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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN:

B A KITCHEN COMPONENTS LIMITED

Plaintiff;

-and-

JOWAT (UK) LIMITED

Defendant.

Stephen Shaw QC with Jonathan Dunlop (instructed by Pinsent Masons Solicitors) for the Plaintiff
Frank O'Donoghue QC with David Dunlop QC (instructed by DAC Beachcroft Solicitors) for the Defendant

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SIR RONALD WEATHERUP

[1] The plaintiff, a manufacturer of kitchen doors, claimed damages against the defendant, a manufacturer and supplier of adhesive, for damages for loss and damage sustained by the plaintiff by reason of defects in the kitchen doors occasioned by the unsuitability of the defendant's adhesive when applied to the doors. At an initial hearing to determine whether the defendant was liable to the plaintiff for the defective condition of the doors it was found that the defendant was liable. The defendant appealed against the finding and the appeal was dismissed. The judgment at first instance is at [2017] NIQB 76 and the judgment on appeal is at [2018] NICA 51.

[2] The proceedings then continued to the completion of the first instance hearing and the assessment of damages due to the plaintiff. The defendant relied on its standard conditions of sale to limit liability to the price of the adhesive purchased. The plaintiff contended that the defendant was unable to rely on the limitation on the grounds that the issue concerning the limitation had already been decided

against the defendant at an earlier stage of the proceedings and also that the issue had been within the remit of the initial hearing and could not be raised again. By a Ruling dated 9 September 2020 it was found that the defendant's reliance on the limitation had not already been decided against the defendant and the initial hearing had not had the effect of preventing the defendant from raising the standard conditions of sale and the issue had yet to be determined. The Ruling of 9 September 2020 is at Appendix 1 to this judgment.

[3] The issues are first of all, whether the defendant's conditions of sale and the limitation clause contained therein and relied on by the defendant were incorporated into the contract between the parties; secondly, if incorporated, whether the limitation clause is applicable to limit the plaintiff's entitlement to damages to the purchase price of the adhesive; and thirdly, if the damages are not so limited, to determine the amount of the plaintiff's damages.

[4] Affidavits were admitted in evidence on behalf of the plaintiff from David Caulfield, Sales and Marketing Manager and Kieran McCracken, Director and on behalf of the defendant from Craig Boulton, General Manager and Director, Simon Preston, Sales Director, Nicholas Orton, Managing Director and Klaus Kullmann, member of the Board. Oral evidence was received by video link from Mr Orton and Herr Kullmann and in person from Mr McCracken and JP Corrigan, the plaintiff's in-house accountant.

[5] The plaintiff business was commenced by the McCracken brothers as a partnership in 1990 and was incorporated in 1994. The production of kitchen doors made from MDF board and PVC foil commenced in 1997 with the use of Henkel and other adhesives. New premises were acquired in 2000 and an investment of £2M was made in new machinery. In 2003 the plaintiff was the only manufacturer of vinyl wrap doors that completed the process by automated lines. The plaintiff had a turnover of £2M-3M and a staff of 12 to 15 when contacts commenced with the defendant in 2003. At that time, while Henkel led the market, I find that the defendant was a substantial manufacturer and supplier of adhesive.

[6] In 2003 the defendant's representative Simon Preston approached the plaintiff's representative Kieran McCracken to discuss the use by the plaintiff of the defendant's adhesive in the manufacture of the plaintiff's kitchen doors. Also present at the meeting was Philip Bingham of PB Boards (NI) Ltd and while there is some dispute about his status I find him to have been an employee of a company that acted as a representative of the defendant in the engagement with the plaintiff.

[7] While the Henkel product used by the plaintiff was a two part glue the defendant had developed a one part glue. Mr Preston and Mr Bingham carried out an inspection of the plaintiff's plant and machinery, materials and processes and there were discussions between the parties as to the advantages of transferring to the use of the defendant's one part glue. Various tests of the defendant's product were

arranged by the defendant aimed at demonstrating its suitability for the plaintiff. In April 2003 there were initial trials that gave rise to some concern about the viscosity of the adhesive, there were full trials on the automated lines, 'German Tests' were completed whereby four doors with the defendant's glue and four doors with Henkel glue were sent blind for heat testing and finally cut and peel adhesion tests were undertaken. Some test results were not available until June 2003. Discussions between the plaintiff and the defendant extended to the price that would be charged, the quantities that could be ordered and arrangements for delivery. The evidence of Mr McCracken was that the glue to be delivered by the Defendant was specifically developed to bond together the plaintiff's MDF and PVC.

Incorporation of the defendant's conditions of sale

[8] On 1 or 2 May 2003 the plaintiff placed an order for 1000 kg of the defendant's glue at the agreed price of £3.15 per kg by the use of the plaintiff's standard form written purchase order. This was to be the first of forty orders placed by the plaintiff with the defendant, the remaining orders being each for 2000kg. A letter dated 2 May 2003 sent by fax from PB Boards (NI) Limited, on behalf of the defendant, to the plaintiff, enclosed the defendant's standard form acknowledgment confirming the plaintiff's order.

[9] In respect of orders received the documents generated by the defendant were as follows. An acknowledgement was issued by the defendant which contained, above the details of the order, the words "We supply according to our general sales conditions". At the bottom of the defendant's acknowledgment were the words "Any sale by Jowat (UK) Limited is made on the basis of our conditions of sale, delivery and payment". On the back of the defendant's original acknowledgement were the defendant's conditions of sale. The defendant then issued a standard form delivery note in respect of the delivery of the order which on its face contained the same two references to the defendant's conditions of sale as appeared on the defendant's acknowledgment. On the back of the defendant's original delivery note were the defendant's conditions of sale. The defendant then issued an invoice for payment of the sum due in respect of the order which again contained on its face the two references to the defendant's general conditions of sale which had appeared on the defendant's acknowledgment and the defendant's delivery note. On the back of the defendant's original invoice were the defendant's conditions of sale.

[10] Neither originals nor copies of the plaintiff's first purchase order or the defendant's first acknowledgment or delivery note or invoice were available. Some examples were available of documents generated by later orders. The earliest example of an invoice with the conditions of sale was 2 February 2004. An issue arose about the conditions of sale on the later documents being the same as those that applied in May 2003. Mr McCormick was asked about the availability of the originals of the early invoices which had been received by the plaintiff and his response was that they had been destroyed. Being pressed by Counsel for the

defendant Mr McCormick accepted that some of the early invoices were in the plaintiff's possession. On this point I found Mr McCormick to have been initially misleading. I had no other occasion to reach that conclusion. I am satisfied that each of the three defendant's documents was generated by each of the plaintiff's orders and that the first of each such document was identical to such later copies as are available in relation to subsequent orders placed by the plaintiff. Accordingly, I find that the version of the defendant's conditions of sale produced in evidence represented the defendant's conditions of sale in May 2003.

[11] The defendant's conditions of sale at Clause 8 deals with "Warranties and liability" and states:

> "8.1 Except where the goods are sold to a person dealing as consumer (within the meaning of the Unfair Contract Terms Act 1977), all warranties, conditions or other terms implied by statute or common law are excluded to the fullest extent permitted by law.
>
> 8.4 Where any claim in respect of any of the goods which is based on any defect in the quality or condition of the goods or the failure to meet specification is notified to the seller in accordance with these conditions the sellers will be entitled to replace the goods (or the part in question) free of charge or at the seller's sole discretion refund to the buyer the price of the goods (or a proportionate part of the price) but the seller shall have no further liability to the buyer.
>
> 8.5 Except in respect of death or personal injury caused by the seller's negligence, the seller shall not be liable to the buyer by reason of any representation (unless fraudulent) or any implied warranty condition or other term or any duty at common law or under the express terms of the contract for any indirect special or consequential loss or damage (whether for loss of profit or otherwise) cost expenses or other claims for compensation whatsoever (whether caused by the negligence of the seller, its employees or agents or otherwise) which arises out or in connection with the supply of the goods or their use or resale by the buyer and the entire of the liability of seller under or in connection with the

contract shall not exceed the price of the goods, except as expressly provided in these conditions."

[12] As to the receiving of notice of standard form conditions in a document Chitty on Contracts at paragraph 13-013 states as follows:

> "(1) If the person receiving the document did not know that there was writing or printing on it, he is not bound.
>
> (2) If he knew that the writing or printing contained or referred to conditions, he is 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."

[13] Clause 8 is a stringent limitation of liability clause excluding all implied terms, restricting any liability for defects in quality or condition or specification to refund or replacement of the product and in respect of any non-fraudulent representation or implied term at common law or express contract term, excluding any indirect, special or consequential compensation. And limiting liability to the price of the product.

[14] While the plaintiff and the defendant were not engaged in the same business, Mr McCracken accepted that he knew in 2003 that the adhesive industry operated on standard terms and conditions that limited liability. However, he regarded the defendant's terms as what he called "general conditions" which did not apply in the present case because, in Mr McCracken's view, the plaintiff and the defendant had agreed a "bespoke" product namely, a form of adhesive produced specifically for the plaintiff. I do not accept that this is a distinction which makes any difference to the application or otherwise of the defendant's conditions of sale to the contractual arrangements between the plaintiff and the defendant.

[15] Further, Mr McCracken stated that his industry and the adhesive industry worked on a guarantee of the product and that where that guarantee was a conflict with a clause exempting or limiting liability it was a matter for the courts to resolve. However, his evidence was that the defendant's conditions of sale provided no warranty of the product and that had he been informed at the time of the first discussions with the defendant that the effect of the defendant's conditions of sale would be that the defendant would not be liable for a defective product he,

Mr McCracken, would not have agreed to purchase the defendant's adhesive. On the other hand Mr McCracken accepted that he was aware of terms and conditions attached to the defendant's invoices and did not pay attention to them. I am satisfied that the distinction between firms that offer a guarantee and those that do not is the result of Mr McCracken's engagement in this litigation and was not a consideration at the time that the plaintiff ordered the defendant's adhesive. At that time, as he agreed, he simply did not consider the effect of the conditions of sale.

[16] Nor do I find that in the circumstances prevailing in 2003 when the defendant approached the plaintiff there was any imbalance in the bargaining positions of the parties such as impacted on the plaintiff's decision to change to the defendant's product. I am satisfied that such clauses as were employed by the defendant are not and were not unusual in the adhesives industry, although some conditions of sale maintain versions of a warranty on quality and condition and some contain different versions of exclusion of types of loss and damage. I find that in 2003 the Plaintiff was aware that the adhesives industry applied conditions of sale that contained limitations on liability such as those found in the defendant's documents. Further, I find that the plaintiff became aware after the commencement of this litigation that some suppliers such as Henkel, the plaintiff's existing supplier in 2003, provided a warranty that the product conformed to specification and was free of defects and of satisfactory quality and that other suppliers did not. Clauses such as those included by the defendant are generally not considered to be particularly onerous or unusual. I do not find the defendant's conditions of sale to be particularly onerous or unusual.

[17] As to incorporation of the defendant's conditions of sale, I find, first of all that there was no completed agreement entered into between the plaintiff and the defendant in the general discussions and negotiations between the representatives of the plaintiff and the defendant on or before 1 May 2003. I find that while there was agreement on some aspects of potential trading between the plaintiff and the defendant, such as the price per kg and the method of delivery, there was no concluded offer or acceptance.

[18] I find that the plaintiff's offer to purchase was in the form of the plaintiff's standard form purchase order sent on 1 or 2 May 2003. I find that on 2 May 2003 PB Boards (NI) Limited, on behalf of the defendant, sent to the plaintiff the front page only of the defendant's standard form acknowledgment which contained a counter offer with the notice of the defendant's conditions of sale. By the two references on the front of the acknowledgement I find that the defendant intended to contract on its conditions of sale. I find that the actual conditions of sale which appeared on the back of the defendant's original acknowledgments were not forwarded to the plaintiff on 2 May 2003.

[19] I find that the defendant's delivery note was not enclosed with the letter of 2 May 2003. The letter of that date stated that the defendant's acknowledgement was enclosed but referred to the defendant's delivery note, with delivery scheduled

for 7 May, without stating that a copy was enclosed. The defendant's computerised records of deliveries state the delivery date as being 7 May, although Mr Orton of the defendant recognised that the records contained the projected delivery dates and there could have been delay in delivery in some cases. There was no evidence of any issues about delivery of the plaintiff's orders. I find that the first delivery was made on 7 May 2003. Mr Preston's affidavit evidence was that a delivery note was forwarded to the carrier and attached to the actual delivery to the plaintiff. From the evidence of Mr Orton I am satisfied that the defendant's delivery notes were sent by the defendant to the carrier, but I am not satisfied that the defendant's delivery notes were attached by the carrier to the delivery to the plaintiff.

[20] The Court has to determine what each party was reasonably entitled to conclude from the acts and words of the other. I find that the plaintiff accepted the defendant's counter offer by accepting delivery of the adhesive on 7 May 2003 with notice of the defendant's terms and conditions set out in two places on the face of the defendant's acknowledgment, the front page of which had been enclosed with the letter of 2 May 2003 faxed to the plaintiff. In any event, the plaintiff was aware that standard conditions limiting liability applied. The defendant was entitled to assume that by accepting the delivery with notice of the defendant's conditions of sale and without objection, the plaintiff was accepting the defendant's conditions of sale.

[21] I find that the defendant sent an invoice claiming payment of the price of the plaintiff's first order and first delivery to the plaintiff. There was no evidence of issues having arisen in respect of payments by the plaintiff in respect of the invoices furnished by the defendant for the total of forty orders for adhesive placed by the plaintiff with the defendant. Only a sample of the invoices was available with the first being 2 February 2004. There was no evidence as to dates of payments made by the plaintiff on foot of the invoices. As an illustration, the defendant's invoice for the plaintiff's order 3480 was issued on 9 September 2005 in respect of an order placed by the plaintiff and recorded by the defendant on 1 September 2005 and recorded as delivered on 6 September 2005, that is, the delivery was within days of the order and the invoice was within days of the anticipated delivery. The plaintiff's second order, which like all subsequent orders was for two kg of adhesive, is recorded in the defendant's system as being 22 May 2003 with a delivery date of the first part on 28 May 2003 and the second part on 4 June 2003. I find that the plaintiff received the invoice for the first order prior to the placing of the second order which is recorded in the defendant's system on 22 May 2003. Accordingly, I find that, on the placing of the second order the plaintiff was on notice of the defendant's conditions of sale by receipt of the defendant's acknowledgment by fax on 2 May 2003 and further by receipt of the invoice in respect of the first order, at which time the plaintiff also received the conditions of sale on the back of the invoice.

[22] In *Balmoral Group Limited v Borealis (UK) Limited* [2006] EWHC 1900 (Comm) the defendant supplied a product to the plaintiff to be used in the manufacture of oil tanks and subject to its conditions of sale. The terms excluded warranties of quality,

fitness and description and limited liability for defects to the price of the goods. The use of the product resulted in a high failure rate in the tanks produced by the plaintiff. The conditions of sale were on the back of the invoices and Christopher Clarke J stated that by putting its terms on the back of their invoices Borealis indicated to Balmoral that, so far as Borealis were concerned, they intended the contract to be on those terms. Those invoices were seen and initialled by the Managing Director of Balmoral's rotomoulding division and he realised that there were terms on the back of the invoices, which he reviewed but did not study. Balmoral thereafter purchased material at the quoted price with knowledge of Borealis' conditions without ever suggesting that they were not applicable. Borealis knew that the invoices were received and paid without demur. A reasonable person in their position would be entitled to assume, as was found to be the fact, that someone at Balmoral had considered whether or not to pay the invoice and had seen the conditions on the back. In those circumstances Borealis was reasonably entitled to assume that Balmoral accepted the applicability of the conditions and if Balmoral wanted to pay the price quoted without accepting the terms, it was incumbent on it to say so.

[23] In *Goodlife Foods Limited v Hall Fire Protection Limited* [2018] EWCA Civ 1371 the defendant provided a fire detection system for the plaintiff's factory for £7,490 with a contract that excluded all liability for damage to property or goods, a warranty for the replacement of defective parts and a proposal for insurance to cover risks that could be provided at additional cost. A fire caused substantial damage to the plaintiff's property. The Court of Appeal found that the exclusion clause was not particularly unusual or onerous and that it had been fairly and reasonably brought to the attention of the plaintiff. The defendant provided a quotation expressly referring to the terms and conditions on the face and providing a copy of the terms and conditions. The opening paragraph drew particular attention to specific conditions which did not provide for the imposition of any form of damages. The plaintiff later submitted a purchase order and the terms and conditions were sent again to the plaintiff with the acknowledgment of order. Coulson LJ stated that, in recent times, claims which limited a specialist supplier to damages in the amount of the contract price or which excluded liability for indirect loss or loss of profit had not been regarded by the courts as particularly onerous or unusual. The context of the contract as a whole was a one off supply contract carried out for a modest sum with an alternative offer from the defendant of a wider liability with appropriate insurance arrangements and an increase in the contract price. The plaintiff had reasonable notice as the clause was not buried away in the middle of a raft of small print, was expressly referred to in the front of the quotation printed in clear type, the potentially wide-reaching effect was expressly identified at the very start, a warning was cast in almost apocalyptic terms and it would have been commercially unrealistic to say that it had not fairly and reasonably been brought to the plaintiff's attention. Thus, even if it had been a particularly onerous and unusual clause it would still have been incorporated into the contract.

[24] In the present case I have found that the first contract was entered into between the plaintiff and the defendant in May 2003 when the defendant's counter offer contained in the acknowledgement was accepted by the plaintiff on acceptance of the delivery from the defendant's carrier. At that time the plaintiff had notice that the sale was subject to the defendant's conditions of sale and before accepting could reasonably have been expected to ascertain the nature of the conditions of sale and reject them if they were not considered acceptable.

[25] In the alternative, if I had found that the defendant's conditions were particularly onerous or unusual, which I have not, I would have found that the plaintiff had fair and reasonable notice of the actual terms of the defendant's limitation clause on receipt of the defendant's invoice for the first delivery with the conditions set out on the back of the invoice. In those circumstances the plaintiff placed a second order with that knowledge and the defendant's conditions of sale were incorporated into the second and subsequent contracts. Further, if the defendant's terms were not incorporated upon the plaintiff accepting the first delivery without objection to the defendant's terms of which the plaintiff had notice, contrary to my finding above, I would have found that the defendant's terms were incorporated upon the plaintiff placing the order of 22 May 2003, having received the defendant's conditions of sale on the back of the first invoice.

Interpretation of the defendant's conditions of sale

[26] Having found that the defendant's conditions of sale were incorporated into the contracts between the plaintiff and the defendant it is necessary to consider the interpretation of the terms of the contract. Clause 8.3 is a blanket exclusion of all implied terms to the extent permitted by law. The finding of the court on the initial hearing and on appeal was that the defendant was in breach of the implied term that the adhesive supplied by the defendant would be suitable for use by the plaintiff.

[27] Clause 8.4 limits liability for defects in condition, quality or specification to replacement or refund of the price of the adhesive. The present case involves defects in the condition and quality of the adhesive. The consequences of a breach are limited to the price of the adhesive.

[28] Clause 8.5 applies to any implied warranty, condition or other term and excludes liability "…. for any indirect special or consequential loss or damage…." The present case involves breach of an implied term. In respect of the exclusion of indirect or consequential loss Benjamin's Sale of Goods 10th Edition, paragraph 13-037 states:

> "The current authority is that such clauses only exclude losses covered by the second part of the rule in *Hadley v Baxendale*. That is to say unusual losses for which the defendant would not be liable unless made

> aware of the risk of them. It seems that this is now so well established that only the Supreme Court can reconsider the matter."

[29] Benjamin states that the leading authority is *Croudance Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyds Reports 55. The exclusion of "consequential loss or damage" was held by the Court of Appeal not to cover any loss which directly and naturally resulted in the ordinary course of events from the defendant's breach. The court at first instance and on appeal followed *Millars Machinery Co Ltd v Way* [1930] 40 Comm. Cas. 204 which it was said by Parker J had equated "consequential" with "indirect" and treated them as interchangeable.

[30] Clause 8.5 also extends to the exclusion of "special" loss or damage. The word conveys the meaning that the loss is other than a direct and natural result of the breach. Clause 8.5 also includes the words in parenthesis "whether for loss of profits or otherwise". Benjamin notes that it is a matter of interpretation as to whether the addition of the words "loss of profits" affects the scope of the exclusion of consequential loss or whether it is the scope of lost profits that is affected by the preceding exclusion of consequential loss. As the words appear in parenthesis immediately after the limitation in respect of indirect, special and consequential loss I interpret the reference to loss of profits as being limited by the scope of the preceding words. In any event I find that the plaintiff's heads of claim do not include a claim for loss of profits. I also interpret "otherwise" as being affected by the preceding words "indirect, special or consequential loss or damage", the scope of which is limited as stated above. Further, Clause 8.5 refers to "costs, expenses or other claims for compensation whatsoever". Again, I interpret those items as being covered by the preceding words "indirect, special or consequential" and thereby limited in scope as stated above. To the extent that the interpretation of the words referred to may be unclear I interpret them contra proferentum as being in respect claims for compensation which are indirect, special or consequential.

[31] Finally, Clause 8.5 provides that contractual liability shall not exceed the price of the goods. There appears to be three parts to clause 8.5. The first concerns liability for death or personal injury arising from negligence and is not this case. The second part is the exclusion of indirect, special and consequential loss discussed above. The third part is the limit of liability to the price of the goods, the scope of which is unclear when account is taken of the limit imposed by the second part. If the third part applied to all contractual liability there would be no need for the second part. Therefore, I assume that the second and third parts apply to different situations. One interpretation may be that, as the third part limits the damages to the price paid "except as expressly provided in these conditions", the third part is subject to the second part and there remains an area of contractual liability where direct damage is recoverable under that part. On the other hand it may be said that recovery of direct damage is not "expressly provided" by the conditions. Again, applying the contra proferentum rule, I find that the second part of clause 8.5 should

be given a purpose and that where it applies, as in the breach of an implied term, it permits recovery of loss which is a direct and natural result of the breach.

[32] Accordingly, I find that Clause 8.4 imposes, in respect of defects in the product, a limit on damages to the price of the adhesive and Clause 8.5, in respect of breach of an implied term, excludes liability for indirect, special or consequential loss or damage but does not exclude liability for direct loss and damage.

The reasonableness of the defendant's conditions of sale

[33] The Unfair Contract Terms Act 1977 introduced a statutory requirement that a contract term should be fair and reasonable. The burden is on the defendant to establish that limitation clauses in the conditions of sale are fair and reasonable. The limitations are that damages are restricted to the price of the adhesive under Clause 8.4. The same applies to clause 8.5 if, contrary to my finding, this clause also restricts damages to the price of the adhesive. The further limitation under Clause 8.5 excludes damages for indirect, special and consequential loss and damage but as I have found does not exclude direct loss resulting naturally from the breach.

[34] Where liability is restricted to a specific sum, as I find to be the case where the limit of damages is set at the price of the adhesive, regard is be had in particular to the resources of the parties and the availability of insurance. In addition, considering the reasonableness of both Clauses 8.4 and 8.5, statutory guidelines require regard to be had in particular to 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 to enter into a similar contract with other persons, but without having to accept a similar term.

(c) Whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties).

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

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

Further factors were identified by Potter LJ in *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] EWCA Civ 1449, to which I have regard.

[35] Klaus Werner Kullmann is a member of the Board of Jowat SE and responsible for sales and manufacturing activities of the group worldwide. His evidence was that the defendant's exemption clause was standard in the adhesive and chemical industry. He described adhesive as a modestly priced product that, once supplied, may form part of highly technical and expensive products where a perceived defect in the adhesive could lead to damages wholly disproportionate to the value of the product supplied. The plaintiff's previous supplier, Henkel, described as the largest glue manufacturer in the world, had conditions of sale that provided a warranty that the product conformed to specification, was free from defects and was of satisfactory quality but that total liability concerning performance of the contract would be limited to the price paid and that in respect of a breach there would be no liability for any direct or consequential loss or loss of profit, business or goodwill. The plaintiff's present supplier, Advatac, had conditions of sale that provided that with defects in quality, condition or specification, liability was limited to replacement or the price of the product and for breach there was no liability for consequential loss or damage, costs, expenses or other claims for consequential compensation. I am satisfied that the defendant's limitation of liability clause is common practice in the industry.

[36] The plaintiff relied on the defendant to supply a suitable product and the defendant was aware of the particular purpose for which their product was required. The defendant approached the plaintiff in the hope of obtaining the plaintiff's business. The defendant was introduced to the plaintiff's materials and manufacturing process. A variety of tests were carried out by which the defendant sought to demonstrate to the plaintiff that its product was suitable for the plaintiff's purpose and the plaintiff sought such assurances from the tests undertaken. The judgments at first instance and on appeal found that the defendant failed to appreciate the significance of the wax content of the MDF and its overall effect on the adhesive, that the wax content was variable, that no issue was raised by the defendant about the use of MDF or the particular MDF used by the plaintiff and that the defendant was in breach of contract in failing to have any or adequate regard to the effect of the presence of wax in the MDF.

[37] The approach to the question of reasonableness in *Balmoral Group* and in *Goodlife* referred to above is illustrative. In *Balmoral Group* Christopher Clarke J found that the defendant had not established that the limitation on liability was reasonable. The relevant clause excluded conditions and warranties as to quality, fitness and description, excluded liability for defects and limited compensation to the price of the goods. The defendant supplied the product for the purpose of making oil tanks and it was the assumption of both sides that it was capable of being used to make consistently satisfactory tanks. The presence of a latent defect

rendered that assumption impossible. In the circumstances where the assumption of consistently satisfactory tanks was impossible because of a latent defect, a blanket exclusion of liability was found to be prima facie unreasonable. The rejected submissions from *Borealis* find an echo in those made by the defendant in the present case. *Borealis* submitted that it could not be expected to test its product for all uses of any prospective purchaser, that it was the buyer who would know the intended use of the product, the design of the product made by the purchaser and of the mould used to produce it, how that product would be engineered, to what stresses it would be subject and the method of processing. Accordingly, the submission was that the buyers were the experts in working out whether the material was going to work for their purposes and the seller had little or no control over the manner in which it was used and little or no knowledge, much less control, as to the extent to which and the terms upon which the products manufactured were marketed and sold.

[38] The court was not persuaded that requiring the plaintiff to bear the entire risk of a latent defect was an appropriate allocation of risk. The defendant had extensive insurance against such a risk and the evidence did not establish that product recall insurance would have been normal for someone in the plaintiff's position. The contract was not made as a result of a serious negotiation as to the incidence of risk and while the defendant's terms were standard in the trade they were not the product of any agreed process of negotiation between representatives of sellers and buyers. The defect lay within the seller's sphere of expertise. It was more appropriate that the loss from such a defect should be borne by the seller and it was not unreasonable that he who stood to make the profit should carry the loss. If the product was unsuitable the plaintiff would suffer a huge loss as a foreseeable consequence of the defect and had no real opportunity to avoid that consequence.

[39] In *Goodlife* the Court of Appeal upheld the finding that the clause was reasonable. While liability for damage to property and goods was excluded, the terms included a proposal for insurance cover for the excluded risks, at extra cost to the buyer. In distinguishing *Balmoral Group* Coulson LJ referred to the finding in that case that it was the assumption of both sides that the plaintiff was relying on the defendant to supply a product capable of being used to make consistently satisfactory tanks. Coulson LJ stated that as a matter of fact the manufacture of satisfactory tanks was impossible, that the plaintiff did not have relevant insurance and there was no evidence that product recall insurance would have been normal and further that it was not possible for the plaintiff to contract elsewhere on any better terms. Insurance was found to be at the heart of the reasonableness issue in *Goodlife*. It was an important consideration because of the identity of the party best placed to effect the necessary insurance and because of the express alternative identified by the defendant. The plaintiff was identified as conducting a potentially hazardous operation with its own unique knowledge of its property and the precise effect on its business of a fire and was plainly regarded as being in the best position to place its own insurance to cover those risks in a way most suited to its own business. Further, the exclusion clause offered the plaintiff an alternative to covering

the risks by taking out insurance at additional cost. The alternatives thereby stressed the necessity for that insurance and should have concentrated the plaintiff's mind on insurance and whether the cover needed to be enhanced or modified.

[40] The plaintiff's own conditions of sale include a warranty of merchantable quality and description, a provision excluding liability for any consequential or special loss and limits any liability to the value of goods supplied. As Christopher Clarke J stated in *Balmoral Group*, the fact that a purchaser has similar conditions of sale to those that he impugns cannot be conclusive, not least because the purchaser may be hard pressed to defend his own conditions of sale from a reasonableness challenge.

[41] In the present case I have not been persuaded that the respective bargaining strengths or the resources of the parties are significant factors. The defendant did not have a commercial advantage over the plaintiff. The plaintiff did not have regard to the defendant's conditions of sale when they were brought to its attention by notice on the defendant's documents and in any event regarded any limitation as inapplicable because the product was thought to have been designed for the plaintiff. There was no specific inducement to agree the limitation clause and no real opportunity to enter an alternative contract without a limitation clause. I am satisfied that the plaintiff knew of the practice of the adhesive industry and the existence of the defendant's conditions of sale and ought reasonably to have known of the limitation of liability. There was no condition precedent to the limitation of liability. The defendant did have insurance against the risks that materialised in the present case.

[42] As to whether this was a special order for the plaintiff, it was the plaintiff's evidence that the adhesive was manufactured, processed and adapted to the special order of the plaintiff. This was based on the defendant's visit to the plaintiff's premises, examination of the plaintiff's processes and the production of an adhesive which the defendant represented as being suitable for the plaintiff's purposes. I find that while the adhesive purported to have been produced to meet the particular needs of the plaintiff I have not been satisfied that it was manufactured or processed or adapted to the special order of the plaintiff so as to be different to the 150:50 version otherwise produced. However, both parties proceeded on the basis that the adhesive was suitable for the plaintiff's needs and that proved not to be the case. The plaintiff relied on the defendant to produce a suitable product and the defendant purported to have the expertise to produce such a product and the plaintiff reasonably relied on the defendant's expertise. The defendant had access to the plaintiff's materials and did not conduct appropriate tests to determine whether a problem would arise with the application of the glue to the MDF used by the plaintiff.

[43] The defendant relied on the variety and range of products into which the adhesive may be incorporated, including as Herr Kullmann stated, highly technical

and expensive products, such that liability must be limited to ensure the commercial viability of the sales of low cost items. While that may be the case generally, the present case is not one where the defendant was blind to the particular use the plaintiff would make of the product. The defendant had engaged in actively seeking out the plaintiff as it developed market leading systems, examined those systems, tested its adhesive against those systems and the materials used and promoted itself to displace a competitor whose product had not caused the problems that emerged with the later use of the defendant's product

[44] The defendant designed the product, knew its ingredients, sought to replace the plaintiff's existing supplier, examined the plaintiff's materials and processes, tested the suitability of the adhesive for those materials and processes and presented the adhesive as capable of replacing the existing supplier. The defendant contends that this is not a case of latent or inherent defect. However, there was an inherent defect in the defendant's adhesive. Unlike other adhesives used by the plaintiff, it was not compatible with the level of wax in some of the MDF used by the plaintiff. The result of the inherent defect in the adhesive was that it was rendered ineffective when applied to some of the MDF, with the result that there was delamination of the affected doors. The defendant promoted the product as suitable for use with MDF. The defendant's testing failed to identify the unsuitability of the adhesive for use with the plaintiff's materials. Only the defendant had knowledge of all the ingredients of the adhesive. The defendant was entitled to maintain the commercial confidence in the make-up of the adhesive but the defendant, having undertaken tests to satisfy the plaintiff that the one part adhesive was suitable for the plaintiff's purposes, it was incumbent on the defendant to devise appropriate tests to confirm the suitability of their product for use with the plaintiff's materials and processes.

[45] The fault lay in the adhesive. In turn the fault lay with the defendant in failing to identify the fault in the adhesive. Other adhesives used by the plaintiff before and after use of the defendant's adhesive did not display the delamination problems that emerged with the use of the defendant's adhesive. The defendant appears to have been unaware of the impact of wax on the suitability of its product. This was not a defect which was inherent in the adhesive supplied by other manufacturers, but was particular to the defendant's adhesive. Further, it would have been apparent to the defendant that, if their product had an inherent defect and the adhesive was ineffective, the doors would fail and have to be replaced. It was foreseeable that loss would be occasioned by the plaintiff having to make arrangements for the replacement of delaminated doors. The defendant's concerns for the scale of loss that might arise from a defect in the adhesive have greater force when applied to indirect, special or consequential loss.

[46] One consideration is whether the allocation of risk effected by the limitation is appropriate. The limitation clause placed the risk on the plaintiff and the defendant explained that approach by reference to a purchaser's knowledge of its product and process and the risk to the defendant of loss disproportionate to the price of the

product. On the other hand the unsuitability of the product could lead to substantial loss to the purchaser, equally being a loss disproportionate to the price paid for the product. As to responsibility for the loss, the inherent defect in the adhesive was the fault of the defendant. The composition and operation of the adhesive fell within the expertise of the defendant. To the extent that those losses might be disproportionate to the cost of the adhesive the defendant was able to obtain and did obtain the requisite insurance. It would be more appropriate that the risk of loss from such a defect should fall on the defendant as supplier.

[47] In the circumstances recited above, I have not been satisfied by the defendant that Clause 8.4, which limits liability for defects in condition and quality of the adhesive to the price of the adhesive, is reasonable. In so far as Clause 8.5 limits liability for breach of an implied term to the price of the goods, contrary to the finding above, I have not been satisfied that Clause 8.5 is reasonable. In so far as Clause 8.5 limits liability for breach of an implied term to direct damage naturally resulting from the breach and excludes liability for indirect, special or consequential loss or damage, which I have found to be the case, I am satisfied that the clause is reasonable.

The assessment of the plaintiff's damages

[48] The evidence for the plaintiff was that the first complaints about delamination of the doors were in October 2004 although there had been earlier evidence that the first complaints were in October 2005. The defendant contended that this change of evidence impacted not only on the assessment of damages but on the issue of the liability of the defendant. I accept the evidence that the first complaints were in October 2004 and that the earlier reference to October 2005 was a mistake and the assessment of damages will be considered accordingly. As to the impact of this date on the liability of the defendant, I have completed the initial hearing on the liability of the defendant and will not and cannot reopen that issue.

[49] As stated above, I have found the limit on liability under clause 8.4 and 8.5 to the price of the adhesive to be unreasonable. The defendant's assessment of damages is based on the price paid for the adhesive, being £251,000. The defendant then takes the failure rate of the doors as 6% of the total produced and applies that percentage to the price paid, being £13,600 as representing the amount of damages the plaintiff is entitled to recover. The defendant's failure was in not providing a product that was consistently compatible with the wax content of the MDF used by the plaintiff. It is not that only some of the adhesive was deficient. It was all deficient in that it was not suitable for use with the variations in the wax content of the MDF. If, contrary to the finding above, the defendant's liability is limited to the price paid, I find that the plaintiff is entitled to recover £251,000.

[50] The evidence as to the assessment of damages on behalf of the plaintiff was that of Kieran McCracken, JP Corrigan, the plaintiff's in-house accountant, the report

of GMcG, chartered accountants, prepared by Tony Nicholl and Paul Black and the oral evidence of Paul Black of GMcG. The evidence on behalf of the defendant was the report of ASM, chartered accountants, prepared by Nicola Niblock and Ms Niblock's oral evidence. The expert witnesses gave their evidence concurrently. The exchange of experts' reports and the subsequent experts' meeting resulted in the production of a Scott Schedule which is Appendix 2 to this judgment.

[51] The first page of the Scott Schedule sets out the plaintiff's claim at £1,401,002 plus interest, as calculated by GMcG. This total is made up of six subtotals, being first, £37,286 the cost of the replacement of 4030 doors, as recorded manually between 2004 and 2006; second, £873,885, the cost of the replacement of the doors recorded on an automated system from 2007, being an overall total for manual and automated recording of 131,419 doors replaced; third, £6,400 extra credits issued; fourth, £182,865 refitting credits issued; fifth, £105,584 additional staff costs incurred; and sixth, £194,982 additional sales team costs and expenses.

[52] The second page of the Scott Schedule contains the ASM calculation of the plaintiff's loss at £493,367 and the corresponding subtotals are £10,388, £286,514, nil, £115,632, £60,599 and £20,234.

[53] The defendant contends that the plaintiff's claim includes loss of profits and loss of sales that are irrecoverable in any event. I find that the plaintiff's heads of claim do not include loss of profits or loss of sales. I am satisfied, subject to the comments on the sixth item of dispute discussed below, that each head of claim amounts to direct loss resulting naturally from the defendant's breach. As such, each head of claim, if proved by the plaintiff, will be a recoverable loss as it will not be excluded under the second part of Clause 8.5 for the reasons set out above.

[54] Nine items were identified by the experts as representing the differences between the two calculations and I deal with each of the nine items.

[55] The first item concerns the number of doors delaminated, which the plaintiff claims as 131,419. The defendant makes a comparison with the replacement rates for doors in the four years after the plaintiff ceased using the defendant's glue and applies that replacement rate to reduce by 21.3% the number of doors to be included in the plaintiff's claim on the basis that that quantity of doors would have had to be replaced in any event. The plaintiff amended the figures for replacement doors but the amendment was not explained. I find for the defendant's approach and adopt the reduction of 21.31% and find that the plaintiff is entitled to claim in respect of the replacement of 103,419 doors.

[56] The second item concerns the number of delaminated doors recorded on the manual system. It was agreed that the original figure should be reduced to 4,030 and that is the figure included in the Scott Schedule and is included in the total

number of delaminated doors. Accordingly, the figures have already been adjusted to take account of this item.

[57] The third item concerns the selling price of the doors from year to year which the plaintiff lists in a column headed "Avg Selling Price" with the first price £16.47 and the last price £20.66. The plaintiff has made the calculation by the use of the replacement price and the original discount for the door. The defendant contends that the correct approach is to use the replacement price and the discount at replacement, rather than the original discount. Further, the plaintiff has used a replacement price and a global cost of sales percentage (COS%). The defendant contends for an average sales price and an average COS%, rather than the global COS%. The plaintiff objects that the defendant's approach does not take account of orders supplied free of charge or of bulk orders. The plaintiff has not provided the material to sustain these objections. I find for the defendant's approach on the selling price of the doors and adopt the figures set out under "Avg selling price" on the defendant's sheet.

[58] The fourth item concerns costs of sales which the plaintiff sets out under the heading "COS%" with the first figure being 56.18% and the last 60.39%. The plaintiff has made the calculation with the inclusion of certain fixed costs. The defendant contends that it is necessary to adopt the actual additional costs incurred and to exclude fixed costs. The defendant allows 10% of the production wages and overtime costs. The plaintiff objects that this makes no allowance for alternative sales or lost sales. The plaintiff has not produced evidence to support a claim for alternative sales or lost sales. I adopt the defendant's approach to the cost of sales and the defendant's figures under the heading "COS%" with the first figure being 38.21% and the last figure being 43.37%. Accordingly, I reject the plaintiff's production costs of the replacement costs at £1,253,557 and allow the defendant's calculation of production costs at £570,146.

[59] The fifth item concerns revenue received for the replacement doors where the plaintiff makes no allowance for receipts in respect of the manually recorded doors. The defendant estimates revenue of £3,829 for the period of the manual records, calculated on the basis of revenue received in the succeeding three years. The plaintiff objects that there were unlikely to be any revenues received in the period, although concedes that there may been some small receipts. I accept the defendant's approach and the calculation of £3,829 received in respect of the period of the manual record. In respect of the automated record the defendant's figures under the heading "Revenue Received" will apply. I adopt the defendant's approach and find the total revenue received to be £273,244. Accordingly, I find the plaintiff's loss for the replacement of the doors recorded in the manual system under the first sub total to be £10,388 and in the automated system under the second sub total to be £286,514.

[60] The sixth item concerns extra credits to the panelling centre which the plaintiff claims at £6,400. The defendant rejects the claim by reason of the absence of

evidence that the credits related to the problem with the glue. Mr Corrigan's evidence was that he was informed by staff in the office of a meeting with a Dublin outlet to secure future business after delamination problems had arisen. Further orders were achieved upon the plaintiff providing four credit notes to a total value of €8,000 being paid to the Dublin outlet. I find that while this payment related to a problem with the glue it was an indirect consequence of the delamination problems as it represented a discount made to secure a further order rather than being a direct result of the defects. Had I allowed the item I would have accepted the conversion rate at £6,400. Accordingly, I reject the claim for £6,400 in extra credits.

[61] The seventh item concerns the refitting credits which the plaintiff claims from the year ending March 2006 to the year ending March 2011 in the sum of £182,865. The defendant found no evidence for credits in the year ending March 2006 or in the year ending March 2011. In the other years the defendant reduced the credits by one third as the allowance was regarded as a "loyalty discount." Mr Corrigan's evidence was that refitting credits at £4 per door were given to customers up to April 2010. I accept Mr Corrigan's evidence. Unlike the sixth item I am satisfied that this item was indeed a credit issued in respect of replacement of the doors and a direct consequence of the delamination problems and not a discount to secure a further order. I allow the refitting credit for the year ending March 2006 and also for the year ending March 2011 as reflecting credits given in April 2010. I allow the refitting credits without deduction as being a direct cost incurred. Accordingly, I allow the plaintiff's claim of £182,865 for refitting credits.

[62] Item eight concerns additional staff costs which the plaintiff claims from the year ending March 2006 to the year ending March 2013. Two staff make up this claim, namely Rhonda Darragh who moved internally in 2005 to deal with complaints about delamination and Colin Maxwell who was engaged as Customer Services Manager and the claim relates to the period from April 2007 to November 2008. Percentages of the two employees' wages are claimed in the total sum of £105,584. The defendant objects to any claim for Rhonda Darragh prior to October 2006 on the basis that she was employed in customer services and no additional cost would have been incurred. The defendant also objects to the claim for Colin Maxwell as he was not actually engaged to deal with problems of delamination, but the defendant allows 20% of his time as related to delamination problems. There was a period of confusion about the date on which the first complaints of delamination arose. The plaintiff's Answer to Interrogatories gave that date as October 2005. As stated above, I accept the evidence of Mr Corrigan that the date was included by mistake and that the first complaints arose in October 2004. I am satisfied that the plaintiff is entitled to claim the additional staff costs for Rhonda Darragh for the years ending March 2006 and March 2007. I also accept the evidence of Mr Corrigan that while no additional staff were engaged by reason of the delamination problems there was acceleration of the recruitment of Colin Maxwell as Customer Services Manager in response to the delamination problems and that during the peak of the replacement of doors in 2008 and 2009 he devoted a

significant amount of time to addressing those problems. I allow the plaintiff's claim in respect of Colin Maxwell. Accordingly, I allow the plaintiff the additional staff costs claimed at £105,584.

[63] The ninth item concerns sales team costs and expenses for the year ending March 2005 to the year ending March 2012. The plaintiff claims a percentage of the expenditure on salaries, mobile phones, motor fuel, other motor costs and contract hire to a total of £194,982. The plaintiff accepted that the delamination problems did not occasion the recruitment of additional sales staff or the payment of overtime. The defendant rejects any claim for a percentage of salaries or for motor contract hire as a fixed cost. Further the defendant reduced the percentage claimed for mobile phone, motor fuel and other motor costs. Mr Corrigan qualified the evidence that no additional staff had been recruited. Over the years the sales team had increased from 2 to 6 and the customer services team increased from 3 to 5. It was accepted that this coincided with a period when the plaintiff was significantly increasing its business. Much staff time was therefore said to have been diverted to dealing with the delamination problem. The recruitment of additional staff was said to have been accelerated by the demands of the delamination problem. I have not been satisfied that the plaintiff should recover additional salaries for the sales team. Additional staff costs for Rhonda Darragh and Colin Maxwell have already been included. I have not been satisfied that the plaintiff should recover motor contract hire as I accept the defendant's approach that these are fixed costs. I am satisfied that staff follow up on the delamination problems would have involved the sales team in additional costs by mobile phone, motor fuel and other motor costs. While customer services might have been the first line of resort for delamination problems I am satisfied that on the ground the issue had to be confronted by sales staff as well. I allow the plaintiff's claim at the rates charged for mobile phone, motor fuel and other motor costs. Thus the total allowed for sales team costs and expenses is £39,251.

[64] The allowance made for the six subtotals is therefore £10,388, £286,514, nil, £182,865, £105,584 and £39,251, being a grand total of £624,602.

[65] The plaintiff claims interest at 6% per annum. The defendant points to the average bank rate during the period as being 0.5%. There is no evidence that by reason of the delamination problems the plaintiff required overdraft facilities or incurred additional banking charges. The plaintiff has calculated interest on a year by year basis and I accept the plaintiff's approach. However, I allow interest at the rate of 2% per annum which is the more customary rate awarded in commercial actions in the low interest period in the absence of evidence of any finance costs having been incurred.

APPENDIX 1

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEENS BENCH DIVISION (COMMERCIAL)

BETWEEN:

BA KITCHEN COMPONENTS LTD

Plaintiff

-and-

JOWAT (UK) LTD

Defendant

SIR RONALD WEATHERUP

9 September 2020 - Ruling on the defendant's reliance on the limitation clause in the defendant's terms and conditions.

1. The plaintiff claimed damages for loss and damage arising in the course of the manufacture of kitchen doors by the plaintiff, which the plaintiff blamed on the adhesive supplied by the defendant. A split trial was undertaken and in the initial hearing the defendant's adhesive was found to be the cause of the plaintiff's defective kitchen doors, a finding confirmed on appeal. For the judgments setting out the details see at first instance [2017] NIQB 76 and on appeal [2018] NICA 51.

2. On the proceedings moving to a completion of the hearing, the defendant relied on its standard terms and conditions that include the provision that the extent of the defendant's liability shall be a refund of the price of the adhesive, the defendant contending that the application of the limitation clause remains to be decided. The plaintiff objects that this issue cannot now be raised by the defendant, contending that the limitation clause is an issue already concluded against the defendant and in any event was within the remit of the initial hearing.

3. The plaintiff issued proceedings in 2009 and the defendant applied to the Master to set aside the Writ on the ground that the appropriate jurisdiction for proceedings was in England. The defendant's terms and conditions provided that the buyer submitted to the non-exclusive jurisdiction of the English courts. In response the plaintiff contended that the appropriate jurisdiction was Northern Ireland. A dispute about the incorporation of the defendant's terms and conditions arose from the affidavits filed on behalf of the defendant and the plaintiff upon the application to the Master. On 22 June 2010 the Master ordered that the defendant's application be dismissed, no reasons being given.

4. The plaintiff contends that the Master's Order involved a finding that the defendant's terms and conditions were not incorporated in the contract. I do not accept that contention. The essence of the contest at that stage was whether England or Northern Ireland was the convenient jurisdiction. The defendant of course relied on the incorporation of its terms and conditions. Against the backdrop of a dispute about the incorporation of the defendant's terms and conditions the Master dealt with whether the claim should continue in the jurisdiction of Northern Ireland. It does not follow that the Master made a finding (albeit unstated) on the incorporation of the defendant's terms and conditions. It would have been sufficient for the Master to assume incorporation and decide on the convenient jurisdiction. It cannot be assumed that the Master made a finding on incorporation. I reject the plaintiff's contention that the Order of the Master concluded the issue of incorporation of the defendant's terms and conditions.

5. The defendant filed its defence on 24 August 2011 and pleaded the limitation clause in the defendant's terms and conditions. The plaintiff took issue with this pleading in its reply by reference to the absence of agreement to the defendant's terms and conditions and by rejecting that those terms and conditions formed part of the contractual arrangements. The plaintiff did not plead that the issue of the defendant's terms and conditions had been concluded against the defendant.

6. The respective experts for the plaintiff and the defendant disagreed on the cause of the defects in the kitchen doors. Eventually a Court appointed expert was engaged. In 2012 a split trial was directed with the liability of the defendant to be determined first. As appears from the judgment at first instance at paragraphs [13] and [14] and repeated on appeal at paragraph [2] the issue at the first hearing concerned whether the defendant was responsible for the defects in the kitchen doors by reference to the suitability of the adhesive supplied by the defendant for use in the plaintiff's manufacturing process. The plaintiff blamed the defendant's adhesive and the defendant blamed the plaintiff's manufacturing process. This involved evidence about the nature of the defendant's adhesive and the nature of the plaintiff's manufacturing process and the nature of the order placed by the plaintiff and accepted by the defendant, all of which bore on whether the defendant was responsible for the condition of the kitchen doors. I read the reference to "liability" in the direction of 12 March 2012 as referring to the matters identified above.

7. Thus the initial hearing was not simply addressing the narrow but complex ground of the scientific dispute between the experts but was addressing the wider ground that extended to the plaintiff's manufacturing process and the ordering process, all directed to establishing responsibility for the defects in the kitchen doors. The defendant did not, in the course of the hearing, raise the issue of the limitation clause in its terms and conditions and there was no evidence as to the incorporation of the limitation clause in the defendant's terms and conditions. The defendant, having pleaded the limitation clause in its defence, has not, in the course of the proceedings to date, sought to abandon the pleading of the limitation clause as an

aspect of the defence to the plaintiff's claim. Nor do the judgments of the Court at first instance or the Court of Appeal address the issue of the limitation clause or seek to preclude the defendant from relying on the limitation clause pleaded in the defence.

8. The plaintiff refers to Clause 8.1 of the defendant's terms and conditions which states that "terms implied by statute or common law are excluded to the fullest extent permitted by law". From this the plaintiff contends that, had the defendant's terms and conditions applied, the Court at first instance and the Court of Appeal could not have made the finding they did that it was an implied term that the adhesive would be suitable for the plaintiff's use. Had this been raised at the first hearing it would have opened a debate about the extent to which the defendant was permitted by law to exclude implied terms in the contract. This debate did not happen, either because the defendant overlooked the argument or decided that it was preferable not to open up that issue. In either event the Court was not required to address incorporation of the defendant's terms and conditions and has made no finding on incorporation.

9. In all the circumstances outlined above I am satisfied that there remains to be determined the pleaded issue of the incorporation of the defendant's terms and conditions and the application of the limitation clause.

10. In any event, I am satisfied that the limitation clause is a quantum issue as it goes to the assessment of the damages to be awarded to the plaintiff, now that the defendant has been found to be responsible for the defects in the kitchen doors. The limitation clause is in the third category identified in Chitty on Contacts, General Principles, paragraph 15-003, as it limits compensation for the defendant's breach. Proof of incorporation of the limitation clause is a necessary part of the defendant establishing the contractual limit on damages. If it is established that the clause has been incorporated and that it applies to the present case then the limitation clause fixes the amount of compensation payable by the defendant as being the price of the adhesive. On the other hand, if the limitation clause does not apply, then the compensation is not the contractual damages but the recoverable loss and damage actually sustained.

SCOTT SCHEDULE

	GMcG									
	Replacement quantity	Adjustment	Restated quantity	Avg selling price	Adjusted selling price	COS%	Replacement cost	Revenue received	£	£
Costs of replacing delaminated doors		0.0%								
Delamination costs - manual system	4,030	-	4,030	16.47	66,374	56.18%	37,286	-	37,286	
Delamination costs - automated system		-		derived						37,286
Y/e March 2007	24,274	-	24,274	14.95	362,879	61.82%	224,340	1,348	222,992	
Y/e March 2008	41,965	-	41,965	14.49	608,214	64.29%	391,007	9,535	381,472	
Y/e March 2009	33,947	-	33,947	15.09	512,143	60.40%	309,327	101,183	208,144	
Y/e March 2010	13,494	-	13,494	16.49	222,519	60.39%	134,382	111,118	23,264	
Y/e March 2011	6,616	-	6,616	16.08	106,415	66.60%	70,874	45,002	25,872	
Y/e March 2012	3,591	-	3,591	18.41	66,123	67.97%	44,945	42,233	2,712	
Y/e March 2013	1,371	-	1,371	17.09	23,431	67.87%	15,903	17,381	-1,478	
Y/e March 2014	526	-	526	17.42	9,162	64.22%	5,884	7,203	-1,319	
Y/e March 2015	208	-	208	18.09	3,762	60.84%	2,289	2,806	-517	
Y/e March 2016	8	-	8	23.00	184	60.30%	111	174	-63	
Y/e March 2017	136	-	136	18.76	2,552	61.91%	1,580	1,190	390	
Unknown	1,253	-	1,253	20.66	25,881	60.39%	15,630	3,213	12,417	
	131,419		131,419				1,253,557	342,386		873,885
Extra discounts to customers									-	
										-
Extra credits re: panelling centre									6,400	
										6,400
Refitting costs										
y/e March 2006									4,030	
y/e March 2007									51,279	
y/e March 2008 (restated)									103,235	
y/e March 2009									18,925	
y/e March 2010									-	
y/e March 2011									5,396	
										182,865

Additional staff costs	RD			CM			£
Overheads y/e March 2006	14,707	80%	11,765				11,765
Overheads y/e March 2007	15,295	80%	12,236				12,236
Overheads y/e March 2008	17,211	80%	13,769	31,370	70%	21,959	35,728

BA KITCHEN COMPONENTS v JOWAT (UK) Limited **APPENDIX 2 (1 of 2)**

SCOTT SCHEDULE

	GMcG											
	Replacement quantity	Adjustment	Restated quantity	Avg selling price	Adjusted selling price		COS%	Replacement cost	Revenue received		£	£
Overheads y/e March 2009					20,812	80%	16,650	20,794	70%	14,556	31,205	
Overheads y/e March 2010					20,195	40%	8,078				8,078	
Overheads y/e March 2011					20,582	20%	4,116				4,116	
Overheads y/e March 2012					21,821	10%	2,182				2,182	
Overheads y/e March 2013					5,455	5%	273				273	
							69,069			36,515	105,584	105,584

Sales team cost and expenses	Salaries			mobile phone			motor - fuel			motor - other			motor – contract hire				
Overheads y/e March 2006	201,915	10%	20,192	10,492	10%	1,049	13,815	10%	1,382	28,802	10%	2,880					
Overheads y/e March 2007	203,644	10%	20,364	14,002	10%	1,400	15,161	10%	1,516	12,723	10%	1,272					
Overheads y/e March 2008	223,752	10%	22,375	10,186	10%	1,019	17,462	10%	1,746	77,977	10%	7,798	6,107	10%	611		
Overheads y/e March 2009	300,225	10%	30,023	10,410	10%	1,041	34,197	10%	3,420	44,057	10%	4,406	26,833	10%	2,683		
Overheads y/e March 2010	349,322	5%	17,466	12,848	5%	642	33,978	5%	1,699	21,083	5%	1,054	56,151	5%	2,808		
Overheads y/e March 2011	338,786	5%	16,939	10,377	5%	519	35,976	5%	1,799	24,369	5%	1,218	69,793	5%	3,490		
Overheads y/e March 2012	316,526	5%	15,826	8,110	5%	406	35,610	5%	1,781	24,082	5%	1,204	59,113	5%	2,956		
			143,185			6,076			13,342			19,833			12,547	194,982	194,982
																	1,401,002
Interest																	950,861
TOTAL CLAIM																	2,351,863

BA KITCHEN COMPONENTS v JOWAT (UK) Limited **APPENDIX 2 (2 of 2)**

SCOTT SCHEDULE

	ASM										Difference
	Replacement quantity	Adjustment	Restated quantity	Avg selling price	Adjusted selling price	COS%	Production cost	Revenue received	£	£	£
Costs of replacing delaminated doors		21.31%		App I2							
Delamination costs - manual system	4,030	-858	3,172	11.73	37,208	38.21%	14,217	3,829	10,388		
Delamination costs - automated system										10,388	-26,898
Y/e March 2007	24,274	-5,172	19,102	11.55	220,628	42.68%	94,164	1,061	93,103		
Y/e March 2008	41,965	-8,942	33,023	11.75	388,020	44.80%	173,833	7,503	166,330		
Y/e March 2009	33,947	-7,233	26,714	12.74	340,336	41.89%	142,567	79,621	62,946		
Y/e March 2010	13,494	-2,875	10,619	14.04	149,091	43.37%	64,661	87,439	- 22,778		
Y/e March 2011	6,616	-1,410	5,206	14.05	73,144	47.21%	34,531	35,412	-881		
Y/e March 2012	3,591	-765	2,826	18.41	52,037	48.33%	25,149	33,225	- 8,076		
Y/e March 2013	1,371	-292	1,079	17.09	18,441	49.63%	9,152	13,677	- 4,525		
Y/e March 2014	526	-112	414	17.42	7,211	48.92%	3,528	5,668	- 2,140		
Y/e March 2015	208	-44	164	18.09	2,966	45.66%	1,354	2,208	-854		
Y/e March 2016	8	-2	6	23.00	138	46.04%	64	137	- 73		
Y/e March 2017	136	-29	107	18.76	2,008	45.93%	922	936	- 14		
Unknown	1,253	-267	986	14.04	13,843	43.37%	6,004	2,528	3,476		
	131,419		103,418				570,146	273,244		286,514	-587,371
Extra discounts to customers									-		
										-	
											-
Extra credits re: panelling centre									-		
										-	
Refitting costs											-6,400
y/e March 2006							-		-		-4,030
y/e March 2007							51,279	66.67%	34,188		-17,091
y/e March 2008 (restated)							103,235	66.67%	68,827		-34,408
y/e March 2009							18,925	66.67%	12,617		-6,308
y/e March 2010									-		-
y/e March 2011							-		-		-5,396
										115,632	
Additional staff costs					RD		CM				
Overheads y/e March 2006					-	0% -			-		-11,765
Overheads y/e March 2007					6,373	80% 5,098			5,098		-7,138

BA KITCHEN COMPONENTS v JOWAT (UK) Limited **APPENDIX 2**
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SCOTT SCHEDULE

	ASM												Difference
	Replacement quantity	Adjustment	Restated quantity	Avg selling price	Adjusted selling price		COS%	Production cost		Revenue received	£	£	£
Overheads y/e March 2008					17,211	80%	13,769	31,370	20%	6,274	20,043		-15,685
Overheads y/e March 2009					20,812	80%	16,650	20,794	20%	4,159	20,808		-10,397
Overheads y/e March 2010					20,195	40%	8,078				8,078		-
Overheads y/e March 2011					20,582	20%	4,116				4,116		-
Overheads y/e March 2012					21,821	10%	2,182				2,182		-
Overheads y/e March 2013					5,455	5%	273				273		-
							50,166			10,433		60,599	

Sales team cost and expenses	mobile phone			motor - fuel			motor - other			£	£	Difference £
Overheads y/e March 2006	10,492	2.42%	254	13,815	2.42%	334	28,802	2.42%	697	1,285		-24,217
Overheads y/e March 2007	14,002	4.02%	563	15,161	4.02%	609	12,723	4.02%	511	1,684		-22,869
Overheads y/e March 2008	10,186	7.45%	759	17,462	7.45%	1,301	77,977	7.45%	5,809	7,869		-25,679
Overheads y/e March 2009	10,410	7.02%	731	34,197	7.02%	2,401	44,057	7.02%	3,093	6,224		-35,348
Overheads y/e March 2010	12,848	2.80%	360	33,978	2.80%	951	21,083	2.80%	590	1,901		-21,768
Overheads y/e March 2011	10,377	1.02%	106	35,976	1.02%	367	24,369	1.02%	249	721		-23,244
Overheads y/e March 2012	8,110	0.81%	66	35,610	0.81%	288	24,082	0.81%	195	549		-21,623
			2,838			6,252			11,145		20,234	

	£	£
	493,367	-907,635
Interest	O/S	
TOTAL CLAIM	493,367	