Neutral Citation Number: [2018] EWCA Civ 1371

Case No: A1/2017/1602

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
His Honour Judge Stephen Davies

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2018

Before :

LORD JUSTICE GROSS
LORD JUSTICE MOYLAN
and
LORD JUSTICE COULSON

- -

Between :

Goodlife Foods Limited	**Appellant**
- and -	
Hall Fire Protection Limited	**Respondent**

- -
- -

Aidan Christie QC & Martyn Naylor (instructed by **Clyde & Co Solicitors**) for the **Appellant**
Leigh-Ann Mulcahy QC & Simon Paul (instructed by **Plexus Law Solicitors**) for the **Respondent**

Hearing date: Thursday 10th May 2018

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Approved Judgment

Lord Justice Coulson :

1. Introduction

1. This appeal concerns an exclusion clause in the standard terms of a specialist fire suppression contractor. The issues are whether the clause was incorporated into the contract between the parties and, if so, whether the clause was reasonable within the meaning of the Unfair Contract Terms Act 1977 ("UCTA").

2. Following a fire at their factory premises in Warrington on 25 May 2012, the appellant (whom I shall call "Goodlife") commenced proceedings against the respondent (whom I shall call "Hall Fire") for breach of contract and/or negligence in the supply and installation of a fire suppression system which Hall Fire had installed some ten years before. It is common ground that the claim for breach of contract is statute-barred. However, the claim in negligence, where the six year limitation period did not begin to run until the date of the fire, is not statute-barred. The parties are, however, rightly agreed that the terms of the contract are directly relevant to the nature and scope of Hall Fire's duty of care.

3. In their defence to the claim, Hall Fire seeks to rely on clause 11 in their standard terms and conditions. If they are entitled to rely on clause 11, it would exclude their liability for any part of Goodlife's claim for damages. In consequence, the issues as to incorporation and reasonableness were deemed suitable to be taken as a preliminary issue. In a detailed judgment dated 19 April 2017 ([2017] EWHC 767 (TCC)), His Honour Judge Stephen Davies decided the preliminary issue in favour of Hall Fire. In particular, he concluded that clause 11 was not particularly unusual or onerous, and was fairly and reasonably drawn to Goodlife's attention. It was therefore incorporated into the contract. In addition, he held that, by reference to the UCTA guidelines and the case-law, Hall Fire had shown that clause 11 was reasonable.

4. On 1 August 2017, permission to appeal against those findings was given by Jackson LJ. At the same time, he refused permission to appeal in respect of an entirely separate aspect of Goodlife's pleaded case, to the effect that the fire suppression system amounted to electrical equipment within the meaning of the Electrical Equipment (Safety) Regulations 1994. Thus, if this court upholds the judge's findings about clause 11, that is the end of these proceedings.

5. Two distinct issues are raised on this appeal, although the first can be sub-divided. They can be summarised as follows:

    a) *Issue 1a):* Was clause 11 particularly unusual and/or onerous and *Issue 1b)*: even if it was, was it fairly and reasonably brought to the attention of Goodlife?

    b) *Issue 2):* If clause 11 was incorporated into the contract, was it unreasonable (and therefore ineffective) as a result of the operation of UCTA?

2. The Facts

6. The judge's findings of fact are set out at paragraphs 13 - 36 of his judgment. Neither party to the appeal quarrels with those findings, and I gratefully adopt them for the purposes of the following summary.

7. Goodlife produces frozen food products at its factory in Warrington. It had a multi-purpose fryer which it used to cook the food products which were subsequently frozen before being sold to customers, such as supermarkets. At the time of the contract with Hall Fire, its annual turnover was in the region of £2.7 million.

8. Hall Fire had been trading 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. They had their own standard terms and conditions. They were a company of a similar size to Goodlife, with an annual turnover of around £4.8 million.

9. At paragraph 20 of his judgment, the judge noted that it was common ground that, at the time of the contract, Goodlife was insured against property damage and business interruption. Thus, this claim is an adjusted claim pursued by subrogation by Goodlife's insurers. Hall Fire too are insured against this claim. The judge inferred that both parties carried the same or similar insurance at the time of the contract. He was satisfied "that this is precisely what would have been expected to be the position, had attention been given to the question at the time".

10. In early 2001, Goodlife sought a quotation from Hall Fire for the provision of a fire detection and fire suppression system for the multi-purpose fryer. The quotation was dated 30 January 2001. The judge found Hall Fire's standard terms and conditions were expressly referred to on the face of the quotation and, as the judge found, they were also sent with that quotation. They are headed "Section 4 CONDITIONS OF CONTRACT (HALL FIRE SOLUTIONS)".

11. The opening paragraph of the conditions is in the following terms:

> "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…"

12. Section 4 comprised 22 separate conditions, of which the first 19 were on the first page, correctly described by the judge as being "in relatively small but no means illegible type. The individual clauses do not have headings".

13. Clause 11, approximately two thirds of the way down the page, read as follows:

> "11) We exclude all liability, loss, damages 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 defected 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."

Although the text was not separated into these three separate components, this division of clause 11 is in accordance with paragraph 39 of the judgment of Judge Davies, and I use the same division in my analysis of the clause below.

14. The judge also referred to clause 19, at the bottom of the first page of the terms and conditions, which provided 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 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."

15. It was common ground that no letter from Hall Fire's insurance brokers was in fact enclosed and there was no evidence about what it might have said. The evidence from Hall Fire's Mr Green was that he had not had any specific discussion 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". At paragraph 32 of his judgment, Judge Davies found:

> "Whatever its relevance to this case in the 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 its own insurance which it would have regarded as perfectly adequate for its own purposes."

16. At paragraph 33 of his judgment, the judge referred to Section 9 of Hall Fire's supplementary conditions entitled 'Warranty'. That said:

> "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. Accepting these items, the 12 months 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 company's recommendations etc."

17. Although the quotation was produced in January 2001, Goodlife did not accept it for well over a year. They provided a purchase order dated 2 April 2002. No copy of that purchase order was available to the judge but, as he noted at paragraph 34 of his judgment, there was no suggestion or evidence that the purchase order amounted to a counter-offer. Clause 11, along with the rest of the conditions noted at paragraph 12 above, therefore became an express term of the contract (subject to the arguments on this appeal). Indeed, the same terms and conditions were found by the judge to have been sent again by Hall Fire when they sent their acknowledgment of order document in April 2002. Thereafter, Hall Fire installed the suppressant system to suppress a fire starting in or around the fryer.

18. The value of the contract was £7,490 (see paragraph 59 of the judge's judgment). It is a commonplace that the cost of this sort of specific fire suppression system is often very modest, particularly when set against the losses that can arise if things go wrong. This case is no exception. The fire on 25 May 2012 is said to have originated at the fryer. It is Goodlife's pleaded case (and these were the assumed facts for the purposes of the preliminary issue) that the fire caused property damage and business interruption losses of about £6.6 million. They allege that the cause of the fire was a defect in the insulation of a compression joint on a dog-leg section of pipework on the top of the hood of the fryer. The pipework should have carried suppressant media to extinguish or suppress the fire, but failed to do so because the joint failed and separated.

3. The Judgment

19. At paragraphs 39 – 51, the judge dealt with the proper construction of clause 11. No part of that analysis is challenged on this appeal. The relevant conclusions are summarised below:

    i) At paragraph 39, the judge broke clause 11 down into its three separate parts: the exclusion of liability; the free of charge replacement for faulty components (to be read together with the warranty in Section 9); and the offer to provide insurance to cover those risks for which liability would otherwise be excluded. As already noted, I have followed that division in setting out the clause at paragraph 13 above.

    ii) At paragraphs 43 – 45, the judge found that the clause could never have operated so as to exclude liability for personal injury or death to anyone other than the other contracting party, but that in any event any attempt to exclude liability for personal injury or death was prohibited by s.2(1) of UCTA.

    iii) At paragraphs 46 – 47, the judge held that there was no question of clause 11 being construed so as to exclude liability for civil fraud.

    iv) At paragraph 49, the judge described the warranty in respect of the faulty components (the second part of clause 11, when read with Section 9) as "clearly an effective, although limited, warranty". He rejected Hall Fire's submission that the "defective parts" would include any parts themselves damaged by a faulty component. But he construed this second part of clause 11, in conjunction

with the Section 9 warranty (set out at paragraph 16 above), as meaning that Hall Fire undertook to make good, free of charge, defective components appearing within 12 months of the date of practical completion. He concluded that this "was something of real value which was being offered to the customer under the standard terms and conditions".

v) At paragraph 50 of his judgment, the judge found, in relation to the third part of clause 11, that it imposed no obligation to insure on anyone. But, as he put it, "it simply makes clear that Hall Fire would be willing to provide insurance to cover the excluded risks if required".

20. The judge then moved on to consider those issues (incorporation and reasonableness) which are the subject of this appeal. At paragraphs 52 – 62, he concluded that the clause was not unusual or onerous. He did so by reference to certain of the authorities, and by reference to the specific evidence at the hearing as to the nature and ambit of exclusion and limitation clauses promulgated by other companies also operating within the fire protection industry. At paragraph 56 he summarised that evidence, noting that all companies sought to rely upon some form of exclusion or limitation of liability clause. He found that clause 11, as promulgated by Hall Fire, was "at the most far-reaching end of the spectrum", and that the most common type of provision sought to limit liability to the contract price and to exclude consequential loss.

21. At paragraph 59 of his judgment, the judge accepted that, although clause 11 was a wide-ranging exclusion clause, it was not particularly onerous or unusual. He found 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."

22. On the question of whether or not the clause was fairly and reasonably drawn to Goodlife's attention, the judge's findings were at paragraphs 57 and 61:

> "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….
>
> 61. In so far 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 that 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."

23. Thus, at paragraph 62 of his judgment, the judge concluded that, either because clause 11 was not unusual or onerous, or if it was, it was fairly and reasonably drawn to Goodlife's attention, it was incorporated into the contract. The remaining issue concerned reasonableness, pursuant to the provisions of UCTA.

24. The judge dealt with the issue of reasonableness in detail at paragraphs 63 – 91 of his judgment. For the detailed reasons set out there, he concluded that Hall Fire had discharged the burden of showing that the term was reasonable within the meaning of UCTA. There is no suggestion now that he did not have regard to either Section 11, or the guidelines set out in Schedule 2 of UCTA, or the relevant authorities. At paragraph 80 he said:

> "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."

25. In paragraph 81, the judge dealt with Goodlife's submission that the offer from Hall Fire in relation to arranging cover was an empty offer. Although the judge accepted

some of the criticisms that Goodlife had made about the third part of clause 11, he emphasised that:

> "…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."

26. For the reasons set out at some length in this part of his judgment, at paragraph 91, the judge concluded that Hall Fire had discharged the necessary burden of proof and that clause 11 was reasonable in all the circumstances.

27. I now turn to the two issues raised on this appeal. I deal with them by identifying the issue and its consequences: identifying the relevant principles of law; summarising the parties' respective submissions; and setting out my analysis and conclusions in respect of those submissions. In so doing, I remind myself that the correct approach of this court to first instance decisions concerned with issues of reasonableness was identified in the speech of Lord Bridge of Harwich in *George Mitchell (Chesterhall Limited) v Finney Lock Seeds Limited* [1983] 2 AC 803 when he said:

> "It may, therefore, be appropriate to consider how an original decision as to what is "fair and reasonable" made in the application of any of these provisions should be approached by an appellate court. It would not be accurate to describe such a decision as an exercise of discretion. But a decision under any of the provisions referred to will have this in common with the exercise of a discretion, that, in having regard to the various matters to which the modified section 55 (5) of the Act of 1979, or section 11 of the Act of 1977 direct attention, the court must entertain a whole range of considerations, put them in the scales on one side or the other, and decide at the end of the day on which side the balance comes down. There will sometimes be room for a legitimate difference of judicial opinion as to what the answer should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong."

28. For the avoidance of doubt, I consider that the same, careful approach is also appropriate to the judge's findings as to the allegedly onerous nature of the clause and

whether notice of that clause was reasonably and fairly given. These are questions of evaluation for the first instance judge, so Lord Bridge's concern to ensure that interference by this court should be restricted to the limited circumstances which he described (error of principle or plainly wrong) is equally applicable to the part of this appeal concerned with incorporation.

4. Issue 1a): Was Clause 11 Particularly Unusual or Onerous?

Issue 1b): Even if it was, was it Fairly and Reasonably Brought to Goodlife's Attention?

4.1 The Issues and their Consequences

29. It is a well-established principle of common law that, even if A knows that there are standard conditions provided as part of B's tender, a condition which is "particularly onerous or unusual" will not be incorporated into the contract, unless it has been fairly and reasonably brought to A's attention. Here, Goodlife say that clause 11 was particularly unusual and onerous. There was a good deal of evidence before the judge on that point. If Goodlife are right about that then, provided they can also show that it was not fairly and reasonably drawn to their attention, clause 11 would not be incorporated into the contract.

4.2 The Relevant Principles of Law

30. Paragraph 13-015 of *Chitty on Contracts* (32nd ed. 2014) summarises the relevant principle 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."

This principle derives from what have been called the "ticket" cases such as *Thornton v Shoe Lane Parking Limited* [1971] 2 QB 163. In that case, the ticket referred to the conditions, which could be found on a notice on a pillar opposite the ticket machine. In the middle of condition 2, there was a purported exclusion of liability, not only for damage to the customer's car, but also for injury to the customer "howsoever caused". The Court of Appeal said that such a clause was unusual and onerous; the case was decided on the basis that it had not been fairly brought to the notice of the customer, although Denning LJ's analysis was focused on whether the contract was made before the customer was even aware of the conditions.

31. In *Interfoto Picture Library Limited v Stiletto Visual Programmes Limited* [1989] 1 QB 433, the standard condition in question, which imposed a holding fee of £5 per day for each transparency that was retained beyond a period of 14 days, was found by the court to be "a very onerous clause". Dillon LJ at page 438F said that "the defendants could not conceivably have known, if their attention was not drawn to the clause, that the plaintiffs were proposing to charge a 'holding fee' for the retention of the transparencies at such a very high and exorbitant rate".

32. As to whether it was fairly and reasonably drawn to the defendants' attention, the offending condition was described as being "merely one of four columns' width of conditions printed across the foot of the delivery note". Bingham LJ said (page 445G – H):

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

Also in *Interfoto*, Bingham LJ observed that:

> "The more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given."

Speaking for myself, I find that a helpful distillation of the necessary relationship between, on the one hand, the degree of onerousness in the clause and, on the other, the degree of notice required.

33. The authorities do not always agree as to what amounts to an 'onerous' clause. In *Interfoto* Bingham LJ called the clause in question "unreasonable and extortionate". Dillon LJ referred to "particularly onerous" clauses. In a case decided at about the same time, *Circle Freight International Limited (T/A Mogul Air) v Medeast Gulf Exports Limited (T/A Gulf Exports)* [1988] 2 Lloyd's Rep 427, the clause in question, which limited the carrier's liability to a very small sum, were found to be neither unusual nor "Draconian".

34. In *Allen Fabrications Limited v ASD Limited* [2012] EWHC 2213 (TCC), Judge Waksman QC (sitting as a Judge of the High Court) said:

> "So the mere fact that the clause is a limitation or exclusion clause does not seem to me to render it onerous without more. Much will depend on the context. It might be said that if in very common use it is less likely properly to be regarded as onerous especially between two commercial parties since that is the business in which they knowingly operate. Furthermore, where the terms, if incorporated, would be subject to scrutiny under UCTA it can be argued that a somewhat more flexible approach to what is truly "onerous" could be taken."

35. I agree with Judge Waksman that the mere fact that the clause in question is a limitation or exclusion clause does not of itself mean that it is onerous or unusual. Everything turns on the context. But as to his other observation, that because these principles were developed before UCTA, a more flexible approach may now be necessary, I am much less certain. For my own part, I consider that these two principles (namely incorporation at common law on the one hand, and the reasonableness of any term incorporated pursuant to UCTA, on the other) are separate, and the questions to be decided in respect of each are distinct. There may be some overlap in the matters that fall to be considered under each principle, but that is all.

36. In recent times, clauses which have limited a specialist supplier or sub-contractor's liability to the (often modest) amount of the contract price, or which have excluded liability for indirect loss or loss of profit, have not been regarded by the courts as particularly onerous or unusual. One example of the former is the decision by Christopher Clarke J in *Shepherd Homes Limited v Encia Remediation Limited* [2007] BLR 135 at paragraphs 66 – 68. A specialist engineering sub-contractor limited its liability to the contract price, and the judge said that that term was not particularly onerous or unusual.

37. In *Trebor Bassett Holdings Limited and Another v ADT Fire and Security PLC* [2011] EWHC 1936 (TCC) at paragraph 201, I found that a clause which purported to limit liability to the value of the contract price (about £13,000) was not particularly unusual. Although that finding was *obiter* (because I had found that the clause was not incorporated anyway, on a 'battle of the forms' basis), it was in part based on another quotation, from the unsuccessful sub-contractor, which had limited liability to £10,000. Those modest figures were to be set against the damages claimed in Trebor Bassett, which were put at about £120 million.

38. Examples of clauses which excluded claims for indirect loss or loss of profit, which have been upheld by the courts, include *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317 and *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361, both discussed in greater detail in Section 5 of this Judgment below. Clauses which have excluded liability altogether have not always been upheld by the courts. Two examples, relied on by Mr Christie QC, *Charlotte Thirty Ltd & Another v Croker Ltd* (1990) 24 Con LR 46, and *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm) are also discussed in Section 5. None of these authorities are directly relevant to incorporation; they were all decided under UCTA.

4.3 The Parties' Submissions

39. On behalf of Goodlife, Mr Christie submitted that this was a 'blanket' exclusion clause. He argued that the clause was unusual because, as the judge put it, having reviewed the evidence of other terms and conditions in common use, clause 11 was "at the most far-reaching end of the spectrum". He said that the judge's analysis at paragraph 59 of his judgment (paragraph 21 above) in which the judge noted that there was little substantial difference between clause 11 and a clause limiting liability to the contract price, created a false dichotomy. He said that there could have been other sorts of claims arising out of Hall Fire's work that would have been covered (wholly or at least in part) by a clause limiting recovery to the contract price. In that context, he relied on *Allen Fabrications* where, at paragraph 79, Judge Waksman observed that, even in the context of a multi-million pound claim, the contract sum of £705 was meaningful and that, in other cases, the value of the goods supplied (which was the relevant limit in that case) might have been much more significant.

40. In addition, Mr Christie criticised the individual elements of the judge's reasoning at paragraph 61 of his judgment (paragraph 22 above) dealing with notice. He said that the notice had to be over and above the norm, so that the fact that the terms and conditions were expressly referred to on the face of and sent with the quotation was irrelevant. As to the wording at the beginning of the standard terms and conditions (paragraph 11 above), which was the judge's principal reason in paragraph 61 for finding that notice had been fairly given, Mr Christie argued that the warning was

inaccurate, not to say misleading. He said that the warning was so 'over the top' that it would have put off any reader going further.

41. In response, Ms Mulcahy QC for Hall Fire submitted that the fact that the clause was a limitation or exclusion clause did not, without more, make it onerous or unusual, relying on *Allen Fabrications* for that proposition. She rejected the suggestion that clause 11 was a blanket exclusion clause, because of the warranty, identified by the judge at paragraph 49 of his judgment, which he described as being "something of real value". She supported the judge's finding that the clause in this case was little different to a clause limiting liability to the contract price, which she said was a realistic analysis.

42. As to notice, she said that Hall Fire's terms and conditions had been expressly referred to on the face of their quotation and had been supplied both with the quotation and the subsequent acknowledgement of order. She said that the fact that the warning at the start of the conditions was starker than it needed to have been was a point in her favour, because it meant that it was something which simply had to be considered by Goodlife. She said that, if the principle behind the common law rule was to avoid the mischief of ignorance, then that could not have arisen because Goodlife had had the document for a long time before agreeing to it, and the introductory words made plain the wide-ranging nature of the provisions in the printed conditions.

4.4 Analysis and Conclusions

43. For the reasons set out below, I do not consider that there are any grounds to interfere with the judge's conclusions that i) clause 11 was not particularly onerous and unusual, and that ii) notice of it was fairly and reasonably given to Goodlife.

44. The judge did not err in law in reaching these conclusions, and it was not altogether clear that Mr Christie was suggesting otherwise. He heard oral evidence as to the formation of the contract and was shown a good deal of comparative material on which to reach a view as to the nature and ubiquity of the exclusion clause in question. Those were evaluative decisions, as was his view as to the fairness and reasonableness of the notice provided. His explanation for the balancing exercise which he undertook (and which I have endeavoured to summarise above) cannot be regarded as plainly wrong. Accordingly, I do not consider that there is any basis on which this court could allow an appeal on the inter-related issues going to incorporation. In any event, for the reasons noted below, I consider that the judge's conclusions as to incorporation were correct.

45. My starting point is that it is inaccurate to describe this as a blanket exclusion clause. The warranty in respect of components preserved a limited liability on the part of Hall Fire. To the extent that labels matter, therefore, I might have described clause 11 as a stringent limitation of liability clause. However, the judge used the expression 'exclusion clause' in his judgment (whilst making it plain that it was not a 'blanket' exclusion clause), so I am content to adopt his wording.

46. The question of whether or not clause 11 was particularly onerous or unusual has to be considered in the context of the contract as a whole. This was a one-off supply contract carried out, for a modest sum, in 2002. Other than the limited warranty noted by the judge, Hall Fire had no maintenance obligations or any other connection with the premises at Warrington after they had installed the system. In those circumstances, I

consider that it was neither particularly unusual nor onerous for Hall Fire fully to protect themselves against the possibility of unlimited liability arising from future events.

47. In addition, Hall Fire indicated that, as an alternative, they might have been prepared to accept a wider liability, but that this would have involved, amongst other things, insurance arrangements and an increase in the contract price. That alternative was not pursued. That is another reason why I do not consider that clause 11, wide-ranging though it be, could be described as particularly onerous or unusual.

48. These conclusions are borne out by the evidence before the judge, some of which was also referred to us, relating to the terms and conditions of other fire suppression sub-contractors and suppliers. All of them offered a wide variety of exclusion and limitation clauses; some of them offered insurance as a (more costly) alternative. Thus, although the judge said that clause 11 was at the far end of the spectrum, the important point was that, on a consideration of all these different provisions, he concluded that it remained within the spectrum of clauses which could not be regarded as particularly onerous or unusual.

49. I do not accept Mr Christie's criticism that the judge was setting up a false dichotomy when he said that there was little difference overall between a clause like clause 11 and a clause which limited liability to the contract price. What the judge was considering was, on the one hand, a claim based on loss or damage before a fire, and a claim based on loss and damage after a fire. In the former case, say where some of the ducting had come away or there was a leak in the gas canister, the limited warranty that offered the replacement of defective components would have been triggered, and Hall Fire would have been liable to replace those defective components free of charge.

50. But if there were latent defects, or if some of the components deteriorated over the years then, given the nature of the system supplied, such hidden problems would only ever have become apparent after a fire, when they would have been implicated as the reason why the fire had spread and not been contained. Then, the losses would be of a completely different order. In those circumstances, the judge was right to observe that the difference between a clause like clause 11, and a clause which limited liability to a small sum, was negligible.

51. Mr Christie endeavoured to argue that there were what he called "middle options" which would not necessarily fall into either of the two types of claim identified above, and where a clause limiting Hall Fire's liability to the contract price would have been meaningful. He took, as an example, a situation where the brackets gave way and the ducting caused damage to other Goodlife property as it fell. He said that in those circumstances a limitation/exclusion limited to the value of the contract would have been of value. But in my view, there are two answers to that.

52. First, it is always possible to identify different types of claim which *might* arise, and which might therefore illuminate a clause like this in a flattering or a stark light (depending on the reason for using the example in the first place). What this experienced TCC judge was doing, in my view quite rightly, was focussing on the two most likely scenarios (before or after a fire), in order to explain why there was no substantive difference between clause 11 and a clause which limited the supplier's liability to a modest contract sum. Secondly, even on Mr Christie's example, pursuant to the warranty in the second part of clause 11, Hall Fire would have been liable for at

least some of the claim (namely the free of charge replacement of the defective components), whilst the consequential losses (damage to other property) would have been borne by Goodlife (through their insurance). That might well be regarded as a reasonable allocation of risk: it is the same as or similar to the allocation of risk supported by the courts in those cases, such as *Watford Electronics* and *Regus*, where the exclusion of any indirect or consequential losses was upheld as reasonable.

53. On the issue of notice, I consider that the judge was plainly right in his conclusions. Clause 11 was not buried away in the middle of a raft of small print, such as occurs in some of the older cases. Instead it was one of the standard conditions which were expressly referred to on the front of the quotation and which were printed in clear type. Moreover, its potentially wide-reaching effect was expressly identified at the very start of those same conditions. In my view, the fact that the warning (paragraph 11 above) was cast in almost apocalyptic terms is a point against (rather than in favour of) Goodlife: if that did not alert them to the effect of clause 11, then nothing would have done. A buyer who started reading these conditions would have seen by the very first words used that, at the very least, the conditions contained terms which were emphatically not in the buyer's interests. Obviously, the buyer should then have read on.

54. In addition, the judge was right to note that Goodlife had over a year between the sending of the quotation, with the relevant standard terms and conditions, and the entering into of the contract. They have never suggested that they did not read the terms or understand them. Even if they were unsure about clause 11, they had plenty of time to take advice. On the evidence, we have to assume that they accepted the terms and conditions as they were.

55. In such circumstances, it would be commercially unrealistic to say that clause 11 was not fairly and reasonably brought to the attention of Goodlife. Thus, even if I was wrong and this was a particularly onerous and unusual clause, it would still have been incorporated into the contract. So the final question raised on this appeal is whether the judge was right to conclude that Hall Fire had succeeded in showing that clause 11 was reasonable.

5. Issue 3: Was Clause 11 Reasonable in accordance with UCTA?

5.1 The Issue and its Consequences

56. If (as I believe it was) clause 11 was incorporated into the contract, then Goodlife say that it was unreasonable in accordance with UCTA. If they are right, then the clause will be ineffective. If they are wrong, the claim against Hall Fire cannot succeed.

5.2 The Relevant Principles

5.2.1 UCTA

57. Section 2 of UCTA is in the following terms:

> "**2. Negligence liability.**
>
> (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude

> or restrict his liability for death or personal injury resulting from negligence.
>
> (2) In the case of other loss or damage, 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.
>
> (3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk."

Pursuant to section 1, negligence includes a breach of contract.

58. The reasonableness test was set out in section 11 in the following terms:

> "**11. The "reasonableness" test.**
>
> (1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 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) ln 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; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.
>
> (3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.
>
> (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 (under this or any other Act) 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) lt is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does."

59. Schedule 2 is headed "'Guidelines' for application of reasonableness test". It is in the following terms:

> "The matters to which regard is to be had in particular for the purposes of sections 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 a similar term;
>
> (c) whether the customer knew or ought reasonably to have known of the existence and the 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 was 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."

60. In *Overseas Medical Supplies Limited v Orient Transport Services Limited* [1999] 2 Lloyd's Rep 273 at paragraph 10 of his judgment, Potter LJ set out eight observations from the authorities dealing with the UCTA test of reasonableness. Amongst other things, he noted that Schedule 2 was relevant to Section 3 of UCTA, whilst bearing in mind that the court was dealing with a commercial and not a consumer transaction; and that the question of reasonableness must be assessed having regard to the relevant clause viewed as a whole, and not taken in isolation. He also noted, by reference to *Singer Co (UK) Limited v Tees and Hartlepool Port Authority* [1988] 2 Lloyds Rep 164, and *The Flamar Pride* [1990] 1 Lloyd's Rep 434, that the availability of insurance to the supplier was relevant, but by no means determinative. His final observation (again by reference to *Singer*) was that the presence of a term allowing for an option to contract without the limitation clause, but with a price increase in lieu, was again important although, if the condition worked in such a way as to leave little time to put such option into effect, that may effectively eliminate the option as a factor indicating reasonableness.

5.2.2 The Importance of the Agreed Terms

61. A number of the authorities have stressed the importance of terms freely agreed by parties of broadly equal size and status. The starting point for that analysis is *Photo Production Limited v Securicor Transport Limited* [1980] AC 827 where, although the contract was made before UCTA, Lord Diplock said (page 848 F – G):

> "A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words."

The House of Lords held (in the absence of UCTA) that, where an exclusion clause was clear, the court was not entitled to reject it, however unreasonable it might think it to be.

62. In Granville Oil & Chemicals Limited v Davis Turner & Co Limited [2003] 2 Lloyd's Rep 356 at 362, Tuckey LJ said:

> "The 1977 Act obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms."

A number of other judges, such as Christopher Clarke J in *Balmoral*, have shared that lack of enthusiasm (see paragraph 405 of the judgment in that case).

63. In *Watford Electronics Limited v Sanderson CFL Limited*, a case about limiting liability to the contract price and excluding consequential loss, Chadwick LJ said at paragraph 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."

5.2.3 The Importance of Insurance

64. Many of the authorities stress, as a factor relevant to any consideration of reasonableness, the ease or otherwise with which the parties could obtain insurance in respect of the losses caused. This is perhaps unsurprising given that s.11 of UCTA expressly refers to it. Moreover *George Mitchell*, the first case of note decided under the statutory forerunner to UCTA, concluded that the term was unreasonable because (amongst other things) the appellant seed suppliers could have insured against the risk of crop failure caused by supplying the wrong variety of seeds, without materially increasing their price.

65. Insurance was also a factor in *Watford Electronics*. At paragraph 54 of his judgment, Chadwick LJ said that, when assessing whether the term excluding indirect loss was a fair and reasonable one, the court needed to consider:

> "…(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."

66. Similarly, at paragraph 41 of his judgment in *Regus v Epcot*, Rix LJ pointed to the fact that the clause in question advised Regus' customers to protect themselves by insurance for the losses with which it was concerned. He said that the probability was that it would have been easier for each customer to insure himself against business losses, rather than for Regus to insure all of its 'constantly changing phalanx of customers'. He went on at paragraph 42 to say:

> "Moreover, if insurance is left to each business customer, that customer has full autonomy over whether, how and at what price he wishes to insure against business losses. If, however, such losses have to be insured by Regus, then that autonomy is lost, and the expense has necessarily to be incurred and transferred to each customer in the form of the fees charged."

67. Finally, in this short review of the cases concerned with insurance in the context of UCTA, I note that, in *Shepherd Homes*, at paragraph 95, Christopher Clarke J found that a factor in favour of upholding the clause was that the subcontractor would not have been able to bear a liability for the contract price without insurance, and that any insurance over and above what it had would probably have been prohibitively expensive (see paragraph 95). And in *Allen Fabrications*, Judge Waksman said, at

paragraph 74, that it was a critical factor in supporting the exclusion clause that Allen had appropriate insurance in place with regard to the claims made against it, and which it was seeking to pass on.

5.2.4 Other Cases

68. I have already set out at paragraph 38 above some of the cases to which we were referred, where the courts have upheld clauses in which the subcontractor or supplier has limited its liability to the contract sum, or another amount which was tiny compared to the damages claimed. Mr Christie relied on two cases where clauses which purported to exclude liability altogether were found to be unreasonable. In *Charlotte Thirty Limited & Bison Limited v Croker Limited* (1990) 24 Con LR 46, Judge Malcolm Potter ruled that a comprehensive exclusion clause put forward by a subcontractor failed "by a comfortable margin" the test of reasonableness under UCTA. This was because the clause cut across (and was at odds with) the usual construction industry practice as to defects liability periods, and the contractor's underlying obligation to carry out appropriate remedial works when notified of defects.

69. The other case was *Balmoral Group Limited v Borealis UK Limited & Others* [2006] EWHC 2531 (Comm) where Balmoral, who manufactured storage tanks, contracted with Borealis to supply polyethylene for the process. Borealis supplied a product called 'borecene' pursuant to the contract, which excluded the implied term as to fitness for purpose. Christopher Clarke J's primary finding was that there was no breach of contract at all. It therefore follows that his analysis of the position pursuant to UCTA was entirely *obiter*. He said that, assuming breach, the exclusion clause would have been unreasonable because Borealis knew that Balmoral was buying borecene for the purpose of making oil tanks and that it was relying on Borealis to supply a polymer capable of being used to make consistently satisfactory tanks. He found that it was the assumption of both sides that it was so capable. Thus he found that the supply of a product which, because of an assumed latent defect, made the manufacture of consistently satisfactory tanks impossible would confound those assumptions. In those circumstances, an exclusion of liability was *prima facie* unreasonable.

70. In my view, three points should be made about that part of the judgment in *Balmoral*. First, the assumptions made by the judge meant that, as a matter of fact, the supply of a product with a latent defect made the manufacture of satisfactory tanks impossible. On that assumption, it was perhaps unsurprising that a clause excluding liability was found to be at odds with the assumptions at the heart of the contract. Secondly, a factor in the rejection of the exclusion clause was that Balmoral did not have relevant insurance, and that the evidence did not establish that product recall insurance would have been normal for a manufacturer in Balmoral's position (paragraph 422). Thirdly, the judge found that it was not possible for Balmoral to contract anywhere else: at paragraph 423 the judge expressly found that "Balmoral's scope for going elsewhere on any better terms was very limited".

5.3 The Parties' Submissions

71. Mr Christie did not have any specific points to make on Schedule 2 of UCTA. But he had 5 overarching points in support of his submission that clause 11 was unreasonable. Altering their sequence for convenience, they were:

(a) Clause 11 was a blanket exclusion clause.

(b) The unreasonable nature of the clause was not saved by the limited warranty.

(c) The judge was creating a false dichotomy when comparing contracts which limited the recoverable loss to the contract price, and contracts which excluded liability altogether.

(d) Insurance added nothing to the consideration of what was or was not reasonable because the judge had found that both parties had the relevant insurance.

(e) This was an unfair and unreasonable allocation of risk, because the exclusion cut across Hall Fire's primary obligation to provide a system which prevented fire in the first place.

72. In response, Ms Mulcahy relied on two parts of Schedule 2, namely the fact that Goodlife could have gone elsewhere and that reasonable notice of clause 11 was given. As to Mr Christie's five points, she said:

i) Clause 11 was not a blanket exclusion clause, and the judge's careful construction of the clause had made that plain.

ii) The warranty within clause 11 was, as the judge found, something of value which, when allied to the express warning on insurance, meant that the clause was reasonable.

iii) There was no false dichotomy and the judge was entitled to draw the distinction between losses before a fire and losses after a fire.

iv) Insurance was not a neutral factor but was a highly relevant factor in Hall Fire's favour, given that (i) Goodlife were obviously in a much better position than Hall Fire to insure their likely losses, and (ii) Hall Fire had expressly drawn their attention to the fact that, if Goodlife wanted Hall Fire to be liable for losses which were currently excluded by clause 11, then insurance could be arranged.

v) The clause was a fair allocation of risk. It did not cut across a core obligation but was simply part of the overall package of rights and obligations.

5.4 Analysis and Conclusions

73. I start with the Schedule 2 guidelines. In my view, with the exception of sub-paragraphs (b) and (e), they have no relevance to the present dispute. But those two sub-paragraphs are of significance: both are in Hall Fire's favour and point towards the reasonableness of clause 11. Thus:

i) The parties were broadly equal in terms of their bargaining positions.

ii) Goodlife received no inducement to agree to clause 11. However, as the judge expressly found at paragraph 79 of his judgment, Goodlife could have

gone elsewhere and found a supplier who was prepared to contract on a less stringent basis. That was therefore a factor in favour of Hall Fire's case that the clause was reasonable. It also distinguishes this case from *Balmoral v Borealis*.

iii) Goodlife ought reasonably to have known of the existence of the terms for the reasons which I have summarised in paragraphs 53-55 above. Notice was fairly and reasonably given. That is another factor in favour of Hall Fire's case that clause 11 was reasonable in all the circumstances.

iv) This is not a clause that excluded or limited liability on the operation of a condition.

v) There was no evidence that the goods were manufactured, processed or adapted to Goodlife's order.

74. I then turn to Mr Christie's five points. The first two, concerned with the nature and scope of clause 11, I take together. For the reasons already set out in paragraphs 45-48 above, I reject them. The judge found that this was not a blanket exclusion clause and that the warranty in respect of the defective components, although limited, was something of real value to Goodlife. Although, clause 11 was at the far-reaching end of the spectrum, it was not beyond it. I can see no basis to disagree with the judge's conclusions on these issues.

75. As to Mr Christie's third submission about the so-called false dichotomy, I have already dealt with and rejected that argument: see paragraphs 49-52 above.

76. Mr Christie's fourth point, concerned with insurance is, in my judgment, at the heart of the reasonableness issue in this case. For the reasons set out below, I do not accept his submission that insurance was a neutral factor. On the contrary, I consider that it was an important consideration in favour of Hall Fire and the reasonableness of clause 11. There are two reasons for that: the identity of the party best-placed to effect the necessary insurance, and the express alternative identified by Hall Fire in the third part of clause 11.

77. As to the identity of the party best-placed to effect the necessary insurance, there can be no doubt that that was Goodlife. As the authorities noted at paragraphs 64 - 67 above make plain, a party such as Goodlife, conducting (as part of its regular business) a potentially hazardous operation, and with its own unique knowledge of its property and the precise effect on its business if there was a fire which stopped the factory working, was plainly in the best position to place its own insurance to cover those risks in the way most suited to that business. The judge found that Goodlife had that necessary insurance. As the authorities demonstrate, that was a powerful factor in favour of Hall Fire and the reasonableness of the clause. The fact that Hall Fire also had insurance is relevant but by no means determinative (see paragraph 60 above), in part because Hall Fire's insurers would never have had the same detailed knowledge of that which needed to be insured.

78. Furthermore, on the facts of this case, it does not end there. As the judge expressly noted, although clause 11 excluded liability for future events, it suggested an alternative to Hall Fire's basic tender, to be effected by way of insurance. The third part of the

clause stated that this would then allow Goodlife to have the benefit of that liability which the second part of clause 11 otherwise excluded. The judge dealt with the importance of this in the context of UCTA at paragraphs 80 – 81 of his judgment (set out at paragraphs 24 and 25 above).

79. I respectfully agree with the judge that the third part of clause 11 was one of the most important elements in the court's consideration of reasonableness. The first two parts of clause 11 limit Hall Fire's liability very significantly. But the third part of the clause went on to say that, if Goodlife wanted that liability to be reinstated, it would cost them more, but would give rise to insurance, and therefore protection for losses which would otherwise be excluded. That is an important consideration: see paragraph 60 above and the case of *Singer* in particular. Is it unreasonable for one party to exclude liability for the vast majority of the damage and loss that might arise from its own defective performance, whilst making clear that, if the customer does not want such liability to be excluded, then, on the taking out of and payment for the necessary insurance, liability would be accepted? For the reasons I have given, I consider that the answer is No.

80. I also agree with the judge that the third part of clause 11 was not an empty offer. It did not merely tell Goodlife something they already knew. It was reiterating that Hall Fire did not assume a liability for future events if Goodlife did not put in place the necessary insurance. It stressed the necessity of that insurance. It would have concentrated Goodlife's mind as to what insurance cover they already had, so that they could decide whether that cover needed to be enhanced or modified as a result of Hall Fire's alternative offer. Even if the provision had no other effect beyond allowing Goodlife to be satisfied that it had sufficient insurance of its own to cover the potential losses caused by any fire, then the third part of clause 11 would have fulfilled its function. Indeed, there is no evidence to say that this was not precisely what happened.

81. In my view, it would be unrealistic to ignore the fact that this claim is brought by Goodlife's insurers. To that extent, the existence of this subrogated claim confirms what Rix LJ said in *Regus*: the insurers of the owner, who know in detail what the property consists of and what the losses might be if there was an interruption to the business, are in a much better position to provide proper insurance than the insurer of a third party supplier who has no knowledge of any of those matters of detail.

82. Neither can there be any suggestion that Goodlife did not have the time to consider and explore the alternative option. After all, there was more than a year between their receipt of the term proposed by Hall Fire, and their agreement to the contract. There was ample time for the insurance position to be fully explored. The fact that it was not raised at all with Hall Fire may therefore suggest that Goodlife was happy with its insurance cover.

83. Accordingly I have concluded that the position in relation to insurance is not neutral, but is instead a critical factor in Hall Fire's favour.

84. That leaves Mr Christie's final submission that, because Hall Fire were seeking to avoid their core obligation of providing a proper fire suppression system, clause 11 should be regarded as unreasonable. In making that submission, Mr Christie relied heavily on the judgment of Christopher Clarke J in *Balmoral v Borealis*, and also on *Charlotte Thirty*.

85. I do not accept that submission for a number of reasons. First, the contention that this went to the assumption at the heart of the contract ignores clause 11 itself. When looking at the parties' rights and obligations, the contract has to be looked at as a whole. Thus, although Hall Fire had agreed to provide the fire suppression system, they had agreed to do so on the basis that they had severely limited their liability for any future claims. The supply of the system cannot be looked at in isolation from the terms on which Hall Fire were prepared to supply and install it. So clause 11 cannot be left out of account when considering the parties' core obligations. In my view, that provides a very powerful answer to Mr Christie's submission.

86. Secondly, I should say that, in my view, *Balmoral* was a very different case. There, on the facts assumed by the judge for his *obiter* analysis, it was impossible for Borealis ever to comply with the contract. He therefore found that it would be unreasonable for them to exclude their liability for something which was contrary to both parties' assumptions. But that is not this case: there is no suggestion of impossibility here. In addition, because of the insurance element and the fact that Balmoral could not contract elsewhere, *Balmoral v Borealis* was a long way from the facts of this case. I do not think it is of assistance in the more typical circumstances that arose here.

87. For the avoidance of doubt, I consider that *Charlotte Thirty* was also a very different situation. The exclusion in that case cut across all the construction industry norms. By contrast, the limited warranty here, with its reference to the defects liability period of 12 months, was in accordance with general construction industry practice.

88. Thirdly, I consider that it is in relation to the allocation of risk that the principles set out in paragraphs 61 - 63 above, concerned with the importance of terms freely agreed between the parties, become of particular relevance. Essentially what Mr Christie seeks to do is to ignore or set aside clause 11 (which was of course one of the terms agreed by the parties) in order to say that, if it is added back, it must be unreasonable. That is not an appropriate approach to construction, or a consideration of the contract's central assumptions. Clause 11 was freely agreed between the parties. It meant that both parties knew that (amongst other things) Hall Fire did not have an open-ended liability for events that happened a decade or more after the installation. For the reasons that I have given, it seems to me that that was an entirely reasonable allocation of risk in a contract worth £7,490. What is more, it was an allocation of risk that was expressly advertised, with an alternative option, in the third part of clause 11.

89. At one point, Mr Christie sought to distinguish *Watford Electronics* and some of the other authorities concerned with the importance to be attached to terms which had been agreed by the parties, on the grounds that, in those cases, the clause in question had been the subject of detailed negotiations. He contrasted that with the present case, in order to argue that the reasoning in those cases (to the effect that it was difficult to say that a carefully-negotiated clause was somehow unreasonable), did not apply here. I think that submission is erroneous for two reasons.

90. First, it is clear on the facts that, as Ms Mulcahy demonstrated, there was some negotiation here. The price was reduced to £7,490 from the higher figure which Hall Fire had originally quoted. That could only have come about through negotiation. Thus the difference between the present case and, say, *Watford Electronics*, is merely one of degree, as to the extent of the negotiations that occurred. Such a difference would not ordinarily justify a different outcome on the question of reasonableness.

91. Secondly, as I put to Mr Christie during the course of argument, it cannot be right in principle that a party who did not negotiate over every proposed clause, but instead accepted what was being offered, is then in a better position to argue subsequently that the clause in question is unreasonable. Every case will turn on its own facts. Clearly, if an exclusion clause was retained despite strenuous attempts during negotiation by A to remove it, then that might make it much harder for A to say subsequently that it was unreasonable. But the converse is not true, and no part of Chadwick LJ's judgment in *Watford Electronics* should be read as supporting any such proposition.

92. Finally, on the issue of allocation of risk, Ms Mulcahy took us through a number of the standard terms and conditions offered by Hall Fire's competitors. It is unnecessary to set them out in detail; they all involved different permutations of exclusions, limitations and warnings as to the need for insurance. Although the precise degree of risk allocated to the parties varied from one set of standard terms and conditions to another, the essential parameters were broadly the same. Contractors in the fire-suppression business seek to limit or exclude their liability for losses which might occur a long time after their work is done, and in respect of which the customer, rather than themselves, is in a much better position to effect the relevant insurance.

93. Mr Christie's parting shot was that, if this appeal was refused, it would emasculate UCTA. I do not agree. As noted above, the clause in question has to be considered in both its contractual and factual context. Some clauses will fall one side of the line; some the other. It is impossible to lay down prescriptive rules. If, as Mr Christie put it, UCTA remains in force to protect against unconscionable behaviour, I consider that it still has a valuable role to play. But I am in no doubt that there was no unconscionable behaviour on the part of Hall Fire, so in this case there is nothing for UCTA to protect against. More widely, it is certainly right, as the commentators have noted, that the trend in the UCTA cases decided in recent years has been towards upholding terms freely agreed, particularly if the other party could have contracted elsewhere and has, or was warned to obtain, effective insurance cover. To that extent, therefore, my views are in line with that trend.

94. For all these reasons, I consider that there is no basis on which this court should interfere with the findings of the judge that clause 11 was reasonable in all the circumstances.

7. Conclusions

95. For the reasons set out above, I conclude that:

i) Clause 11 was not particularly onerous or unusual;

ii) Clause 11 was fairly and reasonably brought to the attention of Goodlife;

iii) Clause 11 was therefore incorporated into the contract;

iv) Clause 11 was reasonable, even though it was a stringent limitation of liability provision, because of the two relevant Schedule 2 factors; the insurance position generally; the specific alternative in respect of insurance which Goodlife had plenty of time to consider but which they did not pursue; and because of the reasonableness of the overall allocation of risk between the parties.

96. I would therefore dismiss this appeal.

Lord Justice Moylan :

97. I agree with both judgments.

Lord Justice Gross :

98. I also agree with the comprehensive judgment of Coulson LJ and for the reasons he gives, that the appeal should be dismissed. I add only a few words of my own.

GENERAL CONSIDERATIONS

99. An important pillar of English common and commercial law is party autonomy. Parties are free to contract on terms they choose, to allocate risks as they see fit - and the Court will enforce their bargains. Outside the scope of application of the Unfair Contract Terms Act 1977 ("UCTA") but taking account of its enactment, as Lord Wilberforce observed in *Photo Productions v Securicor Ltd* [1980] AC 827, at p. 843:

> "After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said….for leaving the parties free to apportion the risks as they think fit and for respecting their decisions."

Lord Diplock, in his speech, put the same concept in these terms (at p. 848):

> "A basic principle of the common law of contract….is that parties to a contract are free to determine for themselves what primary obligations they will accept…."

100. The common law was, of course, alive to the difficulties posed by exemption clauses and addressed them, for a time, through the doctrine of fundamental breach and, enduringly, through the techniques of requiring adequate notice and a process of strict construction so as to narrow their scope.

101. With regard to the question as to the adequacy of notice, the common law in effect operated a sliding scale, tellingly encapsulated by the observation of Bingham LJ (as he then was) in *Interfoto Library Ltd v Stiletto Ltd* [1989] 1 QB 433, at p. 443:

> "…the more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given."

In essence the question of the reasonableness of notice entails "a principle of fair and open dealing" (Bingham LJ in *Interfoto*, at p. 439) or avoiding the "mischief of ignorance" (to paraphrase HHJ Waksman's summary, in *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC), at [62]).

102. As already mentioned, the common law circumscribed the operation of exemption clauses by adopting an approach of strict construction. When the Legislature intervened by enacting UCTA, it adopted a different technique, requiring the clauses in question to satisfy the requirement of "reasonableness". UCTA applies to the present contract because it was based on Hall Fire's standard terms; hence the need for cl. 11 to satisfy the requirement of reasonableness.

103. However, even where UCTA is applicable, at least in the case of commercial contracts between parties of broadly equal bargaining power, considerations of party autonomy and freedom of contract remain potent. Thus, in *Watford Electronics v Sanderson* [2001] EWCA Civ 317; [2001] 1 All ER (Comm) 696, Chadwick LJ said this:

> "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."

104. The observations of Tuckey LJ in *Granville Oil v Davis Turner* [2003] EWCA Civ 570; [2003] 2 Lloyd's Rep. 356, at [31], were to the same effect:

> "The 1977 Act [i.e., UCTA] obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms."

105. It may be noted that decisions, as to whether a particular clause is "reasonable" within the meaning of UCTA, or whether, having regard to the nature of the exclusion or limitation of liability clause in question, adequate notice has been given, are evaluative in character. Accordingly, a reluctance to interfere with bargains made by commercial parties is accentuated in an Appellate Court by the consideration that this Court "…should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong": Lord Bridge of Harwich, in *George Mitchell (Chesterfield) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, at p. 816.

106. Against the background already outlined, the issues in the present case as to the incorporation of cl. 11 and its reasonableness, involve the application of two control mechanisms: first, the common law technique, going to the adequacy of notice;

secondly, the statutory (UCTA) test of reasonableness. I agree entirely and specifically with the observations of Coulson LJ (at [35]) that the issues of incorporation (at common law) and reasonableness (under UCTA) are separate and the questions to be decided in respect of each are distinct, though there may be some overlap.

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107. *Incorporation*: Even treating cl. 11 as an exclusion clause at, as the Judge put it, "the most far-reaching end of the spectrum", I see no basis for interfering with the Judge's conclusion that it was incorporated into the contract. Though unnecessary to go further, for my part, I think that was plainly the correct conclusion to reach.

108. *Reasonableness*: Like Coulson LJ, I can see no basis for interfering with the Judge's conclusion that cl. 11 was reasonable in all the circumstances, even on the footing that it was a far-reaching exclusion clause. Though again unnecessary to go further, in my judgment, that was the correct conclusion to reach.

109. Briefly expressed, my reasons for reaching this conclusion, in agreement with those given by Coulson LJ, are as follows:

(i) As Goodlife contended, the reasonableness of cl.11 falls to be judged at the time the contract was entered into – not in the light of the events which subsequently happened. However, at the time the contract was entered into, its salient features included the following: this was a one-off supply contract without a continuing maintenance obligation (save for the warranty element of cl.11 and that contained in section 9 of Hall Fire's supplementary conditions); this was a relatively low value contract (the contract price was £7,490.00); subject to any exclusions or limitations of liability, Hall Fire was exposed to potentially unlimited liability for an indefinite period. In the event, just such a (by no means untypical) risk materialised: a fire about a decade post-contract, giving rise to a claim for some £6.6 million damages.

(ii) For my part, cl. 11 was an exclusion clause and a far-reaching exclusion clause at that; but it was not a blanket exclusion clause. I can see no reason to interfere with the Judge's conclusion that the warranty was of real value.

(iii) As a matter of commercial reality, the Judge was right to say that there was little difference overall between a clause such as cl. 11 and other clauses available in the market, limiting liability to the contract price. Contrary to the submissions advanced on behalf of Goodlife and for the reasons given by Coulson LJ (at [49] – [52]), the Judge was not setting up a false dichotomy.

(iv) As the Judge found (at [79] of his judgment), Goodlife could have gone elsewhere and entered into a contract with another supplier but without a similar term to cl. 11 – a factor specifically featuring at para. (b) of Schedule 2 to UCTA. As it is, there had been some negotiation in finalising the terms, evidenced by the reduction in contract price achieved by Goodlife.

(v) With regard to insurance, I have nothing to add to Coulson LJ's full reasons for treating it as a "critical factor" in Hall Fire's favour (at [64] – [67] and [76] – [83] of his judgment). On any view, the reference to insurance in cl. 11 made Hall Fire's exclusion of liability abundantly plain while leaving it open to Goodlife to obtain its own insurance or contract on a different and more expensive basis if Hall Fire was requested to obtain insurance on Goodlife's behalf.

(vi) I too would reject the Goodlife submission that clause 11 did not satisfy the requirement of reasonableness because it undermined Hall Fire's "core obligation" under the contract, namely the provision of a proper fire suppression system. To my mind, this submission begs the question, as Hall Fire's "core obligation" can only be ascertained when regard is had to the terms of the contract as a whole, including (not excluding) the provisions of cl. 11. Furthermore, the Goodlife approach runs counter to the tenor of the observations in *Photo Productions v Securicor (supra)*, that the parties are free to apportion risks and incur obligations, as they think fit (subject only in the present context to satisfying the requirement of reasonableness).

(vii) Overall, this was a commercial contract between parties of broadly equal bargaining power. Like Chadwick LJ and Tuckey LJ in the authorities cited above and fully cognisant of the requirement of reasonableness, I think the Court should be slow to intervene in such a case, all the more so on an appeal.