Neutral Citation Number: [2022] EWHC 2434 (TCC)

Case No: HT-2020-LDS-000008

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LEEDS DISTRICT REGISTRY

The Court House
Oxford Row
Leeds LS1 3BG

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Before :

Her Honour Judge Kelly sitting as a Judge of the High Court

- -

Between :

SCOTBEEF LIMITED

Claimant

- and –

D&S STORAGE LIMITED (IN LIQUIDATION)

Defendant

- -
- -

Mr Andrew Brown (instructed by **Birketts LLP**) for the **Claimant**
Mr Max Davidson (instructed by **TKTL Solicitors**) for the **Defendant**

Hearing date: 21 October 2021
Date draft circulated to the Parties 29 September 2022
Date handed down 14 October 2022

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APPROVED JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Friday 14th October 2022.

Her Honour Judge Kelly

1. This judgment follows the trial of the preliminary issues ordered to be tried by order made on 22 March 2021. The preliminary issues are:
   (1) Whether the Food Storage & Distribution Federation ('FSDF') terms and conditions were incorporated into a contract between the parties, as alleged by the Defendant;
   (2) The effect of this (if any) upon the Defendant's liability.

2. The Claimant was represented by Mr Andrew Brown of counsel, and the Defendant was represented by Mr Max Davidson of counsel. I had the very great assistance of skeleton arguments from both counsel before the start of the hearing.

3. At the start of the hearing, the Defendant made an oral application to admit further documents. The documents which it sought to admit were three different sets of terms and conditions which the Defendant wished to rely upon to demonstrate industry standard terms and conditions. I gave reasons at the time of the decision for allowing the Defendant to refer to the terms of the United Kingdom Warehousing Association ("UKWA") as those had been referred to in the pleadings, but refused permission to rely upon the other documents.

4. In addition, a late application had been made to admit the witness statement of Mr David Brian Straw ("Mr Straw") dated 23 July 2021 as hearsay evidence as a result of Mr Straw's ill-health. I admitted Mr Straw's witness statement into evidence, and indicated during the course of my judgment on that issue that I would have to consider what weight could be given to the statement because Mr Straw could not be cross-examined.

Background

5. The Claimant claims £395,588 from the Defendant arising out of the alleged breach of contract by the Defendant in respect of storage of the Claimant's meat. A quantity of the Claimant's meat was found to be covered in mould and subsequently deemed unfit for human or animal consumption and had to be destroyed.

6. The Defendant admits that mould was found on meat products, but denies that the mould was caused by any failure of the refrigeration system at the storage facility nor by any breach of contractual duty by the Defendant. Further, the Defendant asserts that the contract incorporated the Food Storage & Distribution Federation ("FSDF") terms and conditions which included time bar conditions, the effect of which was that the Claimant was time-barred from bringing any legal proceedings against the Defendant by, at the latest, 3 July 2020.

7. Further, if the claim was not time-barred, the Defendant asserted that the FSDF terms and conditions limited any damage found to have been caused by any breach to £250 per metric ton in any event. The Defendant's case is that there was a single contract, originally agreed in February 2017, which contract was subsequently amended to incorporate the FSDF terms and conditions.

8. The relevant FSDF terms and conditions were "Recommended Conditions For Storage Services" 2015 as follows:

> "11.4 The Company shall have no liability for any claim unless;
> a) the Company receives written notice of it within 10 days of the date upon which the Customer became aware of the event giving rise to such claim or would have become aware of the event had the Customer acted with reasonable diligence ("the Date"); and
> b) a detailed claim giving sufficient details of the claim and alleged loss to allow the Company to investigate the claim including but not limited to the weight, value and date of delivery into store is submitted to the Company in writing within 21 days of the Date.
>
> …
>
> "11.7 In any event and subject to the rest of this Condition 11 and save where a higher limit is agreed pursuant to Condition 11.9, the Company's liability to the Customer, Owner or any other party with an interest in the Goods arising out of or in connection with the Services and / or the Goods whether based in contract, tort (including but not limited to negligence), bailment, restitution, equity, arising from statute or otherwise and including but not limited to in respect of loss (including theft), destruction, damage, unavailability, contamination, deterioration, delay, non-delivery, mis-delivery, unauthorised delivery, noncompliance with instructions or obligations, incorrect advice or information, loss or corruption of data, interference with or disruption of computer systems or any event giving rise to any liability of the Customer or Owner to any other person or authority shall never exceed:
> (a) the Value of the Goods or the part thereof that is lost or damaged; or

(b) £250 per metric tonne of gross weight of that part of the Goods to which the claim relates;
whichever shall be the lesser.

"11.10 No legal proceedings may be brought against the Company whether by a claim, counterclaim, Part 20 claim or otherwise unless they are issued and/or served within nine months of the event giving rise to the claim."

9. In addition, on the front page of the recommended conditions there were three introductory paragraphs set out in bold as follows:

"The Customer's attention is drawn specifically to conditions 4, 5, 7, 10, 11, 13, 14, 17, 19 and 21 which exclude or limit the Company's and the Company's subcontractors' liability or require the Customer to indemnify the Company and/or its sub-contractors in certain circumstances. There are also strict time limits within which claims for loss or damage must be notified and proceedings brought. Clause 15 entitles the Company to exercise a lien over goods consigned to it and provides for consequential rights.

To enable the Company to provide the Services to the Customer for the charges quoted the Company excludes and/or limits it's (*sic*) liability for certain types of loss and damage and places a limit on any liability to the Customer.

The Company will not insure the Goods and the Customer and/or the Owner are advised to check their own insurance arrangements having regard to the limitations on the Company's liability and the indemnities being given by the Customer in the Conditions".

10. The following chronology is of assistance:

c. 2010	The Claimant began its relationship with Woolley Bros. (Wholesale Meats) Limited ("Woolleys"). Woolleys began to store its own meat with the Defendant.
Early 2017	The Claimant decided it needed a further depot and opened one in Wolverhampton. The Claimant asked Woolleys to make arrangements with the Defendant to store meat on behalf of the Claimant. The Claimant did not handle the meat before it went into storage with the Defendant. Woolleys processed the meat and then sent it to the Defendant and paid for it to be blast frozen. At that point, ownership of the meat transferred from Woolleys to the Claimant and the Claimant then paid the Defendant for the meat to be stored.

	The Claimant understood from discussions with Woolleys that the Defendant had appropriate insurance cover if anything should happen to the meat. Woolleys negotiated the price per pallet with the Defendant, acting as agent for the Claimant. Thereafter, weekly storage invoices were sent by the Defendant directly to the Claimant's head office by post. There was no written contract between the Claimant and the Defendant in respect of provision by the Defendant of cold storage services.
27 February 2017	First invoice from Defendant to Claimant – UKWA Terms are referred to on the invoice. The Defendant asserts in paragraph 7 of its Amended Defence that although the Defendant traded on UKWA terms and conditions, it is not alleged that those terms were in fact incorporated into any material contract with the Claimant.
c.1 May 2017	The Defendant became a member of FSDF.
c.15 May 2017	In its Amended Defence, the Defendant alleged that its employee, Clare Portsmouth, telephoned the Claimant and Woolleys to inform them that the Defendant was no longer trading on UKWA terms and conditions and from then on was trading on FSDF terms and conditions. In his witness statement, Mr Straw stated that he spoke to Gary Blockley of Woolleys by telephone and "mentioned to him" that the Claimant was switching from UKWA to FSDF terms and conditions and that the payment for claims was going up to £250 per tonne of meat damaged from £100 per tonne. Mr Straw also stated that he asked Clare Portsmouth to inform all customers about the change to the terms and conditions.
15 May 2017	First invoice from the Defendant to the Claimant which refers to FSDF terms and conditions.
7 January 2019	Woolleys and the Defendant enter into a written contract, the terms of which differ from the FSDF terms and conditions and FSDF terms and conditions are not mentioned in that contract.
18 February 2019	The invoices from the Defendant stop referring to FSDF terms and conditions (apart from a single invoice dated 16 September 2019).

3 October 2019	The Defendant transferred to the Claimant six pallets of beef which were discovered to contain mould.
24 October 2019	The Defendant provided the Claimant with a spreadsheet detailing the damage to the meat transferred to the Claimant on 3 October 2019.
14 April 2020	An inspection took place of 102,355kg of the Claimant's meat stored in the possession of the Defendant. The meat was declared unfit for human or animal consumption.
23 July 2020	This claim was issued for £395,588 claiming breach of bailment and/or breach of contract and/or tortious liability following the spoiling of 102,400 kg of meat stored by the Defendant for the Claimant.
18 January 2021	The Defendant's Defence set out amongst other things that the Defendant relies upon express incorporation of the FSDF terms and conditions by reason of reference to them on the invoices, and/or by reason of course of dealing.
29 March 2021	An Amended Defence was filed adding allegations that: (1) Woolleys acted as agent for the Claimant; and (2) an employee of the Defendant, Clare Portsmouth telephoned both Woolleys and the Claimant on or around 15 May 2017 to give notice of the FSDF terms being incorporated into any trading relationships moving forward.
7 May 2021	The Claimant's Reply asserted that: (1)Woolleys arranged all storage matters on behalf of the Claimant, but did not have authority to contract on any FSDF terms; (2)Clare Portsmouth did not contact the Claimant; (3)The FSDF terms were not incorporated either by notice or course of dealing; and (4)The pleaded terms are unfair and unenforceable as a result under the Unfair Contract Terms Act 1977 ('UCTA').

11. I have had the benefit of reading the witness statements of Mr Simon Charles Dowling ("Mr Dowling") for the Claimant and Mr Straw for the Defendant, together with the various documents to which I was taken during the course of the trial and directed to in the skeleton arguments. During the trial, I had the benefit of hearing oral evidence from

Mr Dowling for the Claimant. The statement of Mr Straw was admitted as hearsay evidence for the Defendant.

12. This is a case which does not solely turn on the credibility of the oral evidence, but also on the documentary evidence contained within the trial bundles. I do not propose to rehearse all of the arguments raised by the parties, nor all of the evidence referred to during the course of the hearing. However, I record that I read and considered the evidence as a whole, as well as various documents within the trial bundle to which my attention was drawn, in addition to all the arguments raised by the parties before coming to my decision.

The Issues

13. The parties set out their respective positions on various matters which need to be determined in order to answer the preliminary issues raised.

14. The matters which need to be determined are as follows:

    (1) Were the FSDF terms and conditions standard terms used in the industry?
    (2) What was the meaning of clause 11.10?
    (3) Were some or all of the clauses relied upon limiting liability onerous in all the circumstances?
    (4) Were the FSDF terms and conditions incorporated into the contract by variation and was sufficient notice of the terms and conditions given:
        (a) by reason of specific notice having been given in telephone calls from:
            (i) Mr Straw to Gary Blockley of Woolleys in May 2017; and/or
            (ii) Clare Portsmouth to the Claimant and/or Woolleys in May 2017;
        (b) by signature of the Defendant's invoices by Mr Dowling;
        (c) by reference to them solely on the invoices?
    (5) Should the relevant FSDF terms and conditions be struck down as a result of the provisions of the Unfair Contract Terms Act 1977 ("UCTA") in any event?

The Law

15. Happily, counsel largely agree on the legal principles, even if they disagree as to whether some of the principles apply on the facts of this case.

16. Chitty on Contracts (34th edition) at paragraph 15 – 005 onwards deals with incorporation of terms by reasonable notice as follows. The terms of a contract can be incorporated by a written document which is signed, by sufficient notice of the terms being given and by course of dealing. Paragraph 15 – 005 deals with incorporation of terms by signature:

> "Where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will ordinarily be bound by the terms of the written agreement whether or not they have read them and whether or not they are ignorant of their precise legal effect. The document that has been signed must be a contractual document and not an administrative document, such as a time sheet or a statement of account which is intended simply to record the performance that has taken place under the contract. In deciding whether the document which has been signed is a contractual document intended to have contractual effect, the court will consider not only the nature and the purpose of the document, but also the circumstances surrounding its use by the parties and their understanding of its purpose at that time. The rule that a party is bound by their signature has been described as 'an important principle of English law which underpins the whole of commercial life' such that 'any erosion of it would have serious repercussions far beyond the business community'.

17. Paragraph 15 – 007 sets out:

> "A different problem may arise in proving the terms of the agreement where the contract document has not been signed and it is sought to show that the terms are contained or referred to in a notice or similar document i.e. in some ticket, receipt or standard form document. Frequently, the document is simply made available to a party before or at the time of making the contract, and the question will then arise whether the printed conditions which it contains or to which it refers have become terms of the contract. The party to whom the document is supplied will probably not trouble to read it, and may even be ignorant that it contains any conditions at all. Yet such notices may embody clauses which purport to impose obligations on them or to exclude or restrict the liability of the person supplying the document. Thus it becomes important to determine whether these clauses should be given contractual effect. This will depend upon the form of the notice, the time at which it is brought to the attention of the other party and whether reasonable steps have been taken to draw the notice to the attention of the other party."

18. The meaning of notice is dealt with at paragraph 15 – 010:

> "It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that they should have been made subjectively aware of their import or effect. The rules which have been laid down by the courts regarding notice in such circumstances are three in number:
>
> (1) if the person receiving the document did not know that there was writing or printing on it, they are not bound (although the likelihood that a person will

> not know of the existence of writing or printing on the document is now probably very low);
> (2) if they knew that the writing or printing contained or referred to conditions, they are bound;
> (3) if the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them."

19. The reasonable sufficiency of notice is dealt with at paragraph 15 – 011:

> "It is the third of these rules which has most often to be considered by the courts. The question whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the tribunal must look at all the circumstances and the situation of the parties. But it is for the court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient. Cases in which the notice has been held to be insufficient have been those where the conditions were printed on the back of the document, without any reference, or any adequate reference, on its face, such as, (i) "[f]or conditions, see back", (ii) where, on documents sent by fax, reference was made to conditions stated on the back, but those conditions were not in fact stated on the back or otherwise communicated, or (iii) where the conditions were obliterated by a printed stamp. In many situations, however, the tender of printed conditions will in itself be sufficient. It is not necessary that the conditions themselves should be set out in the document tendered: they may be incorporated by reference, provided that reasonable notice of them has been given. Reference to standard terms to be found on a website may be sufficient to incorporate the terms on the website into the contract."

20. As to incorporation through a course of dealing, in *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125, Lord Reid set out at page 127 of the judgment:

> "The only other ground on which it would seem possible to import these conditions is that based on a course of dealing. If two parties have made a series of similar contracts each containing certain conditions, and then they make another without expressly referring to those conditions it may be that those conditions ought to be implied. If the officious bystander had asked them whether they had intended to leave out the conditions this time, both must, as honest men, have said "of course not." But again the facts here will not support that ground. According to Mr. McSporran, there had been no constant course of dealing; sometimes he was asked to sign and sometimes not. And, moreover, he did not know what the conditions were. This time he was offered an oral contract without any reference to conditions, and he accepted the offer in good faith.

> "The respondents also rely on the appellant's previous knowledge. I doubt whether it is possible to spell out a course of dealing in his case. In all but one of the previous cases he had been acting on behalf of his employer in sending a different kind of goods and he did not know that the respondents always sought to insist on excluding liability for their own negligence. So it cannot be said that when he asked his agent to make a contract for him he knew that this or, indeed, any other special term would be included in it. He left his agent a free hand to contract, and I see nothing to prevent him from taking advantage of the contract which his agent in fact made.
>
> > "The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other" (Gloag on Contract, 2nd ed., p. 7).
>
> In this case I do not think that either party was reasonably bound or entitled to conclude from the attitude of the other, as known to him, that these conditions were intended by the other party to be part of this contract."

21. I was also referred to the case of *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 where the court noted that as well as a course of dealing, in order to imply terms, they would have to be necessary for business efficacy or so obvious as to go without saying.

22. In *Transformers and Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC), Edwards-Stuart J conducted a review of numerous authorities in relation to course of dealing including:

    Tekdata Interconnections Ltd v Amphenol Ltd [2009] EWCA Civ 1209

    Balmoral Group v Borealis (UK) [2006] EWHC 1900 (Comm)

    Capes (Hatherden) Ltd v Western Arable Services Ltd [2010] 1 Lloyd's Rep 477

    Sterling Hydraulics Ltd v Dichtomatik Ltd [2007] 1 Lloyd's Rep 8

    Circle Freight International Ltd v Medeast Gulf Exports Ltd [1988] 2 Lloyd's Rep 427

23. Having done so, he summarised the effect of those authorities at paragraph 42 of the judgment as follows:

> "From my rather brief review of some of the relevant authorities, I consider that in cases of this sort the following principles apply:
> i) Where A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, the correct analysis, assuming that each party's conditions have been reasonably drawn to the attention of the other, is that there is a contract on B's conditions: see *Tekdata*.
> ii) Where there is reliance on a previous course of dealing it does not have to be extensive. Three or four occasions over a relatively short period may suffice: see *Balmoral* at [356] and *Capes (Hatherden)*.

iii) The course of dealing by the party contending that its terms and conditions are incorporated has to be consistent and unequivocal: see *Sterling Hydraulics*.
iv) Where trade or industry standard terms exist for the type of transaction in question, it will usually be easier for a party contending for those conditions to persuade the court that they should be incorporated, provided that reasonable notice of the application of the terms has been given: see *Circle Freight*.
v) A party's standard terms and conditions will not be incorporated unless that party has given the other party reasonable notice of those terms and conditions: see *Circle Freight*.
vi) It is not always necessary for a party's terms and conditions to be included or referred to in the documents forming the contract; it may be sufficient if they are clearly contained in or referred to in invoices sent subsequently: see *Balmoral* at [352], [356].
vii) By contrast, an invoice following a concluded contract effected by a clear offer on standard terms which are accepted, even if only by delivery, will or may be too late: see *Balmoral* at [356]. This

24. *Transformers* was a battle of the forms case. On the facts of the case, the claimant's orders were placed by different methods (including by post, fax and email) and the relevant terms which the claimant sought to be relied upon were only apparent on orders sent by post. The judge found that by not sending terms and conditions when placing orders by fax or email, even though they were printed on the reverse of purchase orders sent from time to time by post, that was not sufficient when the purchase order sent did not refer on its face to any terms and conditions. The defendant asserted that its terms were incorporated because it referred to its terms when sending an acknowledgement of the order. As the terms were not standard industry terms in a form in common use in the industry, the judge found that to give reasonable notice, the fact of the terms should have been referred to on the face of the acknowledgment of order and the terms themselves set out on the back of the acknowledgement (unless the terms were sent to the other party).

25. The judge also said at paragraph 53:

> "I accept that the position may be different if the terms and conditions which the seller seeks to impose are those which are routinely applied to contracts of the type in question, because, for example, they are the terms and conditions of a particular trade association, as in the *Circle Freight* case. In those circumstances it may be sufficient for the seller simply to refer to those conditions on the face of the acknowledgement of order stating that copies are available on request - but that is not this case."

26. Lewison LJ notes in The Interpretation of Contracts 7th edition at paragraph 3.105:

> "It is not necessary to the incorporation of trading terms into a contract that they should be specifically set out provided that they are conditions in common form or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and they are available on request. A statement that the terms and conditions are available on a website may be sufficient in the case of a contract made between commercial parties."

27. In *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) PTE Ltd* [2015] EWHC 25 (Comm), Teare J held, concerning the incorporation of Impala's standard terms and conditions of warehousing, at [16] that:

> *"*16. As a matter of English law where terms are incorporated it must be shown that the party seeking to rely on the conditions has done what is reasonably sufficient to give the other party notice of the conditions; see Chitty on Contracts Vol.1 para.12-014. Here, the first page refers to the warehouse certificate as being subject to the Terms and Conditions of Impala. At the base of the page the reader is invited to refer to the reverse of the page for additional conditions. On the reverse the reader is referred to Impala's web-site for its Terms and Conditions. Thus, the holder of the warehouse certificate knows that the certificate is subject to Impala's Terms and Conditions. He is referred to the reverse of the certificate. On the reverse he is told where to find the Terms and Conditions. I consider that these steps are reasonably sufficient to give the holder notice of the conditions. In this day and age when standard terms are frequently to be found on web-sites I consider that reference to the web-site is a sufficient incorporation of the warehousing terms to be found on the web-site."

28. In *SKNL UK Limited v Toll Global Forwarding* [2012] EWHC 4252 (Comm), Cooke J was considering the incorporation of standard terms by reference. No detailed terms and conditions were agreed at the time of contracting, but a series of invoices indicated the incorporation of BIFA Terms and Conditions. Cooke J, at [14], found that the BIFA Terms were incorporated by reason of the extensive course of dealing on the basis of the invoices where nothing to the contrary was ever agreed.

29. In *Circle Freight International Limited v Medeast Gulf Exports Limited* [1988] 2 Lloyd's Rep 427, the Defendant exporters had traded with the Claimant freight forwarders on about 11 occasions over the course of about 6 months. The Claimants' invoices had stated that they transacted business on the terms of the Institute of Freight Forwarders. The invoices also stated that a copy of the current trading conditions of the Institute of Freight

Forwarders was "available on request". There was no other contractual document between the parties other than the invoices. The Court of Appeal held the terms were incorporated. Taylor LJ said at 433rhc:

> "…it is not necessary to the incorporation of trading terms into a contract that they should be specifically set out provided that they are conditions in common form or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and they are available on request. Other considerations apply if the conditions or any of them are particularly onerous or unusual.
> Again, it is not necessary that notice of the conditions should be contained in a contractual document where there has been a course of dealing.
> Here, the parties were commercial companies. There had been a course of dealing in which at least 11 invoices had been sent giving notice that business was conducted on the IFF terms at a place on the document where it was plain to be seen. Mr. Zacaria knew that some terms applied. He knew that forwarding agents might impose terms which would frequently be standard terms and would sometimes or frequently deal with risk. He never sought to ask for or about the terms of business. The IFF conditions are not particularly onerous or unusual and, indeed, are in common use. In these circumstances, despite Mr. Gompertz's clear and succinct argument to the contrary, I consider that reasonable notice of the terms was given by the plaintiffs. Putting it another way, I consider that the Defendants' conduct in continuing the course of business after at least 11 notices of the terms and omitting to request a sight of them would have led and did lead the plaintiffs reasonably to believe the Defendants accepted their terms. In those circumstances it is irrelevant that in fact Mr. Zacaria did not read the notices."

30. The Court of Appeal considered the nature of 'onerous' terms in *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] CTLC 265 where at paragraph 35 of the judgment, Coulson LJ approved the judgment of His Honour Judge Waksman QC (as he then was) in *Allen Fabrications Ltd v ASD Limited* (set out in paragraph 34) that:

> "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".

31. Later, at paragraph 53 of the judgment, in the circumstances of that case, Coulson LJ considered that sufficient notice had been given stating:

> "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."

32. The Claimant also relies upon section 11 of UCTA, asserting that the terms are unreasonable and therefore liable to be struck down. The reasonableness of a term must be assessed at the time the contract is made, rather than with the benefit of hindsight.

The Evidence

Mr Dowling

33. Mr Dowling was the only witness to give oral evidence. Mr Dowling was employed by the Claimant as a director. He had worked for the Claimant company for about 20 years and had been a director since 2009. His job was to look after the primary production side of the business, which was the slaughtering and processing of the animals. Mr Dowling described how the Claimant was predominantly a supplier to the UK retail market. It had approximately 1150 employees operating over seven sites. Three of those sites related to the primary production and four were retail. The turnover of the business was about £320 million.

34. Mr Dowling described how the Claimant came to store meat with the Defendant. In 2017, when the Claimant opened a site in Wolverhampton, Mr Dowling had a conversation with Mr Steven Woolley ("Mr Woolley") of Woolleys about meat storage. Mr Dowling described Woolleys as a trusted partner and the Claimant held a 30% shareholding in Woolleys. Mr Woolley told Mr Dowling that Woolleys already had their own storage contract with the Defendant since 2010 and that the Defendant had appropriate insurance cover should anything happen to the Claimant's meat whilst it was stored by the Defendant. Mr Woolley said that Mr Straw of the Defendant had told him that the Defendant had insurance for any claim up to £600,000 covering any deterioration of stock and that Mr Straw had shown Mr Woolley the certificate of insurance.

35. The arrangement between the Claimant and Woolleys was that the Claimant did not handle the meat at all before it went into storage. Woolleys processed the meat and then it was sent to the Defendant and Woolleys paid for it to be blast frozen. Thereafter, ownership of the meat was transferred to the Claimant from Woolleys and the Claimant paid the Defendant for the storage of the meat thereafter. That arrangement had applied since it began in 2017.

36. All of the arrangements for the storage of the meat were made by Woolleys with the Defendant. There were no negotiations or discussions at all between the Claimant and the Defendant directly. Mr Dowling described that Mr Woolley had negotiated a price per pallet of meat with the Defendant on the Claimant's behalf. He said that all he knew from Mr Woolley was about the insurance and that the storage price at the going rate was agreed to be paid by the Claimant directly to the Defendant. Mr Dowling stated that Woolleys did not have authority to agree anything else on the Claimant's behalf.

37. Mr Dowling would not accept that he had appreciated that the agreement with the Defendant being negotiated by Woolleys would not only relate to the going rate but also the "going terms". He maintained that all that had been agreed was a price for the storage per pallet and that the Defendant had adequate insurance cover. Mr Dowling was unsure if the Claimant had its own insurance cover in respect of the damaged meat nor what the extent of the cover was as one of his colleagues dealt with that.

38. Mr Dowling accepted that he trusted Woolleys to negotiate with the Defendants on behalf of the Claimant and that if Woolleys had agreed the going rate and the going terms as part of the agreement with the Defendant, the Claimant would have accepted those terms. However, he maintained that he had not authorised Woolleys to enter a contract on the Defendant's usual conditions. He just agreed that Woolleys could put the meat into the Defendant's storage.

39. The Defendant invoiced the Claimant directly for the storage of meat products on a weekly basis. The weekly storage invoices were sent by the Defendant by post directly to the Claimant's head office in Stirlingshire. Once received, the administration clerks

would code the invoice, according to the account to which it related, and the invoice was then sent to Mr Dowling for approval of payment. He did that by signing the invoice. Once it was signed, it was passed back to the clerks for processing and payment. All of the invoices were paid within 21 to 28 days, normally by cheque.

40. Mr Dowling said that the Claimant also contracted with one other warehouse to store the Claimant's meat products in England. When it was suggested that the contract with that warehouse would be made on standard terms and conditions, Mr Dowling denied that and said that the Claimant did not trade on other parties' standard terms and conditions. It negotiated with a cold store company directly and insisted on a term that the cold store was adequately insured to protect the Claimant's meat for deterioration, damage and in respect of any fire. That had been the negotiation process before, rather than after, the events of this case. Although the Claimant had not directly negotiated with the Defendant, Mr Dowling asserted that Woolleys had negotiated the same on their behalf with the Defendant.

41. In October 2019, some of the Claimant's meat which had been in storage with the Defendant was discovered to be damaged. As part of the investigation of the claim, Mr Dowling located and reviewed the invoices sent by the Defendant and discovered that:
    a. invoices between 27 February and 30 April 2017 contained the following wording:
    "A Member of UKWA
    UKWA Terms & Conditions Apply
    Settlement Terms Strictly 30 days Net"
    b. invoices from 15 May 2017 to 4 February 2019 contained the following wording:
    "A Member of FSDF
    FSDF Terms and Conditions Apply
    Settlement Terms Strictly 30 Days Net"
    c. invoices between 18 February 2019 to 3 November 2019 (with the exception of one invoice dated 16 September 2019) were in a new format and none of the invoices contained any reference to FSDF, UKWA nor any other reference to there being any terms and conditions.

42. Mr Dowling maintained that at the time of signing the invoices, he had not noticed the words at the bottom of some of the invoices. He said he simply never noticed them. The Defendant had never supplied any other details when the invoices were sent to explain what the wording meant. He thought the wording meant that the Defendant was a member of some sort of trade organisation, not that there were contractual terms and conditions which had not otherwise been sent. He just thought it was a trade organisation membership in the same way that the Claimant was a member of BMPA and QMS. Mr Dowling explained that when he was looking at the invoices and signing them off for payment, he was mainly looking at the charges and whether they were correct in respect of the correct number of pallets, pallet rate, what had been received and what had been dispatched. That was what he was signing off on for payment.

43. Mr Dowling was asked what he thought the payment terms were. He answered "we pay in 28 days". When the wording set out on the invoice was read to him, he replied "we try to pay all people within 28 days". When it was suggested that because there were no other contractual documents with the Defendant, the invoices were therefore important documents and that Mr Dowling should have taken into account the wording in respect of being a member of FSDF, he replied that when you read the wording, it basically told you that you had to pay within 30 days and nothing else. There was nothing on the back of the invoice about terms and conditions as some invoices have and there was no other notification that these conditions applied.

44. Mr Dowling would not accept that the words meant that the FSDF conditions applied when the Claimant had never seen them. He thought the only terms and conditions which applied to the agreement with the Defendant were what he understood had been agreed – that is the Claimant paid the rate agreed and that the Defendant had sufficient cover for the Claimant's meat products for any deterioration of the meat up to a value of £600,000 per claim. Mr Dowling agreed that he had not paid much attention to the terms and conditions between the Claimant and the Defendant as he did not need to because Woolleys were doing all of the organising. He accepted that the words were on some of the invoices but not all of them. He understood the wording to mean that you had to pay

within 30 days and he did not understand that other conditions were being referred to nor relied upon by the wording.

45. Mr Dowling was aware of the assertion that Clare Portsmouth of the Defendant had telephoned the Claimant's offices in May 2017 to notify the Claimant that the Defendant was now trading on FSDF terms and conditions from that point. Mr Dowling denied receiving such a call and said that he had never spoken to her until the Claimant had the problem with the spoiled meat. He had also asked the Claimant's group finance director, Tony Kirkbright, whether he or any of his staff had received such a call. Mr Kirkbright denied receiving a call, as did all of his staff. Although it was suggested to Mr Dowling that Mr Kirkbright may not recall receiving the call on a "trivial matter" such as terms and conditions on a contract, Mr Dowling thought that Mr Kirkbright would recall if he had had a call and he said he had not. No notification in writing of a change to FSDF terms and conditions was ever received from the Defendant.

46. Mr Dowling accepted that the Claimant had its own terms and conditions and that he would expect to see some terms limiting liability in certain situations, including in situations where a customer may bring a claim. Mr Dowling accepted that he would expect notice to be given promptly of any claim or it may not be able to be brought. The purpose of that, Mr Dowling asserted, was so that the service provider could investigate the claim to see if there was a Defence. The relevant clause (clause 11.4 of the FSDF terms and conditions) was read to Mr Dowling. Mr Dowling thought that 10 days was not a lot of time to give written notice initially but that 21 days to give more detailed particulars was not particularly onerous.

47. When asked about the limit of liability of £250 per metric ton or the value of goods, whichever was lower, Mr Dowling agreed he understood that term but stated he would not always expect to see a term in a contract setting a maximum liability, although he would generally expect to see such a term. When it was put to him that if nothing else had been agreed, this term was not particularly onerous nor unusual in the trade, Mr Dowling stated that the cover looks like the bare minimum cover and was very very low at £250 per tonne. Mr Dowling also accepted that he understood that the terms stated that the

Claimant had to issue any claim in court within nine months in any event. He thought that he would have considered that the term was fair if he had considered it in 2017 and would give plenty of time to investigate and bring a claim.

Mr Straw

48. Mr Straw's statement was admitted as hearsay. In his statement, Mr Straw set out background to the contract between the Claimant and the Defendant. In 2010, the Defendant started storing meat for Woolleys and initially had an oral agreement with them. It was stated that the Defendant traded with Woolleys on UKWA terms and conditions which were referred to on the invoices. In late 2016, Mr Straw noticed that a fellow cold storage operator was involved in the FSDF. Mr Straw asked the managing director of the competitor about FSDF and was told it was a new group and that the Defendant should join so they applied in the spring of 2017, paid a subscription fee and became a member in May 2017.

49. Until payment was made to the FSDF, the Defendant was not permitted to use FSDF terms and conditions and so it continued to use the UKWA conditions. Mr Straw stated that from May 2017, the Defendant adopted the FSDF 'Recommended Conditions for Storage Services' (which he referred to as "FSDF Conditions" in his witness statement). Mr Straw described the FSDF Conditions as being the "Bible for the cold store industry" and described the FSDF as being the "primary industry body for refrigeration and frozen foods in the UK". The FSDF changed its name in June 2019 to Cold Chain Federation and also adopted revised conditions of business. The Defendant's membership with the Cold Chain Federation was maintained until 2020 when the Defendant's warehouse premises were damaged in a storm. Mr Straw understood that the meat for which the Claimant brings this claim was stored with the Defendant before June 2019.

50. In early 2017, Woolleys told the Defendant that the Claimant wanted to store some meat with the Defendant. Woolleys would handle the logistics of delivering the Claimant's meat to the Defendant and arranging collection, but storage costs would be invoiced directly to the Claimant. All communications about the meat would be with Woolleys. The Claimant did fill out a new customer form but only provided their address as they

would only accept invoices by post and not by email. Mr Shaw said he understood that Woolleys were the Claimant's agent.

51. The arrangement started on 15 February 2017 when the Defendant was still operating under UKWA conditions. This was the position until 15 May 2017. When the invoices were sent out from 15 May 2017, the invoices contained the words

> "A Member of FSDF
> FSDF Terms and Conditions Apply
> Settlement Terms Strictly 30 Days Net"

52. Mr Straw said that on the homepage of the Defendant's website, there was a tab referring to the Defendant's conditions and when you clicked on the tab, it took you to a PDF version of the FSDF Conditions. Mr Straw did not give any evidence as to whether or not the UKWA Conditions could also be accessed via the Defendant's website before the FSDF conditions were put on the Defendant's website.

53. Mr Straw said that he spoke to a Gary Blockley of Woolleys in around May 2017 when he "mentioned" that the Defendant was switching from UKWA to FSDF Conditions. The only change of conditions to which he drew attention in the conversation was that the payment for claims would go up to £250 per tonne of damaged meat rather than £100 per tonne. Mr Straw also stated that in May 2017, he had asked Clare Portsmouth to telephone "all our clients" to notify them that going forward the FSDF Conditions would apply to their contracts with the Defendant.

54. Apart from the invoices, Mr Straw accepted that there was no written record of the Claimant (or indeed any other customer) being informed of the change to FSDF Conditions. Mr Straw stated that Miss Portsmouth was a senior employee and very reliable, so he trusted her to follow his instructions. Mr Straw set out that 11 invoices referred to the UKWA Conditions until May 2017 and between May 2017 and the end of 2018, the invoices referred to the FSDF Conditions. In 2019, Mr Straw set out that 52 invoices had been sent to the Claimant but only nine contained any reference to FSDF Conditions. Mr Straw explained that he had been seriously unwell in 2019 and had time off. The lack of the express reference was due to "an oversight" by Clare Portsmouth. No

evidence was available from Clare Portsmouth because she left the company in August 2020 and Mr Straw said he had no current contact details for her.

55. In late 2018, Woolleys contacted the Defendant as a result of a British Retail Consortium review which had noted that there was no written contract between Woolleys and the Defendant. Woolleys provided what Mr Straw described as "a very basic contract" which he understood was primarily to record the services the Defendant had agreed to provide. That contract was described as a general service agreement and dated 7 January 2019. It was signed by Clare Portsmouth on behalf of the Defendant. Mr Straw stated that Woolleys were aware that the Defendant traded on what he described as being "detailed and industry-standard FSDF Conditions". As the Woolleys contract was not as detailed and did not state that it was intended to replace the FSDF Conditions, Mr Straw assumed that the FSDF Conditions governs the contract "except for any obvious conflict".

Assessment of the witnesses

56. Mr Dowling came across as doing his best to answer the questions put to him and in a straightforward manner. He remained consistent in the answers which he gave. As far as he was concerned, the matter was relatively straightforward. I accept that he gave his evidence to the best of his ability to tell me what he recalled.

57. On occasion, Mr Dowling did not really understand the wording and the purpose of some of the questions being put to him and became a little confused in the answers which he gave, for example when answering questions about the insurance cover held by the Claimant. However, whilst he became confused, I did not form the impression that he was trying to be deliberately evasive or not answer the questions.

58. Mr Straw's evidence was limited to his statement which was admitted as hearsay. The weight to be given to that evidence is a matter for me to decide. I accept, of course, given his significant health issues that Mr Straw was not realistically able to give oral evidence. His witness statement was made in July 2021, many months after the events. In addition, he could not be cross-examined on various issues of significance and dispute between the

parties. In those circumstances, I do not give his evidence significant weight unless it is supported by other evidence.

59. It is also right to note that there were some matters which were not covered by his witness statement when they could have been. For example, Mr Straw did not explain why he personally spoke with Mr Blockley but not (on the face of his witness statement) with any other client. Nor was there any explanation as to why the telephone conversation between Mr Straw and Mr Blockley was mentioned for the first time in Mr Straw's witness statement and had not been pleaded in either the Defence or the Amended Defence.

Findings

Were the FSDF terms and conditions standard terms used in the industry?

60. It is relevant to consider whether or not the FSDF terms and conditions were standard within the industry. The answer to that question may have an effect on the adequacy of notice given by the Defendant of the FSDF conditions.

61. I am unable to find on the evidence, on the balance of probabilities, that the relevant FSDF terms were standard within the industry. The only evidence about this issue comes from Mr Straw and thus it was submitted by Mr Davidson that I had to accept Mr Straw's evidence on its face on this issue.

62. Mr Straw's evidence on this point was that the FSDF conditions were "the Bible for the cold store industry" and that the "FSDF is the primary industry body for refrigeration and frozen foods in the UK". That may be the case now and at the time of preparation of Mr Straw's witness statement in July 2021. However, the Defendant's primary case is that there was a single contract which was amended in May 2017. Mr Straw's evidence was also that as of late 2016 when he spoke with a competitor, he was told that the FSDF was a "new group". I have no other information about the FSDF.

63. I have no evidence as to what other trade organisations operated in this industry, nor what terms were used by those bodies, apart from the UKWA upon whose terms the Defendant previously relied. I have no evidence as to the respective sizes of the FSDF, the UKWA nor any other trade organisations, nor any evidence as to the size of the market as a whole, for this industry. I have no independent means, therefore, of assessing Mr Shaw's bald assertion (on which he could not be cross-examined) that the FSDF is the primary industry body for refrigeration and frozen foods, nor that its conditions are treated generally as the "Bible" for the industry, either now or in May 2017 when the Defendant asserts the contract was amended.

64. Whilst there are similarities between the FSDF conditions and those of the UKWA, they are not identical in respect of the particular terms relied upon by the Defendant in this case. For example, term 3.7.1 of the UKWA terms requires the cold storage company to receive written notice within 10 days of the events giving rise to a claim coming to the knowledge of the customer. The UKWA terms do not (in addition) restrict liability if written notice within 10 days is not given from the date the customer would have become aware of the relevant event if the customer had acted with reasonable diligence as the FSDF Conditions do.

65. Further, the UKWA terms require written notice of the detail of the claim within 21 days, but to do not specify that the written detail must include the weight, value and date of delivery into the cold store, which detail is required by the FSDF. The UKWA simply requires sufficient detail to enable investigation.

66. Whilst the conditions of both organisations place a limit on liability in respect of loss and damage, the UKWA limits losses to £100 sterling per tonne and the FSDF limits losses to £250 per metric tonne of gross weight, unless a different limit is specified by the customer and additional insurance obtained by the cold storage company. In addition, there are different mechanisms and timings for any new liability payment limit specified by the customer under the respective conditions to come into effect.

67. In addition, the payment terms and interest rates on any late payments are different in the FSDF conditions and the UKWA conditions. In addition, both the FSDF conditions and the UKWA conditions about payment differ from what was set out on the Defendant's FSDF invoices, which stated "Settlement Terms Strictly 30 Days Net".

68. Whilst the Claimant did not provide any evidence as to whether the FSDF conditions were standard conditions, I remind myself that the burden of proof on this issue falls on the Defendant who asserts that they are standard conditions. For the reasons set out above, I do not accept that the Defendant has provided sufficient evidence to establish that this is the position.

What was the meaning of clause 11.10?

69. Clause 11.10 reads:

> "11.10 No legal proceedings may be brought against the Company whether by a claim, counterclaim, Part 20 claim or otherwise unless they are issued and/or served within nine months of the event giving rise to the claim."

70. The wording of clause 11.10 echoes the wording used in clause 11.4 a) which requires the Defendants to receive written notice from the Claimant "within 10 days of the date upon which [*the Claimant*] became aware of the event… would have become aware of the event had [*the Claimant*] acted with reasonable diligence".

71. The issue which I must determine is when time starts to run for the purposes of clause 11.10. In my judgment it starts to run in respect of each pallet of meat on the date when the Claimant either became aware of there being a problem with the individual pallet of meat or, if sooner, the date when the Claimant would have become aware if it acted with due diligence. Insofar as is necessary, I find that additional wording must be implied and read into the clause to give it the meaning which I have determined in order to give it business efficacy. The clause was relied upon by the Defendant and therefore any ambiguity in drafting must be construed in favour of the Claimant.

72. It is difficult to see that the Claimant could have been aware earlier than the date it actually knew of damage to meat in circumstances where the Defendant was in sole

possession of the meat pallets and therefore solely knowledgeable of the condition of the meat. The Claimant would only be able to ascertain any potential damage, and thereafter investigate the cause of that damage, if the Claimant sought to inspect its meat pallets during storage (when there would be no obvious reason for doing so) or the Defendant informed the Claimant of any damage.

73. The Claimant argued that clause 11.10 required the Claimant to be aware of damage about which it could not know absent provision of relevant information by the Defendant or the Defendant delivering the meat to the Claimant, or the Claimant having reason to inspect the meat.

74. If I am wrong, and the meaning of the wording of clause 11.10 does in fact potentially start time running before the Claimant in fact was or could be aware of any damage to its meat, I would have found that clause 11.10 was onerous. That could affect the adequacy of any notice of the term given by the Defendant to the Claimant. I deal with the adequacy of notice below.

75. Further, I do not accept the Defendant's argument that because six individual pallets were found to be damaged on 3 October 2019, that is the date of "the event giving rise to the claim" in respect of all of the meat pallets later found to be damaged. The Defendant itself gave notice of further damaged products on 24 October 2019 via email to the Claimant. The Defendant charged the Claimant in respect of each individual pallet of meat on a weekly basis. There is no evidence that before 24 October 2019 the Claimant was in fact aware of further pallets of meat being damaged, nor that it was not reasonably diligent. That further additional 102,355kg of meat damage was then confirmed as a result of an inspection in April 2020.

76. It follows that if the FSDF conditions are incorporated into the contract, I find that only the claims in respect of the first six pallets of meat notified on 3 October 2019 are time-barred as a result of clause 11.10.

Were some or all of the clauses relied upon limiting liability onerous in all the circumstances?

77. Each of the individual terms relied upon must, of course, be considered individually when deciding whether each or any of them are onerous. It is relevant, in my judgment, that the FSDF felt it necessary to draw the attention of its customers specifically to a number of their conditions on the front page of the conditions and in bold. Attention was drawn to clause 11 noting the possibility to exclude or limit the Defendant's liability. In addition, the warning on the front page of the conditions noted that there were strict time limits for both notifying and bringing proceedings. However, that fact alone does not suffice to establish that the clauses are onerous.

78. In light of the evidence of Mr Dowling, where he accepted that it was usual for there to be a time limit in respect of the bringing of proceedings, he accepted that nine months was a reasonable period to require the commencement of proceedings within the industry and that he would expect some time limit condition in terms and conditions, I find that clause 11.10 was not onerous.

79. In addition, I do not find clause 11.4 to be onerous. Whilst Mr Dowling thought that written notice being given by the Claimant within 10 days of becoming aware of the event was "a bit tight", he did not think that giving full details within 21 days of the event was particularly onerous. Accepting his evidence as I do, I cannot find that the limits set out in clause 11.4 are onerous. Mr Dowling accepted that some type of time limit conditions was used within the industry and might be expected. The requirement is to give written notice within 10 days of the customer becoming aware of the events giving rise to the claim, or the date they would have become aware if they had acted with reasonable diligence. Whilst that is a short period of time, it is nonetheless a period which does give sufficient time for notice to be given. As to the further written details, again whilst the period of 21 days to provide sufficient details in writing to allow the Defendant to investigate is relatively short, it is not so short as to make it onerous.

Were the FSDF terms and conditions incorporated into the contract by variation and was sufficient notice of the terms and conditions given:

(a) by reason of specific notice having been given in telephone calls from:

(i) Mr Straw to Gary Blockley of Woolleys in May 2017; and/or

(ii) Clare Portsmouth to the Claimant and/or Woolleys in May 2017;

(b) by signature of the Defendant's invoices by Mr Dowling;

(c) by reference to them solely on the invoices?

Notice by telephone?

80. The Defendant relied primarily on specific notice having been given of the change to FSDF terms and conditions in the telephone calls of Mr Straw to Mr Blockley and in addition by Clare Portsmouth to "all customers". The Claimant denies that it received any such telephone call from Clare Portsmouth.

81. It was submitted on behalf of the Defendant that I should accept the evidence of Mr Straw about his telephone call to Gary Blockley because there was no evidence to counter that assertion from the Claimant. Whilst that is factually correct, I accept the submission made by Mr Brown that the lack of such evidence from the Claimant is hardly surprising given that the first time any assertion was made about a telephone call being made by Mr Straw was in his witness statement exchanged simultaneously with that of Mr Dowling.

82. It is also noteworthy, in my judgment, that when the Defence was amended, it was asserted that Clare Portsmouth telephoned all of the Defendant's customers, including the Claimant and Woolleys. No mention at all was made of any telephone calls being made by Mr Straw. That is surprising given the potentially critical importance of this telephone call alerting the Claimant's agent to the FSDF conditions. It is also a surprising absence (when Clare Portsmouth no longer worked for the Defendant and it was asserted that she could not be contacted) as Mr Straw could give evidence about any telephone calls which he made.

83. There is no file note or other documentary evidence, contemporaneous or otherwise, to suggest that Mr Straw or Ms Portsmouth made any telephone calls to alert customers to the adoption of FSDF Conditions. There is no explanation set out by Mr Straw as to why he specifically spoke to Mr Blockley, when Mr Straw's evidence is that Clare Portsmouth dealt with all contractual matters and he had specifically tasked her with contacting all

customers to advise of the change of conditions. The accuracy and reliability of Mr Straw's recollection was not able to be tested in cross-examination. In all of those circumstances, I do not find that Mr Straw did speak with Mr Blockley nor that Mr Straw notified Woolleys (including as agent for the Claimant) by telephone call to a change to FSDF conditions.

84. As to the alleged calls made by Clare Portsmouth, I have no evidence from her at all. The evidence from Mr Straw amounts to the fact that he had asked her to make those telephone calls and he found her "very reliable" and he trusted her to follow his instructions.

85. Mr Dowling's evidence was that he personally had not received any telephone call from Clare Portsmouth, because he had not spoken to her at all before there was a problem with the meat. Further, he had made enquiries of the Claimant's staff and had been told that neither Tony Kirkbright, nor any member of his staff, had received such a call either. The other director who was the chief executive also denied having any dealings with Clare Portsmouth and said he did not know who she was. I prefer the evidence of Mr Dowling to the evidence of Mr Straw on this point.

86. I cannot accept Mr Straw's bare assertion as to the efficiency and reliability of Clare Portsmouth. The only evidence which I have relating to the efficiency and abilities of Clare Portsmouth is provided by Mr Straw himself. In 2019, Mr Straw was ill for a period of months and had to take some time off from the Defendant's business. When dealing with the fact that for a period of months in 2019, no reference was made to the FSDF conditions on the invoices, Mr Straw described that as being as a result of "an oversight" by Clare Portsmouth. That evidence in my judgment undermines Mr Straw's assertion about the reliability of Clare Portsmouth. The occasional invoice with missing information might well be described as an oversight. The agreed facts here are that none of the invoices (with the exception of a single invoice in September 2019) from February to October 2019 referred to the FSDF conditions.

87. Taking into account all of those matters, I find as a fact that Clare Portsmouth did not telephone either the Claimant, or Woolleys as agent for the Claimant, to notify them of a change of conditions to the FSDF conditions at any time.

Notice by signature?

88. There was no written contract between the parties. The Defendant's argument on this point rests solely on the fact that Mr Dowling had signed the invoices sent by the Defendant when authorising them for payment by his accounts team.

89. I cannot find on the evidence that the fact that Mr Dowling signed the invoices is sufficient to incorporate the FSDF conditions into the contract between the parties. Mr Dowling's evidence was clear that when he was considering the invoices, the purpose of his signature on those invoices was an internal process for the Claimant. I accept his evidence, including that he had not particularly noticed the wording at the bottom of the invoices until this claim arose. He was checking that the amounts of meat in respect of which a charge was raised by the Defendant were correct and signing as a means of indicating to his accounts department that the invoice could be paid.

90. In those circumstances, in my judgment, the invoices were not contractual documents. The use of the invoice by Mr Dowling was as a statement of account used to check the performance which had taken place under the contract. It is also notable in my judgment that there is no evidence at all that the Defendant had any knowledge of the fact that Mr Dowling signed each of the invoices as part of the Claimant's internal processes to authorise payment until this claim was brought.

Notice by reference to the FSDF Conditions solely on the invoices?

91. The Defendant argues that sufficient notice of incorporation of the FSDF conditions was given to the Claimant as a result of the wording on the invoices:

> "A Member of FSDF
> FSDF Terms & Conditions Apply
> Settlement Terms Strictly 30 Days Net".

92. On the facts of this case, I cannot find that sufficient notice of the FSDF conditions was given to the Claimant merely by the use of those words on the invoices without anything more. I have already found that the relevant terms were not established as standard terms in the industry and that there were no telephone calls made by anybody to either Woolleys or the Claimant to notify them of the intended incorporation of the FSDF conditions.

93. Neither those conditions nor the UKWA conditions were ever sent to the Claimant or Woolleys. The FSDF conditions were not set out on the reverse of the invoices. The Claimant was given no indication as to what the FSDF was, nor where the terms and conditions could be located. There was no direction to the FSDF website, nor to the Defendant's own website. The invoices did not state that the terms and conditions were available on request.

94. As to the terms and conditions being available on the Defendant's website, there is precious little evidence about that, beyond a fleeting reference in Mr Straw's evidence to them being available if one clicked on a tab which referred to conditions. There is no evidence detailing from what date the FSDF conditions could be accessed by clicking on that tab. There is no evidence showing how the website looked, so it is not possible to see how obvious (or otherwise) the tab referred to by Mr Straw was to someone looking at the Defendant's website.

95. There is no evidence as to whether or not the UKWA terms previously relied upon by the Defendant were available on the Defendant's website, nor (assuming they were accessible on the Defendant's website) if they were accessed in the same way as the FSDF conditions could be accessed at some later date. In addition, Mr Straw acknowledged that the Defendant was still listed on the UKWA website as being a member of that organisation.

96. In addition, the reference to payment being "Strictly 30 Days" on the face of the invoice would, in my judgment, give the impression if one read all the words set out that the most important term was the term as to payment. One would get no impression as a reasonable

person in the position of the Claimant that there were other (potentially onerous) terms if one troubled to look elsewhere for the full FSDF terms and conditions. In addition, I cannot see that the full FSDF conditions, including the ones specifically relied upon by the Defendant, are necessary to give business efficacy to the agreement nor as to be so obvious as to go without saying in respect of a meat storage agreement.

97. As to course of dealing, the same words were referred to on the invoices between 2017 and January 2019. However, I accept the Claimant's argument that even if the setting out of the words on the invoices were sufficient to incorporate the terms as a result of a course of dealing, the lack of that wording on the invoices (apart from one invoice) over the nine months before the claim was made must be sufficient to remove the FSDF terms and conditions as governing the relationship between the parties from early 2019 in any event and a new course of dealing was established.

Should the FSDF terms and conditions be struck down by application of the provisions of UCTA in any event?

98. In my judgment, the FSDF conditions should not be struck down as a result of the application of the provisions of UCTA. I accept the Defendant's arguments on this point. There is nothing unreasonable about a clause requiring prompt notice of a claim and sufficient details of the claim to allow the Defendant to investigate it. Nor is there anything unreasonable about requiring the commencement of proceedings within nine months in circumstances where the parties, on the face of it, are of equal bargaining power. Indeed, as Mr Dowling stated, the Claimant company usually agreed bespoke terms with those with whom it stored its meat. It is difficult, given that factual situation, to find that the Claimant was at any disadvantage in terms of its bargaining position.

99. In addition, it is clear from the evidence of Mr Dowling that time limit clauses are usual in this industry and I find that although the terms restricted liability if the conditions were not complied with, that was reasonable at the time the contract was entered into in that compliance with the conditions would be practicable even if timescales were short. There was no inducement to enter into an agreement containing the clauses. In all the circumstances, I cannot see that the conditions should be struck down.

Conclusion

100. As a result of the various facts and matters found above, the answers to the preliminary issues posed are as follows:

(1) Are the Food Storage & Distribution Federation ('FSDF') terms and conditions incorporated into a contract between the parties, as alleged by the Defendant? No.

(2) What is effect of this (if any) upon the Defendant's liability? The Claimant's claim is not time barred, nor limited by the FSDF Conditions.

101. I am grateful to counsel for their very able assistance in this matter.