or importers. By virtue of s.6(6) of and Schedule 1 to the 1987 Act the limitation period applicable to bringing actions by virtue of Part 1 is provided for by what is s. 11A of the Limitation Act 1980, with the 10 year longstop from the time of the supply of the product.

126. Goodlife's case is that there is no basis for construing the 1987 Act as carrying over the special limitation regime applicable to Part 1 into claims under Part 2 and s. 41(1) of the Act. Mr Christie submits that:

(a) Part 2 of the 1987 Act, entitled as it is "Consumer Safety", and empowering as it does the Secretary of State to make regulations for the purpose of securing the safety of goods other than those specified in s. 11(7), has a subject matter which is at least in legal terms completely separate from that of Part 1.

(b) Included within Part 5 of the 1987 Act, entitled "Miscellaneous and Supplemental", is s. 41, submission-section (1) of which provides that:

"(1) An obligation imposed by safety regulations shall be a duty owed to any person who may be affected by a contravention of the obligation and, subject to any provision to the contrary in the regulations and to the defences and other incidents applying to actions for breach of statutory duty, a contravention of any such obligation shall be actionable accordingly."

(c) This is a straightforward provision, which has the effect of conferring a civil cause of action upon persons affected for damages for contravention of an obligation imposed by safety regulations made under Part 2, and the provisions of the Limitation Act 1980 applicable to the bringing of such claims apply to it.

(d) There is no real doubt that a claim for damages for breach of statutory duty is treated as a claim for damages in tort for the purposes of limitation, with the result that the limitation period is 6 years from the accrual of the right of action, as provided by s. 2 of the Limitation Act 1980: see the discussion by McGee in Limitation Periods (7th edition) at 4.013 – 4.026. Even if it could be argued that the claim falls within s.9 (action for sums recoverable by statute), it matters not, because the same limitation period applies.

(e) It is clear from s.41(1) that the cause of action accrues when a person is affected by a contravention of the safety obligation. It is also clear from the decision in Howmet that a person is only affected when he suffers actionable damage as a result of the contravention: see the judgment of Jackson LJ in the Court of Appeal at [103]. It follows that in this case Goodlife has 6 years from the date of the fire to bring a claim under s.41(1) of the 1987 Act and, hence, is well within time to do so.

127. Ms Mulcahy's argument rests on s. 41(2) of the 1987 Act, which provides that:

"(2) This Act shall not be construed as conferring any other right of action in civil proceedings, apart from the right conferred by virtue of Part I of this Act, in respect of any loss or damage suffered in consequence of a contravention of a safety provision"

128. The argument is that the right conferred by s. 41(1) is, by s. 41(2), to be treated as a right conferred by virtue of Part 1, with the result that the limitation period applicable to Part 1 claims also applies.

129. Mr Christie's response is that the crucial word in s. 41(2) is "other", which is intended to and does simply make clear that it is s.41(1) which confers the right in question, and that the words relied upon by Ms Mulcahy are simply there to make clear that this is not intended to affect the cause of action conferred by Part 1. He also submits that the difference between the phrase "safety regulations" in s. 41(1) and the phrase "safety provision" in s. 41(2) is telling, since the definition of the latter in s. 45 includes provisions of prohibition notices and suspension notices as well as safety regulations, thus making clear that s. 41(2) is intended to delimit the scope of any claims for breach of statutory duty as regards the whole enforcement regime in Part 4, which relates to Parts 2 and 3 only.

130. For present purposes, all that I need to say is that in my view Mr Christie's argument passes by a comfortable margin the requirement that it need be reasonably arguable. Accordingly, I would not have refused permission to amend the claim on this basis.

D. Conclusions

131. Thus far I have not made reference to the terms of the preliminary issue as ordered. They are:

(1) Whether clause 4(11) of the Defendant's terms and conditions was incorporated into the Contract;

(2) Whether clause 4(11) operates so as to reasonably prevent a duty of care arising or to reasonably exclude or limit any liability the Defendant may have to the Claimant in tort; and

(3) Whether clause 4(11) prevents the Claimant's insurers from pursuing this claim as a subrogated action.

132. Given the conclusions I have reached the answers to the preliminary issues are as follows:

(1) Clause 4(11) of the Defendant's terms and conditions was incorporated into the Contract;

(2)
Clause 4(11) operates so as to reasonably exclude any liability the Defendant may have to the Claimant in tort; and

(3)
Clause 4(11) does not prevent the Claimant's insurers from pursuing this claim as a subrogated action, but not relevant given the answer to issue (2).

133. The consequence of findings (1) and (2) is that the claim as currently pleaded cannot succeed and must be dismissed.

134. The application for permission to amend must also be dismissed, but I repeat my provisional view as to Goodlife's entitlement to at least consider whether it can formulate a properly particularised proposed substituted amended Particulars of Claim under the 1994 Regulations and the 1987 Act which is properly arguable.

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[1] There is evidence that the original price was reduced from £7,950 to £7,490, but no evidence as to when or how this was proposed or agreed.