FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 55
A632/14

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD PENTLAND

in the reclaiming motion

by

BENKERT UK LIMITED

Pursuers and Reclaimers

against

PAINT DISPENSING LIMITED

Defenders and Respondents

Pursuers and Reclaimers: A Smith, KC; CN Smith; BTO Solicitors LLP
Defenders and Respondents: Lord Keen of Elie, K.C.; McGregor; DWF LLP

9 December 2022

Introduction

[1] On 10 November 2009 a fire caused substantial damage at the reclaimers' printing factory in Alva. The agreed losses amounted to £29,680,235. After proof the Lord Ordinary concluded that the fire was caused by a spark igniting solvent vapour at an ink dispensing machine. A Jubilee clip had suddenly come off a polypropylene hose connecting the dispensing machine to drums storing ink and solvent, allowing solvent vapour to escape

into the atmosphere. A spark generated by static electricity or by the clip striking the machine ignited the vapour with catastrophic consequences.

[2] The Lord Ordinary held that a maintenance engineer employed by the respondents, Mr Andrew Dunkley, should have advised the reclaimers when he serviced the machine in April 2009 that the use of Jubilee clips to attach polypropylene hoses was liable to lead to a fire. Mr Dunkley ought to have recommended their replacement by metal braided hoses with swaged/swivel nut fittings. Had this recommendation been made, the reclaimers would have implemented it and the fire would not have occurred. The respondents were vicariously responsible for Mr Dunkley's negligent failure; it amounted to a breach of the maintenance agreement between the parties. The respondents' liability was, however, limited to £3,225.06 by a clause in the maintenance agreement.

[3] In this reclaiming motion (appeal) the reclaimers say that the limitation clause was ineffective under the Unfair Contract Terms Act 1977 (UCTA) because it was not fair and reasonable to incorporate it into the parties' contract. The respondents cross-appeal challenging the finding of breach of contract and negligence on the part of Mr Dunkley. The court therefore requires to consider: (1) whether the respondents are liable under the contract and at common law for the reclaimers' losses; and (2) if they are, whether the limitation clause meets the reasonableness test set out in UCTA and has accordingly limited the respondents' liability.

The core facts

The ink dispensing machinery

[4] At the time of the fire the reclaimers produced printed paper used mainly in the

manufacture of cigarette filters. The paper was printed with solvent-based coloured ink. The factory had two ink dispensing machines, one small and one large. They had been supplied by the respondents, whose name until October 2019 was Rexson Colorweigh Limited. The machines were bespoke to the reclaimers' requirements and were similar to one another in their design. Twenty four stainless steel pipes supplied the machines with different inks or solvents. The pipes did not connect to the machines directly; rather, they were attached to short lengths of EPDM (polypropylene) hoses, which in turn connected to the dispensing head of each machine. The hoses were held in place to the pipes at one end and the dispensing heads at the other by Jubilee clips. Jubilee clips are circular bands which were placed around the hoses and tightened. As the clip was tightened, the band would compress and thereby be secured around the hose. The clips are shown in the following images:

A Jubilee clip

Jubilee clips mounted on a hose pipe.

[5] The dispensing heads had an appearance similar to that of a shower head. A simplified diagram of the large ink dispenser was provided to the court. The dispensing head is not shown, but the court's understanding is that it would be located beneath the cuboid featured on the diagram on top of which the valve connections can be seen:

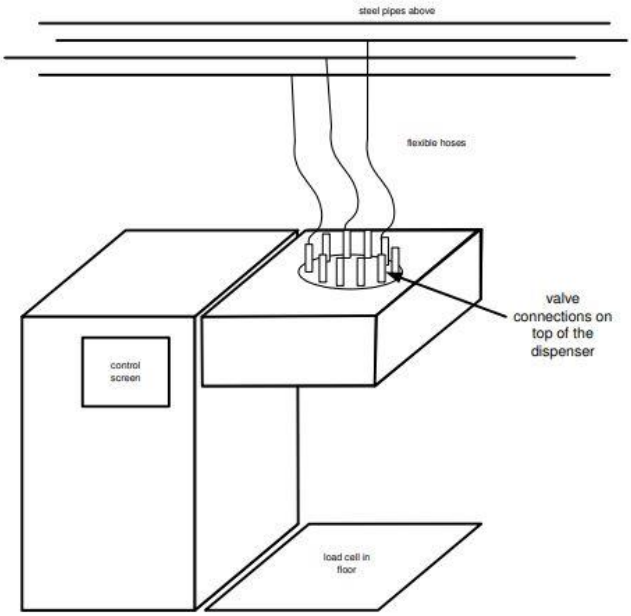
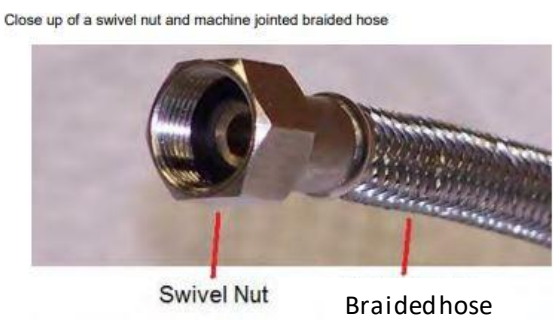
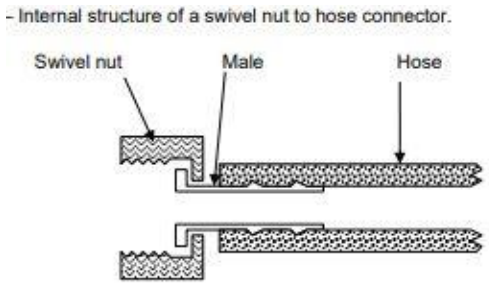


Figure 7
simplified layout of the large dispenser
note that only a few valves, hoses and pipes are shown for clarity

[6] At the heart of the issue of liability for the fire is the reclaimers' contention that Jubilee clips posed an inherent risk of detachment which made them unsuitable for use with the ink dispensers given the highly volatile nature of the solvents and inks they dispensed. The reclaimers contend that swaged fittings ought to have been used instead. Swaged fittings are shown in the following photograph and diagram:





[7] The pipes and hoses delivered the inks and solvents to valves. This process was powered by a pump. The user would place a container beneath the dispensing head and

key the appropriate ink or solvent order into the control panel. That instruction would cause the requested composition of ink and solvent to be mixed, the pump to start, the mixture to be pumped through the pipes to the valves, and the relevant valve to open in order to release the mixture into the container. In the case of solvents, these were simply pumped up a single pipe. Ink, however, tended to settle and so could not be left in pipes when the machines were not in use. To prevent settling, the inks were pumped around a circuit when not in use.

2002 and 2007 modification of the hoses on the machines

[8] Originally, the hoses on each machine were made of rubber, which was covered with a woven stainless steel outer sheath. In 2002 and 2007 the respondents recommended that the ink lines on both machines should be replaced with EPDM hoses. This was described as an upgrade, made to improve the flow rate (in 2002) and to resolve blockages of four hoses which were being brought back into use after a period of non-use (in 2007). The solvent lines remained rubber with woven stainless steel.

Nature of solvents

[9] Solvents are highly flammable. Senior counsel for the reclaimers described them as being as volatile as petrol. Solvents and solvent-based inks can be ignited by static electricity. The risk was such that anti-static precautions were in place at the factory, such as the wearing of anti-static work clothing and boots.

Maintenance of the machines

[10] The large dispenser was installed in 1997, the small dispenser in 2002. Between 1997 and 2002 the respondents were subcontracted to carry out the maintenance of the machines

on behalf of the suppliers. From 2002, the reclaimers and respondents contracted directly for the programmed maintenance of both machines. From 2005 the arrangements were placed on a more formal basis, in terms of which the respondents agreed to provide two routine maintenance visits annually and to repair any defects discovered during their visits or reported by the reclaimers. The respondents would ask the reclaimers to sign a copy of the contract at each visit, prior to the service. In practice, Mr Rolf Maitland, the production manager at the factory, would sign on the reclaimers' behalf. Mr Neil Sharpe, the reclaimers' financial director, probably looked at the contract in 2005, including the limitation clause, when matters were formalised. The contract remained the same in all material respects from 2005 to 2009 when the fire occurred. Mr Sharpe had seen limitation of liability clauses in contracts with other suppliers before. The reclaimers did not attempt to negotiate the terms of the maintenance contract at any stage.

[11] The respondents' employee, Mr Dunkley, a service engineer, ordinarily carried out the services on the machines. During the services he would check that all pipe work joints and fittings were tight and that there were no leaks, visually check that the Jubilee clips were not loose, and replace valves as necessary. To check for leaks, Mr Dunkley would pump fluid through the machine and observe what happened.

Provision of insurance information

[12] The reclaimers' practice was to ask regular contractors to provide details of their liability insurance cover, although Mr Sharpe could not say whether this had been done in relation to the respondents before 2009. In 2009 a letter addressed "to whom it may concern" dated 1 July that year from a firm of insurance brokers to the respondents was produced to the reclaimers. The letter listed all the insurances the respondents had in force

for the coming year, including public/products liability with an indemnity limit of £5,000,000 for any one occurrence.

Mr Dunkley's maintenance visit on 1 and 2 April 2009

[13] Mr Dunkley's last service of the dispensers before the fire took place on 1 and 2 April 2009. The Lord Ordinary explained that his work report for that visit records that he replaced three valves on the large dispenser and carried out more extensive work on the small dispenser, including replacing nine valves. He had been due to return in about November 2009, but the fire intervened.

The fire

[14] At around 11.25am on 10 November 2009, Mr Gerald Hastings, who worked on the printing presses, went to the ink plant room with a metal can to obtain solvent for the job he was doing. As he was obtaining solvent from the small dispenser, he heard a sharp bang behind him. He turned round and saw flames around the hood at the top of the large dispenser. He left the can where it was and ran through the doorway into the main factory area to raise the alarm. Shortly afterwards the fire alarm sounded and the fire door between the ink plant room and the main factory closed automatically. The reclaimers' trained fire team arrived within about two minutes of the sounding of the alarm. However, the fire spread rapidly across the whole ink plant room and an adjacent store before it could be extinguished. The post-fire investigation found that the Jubilee clips at the large dispenser head were mainly in place, but that one clip was missing.

The cause of the fire

[15] The Lord Ordinary's findings as to the cause of the fire were not challenged. The

seat of the fire was at the large dispenser head. The cause was a leak of flammable solvent vapour or ink from a loosened, vulnerable hose. The hose was vulnerable because it was missing its Jubilee clip or because its clip had been under-tightened. When Mr Hastings closed the valve on the small dispenser, there was a sudden increase in pressure in the system, either as a result of the valve closure alone or in combination with a sudden pulse from the pump. This increase in pressure caused the vulnerable hose suddenly to detach from its ferrule. A cycle of pressure pulses repeated many thousands of times could cause such an occurrence to happen if a hose was left vulnerable. Vapour escaped and was ignited by a spark.

[16] The likely source of the spark depended in part upon whether the EPDM hoses had anti-static properties. The Lord Ordinary was unable to reach a concluded view on whether they had. Since there were credible sources of ignition in either scenario that question did not have to be resolved. The spark was either caused by electrostatic charge from the escaping solvent itself, or from the Jubilee clip on the detached hose (if there was one) striking the surface within the dispenser head.

[17] The alternative explanations for the fire advanced by the respondents (that the clip came off during the fire; that a fire investigator had removed it; or that the reclaimers' employee, Mr George Mitchell, who had carried out some work on the large dispenser on 17 May 2009, was responsible) were either not credible or not proven on a balance of probabilities.

The use of Jubilee clips

[18] The Lord Ordinary heard opinion evidence from four skilled witnesses. They were Mr Daniel Pointon of Burgoynes, consulting scientists and engineers; Mr Michael Halliday,

HSD Safety Ltd, loss prevention consultants; Mr Anthony Brunton, master plumber; and Mr Peter Reupke of Hawkins, forensic engineers. Messrs Pointon, Halliday and Brunton were instructed by the reclaimers, Mr Reupke by the respondents. Each of these witnesses gave a view on the use of Jubilee clips to secure the EPDM hoses.

[19] The reclaimers' witnesses considered that the use of Jubilee clips to secure the hoses was considerably less robust than the previous system. There was a corresponding increase in the risk of failure and leakage. Mr Halliday did not accept that the use of Jubilee clips was appropriate. Mr Brunton commented that it was "concerning" that the respondents had opted to use them in a system where high operational pressures were generated. Mr Reupke was the only skilled witness to opine that the clips were an adequate connection method for the machines. All of the skilled witnesses were, however, in agreement that there was an increased risk of a hose separating from its joint if a Jubilee clip was absent completely, that the failure to attach a clip was not proper practice, and that the absence of a clip should have been noticed during an inspection.

[20] The reclaimers contend that the fire would not have occurred had the Jubilee clips been replaced by swaged/swivel nut connections. They argue that the use of Jubilee clips created a significant risk of fire if a hose were to become detached from its connection. Had the service engineer been exercising reasonable care and skill in carrying out the respondents' contractual maintenance obligations, he would have advised the reclaimers to replace the Jubilee clips. The reclaimers would have implemented that advice, and the fire would not have occurred. The respondents argue that they fulfilled all of their contractual duties and that, even if they had not, their liability under the contract was limited to £3,225.06.

The relevant statutory provisions

The application of the English provisions of UCTA

[21] Part I of the Act amended the law for England, Wales and Northern Ireland, Part II for Scotland. Part III set out provisions applying to the whole of the United Kingdom. The Lord Ordinary considered that the applicable law for the purposes of the present case was English law. Before him neither party contended that there was any material difference between the provisions applicable in Scotland and those applying in the rest of the United Kingdom. For reasons on which the court will elaborate in paragraphs [56] to [60] the relevant provisions in the present case are the Scottish provisions.

The relevant Scottish provisions

[22] UCTA provides that where a contract term purports to exclude or restrict liability for breach of duty arising in the course of a business the term shall have no effect if it was not fair and reasonable to incorporate it in the contract (s 16(1)(b)). The rule applies also in the case of standard form contracts (s 17(1)(a)). The test of reasonableness is governed by section 24, which (so far as material) reads as follows:

> **"24 The 'reasonableness' test.**
>
> (1) In determining for the purposes of this Part of this Act whether it was fair and reasonable to incorporate a term in a contract, regard shall be had only to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties to the contract at the time the contract was made.
>
> **…**
>
> (3) Where a term in a contract … purports to restrict liability to a specified sum of money, and the question arises for the purposes of this Part of this Act whether it was fair and reasonable to incorporate the term in the contract … then … regard shall be had in particular to—

> (a) the resources which the party seeking to rely on that term or provision could expect to be available to him for the purpose of meeting the liability should it arise;
>
> (b) how far it was open to that party to cover himself by insurance."

[23] The onus of proving that it was fair and reasonable to incorporate a term in a contract lies on the party so contending (s 24(4)).

[24] Schedule 2 contains guidelines for the application of the reasonableness test. In Scotland, the guidelines only apply in the case of contracts for sale and hire purchase and the supply of goods (ss 20 and 21). It was, however, common ground that the court could still take the Schedule 2 guidelines into account in the circumstances of the present case. The matters to which regard is to be had are stated to be any of the following which appear to be relevant:

> "(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
>
> (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term;
>
> (c) whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
>
> (d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
>
> (e) whether the goods were manufactured, processed or adapted to the special order of the customer."

The contract

[25] The maintenance contract in force at the time of the fire was signed by Mr Rolf Maitland, the reclaimers' production manager, on 30 March 2009, shortly before Mr Dunkley's inspection on 1 and 2 April. The contract was in all material respects in the same terms as the contracts agreed every year since 2005. Mr Maitland had signed each of them. The contract was not in any way complex. It contained ten simple and straightforward clauses and a short schedule. It ran to nine pages (including a cover sheet and brief schedule) in a normal font size. Clause 3 required the respondents to provide certain specified services to the customer. Clause 3.1.1 provided that there were to be two visits by a service engineer to the factory each year to carry out "routine maintenance in accordance with the Maintenance Checklist" on the two dispensers. The service engineer was required to repair any defect in or malfunction of the equipment discovered in the course of the routine maintenance or reported to the respondents by the reclaimers (clause 3.1.2) and was to carry out the services with reasonable care and skill (clause 5.4).

[26] The maintenance checklist directed the service engineer to carry out the following checks in relation to the hoses and pipework on the machines:

> "Hoses and dip tube assembly
>
> 1. Check all the hose clamps are tight and secure.
>
> …
>
> 2. Check the suction hoses are secure/tight and are free of kinks.
> 3. Check all hose fittings are secure/tight and not damaged.
> 4. Check the suction tube and return tubes are free of obstruction (so the fluid flows freely).
> 5. With [recirculation] on check all the fittings for leaks.
>
> …
>
> Pipework
>
> 1. Check all pipe work joints and fittings are tight and there are no leaks.
> 2. All flexible hoses should be kink free. Tighten swivel nuts if required.

3. Check all pipe work is secured to the framework or racking."

[27] Clause 5 limited the respondents' liability under the contract as follows:

"5 Liabilities

5.1 Subject as expressly provided in this Agreement, all warranties, conditions or other terms implied by statute or common law are excluded to the fullest extent permitted by law.

5.2 Nothing in this Agreement excludes or limits the liability of the [respondents] for death or personal injury caused by its negligence or fraudulent misrepresentation.

5.3 THE CUSTOMER'S (reclaimers') ATTENTION IS SPECIFICALLY DRAWN TO THE PROVISIONS SET OUT BELOW:

5.3.1 the [respondents'] total liability in contract, tort, misrepresentation or otherwise arising in connection with the performance or contemplated performance of the Services shall be limited to the Basic Charge; and,

5.3.2 the [respondents] shall not be liable to the [reclaimers] for any indirect or consequential loss or damage (whether for loss of profit, loss of business or otherwise), costs, expenses or other claims for consequential compensation whatsoever and howsoever caused which arise out of or in connection with this Agreement."

[28] The "Basic Charge" was defined to be the annual maintenance charge to be paid by the reclaimers to the respondents in terms of the contract, which was £3,225.06 per annum (clause 1 and the Schedule to the contract). Therefore clause 5.3 limited the respondents' liability for losses caused as a result of any breach of the contract or negligence by them to £3,225.06.

[29] Clause 10 was headed "Jurisdiction". It provided that English law was to apply to the contract and that the parties agreed to submit to the non-exclusive jurisdiction of the English courts.

The Lord Ordinary's opinion

Liability

[30] The respondents, through Mr Dunkley, were in breach of their contractual and common law duty in failing to recommend to the reclaimers, in the course of performance of their contractual maintenance obligations, that the EPDM hoses and Jubilee clips at the large dispenser head be replaced with swaged/swivel nut fittings. The use of Jubilee clips was, at its lowest, sub-optimal. The decision to deploy them instead of swaged/swivel nuts on the ink lines in 2002 was not a carefully considered design decision. As such, their usage fell within the scope of review when routine maintenance was being carried out. The difference between swaged or swivel nut fittings and Jubilee clips lay in the capacity for something to go wrong. A swaged fitting was not susceptible to loosening by pressure pulses from pumps or valves. A nut which had been tightened incorrectly or inadequately would be immediately obvious as it would be evidenced by a leak, and could be remedied by re-fitting the connection; an under-tightened Jubilee clip might not be immediately apparent or apparent at all until shortly before failure. That risk and the potentially catastrophic consequences of its materialising were well-recognised, and were such as to impose a duty on the respondents, as those contractually responsible for the maintenance of the system, to eliminate the risk by recommending the replacement of clips with nuts.

Limitation of liability

[31] The matters in Schedule 2 potentially applicable to the present case were: (a) the strength of the parties' bargaining positions relative to each other, taking into account (among other things) alternative means by which the reclaimers' requirements could have been met; (c) whether the reclaimers knew or ought reasonably to have known of the

existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); and (e) whether the goods were manufactured, processed or adapted to the reclaimers' special order.

[32] Further guidance could be derived from case law. (1) In applying the reasonableness test, the court must entertain a whole range of considerations, put them in the scales on one side or the other, and decide on which side the balance came down (*George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] 2 AC 803, Lord Bridge of Harwich at 814-5). (2) In relation to the question of equality of bargaining positions, regard should be had not only to the question of whether the customer was obliged to use the services of the supplier, but also how far it would have been practicable and convenient to go elsewhere (*Overseas Medical Supplies Ltd* v *Orient Transport Services Ltd* [1999] 2 Lloyd's Rep 273, Potter LJ at paragraph 10). (3) In cases of limitation rather than exclusion of liability, the size of the limit compared with other limits in widely used standard terms may also be relevant (*Overseas Medical Supplies* at paragraph 40). (4) The ease with which one or other of the parties could obtain insurance was an important factor (*Goodlife Foods Limited* v *Hall Fire Protection Limited* [2018] CTLC 265, Coulson LJ at paragraphs 64-7).

[33] Applying the *George Mitchell* balancing exercise, the respondents had discharged the onus of demonstrating that the limitation of liability clause was fair and reasonable. Section 11(4)(b) of UCTA required the court to consider how far it was open to the respondents to cover themselves by insurance. The respondents had public liability insurance for a sum (£5 million) which bore no relation to and was only a fraction of the agreed amount of the reclaimers' losses. While there was no express requirement under UCTA to have regard to the availability of insurance for the other party, this was

nonetheless an important though not a decisive consideration. The reclaimers did carry insurance. It would be unrealistic to ignore the fact that the present claim was a subrogated one by their insurers. The reclaimers were in a far better position than the respondents to assess the size of their potential losses, including partial or total destruction of the factory and lengthy business interruption. The balance favoured the respondents being permitted to say to them that they would not accept liability for losses which it was impossible for them to quantify and that it was up to the reclaimers to make whatever insurance arrangements they thought necessary.

[34] The reclaimers were sufficiently aware of the limitation clause. It was given prominence within the six-page contract, being the only clause to be prefaced with a warning in underlined capital letters. It had appeared in previous agreements and formed part of the course of dealing. Mr Sharpe was familiar with limitation clauses and had probably been aware of the one in the maintenance contract. While the respondents were unlikely to have been willing to remove or amend the clause, the bespoke nature of the machines did not prevent the reclaimers from engaging alternative maintenance services. Although it was desirable to employ the suppliers of the machinery to maintain it, that was a commercial judgement for the reclaimers; it did not indicate a lack of bargaining power on their part. The parties' respective bargaining power was neutral in the balancing exercise. For these reasons, the respondents had discharged the onus of showing that the limitation was fair and reasonable. Their liability to make reparation to the reclaimers was limited to the sum of £3,225.06.

Submissions in the reclaiming motion

Reclaimers

[35] The court should take certain of the factors in Schedule 2 into account. Factor (d) was of no assistance, but factors (a), the parties' bargaining positions, (b), the availability of alternative service contracts, (c), customer awareness of the clause and (e), whether the goods were manufactured, processed or adapted to the special order of the customer, were each relevant.

[36] The Lord Ordinary was plainly wrong to find that the limitation clause was reasonable. The primary criticism was that he failed to give consideration, or sufficient weight, to a number of matters in considering whether the respondents had discharged the onus of proving reasonableness. The court should therefore reconsider that question.

[37] There were eight factors which showed that the respondents had failed to discharge the onus. The first was the risk of catastrophic consequences which could result from a breach of the maintenance contract. No evidence was led that the risks associated with the 2002 change of specification had been drawn to the attention of the reclaimers. The fact that the reclaimers were not aware of the risk they were undertaking at the material time demonstrated that the bargaining positions of the parties were not equal (factor (a)). Second, maintenance was under the control of the respondents at all material times. Third, the respondents stated that the contract was the same as the previous ones signed with Flint (Flint Ink (UK) Limited) prior to the takeover of Flint's maintenance obligations by the respondents in 2002. Fourth, the contract had been signed by the production manager, Mr Maitland. His focus was on production, not contracts and he was inexperienced in contractual matters. One had to accept the reality of what was being put to whom. Though

the financial director (Mr Sharpe) was aware of the contract's terms, Mr Maitland's role was still an important factor to be weighed in the balance. Confusion about the contractual position was caused by the respondents approaching Mr Maitland instead of the reclaimers' directors (factor (c)). Fifth, there was no indication given by the respondents of what it would cost customers to provide them with a higher level of insurance cover. Sixth, the regular and repeated provision of insurance information to the reclaimers showed that the respondents themselves considered the limitation clause ineffective. Seventh, the Lord Ordinary placed insufficient emphasis on the fact that the respondents were maintaining machinery that they had designed. The respondents had intimate knowledge of the equipment, which was a particular source of danger. It would have been a highly imprudent decision for the reclaimers to have contracted with another entity for maintenance (factor (b)). Eighth, the Lord Ordinary's reliance on the fact that the present claim was a subrogated one failed properly to take into account section 24(3)(b) of UCTA.

[38] The dominant factor was the repeated provision of confirmation by the respondents to the reclaimers that they held public liability insurance in the amount of £5 million. The provision of that confirmation was inconsistent with the respondents having effectively limited their liability. It inferred that they did not consider the limitation clause to be effective. There was no other purpose in disclosing the existence of the cover in circumstances where the respondents were not doing any other work for the reclaimers. The level of that cover, £5 million, rendered unreasonable the limitation of liability to such a modest sum as provided for in the maintenance contract and served to undermine the central obligation on the respondents to use reasonable care to maintain the equipment. That factor outweighed all the others; it was not mentioned in the Lord Ordinary's balancing

exercise. The importance of insurance mainly related to its availability to the party seeking to rely on the limitation clause. It was not illegitimate to have regard to the availability of insurance on the reclaimers' side, but it was notable that this was not the approach reflected in section 24(3)(b) of UCTA. The availability of insurance to the other party was subordinate to the availability of insurance on the respondents' side. The respondents did not lead evidence to explain or justify the mismatch between the level of cover and the limitation amount. They had not offered an alternative contract providing a less draconian limitation. Where the costs of obtaining public liability insurance would naturally be passed onto customers, it was unfair and unreasonable to prevent a customer from enjoying the benefits of that insurance policy where it would otherwise cover the risk which had manifested.

[39] Regarding factor (a), the parties' bargaining positions, the Lord Ordinary was plainly wrong to conclude that this was a neutral factor. He accepted that the reclaimers' prospects of negotiating on the respondents' standard terms were minimal. If the response was merely to argue that a party had agreed to the terms, the policy underlying UCTA would be weakened. UCTA recognised circumstances where parties could enter into a contract without negotiating and with their eyes open, but where the inability to negotiate was still a factor to be considered in the context of fairness. Mr Maitland's inexperience and lack of qualification in these matters was demonstrative of the disparity in the parties' respective bargaining power. The potential for renegotiation was fanciful. Mr Darren Kennedy, the respondents' finance director, could not recall any instances where the respondents had renegotiated its standard terms with a customer. That should have supported a finding that the limitation clause was unreasonable.

Respondents

[40] A preliminary issue was that there was no direct evidence of the scope of the respondents' insurance and how it would apply to the reclaimers' losses. The letter produced to the reclaimers was generic; it recorded all the respondents' insurance policies. Clause 5.2 of the maintenance contract was relevant in this context. It stated that the contract did not exclude or limit liability for death or personal injury. The contract thus provided for public liability in respect of death or personal injury; there was insurance in place to cover that. On the face of it there was no cover for maintenance.

[41] There were essentially three points. The first concerned the test for reasonableness. It was not possible to lay down prescriptive rules regarding what was reasonable and what was not. The purpose of UCTA was to protect against unconscionable behaviour. (*Goodlife Foods Limited*, Coulson LJ at para 93). In the present case, there had been no unconscionable behaviour, and so the reasonableness test was met.

[42] The second concerned the facts and how the Lord Ordinary dealt with them. He correctly held that the respondents had discharged the onus of demonstrating that the limitation clause was fair and reasonable, and therefore that the respondents' liability in respect of the reclaimers' losses was limited to £3,225.06. He considered a number of relevant facts: (a) the agreement ran to nine pages in normal type and only the limitation clause was headed in capitals and underlined; (b) it was not especially onerous or unusual; (c) the reclaimers' financial director, Mr Sharpe, confirmed that he had seen similar limitation of liability clauses in other contracts and had never attempted to renegotiate with the respondents; (d) failure to offer an alternative contract to a customer was not a relevant factor in determining whether a clause was reasonable; (e) the reclaimers were a major

commercial enterprise and their complaints about the clause must be seen in that context (*Watford Electronics Limited* v *Sanderson CFL Limited* [2002] FSR 19); (f) the respondents carried public and products liability insurance cover in the sum of £5 million and had confirmed this to the reclaimers upon request; (g) the reclaimers carried insurance of their own; (h) Mr Kennedy testified that if a customer challenged the standard terms the respondents would try to come to an agreement with them; and (i) without the limitation clause, the respondents' insurance costs and consequently prices, would have increased. A plea of *non est factum* was not available to anyone who was content to sign a document without taking the trouble to try to find out at least its general effect (*Saunders* v *Anglia Building Society* [1971] AC 1004).

[43] Finally, there was the basis on which the court should address the conclusions of the Lord Ordinary in his role as the decision maker. If the Lord Ordinary noted a material issue, then the weight to be attached to it was a matter for him. He had carried out the relevant weighing exercise and arrived at a conclusion which was not plainly wrong. There was therefore no justification for interfering with his decision. No grounds for review of his determination of reasonableness had been made out.

Submissions in the cross-appeal

Respondents

[44] The Lord Ordinary was not entitled to conclude that the respondents were liable for the reclaimers' losses. The breach of contract case pled against them was that they had failed to deploy reasonable care and skill pursuant to clause 5.4 of the contract, in that they ought to have advised that a replacement to the polypropylene hose and Jubilee clip system

should be implemented. The common law case was that the respondents were vicariously liable for the negligence of their service engineer, Mr Dunkley.

[45] The Lord Ordinary was not entitled to conclude that Mr Dunkley had breached any contractual duty incumbent upon him. In his witness statement, Mr Dunkley had explained that he carried out approximately eighty to one hundred services per year across about forty to fifty customer sites, with 70% of the work related to solvent based ink machines, and that the vast majority of these contained EPDM hosing and Jubilee clips. It was never put to Mr Dunkley that he should not have used the Jubilee clip and EPDM hose, or that such a system was a defect, or that he should have advised the reclaimers that such a system ought to be replaced with swaged fittings. These specific criticisms should have been put to Mr Dunkley as a matter of basic fairness. Instead, Mr Dunkley left court after giving his evidence without any inkling that he was going to be blamed for £29 million worth of fire damage. Nor were the criticisms put to any other witness. Mr Dunkley was asked why Jubilee clips were used instead of swaged fittings; he stated that it was for reasons of cost and accessibility, in that you would run out of space to tighten up a series of nuts where the hoses were lined up as they were. The reclaimers' expert Mr Halliday, who was critical of Mr Dunkley, had the expertise of a chartered chemist, and accordingly was not in a position to give evidence as to what a service engineer might reasonably do (*Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59 at para 50). In any event, Mr Halliday (and the other experts in their joint statement) agreed that the design of the equipment was the responsibility of the reclaimers and that an attending engineer would expect to maintain the equipment as found and would not consider the design. There was no evidence that Mr Dunkley did anything other than to fulfil his maintenance obligation.

[46] The only common law case ultimately advanced against the respondents was that they failed properly to train Mr Dunkley. There were no averments to support such a case. There was no evidence led about the training of engineers. There was no training or vicarious liability case made out. The Lord Ordinary's conclusion that Mr Dunkley was in breach of contractual and common law duty as a result of using flexible hoses and Jubilee clips and not advising the reclaimers against their use, is in effect to find liability as a result of negligent design. The reclaimers did not plead a design case. The agreement was a maintenance contract, not a warranty.

Reclaimers

[47] The cross-appeal was without merit. The reclaimers' skilled witnesses Mr Brunton and Mr Halliday, were clear in their view that an experienced service engineer ought to have made the reclaimers aware of the risks of using Jubilee clips. While skilled witness evidence may be led as to the standard in a particular profession, the court is the ultimate arbiter of what amounts to reasonable skill and competence and is entitled to conclude for itself that the standards observed by a particular professional fall short of what is reasonably required (*Midland Bank Trust Co Ltd* v *Hett, Stubbs & Kemp* [1979] Ch 384, Oliver J at 402B-E).

[48] Clause 3.1 of the maintenance contract made it clear that the respondents were responsible for, *inter alia*, the repair of any defect in or malfunction of the equipment. The ordinary meaning of a defect was something giving rise to malfunction. That was a broad contractual duty.

[49] It was made clear to Mr Dunkley during his evidence that the essence of the reclaimers' case was that swaged fittings were superior to Jubilee clips, and that the clips were sub-optimal. That was discussed with him during cross-examination; Mr Dunkley did

not accept that the clips were inappropriate. He was not directly asked whether the clips were appropriate but the tenor of his evidence was that they were. It could not be correct that the reclaimers' case failed because it was not put to Mr Dunkley that he should have reported issues with the clips. Mr Dunkley could have responded that he agreed, or disagreed with that proposition, but it was unclear how either of those answers would advance matters when he was given ample opportunity to comment on both systems. There was substantial evidence before the court to entitle it to find that Mr Dunkley was in breach of his duty to repair and maintain the equipment and that his failure to recommend the replacement of the Jubilee clip system with swaged fittings was negligent.

Analysis and decision

The cross-appeal: liability for the reclaimers' losses

[50] It makes sense to address the cross-appeal first. If it succeeds the question as to the effectiveness of the limitation clause is no longer strictly relevant.

[51] Before turning to consider the maintenance contract and its interpretation, it is important to note what the legal basis of the reclaimers' case against the respondents actually was. The case pled by the reclaimers was said to be based on: (i) a breach of the contractual requirement that the services be carried out with reasonable care and skill and (ii) vicarious liability for the failings of Mr Dunkley. In respect of both, the breach/failure relied upon was the failure to advise the reclaimers that the Jubilee clips and EPDM hoses ought to have been replaced with swivel/swaged fittings and metal braided hoses. In recording the reclaimers' submissions, the Lord Ordinary noted that their case was not one of faulty design (para [66]). Nor was it a case against the engineer personally. Rather, the

fault was said to be that the respondents had failed properly to train Mr Dunkley to identify the risk arising from use of the Jubilee clips.

[52] The principal contractual obligation was to carry out routine maintenance twice per year, in accordance with a maintenance checklist, which comprised specific tasks, checks and directions to the service engineer. The contract was headed "Basic Maintenance Agreement". The equipment was defined as the specified machines (the small and large dispensers) which the respondents had "agreed to maintain". All four of the skilled witnesses agreed that an attending engineer would expect to maintain the equipment as found, not to consider the design. The court agrees. The scope of the contract was to maintain the machines. In other words, a service engineer was obliged to carry out such work as was necessary to keep them in a consistent state. The respondents' contractual obligation did not extend to evaluating the design and functionality of the two dispensers or advising on and making improvements to them.

[53] With that in mind, the question is whether the use of Jubilee clips was an issue of design or of maintenance. The reclaimers submitted that a defect was simply anything giving rise to a malfunction, and that the use of that word accordingly gave rise to a broad contractual obligation. The court does not accept that this is the proper meaning of the word "defect" when it is construed properly in its context. The word appears in clause 3.1.2, which requires the attending service engineer to "repair" defects or malfunctions. The plain meaning of repair is to fix something which has broken or been damaged, to put it back into its original state. It does not mean to improve upon or redesign. The use of Jubilee clips may have been a defect in the design of the machines, but a Jubilee clip which was fitted and working as intended was not in need of repair, and therefore it was not the kind of defect

which the contract was intended to cover. The Lord Ordinary erred in holding that it was. The fact that the respondents did not advise the reclaimers to switch from Jubilee clips to swaged/swivel nut fittings did not amount to a breach of the maintenance contract. Nor did it amount to a breach of any common law duty of care by the service engineer, who owed the reclaimers no obligation to consider the machines' design. That being so, the respondents cannot be vicariously liable for any action or omission of Mr Dunkley.

[54] Those conclusions are sufficient to dispose of the cross-appeal in the respondents' favour. However, it is worthy of note that the whole question of Mr Dunkley's and the respondents' responsibilities under the contract does not appear to have been properly explored in evidence. It was never put to Mr Dunkley that he ought to have advised the reclaimers to remove all Jubilee clips and implement a swaged/swivel nut system instead. It was inappropriate for the Lord Ordinary to find fault with Mr Dunkley for not having done so when he had never been given the opportunity to respond to this key criticism.

[55] It follows that the cross-appeal must be sustained. The respondents are not liable to the reclaimers for breach of contract or negligence.

The reclaiming motion: reasonableness of the limitation clause

Scots or English law?

[56] Although the effectiveness of the limitation clause no longer arises, we propose to address the question out of deference to the arguments addressed to the court.

[57] Before turning to the relevant provisions of UCTA, it is important to comment on one particular issue which arises from the Lord Ordinary's opinion. As already explained, clause 10 of the maintenance contract contained a choice of law clause, which provided that

English law was to govern its terms. The reclaimers opted to raise the action in the Court of Session on the basis that the place of performance of the respondents' contractual obligations was the reclaimers' factory in Scotland (article 2 of condescendence). In the pleadings, the parties made reference to sections 2, 3 and 11 of UCTA. Those provisions apply in England, Wales and Northern Ireland, but not in Scotland. Equivalent provision is made for Scotland by sections 16, 21 and 24.

[58] The presumption is that foreign law coincides with Scots law unless the contrary is proved (*Royal Bank of Scotland Plc* v *Davidson* 2010 SLT 92, Lord Ordinary (Drummond Young) at para 17; *Bonnor* v *Balfour Kilpatrick Ltd* 1974 SC 223, Lord Ordinary (Kincraig) at 225; *Ertel Bieber and Company* v *Rio Tinto Company Limited* 1918 AC 260, Lord Parker of Waddington at 302). The burden of proving the content of foreign law is on the party who maintains: (i) that foreign law applies and (ii) that it differs from Scots law. In the present case neither party contended that there was any difference between the Scottish provisions of UCTA and those which apply in the rest of the UK.

[59] This agreed stance did not, however, mean that it was open to the Lord Ordinary to interpret and apply English law. Foreign law (including the law of England and Wales) is a question of fact and judicial notice cannot be taken of it in the absence of proof (Anton, *Private International Law*, 3rd ed. 2011, para 27.172). Proof can take the form of an unqualified admission in the pleadings, but if that is the approach taken, the content of the foreign law must be relevantly set out by means of distinct and pointed averments (*Royal Bank of Scotland Plc* v *Davidson, supra*; *Landcatch Limited* v *The International Oil Pollution Compensation Fund and Others* [1998] ECC 314, Lord Ordinary (Gill) at para 166). There were no such averments in the present case; all that was done was to refer without elaboration or

explanation to sections 2, 3 and 11, and Schedule 2 of UCTA. The position is the same in the case of a statutory provision which applies only in parts of the United Kingdom outside Scotland as it is for the statutes of other countries. In *McElroy* v *McAllister* 1949 SC 110, Lord President Cooper stated (at 137) that he was reluctant to assert any right in a Scottish court to determine for itself the construction of an English Act as a matter of law.

[60] Applying these principles, in the absence of proof or averments as to the content of the foreign law, the presumption that foreign law coincides with Scots law has not been displaced. The Lord Ordinary ought to have interpreted and applied the Scots provisions of UCTA. This issue was raised by the court with parties at the hearing of the reclaiming motion and parties subsequently made submissions on the Scottish provisions. The court will accordingly refer to those provisions rather than to sections 2, 3 and 11.

The role of the appellate court in considering reasonableness

[61] The correct approach to review by an appellate court of the decision of a first instance judge on whether to override a contractual term excluding or restricting liability on the ground that it was not fair and reasonable was considered in *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] 2 AC 803, Lord Bridge of Harwich at 816A-B:

> "There will sometimes be room for a legitimate difference of judicial opinion [on reasonableness] where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong."

[62] *George Mitchell* was an English case which considered the application of the English provisions of UCTA (although they had yet to come into force). The court likened the

balancing exercise in this context to an exercise of discretion by the first instance judge in that both involved the consideration of different factors and the placing them on one side of the scales or the other. The balancing exercise to be carried out under the Scottish provisions is similar in nature. The court considers that the same approach should be taken by the appellate courts in Scotland in relation to the section 24 reasonableness test. As such, a relatively high degree of deference will be afforded to the balancing exercise carried out at first-instance and the court will not interfere unless it is satisfied that the lower court proceeded upon an erroneous principle or was plainly or obviously wrong.

Fair and reasonable?

[63] Section 16 of UCTA applies just as much to contracts between large commercial parties as it does to those limiting or excluding liability to a small business or consumer. The same is the case with section 17, which applies not only to consumer contracts but to standard form contracts, which may often be entered into by businesses. However, in assessing the reasonableness of an exclusion or limitation clause, it would be unrealistic for the court to ignore the size, scale and resources of the respective contracting parties; these factors are likely to have a bearing on their bargaining power relative to one another. What may not be a reasonable limitation of liability towards a consumer, who may often be in a relatively weak bargaining position, may be reasonable if applied to a business. Commercial parties are generally the best judges of what is fair and reasonable for them:

> "Where experienced businessmen representing substantial companies of equal bargaining power negotiate an agreement, they may be taken to have had regard to the matters known to them. They should, in my view be taken to be the best judge of the commercial fairness of the agreement which they have made; including the fairness of each of the terms in that agreement. They should be taken to be the best judge on the question whether the terms of the agreement are reasonable. The court should not assume that either is likely to commit his company to an agreement

> which he thinks is unfair, or which he thinks includes unreasonable terms. Unless satisfied that one party has, in effect, taken unfair advantage of the other–or that a term is so unreasonable that it cannot properly have been understood or considered–the court should not interfere." (*Watford Electronics Limited* v *Sanderson CFL Limited* [2002] FSR 19, Chadwick LJ at paragraph 55).

The court should be reluctant to interfere with a bargain made by a commercial party (*Goodlife Foods Limited* v *Hall Fire Protection Limited* [2018] CTLC 265, Gross LJ at paragraph 105). It should not lightly make a finding that a large commercial concern with access to legal and contractual expertise entered into an unreasonable agreement or agreed terms in a contract that were not fair and reasonable.

[64] It is significant that the reclaimers did not at any stage attempt to enter into negotiation with the respondents regarding the contract's terms. It does not matter that the reclaimers' financial director, Mr Sharpe, had sight of the contract but opted not to read it in detail. It was not for the respondents to ask their customer, a large commercial concern with an annual turnover of £25 to £30 million at the Alva plant alone, whether they had properly read the contract presented to them. It was not for them to interrogate whether Mr Maitland was the appropriate person to sign the contract at each visit. The limitation clause was the only clause in capital, underlined letters in the short and uncomplicated nine-page agreement. It was designed to catch the eye of any person flicking through it, let alone a financial director (or other senior employee) who would reasonably be expected to have a strong interest in reading and considering each clause in detail before assenting to it on behalf of his or her employers. In any event, Mr Kennedy of the respondents gave evidence that they would have negotiated with the reclaimers had they been asked to do so and he adhered to that position during cross-examination. The reclaimers knew (or must be taken to have known) of the existence and terms of the limitation clause, to which their attention

was clearly and specifically drawn when the contract was presented to them. They had more than sufficient bargaining strength to negotiate had they considered it important to do so.

[65] It is clear (and was not disputed) that the policy intention behind the legislation is for the courts to have regard to the availability and practicability of taking out insurance by each contracting party. Section 24(3)(b) of UCTA requires the court to consider how far it was open to the party attempting to rely upon a limitation clause to cover itself by means of insurance. That question is not limited to the issue of whether any kind of insurance was available. It is a broader question than that and takes into account the commercial realities associated with obtaining insurance. One of those realities is that obtaining insurance to cover potential customer losses will usually result in a price increase for the customer. If, for example, the result of the party taking out insurance would have been a material price increase for the customer, that would be relevant to the question of whether it was in fact "open" to the party to insure against that risk. For example, in certain circumstances, it may be more economical for the customer to insure separately against a risk which may or may not materialise.

[66] Mr Kennedy explained in his evidence that in the absence of the limitation clause the respondents would have had to increase their insurance costs and that would have been reflected in the prices charged to customers. The reclaimers were in a far better position than the respondents to estimate potential losses (including indirect and consequential losses) to their business from a fire at the factory and to obtain insurance accordingly, as they in fact did. The contract was for a small amount. To expect the respondents to obtain insurance sufficient to cover very substantial losses sustained by each of their customers, the

nature and extent of which they were in no position to estimate, would be entirely unrealistic. The fact that the respondents held public liability insurance and disclosed this fact to the reclaimers when they asked them to do so is irrelevant in the context of considering whether the limitation clause was fair and reasonable. The availability and disclosure of such cover cannot be taken as somehow derogating from the plain terms of the limitation agreed between the parties, particularly in view of the fact that the respondents had unlimited liability for death and personal injury caused by their negligence. It is also irrelevant that the respondents did not offer to contract with the reclaimers on different terms; there was no obligation on them to do so, whether under UCTA or otherwise. Moreover, the reclaimers had taken out insurance to cover the type of losses which they sustained as a result of the fire. The present action is one pursued in their name by their insurers in exercise of their subrogation rights.

[67] All these factors point strongly towards the conclusion that the limitation clause was fair and reasonable. The court is satisfied that in assessing the reasonableness of the limitation clause, the Lord Ordinary did not proceed on the basis of an erroneous principle or reach a decision which was plainly wrong. The court therefore finds no reason to interfere with his conclusion.

Disposal

[68] The court will refuse the reclaiming motion. It will allow the cross-appeal, recall the Lord Ordinary's interlocutors of 31 March 2022, repel the reclaimers' pleas-in-law, sustain the respondents' second plea, and assoilzie the respondents. All questions of expenses are reserved.