Neutral Citation Number: [2023] EWCA Civ 1297

Case No: CA-2022-002404

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
MR JUSTICE ANDREW BAKER
[2022] EWHC 2971 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 November 2023

Before:

LORD JUSTICE BEAN
LORD JUSTICE SINGH
and
LORD JUSTICE PHILLIPS

- -

Between:

LAST BUS LIMITED (TRADING AS DUBLIN COACH)	**Appellant/Claimant**
- and -	
(1) DAWSONGROUP BUS AND COACH LIMITED (FORMERLY DAWSON RENTALS BUS AND COACH LIMITED	**Respondent/ First Defendant**
(2) EVOBUS (UK) LIMITED	**Second Defendant**

- -
- -

Nigel Jones KC and **Edward Rowntree** (instructed by **Geldards LLP**) for the **Appellant**
Stuart Benzie (instructed by **Freeths LLP**) for the **Respondents**

Hearing date: 20 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 10 November by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Phillips:

Introduction

1. This appeal concerns a standard form exclusion clause incorporated into each of a series of hire purchase agreements. The clause purported to exclude the term which would otherwise be implied by section 10(2) of the Supply of Goods (Implied Terms) Act 1973 ("the 1973 Act") that the goods hired under the relevant agreement would be of satisfactory quality. The issue is whether, on an application for summary judgment, the enforceability of the clause was established by the creditor (by satisfying the requirement of reasonableness under section 6(1A)(b) and section 11 of the Unfair Contract Terms Act 1977 ("UCTA")) so that the hirer's claim for damages was rightly dismissed as having no real prospect of success, or whether that question of reasonableness should have been left to a trial. The issue may be of wider importance as neither party's counsel has found any previous decision, at any level, in which a challenge to the reasonableness of a contract term under UCTA was dismissed summarily rather than following a full trial or the trial of a preliminary issue.

2. On 28 November 2022 Andew Baker J ("the Judge") summarily dismissed the claim brought by the appellant ("Last Bus") against the respondent ("Dawson") for breach of five written hire purchase agreements entered between them between 15 July 2014 and 24 February 2017. Last Bus's claim was that the 30 Mercedes Tourismo coaches financed by Dawson under those five agreements were not of satisfactory quality, but were liable to (and in four cases did) catch fire due to defects, requiring Last Bus to employ a far more rigorous and expensive maintenance regime than should have been necessary. Last Bus claimed damages exceeding €10m.

3. In his reserved judgment of the same date the Judge first determined that clause 5(b) of Dawson's standard terms and conditions, which were incorporated into each of the hire purchase agreements, purported (as a matter of construction) to exclude the statutory implied term as to satisfactory quality. There is no appeal from that determination. The Judge further held that Last Bus had no real prospect of resisting Dawson's plea that clause 5(b) satisfied the requirement of reasonableness. It is against that finding that Last Bus appeals, permission to do so having been granted by Males LJ on 3 February 2023.

The facts

4. The following summary is drawn from the Judge's account of the factual background in his judgment and from other documents before the Court.

5. Last Bus operates a fleet of about 60 premium passenger coaches in and around Dublin. For many years Last Bus had operated Setra model coaches, sourced from the second defendant ("EvoBus"), a subsidiary of Daimler AG, but acquired on hire purchase terms from Dawson, a company whose business includes the hire purchase financing of coaches and buses. Indeed, over a period of 20 years Last Bus had entered 45 hire purchase agreements with Dawson, covering about 200 vehicles. Those hire purchase

agreements were all on Dawson's terms and conditions, each containing clause 5(b) referred to above or a materially similar provision.

6. In 2013 and early 2014 Last Bus negotiated directly with EvoBus as to the purchase of a number of Mercedes Tourismo coaches, the Setra model no longer being available due to the transition to compliance with Euro 6 emission standards. Last Bus and EvoBus agreed the number (10 per year for 3 years), the price (approximately £250,000 each) and specification of the coaches to be supplied and EvoBus provided an order confirmation. On 14 April 2014 Last Bus signed two purchase orders for the first 10 coaches on EvoBus' terms and conditions of sale. Those terms contained an exclusion of liability clause and also provided that Last Bus might arrange for a hire purchase company to purchase the goods from EvoBus at the same price and then lease them to Last Bus. Last Bus contends that its orders for the further 20 coaches were implicitly on the same terms.

7. In the case of each purchase order Dawson did indeed step in to purchase the coaches from EvoBus and thereafter leased the coaches to Last Bus pursuant to the five hire purchase agreements referred to above. Clause 5(b) of Dawson's terms and conditions of hire, in which Dawson was defined as "the Company" and Last Bus as "the Customer", provided as follows:

> "The Customer agrees and acknowledges that it hires the Vehicle for use in its business and that no condition, warranty or representation of any kind is or has been given by or on behalf of the Company in respect of the Vehicle. The Company shall have no liability for selection, inspection or any warranty about the quality, fitness, specifications or description of the Vehicle and the Customer agrees that all such representations, conditions and warranties whether express or implied by law are excluded. Notwithstanding the foregoing provisions of this clause, nothing herein shall afford the Company a wider exclusion of liability for death or personal injury than the Company may effectively exclude having regard to the provisions of the Unfair Contract Terms Act 1977. The Customer acknowledges that the manufacturer of the Vehicle is not the agent of the Company and the Company shall not be bound by any representation or warranty made by or on behalf of the Vehicle manufacturer."

8. In 2018 four of the coaches suffered fires. Last Bus alleged that three of those fires were caused by a defective cooling system, requiring Last Bus to undertake a more rigorous and expensive maintenance regime and entailing that the vehicles were not of satisfactory quality. EvoBus denied the allegation, maintaining that the fires were caused by contaminated fuel or misuse of vehicles by Last Bus. Dawson relied primarily on the exclusion in Clause 5(b) and alleged that Last Bus was estopped by contract from asserting a claim in reliance on the statutory implied term.

9. Last Bus commenced these proceedings in April 2020, asserting that, in addition to its contractual claim against Dawson, it had a continuing contract and/or a collateral contract with EvoBus and that neither clause 5(b) of Dawson's terms of business nor the exclusion clause in EvoBus's terms and conditions satisfied the requirement of reasonableness.

10. On 14 March 2022 Dawson applied for summary judgment against Last Bus, an application granted by the Judge as set out above. EvoBus was not party to the application and the claim against that company will proceed to trial in any event.

The relevant statutory provisions

11. Section 10 of the 1973 Act concerns implied undertakings as to quality or fitness in hire purchase agreements. Sub-sections (2) and (2A) provide as follows:

> "(2) Where the creditor bails or hires goods under a relevant hire-purchase agreement in the course of a business, there is an implied term that the goods supplied under the agreement are of satisfactory quality.
>
> (2A) For the purposes of this Act goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all other relevant circumstances."

12. Section 6(1A) of UCTA provides that:

> "Liability for breach of the obligation arising from –
>
> ….
>
> (b) section..10…of the 1973 Act…
>
> cannot be excluded or restricted by reference to a contract term except in so far as the term satisfies the requirement of reasonableness"

13. The "reasonableness" test is set out in section 11 of UCTA. Section 11(1) provides that the requirement of reasonableness is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract is made.

14. Section 11(2) states that, in determining for the purposes of section 6 or section 7 whether the requirement of reasonableness has been met, regard is to be had to the matters contained in Schedule 2. Schedule 2 provides:

> "The matters to which regard is to be had in particular for the purposes of sections 6(1A), 7(1A) and (4), 20 and 21 are any of the following which appear to be relevant—
>
> (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
>
> (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
>
> (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things,

> to any custom of the trade and any previous course of dealing between the parties);
>
> (d) 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."

15. Section 11(5) provides that it is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

16. Section 3 of UCTA applies as between contracting parties where one of them deals on the other's written standard terms of business[1]. Although not relied upon by Last Bus, it was common ground that the section applies in the present case as clause 5(b) forms part of Dawson's standard terms of business. In my judgment, as it is another route to the requirement of reasonableness (albeit not expressly engaging Schedule 2), the section should be taken into account when considering the application of that test in this case.

17. Section 3(2) provides:

> "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 obligations, to render no performance at all,
>
> except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfied the requirement of reasonableness."

The authorities

18. In *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 the House of Lords held, in a landmark decision, that the doctrine of fundamental breach of contract was not good law, and that whether and to what extent an exclusion clause was to be applied to a breach of contract was a matter of construction of the contract. At p. 843C Lord

[1] The section also applied where a contracting party was dealing as a consumer until amended by the Consumer Rights Act 2015. The position of a consumer is now protected by section 62 of that Act which provides by subsection (1) that "An unfair term of a consumer contract is not binding on the consumer".

Wilberforce noted that the doctrine had served a useful purpose where the operation of exclusion clauses had been productive of injustice, but pointed out that Parliament had intervened by passing UCTA, going on to state:

> "This Act applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and reasonable, It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions."

19. In *Lease Management Services Limited v Purnell Secretarial Services Limited* [1993] Tr.L.R. 337 a company leased a photocopier for use in its business. Contrary to assurances given by an agent of the supplier, but also with the apparent authority of the leasing company, the copier lacked an essential feature required by the company. In defence of the company's claim, the leasing company relied upon a widely worded exclusion clause in its standard terms, falling within section 3 of UCTA. At trial, the judge held that the terms satisfied the requirement of reasonableness on the basis that the leasing company had had little part to play in the matter save as finance house, relying in that regard on dicta of Dillon LJ in *R. & B. Customer Brokers Co. Ltd. v United Dominions Trust Ltd.* [1988] WLR 321 at 332. That decision was overturned on appeal, Sir Donald Nicholls V-C (with whom Hirst and Waite LJJ agreed) holding it was not reasonable to exclude liability for an express oral warranty. As to the approach of the judge below, the Vice-Chancellor stated:

> "I have to differ from the Judge. I am unable to accept, as a general proposition, that an exclusion clause which would be unreasonable in a contract for sale by a supplier will be reasonable as between a hirer and a finance company because of the latter's non-inspection of the goods and its non-participation in negotiations proceeding the transaction. If there were such a general proposition, acquisition by hire from a finance company rather than by purchase from a supplier would become a trap. A customer would not expect his rights regarding defects to differ according to which of these two acquisition routes he chooses to follow.
>
> ….
>
> I have in mind that by imposing a reasonableness test Parliament envisaged that a condition such as [the exclusion clause] is not necessarily unreasonable. There may be circumstances where it is reasonable. But where the condition excludes all liability for breach of any representation or warranty, express or implied, the burden of proving reasonableness will not be lightly discharged…".

20. The reasonableness of an exclusion clause contained in the standard terms of a finance company was again considered, this time by way of preliminary issue, in *Sovereign*

Finance Ltd. v Silver Crest Furniture Ltd. and others [1997] 16 Tr.L.R 370. Machinery was supplied under a hire purchase agreement which provided that, as the goods had been selected by the hirer and had not been inspected by the finance company, the latter did not give any representation or warranty, express or implied as to the goods, their merchantable quality or fitness for purpose. Longmore J identified that both section 3 and section 6 of UCTA applied to the clause, and that although section11(2) applied in the case of section 6 (requiring the court to take into account the factors in Schedule 2), little turned on the distinction and he did not have to decide which provision took precedence. In this regard, Longmore J also observed that:

> "…hire purchase agreements will almost invariably be made on the finance company's standard terms of business. Consideration of the sch. 2 factors does not preclude consideration of other relevant circumstances. Conversely, where the court is not obliged to take the factors into account, they will often nevertheless be pertinent.
>
> …Insofar as it may be necessary to decide the matter…it seems to me that in any case where it is sought to exclude liability for obligations implied into a hire purchase agreement the court must have regard to the sch. 2 guidelines… I do have regard to them but do not derive much assistance from them on the facts of the present case. "

21. On the question of reasonableness, Longmore J regarded himself bound by the decision in *Purnell* that an exclusion clause "could not reasonably be relied upon by a finance company merely because the finance company had not participated in the pre-contract negotiations and had not themselves inspected the goods" (p. 60B). Longmore J recorded the finance company's arguments, in support of the reasonableness of the clause, that the hirer could have financed the transaction in alternative ways and should be treated as aware of such a term as it had entered other transactions with similar clauses. However, he concluded as follows:

> "The natural meaning of the clause is that there is to be no liability for any express representation or warranty. It amounts to a total exclusion of all liability. That natural meaning is offensive to reason, as the Vice-Chancellor said in [*Purnell*]…Any clause with that meaning is, therefore, *prima facie* unenforceable.
>
> ……
>
> …it is true that [*Purnell*] did deal with an express or implied warranty made contemporaneously with the contract. It is also true that the present case deals with an exclusion of implied warranties. Nevertheless, the language used in [*Purnell*] applies in terms to implied warranties of the kind relevant in the present case."

22. In *Danka Rentals Ltd v Xi Software Ltd.* [1998] Tr.L.R. 74 HH Judge Gibbs QC (sitting as a High Court Judge) followed the approach taken by Longmore J in *Sovereign* to the question of the reasonableness of an exclusion clause in the terms of business of a finance company, finding the clause to be unreasonable following a trial. At 80A he stated:

> "…More to the point, supposing the parties had contemplated the quality of the equipment supplied to the defendant would have been as completely useless, as it in fact turned out to be, would it have been reasonable for the [finance company] to say: "We accept we are the owners in law. We accept we have undertaken to lease this agreement to you over quite a long fixed term, nevertheless, we can reasonably say to you however useless and defective the equipment will be from the outset, we can require you to look to the suppliers as the people who sold it to use for your remedy and we can require you to continue paying the rent meanwhile"?
>
> I consider it would not be and is not reasonable for the [finance company] to take that position, nor do I think it would be fair. The fact is that the [finance company] were and remain the owners of the goods. They, as well as the [hirer], chose to adopt that route in financing the supply of goods to the defendants. I do not think it is *prima facie* reasonable for them to say: "That is a mere matter of form. We are entitled in all other respects to disassociate ourselves from any obligations as lessors". I find that they have not discharged the burden of providing that it was reasonable to do so in this case."

23. *Watford Electronics Limited* v *Sanderson CFL Limited* [2001] EWCA Civ 317 did not involve a finance company lease, but concerned the direct supply of an integrated software system, comprising equipment and two software licences. The supplier's standard terms of business excluded liability for indirect or consequential losses and limited any liability to the price paid by the purchaser. Following a trial, the clause was found not to be reasonable. That finding was reversed by the Court of Appeal, despite recognising the utmost respect which must be given to the original decision on the question of reasonableness[2]. Chadwick LJ (with whom Peter Gibson LJ and Buckley J agreed) stated:

> "54…it is reasonable to expect that the contract will make provision for the risk of indirect or consequential loss to fall on one party or the other. In circumstances in which parties of equal bargaining power negotiate a price for the supply of product under an agreement which provides for the person on whom the risk of loss will fall, it seems to me that the court should be very cautious before reaching the conclusion that the agreement which they have reached is not a fair and reasonable one.
>
> 55. 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

[2] *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 per Lord Bridge at 815F-816C and *Overseas Medical Supplies Lt v Orient Transport Services Ltd.* [1999] 2 Lloyd's Rep 273 at p. 276.

> 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.
>
> 56. In the present case the parties did negotiate as to the price. Mr Jessa, on behalf of Watford, secured substantial concessions on price from Mr Broderick. The parties negotiated, also, as to which of them should bear the risk (or the cost of insurance against the risk) of making good the loss of profits, and other indirect or consequential loss, which Watford might suffer if the product failed to perform as intended. Mr Jessa was less successful in obtaining from Mr Broderick the concession which he wanted. The most that he could get was an undertaking that Sanderson would use its best endeavours to allocate appropriate resources to ensuring that the product performed according to specification. But, for the reasons which I have sought to explain, that was worth something to Watford; and Mr Jessa decided that he would be content with what he could get. In my view it is impossible to hold, in the circumstances of the present case, that Sanderson took unfair advantage of Watford; or that Watford, through Mr Jessa, did not properly understand and consider the effect of the term excluding indirect loss.
>
> 57. It follows that I would hold that the term excluding indirect loss, applicable in the circumstances which I have described, was a fair and reasonable one to include in the contract."

24. It is apparent from the above that, although the exclusion clause formed part of the supplier's standard terms, its inclusion followed specific negotiation between the parties as to the matters it addressed, so that the clause reflected a negotiated position as to which party would accept certain risks and the cost of insuring against them.

25. In *Granville Oil & Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570 consignors sued freight forwarders for damage to a cargo of paint during transit from Kuwait to Rotherham. The freight forwarders relied on a clause in the British International Freight Association Standard Conditions which discharged any liability if suit was not brought and notified within 9 months. The clause was subject to section 3 of UCTA as part of the transit included UK road transport: that section does not apply to carriage of goods by ship (Schedule 1 para 2(c)). The Court of Appeal reversed the trial judge's finding, after the hearing of preliminary issues, that the clause was reasonable, representing a practical time limit to claim for damage. Tuckey LJ (with whom Potter LJ and Hart J agreed) stated at [31]:

> "For these reasons I think the judge reached the wrong conclusion in this case. If necessary I would say he was plainly wrong. I am pleased to reach this decision. The 1977 Act obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make

> contracts of their choosing and expect to be bound by their terms. Here the transaction includes carriage of goods by sea and insurance. These spheres of commercial activity standing on their own are excluded from the Act (see Schedule 1 paras. 1a (insurance) and 2c and 3 (carriage of goods by ship). In this case the element of road transport was sufficient to render the transaction subject to the Act, but the mixed nature of the contract of carriage emphasises the interest of the freight forwarder in having a time limitation which is applicable across the spectrum of his obligations."

26. As Singh LJ pointed out in the course of argument, the duty of the court is to apply the will of Parliament as enacted through the relevant legislation, and little if any weight should be given to expressions of lack of personal enthusiasm for that legislation or its effect. UCTA is not limited in application to consumer contracts, and applies with full force (subject to the exceptions in Schedule 1) to commercial contracts where one party is dealing on the other's standard terms (section 3) or where the contract is one of hire purchase (section 6(1A)(b)).

27. In *Balmoral Group Ltd v Borealis (UK) Ltd and others* [2005] EWHC 1900 (Comm) concerned contracts between major commercial companies for the supply of borecene in bulk. The supplier's standard terms (to which section 3 UCTA applied) governed the contracts, containing clauses excluding liability for supplying borecene of unsatisfactory quality, save for the provision of replacement product or its price. In considering the Schedule 2 guidelines, following a very lengthy trial, Christopher Clarke J stated as follows in relation to guideline (a), the strength of the bargaining position of the parties:

> "409… in relation to *price*, the parties were on at least an equal footing (indeed Balmoral may have had slightly the upper hand), but on *terms* they were not. Borealis was only prepared to supply borecene, which became, as Borealis no doubt wished, Balmoral's primary raw material, on its terms. Other suppliers, whether of borecene or ZN material were also likely to be willing to supply only on their similar standard terms…."

28. Christopher Clarke J held that the clauses did not meet the requirement of reasonableness, concluding as follows:

> "421. When the contracts were made Borealis knew that Balmoral was buying borecene for the purpose of making oil tanks and that it was relying on Borealis to supply a polymer capable of being used to make consistently satisfactory tanks. It was the assumption of both sides that it was so capable. The supply of a product which, because of a latent defect…made the manufacture of consistently satisfactory tanks impossible would confound those assumptions. In those circumstances a blanket exclusion of any liability whatever is prima facie unreasonable...
>
> 422. A determination of the reasonableness of a contractual exclusion requires consideration of whether the allocation of risk effected by the exclusion is appropriate. I have not been persuaded that requiring

> Balmoral to bear the entire risk of a latent defect in Borealis' product is an appropriate allocation of risk. The Sale of Goods Act itself recognises that, all other things being equal, it should be the seller who bears the responsibility. Borealis has extensive insurance against just such a risk. Whilst product recall insurance would probably have been available to Balmoral, albeit expensively, Balmoral did not have such insurance. The evidence does not establish that product recall insurance would have been normal for someone in Balmoral's position.
>
> 423. But commercial parties habitually make agreements amongst themselves that allocate risk; and the Court should not lightly treat such agreements as unreasonable. The present case is not, however, one in which the contracts made were the result of a serious negotiation as to the incidence of risk: cf the *Watford* case where that was exactly what took place. Borealis' terms were presented on a take-it-or leave it basis and Balmoral's scope for going elsewhere on any better terms was very limited (on the evidence before me to Matrix and, even with them, obtaining any substantial sum would depend on proving negligence). Whilst Borealis UK's terms were standard in the trade they are not the product of any agreed process of negotiation between representatives of sellers and buyers."

29. In *Goodlife Foods Limited v Hall Fire Protection Limited* [2018] EWCA Civ 1371 the defendant had, ten years previously, supplied a fire suppression system to protect the claimant's factory. Following a fire the claimant brought a claim in negligence (a claim in contract being statute-barred), alleging that the system should have operated to stop the fire spreading, but was defective. The defendant relied on an exclusion clause in its standard terms, the reasonableness of which was considered as a preliminary issue. The Court of Appeal upheld the trial judge's decision that the clause met the requirement of reasonableness, an important factor being that both parties had full insurance (the claim being brought by subrogated insurers). Coulson LJ, with whom Gross and Moylan LJJ agreed, stated at [93]:

> "More widely, it is certainly right, as the commentators have noted, that the trend in the UCTA cases decided in recent years has been towards upholding terms freely agreed, particularly if the other party could have contracted elsewhere and has, or was warned to obtain, effective insurance cover…"

30. Gross LJ, at [103], in referring to [55] in the judgment of Chadwick LJ in *Watford*, added that:

> "…even where UCTA is applicable, at least in the case of commercial contracts between parties of broadly equal bargaining power, considerations of party autonomy and freedom of contract remain potent."

The judgment

31. The Judge began his consideration of the reasonableness of clause 5(b) with a general comment, by reference to *Watford*, *Granville* and *Goodlife*, that:

> "16. The more recent authorities on UCTA in the Court of Appeal show a marked reluctance to interfere, by concluding that an exclusion clause has not been shown to satisfy the requirement of reasonableness, in substantial commercial transactions entered into by parties of equal bargaining strength..."

32. The Judge then referred to *Purnell*, recognising at [21] the general proposition that an exclusion clause which would be unreasonable between seller and buyer is not rendered reasonable between hire purchaser and finance house by reason of the latter's lack of involvement with the goods or the commercial negotiations. But at [22] the Judge pointed out that the opposite was true: a clause which would be a reasonable exclusion by a supplier in a direct sale would, other things being equal, also be a reasonable exclusion by a finance company.

33. The Judge, at [35], considered the matters set out in Schedule 2 to UCTA, finding (i) that there was no inequality of bargaining power between Last Bus and Dawson and that Last Bus's requirements could have been met by other means; (ii) that any hire purchase terms available in the market would have come with a similar exclusion; and (iii) that Last Bus ought reasonably have known of the existence and extent of clause 5(b) given previous dealings with Dawson.

34. After considering various factors advanced by Dawson, the Judge summarised its case on reasonableness at [37] as follows:

> "(i) Last Bus was a substantial commercial party well able to acquire the Tourismos, if it so wished, without contracting on a hire purchase basis with Dawson. There is no suggestion, or basis for suggesting, that Dawson, in effect, took advantage of Last Bus, or that Clause 5(b) is so unreasonable that it might have occurred to Dawson that in signing up to it, Last Bus must have not properly understood or considered it;
>
> (ii) if Last Bus was not content with Dawson's exclusionary terms, it was in a position to secure such contractual assurances as to quality as EvoBus was willing to offer, either alongside the use of hire purchase via Dawson (or another finance house), or if necessary by buying directly; and (iii) there was a long and consistent prior course of dealing between Last Bus and Dawson, in which Last Bus had freely agreed to, and never once raised objection to or concern about, Clause 5(b) (or its materially equivalent predecessors)."

35. The Judge noted at [38] that those factors meant that Dawson did not need to rely on the proposition rejected in *Purnell*. At [39] he further recorded Dawson's submission that:

> "[those] factors are sufficient to overwhelm the one factor that, so far as it goes and other things being equal points away from the

> reasonableness of the term, namely that Last Bus did not have the option to contract with anyone else for the hire purchase finance on terms that would not have involved an equivalent exclusion of liability."

36. The Judge concluded at [40] as follows:

> "Bearing in mind the approach taken in cases between substantial commercial parties of equal bargaining power…there is no real prospect of Last Bus resisting Dawson's primary argument. In my judgment, it is compelling and sufficient. There is no need for a trial to see that Clause 5(b) satisfied the requirement of reasonableness. Upon indisputable matters of fact, that in my view is bound to be the finding in this case; and there is no reason, let alone a compelling reason, for keeping Dawson in this Claim if there is no realistic prospect of Last Bus avoiding that finding."

The grounds of appeal and the parties' contentions

37. Last Bus advanced eight grounds of appeal, but the overall thrust was that the Judge should not have determined the highly fact sensitive issue of reasonableness on a summary basis, when not all potentially relevant facts were before him. This was the basis on which Males LJ granted permission to appeal. The specific grounds may be summarised as follows:

    i) Whilst purporting to apply the decision in *Purnell*, the Judge fell into exactly the trap identified in that case, namely, leaving a purchaser of defective goods without any remedy because it had purchased with lease finance (grounds 1, 2 and 5);

    ii) The Judge failed to give proper consideration to whether Last Bus had an enforceable right against EvoBus (notwithstanding its exclusion clause) and was wrong to determine the claim against Dawson in isolation (grounds 3, 4, 6 and 7);

    iii) The Judge adopted the wrong approach to considering the reasonableness of an exclusion clause in the case of a hire-purchase agreement, treating it as reasonable unless there were specific factors that militate otherwise. This was the reverse of the correct position under section 10 of the 1973 Act and UCTA and was wrong as a matter of law (ground 8).

38. In support of its grounds of appeal, Last Bus pointed out that the purported effect of clause 5(b) is a blanket exclusion of any and all liability on the part of Dawson, no matter how defective the coaches may have been: it would effectively have permitted Dawson to provide no value at all under the hire purchase agreements, yet be entitled to the full amount of hire. That was exactly the type of clause which was regarded as "*prima facie* unenforceable" in *Sovereign*, applying the reasoning in *Purnell* that the burden of proving the reasonableness of such a clause "will not be lightly discharged".

39. In that context, the Judge's view at [39] of the judgment (identifying the "only factor that points away" from the reasonableness of clause 5(b)) was far too simplistic and did

not properly reflect the statutory starting point or the main factors identified in the authorities.

40. Further, notwithstanding the tripartite nature of the overall structure of the transactions in question, there was no evidence as to Dawson's back-to-back-rights as against EvoBus, which might have significant effect on the reasonableness of Dawson excluding all liability to Last Bus: indeed Dawson had not put its contracts with EvoBus before the court. Neither was there evidence of the insurance position of any of the three parties involved.

41. Last Bus further pointed out that, in all of the cases referred to above, the issue of reasonableness of a contract term had been determined after a trial of that issue. As mentioned above, the parties had found no case in which a clause had been held to be reasonable within UCTA on a summary basis. Given the factors set out above, Last Bus submitted, this was not a case where it was appropriate to depart from that otherwise universally followed practice.

42. In response, Dawson stressed that the question of reasonableness was highly fact-specific and that this Court should be very slow to interfere with the assessment of those facts by the Judge (as per the cases referred to in footnote 2 above). In this case the facts were unusual and remarkable. First, Last Bus had signed up to a very large number of substantial contracts with Dawson containing the same or materially similar term over many years and must be taken to have been very well aware of the clause and accepted it, meaning that factors (a) and (c) in Schedule 2 to UCTA both weighed heavily in favour of reasonableness. Second, the evidence demonstrated that Last Bus believed when it contracted with Dawson that it had continuing contracts with EvoBus, and that it was therefore looking to EvoBus in relation to the quality of the coaches and well understood and intended that Dawson would not accept liability for such matters as merely the finance intermediary. Dawson emphasised that it was that understanding of Last Bus at the time of contracting with Dawson that mattered, not the actual contractual position. Investigation of that issue at trial would not therefore change the analysis.

43. Dawson further submitted that the Judge had correctly applied the law, rightly identifying the ratio of *Purnell* and taking no account of the fact that Dawson's sole involvement was as finance house. The Judge was further right to identify the approach in commercial cases, apparent from *Watford*, *Granville* and *Goodlife*, but nevertheless gave detailed consideration to the competing factors before reaching the unimpeachable conclusion, influenced by that trend, that clause 5(b) would inevitably be found to be reasonable.

44. In summary, Dawson submitted, Last Bus was trying to circumvent very clear Court of Appeal authority as to the reasonableness of terms in commercial contracts and to rely on UCTA (legislation primarily aimed at protecting vulnerable consumers) to avoid the consequences of its failure properly to read and understand the terms to which it had subscribed for many years.

Discussion

45. As pointed out by Lord Wilberforce in *Photo Production*, in enacting UCTA Parliament did not legislate over the whole field of contract. In commercial matters where the

parties are of equal bargaining power, the parties are free to apportion risk as they see fit without judicial intervention, including by way of exclusion clauses.

46. Parliament did, however, legislate to control the reasonableness of certain terms in specified types of contract and these are not, contrary to Dawson's suggestion, limited to consumer contracts. Exclusion clauses in contracts based on one party's written standard terms of business (section 3) and also those in hire purchase contracts (section 6) are subject to the test of reasonableness, the burden being on the party relying on the term to show that the test is met. The rationale underlying these provisions is obvious: customers contracting with a business on its written standard terms, or with a hire purchase company (also likely to be on the company's standard terms) are considered, on the face of it, *not* to be of equal bargaining power, at least in relation to the terms of business which have not been individually negotiated, but may have been no more than "small print" on the back of the primary contractual documents. Parliament has decided that businesses seeking to rely on those terms to exclude what would otherwise be their liability under the contract must prove the reasonableness of those terms.

47. That is not to say that a customer and a business dealing on the latter's standard terms may not be found to be of equal bargaining power and, indeed, the respective strength of the bargaining position of the parties is the first matter identified in Schedule 2 to UCTA. The three cases mentioned by the Judge are examples: in *Watford*, commercial parties had negotiated not only as to price, but as to the risks reflected in the exclusion clauses in the standard terms (as pointed out in *Balmoral*), and in *Glanville* commercial parties of equal bargaining strength had agreed a contract for international carriage containing a practical time limit for claims. In *Goodlife* the customer had insurance against the exclude risk and the claim was in fact brought by subrogated insurers.

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

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

50. It follows from the above, in my judgment, that the Judge was wrong to approach the question of reasonableness of clause 5(b) on the basis that the parties were of equal bargaining strength and the "marked reluctance to interfere" was engaged. The prior question was whether, where Last Bus was contracting on Dawson's standard terms of business, the parties were on an equal footing as regards those terms. Given that it was plain that Dawson would not have contracted without the exclusion clause and given

the Judge's finding that no materially different terms were available in the market, the conclusion (at least arguably) should have been that the parties were not of equal bargaining strength as regards clause 5(b). On that basis, the Judge adopted the wrong approach, which was a major factor in his conclusion at [40].

51. The proper starting point, in my judgment, was that clause 5(b), contained in standard terms of business of a hire purchase company, purported to exclude any and all liability for the quality of the coaches supplied to Last Bus, leaving Last Bus without a remedy even if it received no value at all whilst having to pay for the hire. *Purnell* makes it clear that such clauses are *prima facie* unreasonable under UCTA, an approach adopted in both *Sovereign* and *Danka* and which the Judge should have followed in this case.

52. It follows from the above matters that I also consider that the Judge was wrong to state in paragraph [39] that there was only one factor that pointed away from the reasonableness of the term (the fact that hire purchase on different terms was not available). Whilst that was indeed a powerful factor, the Judge appears to have left out of account the direct legal and practical effect of the clause, potentially leaving Last Bus without any remedy if the coaches for which it paid £7.5m proved entirely worthless. That factor might have been minimised if Last Bus had had insurance (as in *Goodlife*), but there was no evidence of that. Neither could the Judge have discounted that factor on the basis that Last Bus had a good contractual claim against EvoBus given that EvoBus denied any contract and, in the alternative, relied on its own exclusion clause.

53. A third error on the part of the Judge was, in my judgment, to hold that a trial was not necessary to determine the question of reasonableness. Apart from the general point that such a fact-sensitive issue would ordinarily require a trial (although I do not say that the issue could never be determined on a summary basis), in this case there were obvious matters that required investigation. The reasonableness of clause 5(b) fell to be considered in the full context of the tripartite arrangement with EvoBus, whereby Dawson purchased from EvoBus on terms unknown. As Mr Benzie, for Dawson, conceded in argument, if Dawson had the right to an indemnity from EvoBus, that would potentially be relevant to the reasonableness of its own exclusion clause. I do not accept that the only factor relevant to reasonableness in this regard was Last Bus's subjective understanding of whether it had a contract with EvoBus, if, indeed, that was a relevant factor at all.

54. Further, there was no evidence of the insurance position of any of the three parties. If EvoBus had product liability insurance, or Dawson had liability insurance, that might well have affected the reasonableness of exclusion clauses in any of the contracts in the tripartite arrangement. It seems unlikely that Last Bus would have had insurance against increased maintenance costs, and it is not suggested that it did.

55. It will be apparent from the above that I consider that the Judge adopted the wrong approach to the question of reasonableness, did not take into account key factors and should have refused the application for summary judgment, directing that the matter proceeds to a trial in which all three parties would participate. I should make it plain that I express no view, even on a provisional basis, as to the reasonableness of clause 5(b). That will be a matter for the trial Judge.

56. I should add that the warning that this Court should be slow to interfere with a first instance judge's assessment of the reasonableness of a contract term plainly applies where the assessment was made at trial on the basis of all the evidence, including oral testimony. I do not consider that it applies with the same force where there has been a summary determination, where this Court has all the materials which were before the Judge, and is asked to review a decision that it is not arguable that a contract term is unreasonable. But in any event, my view that the Judge adopted the wrong approach and starting point and did not take into account crucial factors would have justified interfering even after a trial.

Conclusion

57. I would allow the appeal.

Lord Justice Singh:

58. I agree.

Lord Justice Bean:

59. I also agree.