EXCLUSION CLAUSES AND UNFAIR CONTRACT TERMS

FOURTEENTH EDITION

NEIL ANDREWS

Sweet & Maxwell

TABLE OF CONTENTS

TABLE OF CASES

as indeed they accepted, that polymer suppliers contracted on standard terms and that Borealis was supplying Borecene on its conditions. The relevant Kingspan officer received and signed hundreds of invoices and knew that they had terms and conditions. He was also broadly aware that Borealis gave no warranty "when we turned it into green tanks". Kingspan did not have terms on its purchase orders. Borealis' invoices made plain on their face that all sales were exclusively governed by Borealis General Terms and Conditions as printed on the last page. Those terms were printed on a single page in clear and legible typescript. They were never objected to. Borealis Denmark, the court adjudged, "was reasonably entitled to believe that they were accepted". Christopher Clarke J went on to say:

> "In those circumstances I am quite satisfied that, as a matter of English law, those terms were incorporated into the contracts of sale which are the subject of these proceedings ... It does not appear from the evidence that anyone at Kingspan ever read or addressed their minds to the content of the invoices other than the amounts. But that does not alter the position. The test for incorporation is an objective one."

2-114 The need to bring the terms and conditions to the attention of the other contracting party was well illustrated in *SSL International Plc v TTK LIG Ltd*.[149] Incorporation was held not to have occurred on these facts. S, an English company, manufactured and marketed condoms. T, an Indian company, formed a joint venture with S under which T was obliged to supply condoms to S. S generated a purchase order that referenced S's standard terms and conditions which included an exclusive jurisdiction clause. However, the purchase order was never seen by T. T ceased supplying the condoms to S. S served a claim form in respect of alleged breaches of contract on one of the directors that it had nominated to T's board who was within the jurisdiction. S submitted that its standard terms and conditions had been incorporated in the contract.

2-115 The way the parties operated meant that, a contract, or contracts, arose every month for the supply of condoms for delivery, by and large, in the following month, sometimes in the month after that. The final step in the formation of the contract was the purchase order, or the communication of purchase order number. It was the court's opinion that this was "an odd procedure". The purchase order, on the evidence it had seen, was not actually sent to India. The Indian company, therefore, never saw the purchase order and, on all the evidence, had never seen a purchase order in all the years for which this procedure had been operating, but it knew that it was to supply because it had got the purchase order number and was told to which goods it related. The purchase order itself, which was a one or two sheet document, stayed in England and was not communicated, despite the fact it seemed to be addressed to the Indian company. The court noted that the purchase order had a reference to the claimant's standard terms of supply on the bottom of it. However, not being a document which was ever communicated to the other side, it was not presented in a way which would alert the defendant to the existence of the terms or invited to subscribe to them. The reference on the bottom of these untransmitted purchase orders was the only relevant reference to the supply conditions. There was a reference to them on the website but the court did not see how that could be the basis of an acceptance of their incorporation by the Indian company. The result

[149] [2011] EWHC 1695 (Ch).

was that the contract was governed by Indian law since the clause as to English jurisdiction had not been incorporated into the contract.

2-116 In *Frank Maas (UK) Ltd v Samsung Electronics (UK) Ltd*,[150] incorporation was held to have been successful. The relevant clause was a term of the standard contract drawn up by the British International Freight Association (BIFA). In the course of negotiations between the parties, Maas had stated that the contract was to be subject to BIFA terms. A good number of invoices were also sent by Maas that contained the same statement as to the BIFA terms. While there was no document in which Samsung formally accepted these terms as applicable, there was equally none which denied their applicability. There had, though, been a meeting between the parties where reference had been made to the BIFA terms and also to those of the United Kingdom Warehousing Association (UKWA) "as appropriate". It was explained in evidence that BIFA terms were used for "transit movements" and the UKWA terms for "storage accounts". There was also a letter from Maas to Samsung where Maas stated that deliveries of mobile phones and computers would be subject to UKWA terms, and that road haulage would be subject to BIFA terms. Samsung replied that they accepted these terms. There was, though, a later email from Maas which sought to confirm that trading between the parties would be on BIFA terms.

2-117 In resolving this issue, the court returned to the distinction made in evidence between transit movements (BIFA terms) and storage accounts (UKWA terms). The warehouse where the phones had been lodged was known as an Enhanced Remote Transit Shed, approved by Customs & Excise. Goods can be transferred directly to such a shed, and customs formalities dealt with there. This meant that the goods did not have to be left in the storage facilities of the air carrier. It was also the case that the goods could be re-packaged in the shed so that they could be sent out immediately after C&E clearance had been obtained. Such goods would usually be transferred from the shed in a matter of days. Samsung accepted in evidence that the shed was not a true storage warehouse, but was more a short-transit lounge. Maas made no charge for storage since, as far as it was concerned, this was not a storage account.

2-118 The court found that Maas had done what was necessary to give reasonable notice of the BIFA terms. Had the UKWA terms never been referred to, the court said that it would have had no difficulty in concluding that the BIFA terms had been incorporated by conduct or by way of business dealing. Despite such reference, however, the court still found that the contract was governed by the BIFA terms. Even if the UKWA terms had supplanted BIFA, the latter had been reasserted when Maas had emailed Samsung with a statement that they traded under BIFA terms. Samsung had replied that they had mislaid their copy of the terms and requested a replacement. The court also pointed to the use of the shed and concluded that the BIFA terms were applicable because the deposit of the phones was more in the nature of a transit movement than of a true storage.

2-119 The court also pointed to the inherent improbability, in a commercial context, of the contract being subject to no standard terms at all. At best, it could only be said that Maas did not emphasise the BIFA terms since they did not wish to jeopardise an important business client.

2-120 Whether or not a term is incorporated in the contract will depend on the intention of the parties, and the principles to be deployed in establishing such intention

[150] [2004] EWHC 1502 (Comm).

were articulated by Rix J in *Ceval Alimentos SA v Agrimpex Trading Co Ltd*.[151] A sale contract sought to include the terms of a charterparty by use of the clause: "All other terms, conditions and exceptions as per charterparty". One such term was a diversion clause. Rix J concluded that the clause had not been incorporated. Rix J said that it was a "fundamental rule of construction" that one had to seek, by objective means, the true intention of the parties. To do so required the court to note a number of factors:

(1) The incorporation clause was not especially "emphatic". "All" was immediately qualified by "other" in circumstances where the sale contract had already immediately before provided for the deemed incorporation in the charterparty of specific clauses designed to deal with the problem of war.

(2) It was also "common ground" that "all" does not mean what it appears to mean. For instance, charterparty terms not dealing with shipment, carriage or delivery would not be incorporated; nor would terms which could not be "manipulated" to make sense in the context of a contract of sale. Ancillary terms were likewise not incorporated.

(3) There were also factors which led to the conclusion that the diversion clause must be regarded as inconsistent with the sale contract. That contract contained various provisions dealing with the effect of war and in particular the place of delivery. There was, the judge concluded, no room for any further, fundamentally different provision relating to the same specific matter but which was "left for the sellers to deal with behind … the curtain of incorporation". On top of this, the parties had in any event agreed an amendment to the sale contract which was to operate only if the vessel could not reach the specified ports in Yugoslavia. The diversion clause, however, provided that a different port could be selected if an additional war risk premium were imposed. In agreeing to this amendment, the judge concluded, the sellers must have realised that they were agreeing on something at odds with the diversion clause, as the buyers would have realised for themselves if told of that clause.

(4) It was possible that the unusual nature of that clause of itself sufficed to exclude its incorporation. It was scarcely the case that the parties would have contemplated that the sellers would procure a contract which rendered them in breach of their obligation to secure only such contract as was reasonable. Such consideration, however, might well not by itself override a prima facie incorporation, but it was even so "highly relevant" in the consideration of what the parties must be held to have meant by the incorporation clause.

(5) Rationality and commercial common sense also had their part to play in arriving at the true intention of the parties. It was always open to the parties to agree to the inclusion of unreasonable terms of contract: where, however, this was to be done by an incorporation clause, the parties must make their position clear. The judge concluded that the incorporation of the diversion clause, in the absence of specific negotiation between the parties, lacked rationality and flew in the face of commercial common sense.

(6) There was, the judge said, no reason why that clause should be "manipulated", so as to make it effective within the sale contract. The parties had

[151] [1996] 2 Lloyd's Rep. 319.

negotiated their own terms to deal with diversion in the case of war and it was not for the court to save a clause for incorporation which the sellers could have sought to negotiate expressly with the buyers.

Rix J's conclusion that the diversion clause had not been incorporated was supported in particular, he said, by the unusual nature of the diversion clause and the fact that it conflicted with specific terms in the contract dealing with the renomination of the discharge port. 2-121

Multilateral Contract Disapplying Statutory Cap on Restriction on Merchant Shipping Liability

In *Clarke v Earl of Dunraven ("The Satanita")*, the Court of Appeal (upheld by the House of Lords)[152] decided that each yacht-owner's decision to enter the regatta involved assent "by conduct" to the rules governing the event. The upshot was that the participants had acceded to a horizontal set of rules, which included agreement to pay "all damages" consequent on a collision. And so, X was liable in contract to pay "all damages" to Y. This removed a statutory cap on liability. "*The Satanita*" concerned a regatta during which yacht X collided with yacht Y. The event was organised by the Yacht Racing Association. Each owner had signed the Association's terms which stated that a participant would be liable for "all damages" arising from breach of the rules designed to ensure the safe conduct of a race. The Court of Appeal held (affirmed by the House of Lords) that (1) each owner had expressly acceded to the contractual régime prescribed by the Association (creating a vertical contract between owner and Association) and (2) by entering the race each owner had by conduct acceded to a horizontal network of contractual relations linking each participating owner. 2-122

Lord Herschell in the House of Lords confirmed that the statutory cap on liability had been removed by the words "all damages" in this context.[153] Under the relevant statute at the time, the limitation fund was calculated at the rate of £8 per registered ton.[154] On point (2) in the Court of Appeal (and this point was accepted by the House of Lords) Rigby LJ explained the process of the competitors' adhesion to a horizontal contract by their act of participating in the regatta:[155] 2-123

> "…all that is necessary to constitute a contract between the yacht owners is to bring home to each of them the knowledge that the race is to be run under the Yacht Racing Association rules, and that they…deliberately enter for the race upon those terms…[When] the owner of 'The Satanita' on the one hand, and the owner of 'The Valkyri' on the other, actually…became competitors [a contract arose between them] upon those terms…" (Emphasis added.)

Need for Clear Exclusion of the Maritime Statutory Cap on Liability.

The Privy Council in *Bahamas Oil Refining Co International Ltd v Owners of the Cape Bari Tankschiffahrts GmbH & Co KG ("The Cape Bari")* (2016)[156] distinguished *"The Satanita"* (1897) (see above) as a special context in which 2-124

[152] [1897] A.C. 59 HL, affirming [1895] P. 248 CA.
[153] [1897] A.C. 59 at 65–66 HL; as noted in *Bony v Kacou* [2017] EWHC 2146 (Ch) at [39] (Judge Pelling QC).
[154] Now s.185, Merchant Shipping Act 1995, and Sch.7 thereto.
[155] [1895] P. 248 at 262 CA; [1897] A.C. 59 HL for the final appeal, not disturbing this analysis.
[156] [2016] UKPC 20; [2016] 1 All E.R. (Comm) 189, notably at [40]–[49].

yachting competitors were likely to push their craft to the limits and to navigate aggressively. By contrast, ordinary merchant shipping navigation is not conducted in such a way and so clear language would be required to displace the statutory cap in that general context. But the Privy Council could find no such clear language on the facts of "*The Cape Bari*".[157]

Arbitration clauses and multi-partite contexts

2-125 In *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL*,[158] Christopher Clarke J concluded that an arbitration clause had been incorporated. The applicant Turkish company applied to set aside an arbitration award on jurisdiction by which the tribunal decided that it had jurisdiction to entertain the claim made by the respondent Lebanese company alleging breach of a contract for sale. There had been 14 previous contracts between the same parties. The first three contracts were prepared by the applicant. The next contract was prepared by Habas Sinai and contained a London arbitration clause. The following contracts were prepared by the Lebanese party or its agent. The contracts prepared by the Lebanese company contained the arbitration clause. The contracts prepared by the agent and those prepared by the Lebanese company set out the terms relating to material, quantity, price and shipment but those prepared by the agent, unlike those prepared by the Lebanese company, did not set out terms relating to quality, demurrage, force majeure or law and arbitration. Instead the contracts prepared by the agent provided that: "The rest will be agreed mutually"; "The rest will be as per previous contracts"; or "All the rest will be same as our previous contracts".

2-126 The final contract, on which the Lebanese company relied, was prepared by their agent. Accordingly, it did not contain the arbitration clause but provided that: "All the rest will be same as our previous contracts". The Lebanese company alleged that the applicant had repudiated the contract by failing to take delivery. The arbitral tribunal held that the reference to the terms of "our previous contracts" could not have referred to the contracts prepared by the applicant or to those prepared by the agent which did not contain any relevant additional terms or themselves referred to previous contracts. Therefore the reference was to the terms of the contracts prepared by the Lebanese company containing the arbitration clause. The applicant argued that: (1) for a clause such as the arbitration clause to be incorporated into a contract there had to be an express reference to the clause or wording that showed a clear intention to incorporate it and that that requirement was not satisfied; and (2) even if general words were capable of incorporating such a clause, the words used here were not apt for the purpose.

2-127 Christopher Clarke J held that, in principle, English law accepted incorporation of standard terms by the use of general words. The principle did not distinguish between a term which was an arbitration clause and one which addressed other issues. A stricter rule was applied in charterparty/bills of lading cases. There was a material distinction between incorporation of the terms of a contract made between the same parties, a "single contract" case, and incorporation of the terms of a contract made between different parties, even if one of them was a party to the contract in suit, a "two contract" case. In relation to the latter a more restrictive approach to incorporation was required. In such a case it might not be evident that the

[157] [2016] UKPC 20; [2017] 1 All E.R. (Comm) 189, at [50].
[158] [2010] EWHC 29 (Comm).

parties intended not only to incorporate the substantive provisions of the other contract but also provisions such as an arbitration clause, particularly if a degree of verbal manipulation was needed for the incorporated arbitration clause to work. Those considerations did not, however, apply to a single contract case, and the stricter rule was not to be extended to single contract cases since that would involve the exception swallowing up the rule. The instant case was not to be regarded as a two-contract case. In a single contract case, the independent nature of the arbitration clause should not determine whether it was to be incorporated, general words of incorporation were capable of incorporating terms which included an arbitration clause without specifically referring to it and the question was whether in the instant case they did so. It was further said that the court should not be astute to find that the words used had no effect at all. It was not to be assumed that the words of incorporation were intended to refer to all the previous contracts, and it was clear that they did not refer to the first three contracts drafted by the applicant. Nor could they refer to the contracts in which it was agreed that the rest of the terms would be agreed. The remaining contracts either contained the London arbitration clause or incorporated it by reference. It was, therefore, clear that the words of incorporation in the last contract were apt to incorporate the London arbitration clause. Application of the arbitration clause did not require any linguistic manipulation. When the parties referred to "all the rest" being the same there was no good reason to treat them as meaning all of the rest except the arbitration clause.

This approach was approved in *TTMI Sarl v Statoil ASA*.[159] Beatson J there said that counsel had cited the *Habas* case (above) to show that a more restrictive approach to incorporation was adopted where the issue was whether the parties had incorporated the terms of a contract between two other parties than where the issue is whether they have incorporated the terms of a previous contract between them. It was noted that, in *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL*, Christopher Clarke J had said that in the former situation "clear words" were needed because arbitration clauses were not "germane or directly relevant to" the main subject of the contract, were "ancillary provisions", and "oust the jurisdiction of the courts". These requirements were fulfilled in *TTMI SARL v Statoil ASA* itself. There was the reference in the Notices of Readiness to the "the terms and conditions of" the recap email "dated 17 October 2005". Those terms and conditions included an explicit reference to cl.43 of the Shellvoy 5 charter-party form containing the arbitration clause and the notation "OK". **2-128**

In *Barrier Ltd v Redhall Marine Ltd*,[160] an arbitration clause had not been successfully incorporated. The contractor had entered into a contract with a company for the construction of submarines. That contract provided that any disputes arising between the parties would be referred to arbitration. The contractor subcontracted the painting of three submarines to the sub-contractor. The contractor's affiliated company sent the sub-contractor a purchase order. It referred on the back to the contractor's standard conditions, which included an arbitration clause. The copy sent, however, did not have anything printed on the back. The sub-contract incorporated the terms of the main contract and the standard conditions on the reverse of the purchase order. **2-129**

The sub-contractor worked on three additional submarines not covered by the sub-contract. The minutes of a meeting between the contractor and the sub- **2-130**

[159] [2011] EWHC 1150 (Comm).
[160] [2016] EWHC 381 (QB).

contractor referred to works on the fourth and fifth submarines falling under the sub-contract, in accordance with an attached addendum between the main contracting parties. The sub-contractor's representative stated that he was instructed to work on the fourth submarine with reference to the addendum, with a variation to the payment structure but no other significant amendments to the sub-contract. He said that he was later orally instructed to work on the fifth and sixth submarines on the same terms as those which applied to the first three submarines. The sub-contract obliged the contractor to pay the sub-contractor only out of moneys paid to it under the main contract.

2-131 The sub-contractor alleged that the contractor had deducted sums from the amount otherwise due to it. It sought pre-action disclosure of any documents showing whether the sums had been deducted from payments made to the contractor. The contractor opposed the application by asserting, among other things, that the sub-contract incorporated an arbitration agreement, which effectively deprived the court of jurisdiction to make an order for pre-action disclosure. The sub-contractor argued that the parties did not clearly express an intention to incorporate the arbitration clauses for either set of submarines.

2-132 Judge Behrens held[161] that "a reasonable person reading clause 10 of the subcontract would have no doubt that CIL's standard terms were incorporated. The fact that they were not on the back of the purchase order does not affect this. It would at all times have been open to Barrier to request a copy of the terms if they had wanted to." The judge held that the standard terms of the main contractor (CIL) had been incorporated, which included a succinct arbitration clause. But the specific term relating to arbitration within the main contract between BAE and CIL, cl.19, which was quite detailed, was not incorporated because that would require verbal finessing, if the term were to be transposed into the present sub-contract. On the latter point, the judge explained:[162]

> "[28] The incorporation of clause 19 of the Main Contract [the BAE/CIL arbitration clause] is more problematical. This is the incorporation of terms in a contract between BAE and CIL. Thus clear words are required. There are considerable difficulties in incorporating clause 19 in that significant modifications would be required and it is not easy to see how clause 19.5 can be adapted without doing significant violence to the wording. In my view the wording of clause 9 of the sub-contract is not sufficiently clear to incorporate the arbitration clause in the Main Contract."

2-133 *Barrier Ltd v Redhall Marine Ltd*[163] contains the following distillation of the analysis adopted in earlier case law concerning incorporation of terms in a multi-partite context. It will be convenient to cite this succinct summary by Judge Behrens.

> "[23]... Christopher Clarke J...in *Habas Sinai v Sometal* [2010] EWHC 29 Comm at [13]... identified 4 separate situations: (1) A and B make a contract in which they incorporate standard terms. (2) A and B make a contract incorporating terms previously agreed between A and B in another contract or contracts to which they were both parties. (3) A and B make a contract incorporating terms agreed between A (or B) and C. (4) A and B make a contract incorporating terms agreed between C and D."

[161] [2016] EWHC 381 (QB) at [27].
[162] [2016] EWHC 381 (QB) at [28].
[163] [2016] EWHC 381 (QB) at [23]–[26].

Judge Behrens cited[164] Christopher Clarke J's remark at [2010] EWHC 29 Comm at [49]: **2-134**

> "[49] There is a particular need to be clear that the parties intended to incorporate the arbitration clause when the incorporation relied on is the incorporation of the terms of a contract made between different parties, even if one of them is a party to the contract in suit. In such a case it may not be evident that the parties intended not only to incorporate the substantive provisions of the other contract but also provisions as to the resolution of disputes between different parties, particularly if a degree of verbal manipulation is needed for the incorporated arbitration clause to work. These considerations do not, however, apply to a single contract case."

Judge Behrens then summarised the position:[165] **2-135**

> "[25] Thus [Christopher Clarke J] distinguished between the case where there are only two parties involved where no special rules apply and the case where the attempt is to incorporate an arbitration clause between two other parties or one of the parties and a third party. In that situation there is a particular need to be clear that the parties intended to incorporate the arbitration clause. [26] Christopher Clarke's approach was followed by Beatson J in *TTMI SARL v Statoil* [2011] EWHC 1150 (Comm) ...at paragraph 51..."

Disabled persons

Rather special factors come into play where the claimant, even if he were inclined to do so, could not read the appropriate conditions, because he was illiterate, blind, or unable to comprehend English. In *Thompson v London Midland & Scottish Railway Co*[166] the claimant was unable to read. Her niece bought for her a railway ticket which on its face contained the familiar words: "For conditions see back". The back of the ticket made reference to timetables and excursion bills. The bills themselves referred to the timetables, which contained a clause exempting the company from liability in respect of any injury, however caused. The Court of Appeal held that the illiteracy had no effect since enough had been done to bring the terms to the attention of those members of the public to which the claimant belonged. **2-136**

It appears, however, that where the special disability is known to the other party, that will suffice to disapply the particular clauses. The relevant case is *Geier (otherwise Braun) v Kujawa, Weston and Warne Bros (Transport)*.[167] A notice in English was displayed in a car, stating that passengers rode at their own risk. This was held not to bind one particular passenger who, to the driver's own knowledge, spoke German but little English. If the railway company in the previous case had known of the passenger's illiteracy, and had she on that occasion been unaccompanied, presumably she would not have been bound by the clauses unless told of their existence in general or specific terms. Had any such document been signed, however, it appears that the issue of language or literacy would have been irrelevant.[168] **2-137**

It should also be noted that under the provisions of s.20 of Equality Act 2010 there is a duty to make reasonable adjustments to ensure that a disabled person is **2-138**

[164] [2016] EWHC 381 (QB) at [24].
[165] [2016] EWHC 381 (QB) at [25] and [26].
[166] [1930] 1 K.B. 41.
[167] [1970] 1 Lloyd's Rep. 364.
[168] *Coys of Kensington Automobiles Ltd v Pugliese* [2011] EWHC 655 (QB).

not at a disadvantage. In appropriate circumstances this could, for example, require Braille copies of contracts to be provided.

4 Incorporation by a Course of Dealing

2-139 It is possible that, far from being an isolated transaction, the particular agreement between the parties was one of a regular series of such agreements. If, over that period, the parties have regularly and specifically incorporated certain exclusion clauses, it needs to be asked what the effect will be when, perhaps by an oversight, there has been no such specific incorporation. Each case will always depend on its special facts. As has been said: "Where there is reliance on a previous course of dealing it does not have to be extensive. Three or four occasions over a relatively short period may suffice".[169]

2-140 One point can easily be dealt with. In an obiter dictum expressed in *McCutcheon v David MacBrayne Ltd*,[170] Lord Devlin had urged that a term could be introduced by a course of dealing only where there was actual knowledge of the content of that term as opposed to knowledge of its existence.[171] This view was rejected by the House of Lords in *Henry Kendall & Sons v William Lillico & Sons Ltd*.[172] The latter case is also instructive as to when a course of dealing operates to incorporate particular clauses. There had been a verbal contract followed the next day by a "sold note" which contained an exclusion clause. There had been more than 100 similar contract notes in a course of dealing stretching back three years. The recipients knew of the existence of the written conditions but had never raised any query or objection, although they had never read them. As Lord Pearce summarised:

> "The only reasonable inference from the regular course of dealing over so long a period is that SAPPA were evincing an acceptance of, and a readiness to be bound by, the printed conditions of whose existence they were aware although they had not troubled to read them. Thus, the general conditions became part of the oral contract."[173]

2-141 Similarly, in *Allen Fabrications Ltd v ASD Ltd*,[174] a course of dealing was held to be established when the parties had dealt with each other on over 250 occasions and the buyers had received the actual terms on advice notes and there had been a clear reference to the terms on invoices which would have been seen by them.

2-142 These authorities can be contrasted with *McCutcheon v David MacBrayne Ltd*.[175] Here, the claimants' agent had dealt with the defendants on a number of occasions: sometimes he had signed a risk note containing the relevant exclusion clauses and sometimes he had not. He had not so signed on the relevant occasion. Holding that the clauses were not part of the contract, Lord Pearce maintained that the defendants were:[176]

> "seeking to establish an oral contract by a course of dealing which always insisted on a written contract. It is the consistency of a course of conduct which gives rise to the

[169] *Transformers and Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC) at [42] (Edwards-Stuart J).
[170] [1964] 1 All E.R. 430.
[171] [1964] 1 All E.R. 430 at 437.
[172] [1969] 2 A.C. 31 HL.
[173] [1969] 2 A.C. 31 at 113.
[174] [2012] EWHC 2213 (TCC).
[175] [1964] 1 W.L.R. 125.
[176] [1964] 1 W.L.R. 125 at 138.

> implication that in similar circumstances a similar contractual result will follow. When the conduct is not consistent, there is no reason why it should still produce an invariable contractual result."

2-143 The same finding was made in *Hollier v Rambler Motors (AMC) Ltd*.[177] The claimant telephoned the defendants asking for some repair work to be done. The defendants agreed to attend to the defects in due course. These were the only terms of that agreement. It was established that during the previous five years the claimant, on three or four occasions, had had repairs done by the defendants. On the last two of these occasions, the claimant signed a note containing exclusion clauses. This had not happened on this latest occasion. Salmon LJ, with whom Stamp LJ and Latey J concurred, found it impossible to hold that the exclusion clauses had been incorporated into the latest contract. If it were not possible to rely on a course of dealing in *McCutcheon v David MacBrayne Ltd*, "still less would it be possible to do so in this case, when the so-called course of dealing consisted only of three or four transactions in the course of five years".[178] In contrast, though noting that every case must depend on its facts, it was held in *Knight Machinery (Holdings) Ltd v Rennie*[179] that a particular clause had been incorporated into a contract when the parties had contracted on five previous occasions and the particular condition had been used.

2-144 Further guidance as to just when it can be shown that there has been a previous course of dealing, such as would act to incorporate terms on the latest occasion, came in *Petrotrade Inc v Texaco Ltd*,[180] where Langley J said:

> "There is now evidence of numerous contracts for the sale of fuel products over some four and a half years preceding the disputed contract made between Petrotrade and Texaco and between Petrotrade and other companies in the Texaco group. Petrotrade (rightly in my judgment) does not seek to rely upon the latter. All these contracts, where Petrotrade was the seller, and the transactions were of the same nature as the present, were without exception 'confirmed' on Petrotrade's terms and conditions including the two clauses Petrotrade rely upon. Texaco submits that the evidence does not show that Petrotrade has any standard terms and conditions or if it did how they were incorporated into the contracts. Although it is true that no standard printed form has been produced or relied upon I cannot accept that submission. The whole thrust and detail of the evidence shows a method and course of trading including the use of the clauses in question. Moreover, Texaco has not even suggested (let alone produced any evidence) that any other or different terms were ever used or that there ever was a relevant contract where they were not used. The point is taken that many of the previous transactions relied upon were with other divisions of Texaco or for other specific fuel products, but even excluding these (albeit I do not think it is right to do so) there is no dispute that over the 13 or so months prior to the contract there were 5 other contracts for the sale of similar if not the same product between Petrotrade as seller and Texaco as buyer on the same terms and effected in the same manner. In my judgment that is sufficient of itself to establish a course of trading. It is the more so in the context of the total number of contracts between the same parties of which there were 22 in the previous 12 months."

[177] [1972] 1 All E.R. 399.
[178] [1972] 1 All E.R. 399 at 404.
[179] [1995] S.L.T. 166.
[180] *unreported, 21 December 1999, Langley J*; not disturbed on appeal, concerning a different point [2002] 1 W.L.R. 947 (Note); [2001] C.P. Rep. 29 CA (Civ Div).

2-145 In *Motours Ltd v Euroball (West Kent) Ltd*,[181] the parties had entered into around 14 contracts during a period of some 18 months. Many were in writing with the defendants' terms and conditions on the reverse. The claimant did not read the terms and conditions and they were not explained to him. He had in the past signed the forms immediately after a statement which provided that the contract was subject to the terms and conditions overleaf. The court concluded that:

> "the claimant, by continuing business with the defendants after having had notice many times of the terms and conditions, and indeed copies of them, did lead the defendants reasonably to believe that he had accepted their terms."

2-146 An unusual example of how terms can be incorporated through the course of dealing came about in *Lamport & Holt Lines Ltd v Coubro & Scrutton (M&I) Ltd ("The Raphael")*.[182] The second defendants were a subsidiary of the first, the two companies having been separated in 1975 when nationalisation was threatened. The terms and conditions of contract used by the second defendants were exactly the same as those used by the first defendants, with whom the claimants had contracted for many years.

2-147 The matter was slightly complicated by the fact that, when the stationery for the second defendants was printed, and because of a printer's error, the terms and conditions of contract were not printed on the reverse of the invoices. The evidence showed that, when work was to be done for the claimants, a form of acknowledgment was sent out on the reverse of which were the standard conditions. It was immaterial to the claimants which of the two defendants did the particular work on any occasion, the decision being left to the defendants. If the work was allotted to the second defendants, the acknowledgment was sent out on their form, on the back of which were printed their terms and conditions, these being, as stated above, identical to those of the parent company. The evidence also showed that the claimants had been well aware that the second defendants were being incorporated to do the riggers' and shipwrights' work originally done by the first defendants.

2-148 By September 1975, when the contract in question was made, there had been numerous transactions between the claimants and the second defendants when acknowledgments of order were dispatched with the latter's terms and conditions printed on the back. Only one of these acknowledgments could now be found, but Goff J concluded that "on the evidence before the court, I have no doubt that on each occasion they were sent", and that there cannot be the "slightest hesitation" in holding that the terms and conditions of the second defendants were incorporated into the contract in question.[183] This was not contested in the Court of Appeal.

2-149 In (the Western Australia case) *Rinaldi & Patroni v Precision Mouldings*,[184] the defendants were cartage contractors, and the claimants were builders of large fishing boats. An oral agreement was made for the transport of a particular boat. En route, while following the pilot vehicle, the cargo was taken under a low bridge. The boat struck the underside of the bridge and was extensively damaged. It was conceded by Rinaldi that they had been negligent, but they pleaded in their defence that a clause had been incorporated into the contract which gave them a defence in such circumstances.

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[181] [2003] EWHC 614 (QB).
[182] [1981] 2 Lloyd's Rep. 659 (Goff J); [1982] 2 Lloyd's Rep. 42 CA.
[183] [1981] 2 Lloyd's Rep. 659 at 661.
[184] [1986] W.A.R. 131 (Western Australia).

2-150 The evidence showed that, over six months, Rinaldi had carried goods for Precision Mouldings' on some nine or ten occasions. Rinaldi's drivers had in their possession a book of cart notes. The top was white, and was prepared so that it would be signed by the consignee. A blue form and a yellow form were located under the white form. They were all in identical terms, except that the white note was headed "Customer's Copy". Once the goods were delivered, the costing was done on the blue note, and these details would also appear on the yellow note. This latter would then be stapled to an invoice and would then be sent to the consignor for payment. On the face of each cart note, there appeared the words: "All goods accepted subject to conditions on reverse".

2-151 It appeared that, when the parties had contracted with each other, on three occasions the white note had not been signed. On the seven occasions when it had been signed, three times the signature was that of Precision Mouldings' production manager. Once it had been signed by the company's foreman. The other signatures could not be identified. It was also the practice, once a job had been done, for the invoice and yellow note to go to Precision Mouldings' purchasing officer. Once he had satisfied himself that the work had been authorised, had been done and correctly charged for, he would then pass the invoice for payment. He knew that there were words printed on the back of the yellow note but he never read them. The court found that, on the evidence of the dealings between the parties, the contract terms in general, and the exclusion clause in particular, had not been incorporated into the contract.

2-152 Ultimately, everything depends on the facts, and a decision as to whether there has been a sufficient course of dealing can be difficult to make. This was acknowledged by Judge Havelock Allan in *Capes (Hatherden) Ltd v Western Arable Services Ltd*:[185]

> "In the present case, the course of dealing between the parties consists of four contracts in the same year, with an interval of 5 months between the last of them and the two contracts in question. Although a different crop was involved, the procedure by which the previous contracts were concluded was substantially the same. On each occasion the claimant received a contract note referring to Contract 1/04: but he was not required to respond positively to it (e.g. by signing and returning a copy). He did not in fact notice the reference to Contract 1/04 and it was never expressly discussed or drawn to his attention. In my judgment these facts fall right on the borderline. If there had been any persuasive evidence, either that the terms of Contract 1/04 were the usual terms on which grain merchants purchase grain from U.K. producers, or that Mr Capes knew that grain merchants commonly employed standard terms which provided for disputes to be settled by arbitration, I would have been likely to hold that Contract 1/04 was incorporated. In the absence of such evidence, I do not think that the previous contracts justify the conclusion that the AIC terms were incorporated. To put it another way, the limited course of dealing between the parties is not in my view such that an impartial observer would conclude that the parties had reached a common understanding that Contract 1/04 applied."

2-153 A possibly extreme example of a course of dealing not having been established occurred in *Noreside Construction Ltd v Irish Asphalt Ltd*[186] case (which is an Eire, Republic of Ireland, case). Irish Asphalt contended that the delivery dockets

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[185] [2009] EWHC 3065 (QB). See also *SIAT di del Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep. 470 and *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep. 427.
[186] [2011] IEHC 364; [2012] B.L.R. 165.

provided on some 1,190 occasions to Noreside constituted reasonable notice of their terms and conditions and thus were incorporated into the contract between the parties. This did not satisfy the court. What it called a "fundamental problem" for Irish Asphalt was that over the entire period of dealing between the parties, Irish Asphalt had never supplied its terms and conditions to Noreside and in those circumstances it could not be said that Irish Asphalt's terms and conditions could have been incorporated into the series of contracts between the parties by a course of dealing. The court acknowledged, though, that it would have been different had Irish Asphalt on numerous occasions supplied copies of its terms and conditions to Noreside but on a particular occasion had failed to do so. In the context of a breach of contract on that occasion, it would have been very difficult for Noreside to have argued that it was not aware of the terms and conditions.

5 INCORPORATION BY TRADE USAGE

2-154 This further category of incorporation is illustrated by *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd*.[187] Both parties were companies engaged in the hiring out of earth-moving equipment. The defendants needed a dragline crane urgently and contacted the claimants by telephone who agreed to supply one on hire. Nothing was said as to the conditions of hire. Subsequently, a printed form containing the appropriate conditions was sent for signature, but it was never signed. From the evidence, it appeared that there had been two previous agreements within the preceding year which had been effected on the basis of the written terms. These transactions were not known to the defendants' manager when he ordered the crane. In the circumstances, Lord Denning doubted "whether those two would be sufficient to show a course of dealing".[188] The evidence further showed, however, that the defendants knew that firms in the trade imposed conditions as to the hire of plant. Indeed, the defendants did so themselves. In such circumstances,

2-155 Lord Denning did not doubt but that the written conditions had been incorporated into the contract. He:

> "would not put it so much on the course of dealing, but rather on the common understanding which is to be derived from the conduct of the parties, namely, that the hiring was to be on the terms of the claimants' usual conditions ... it is just as if the claimants had said, 'we will supply it on our usual conditions', and the defendants said, 'of course, that is quite understood'."[189]

2-156 Sir Eric Sachs agreed. The machine had been damaged, and under the printed conditions the defendants were to indemnify the claimants. The "business realities of the situation", Sir Eric declared, were "plain". If the defendants had declared to the claimants when the contract was made that risk of damage lay with the latter, the reply would have been "That is nonsense, and you don't get the machine".[190] Moreover, he said, "to hold that the claimants did take the risk impliedly would be unrealistic and obviously contrary to the mythical officious bystander's view".[191]

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[187] [1975] 1 All E.R. 1059.
[188] [1974] 1 All E.R. 1059 at 1061.
[189] [1974] 1 All E.R. 1059 at 1062–1063.
[190] [1974] 1 All E.R. 1059 at 1064.
[191] [1974] 1 All E.R. 1059 at 1064.

In any case, Sir Eric concluded, the matter goes further: both sides knew "that contracts of this type are normally subject to printed conditions".[192]

Support for the above line of argument is to be found in *Keeton Sons & Co Ltd v Carl Prior Ltd*.[193] The defendants, as official shipping and handling agents to a trade association, advised the claimants, machine tool manufacturers, of their appointment by a letter which stated "All business transacted in accordance with Standard Conditions of the Company—copies on application". One of those conditions was that the defendants would not be responsible for any damage to goods unless it was proved that the damage occurred while the goods were in their custody and under their actual control and that such damage was due to the wilful neglect or default of the defendants or their servants. A circular some six weeks later detailed the defendants' services in relation to a forthcoming exhibition in the US and contained the same reference to their trading conditions. The claimants duly engaged the defendants for the shipment of the machine tools. Subsequently, the defendants sent them a telex reminding the claimants of the last date for dispatch of the machines. This telex referred to the earlier circular. In due course, the machines were delivered to the US. It was later agreed that the defendants would arrange for the return to the UK of one of the machines. On its return, that machine was found to be seriously damaged because of the way in which the defendants had packed it. **2-157**

The Court of Appeal stated that it was always a question of fact whether reasonable notice had been given of the incorporation of standard trading terms into a contract between parties. Since the claimants had conceded that they expected to be contracting on the defendants' conditions, and since it was normal that such items would include a clause seeking to exclude liability, it was clear that the claimants had expected and accepted that they would be trading with the defendants on terms which would include limiting and excluding terms. The letter and circular did no more than confirm the obvious, namely that the defendants traded subject to standard conditions and that they could be inspected on request. **2-158**

The approach taken in the Keeton case was adopted in *Laceys (Wholesale) Footwear Ltd v Bowler International Freight Ltd*.[194] The question had been put as to whether certain terms had been incorporated into the contract. There had been nothing in the rate proposal sent under cover of a letter which drew attention to the terms on the reverse side of the covering letter. Although, from 1986 onwards, on at least half a dozen occasions, Bowler had written to Lacey's attempting to secure their business on notepaper which similarly carried the terms and conditions, the recipient could not reasonably be expected to read every unsolicited communication to see what terms and conditions were likely to apply. **2-159**

The Court of Appeal held that reasonable notice had been given and that consequently the terms were incorporated in the contract. The evidence supported the conclusion that the only reasonable inference was that Lacey's knew that carriers and forwarding agents such as Bowler did contract on terms and conditions which limited or were likely to limit their liability as carriers though they did not bother to read them because, as was said, they were meticulous about insuring the goods. Whether the steps taken by Bowler to draw the conditions to their attention were adequate was beside the point. Lacey's were judged to be well aware that there **2-160**

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[192] [1974] 1 All E.R. 1059 at 1064.
[193] [1986] B.T.L.C. 30.
[194] [1997] 2 Lloyd's Rep. 369.

most probably were terms and conditions and, had they chosen to do so, they could have read them (with some difficulty) and informed themselves of them.

2-161 Beldam LJ summed up the position thus:[195]

> "I would hold that [Lacey's] frame of mind was that [they were] prepared to enter into the contract of carriage on the basis of the terms and conditions whatever they were because [they were] going to take steps to see [that they were] properly insured. Thus I would hold that the terms and conditions did apply to this contract of carriage."

2-162 The common understanding of the parties might be that there would be no exclusion clauses, or at least that liability would not be excluded. In *Mostcash Plc v Fluor Ltd*,[196] the claimant argued that it had been the parties' joint intention that the contract would not exclude the defendant's liability for design defects and that provisions were to be included in the contract to make it clear that the defendant warranted that its work would be carried out with reasonable skill and care, so that the end product would be of merchantable quality, and that the defendant would be liable in damages if any of those warranties were breached. Much detailed negotiation took place on the inclusion of such provisions, but they did not actually appear in the contract. Referring to this evidence, the judge held that the parties had proceeded on the basis of a common mistake, where both believed that such liability would not be excluded by the contract, when in fact it did contain an exclusion clause. It would therefore be inequitable for the defendant to rely on the exclusion clause and the contract would be rectified to follow the intention of the parties that the contract would not exclude liability for design defects.

2-163 The *British Crane* case and the *Lacey's Footwear* case were also distinguished in *Scheps v Fine Art Logistic Ltd*.[197] The claimant sought damages from the defendant in respect of the loss of a sculpture which the claimant had purchased while it was being stored by an auction house. He had engaged the defendant to collect the sculpture and store it before it was taken to the artist's studio for some restoration work. When required the sculpture could not be found in any of the defendant's storage units. The latter's view was that it had by accident been destroyed. The defendant maintained that the agreement between the parties incorporated its standard terms and conditions which limited liability for the loss of the sculpture to £350 per cubic metre of its volume. The defendant submitted that it was usual in the transport and storage trade for services to be provided on standard terms and conditions that limited liability and that the claimant must have been aware of that as a result of his considerable experience of arranging for the transport of works of art.

2-164 After considering these two cases, the court held against the defendant. It pointed out that the defendant at no stage provided the claimant with a copy of its terms and conditions or with a document which referred to them. The claimant was a private customer, and there was nothing about the status in which the claimant dealt with the defendant which might have led the defendant to believe that the claimant was dealing with the defendant on the basis of the defendant's terms and conditions. Nor was there anything done or said by the claimant which might have led the defendant to believe that the claimant was contracting with the defendant upon the basis of the defendant's terms and conditions. Although it is more likely than not that the

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195 [1997] 2 Lloyd's Rep. 369 at 372.

196 Unreported 11 April 2002, TCC.

197 [2007] EWHC 541 (QB). See also *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm).

claimant understood that the defendant would probably supply its services pursuant to certain terms and conditions which might well include limits on the defendant's liability, that did not, the court said:[198]

> "entitle the defendant to rely upon its terms and conditions against the claimant because the defendant at no stage mentioned its terms and conditions and, objectively, there was no reason why the defendant might reasonably conclude that the claimant intended to contract with the defendant on the basis of the defendant's terms and conditions."

6 RENEWAL OF CONTRACT: WHETHER TERMS REVISED

Renewal of Insurance Not Incorporating a Merely Proposed Amendment to Scope of Exclusion Clause

2-165 In *Great North Eastern Rly Ltd v Avon Insurance plc*,[199] the Court of Appeal held that the renewal of insurance for the relevant year had not incorporated an inchoate amendment to the cover.

2-166 The claimant railway company had suffered loss when a wheel on a locomotive failed and the train derailed at Sandy in Bedfordshire.[200] That event was attributable to the manufacturer's fault. The original insurance cover excluded loss flowing from "faulty or defective design, materials, or workmanship, inherent vice, latent defect…" But the claimant contended that the insurance policy had been modified for the relevant year so that the insurer was liable for loss attributable to a third party.

2-167 The Court of Appeal upheld a decision on a preliminary issue. It was held that an exclusion clause was effective in rendering an insurer not liable for damage to the claimant railway company's engines and rolling stock. The claimant insured (unsuccessfully) contended that the policy had been amended for the relevant year of cover when the first broker, Fenchurch, had been replaced by Jardine. It was suggested that the broker acting on its behalf had procured an amendment which would have rendered the insurer liable for loss attributable to a third party's intervention or culpability.

2-168 The Court of Appeal held that it was to be expected that a complex insurance contract would be in writing and signed by the insurer. Here the policy for the relevant year had been signed by the insurer, and the broker, Jardine, had confirmed "renewal of the policy"'. It was held that this phrase could only refer to the previous year's terms and not to the new wording put forward by Jardine. Longmore LJ explained his conclusion on this point as follows:[201]

> "[22] …the contract of insurance for the year 1998-1999, even though made somewhat

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198 [2007] EWHC 541 (QB) at [28].

199 [2001] EWCA Civ 780; [2001] 2 ALL E.R. (Comm) 526; [2001] 2 Lloyd's Rep. 649; [2001] Lloyd's Rep. I.R. 793 (Longmore, Chadwick LJJ, Sir Philip Otton).

200 On 16 June 1998, at Sandy, a wheel of a locomotive disintegrated, as a result of "fracture propagation in the wheel initiated by faulty engineering of one of the holes drilled in the wheel for the attachment of balancing weights", work which had been performed by employees of the engine wheel manufactures before the delivery of the wheel to the claimant. The rail service was interrupted when power was switched off for two hours. There were reduced services for six days in order to carry out safety checks on similar engines. The claimant claimed loss of revenue and additional expense in respect of fares, catering, refunds, the cost of providing alternative services etc. of £4.5 million.

201 [2001] EWCA Civ 780; [2001] 2 ALL E.R. (Comm) 526; [2001] 2 Lloyd's Rep. 649; [2001] Lloyd's Rep. I.R. 793, at [22]–[25], [29], [30].

informally, has to be regarded as a contract in writing and falls to be interpreted as such a contract. No one suggests that it is partly an oral contract. ….[23] ….That fax confirmed 'renewal of the policy' …..[24] …an offer to 'renew' a 'policy' must be an offer to renew on the previous year's terms…[25] … no reference at all was made to [the proposed amendments] at [the crucial renewal] meeting. [29] …if the question is whether a term was incorporated into a contract, the subsequent conduct of the parties may be very relevant to the inquiry whether such a term was or was not agreed. [The claimant's] submissions to the contrary were…a misapplication of the principle that the subsequent conduct of the parties cannot be relied on as an aid to the construction of the contract, see *Miller v Whitworth Estates* [1970] A.C. 583, 603D–E per Lord Reid, 615A per Lord Wilberforce. No such principle exists in relation to the question whether an alleged term of a contract was, in fact, agreed. [30] The judge's finding that no discussion took place of the terms of the request for a quotation is, thus, fatal to the submission that the phrase 'renewal of the policy' must in the circumstances of the case be a reference to that request…"

Points to note

- Ensure that your contract terms have met the relevant tests for incorporation.
- It is fundamental that the other party must have had reasonably sufficient notice of your intention to incorporate your terms.
- The safest policy is always to present the terms along with any other contractual document.
- Ensure in particular that faxed copies are faxed front and back.
- If the terms are on the back, this must be clearly stated on the front.
- If you have cause to think that a particular clause is unusual, or onerous, go to very considerable lengths to ensure it is drawn to the other side's attention. The safer position is to assume that any exclusion clause, because it subtracts from the other party's entitlement, is to be carefully presented to the other side.
- Get the contract signed if at all possible. This will overcome many of the problems associated with incorporation.
- Bear in mind, in the case of a consumer contract, the implications for the terms sought to be incorporated of the provisions of the Consumer Protection from Unfair Trading Regulations 2008 and the Consumer Rights Act 2015, particularly if the consumer had no choice about acceptance.
- It is possible that a course of dealing might operate to bring about incorporation.

CHAPTER 3

GENERAL AND SPECIFIC PRINCIPLES OF INTERPRETATION

TABLE OF CONTENTS

1 GENERAL PRINCIPLES OF INTERPRETING WRITTEN CONTRACTS

In the first section of this chapter the general principles governing interpretation of written contracts are summarised.[1] This "general" set of principles refers the law which applies whether or not the clause in issue is an exclusion clause. Nine leading propositions are identified. Then leading judicial summaries of the law are presented, notably (see [para.3.012] below) *Lamesa Investments Ltd v Cynergy Bank Ltd.*[2] 3-001

Proposition (1): objectivity and fidelity

The court must construe a written contract objectively and faithfully. 3-002

Proposition (2): the three evidential bars

The court will not refer to (a) any declaration of subjective intent made by a party; (b) to subsequent conduct; and (c) to the parties' negotiations. Evidential bar (b) does not apply if: (i) the parties had specifically agreed to vary or discharge the agreement; or (ii) there has been a waiver of a party's rights; or (iii) the doctrine of estoppel by convention has arisen. Evidential bar (c) does not apply if: (i) an application is made for the equitable remedy of rectification; or (ii) a mutual understanding can be substantiated on the basis of estoppel by convention, that is, a consensual understanding manifested in their interactive dealings; or (iii) the parties (or a group or sect of which they are members) habitually use the relevant word or phrase in an unusual manner. 3-003

Proposition (3): factual matrix

A party can adduce background evidence which was available to both parties at the time of formation. The purpose of the evidence is not to indicate precisely how the text must be construed but to provide a more general understanding of the 3-004

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1 For expansion of these principles, see N. Andrews, *Contract Law in Practice* (Oxford: Oxford University Press, 2021), Ch.20 and the Bibliography therein at section (25).

2 [2020] EWCA Civ 821 at [18].