Neutral Citation Number: [2024] EWHC 212 (KB)

Case No: CC-2023-BHM-000018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CIRCUIT COMMERCIAL COURT (KBD)

Birmingham Civil Justice Centre
The Priory Courts, 33 Bull Street, Birmingham B4 6DR

Date: 2 February 2024

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

- -

Between :

Tornado Wire Limited	**Claimant**
- and -	
John Good Logistics Limited	**Defendant**

- -
- -

Ali Tabari (instructed by **The Wilkes Partnership**) for the **Claimant**
Thomas Steward (instructed by **Myton Law**) for the **Defendant**

Hearing date: **15 January 2024**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ WORSTER

HHJ WORSTER :

Introduction

1. This is the Defendant's application for summary judgment, seeking the dismissal of the claim pursuant to CPR Part 24; alternatively for an order that the claim be struck out pursuant to CPR Part 3.4.

2. The claim form was issued on 18 May 2023. It was subsequently served, and Particulars of Claim filed on 13 September 2023. The claim is for damages quantified at £953,616.29 for breach of contract and/or negligence. The claim was met by this application, made by notice dated 6 October 2023 and supported by the witness statement of Kenneth Habergham, the Defendant's solicitor. The application notice gives the essential basis of the application as follows:

> *The Claimant's claim became time-barred in March 2022 before commencement of proceedings by the Claimant.*

3. The Defendant has chosen not to file a Defence, or to deal with the underlying dispute in its evidence, limiting itself to the issue of contractual limitation. The Claimant's pleaded case is that it took the same approach in pre-action correspondence; see the Particulars of Claim at paragraph 18. The Claimant contests this application, and served a witness statement from its director Kenneth Campbell dated 2 November 2023. The Defendant served a witness statement in reply from Michael McGaughey (its EU Customs Manager) dated 9 November 2023, and a second statement from Mr Habergham dated 12 January 2024. It also relied on a number of documents referred to in Mr Steward's skeleton argument. Mr Tabari took no point on the lateness of Mr Habergham's 2nd witness statement, or the use of the material referred to in Mr Steward's skeleton argument. He also made it clear that whilst the Claimant's evidence raised the issue of the incorporation of the terms and conditions the Defendant relies upon in support of its case that the claim is time-barred, he was not arguing that point before me.

4. The principles applicable to such an application are well established, and are not in dispute between the parties. Of particular note in respect of a strike out application are that (i) the general position is that the Court is bound to accept the accuracy of the facts pleaded in the Particulars of Claim unless they are contradictory or obviously wrong; and (ii) the court should only strike out a claim in a clear case.

5. The principles to be applied on a summary judgment application were drawn together by Lewison J (as he then was) in his judgment in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:

> *... the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *(i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman ;*

(ii) *A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel ... at [8]*

(iii) *In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*

(iv) *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*

(v) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5)*

(vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd ;*

(vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd .*

Background

6. For the purposes of this application, I take the background facts to be as follows. The Claimant manufactures wire fencing products. As part of that work, it imports steel products such as galvanised wire. Prior to Brexit, steel imports from non-EU countries were subject to quota. The Claimant used freight forwarders to handle these non-EU imports, one of which was the Defendant. When the UK left the EU, virtually all steel wire imports became the subject of the quota regime, including those which came into the UK from the EU. That quota system required all relevant imports to be entered onto the HMRC's "CHIEF" system. A quota was set up on a first come first served basis. Eligible imports within quota were subject to a nil rate of duty, whereas ineligible imports or those outside of quota were subject to a 25% duty.

7. The Claimant did not have access to the CHIEF system, nor did it have the expertise needed to use it, so the Claimant approached the Defendant to act as its customs agent. As a result, in June 2020 the Claimant signed a customs authorisation form by which it appointed the Defendant as its direct representative. From that point, the Defendant dealt with the processing of the Claimant's import entries. The aim of that arrangement was to enable the Claimant to make the maximum use of the nil rate quota. It had no access to CHIEF, and so no means of checking what the Defendant had done. This was specialist work and the Claimant relied on the expertise of the Defendant to do it. The Claimant's case is that the Defendant must have been well aware of that. Given the nature of the agreement and the surrounding circumstances, that is a reasonable assumption to make.

8. In his witness statement, Mr Campbell makes the point that the Defendant did not handle any goods for the Claimant, or deal with the actual imports. Rather they were carrying out (what Mr Campbell refers to as) an administrative "form filling" function. The Claimant would send the Defendant the documents necessary to evidence the imports they were bringing in, and the Defendant would then input that data into the CHIEF system to allow the Claimant to take maximum advantage of the quota. That arrangement continued from June 2020 until 1 July 2021, when the steel the Claimant purchased was taken out of the quota regime. From August 2020 to June 2021 the Defendant made 327 or more Customs Import Declarations to HMRC in respect of the Claimant's galvanised steel imports, with the Defendant being paid for its services. The Claimant's case is that it was owed duties in contract that the work would be undertaken with reasonable care and skill, and that there was a like duty owed in negligence; see paragraphs 6-8 of the Particulars of Claim.

9. On 19 August 2022, HMRC wrote to the Claimant saying that it intended to charge import duty of just over £2.6M in respect of the imports the Defendant had made declarations for. The Claimant received the letter on 30 August 2022. That liability arose because the declarations the Defendant had made did not have the appropriate information as required by the relevant regulations, did not have the appropriate quota number in box 39 of the CHIEF system, and made incorrect use of Duty Override Codes. Had the Defendants entered the correct information, there would have been no liability to pay duty. The Claimant immediately contacted the Defendant, and with its assistance, the liability has been reduced to £953,616.29, which the Claimant paid to HMRC on 4 November 2022.

10. Mr Campbell's evidence is that when the issue was brought to the Defendant's attention by the Claimant's Finance Director, there was an acceptance that they had not applied the quota code directly. Mr McGaughey replied to that evidence. His position is that the relevant member of staff at the Defendant has left, but that there is nothing on the file to confirm the conversation Mr Campbell refers to, and no written communication from the Defendant acknowledging such an error. Mr McGaughey ends by emphasising that the declarations are ultimately the trader's responsibility.

11. I also note that in the letter from HMRC to the Claimant of 19 August 2022, explaining why there was a claim for duty of £2.6M, HMRC referred to the fact that on 10 September 2021 the Government published guidance on its website, and had written to the Claimant, explaining that if the duty override facility had been used incorrectly then a retrospective claim should be made where the quota was still available. The Defendant relies on this to show that the Claimant was told of the potential for the issue, and appears to have done nothing to check the position despite the fact that it was ultimately responsible.

The Contractual terms

12. When the Claimant's Finance Director signed the form of "Authorisation appointing a Customs Clearance Agent to act as a Direct Representative" on the second page of that two page document on 4 June 2020, she did so just above the following rubric:

> *(Unless otherwise agreed, all business undertaken by John Good Logistics Limited is subject to BIFA STC 2017)*

The same rubric also appears at the bottom of the first page of that document. "BIFA" is the British International Freight Association. "STC" are standard terms and conditions. The Claimant says that it never had a copy of those standard terms from the Defendant, but they are widely available, and Mr Tabari did not argue the issue of incorporation.

13. The relevant terms are as follows:

Direct representative is defined as … *the Company acting in the name of and on behalf of the Customer and/or Owner with … HMRC …*

7. In all and any dealings with HMRC for and on behalf of the Customer and/or the Owner, the Company is deemed to be appointed, and acts as, Direct Representative only.

LIABILITY AND LIMITATION

23 The Company shall perform its duties with a reasonable degree of care, diligence, skill and judgment.

27(A) Any claim by the Customer against the Company arising in respect of any service provided for the Customer, or which the Company has undertaken to provide, shall be made in writing and notified to the Company within 14 days of the date upon which the Customer became, or ought reasonably to have

> *become, aware of any event or occurrence alleged to have given rise to such a claim, and any claim not made and notified as aforesaid shall be deemed to be waived and absolutely barred, except where the Customer can show that it was impossible for him to comply with this time limit, and that he has made the claim as soon as it was reasonably possible for him to do so.*
>
> *27(B) Notwithstanding the provisions of sub-paragraph (A) above, the Company shall in any event be discharged of all liability whatsoever and howsoever arising in respect of any service provided for the Customer, or which the Company has undertaken to provide, unless suit be brought and written notice thereof given to the Company within nine months from the date of the event or occurrence alleged to have given rise to a cause of action against the Company*

14. The Defendant relies upon clause 27(B) to defeat the claim. Its case is that on a true construction, it provides a substantive time bar rather than a procedural bar, such that once nine months has elapsed from the event or occurrence alleged to have given rise to the cause of action, the Defendant is discharged. I agree that this is a substantive time bar, and that consequently the provisions of section 32 of the Limitation Act 1980 do not apply. The Defendant's case is that, given that the relevant acts giving rise to the Claimant's cause of action occurred between August 2020 and June 2021, the claim was time barred in March 2022, well before the issue of proceedings.

15. It is apparent that in pre-action correspondence the Claimant raised the issue of whether the term was reasonable within the meaning of the Unfair Contracts Terms Act 1977 ("UCTA"), and that formed the central plank of the Claimant's resistance to this application. However, before I come to that issue, it is convenient to deal with the two other issues raised by Mr Tabari in this skeleton argument. The first was that, as a matter of construction, clause 27(B) could not apply to claims which were not known before the 9 month time bar. The second was that the nine month limitation period did not start running for a claim in negligence until the Claimant had suffered a loss, and that was when it received the letter from HMRC on 19 August 2022.

Construction

16. The approach to contractual interpretation is summarised by Lord Hodge in his judgment in *Wood v Capita* [2017] UKSC 24 at [9] to [15]. At [10] he said this:

> *The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.*

17. Clause 27(B) forms part of a set of terms which are widely used in the freight forwarding industry. Mr Steward took me to the decision of Mr Geoffrey Brice QC at first instance in *Schenkers v Overland Shoes* [1998] I Lloyds Rep. 498 at 501 to 502, where he reviews the evidence given to him as to the commercial background and

development of the BIFA terms. BIFA then represented some 1200 freight forwarders. Mr Steward suggested that the current position was little different. The terms arose out of detailed discussions between BIFA and the British Shippers Council, and were registered with the OFT. The evidence the Judge heard was to the effect that the terms represented a fair, reasonable and balanced solution to the interests of competing parties. The Court of Appeal went on to refer to that evidence; see Pill LJ at 506, and that "background information" was taken into account by the Court of Appeal in *Granville Oil and Chemicals Ltd v Davies Turner and Co Ltd* [2003] EWCA Civ 570; Tuckey LJ at [11]. It is apparent from the above, that the language of this clause was well considered and is to be given considerable weight.

18. The clause forms part of a series of terms dealing with liability and limitation, and is to be read in context. In particular, there is some assistance to be drawn from the sub-clause which immediately precedes it. Clause 27(A) requires a potential claimant to notify the other party of their claim … *within 14 days of the date upon which the Customer became, or ought reasonably to have become, aware of any event or occurrence alleged to have given rise to such a claim…* . The sub clause also makes provision for an exception where it is impossible for the Customer to comply with that time limit. There is a recognition of the need for the Customer to have the opportunity to learn of the event which gives rise to the claim, before giving notification of it.

19. Clause 27(B) begins by referring back to clause 27(A).

> *Notwithstanding the provisions of sub-paragraph (A) above, the Company shall in any event be discharged of all liability whatsoever and howsoever arising ...*

Whilst knowledge of the event or occurrence is also necessary for a party to bring a claim, in contrast to clause 27(A), the words of Clause 27(B) do not contemplate the need for the Customer to have knowledge of the event or occurrence giving rise to the claim. Nor is there a provision similar to the proviso in 27(A) allowing for an exception where it is impossible for the Customer to comply. The time starts to run … *from* ***the date*** *of the event or occurrence alleged to have given rise to a cause of action against the Company* [my emphasis]. The consequence is the discharge of liability … *howsoever arising* .. . The use of the words *Notwithstanding* and ... *in any event* ... would seem to indicate that this limitation to liability is in addition to whether or not the requirements of clause 27(A) have been met. The clause is widely drawn, and clear as a matter of language.

20. The commercial common sense of such a clause is discussed in the authorities; see for example Tuckey LJ in *Granville Oil* at [21]. This is an industry where goods often pass from one party to another as they are transported from the beginning of their journey to their destination, by road, rail, air and sea. There is a need for parties to know quickly whether there is a claim to be dealt with and/or passed on to someone else in the chain, and for the certainty that a limitation period brings, particularly a substantive bar. The rules of international trade (the Hague-Visby Rules being an example) provide for short limitation periods, and in the context of the transport of freight, a nine month limitation period makes commercial sense.

21. The application of that literal interpretation to the facts of this case creates a problem. The Claimant did not know that it was liable for import duty until well after the nine months had elapsed. But that does not mean that the term does not mean what it says. It is unnecessary to decide the point given my overall conclusions on this application, but the Defendant has the better of this argument, and I proceed on the basis that as a matter of construction, knowledge of the event or occurrence giving rise to the cause of action is not necessary to start time running.

22. Mr Steward was driven to congratulate Mr Tabari's on his second argument. In short terms it was as follows:

    (i) Schedule 6 paragraph 1 of the Taxation (Cross-border Trade) Act 2018 provided that even if the Claimant had incurred duty when the relevant entry was made in CHIEF, that liability was not enforceable by HMRC until it served notice of that liability on the Claimant. Notice had to be given within 3 years of HMRC's acceptance of the customs declaration. It was, therefore, perfectly possible for an importer in the Claimant's position to never have to pay.

    (ii) This was a contingent liability, in that it was a liability that did not arise for payment until HMRC gave the requisite notice. In this case, that was the letter of 19 August 2022. That was the date when the Claimant suffered a loss (or actual damage). Mr Tabari referred me to *Sephton v Law Society* [2006] 2 AC 543 at [30].

    (iii) The Claimant's cause of action in contract may run from breach, but the concurrent claim in negligence was not complete or actionable until damage had been sustained. Proceedings had been begun within nine months of the notice, and so, if clause 27(B) was effective, it did not bar the claim in negligence.

23. Mr Steward submitted that there were two flaws in this argument. The first was that Clause 27(B) did not refer to a limitation period of nine months from the date of a completed cause of action (here loss), but to … *nine months from the date of the event or occurrence alleged to have given rise to a cause of action against the Company*. The event or occurrence must, he submitted, refer to the breach of duty which gives rise to the cause of action. That would lead to a (no doubt desirable) certainty. But the wording is not entirely clear. As Mr Tabari submitted, the law is well used to the differences in limitation periods arising from the different constituent elements for a cause of action for (i) breach of contract and (ii) negligence. I also note that there may be a conceptual difficulty in discharging a liability (here in negligence) before it has arisen.

24. Mr Steward's second point is that the effect of the 2018 Act was not as Mr Tabari submitted. The Claimant still had a liability, it was just that HMRC could not enforce it. There was nothing contingent about it. There was some statutory protection given to the tax payer, but that did not remove the liability. The fact that it might subsequently be a liability that could never be enforced was not to the point. It was still a loss which completed the cause of action in negligence.

25. Again it is unnecessary to decide the point, but it seems to me that the liability to HMRC is probably sufficient to amount to "actual damage". The liability itself is not contingent, and to my mind it is sufficient to constitute a loss. I also raised the question of how this liability would have to be dealt with in the Claimant's accounts. It would have to be provided for in some way, and that would probably have the effect of reducing the value of the Claimant. If that remains relevant, it is an issue which might benefit from further consideration and evidence.

26. Whilst I have not finally determined either of those two issues, accepting the Defendant's interpretation of clause 27(B) brings home the width and potentially draconian nature of the provision. It is in that context that I turn to deal with the question of whether there is a real prospect of establishing that the clause fails the reasonableness test.

Reasonableness

27. The Defendant accepts for the purposes of this application, that the contract is to be treated as one where the Claimant has dealt on the Defendant's written standard terms of business for the purposes of section 3 of UCTA. It is for the Defendant to show that clause 27(B) satisfies the requirement of reasonableness; see section 11(5).

28. Section 11(1) of UCTA provides that:

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

29. Schedule 2 of UCTA provides "Guidelines" for the application of the reasonableness test found in section 11(1).

> *The matters to which regard is to be had in particular ... 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.

Mr Tabari relies upon (a) and (d).

30. The Defendant adduces no evidence as such on the issue of reasonableness, but at paragraph 13 of his first witness statement, Mr Habergham says this:

> *... [clause 27(B)] has been held to be reasonable within the meaning of [UCTA]; see Rohlig (UK) Ltd v Rock Unique Ltd [2011] EWCA Civ 18.*

Mr Steward submitted that this time-bar has been held to be reasonable in circumstances very similar to the present one. He refers here both to *Granville Oil* and to *Rohlig v Rock.*

31. The first in time was *Granville Oil*. The claimant in that case contracted with the defendant freight forwarder. The agreement was to arrange insurance against all risks to goods in transit, and was subject to the BIFA terms. The goods were damaged in transit and the defendant made an insurance claim on the claimant's behalf. The claim was rejected by the underwriters, but the defendant failed to tell the claimant about that until the day before the nine month limitation period expired. Despite the fact that the claimant then knew of the problem with the insurance, it did not issue proceedings until more than nine months after both the date of the damage being discovered and the date on which the defendant had informed the claimant that the insurance claim had been rejected. The defendant pleaded the equivalent of clause 27(B). The claimant relied on UCTA, and the matter was tried as a preliminary issue.

32. The Court of Appeal considered the issue of reasonableness afresh on the basis of the findings of fact made by the Judge. The consideration of the issue begins at [17] in the judgment of Tuckey LJ (with whom Hart J and Potter LJ agreed). Having reviewed the arguments, he turns to the issue of whether nine months was a reasonable time limit.

> *[23] ... I have no doubt that it is for a claim for loss of or damage to goods in transit. The loss or damage can be ascertained on delivery. Nine months is ample time for the customer to decide whether to bring suit. This limit is necessary to enable the freight forwarder to claim within the twelve-month time limit which applies to many contracts of carriage.*
>
> *[24] That deals with the typical claim which a freight forwarder will face but, as this case and the Overseas Medical Supplies case show, he may also face a claim for failure to insure. If it is not practicable to expect such a claim to be made within nine months it suggests that the clause does not pass the test of reasonableness on the same grounds as cl 29(A) failed in the Overseas Medical Supplies case.*

33. The judgment then turns to the facts of the case. Nine months would have been sufficient to make a claim for the failure to insure if the customer had been told of the problem. There had been a delay in telling the customer that the underwriters had rejected the insurance claim, but the customer had still waited more than nine months from the date when they had been told there was no cover.

> *[28] On this analysis, the facts of this case do not compel the conclusion that cl 30(B) is unreasonable. As I have said, in the ordinary case the customer will know whether he has cover relatively soon after his goods are damaged. His loss for the failure to insure will of course be related to the amount of his claim for the damage. In these circumstances I think it is fair and reasonable to fix the same time limit for a claim based on failure to insure the goods as is fixed for the claim for damage to those goods*.

34. That is not the position here. There is no evidence that nine months would be sufficient to bring a claim such as the one the Claimant brings in this case. It may be that HMRC could be expected to notify an importer of issues such as those which arose in this case within that time, but it may not; particularly in the context of the changes to the regime brought about by Brexit. On the face of it, there is reason to believe that the delays in notification by HMRC (and thus the ability of the Claimant to bring this claim within the nine months provided for) would potentially be significantly longer than nine months. The work of a direct representative in dealing with customs duties is ancillary to the work of a freight forwarder, and contemplated by the BIFA terms, but this is (at least arguably) not the typical case a freight forwarder will face.

35. The leading judgment in *Rohlig* was given by Moore-Bick LJ. The customer in that case alleged that the freight forwarder had overcharged it in respect of transport charges. I note the following:

(i) *Clause 27(B) is deliberately framed in very broad terms ... and on its face intended to discharge the company from all liability*; [17].

(ii) The customer's case was that the clause did not apply to causes of action which could not reasonably have been discovered before the time-bar expired; [19].

(iii) *Whether a term satisfies the statutory requirement of reasonableness is to be judged by reference to the circumstances of each case at the time the contract is made, but the meaning of the words used ... must be taken to be the same in the absence of any reason to conclude otherwise*; [21].

(iv) *In principle the question must be considered separately in each case because the circumstances surrounding the contract may differ from case to case, but where a standard condition of this kind is involved I do not think that the court should be astute to draw fine distinctions between cases that in broad terms are very similar. It is important for those engaged in any commercial activity, whether as providers of goods or services or as customers, to know whether a particular*

clause will generally be regarded as reasonable in the context of contracts of a routine kind made between commercial parties. [23].

36. Mr Steward relies on the passage from *Rohlig* at paragraph [23] in particular to show that the BIFA terms are not applicable just to the carriage of goods, but have application to ancillary services such as those provided here, and that clause 27(B) applies whether or not a party knows or can ascertain that is has a claim. He also submits that other standard terms used in the industry, such as the terms and conditions of the Institute of Chartered Shipbrokers (a copy of which he attaches to his skeleton argument) include a nine month time-bar, and that there is no reason to conclude that the parties' bargaining strengths are significantly unequal. Apparently the Claimant describes itself on its website as "*widely recognised as the industry-leading fencing manufacturer*" (again material which derives from his skeleton argument).

37. Mr Tabari's submissions may be summarised in this way:

(i) It is for the Defendant to show that this term is reasonable.

(ii) Nine months is not a reasonable time limit. It is at least unclear whether the loss here is the sort of loss that can be ascertained within nine months. *Granville Oil* is to be distinguished.

(iii) This is not a case where there is any question of a liability being passed on to others. The commercial justification for the nine month time limit does not apply.

(iv) The Claimant could not have discovered the Defendant's breach until it received HMRC's letter.

(v) Each case is to be determined on its facts. Whilst the BIFA terms have been found to be reasonable in some instances, that does not mean that they are reasonable in all circumstances

38. Mr Tabari also referred me to the recent decision of the Court of Appeal in *Last Bus v Dawsongroup Bus and Coach Limited* [2023] EWCA Civ 1297. The leading judgment was given by Phillips LJ, with whom Singh and Bean LJJ agreed. It is a case in which the application of UCTA to standard terms of business governing commercial contracts is considered. It is not a case in which the BIFA terms were under consideration, although the decision in *Granville Oil* is reviewed. The discussion from [45] to [51] is of relevance.

[45] ... in enacting UCTA Parliament did not legislate over the whole field of contract. In commercial matters where the parties are of equal bargaining power, the parties are free to apportion risk as they see fit without judicial intervention, including by way of exclusion clauses.

[46] Parliament did, however, legislate to control the reasonableness of certain terms in specified types of contract and these are not ... limited to consumer contracts. Exclusion clauses in contracts based on one party's written standard terms of business (section 3) ... are subject to the test of

reasonableness, the burden being on the party relying on the term to show that the test is met. The rationale underlying these provisions is obvious: customers contracting with a business on its written standard terms ... are considered, on the face of it, not to be of equal bargaining power, at least in relation to the terms of business which have not been individually negotiated, but may have been no more than "small print" on the back of the primary contractual documents. Parliament has decided that businesses seeking to rely on those terms to exclude what would otherwise be their liability under the contract must prove the reasonableness of those terms.

[47] That is not to say that a customer and a business dealing on the latter's standard terms may not be found to be of equal bargaining power and, indeed, the respective strength of the bargaining position of the parties is the first matter identified in Schedule 2 to UCTA. The three cases mentioned by the Judge are examples: ... in Glanville commercial parties of equal bargaining strength had agreed a contract for international carriage containing a practical time limit for claims.

[48] It is perhaps not surprising that cases such as those, where commercial parties were found to be of equal bargaining strength (and particularly where they have insurance), this Court has emphasised that the bargain of the parties should generally prevail and the clause therefore held to be reasonable under UCTA. That is (and can only be) an application of the statutory reasonableness test in the circumstances of the case, with particular regard to Schedule 2(a) of UCTA. It is certainly not ... a repudiation of the application of the statute or an effective reversal of the burden of proof in relation to the reasonableness of a term.

[49] An important distinction in this regard was made by Christopher Clarke J in Balmoral. Even where the parties are large commercial concerns and of equal bargaining strength as regards the price to be paid under the contract, that does not mean that they are of equal bargaining strength in respect of the terms. A supplier may be willing to negotiate the unit price, but will only supply on its standard terms, a position taken by all other suppliers in the market. That crucial distinction must, in my judgment, be borne in mind when considering the reasonableness of standard terms and, to a large extent, epitomises the rationale for controlling standard terms of business by statute.

[50] It follows from the above, in my judgment, that the Judge was wrong to approach the question of reasonableness of clause 5(b) on the basis that the parties were of equal bargaining strength and the "marked reluctance to interfere" was engaged. The prior question was whether, where Last Bus was contracting on Dawson's standard terms of business, the parties were on an equal footing as regards those terms. Given that it was plain that Dawson would not have contracted without the exclusion clause and given the Judge's finding that no materially different terms were available in the market, the conclusion (at least arguably) should have been that the parties were not of equal bargaining strength as regards clause 5(b). On that basis, the Judge adopted the wrong approach, which was a major factor in his conclusion at [40].

> *[51] The proper starting point, in my judgment, was that clause 5(b), contained in standard terms of business of a hire purchase company, purported to exclude any and all liability for the quality of the coaches supplied to Last Bus, leaving Last Bus without a remedy even if it received no value at all whilst having to pay for the hire. Purnell makes it clear that such clauses are prima facie unreasonable under UCTA …*

39. The following points arise from a consideration of that discussion when set alongside the facts of this case:

(i) Because the parties are contracting on the Defendant's standard terms of business, they are not (on the face of it) of equal bargaining power; [46].

(ii) There was no negotiation of the terms in this case, and unlike the position in *Granville Oil*, the time limit was (at least arguably) insufficient to allow the Claimant to bring the claim; [47].

(iii) The insurance position may be relevant. There is no evidence from the Claimant on the issue (a valid criticism made by Mr Steward) but I infer that the Claimant was not insured, and it is reasonable to expect that there will be some evidence at trial as to the availability (or otherwise) of insurance to cover the failure of a freight forwarder to fill in the relevant forms correctly; [48].

(iv) The non negotiability of the standard terms, and the lack of alternative terms in the market are issues which suggest a lack of equality of bargaining power; [49]-[50].

(v) A clause which leaves the Claimant without a remedy is prima facie unreasonable; [51].

Decision

40. Mr Steward is right to emphasise that the BIFA terms are widely used, drafted with a view to achieving a fair balance between the legitimate interests of the parties, and should have been known to the Claimant. I acknowledge the guidance given by Moore-Bick LJ in *Rohlig* at [23], but this is not a case where I should import the finding of reasonableness from a consideration of other cases. *Last Bus* makes it plain that there should be a consideration of the question of reasonableness on the particular facts of this case. The Claimant could have done more in terms of the evidence it adduced, to highlight the areas where further evidence is needed, but there is more than enough in the simple facts of the case to demonstrate that there is a real prospect of success on the issue.

41. Standing back, this contract was entered into with a view to the Claimant maximising the use of the available quota, so that it did not have to pay import duty. Given the extent of the business involved, the parties would probably have contemplated the

potential for significant loss if there were some error on the part of the Defendant. It may well have been that they would also have understood that HMRC's response time would have been unpredictable, or subject to significant delay given the issues which arose on Brexit.

42. Would they have regarded it as fair and reasonable to include a clause which barred a claim which went to a failure on the part of the Defendant to take reasonable care to meet the central purpose of the contract, potentially costing the Claimant a lot of money, in circumstances where the Claimant could well have had no knowledge of the basis of such a claim until after the limitation period ran out? That might put the question from the Claimant's point of view, but it illustrates the potential unreasonableness of clause 27(B) on the facts of this case. There is a real prospect that the answer to that question would be no.

43. The application is dismissed. The parties are to agree directions for the service of a Defence and a Reply, and identify dates for a CCMC in April-June 2024. It may be that this is a case which is suitable for the Shorter Trials Scheme. That will depend on the nature of the Defence, but no doubt the parties will keep that in mind. I have not heard submissions on costs, but my provisional view is that the Claimant is the successful party and should have its costs of the application. I can summarily assess those on the basis of written representations or at the CCMC if that assists. If a minute of order can be agreed, I will dispense with attendance on handing down. May I thank Counsel on both sides for their assistance.