Neutral Citation Number: [2017] EWHC 3366 (Comm)

Case No: C40MA066

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 19/12/2017

Before :

HIS HONOUR JUDGE EYRE QC
(sitting as a Judge of the High Court)

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Between:

ONE FISH COMPANY LIMITED	**Claimant**
- and -	
ICELAND FOODS LIMITED	**Defendant**

- -
- -

STEVEN FENNELL (instructed by **Mr. Greg Plunkett**) for the **CLAIMANT**
ANDREW LATIMER (instructed by **Pannone Corporate LLP**) for the **DEFENDANT**

Hearing dates: 28th, 29th, 30th November, 1st and 4th December 2017

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JUDGMENT

His Honour Judge Eyre QC:

Introduction.

1. It is common ground that the Claimant and the Defendant were parties to an agreement whereby the Claimant was to supply the Defendant with frozen salmon fillets in the calendar year 2014. The salmon fillets were to be supplied in packs of 4 at a price of £8.92 per kilogram. They were to be sold as the Defendant's "own label" fillets and so were to be supplied in packaging bearing the Defendant's name and with the artwork for the packaging in a form approved by the Defendant.

2. It is also common ground that the contract between the Claimant and the Defendant came to an end in September 2014 following the placing of orders or purported orders by the Defendant. The crucial dispute between the Claimant and the Defendant relates to the effect of those orders. The Claimant says that the orders came as the culmination of a series of breaches by the Defendant; that they were orders which it was impossible for the Claimant to fulfil; and that the Defendant knew the Claimant could not fulfil the orders in the terms they were made. It is the Claimant's position that it was being "set up to fail" and that the Defendant's actions demonstrated that the Defendant did not intend to abide by the contract. That was, the Claimant says, a renunciation of the contract which the Claimant was entitled to and did accept as ending the contract. The Defendant's position is that it was the Claimant which had been failing to perform its obligations and that the orders were a genuine demonstration of the Defendant's intention to honour its obligations and to take frozen fish from the Claimant. In those circumstances, the Defendant says, the Claimant's purported termination of the contract in response to the orders was itself a renunciation which the Defendant was entitled to and did accept as then ending the contract.

3. There was substantial agreement about large parts of the relevant factual background. The Defendant is a retailer of frozen food products to the public. In 2012 and 2013 the Defendant had bought salmon fillets from SNG UK Limited ("SNG"). The arrangements in those years had been for the Defendant to take 25% of its requirements for frozen salmon fillets from SNG. The balance of the Defendant's requirements had been obtained in those years from Marine Harvest ASA ("Marine Harvest") and that arrangement was to continue for 2014. Salmon fillets were an important product for the Defendant being one of their top ten selling products. However, there was to be an increase in the price and a reduction in the size of the packs to be sold by the Defendant in 2014. The Defendant says that there was some uncertainty as to how consumers would react to these changes and as to the level of demand. The Claimant accepts that these changes were to be made but says that the Defendant was nonetheless in a position to predict at least the minimum quantity of salmon which it would require.

4. The parties are agreed that the original agreement for 2014 was made between the Defendant and SNG. They are also agreed that the Defendant's "Terms and Conditions of Purchase" were incorporated in the contract. The Claimant is described in the Particulars of Claim as having been a sister company of SNG.

In any event it is common ground that there was a novation of the contract to the Claimant on 26th November 2013. The supply in 2012 and 2013 had been from a processing factory in Poland but the intention of the Claimant was that the supply for 2013 should be from a factory in Norway.

My Approach to the Matters of Factual Dispute.

5. My decision will turn in very large part on questions of interpretation of the correspondence and assessment of the effect of the parties' actions in the light of my conclusions as to the terms of the contract. There are, nonetheless, a number of matters in respect of which there are disputes as to what was actually said and done.

6. In coming to conclusions about those disputes I remind myself of the need to exercise care in drawing conclusions from the demeanour of a witness when giving evidence. What might appear to one judge to be evasion and a reluctance to answer questions indicative of unreliability in the evidence of a particular witness might to another judge be seen as commendable caution and care in giving evidence indicative of the reliability of the same witness's evidence. I must also bear in mind the common ability and tendency of those looking back on events in the past to persuade themselves that what they wanted to happen or what they think should have happened did actually happen. It follows that I must set my assessment of the impression made by the oral evidence of the witnesses against the conclusions to be drawn from the contemporaneous documents and from inherent likelihood using the contemporaneous documents in particular as the best guide to what occurred.

7. I am satisfied that most of the witnesses giving evidence in the trial of this matter were striving to give me their honest recollection albeit a recollection inevitably coloured by the passage of time and by the viewpoint from which they were seeking to recollect matters. However, I was driven to the conclusion that I could not regard the evidence of Carl a Lag as reliable. I take account of the fact that although he is a fluent English speaker English is not Mr. Lag's first language. Nonetheless, there were aspects of Mr. Lag's evidence which led me to conclude that the reliability of that evidence was at best questionable. I have set out at [21] and [22] below an instance where there were differences between the evidence which Mr. Lag gave orally and the account set out in his witness statement about a significant alleged conversation. In addition I have noted at [23] his action when he met Mr. Thomas of the Defendant on 24th January 2014. I bear in mind that on that occasion Mr. Lag was not giving evidence in court but it is apparent that he regarded it as appropriate to assert to Mr. Thomas that the agreement was that the Defendant would take 225 tonnes of salmon from the Claimant when even on the Claimant's case the obligation was only to take 200 tonnes. Similarly, as described at [43] below Mr. Lag regarded it as appropriate to take Miss. Decruze to the plant at Oksnes and to cause her to begin to inspect that plant without telling her in advance of her arrival there that it was not the plant which she had come to inspect. Those actions were cavalier at best and demonstrate that Mr. Lag did not feel constrained by a requirement of scrupulous factual accuracy in his dealings with the Defendant. I do not conclude that Mr. Lag has deliberately lied in his evidence in this case. Moreover, I formed the impression that he was genuine in his belief that the

Defendant had treated the Claimant badly. Nonetheless, those aspects of his dealings with the Defendant and of his evidence mean that I cannot regard his evidence as reliable and I attach little weight to his evidence where that evidence conflicts with the account given by others and still more so when it is inconsistent with the contemporaneous documents.

The Quantity of Salmon to be ordered.

8. The first important matter of dispute between the parties is the question of the quantity of salmon fillets which the Defendant was to take from the Claimant. The Claimant's case is that the agreement was for the Defendant to take a minimum quantity of 200 tonnes in 2014. The Defendant says that there was no fixed quantity but that instead it was to order 25% of its requirement for 2014 from the Claimant. Both sides are agreed that the contract was formed in e-mails and telephone conversations on 7th November 2013 but while the Defendant says that the e-mails accurately record what was agreed the Claimant contends that the conversations effected a different agreement providing for the supply of a minimum quantity of salmon.

9. The relevant e-mails were:

30th October 2013 when Michael Lavelle (at that stage an employee of SNG and subsequently the Managing Director of the Claimant) e-mailed Alastair Crimp of the Defendant saying:

> "to confirm our earlier conversation; our new fixed 12 months contract prices for 2014 are:
>
> "200MT Plain 4 pack fillets - £9.80/kg (net) …."

On 6th November 2013 Mr. Lavelle sent a further e-mail which he described as nullifying his earlier e-mail and in which he quoted a revised price of £9.45/kg. He went on to say:

> "this offer is based on Norwegian raw material, processed and packed in Norway (not Poland) which we would be delighted to show Emma at her earliest opportunity …". The latter element being a reference to Emma Decruze, the Defendant's relevant food technologist who would in due course need to approve any new processing facility.

On 7th November at 10.40 Mr. Crimp sent an e-mail to Mr. Lavelle. He copied Mr. Lag of SNG (and now of the Claimant) into his e-mail as had Mr. Lavelle. Mr. Crimp said:

> "As discussed this morning we cannot process the Natural Salmon business at the price indicated below [being a reference to Mr. Lavelle's e-mail appearing below in the e-mail chain]

> "However, we would be prepared to maintain the 25% share of this product with SNG at £8.92/kg. Can you confirm today if this is workable or not."

Mr. Lag replied at 11.48 the same day asking to be given until the end of the day to confirm and saying "I hate to let this business go away after so much struggle."

It appears that SNG had reached a decision by 14.51 on that day because that was when Mr. Lag e-mailed Mr Crimp saying:

> "I can hereby confirm your price of £8.72/kg.
>
> "Start January (pending packaging material printing)
>
> "This will be done in a new plant – not BG Poland".

10. The Claimant's case is that the e-mail exchanges were not the totality of the dealings forming the agreement. In his witness statement Mr. Lag said that there had also been a telephone conversation in which he had spoken to Mr. Crimp and in which Mr. Crimp had agreed that the Defendant would buy a minimum of 200 tonnes from SNG in 2014. Mr. Lag said that Mr. Crimp anticipated that there would be substantial sales in 2014 "well in excess of 800 tonnes". The Claimant's position, therefore, is that through Mr. Crimp the Defendant was saying in terms that it would order a minimum of 200 tonnes and that the Claimant's e-mail confirmation at 14.51 was given on that basis.

11. Mr. Crimp denied that he had at any stage agreed that the Defendant would take a fixed quantity of salmon fillets from the Claimant. He accepted that both Mr. Lavelle and Mr. Lag had pressed him to agree to take a fixed quantity of 200 tonnes. However, he said that he had told them both that he could not agree to take a particular quantity but that the agreement would be a percentage of the Defendant's requirements as had been the case in previous years. Mr. Crimp said that he had attempted to give an indication of the quantity which the Defendant would be likely to require but that he had made it clear that there was no commitment to ordering a particular minimum quantity.

12. It follows that there is a direct conflict as to what was said in conversations which both sides accept took place. On behalf of the Claimant there are said to be a number of matters which should incline me to accept Mr. Lag's account.

13. First, it is said that the attitude of SNG as to its willingness to contract on the basis of a percentage of the Defendant's requirements rather than a fixed quantity had changed because in 2013 the Defendant had cancelled its contract to take marinated salmon from SNG. It is said that SNG had not challenged this but that the cancellation had changed its perception of the approach to be taken in its dealings with the Defendant.

14. It was said that the supply to the Defendant in 2013 had in fact equated to 200 tonnes when annualised and so it was understandable that this figure was being agreed. There was agreement that the supply in 2013 had been a total of about

146 tonnes for the calendar year. I could understand how the supply in 2012 which had been about 180 tonnes for a part year could be regarded as equating to 200 tonnes a year. However, I was unable to understand or accept the contention that the total of 146 tonnes for 2013 equated to 200 tonnes in a full year. In any event while that could indicate the quantities which the parties expected to be required it does not mean that the Defendant would have committed itself to take a minimum quantity of that amount. Mr. Crimp accepted that he had given an indication of the quantity which he anticipated would be required but was clear in saying that he had put this forward as an indication or forecast only and that the commitment was to a percentage of the Defendant's requirement and not to a particular quantity. In that regard I have already noted that there were to be changes in the price of the packs being sold to the public and that the Defendant has said that there was a concern that this would impact on the quantity to be sold.

15. Next Mr. Lag contended that the trade operated on the basis of orders being placed for fixed quantities of goods. He said that he had to and did place an order for a fixed quantity of salmon from SNG's supplier, Hofseth International AS ("Hofseth"). Indeed, the order placed with Hofseth was for 239 tonnes. Mr. Lag explained that this was because he had been led to believe that the Defendant would be likely to require more than 200 tonnes from the Claimant. It was Mr. Lag's contention that as SNG had to order a specific quantity from its supplier it needed to know that it would itself be selling a fixed quantity to the Defendant. I find this contention unpersuasive. It was common ground that the contracts for supply in 2012 and 2013 had been on the basis of SNG supplying a percentage of the Defendant's annual requirement for salmon fillets and that the Defendant had not been committed to ordering a particular minimum quantity. It is not suggested that the practice in the trade generally had somehow changed in the course of 2013. Moreover, I have regard to the nature of the process in which the parties were engaged. The Claimant was supplying packs of salmon fillets to the Defendant which the Defendant was, in turn, selling to the general public. There was no fixed or set quantity of such fillets which the Defendant could guarantee selling to the general public. The quantity sold would depend on a range of factors not least being matters of public taste and the offers or promotions mounted by the Defendant's competitors. I have already noted that the Defendant was concerned that the increase in price of its packs of fillets would have an impact on sales. Even without that factor there was an inherent uncertainty in the quantity which would be sold. If at any stage in the chain of contracts running from the purchase of the salmon from the source fish farmers to the sales by the Defendant to the public there was a contract involving an agreement by one party to purchase a fixed quantity of salmon fillets from another party further down the chain then the purchasing party would run the risk either of having to pay for more salmon than it needed or of ordering less than it needed. There is no intrinsic reason why the Defendant should have agreed to bear that risk rather than requiring it to be borne by the Claimant (if the Claimant had indeed to buy fixed quantities from its suppliers).

16. Finally, the Claimant prays in aid the correspondence from the Defendant in the period from 28th January 2014 onwards. Mr. Crimp had left the Defendant's employment on 11th December 2013. Shortly before that Gareth Thomas had

rejoined the Defendant. Mr. Thomas was to be the Category Manager for Frozen 1 - the Defendant's category of goods which included frozen fish. Mr. Thomas was in a position senior to that of Mr. Crimp (who had been a Senior Buyer) but a degree of reorganisation had meant that Mr. Thomas was to deal directly with some of Mr. Crimp's responsibilities including the dealings with the Claimant. On 24th January 2014 Mr. Thomas had met with Mr. Lavelle and Mr. Lag and had discussed the arrangement between the Defendant and the Claimant (the latter having by now replaced SNG in the arrangement). The minutes of the meeting include the reference "current contract is 225mt over Jan – Dec 2014". On 28th January 2014 Mr. Lavelle sent an e-mail to Mr. Thomas addressing a suggestion which Mr. Thomas had made pressing for a discount and saying "to confirm 2014 business (200MT plain fillets 520g 4 pack @ £8.92/kg) was agreed and calculated on a net basis and as such there is no room for any additional discounts." Thereafter there were occasions on which Mr. Thomas referred to the contract as being for a fixed quantity of 200 tonnes. Thus, by way of example, on 11th September 2014 Mr. Thomas e-mailed Mr. Lavelle saying "our contract with you is for 200 tonnes of salmon fillets from an Iceland-approved factory."

17. At the start of the trial I ruled that it was not open to the Claimant on its pleaded case to contend that there had been a variation of the contract in January 2014 to provide that the Defendant was required to take a minimum quantity of 200 tonnes if that was not the original agreement. Wisely, Mr. Fennell on behalf of the Claimant did not seek permission to amend the Particulars of Claim to assert an agreed variation in January 2014. Instead the Claimant contended that the material from the Defendant was relevant as showing the Defendant's understanding of the terms of the contract. It was said that this understanding was relevant as an indication of what had been agreed in November 2013.

18. I accept that in an appropriate case a party's subsequent actions and statements can demonstrate what a party knew or believed to have been agreed and that this can be evidence (potentially significant evidence) of what was agreed. However, that is not the position in respect of the correspondence from Mr. Thomas. It is significant that Mr. Thomas was not, himself, involved in the dealings in November 2013 and so the e-mails he sent were not coming from a person who had taken part in the dealings constituting the agreement. It is to be noted that Mr. Crimp prepared a handover document for Mr. Thomas explaining to the latter what the arrangement was. In this Mr. Crimp said of the relationship with SNG "only started trading in 2012. Initially with 25% of the Farmed Salmon 4pk business". He went on to say "we have agreed to maintain 25% of our salmon 4pk requirement with SNG for 2014. This is at an increased cost of £8.92/kg (£4.638 per 520g unit)". There is no suggestion in the handover document that Mr. Crimp had altered the previous arrangements and agreed that a fixed quantity would be taken. Indeed, the document expressly points the other way. The agreement was made on 7th November 2013 and Mr. Crimp left the Defendant on 11th December 2013. Accordingly, the handover document demonstrates that in the period shortly after the making of the agreement Mr. Crimp was saying to his colleagues and superiors that the arrangement was one for the purchase of a percentage of the Defendant's requirements.

19. Mr. Crimp sent an e-mail to Mr. Lag with a copy to Mr. Lavelle at 11.21 on 11th November 2013. In this he said "I can confirm our agreement for you to supply 25% of the Iceland Salmon Fillets 4pk volume in 2014". In my judgment this e-mail is highly significant evidence. It was sent within days of the agreement and refers in plain terms to a percentage agreement rather than one for a fixed quantity. Moreover, it was sent to Mr. Lag and Mr. Lavelle, the former being, on the Claimant's case, the person who had told Mr. Crimp that the agreement had to be for a fixed minimum quantity. Not only does the e-mail indicate Mr. Crimp's understanding of what had been agreed but it made it clear to the Claimant what that understanding was. The Claimant alleges that the parties had reached agreement for a fixed quantity rather than a percentage and in particular that this agreement had been reached when Mr. Lag had responded to an e-mail from Mr. Crimp and had said that the Claimant needed to do the deal on the basis of a fixed quantity and not a percentage. If that had been the case one would have expected a prompt response from the Claimant challenging and correcting Mr. Crimp's 11th November e-mail and reminding him that the agreement was for 200 tonnes and not for 25%. There was no such written response. Indeed, Mr. Lag replied to Mr. Crimp at 11.41 saying "Thank you for confirming."

20. Mr. Lavelle and Mr. Lag accepted that not only was there no written challenge to that e-mail but also that there was no oral challenge. In his witness statement at [18] Mr. Lavelle had said that although the opening of the e-mail did not accurately reflect what had been agreed Mr. Lag had not regarded it as inconsistent with an agreement for the purchase of 200 tonnes because an annual demand for more than 800 tonnes was anticipated. In his statement Mr. Lag made the same point saying that he did not challenge Mr. Crimp because he would have expected the latter to have responded with saying "I have already told you that we will buy a minimum of 200 tonnes". When he was cross-examined about this Mr. Lavelle initially said that the e-mail "set alarm bells ringing" and that he believed that Mr. Lag had responded to it. Then he corrected his answer to say that it had not caused concern and that this had been after he had discussed it with Mr. Lag. In his replies in cross-examination Mr. Lag said that the e-mail had not caused him concern because 25% of 800 tonnes was 200 tonnes. He went on to say that it would be a "nonsense" to work on the basis of a percentage rather than a fixed quantity although failing to explain why the dealings in the preceding years had been on the basis of percentages. I found this evidence unconvincing and in particular it failed to explain why there was no challenge to Mr. Crimp's e-mail if, as the Claimant says was the position, that e-mail failed to reflect what had been agreed in a key respect.

21. In his witness statement at [17] Mr. Lag had said

> "In late November, or early December 2014 [a clear typographical error for 2013], prior to me placing an order with Hofseth to satisfy the 2014 Contract, I had another telephone conversation with Alastair Crimp and he again promised that the Defendant would purchase a minimum of 200 tonnes of salmon fillets. Alastair Crimp made clear that the Defendant may need to purchase more than 200 tonnes in 2014 …"

22. Mr. Lag had signed that witness statement on 4th July 2017 and on 31st January 2017 he had signed the Statement of Truth in respect of the Claimant's Further Information where the same conversation was asserted. Mr. Crimp denied any such further conversation. Moreover, there was no challenge to his evidence that he left the employment of the Defendant on 11th December 2013 and thereafter had no further involvement in these matters. When he was cross-examined about these assertions Mr. Lag said that he could not now remember whether there had been a further conversation with Mr. Crimp after 7th November 2013 in which the Defendant's promise to take a minimum quantity of 200 tonnes was renewed. He was pressed on this and said that he could not remember what he had been referring to in [17]. I found this explanation also to be unconvincing and must regard this aspect as casting considerable doubt on the reliability of Mr. Lag's evidence. On two separate occasions he formally confirmed the accuracy of documents asserting that there had been a further conversation with Mr. Crimp in late November or early December 2013 but when confronted with the fact of Mr. Crimp's departure from the Defendant Mr. Lag resorted to saying that he could not remember what he had been referring to.

23. I have already mentioned that Mr. Lag and Mr. Lavelle met Mr. Thomas on 24th January 2014. This was a meeting for Mr. Thomas to meet those running the Claimant. Mr. Thomas's evidence was that in the meeting Mr. Lag had originally said to Mr. Thomas that the agreement was one whereby the Defendant had agreed to take a minimum of 200 tonnes of salmon fillets from the Claimant but then changed that to say the agreement had been for 225 tonnes. This was more than had been agreed even on the Claimant's case. The Defendant's note of the meeting records the contract as having been said to be for 225 tonnes and I accept Mr. Thomas's evidence in this regard. The Defendant says that this was a "try on" by Mr. Lag in which he was hoping to take advantage of the fact that Mr. Thomas had not been involved in the initial negotiations and to persuade him that the Defendant had been committed to more than had been the case. Mr. Lag was cross-examined about this. His initial response was to say that he did not think that he had told Mr. Thomas that the contract was for 225 tonnes. Then he said he could not remember. Then he accepted that he had "put a little bit on" the contract figure. He said that this was from a sales perspective on the expectation of a new launch. Mr. Lag's final position was to say "I don't remember saying that but we are sellers and we are trying to get as much as possible from the customer. I don't think that I said that there was a firm contract for 225 tonnes. I probably said that we were ready to supply 225 tonnes." This also I find unconvincing. The only credible explanation is that Mr. Lag was, indeed, trying to take advantage of the fact that Mr. Thomas had less information than he had as to what had been agreed. Mr. Lag seems to have regarded this as a legitimate business tactic. Opinions may well differ in that regard but as stated above it does show that Mr. Lag did not feel constrained by a requirement of strict factual accuracy in his dealings with the Defendant.

24. This means that the contemporaneous documents and commercial likelihood are consistent with the evidence of Mr. Crimp. Against that there is oral evidence which I have been driven to regard as unreliable. The Defendant's position is supported by the fact that the agreements for the previous years had been on the

footing of the Defendant taking a percentage of its requirement from SNG and not a fixed quantity. It is inherently unlikely that the Defendant would have agreed to change this at a time when there was a prospect of the increase in price leading to reduced retail sales. Moreover, the evidence demonstrates that the Defendant's agreement with Marine Harvest for 2013 was for the Defendant to take 75% of its requirement from that company. I accept the point made by Mr. Crimp that it would have caused practical difficulties for the Defendant to have agreed with one supplier to take 75% of its requirement from that supplier and to have agreed to take a set quantity from a different supplier. Those were difficulties of which Mr. Crimp was aware and which he is likely to have striven to avoid.

25. In those circumstances I conclude that the agreement between SNG and the Defendant was not for the purchase of a set minimum quantity of salmon fillets but one whereby the Defendant was committing itself to buying 25% of its requirement for such fillets from the Claimant.

The Country from which the Salmon Fillets were to be supplied.

26. The parties are agreed that the agreement provided for the salmon fillets to be supplied from premises in Norway. I will address later the questions of whether that provision was varied and whether it was in any event a condition which the Claimant was entitled to waive.

Implied Terms.

27. The Claimant contended that a number of terms were to be implied into the agreement. Those of relevance for current purposes are a term that the Defendant would place orders for salmon fillets at regular intervals over the course of 2013 and a term that the Defendant would not unreasonably refuse or withhold its approval of a processing factory proposed by the Claimant.

28. The parties were agreed that the approach to be taken in respect of the implication of terms was that laid down in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd & another* [2015] UKSC 72 [2016] AC 742. The Supreme Court explained there that the former requirements or preconditions for the implication of a term are not to be regarded as having been in some way diluted or subsumed in an approach of interpreting the contract as some had thought following the decision of the Privy Council in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988. This follows from the judgment of Lord Neuberger at [16 – 21] and at [24] – [25]. Lords Carnwath and Clarke at [57] – [60] and at [77] respectively agreed that the traditional requirement of necessity had not been diluted.

29. The effect of this in the circumstances of the present case is that in order for a term to be implied I must be satisfied that the term is necessary for business efficacy or of sufficient obviousness for implication to be appropriate (keeping in mind the overlap between obviousness and the requirements of business efficacy).

30. Mr. Fennell placed a degree of reliance on the decision of Briggs J (as he then was) in *Jackson v Dear* [2012] EWHC 2060 (Ch) (reversed on grounds not relevant for current purposes). In particular Mr. Fennell pressed me to have regard to the passage at [40 (vi)] where Briggs J said:

> "Although necessity continues (save perhaps in relation to terms implied by law) to be a condition for the implication of terms, necessity to give business efficacy is not the only relevant type of necessity. The express terms of an agreement may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean. In such a case an implied term is necessary to spell out what the contract actually means."

31. Mr. Fennell sought to argue that this showed the width of the requirement of necessity and that it was not confined to commercial necessity. The decision of Briggs J preceded that of the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd & another* and must be read in the light of that subsequent binding decision. In any event I do not understand Briggs J to have been making a point materially different from that set out in the sixth of Lord Neuberger's points at [21] namely that:

> "necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

32. The Claimant accepted the Defendant's Terms and Conditions of Purchase were terms of the contract. Condition 23.4 of those Terms and Conditions was an "entire agreement" clause. However, for the Defendant Mr. Latimer correctly accepted that that the presence of this condition did not preclude the implication of terms on the basis of obviousness or business efficacy provided that those criteria were judged in the light of the words actually used by the parties.

Was there an Implied Term that Orders were to be placed at Regular Intervals?

33. It was the Claimant's case that a term was to be implied requiring the Defendant to place orders at regular intervals during the calendar year. The Claimant pointed to the fact that retail sales would be taking place throughout the year. Mr. Fennell referred me to the Court of Appeal decision in *Northern Foods Ltd v Focal Foods Ltd* [2001] EWCA Civ 1282 where such a term was implied. At [65] Jonathan Parker LJ said the agreement there would otherwise make little if any commercial sense because if the buyer were free to determine when to place orders it would do so at times when the open market price was higher than that stipulated under the agreement. Mr. Fennell did not suggest that *Northern Foods v Focal Foods* required the implication of such a term in all supply contracts of this type but did contend that it demonstrated the scope for such implication.

34. The Defendant did not accept that any such term was to be implied. It contended that such implication was neither necessary nor obvious.

35. In my judgment the Defendant's stance is correct and there is no basis for the implication of such a term. In my judgment such a term is not necessary for the contract to make commercial sense nor can it be said that the parties would have regarded it as so obvious that expression of the term was not needed. The arrangement which the Defendant had with the Claimant and with Marine Harvest was that it would take its full requirement from those suppliers in different percentages and at prices agreed at the outset with those suppliers. There was no scope for purchases on the open market while both those contracts remained in being. Moreover, it is conceivable that for practical purposes it would be appropriate for the Defendant to take supply entirely from one or other supplier for a period of time before reverting to the other. The situation as between the Claimant and the Defendant was markedly different from that in the *Northern Foods* case where it appears that it was open to the purchaser to obtain part of its requirements on the open market and where the product was fresh vegetables. In this case the parties were concerned with a frozen product which was capable of being kept for a substantial period. The obligation on the Defendant was to take from the Claimant 25% of its requirement for frozen salmon fillets in the calendar year 2014 and to pay the agreed price when doing so but there was no requirement that orders be placed at intervals spaced through the year.

Was there an Implied Term that the Defendant could not unreasonably withhold Approval from a Facility put forward by the Claimant?

36. It is common ground that the salmon fillets had to come from a processing factory which had been approved by the Defendant. The Claimant contends that a term is to be implied that the Defendant would not unreasonably withhold approval of a facility put forward by the Claimant. The Defendant says that no such term is to be implied and that it suffices that the Defendant was to act honestly and competently in respect of the inspection and approval of facilities.

37. In my judgment it is significant that the salmon fillets to be supplied by the Claimant were to be sold by the Defendant as its "own label" products and were to be held out to the general public as the Defendant's products. In those circumstances it is far from obvious that the parties were proceeding on the basis that approval of a proposed facility would not be withheld unreasonably. The Defendant might very well not have wished the decision as to the facility from its "own label" products came to be determined solely by objective reasonableness. Similarly, the implication of such a requirement was not necessary for the contract to operate effectively. The arrangement could operate effectively provided that the Defendant addressed in good faith proposals put forward by the Claimant as to particular processing facilities.

Was there a Variation of the Contract such as to permit the Claimant to supply Fillets processed in Poland?

38. The parties are agreed that the contract formed in November 2013 provided for the Claimant to supply fillets processed in Norway. This was a change from the

preceding years in which the processing had been undertaken in Poland. The Claimant contends that the agreement was varied to provide for processing to be again in Poland instead of Norway. The significance of this dispute is that neither of the Claimant's two plants in Norway actually received the Defendant's approval and so there could not be supply from there. The point is of less importance than might otherwise have been the case in the light of my conclusion that there was no implied term requiring the Defendant to place orders at regular intervals. The absence of an approved Norwegian plant and of an agreement to supply from Poland would have provided the Defendant with a defence to the assertion that it was in breach of such an obligation. Nonetheless, this dispute continues to have some relevance to the ultimate outcome of the case. This is because the Claimant says that the Defendant's actions in September 2014 are to be seen in the light of its preceding conduct which is said to include an improper insistence on delivery from Norway.

39. The Claimant had two plants in Norway. One at Oksnes and the other at Syvde. The original intention had been for the supply to be from Oksnes but the Claimant's plans changed and by early December 2013 the Claimant's intention was that there should be supply from the plant at Syvde.

40. Emma Decruze arrived in Norway on 9th December 2013 in order to inspect the Syvde plant and to determine whether it should receive the Defendant's approval. On 10th December 2013 Miss. Decruze was in fact taken to the plant at Oksnes. She described matters thus in her witness statement:

> "20. The following morning on 10 December 2013, Carl [Mr. Lag] took me to the Oksnes site. He did not mention that he was doing this. I had understood that we were travelling to Syvde. I discovered that we were visiting Oksnes rather than Syvde towards the start of the audit. I was checking the Iceland specification document I had taken with me, which included the Syvde details, against the original BRC certificate held at the factory. The BRC certificate contained different details to those in the specification document, which indicated that I was actually at the Oksnes site. No explanation was given as to why I had been taken to Oksnes. The whole situation was strange and I had never experienced anything like it.
>
> 21. I knew however that Oksnes had been considered originally as the supply site. I just "went with it" on the basis that it made sense to utilise the visit to audit the Oksnes site in the expectation that this would be the site from which SNG would supply."

41. Having undertaken an inspection of the Oksnes site Miss. Decruze declined to approve it and set out a number of non-compliances which would need to be remedied if that facility were to be approved.

42. When giving evidence Mr. Lavelle accepted that the decision to take Miss. Decruze to Oksnes rather than to Syvde was "nonsensical" and "an error". In his closing submissions Mr. Fennell began by repeating the Claimant's acceptance that taking Miss. Decruze to Oksnes had been a "dreadful mistake". In my judgment what is significant is that this was a mistake on the part of the Claimant and that it meant that the Defendant's food technologist had inspected Oksnes at the instigation of the Claimant but had not visited Syvde.

43. In his witness statement Mr. Lag had said that it was decided to inspect Oksnes because of lack of time. He did not indicate in his statement that there had been a failure to tell Miss. Decruze that she was not visiting Syvde. Indeed, his statement reads as if this was a joint decision. In cross-examination Mr. Lag said that the journey to Syvde had to be made by boat and that poor weather conditions had prevented this. He did not challenge Miss. Decruze's assertion that she had not been told in advance that she was being taken to Oksnes rather than to Syvde and said that he could not remember why she was not told this.

44. Oksnes had a grade A accreditation from the BRC whereas the accreditation of Syvde was grade B. The Defendant has contended that there was a deliberate attempt to pull the wool over Miss. Decruze's eyes. She was being asked to approve a particular facility but was being taken to a different facility with a higher grading in an attempt to obtain approval which would not otherwise have been obtained. There was debate in the evidence before me as to the difference between the BRC grade A and grade B accreditations. I need not make a finding as to that. I find that the decision to take Miss. Decruze to Oksnes rather than to Syvde and the failure to tell her that this was what was happening were the result of errors on the part of the Claimant and not part of a deliberate scheme to mislead the Defendant. However, as I have already said the failure to tell Miss. Decruze that she was being taken to a different plant from the one where she believed she was going demonstrates that Mr. Lag did not feel constrained by strict factual accuracy in his dealings with the Defendant. Mr. Lag's approach was at best cavalier and was cavalier in respect of a matter which was of real importance namely the Defendant's inspection and approval or otherwise of the plant from which supplies were to be made.

45. The events of 10th December 2013 did mean that the Defendant was in the position that the Oksnes plant had been inspected and a number of non-compliances had been identified. It follows that the Defendant and the Claimant knew what was necessary for Oksnes to achieve approval. The Defendant also knew of the other plant at Syvde but knew that Miss. Decruze had not been taken there and that she had had to discover for herself that she was at a different plant. The Defendant's impression in respect of these matters was brought about by the actions of the Claimant and will be relevant when considering how to assess the Defendant's response when it was asked to arrange for a technologist to travel to assess Syvde.

46. At paragraph 18 of the Particulars of Claim the Claimant asserted that on 10th December 2013 and following her decision not to approve Oksnes Miss. Decruze had agreed with Mr. Lag that the factory in Poland would continue to be used for the "next three months or so". This averment was repeated in the Reply. Mr. Lag gave details of the alleged meeting in his witness statement saying at [29]:

> "On 10 December 2013 a meeting took place in Norway between Tommy Roald and Emma Decruze. The non- compliance of the Oksnes factory was discussed. Whilst I was having a cigarette outside I agreed with Emma Decruze that the BG Poland factory which had produced virtually identical product sold by SNG to the Defendant in 2012 and 2013 would continue to be used as the production site for the salmon fillets for three months or so, commencing January 2014."

47. In his oral evidence at trial Mr. Lag repeated his assertion that there had been such a discussion with Miss. Decruze but accepted that he knew that it was not within her power to vary the contract and said that it had not been a question of asking her to do that.

48. In his witness statement Mr. Lag had said that he had spoken with Mr. Crimp and that the latter had agreed that the Polish factory could be used. In his witness statement Mr. Lag had given no particulars of that alleged conversation. When he was cross-examined it was pointed out to him that Mr. Crimp had left the Defendant's employment on 11th December 2013. Mr. Lag said that he had spoken to Mr. Crimp just before dinner on 10th December 2013. He said that the failure of Oksnes had created a serious situation and that either he or Miss. Decruze had telephoned Mr. Crimp.

49. The Claimant has produced minutes said to have been prepared by Emil Olden of the Claimant in respect of the dealings with Miss. Decruze in part these say "Agreed with Emma that supplies can continue from SNG's Poland factory and Emma will be back to inspect [Oksnes] or [Syvde]. Planned to be latest end January/medio February". These minutes were not provided to Miss. Decruze at the time. I have considerable reservations as to their accuracy or contemporaneity. This is because they indicate that there was an arrangement for Miss. Decruze to inspect Oksnes first with an inspection of Syvde to follow if time permitted but that this was not possible due to lack of time given the time taken to inspect Oksnes. That account of matters accords with neither Miss. Decruze's recollection nor with that of Mr. Lag.

50. Mr. Crimp did not accept that there had been any telephone call to him let alone an agreement by him that the Defendant would accept deliveries from Poland.

51. Miss. Decruze accepted that there had been discussion that evening of what could be done following her decision not to approve Oksnes. She accepted that this involved discussion of the possibility of supplies coming from Poland and that she did mention this to Mr. Crimp. However, she was clear that no agreement was reached in that respect rather there was a discussion of the options available.

52. Mr. Thomas said that the possibility of supply coming from Poland was raised on behalf of the Claimant in the meeting on 24th January 2014 but that his response was to say that the Defendant would continue on the basis of the supply coming from Norway because this was the contractual arrangement and because there was no immediate urgency. This is supported by his manuscript note which I accept was made at or shortly after that meeting and which says in part "do we need them to pack 4pk from Poland?" The note is consistent with the position that there had not already been an agreement that the supply could or should come from Poland rather than Norway. I find that the discussions on 24th January 2014 were on the footing that the common intention was still for there to be supply from Norway but that the possibility of supply from Poland was discussed as an alternative. I find that it was not asserted on behalf of the Claimant at that meeting that the Defendant had already agreed that there should be supply from Poland for three months. This, is itself, an indication that there had been no earlier agreement of the kind now being alleged by the Claimant.

53. There were exchanges with the Defendant's design department with a view to preparing artwork for packaging on the footing of a supply from Poland. These do not, in my judgment, assist in respect of the question of whether a variation had been agreed. They indicate that consideration was being given to arrangements for production in and supply from Poland but they cannot be seen as either themselves constituting an agreement with the Claimant that there could be supply from Poland or as demonstrating that the Defendant had already made such an agreement.

54. It follows that there has been variation in the Claimant's account of what was agreed and with whom it was agreed. Conversely, the Defendant's denial that there was a variation is consistent with the limited documentation. I find that the position was as follows. Oksnes had failed the inspection and a number of non-compliances had been identified in respect of that factory. The issue of whether production should be moved back to Poland was discussed but there was no agreement to vary the contract to provide for this. Instead the Defendant's stance was that it would wait while the deficiencies at Oksnes were addressed.

55. Mr. Fennell makes an alternative submission. This is that the stipulation for processing in Norway was a term introduced for the benefit of the Claimant and which the Claimant was entitled to waive. The assertion is that the Claimant was entitled to elect to produce in Poland and to require the Defendant to accept salmon fillets processed there provided that they came from a factory which had been previously approved by the Defendant. I do not accept this contention. The source of the fillets was clearly a matter of importance to the Defendant as well as to the Claimant. The agreement was that the 2014 supply would come from Norway and the Defendant was entitled to require supply from there. It was not open to the Claimant to elect to supply from elsewhere and to require the Defendant to accept such supply even if this was to be from a factory which had previously been approved by the Defendant.

The Parties' Dealings in the Period to 23rd September 2014.

56. The Claimant says that in the period to 23rd September 2014 there were repeated breaches of contract by the Defendant coupled with failures to move matters forward and that the Defendant was seeking to get out of its obligations to the Claimant. The Claimant's position is that the orders placed on 23rd September 2014 and the subsequent exchanges are to be seen in the light of this history. The Claimant says that the Defendant's actions then were the culmination of a process in which the Defendant was attempting to escape its responsibilities and amounted to the last straw.

57. It follows from my earlier findings that the Defendant was not in breach of the terms of the agreement by failing to place orders at regular intervals at an earlier stage and that the Defendant had not been obliged to accept fillets produced in Poland rather than Norway.

58. What is the position in respect of the Defendant's failure to inspect the factory at Syvde? Was this a breach of the terms of the agreement or an indication of a reluctance to continue with the agreement? The Defendant's stance in relation

to Syvde has to be seen in the context of Miss. Decruze's visit to Norway in December 2013. In particular it is relevant that Miss. Decruze had been taken to Oksnes by the Claimant and that the respects in which those premises did not comply with the Defendant's requirements had been identified. The Defendant's stance of saying that Oksnes should be put in order and that when this had been done those premises would be reinspected was not unreasonable and could not reasonably be seen as an indication of an unwillingness to proceed. It is of note that Miss. Decruze e-mailed Mr. Olden on 12th March 2014 asking for confirmation of the date by when Oksnes would have been refurbished so that she could plan a further visit. Mr. Olden responded with a suggestion that Miss. Decruze work on the basis of a time in early June 2014 for a return visit to Oksnes.

59. On 8th April 2014 Mr. Lavelle e-mailed saying that there would be further delay in respect of Oksnes and proposing an inspection of Syvde instead. He renewed that proposal on 23rd April 2014.

60. On 1st May 2014 Miss. Decruze e-mailed Mr. Lavelle saying "I have spoken with the buyer and they do not need to place any orders with [the Claimant] this year." Mr. Lavelle's attempts to speak to Mr. Thomas about this message received no response until a formal grievance had been raised. Mr. Thomas spoke to Mr. Lavelle on 12th June 2014. The formal written response sent by Jayne Burrell, the Defendant's Code Compliance Officer and Legal Director, was also dated 12th June 2014 and this said "it is still [the Defendant's] intention to purchase the 4 pack salmon fillets from [the Claimant]."

61. The Claimant says that Miss. Decruze's e-mail was a purported cancellation of the contract and that it was only after the robust complaint on the Claimant's part that the Defendant backed down and confirmed that it was willing to continue with the contract. The Defendant says that the e-mail was an attempt to help the Claimant out of a difficult situation in which the Claimant had obligations which it could not fulfil because of the absence of an approved factory. In essence the Defendant says that the e-mail was an offer to release the Claimant from its obligations. The wording of the e-mail was ambiguous and indeed it had been preceded by an internal e-mail in which Miss. Decruze had talked of cancelling the contract. Even if the e-mail is to be seen as having been a purported termination of the contract and so potentially a renunciation on the part of the Defendant it did not have the effect of ending the contract. The Claimant protested and its protests resulted in an assurance that the Defendant intended to continue with the contract.

62. Miss. Decruze's e-mail is not be to be seen in isolation. There was a meeting between Mr. Lavelle and Mr. Thomas on 23rd June 2014. Various options were discussed at that meeting. These included salmon fillets being taken from Oksnes once that factory had been approved. Mr. Lavelle said that the sundry other options were not practicable. Nonetheless, in my judgment they are properly to be seen as attempts to vary the existing contract by agreement and not as an indication that the Defendant would not abide by the contract if a variation could not be agreed.

63. It is significant that by 1st September 2014 the Defendant was saying to the Claimant that it would be prepared to accept supply from Poland. The Claimant's response was to say that by that stage there was insufficient spare capacity at the Polish factory and that Syvde would need to be used. On 4th September 2014 Mr. Lavelle sent a further e-mail expressing the view that the Defendant did not appear willing to take the salmon fillets it was committed to taking and asking Mr. Thomas to make the Defendant's position clear. Mr. Thomas replied on 11th September 2014 asserting the Defendant's belief that the party failing to fulfil its obligations was the Claimant but indicating that an inspection of Syvde could take place. Mr. Thomas said "Given that we have never inspected the factory at Syvde are you confident that it will meet [the Defendant's] accreditation criteria? If not how long do you think it would take to be put into that position? We will need to arrange for a technologist to go there to audit it". The e-mail then proceeded to offer a revised timetable for supply.

64. I have concluded that the Claimant's characterisation of the dealings in the period to 23rd September 2014 is incorrect. Viewed objectively those dealings are not to be regarded as having shown repeated breaches by the Defendant or as showing the Defendant attempting to evade its obligations. Rather there was a period in which problems had been caused by the Claimant's actions in arranging for Miss. Decruze to audit Oksnes rather than Syvde and by the condition of Oksnes when it was audited. Moreover, at repeated junctures in that period the Defendant expressed its readiness to continue with the contract and to take salmon fillets from the Claimant when the latter was in a position to supply them from an approved facility. In addition it had indicated a willingness to arrange for a further visit by a technologist for the purpose of assessing Syvde provided the Claimant confirmed that it believed that Syvde would meet the Defendant's accreditation criteria. The exchanges on 23rd September 2014 and thereafter are to be viewed in the light of that history.

<u>The Exchanges on 23rd September 2014 and thereafter.</u>

65. On 23rd September 2014 the Defendant placed a number of orders with the Claimant. Those orders were for the delivery of quantities of salmon fillets to various locations on 15th October 2014, 12th November 2014, and 29th December 2014. Mr. Thomas says that before placing of the orders he had spoken to Mr. Lavelle on 23rd September 2014. Mr. Lavelle said that he could not remember whether there had been a conversation at that time with Mr. Thomas. However, I find that there was such a conversation substantially along the lines set out by Mr. Thomas in his statement. In that regard it is significant that in the e-mail he sent at 10.28 on 24th September 2014 Mr. Thomas referred to a conversation of the preceding day and said that his e-mail was summarising the conversation. The orders were initially addressed to SNG and the quantity ordered was less than 200 tonnes and also less than 25% of the Defendant's requirement for the 2013 year but neither of those elements are material for present purposes. The orders were reissued addressed to the Claimant and it is not disputed that if necessary the Defendant could have issued further orders making up the shortfall in quantity.

66. The Claimant says that the orders were the culmination of a series of breaches. It also says that the Defendant knew that the Claimant could not comply with the orders. The orders provided for the first deliveries to be made on 15th October 2014 which was just over three weeks later but the Defendant knew that the Norwegian facilities had not yet been approved; that the Polish factory did not have spare capacity; and that packaging had not yet been approved or produced in circumstances where the lead time for this was up to twelve weeks. The Defendant's Terms and Conditions of Purchase provided that time was to be of the essence in respect of delivery and that a failure to deliver on time entitled the Defendant to cancel the contract. The Claimant says that delivery in accordance with the orders was "mission impossible" and that it was being "set up to fail". It says that the Defendant was engineering a situation in which the Claimant would be unable to fulfil the orders and that the Defendant would then cancel the contract asserting that the Claimant was in breach.

67. The Defendant says that the orders were, on the contrary, a manifestation of its intention to abide by the contract. The Claimant had been asserting that the Defendant was trying to escape its obligations and that the Defendant was not prepared to take salmon fillets from the Claimant. The Defendant says that it was countering this assertion by placing orders so that the Claimant could be confident that the Defendant would take fillets from the Claimant. The Defendant says that it was doing what the Claimant had asked it to do namely placing orders for salmon fillets to be supplied by the Claimant. The Defendant says that what was important about the orders was not the dates on which they stated that delivery was to be made but the fact that express orders were being placed. It was open to the Claimant, the Defendant says, to respond saying that delivery on the specified dates was not practicable and proposing alternative delivery dates. It is of note that Mr. Thomas's e-mail said "please confirm when first production will take place so that an Iceland technologist can attend." Thus the Claimant was being told that the Defendant was prepared to arrange for a technologist to attend with a view to approving production.

68. When he was cross-examined Mr. Lavelle accepted that it would have been open to the Claimant to have responded to the orders by asking for more time for delivery. Instead the response was a letter dated 30th September 2014 in which the Claimant asserted there had been a repudiatory breach by the Defendant and that the Claimant was accepting that repudiation as terminating the contract.

69. It is of note that the letter of 30th September 2014 said that the Defendant's repudiation of the contract lay in its failure to order a total of 200 tonnes in the course of the year. It was said that the purported orders were ineffective to remedy that breach and were not to be regarded as genuine orders. It was, accordingly, said that the breach lay in the absence of earlier orders. The Claimant's case was put on this footing in the Particulars of Claim. In Mr. Fennell's skeleton argument and in the submissions before me the Claimant's case was expressed differently. As already explained it was being said that the orders were renunciatory because the Defendant knew that the Claimant could not comply with them and that the Defendant was creating a situation in which it would be able to assert that the Claimant's failure of delivery was a breach.

Sensibly and properly Mr. Latimer on behalf of the Defendant did not take issue in respect of this different formulation and I will consider whether there was a repudiation or renunciation by the Defendant on either of these bases.

70. There is no dispute as to the approach which I am to take in determining whether the Defendant had repudiated the contract or whether its actions on 23rd September 2014 amounted to a renunciation. The relevant principles were summarised by Gross LJ in *Spar Shipping AS v Grand China Logistics (Group) Co Ltd* [2016] EWCA Civ 982 at [67] and [72] – [78]. I was helpfully referred to the observations of Etherton LJ (as he then was) in *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168 at [61] – [63]. Etherton LJ there explained that any assessment of whether there has been a repudiatory breach in a particular case must be focused on the facts on the actual case and that the assessment is to be an objective one.

71. It follows that in relation to repudiation I have to consider whether by virtue of the events including and culminating in its actions on 23rd and 24th September 2014 the Defendant was in breach of contract with the breach being such that the effect of the breach was to deprive the Claimant of substantially the whole benefit of the contract. I have to remember that the latter is an open-textured expression drawing attention to the seriousness of the breach and its consequences. In relation to renunciation I have to consider whether considered objectively the Defendant's actions demonstrated an intention to commit a repudiatory breach by failing to perform future obligations in such a way as to prevent the Claimant obtaining substantially the whole benefit of the contract. The assessment of what the Defendant's actions demonstrated is to be made from the viewpoint of a reasonable person assessing the actions in the context of the dealings as a whole and aware of the facts but taking no account of the Defendant's motive or intention save to the extent that they were disclosed to the Claimant or were apparent from the Defendant's actions or its words to the Claimant.

72. The events of 23rd – 30th September 2014 are to be assessed in the light of the preceding dealings between the parties. I have already set out my conclusions that the Defendant was not in breach of contract in failing to place orders at regular intervals during the year; that the obligation was for the Defendant to order 25% of its requirements from the Claimant rather than 200 tonnes; that the Defendant was not obliged to accept deliveries other than from Norway; and that the Defendant was not at fault in failing to approve Syvde. The fact that neither site in Norway had been approved was due to the Claimant's actions in causing Miss. Decruze to inspect Oksnes; in failing to have Oksnes in a condition such that it could be approved; and in failing to confirm that Syvde was in a state such that a visit to approve it would not be fruitless. In the absence of an approved site the Defendant could not be criticised for failing to place orders and was not obliged under the contract to do so. It follows that the Defendant was not in breach let alone in repudiatory breach in the respects asserted in the letter of 30th September 2014 or in the Particulars of Claim. The benefit which the Claimant was to obtain from the contract was to receive payment for the delivery of salmon fillets meeting 25% of the Defendant's annual requirement and coming from a Norwegian processing facility approved

by the Defendant. The Claimant had not been in a position to perform its side of the bargain and had not been deprived of the benefit of the contract by the actions of the Defendant. It remained open to the Claimant to obtain that benefit notwithstanding the events up to and including those of 23rd September 2014.

73. The Claimant's alternative characterisation of the orders as being a renunciation of the contract fails by reference to the same analysis. I find that the placing of the orders was not the culmination of a series of breaches and failings by the Defendant in which the Defendant had demonstrated an unwillingness to perform the contract and to take salmon fillets from the Claimant. Rather it was the culmination of a period in which the Claimant had not been in a position to supply to the Defendant; in which the responsibility for that state of affairs lay with the Claimant; in which the Defendant had repeatedly stated its willingness to receive salmon fillets from the Claimant; and in which potential solutions to the problem of the absence of an approved site had been ventilated by the Defendant with those solutions including an offer to accept salmon fillets from Poland (something which I have found the Defendant was not obliged to do). I remind myself that the Defendant's subjective intention in placing the orders is irrelevant save to the extent that it was expressly stated or appeared from the facts known to the Claimant. However, applying an objective test I have concluded that the Defendant's action in placing the orders coupled as it was with Mr. Thomas's e-mail of 24th September 2014 could not on any view be seen as an indication of an intention not to perform the contract. On the contrary it was a demonstration of the Defendant's intention to perform the contract by ordering salmon fillets from the Claimant and by offering to send a technologist to inspect the Claimant's production facility.

74. I note that the arrangement between the Claimant and the Defendant was one whereby the Defendant was to order and the Claimant was to supply goods. It may be possible in some circumstances for the placing of an order by the purchaser in such an arrangement to amount to a renunciation of the contract but such would not be a typical renunciation and there was none such here.

The Quantum of the Claim.

75. The conclusions set out above means that the Claim fails. In those circumstances I will set out my findings as the disputed questions in terms of the quantification of the claim briefly.

76. The parties were agreed that if there had been repudiation or renunciation by the Defendant then the Claimant would have been entitled to damages to compensate it for the loss caused by such repudiation or renunciation. Reference was made in the skeleton arguments to various authorities to some of which I was referred in the oral submissions of counsel but ultimately the law was not in dispute. The relevant principles can be stated shortly and I will avoid unnecessary and potentially misleading terms such as gross and net profit. If there had been repudiation or renunciation the damages due to the Claimant would have been those required to compensate it for its loss. That loss is to be seen as the amount which would have been received if the contract had been performed but deducting therefrom expenditure which the Claimant would have had to incur in performing the contract and which it has not in fact had to incur.

The loss suffered is to be reduced by any sums which have been or which should have received by way of actions in reasonable mitigation of the Claimant's loss but taking account of expenditure incurred in mitigation of loss. The difference between the parties lay not in the formulation of those principles but in their application to the facts of the case.

77. I have concluded that the contract was for the Claimant to supply 25% of the Defendant's requirement for the calendar year 2014 and not for a minimum quantity of 200 tonnes. The Defendant's requirement for that year turned out to be 436 tonnes and so the sum which the Defendant would have had to pay the Claimant if the contract had proceeded would have been £972,280 (being 109 tonnes @ £8.92/kg).

78. The Claimant did not buy any fillets from Hofseth. The Claimant accordingly deducted from the sum of £972,280 the sum of £751,004 which would have been paid to Hofseth. It also deducted shipping costs of £15,647; storage and transportation costs in the United Kingdom of £11,959; and invoice factoring charges of £5,931 resulting in a sum of £187,739. In addition it contends that it is liable to pay the sum of £136,459 to Hofseth by way of compensation for the Claimant's failure to take from Hofseth the salmon fillets which it had contracted to buy from that company.

79. There appeared to be dispute between the parties as to the recoverability in principle of the sum payable to Hofseth. However, in my judgment that dispute was largely due to a failure properly to consider the nature of the payment to Hofseth. If the contract had proceeded the Claimant would have obtained salmon fillets from Hofseth and would have paid that company £751,004. That sum would have been recoverable from the Defendant subject to questions of mitigation of loss and in particular of whether the Claimant could and should have sold that fish elsewhere. The Claimant mitigated its loss by obtaining its release from its commitment to make that payment to Hofseth. The price of obtaining that release is properly recoverable as an element in the damages by reason of being an expense of mitigation. As a matter of principle it is immaterial whether the release comes from an agreed variation of the contract between the Claimant and Hofseth or by way of settlement of a potential legal claim from Hofseth (although that difference may be relevant to questions of reasonableness and quantification). The issue in reality is not whether such a payment can or cannot form part of the damages (in my judgment it can as a matter of principle) but whether the Claimant has established that it is in fact liable to make a payment to Hofseth and in what sum.

80. The sum of £187,739 was calculated by Mr. Mark Fairhurst, the forensic accountant instructed on behalf of the Claimant. Mr. Fairhurst received instructions as to the expenditure which would have been incurred by the Claimant if the contract had proceeded and as to that which would not have been incurred. The exercise which he undertook was to apply those instructions to the raw figures and calculate the outcome based on the propositions set out in his instructions. Mr. Fairhurst took account of the financial records provided to him but his calculation was ultimately dependent on the propositions in his instructions as to the expenditure which would have had to be borne if the contract had proceeded and as to whether that would have been borne by the

Claimant. In cross-examination Mr. Latimer criticised Mr. Fairhurst for not investigating further but in my judgment this criticism was misplaced. Mr. Fairhurst was entirely open about the basis on which he proceeded and it was not incumbent on him to carry out his own enquiries to establish the accuracy or otherwise of the factual basis on which he had been instructed to report. As Simon Paley, the Defendant's forensic accountant, said the experts were engaged as accountants and not detectives.

81. Mr. Paley had considered the Claimant's accounts for 2013 and thereafter. He contrasted the overall profitability shown in those accounts with the level of profitability which would appear to have been made on the contract with the Defendant if Mr. Fairhurst's calculations were correct. There was a marked contrast with an overall net profit margin of 2.1% and an asserted profit margin on this contract of 19.3%. Mr. Paley said that this contrast called for enquiry and that in the absence of explanation as to why this contract was much more profitable than the rest of the Claimant's business one should conclude that there was expenditure which would have been borne by the Claimant but which had not been taken into account in Mr. Fairhurst's calculations. On that footing Mr. Paley said that reliance could not be placed on the figures provided to Mr. Fairhurst and a calculation undertaken applying to this contract the level of profitability applicable to the Claimant's overall trading. On that footing he calculated the loss at £52,406.

82. The experts were agreed that if Mr. Fairhurst's exercise had identified all the costs which would have been borne by the Claimant then the loss was of the order identified by Mr. Fairhurst. Conversely Mr. Fairhurst accepted that if there was other expenditure which the Claimant would have had to bear then that should be deducted from his totals and he did not disagree that if the particular figures could not be accepted then Mr. Paley's approach was one legitimate way of identifying the general level of the costs which would have been incurred.

83. A very large part of the difference between the calculations of Mr. Fairhurst and Mr. Paley came down to the question of whether the cost of packaging the salmon fillets was to be borne by the Claimant or by Hofseth. Mr. Fairhurst accepted that the cost of packaging of 200 tonnes of fillets would be of the order of £69,576. If that cost was to be borne by the Claimant rather than by Hofseth then the Claimant's loss would have to be reduced accordingly. Mr. Fairhurst accepted that the Claimant's accounts showed the Claimant paying the cost of packaging on other occasions. Mr. Paley agreed that if the cost of packaging was to be borne by Hofseth rather than by the Claimant then that would go a considerable way to explaining why this contract was more profitable than the general run of the Claimant's business. In addition account was to be taken of the value of the pound sterling and of the Norwegian krone at the relevant times and Mr. Paley accepted that the fluctuation in the exchange rate could have been a factor contributing to the profitability of this contract.

84. The Claimant relied on three matters in support of the assertion that Hofseth would have borne the packaging costs. There was the oral evidence of Mr. Lag in which he asserted that the price per kilo agreed with Hofseth included packaging. In addition a one page "Purchase Contract" was provided. This stated that "[Hofseth] will arrange production and sales of the agreed quality

and volume as per request from [the Claimant]". The Claimant says that production should be seen as including packaging. Finally, a "to whom it may concern" letter from Hofseth was provided. This said that the agreement between Hofseth and the Claimant was for the former to produce salmon portions adhering to "the full specification on the product, packaging material, and standards required… the agreement was to produce and pack the ready to distribute and sell Iceland Foods branded salmon products with no further changes, amendments or transformations required."

85. The Defendant says that this material is sketchy in the extreme and that the Claimant has simply failed to demonstrate that the packaging costs were to be have been borne by Hofseth on this contract in apparent contrast to the normal practice appearing from the Claimant's accounts. The Defendant says that if the packaging costs were to have been borne by Hofseth one would have expected the Claimant to have been able to produce considerably more detail including clear evidence from Hofseth and/or financial records.

86. I agree with the Defendant's submission in this regard. The burden of proving its loss lies on the Claimant. The Claimant's accounts indicate that it generally bears the cost of packaging its products. The material which it has produced to support the assertion that there was something different in this arrangement is considerably less than that which might have been expected if the Claimant's assertion is correct. In that regard I have already explained why I cannot accept the reliability of Mr. Lag's evidence in the absence of support. In those circumstances if I had had to make an award of damages on the claim I would have concluded that on the balance of probabilities the Claimant would have borne the cost of packaging in respect of 109 tonnes of salmon fillets. Scaling down the figure of £69,576 applicable to 200 tonnes that would give the sum of £37,918 to be deducted from the Claimant's loss. However, I would have accepted that once account had been taken of that sum the expenditure which would have been borne by the Claimant had been identified with the otherwise exceptional level of profitability being in part at least due to currency fluctuations. That would give a sum of £149,821 (£187,739 - £37,918).

87. I can deal shortly with the sum of £136,459 which is said to be payable to Hofseth. The Claimant's case in this regard depends wholly on the evidence of Mr. Lag. I was not told how this sum was calculated nor whether it related to 239 tonnes (the quantity said to have been ordered from Hofseth), 200 tonnes or 109 tonnes. During cross-examination Mr. Lag said that he had received a letter from the Chief Executive of Hofseth giving notice of a claim but no such letter has been put before me. The inadequate state of the Claimant's evidence in this regard was demonstrated when Mr. Fennell, in his closing submissions, invited me to give directions for a separate determination of this issue presumably with further evidence to be provided. I agree with Mr. Latimer's response that it is far too late in the day for such an approach. The burden was on the Claimant to prove its claim at trial and it has failed to do so. Accordingly, even if I had found for the Claimant on the claim I would not have accepted that the alleged loss of £136,459 had been proved.

The Counterclaim.

88. It is accepted that if the Defendant was not in repudiatory breach on 23rd September 2014 and if the orders placed then did not constitute a renunciation of the contract then the Claimant's letter of 30th September 2014 was itself a repudiation of the contract. The Defendant accepted that as terminating the contract and suffered loss in that it had to acquire the balance of its salmon fillet requirements from Marine Harvest. It had to pay that company £9.20/kg rather than the £8.92/kg which had been agreed with the Claimant. The Defendant bought an additional 109 tonnes from Marine Harvest to replace the 25% of its requirement which the Claimant should have provided. There is no dispute as to the recoverability of that loss in principle nor as to its quantification and the figure of £30,520 put forward by the Defendant is not challenged.

Conclusion.

89. In those circumstances the claim falls to be dismissed and the Defendant is entitled to judgment on the Counterclaim in the sum of £30,520 together with interest.