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Case No: HT-2014-000245

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 20th January 2016

Before :

MR JUSTICE EDWARDS-STUART
Between :

COMMERCIAL MANAGEMENT (INVESTMENTS) LIMITED	**Claimant**
and	
(1) Mitchell Design And Construct LIMITED **(2) REGORCO LIMITED (FORMERLY ROGER BULLIVANT LIMITED)**	**Defendant**

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

Mr Marcus Taverner QC and Mr Calum Lamont (instructed by **Wragge Lawrence Graham LLP**) for the **Claimant**
Mr Sean Brannigan QC (instructed by **Weightmans LLP**) for the **First Defendant**
Mr Justin Mort QC (instructed by **Kennedys Law LLP**) for the **Second Defendant**

Hearing dates: 16th and 17th December 2015

Judgment
As Approved by the Court

Mr Justice Edwards-Stuart:

1. This is a judgment following a trial of certain preliminary issues. The party responsible for raising those issues is the second defendant, "Regorco". Regorco, who at the time of the events in question was known as Roger Bullivant Ltd ("RBL"), was a ground works sub-contractor. The first defendant ("Mitchell") is a contractor, who was engaged to design and build a warehouse in Erith, Kent. The claimant ("CML") subsequently acquired an interest in the property and is the beneficiary of a warranty given by Regorco.

2. In April 2002 Regorco entered into a sub-contract with Mitchell by which it agreed to carry out certain ground treatment works, known as vibro compaction, at the site on which the warehouse was to be built. By a separate sub-contract Regorco also agreed to carry out the piling at the site.

3. The vibro compaction works were carried out at the end of March 2002, and the piling was installed a month or two later. Practical completion of the building was achieved on 19 December 2002. In November 2011 the sub-tenant in occupation of the warehouse complained of settlement of the slab beneath the production area.

4. Regorco's standard terms and conditions, which is what they are alleged to be, contain a provision, clause 12(d), which requires the notification of any claim to be made in writing within 28 days of the appearance of any alleged defect, or of the occurrence of the event complained of, and in any event to be "*so notified within one calendar year*" of the date of completion of the works.

5. The questions raised by the preliminary issues are, essentially, whether this term was incorporated into the sub-contract between Regorco and Mitchell and, if it was, whether it is subject to the provisions of the Unfair Contract Terms Act 1977 ("UCTA") and, if so, whether it satisfies the test of reasonableness.

6. Evidence was given by Mr Colven, who was the Group Risk Manager for Regorco, and Mr Duncan Archer, a director of Mitchell. Neither had any recollection of the events surrounding the making of the sub-contract, and each was giving his evidence based on his knowledge of his own company procedures and the surviving documents. I thought that they were both careful and honest businessmen.

7. Regorco was represented by Mr Justin Mort QC, instructed by Kennedys Law LLP, Mitchell was represented by Mr Sean Brannigan QC, instructed by Weightmans LLP, and CML was represented by Mr Marcus Taverner QC and Mr Calum Lamont, instructed by Wragge Lawrence Graham and Co LLP.

The events leading up to the placing of the order by Mitchell

8. In 2002 Regorco and Mitchell were not strangers to one another. In the previous few years Mitchell had engaged Regorco on several occasions to carry out piling or ground treatment work. I find that each company was aware that the other had standard terms and conditions, because these were either printed on the back of quotations and orders or were expressly referred to and included in the documents exchanged between them.

9. On 25 February 2002 Mitchell wrote to Regorco inviting it to submit a quotation for the design and installation of the vibro compaction to the floor area of a proposed industrial development. Documents were enclosed with the letter, such as a site plan layout and copies of the borehole logs. There was no reference to any standard terms and conditions but the letter stated that the sub-contract would be let on the basis of the JCT Standard Form of Contract (DOM/2).

10. Regorco replied on 13 March 2002 (the letter is in fact dated in error 13 March 2001) enclosing its estimate for the work. It wrote:

> "Our offer comprises this letter, together with our Standard Terms and Conditions of Contract, our Bill of Quantities and attached appendices A, B, C and D, the FPS Schedule of Attendances, Ground Improvement Protection Document and Completion Certificate.
>
> . . .
>
> We trust that our offer is of interest, should this be the case there are certain aspects of our offer both technical and contractual, that we require to discuss and agree with you, prior to our acceptance of your order. Please note we will be unable to commence any preparation works prior to our agreeing any of these issues. This includes rig reservation. In this regard we would particularly draw your attention to the lack of/inadequate site investigation available to us, and we would stress the need for further discussions to establish these requirements to facilitate our design. Any works undertaken prior to formal agreement of the contract terms shall be carried out under our Standard Terms and Conditions, or upon agreed wording of a Letter of Intent."

Appendix A to the letter included the following:

> "A.6 Contract Conditions — As per Roger Bullivant Standard Terms and Conditions unless agreed otherwise"

The RBL terms and conditions were also enclosed.

11. On 15 March 2002 Mitchell responded to Regorco's estimate saying that it confirmed its "*intention to place a purchase order*" for the vibro compaction proposal and, in addition, a separate proposal in respect of the piling. The letter advised Regorco that the programme required a start on site for the ground treatment before the end of the next week, namely 22 March 2002. The letter concluded by saying:

> "We trust this letter will enable you to reserve the necessary equipment and material for the proposed start dates and will contact you again shortly with suggested dates and times of a pre-order meeting."

This letter made no reference to any terms and conditions that were being put forward by Mitchell. I presume that shortly after writing this letter Mitchell was in touch with Regorco to fix a pre-order meeting and to discuss the precise start date. However, the contemporaneous documents provide no record of this having happened. In my view, this was in effect a letter of intent and, subject to notification of the precise start date,

Regorco would have been expected and entitled to regard this letter as authority to carry out the work.

12. Thereafter, at some time after 5 April 2002, Regorco received a copy of Mitchell's order in duplicate. The order came in two colours, one on blue paper and one on white paper. The latter, when signed on behalf of both parties, was the document that would be finally sent back to Regorco for filing and retention.

13. Following receipt of the order, Regorco wrote a letter to Mitchell on 9 April 2002, marked for the attention of Mr Archer, which included the following:

> "We acknowledge with thanks your order (ref MDC/109/SCO 01) in respect of the above project, accepting our quotation dated 13th March 2002 ref: JR/MG/02/7219 for the sum of £19,682.00 . . .
>
> We note that our quotation referred to above is incorporated as a numbered document in the Sub-Contract, which we have passed to our Group Risk Department for Approval and Execution. Until such time as we mutually agree the terms and conditions of the sub-contract, this letter and our quotations will form the basis of the sub-contract between us.
>
> . . .
>
> We would be grateful if you could confirm the following items:
>
> 1. Forward a copy of the Main Contract particulars along with any amendments and a copy of your proposed sub-contract terms and conditions to enable us to mutually agree the same."

14. By this time the works had been carried out. They were in fact completed on or by 31 March 2002. An internal document of Regorco's Group Risk Department shows that the order was amended, by a Mr Vickers of Regorco, on about 9 April 2002, and was subsequently signed by the relevant directors of Regorco on 16 and 19 April 2002. The order documents, still in duplicate, were then returned to Mitchell for counter signature by the remaining Mitchell director (because one of them had already signed).

15. Although Mitchell put Regorco to proof of the precise stage of the process at which it made the amendments to the order documentation, this internal document of Regorco's shows, conclusively to my mind, that the amendments were made no later than 12 April 2002. Mr Brannigan was not instructed to make a concession to this effect but, very realistically and quite correctly, he was unable to make any positive submission to the contrary.

16. Before I turn to the order in more detail, and precisely how it came to be accepted, it is convenient to describe in more detail each party's standard terms and conditions. RBL's terms and conditions were, as I have already mentioned, referred to from the outset. Mitchell's terms and conditions were, by contrast, referred to for the first time in the order. However, as I have already explained, this was almost certainly not the first time when they had been seen by Regorco. Similarly, I find that Mitchell had been aware, at least in general terms, of Regorco's standard terms and conditions well before this sub-contract.

The RBL terms and conditions

17. These are contained in a one page document headed "Roger Bullivant Terms and Conditions". They are set out in two columns of close print consisting of 16 numbered clauses, of which over half include two or more sub-clauses. They cover many, if not all, of the matters that such terms and conditions usually cover. It was, I thought, revealing that Mr Mort readily accepted and used at the hearing a copy blown up to A3 size for the purpose of the hearing. The small size of the print in the original document may explain a point to which I shall refer below.

18. In his evidence Mr Colven described the document as RBL's standard written terms and conditions that applied in 2002. Whilst he did not say that they were non-negotiable ("*Everything is negotiable for a price*": Day 1/46), he said that in 2002 Regorco did everything that it could to ensure that its terms and conditions were accepted (Day 1/47). Interestingly, Mitchell took the same attitude to its terms and conditions: it always wanted to impose them on every sub-contractor (Day 1/87). In my view, no further evidence ought to be necessary to establish the proposition that the document was Regorco's written standard terms of business in 2002. I should add that Mr Colven's evidence was consistent with the contemporaneous documents, in particular the estimates given by Regorco at the time.

19. However, Mr Mort referred me to some observations of my own in *Yuanda (UK) Co Ltd v W W Gear Construction Ltd* [2010] EWHC 720 (TCC). I said, at paragraph 21:

> "The conditions have to be standard in that they are terms which the company in question uses for all, or nearly all, of its contracts of a particular type without alteration (apart from blanks which have to be completed showing the price, name of the other contracting party and so on). One encounters such terms on a regular basis - whether when buying goods over the internet or by mail order or when buying a ticket for travel by air or rail."

And, at paragraph 26:

> "If there is any significant difference between the terms proffered and the terms of the contract actually made, then the contract will not have been made on one party's written standard terms of business."

20. Those observations must be seen in their context. That was a case where a main contractor was intending to enter into a number of trade contracts with various works contractors and for which purpose its solicitors had prepared a package based on the JCT Trade Contract with a substantial number of amendments which were set out in a separate Schedule of Amendments. Those standard terms of business, if that is what they were, came into existence solely for that particular project. It was not a case where a company had a printed set of conditions that it intended to use for every contract, year in year out, as was the case here. In *Yuanda*, the package was in fact amended by almost every trade contractor and in those circumstances I held that they were not Gear's written standard terms of business.

21. Mr Mort placed great emphasis on examples such as sales over the internet or purchases of tickets where the consumer is faced with a take it or leave it situation and

there is no question whatever of negotiating any sort of amendment to the terms. However, it is not appropriate to consider and to construe UCTA in the context of internet dealings which were not in anyone's contemplation at the time when it was passed even though it may frequently apply to them. One prevailing mischief at which UCTA was directed was the practice of companies to proffer and rely on printed terms and conditions in the hope or expectation that the other party would either not take any notice of them or would regard them as non-negotiable. I discuss in a later section of this judgment the question of what happens when some of the standard terms are incorporated and others are not.

22. I have to say that I did not wholly follow the thrust of Mr Mort's submissions on this aspect of the case, which from time to time appeared to point in contradictory directions. But on the facts of this case I have no hesitation in concluding that the RBL terms and conditions were Regorco's written standard terms of business in 2002.

23. Clause 12 of the terms and conditions was in these terms:

> "Warranty, limitation of liability and notice of complaint
>
> (a) We warrant that we shall carry out the Works in a proper workmanlike manner based upon the information provided to us and in accordance with the knowledge and standards commonly available to and used by the building industry at the date of the Contract. All other warranties, except those given in writing and signed by a Director for and on behalf of the Company, whether purportedly express or implied (whether by statute or otherwise) in relation to the quality or fitness for purpose of the Works or in relation to our performance of the Contract are hereby expressly excluded.
>
> (b) Our liability under the Contract shall, except for liability for: (i) death or personal injury due to negligence; and (ii) delay as specified in clause 6 above, be limited to the cost of remedial or rectification work (whether carried out by ourselves or by a third party) on physical defects in the Works, such cost not to exceed the Contract Price (exclusive of VAT). All liability on our part for indirect or consequential loss or economic damage (including but not limited to loss of revenue or profit) is hereby expressly excluded.
>
> (c) It is a pre-condition of our liability for breach of warranty that the Contract Price shall have been paid to us by the due date, in full without deduction or set-off of any kind.
>
> (d) All claims under or in connection with this Contract must in order to be considered as valid be notified to us in writing within 28 days of the appearance of any alleged defect or of the occurrence (or non-occurrence as the case may be) of the event complained of, and shall in any event be deemed to be waived and absolutely barred unless so notified within one calendar year of the date of completion of the works.
>
> (e) . . ."

24. Clause 12(d) is the provision that is at the heart of this case.

Mitchell's terms and conditions

25. These are printed on the reverse of Mitchell's order forms and so, like RBL's terms and conditions, they are confined to one page. They are headed "General Conditions of Order". They run to 19 clauses, several of which have sub-clauses. The font is slightly larger than that on RBL's terms and conditions, but not by much.

26. Clause 14, in its original form, was in the following terms (with the subsequently deleted words in italics):

> "**Conditions of Order**
>
> The terms of this order and its conditions shall be deemed to override any terms and conditions of your tender, *estimate, quotation, specification or acceptance of order however expressed or implied which are inconsistent therewith. Your commencement of work or placing of orders for materials or services against this order shall be deemed to imply that you have accepted this order on these terms and conditions and no other*."

27. Clause 14, following its amendment (in bold text) by Mr Vickers of Regorco, read as follows:

> "**Conditions of Order**
>
> The terms of this order and its conditions shall be deemed to override any terms and conditions of your tender, **where applicable, otherwise, Roger Bullivant Conditions apply.**"

Against the amendment, Mr Vickers initialled the document. In addition, he initialled the foot of the page. Mr Archer said that he would have known that these were not the initials of any director of Mitchell (Day 1/122).

28. Clause 15 was in the following terms:

> "**Liabilities and Insurance**
>
> The Sub-Contractor shall maintain insurance and indemnify Mitchell Design and Construct Ltd against liability at law for death or injury to persons or loss of or damage to property (including consequential loss flowing therefrom) arising out of the performance of the Sub-Contract and upon demand produce to Mitchell Design and Construct Limited his policies of insurance and premium receipts and in the event of failure by the Sub-Contractor to comply with the provisions of this clause, the Contractor may himself insure and deduct the cost of the premium so incurred from any Monies becoming due to the Sub-Contractor. "

The order

29. This was dated 5 April 2002, although it seems likely that it was not sent until two or three days later because it was received by Regorco on 9 April 2002. The material parts read as follows:

"This order to be read in conjunction with the conditions overleaf"

Scope of works

1./ To design, supply and install all as detailed on your quotation dated 13 March 2002 ref JR/MG/02/7219 the following:
Vibrocompaction ground improvement £19,682.00
2./ All as the Employers Requirement documents received at tender enquiry. See quote
3./ Should any discrepancies arise, then the Employer's Requirements documentation shall take precedence.
4./ All the work is to be co-ordinated to provide a comprehensive fully operating installation, without the need for main contractor co-ordination between sub-trades.
5./ The contract will be a DOM/2 form of agreement
6./ Contract sum excludes a prompt payment discount of 2.5%
7./ Retention to be 3%
7./ Site commencement date 27 March 2002
with a maximum installation period of 1½ weeks on site.[1]

Contract sum excluding VAT £19,682.00

Both copies of this sub-contract order should be signed where indicated and returned to this office for signature by Mitchell Design & Construct Ltd. The WHITE copy will then be forwarded to yourselves for your own records

Below this wording there were two columns under the heading "Executed as a Deed", where it was indicated that it was to be signed by a Director and the Secretary of each party or by two Directors. In fact when it was issued by Mitchell it was already signed by Mr Archer. After two amendments had been made - one on the face of the document, the other on the reverse - to which I shall refer in more detail shortly, it was then signed by two signatories on behalf of Regorco and returned at some time after 19 April 2002. It was then signed by Mr Peter Mitchell, on behalf of Mitchell, on 24 April 2002. The white copy was then returned to Regorco under cover of a "with compliments" slip and was received on 26 April 2002.

30. The first amendment was to the front page of the order. It was to item 5./, so that it read:

as

Terms of 5./ ~~The~~ contract will be ~~a~~ DOM/2 form of agreement**, unamended.**

This amendment was initialled "DC" by Mr Colven. For some reason, unexplained, Mr Vickers, who made the amendments, did not initial the amendment to the first page of the order. The second amendment, made at the same time, was to clause 14 and was in the terms that I have already described.

31. Two things should be noted at once about this order. The first is that, contrary to the submissions of Mr Mort, item 1./ is not, in my view, worded so as to incorporate the

[1] There is no typing error: there were two paragraphs numbered 7.

terms of Regorco's quotation - although it refers to it - but rather so as to identify the work that is the subject of the order (namely, the work which is described in that quotation). The second point is that this is not a list of "numbered documents" that are to form part of the contract, in the sense in which that expression is usually used, because many of the items are not documents at all but statements of fact. Accordingly, I consider that when Regorco wrote to Mitchell on 9 April 2002 saying that they noted that their "*quotation referred to above is incorporated as a numbered document in the Sub-Contract*", they were not correct.

The offer and acceptance

32. The order dated 5 April 2002 was not an acceptance of Regorco's estimate, not least because, for the first time, it introduced Mitchell's terms and conditions.

33. It is necessary to examine briefly how the contract came to be concluded. The first question is whether Regorco, by returning the order documents having countersigned them, accepted the counter offer represented by the order. This question has to be approached in two stages. First, did Regorco's alterations to the item numbered 5, which referred to the DOM/2 conditions, constitute a material alteration such as to turn an acceptance of an offer into a counter offer? The second stage is to ask whether the amendment to clause 14, which clearly was a material alteration, was seen by or effectively brought to the attention of Mitchell?

34. In my view, the amendment to alter the reference to the DOM/2 conditions was material because it prescribed the terms to be incorporated, rather than leaving the precise wording open. I did not understand anyone to contend otherwise.

35. As to the amendment to clause 14, Mr Brannigan skilfully extracted a concession from Mr Colven that the failure to bring that alteration expressly to the attention of Mitchell did not reflect well on Regorco (Day 1/52). This was because there was nothing on the face of the order document (or, it seems, in any other document) when returned by Regorco to draw Mitchell's attention to the fact that the terms on the reverse had been altered. On the other hand, the amendment to the reference to the DOM/2 conditions on its face was made in blue ink and would, I find, have been seen by the most casual reader of the documents. It is at least arguable that this amendment should have prompted the person who received the document to turn it over and check that no amendments had been made on the reverse.

36. However, any doubt out about this point is put to rest by the candid evidence of Mr Archer. At paragraphs 25-27 of his witness statement, he said that if these amendments were on the document when it was received back from Regorco, then either he or Mr Mitchell would have noticed them because it was their procedure to review the documents carefully. Mr Mitchell said much the same at paragraphs 9-11 of his witness statement. Mr Archer made the same point in his evidence (Day 1/101). In addition, Mr Archer said that he was not relying on Regorco to say: "*By the way, you need to look at the back of the document*" (Day 1/103). Although Mr Mitchell was not called as a witness, I consider that, since his witness statement was served in the usual way, this was an admission against interest by Mitchell and is therefore admissible evidence.

37. The question, asked rhetorically by Mitchell, is that if either Mr Mitchell or Mr Archer saw the amendments, why did they not go back to Regorco? In my view there are at least two possible answers to this. The first is oversight: the work had already been carried out and so it might not have been seen as a priority and, as a result, was just overlooked. Mr Archer realistically accepted that as a possibility (Day 1/126). However, although this is not in line with what Mr Archer said in evidence, I consider that a far more likely explanation is that Mitchell decided to do nothing. Had Mitchell gone back and asked Regorco to withdraw the amendment to clause 14, Regorco might well have refused. In that event, Mitchell might find itself with no agreement on the terms of the formal contract, with the result that the work would have been carried out on Regorco's terms and conditions as it had stated would be the case in its letter of 21 March 2002.

38. This is, I accept, pure speculation - but it provides a plausible explanation as to why Mitchell might well have accepted the amended order in spite of being aware of Regorco's amendment to clause 14. At any rate, whether this is right or wrong, I find, first, that Mitchell was aware of the amendments to both the face of the order and to condition 14 on the reverse and, for whatever reason, accepted Regorco's counter-offer made by the return of the amended forms on about 25 April 2002. Second, I find that Mitchell was not relying on Regorco to point out any amendments that it had made to the order before returning it for signature.

The effect of the amendment to clause 14

39. Each party took a different position on what the amendment meant, although it was common ground that the amendment was to be read as if the words "*where applicable*" appeared after the eighth word in the first line (i.e. after "conditions").

40. Mr Mort submitted that Mitchell's terms prevailed only if they were inconsistent with the RBL conditions. It followed, so the argument ran, that clause 12(d) did not conflict with the indemnity provisions at clause 15 of Mitchell's conditions and clause 5.6 of the DOM/2 conditions: all it did was to impose restrictions upon the circumstances in which the indemnity could be enforced.

41. Both Mr Brannigan and Mr Taverner made the point that Regorco's amendments specifically removed the reference to inconsistency so that it was not open to Mr Mort to argue the point as if that had not happened. Whilst there has been some difference of judicial opinion on the admissibility of words which have been deleted from a contract, I prefer and accept the view taken by the authors of Keating on Construction Contracts, 8th Edition, at paragraph 3-007[2] (and repeated in the 9th Edition). There, in relation to text which has been deleted but remains in the document in legible form, the authors say this:

> "Where parties have made a contract in a document that contains deletions, to look at the deletions does not offend the principle discussed above which prevents reference to preliminary negotiations. The deletion is physically contained in the concluded contract. It is submitted that the court should first construe the retained words. If they are unambiguous, reference to the deletion

[2] Cited with approval in *Mopani Copper Mines v Millennium Underwriting Ltd* [2008] EWHC 1331 (Comm).

is unnecessary. If they are ambiguous, reference to deletions from printed documents should be permitted to see whether objectively they throw light on the meaning of the retained words."

42. Mr Brannigan submitted that all that was necessary in order for Mitchell's term to prevail was that it was "applicable": it was not necessary that it conflicted with any particular term in RBL's terms and conditions. Mr Brannigan submitted that a term was "applicable" if it was relevant to the sub-contract - whether as to performance or remedies - and, if it was, it prevailed over any term in RBL's conditions that dealt with the same subject matter.

43. Mr Taverner had a rather different argument. He submitted that, in the light of the wording of Regorco's estimate (namely, the reference to RBL's terms and conditions applying "unless otherwise agreed"), RBL's terms and conditions would be incorporated only if there was no agreement to the contrary ("otherwise") - see Day 2/188[3]. So it followed, according to Mr Taverner's argument, that once some other agreement had been reached, RBL's terms and conditions would no longer apply. He rejected any suggestion of partial substitution: the outcome was, as he put it, a binary one - that is to say that either Mitchell's or RBL's terms and conditions applied in full, it had to be one or the other.

44. When construing a term such as this, the overarching objective for the court is to identify the intention of the parties. It is now so well established (that it needs no citation of authority) that this is to be done by determining what a reasonable person having all the background knowledge which would reasonably have been available to the parties would have understood the parties to have meant.

45. Mr Taverner's submissions, to which I have probably not done full justice, were made with typical force and attractiveness, but I cannot accept them. In effect, they involve reading the words "*where applicable*" as meaning "*if agreed*". In my judgment that is not an available meaning of the words, let alone their ordinary meaning. If one considers the position from the point of view of the hypothetical reasonable man, whether standing in the camp of Mitchell or Regorco, he would surely assume that the object of Mr Vickers in amending clause 14 was to improve Regorco's contractual position. I cannot think for one moment that he would have attributed to Mr Vickers the intention of seeking to abandon Regorco's terms and conditions in favour of those of Mitchell. The extent to which Mr Vickers might have succeeded in his attempt is another matter.

46. Further, I accept the submission (by both Mr Taverner and Mr Brannigan) that Mitchell's terms do not prevail only where there is inconsistency between the two rival sets of terms and conditions. In my view there is no ambiguity here. However, if there was any ambiguity, the court would be entitled to take into account the fact that the requirement for inconsistency had been deleted by Mr Vickers and replaced with the words "*where applicable*". That indicates fairly clearly that inconsistency was not a precondition of Mitchell's terms and conditions prevailing.

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[3] The transcript for Day 2 continued the numbering from Day 1, so that the transcript for Day 2 starts at page 131.

47. In my opinion, "*applicable*" is the opposite of "*not applicable*". Everyone will at some time have filled in a form or completed a questionnaire which contains a question or questions that are irrelevant to the purpose for which the form is being completed. Such questions are invariably met with the response "*N/A*" - "*not applicable*". Turning to this case, if a term is relevant to the performance of the sub-contract or the remedies under it, it is by definition applicable. I reject Mr Mort's submission that there has to be inconsistency in order to bring the overriding provision into play.

48. The question of construction at the heart of the dispute is whether the indemnity provision in clause 15 of Mitchell's terms and condition (or in DOM/2) overlaps, either wholly or in part, with the subject matter of RBL's clause 12(d). Mr Brannigan submits that both of them concern the exercise of a remedy available to Mitchell: in the one case giving Mitchell an unqualified right to an indemnity and the other containing restrictions on the exercise of that right. It is clear that clause 12(d) is concerned to limit the circumstances in which Mitchell can make a claim against a Regorco, whether in contract or tort and whatever the type of remedy sought.

49. Mr Mort submits that there is no overlap: clause 12(d) is concerned solely with preconditions for the availability of the remedy, not with the existence or nature of the remedy itself. As he put it in his skeleton argument, it "*does no more than modulate the consequences of other provisions in the circumstances described*". Accordingly, he submits that since there is no term in Mitchell's terms and conditions which governs the same subject matter, namely time limit for making claims, there is nothing applicable to time limits and so clause 12(d) of RBL's terms and conditions is not overridden.

50. This is perhaps a useful point at which to consider clause 12(d) a little more closely. I have set it out at paragraph 19 above. Reflecting on what had been said during the first day of the hearing it occurred to me that there was one aspect of clause 12(d) which had, it seemed, not occurred to any of the parties[4]. This is whether the requirement to give written notification within 28 days of the appearance of the defect (or of the occurrence of the event giving rise to the claim) and the requirement to give that notification in any event within one year are cumulative requirements. In other words, whilst the primary requirement was to give written notification within 28 days (of the relevant event) that had to be done in any event within one calendar year.

51. I therefore raised this point with counsel when the hearing resumed on the second day and indicated my provisional view. Mr Brannigan agreed with it and Mr Taverner was, I think, minded to adopt it also. However, Mr Mort submitted that my provisional conclusion was not correct. He submitted that the words "*unless so notified*" simply referred to the requirement for the notification to be in writing.

52. This is a short point of construction. In my view, by the terms of clause 12(d) notification of a claim had to satisfy two requirements: first, it had to be in writing and, second, it had to be given within 28 days of the relevant event - either the appearance of the defect or the occurrence of the event complained of. Meeting one of these requirements only would, by the terms of the clause, invalidate the claim. The

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[4] I suspect that this may have been because the font size in the original, possibly combined with a lack of clarity in the copy, was so small that the word "so" went unnoticed.

12 month long stop is added as a further requirement, not as an alternative. Mr Mort submitted in his skeleton argument that Mitchell could protect itself by giving written notice of a claim in every case towards the end of the permitted notice period (and, by implication, irrespective of whether or not there was any basis for doing so). I found this an unattractive and artificial submission. One cannot make a claim unless there is something to make a claim about. In my view, such a claim would only be valid if a defect (or relevant event) had appeared within the preceding 28 days.

53. These considerations lead to the following conclusions. Clause 15 of Mitchell's terms and conditions is essentially an indemnity clause (albeit coupled with an obligation to insure). It is not concerned with any other type of remedy. By contrast, as I have already mentioned, clause 12(d) of RBL's terms and conditions applies to any type of claim, whether in contract or tort, and whatever the remedy.

54. The right to an indemnity given to Mitchell by clause 15 has no limitation on the time in which a claim has to be made: the only time limits on Mitchell's right to claim such an indemnity are those imposed by the statutory provisions relating to limitation. Suppose that there was a clause in RBL's terms and conditions which provided that, where Mitchell had a right of indemnity, any claim for such indemnity had to be made within the time limits set out in clause 12(d). In my view, such a clause would cover the same subject matter as Mitchell's clause 15 and, accordingly, would be overridden by it. I cannot see how it makes any difference if clause 12(d) is in fact drafted so as to apply to all types of claim, not just to claims for an indemnity: to the extent that it applies to claims for an indemnity it covers the same subject matter as clause 15 and is therefore overridden. This conclusion disposes of these preliminary issues, but in case these issues should go further I shall consider the questions that arise under UCTA in the next sections of this judgment.

55. This conclusion makes it unnecessary to consider the cases cited by Mr Mort to the effect that the provisions of a contract must, so far as possible, be read together: see, for example, *Forbes v Git* [1922] 1 AC 256, at 259; *RWE Npower Renewables Ltd v JN Bentley Ltd* [2014] EWCA Civ 150, at [15]-[17]. These authorities are not relevant to a situation where certain clauses, which would otherwise have been incorporated into the contract, are stated by another provision to have been overridden.

56. It may well be, although I have heard no argument about it, that clause 12(d) could apply, without being overridden, to any other type of claim for which express provision is not made in Mitchell's terms and conditions. However, since that point has not arisen, I will say no more about it.

The Unfair Contract Terms Act 1977 ("UCTA")

57. Section 1 of UCTA provides that, apart from cases of personal injury or death, a person cannot restrict his liability for negligence "*except in so far as the term or notice satisfies the requirement of reasonableness*". Section 3 of UCTA provides:

> "3 Liability arising in contract.
>
> (1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term—

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled—

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness."

58. Section 11 of UCTA provides:

"(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 . . . is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, for ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."

(2) In determining for the purposes of section 6 or 7 about whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

(3) . . .

(4) Whereby reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to

(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and

(b) how far it was open to him to cover himself by insurance.

(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does."

59. Whilst this section provides that Schedule 2 applies only to cases under sections 6 and 7, the guidelines are regarded of general application to the question of reasonableness (see *Stewart Gill Limited v Horatio Meyer* [1992] 1 QB 600 at 608, per Stuart-Smith LJ, cited in *Pegler v Wang* [2000] BLR 218. They are:

> "(a) The strength of the bargaining positions of the parties relative to each other, taking account (among other things) alternative means by which the customer's requirements could have been met;
>
> (b) Whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
>
> (c) Whether the customer knew or ought reasonably have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any course of dealing between the parties);
>
> (d) Where 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 that condition would be practicable; and
>
> (e) Whether the goods were manufactured, processed or adapted to the special order of the customer."

60. For completeness, I should mention section 13, which provides:

> (1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents —
>
> (a) making the liability or its enforcement subject to restrictive or owners conditions;
>
> (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
>
> (c) excluding or restricting rules of evidence or procedure."

Did Mitchell deal on Regorco's written standard terms of business?

61. Mr Mort submits that it did not. He submitted that for this condition to be satisfied Regorco's terms and conditions would have had to have been incorporated in their entirety. It is not sufficient, he said, if only some of Regorco's conditions find their way into the contract.

62. In my view, the answer to this submission is to be found in *Pegler Ltd v Wang (UK) Ltd* (see above), a decision of His Honour Judge Bowsher QC. The text of the judgment is not reported in full in the Building Law Reports, but, thanks to the industry of Mr Lamont, the court was provided with a transcript of the full judgment. Unfortunately, the benefit of Mr Lamont's efforts was somewhat lost, because in the version of the transcript that he was able to print out, the paragraph numbering has gone wholly awry. By way of example, the index to the judgment shows that it ran to 387 paragraphs, whereas in the transcript before the court the last paragraph is

numbered 87. Unfortunately, the readers of this judgment will have to bear with the problems that this presents.

63. Taking the part of the judgment that appears under the heading "The Contract", it is clear that the contract in that case was a lengthy document consisting of several parts. The Judge said that the main body of the contract was extensively modelled on Wang's standard terms and conditions. Schedule A to the contract incorporated Wang's Response to the tender and also, by reference, the Invitation to Tenderers ("ITT"). In addition, Schedule A incorporated some correspondence. Schedule B contained "special conditions" modelled on Pegler's standard terms. As to Schedule B, the contract provided that the special conditions were to take precedence "*in the event of a conflict within the Contract*".

64. Clause 5.15, which was part of the contract, which appeared under the heading "General Terms and Conditions", contained various exclusion clauses which appear to have been drawn from Wang's standard terms and conditions. For example, clause 5.15.3 provided that Pegler may recover an amount to compensate for any direct physical loss suffered as a result of a performance failure by Wang, subject always to a stated maximum aggregate liability. Clause 5.15.6 provided that Wang was not be in any event liable for any indirect, special or consequential loss, howsoever arising (including but not limited to loss of anticipated profits).

65. Clause 43(a)(i) of Schedule B provided as follows:

> "The Customer shall be entitled at its option and without prejudice to its other rights to cancel or suspend the Contract or any unperformed part thereof by notice in the event that either:
>
> (1) Wang commits any material breach of its obligations hereunder and fails to remedy such breach within thirty days of written notice from Customer requiring the remedy thereof; in which case the Customer reserves the right to recover any deposits or advances and may claim for any other financial loss caused by the breach."

66. Under the heading "Exclusion of Liability Clauses" the Judge, having referred to clause 43(a)(i), said this:

> "The rights reserved, including the right to "may claim for any other financial loss caused by the breach" are exerciseable only after notice and after giving a locus poenitentiae. Pegler submit, and I accept, that the clause gives a right of redress independent of any right to damages at common law. Pegler submit, and I also accept, that that right of redress is not restricted by the exclusion clauses on which Wang rely because the Special Conditions take precedence in the event of any conflict with the contract."

67. Wang argued that the terms on which it relied were not to be treated as its "written standard terms of business" because this was not a contract entered into on Wang's Standard Terms and Conditions. Wang submitted that the contract was entered into after a process of negotiation in which significant terms were lifted straight from Pegler's Standard Terms and Conditions and indeed were stipulated to take precedence in the event of a conflict between those and other terms and conditions.

The fact that certain terms relied upon were terms which Wang endeavoured to include in all its contracts did not mean, according to Wang, that the end product fell within section 3 of UCTA.

68. In response to that submission His Honour Judge Bowsher said this, at paragraphs 67 and 68:

> "(67) That submission raises an issue whether the words "the others written standard terms of business" refer only to a situation where the whole of a party's standard terms are applied or, on the other hand to a situation where only some standard terms are incorporated into a contract. In this connection, it is to be observed, that in the part of the Act applying to Scotland, reference is made to "a Standard form contract" rather than to "the others written standard terms of business: see section 17. Sometimes, of course, a party is presented with a printed form to which the only permitted alterations are the filling in of blanks, and in other cases, as here, some terms are tailor-made for the contract in question and others are in a standard form.
>
> (68) The words "on the others written standard terms of business" are not defined or explained by the Act. As I pointed out in my judgment in *British Fermentation Products Ltd v Compair Reavell Ltd* [1999] 66 Con LR and [1999] BLR 352, the Law Commissioners made a deliberate decision not to recommend such a definition."

69. Judge Bowsher then referred to a Scottish decision, *McCrone v Boots Farm Sales Ltd* 1981 SLT 103, at 105, in which Lord Dunpark considered the meaning of the words "standard form contract" in the part of UCTA applicable to Scotland. He said this:

> "The Act does not define "standard form contract", but its meaning is not difficult to comprehend. In some cases there may be difficulty deciding whether the phrase properly applies to a particular contract. I have no difficulty deciding that, upon the assumption that the defenders prove that their general conditions of sale was set out in all their invoices and they were incorporated by implication in their contract with the pursuer, the contract was a standard form contract within the meaning of the said section 17.
>
> Since Parliament saw fit to leave the phrase to speak for itself, far be it from me to attempt to formulate a comprehensive definition of it. However, the terms of s. 17 in the context of this Act make it plain to me that the section is designed to prevent one party to a contract from having his contractual rights, against a party who is in breach of contract, excluded or restricted by a term or condition, which is one of a number of fixed terms or conditions invariably incorporated in contracts of the kind in question by the party in breach, and which have been incorporated in the particular contract in circumstances in which it would be unfair and unreasonable for the other party to have his rights so excluded or restricted. If the section is to achieve its purpose, the phrase "standard form of contract" cannot be confined to written contracts in which both parties use standard forms. It is, in my opinion, wide enough to include any contract, whether wholly written or partly oral, which includes a set of fixed terms or conditions which the

proponent applies, without material variation, the contracts of the kind in question. It would, therefore, include this contract if the defenders general conditions of sale are proved to have been incorporated in it. In that event, it would be for the defenders to prove that it was fair and reasonable for their condition 6 to be incorporated in this contract."

70. Judge Bowsher continued, at paragraphs 72 and 73, as follows:

> "(72) Lord Dunpark's words, "It is, in my opinion, wide enough to include any contract, whether wholly written or partly oral, which includes a set of fixed terms or conditions which the proponent applies, without material variation, to contracts of the kind in question", if applied to this case would bring the exclusion clauses on which Wang rely within the Act. **The evidence shows that while Wang was prepared to negotiate on matters such as clauses defining the moments of delivery, performance, passing of risk and similar matters, Wang was also determined to use its standard exclusion clauses which, apart from one small and inconsequential exception, were not negotiable.** The evidence of that determination was given in the affidavit evidence of Mr Roger Whitehead, a director of Wang, in answer to interrogatories and in the written and oral evidence of Mr Lambert, Wang's legal adviser at the time. Mr Whitehead produced copies of the 1986 and 1988 editions of Wang's standard terms and conditions, including the terms under consideration. Mr Whitehead's evidence was that even in cases where there were on the file standard terms of both Wang and a customer, it had never been the intention of Wang's sales staff to bind Wang contractually on any terms other than those contained in Wang's Standard Terms and Conditions. The evidence of Mr Lambert was that "the way that the contract was put together was that the main body of the contract essentially comprised Wang's standard terms". He also said that clause 5.15 was "in Wang's standard form". He confirmed that in his oral evidence. The small exception was the willingness to change the closing words of clause 5.15.4 to substitute the total price of the contract for a stated sum of money, namely £250,000 . . . A standard term is nonetheless a standard term even though the party putting forward that term is willing to negotiate some small variations of that term.
>
> (73) I find that, so far as concerns the exclusion clauses, Pegler were dealing "on the others written standard terms of business", and that is sufficient to cause the Act to apply to those terms. For the Act to apply, it is not necessary for the whole of the contract to be 'on the others written standard terms of business'."

(My emphasis)

71. In my view, that decision has direct relevance to the facts of this case. Here Mitchell attempted to incorporate its standard terms and conditions in their entirety and to exclude the incorporation of any of Regorco's terms. However, Regorco's standard terms and conditions were incorporated only to the extent that Mitchell's terms did not prevail over them. As with Mitchell's right to indemnity in this case, Pegler had a

term which gave it a right that would not have attached at common law. That right was not restricted by the exclusion clauses relied on by Wang because the Special Conditions were to take precedence in the event of any conflict. Like *Pegler*, this is a case where some terms were tailor made for the contract in question and others were in standard form. It seems that Wang did not insist on the incorporation of all its standard terms and conditions into the contract, only the exclusion clauses.

72. However, the effect of Judge Bowsher's decision was that his observations on UCTA were unnecessary (as he noted at paragraph 62). Nevertheless, I agree with his reasoning and I propose to adopt it.

73. Clause 12(d) is one of Regorco's standard terms and conditions. If, therefore, it was incorporated into the contract at Regorco's insistence, then - adopting the reasoning in *Pegler v Wang* - I consider that Mitchell would have been required to deal on Regorco's written standard terms of business. I must therefore turn to the question of reasonableness.

The requirement of reasonableness

74. As UCTA makes clear, the burden of showing that clause 12(d) was reasonable rests squarely with Regorco. I have already mentioned the two triggers which start the running of the 28 day time period: they are "*the appearance of any alleged defect*" and "*the occurrence (or non-occurrence as the case may be) of the event complained of*". In the case of the ground treatment work that was carried out by Regorco, the event complained of could only be negligent design or construction in relation to that work. In the circumstances Mr Mort realistically conceded that the 28 day period would have run, or very nearly run, by the time the contract was concluded on about 24 April 2002.

75. In reality, therefore, the only operative trigger is the appearance of any alleged defect. In practical terms, any defect in the ground compaction work would never be visible because it would be concealed by the structure above it. Accordingly, any defect in that work would manifest itself in the form of some distress to the structure of the building, probably cracking of the floor slab or a wall.

76. It is in the nature of ground compaction work and piling that in general defects do not appear until sometime after the work has been carried out, although Mr Colven did say that occasionally piles or ground improvement columns can fail whilst the contractor is still on site (Day 1/68). In general, failure is unlikely to occur until substantial loading is applied to the ground or piles, as Mr Colven agreed (Day 1/67). The designer of the ground treatment work would be expected to anticipate not only the loads imposed by the building itself, but also the loads - both live and dead - imposed by the use of the building. For example, if the building is a warehouse used to store, say, paint, fork lift trucks are likely to be used to move the goods around the warehouse. All this is self-evident.

77. However, what this means in practical terms is that there will often be a substantial lapse of time between the carrying out of the work and the occurrence of any visible cracking to the fabric of the building, and an even longer lapse of time until the likely cause of the cracking is established. The construction of even a simple warehouse building is likely to take a few months, and it will not be for a few further months

before it becomes at least substantially loaded by the user. Whilst it is possible, as Mr Colven agreed, for ground treatment works to fail whilst the sub-contractor is still on site, in such cases the potential for a claim is reduced because the sub-contractor will probably put the work right straightaway. Where the failure of ground or piles occurs under load, experience suggests that that seldom, occurs instantaneously: it is usually a gradual process.

78. It is, in my experience at least, rare for a failure of ground or piles to manifest itself in a period measured in months, rather than in years. Of course, there may be exceptional cases when the design or construction is so poor that failure occurs almost immediately upon loading, but I cannot recall such a case. In this case, the lapse of time was in excess of 10 years: whilst I would not suggest that such a long period is normal, it is more of the order that one would expect.

79. Another feature of this type of failure is that it is almost invariably progressive, starting with small cracks which then grow larger. Such cracking, when it begins, may not be readily visible. It may occur in a part of the warehouse or factory which is seldom visited, or in a dark corner or in an area where the presence of fixtures or goods may make the cracking difficult to see. There would be an "appearance" of cracking, as Mr Mort accepted (at Day 2/299), when the cracking becomes visible or capable of being seen - not when someone actually sees it. In these circumstances it is not unlikely that the first "appearance" of cracking may go unnoticed by anyone for days if not weeks.

80. A further and rather more substantial problem is that a contractor in the position of Mitchell will not be the user of the building. It is therefore in no position to observe any cracking when it appears. Of course, such a contractor could ask the occupier of the building to make regular checks for any signs of cracking during what is left of the first year after the completion of the ground treatment, but the occupier might have little or no incentive to put himself out, let alone incur inconvenience or expense, in order to do this.

81. Perhaps anticipating an argument along these lines, Mr Mort suggested in his skeleton argument that Mitchell could have taken steps within "*the agreed notice period*", such as monitoring the execution of the work and carrying out tests when it was complete, in order to put itself in a position to give the required notice. This submission struck me as somewhat fanciful but, leaving that aside, it appeared to have been based - at least in part - on Mr Mort's construction of clause 12(d), which was that "*the agreed notice period*" was one calendar year[5] rather than, as I have found it to be, within 28 days of the appearance of the defect or the occurrence of the event complained of. Leaving that point aside, I thought that Mr Mort's submissions on this aspect came close to suggesting that Mitchell should not only pay reputable and known sub-contractors to carry out works of design and construction but also that they should then check and supervise every aspect of it themselves.

82. Turning back to UCTA, it is important to remember that the question posed by the guidelines in Schedule 2 concerns what it is reasonable to expect, not what actually happens.

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[5] See, for example, paragraph 191 of Regorco's skeleton argument (". . . *a period of a year following completion of the works is in a wholly different category*").

83. In his skeleton argument Mr Mort referred to a number of examples of time bar clauses in particular types of contract. In my view, such examples - arising as they do in the context of different situations - are of limited value. For example, Mr Mort relied on clause 20 of the standard FIDIC form of contract which requires a contractor, who wishes to claim an extension of time or additional payment under the contract, to give notice as soon as practicable, and not later than 28 days after he became aware, or should have become aware, of the event or circumstance giving rise to the entitlement. Two points can be made about this. First, contractors on building projects generally know when a contract is in delay or whether the work has been disrupted and so giving notice of the relevant event within 28 days should not be unduly onerous. Further, unlike clause 12(d), time runs from the date on which the contractor is aware, or should have been aware, of the event in question. Mr Mort's concession, which in my view was correctly made, that under clause 12(d) time runs when the defect was capable of being seen, rather than from when the contractor knew or ought to have known about it, also shows why clause 12(d) is much more onerous than clause 20 of the FIDIC contract.

84. Mr Mort reminded me also, quite correctly, that commercial parties are entitled to allocate the risk as they think fit and that the court should not place too high a hurdle in the way of a party, such as Regorco, that is seeking to show that a particular term was reasonable. I do not consider it necessary to refer to the authorities that he mentioned, but I am acutely aware that the court must consider all the conflicting factors carefully before reaching a conclusion that a particular term is not reasonable.

85. Mr Taverner and Mr Lamont referred to several factors in addition to the Schedule 2 guidelines, but I did not find these to be of much help. For example, one was the submission that if clause 12(d) were to be upheld, it might (according to Mitchell) invalidate Mitchell's insurance cover.

86. Turning now to those guidelines, and taking them in turn, I consider he position is as follows:

(a) This factor is neutral. There is no evidence of any imbalance of strength in the bargaining positions of Mitchell and Regorco, but there is some evidence that Mitchell's requirements could have been met by engaging a sub-contractor whose conditions did not contain a term as draconian as clause 12(d): in answer to Mr Brannigan, Mr Colven said he was not aware of any projects where there was a limitation clause which prevented claims against a specialist piling contractor that were made after a year (Day 1/54), and he said in his witness statement (at paragraph 46) that Mitchell could have placed an order for the ground treatment work with a specialist sub-contractor that did not limit its liabilities. This factor is, therefore, in Regorco's favour.

(b) There is no evidence of any inducement to accept the term: on the contrary, the work had already been carried out. In fact, as I have already mentioned, Mitchell was in the difficulty that if no formal agreement was concluded, the likely position was that the work would have been carried out pursuant to the letter of 15 March 2002 and therefore subject to the RBL conditions.

(c) I accept that Mitchell ought reasonably to have known of the existence of the term, but I am not prepared to find that it ought reasonably to have known of its extent. The fact that, it seems, none of the counsel or solicitors in this case had appreciated the effect of the words "*unless so notified*" speaks for itself. It does not lie in the mouth of Regorco to say that Mitchell should have appreciated their impact.

(d) For the reasons that I have now given, I consider that it was not reasonable to expect, at the time when the sub-contract was made, that compliance by Mitchell with the 28 day time limit imposed by clause 12(d) would, in most cases at least, be practicable.

(e) I regard this factor as neutral. Although, of course in one sense the work was carried out to the special order of the customer, it was a standard technique that was already in regular use.

87. It is also relevant that this is a case where it seems that both sides could protect themselves by taking out appropriate insurance. There is certainly no evidence to the contrary.

88. In the circumstances of this sub-contract, I consider that factor (d) is the most powerful. In the light of the considerations that I have mentioned, I conclude that the parties would not reasonably have expected - if they had thought about it - that compliance with both the 28 day time limit and the requirement to make a claim within a year would be achievable, let alone practicable, save in rare cases.

89. So if, contrary to the conclusions that I have already reached, clause 12(d) of RBL's terms and conditions was incorporated into the sub-contract, I find that it does not satisfy the reasonableness test.

Conclusions

90. My answers to the preliminary issues are therefore as follows:

1) Was the hand written amendment to clause 15 of Mitchell's standard terms added by Regorco after both parties had executed the subcontract order?

No.

2) Was clause 12(d) of RBL's standard terms incorporated into the sub-contract orders by the handwritten reference at clause 14 of Mitchell's standard terms?

No.

3) If clause 12(d) were incorporated, was the sub-contract order "*on*" RBL's "*written standard terms of business*" for the purposes of section 3(1) of UCTA?

Yes, it would have been.

4) If the sub-contract orders were on RBL's written standard terms of business, does clause 12(d) satisfy the requirement of reasonableness for the purposes of section 3(2) of UCTA?

No, it would not.

5) In circumstances where there was no notification of any claim within one calendar year of completion of the works, does clause 12(d) provide a defence,

a) for the purposes of any claim brought by CML

b) for the purposes of any claim brought by Mitchell?

In the case of the claim brought by Mitchell, no.

In the case of a claim brought by CML, no (because by the terms of the warranty CML could be no better off than Mitchell).

Afternote

91. In this case the skeleton arguments submitted on behalf of two of the parties ran to about 20 or so pages. The skeleton argument submitted on behalf of the third ran to over 70 pages. Allowing for the fact that the latter adopted a larger font and/or greater line spacing than the other two, it was still about two and a half times as long. The ability to navigate it was not assisted by the fact that it had no index.

92. Paragraph 15.2.1 of the TCC Guide provides that:

> "In general terms, all opening notes should be of modest length and proportionate to the size and complexity of the case."

93. In the context of this trial of these preliminary issues, I consider that a skeleton argument running to more than about 25 pages, assuming the usual spacing and font size, is not of modest length. The offending skeleton argument in this case exceeded this limit by a comfortable margin. There is a reason for this provision, which is not simply to save time and paper. More fundamentally, it is also the case that once a skeleton argument runs to more than about 25 pages it is usually because it is over discursive, making it difficult for the reader to identify the real issues and to follow the argument. Also it makes it more difficult for the reader to find his or her way quickly to the part of the skeleton argument which is dealing with the point currently under consideration (particularly if it has no index).

94. A related point is the over citation of authority. The bundles of authorities for this hearing contained about 40 reports - albeit with some duplication. I have found it necessary to refer to only a handful of them. I commend practitioners to the observations of Stuart-Smith J at paragraphs 19 and 20 of his judgment in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2015] EWHC 3573. In saying this, I do not wish to be overcritical: of course counsel will wish to err on the side of caution and will be naturally averse to the risk of criticism if a relevant authority is not cited. I fully understand that. I would simply encourage counsel not to cite several cases where one or two will do, and not to cite authorities which simply illustrate the

application of a well-known principle to particular facts (unless those facts are of particular relevance to the case under consideration) or which are examples where the conclusion contended for in the present case has been reached in different circumstances.