**Neutral Citation Number: [2023] EWHC 2661 (Comm)**

**CC-2022-NCL-000007**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS IN NEWCASTLE**
**CIRCUIT COMMERCIAL COURT (KBD)**

**Before HH Judge Kramer sitting as a judge of the High Court at the Moot Hall, Castle Garth, Newcastle upon Tyne on 21, 22 and 29 September.**

**BETWEEN:**

**DUNELM GEOTECHNICAL & ENVIRONMENTAL LIMITED**

**CLAIMANT**

**-and-**

**BRAY CRANES LIMITED**

**DEFENDANT**

JUDGMENT

1. The claimant carries on the business of ground investigation services. The defendant is a crane hire company.

2. In 2021, the Port of Tyne employed the claimant to drill a number of bore holes off the quay wall at Howden to collect environmental samples, preparatory to deepening the riverbed. As the work entailed drilling over water, the drilling rig had to be placed on a pontoon. The claimant contracted with the defendant to lift the rig from the quay onto the pontoon. The lift took place on 9th November 2021 but did not go as planned. As a result of the negligence of the crane driver, part of the lift fell from the sling, damaging the pontoon and other equipment and depositing pieces of the rig in the River Tyne. The claimants seek to

recover their losses arising from this incident from the defendant. The Defendant counterclaims for the hire charges it quoted for the two day hire under the contract.

3. As regards the accident, liability is not an issue. judgment on liability with damages to be assessed was given at the costs and case management conference on 9th May 2023. The matters for trial are as to whether the contract for the crane hire excluded liability for the bulk of the losses claimed, the amount of such losses and whether the Defendant is entitled to payment for its services.

4. The claimant is represented by James McHugh and the Defendant Sahana Jayakumar, both of counsel.

5. The contractual issues on the claim turn upon (a) the question as to whether a limitation of liability clause which appears in the Construction Plant-Hire Association Standard Terms and Conditions for Contract Lifting Services was incorporated into the contract of hire and (b) if it was, whether is satisfied the test of reasonableness for the purposes of s.11(1) of the Unfair Contract Terms Act 1977. The contested term is as follow:

*"7.2 The Company shall not be liable or responsible for any of the following, however arising:*

*7.2.1 Loss or damage of whatever nature due to or arising through any cause beyond the Company's reasonable control.*

*7.2.2 Whether by way of indemnity or by reason of any breach of the contract, breach of statutory duty or misrepresentation or by reason of*

*the commission of any tort (including but not limited to negligence) in connection with the contract, for any of the Client's loss of profit, loss of the use of the plant or any other asset or facility, loss of production or productivity, loss of contracts with any third party, liabilities of whatever nature to any third party, and/or any other financial or economic loss or indirect or consequential loss or damage of whatever nature; and*

*7.2.3 Loss or damage to the Contract Goods whilst in storage outside the control of the Company."*

6. The quantification of loss turns upon whether, on the oral and documentary evidence I have received, I am satisfied that the loss claimed was incurred and caused by the breach and, applying the first and second rules derived from Hadley v Baxendale (1854) 9 Ex 341, that such loss is of a type which was, at the time of the contract, reasonably foreseeable as likely to result from a breach, taking into account the knowledge imputed to the defendant, from the objective circumstances, as being the likely consequences, and its actual knowledge of special circumstances.

7. Ms Jayakumar sought to argue in closing that the claimant's losses should be limited as they may not have been caused by the Defendant but by some other, unspecified, cause. Further, some of her cross-examination as to why hire and service charges were incurred for a lengthy period following the accident seemed to go the question of mitigation of loss. It is for the defendant to plead and prove an intervening cause breaking the chain of causation and the claimant's failure to mitigate loss. The Defence, however, merely puts the claimant to proof of its losses.

Questions of intervening cause and mitigation of loss are, accordingly, not amongst the issues for me to decide.

8. It is common ground that the outcome of the counter-claim depends on findings as to whether the defendant was in repudiatory breach by the negligent lift and, if so, whether the claimant informed the defendant that it elected to terminate the contract in the light of that breach. Mr McHugh, however, did not press the repudation/election point strongly as he recognised, realistically, that, following the lift, the claimant had requested the defendant to remain on site and to prepare a Risk Assessment and Management Plan to recover the parts of the lift dropped into the Tyne, which is conduct consistent with affirmation of the contract.

The Incorporation Issue

9. The sequence of events leading to the supply of the crane to site are not in doubt and are set out in an agreed chronology. In November 2021 the Port of Tyne appointed the claimant to carry out percussive borehole sampling at the Port of Tyne Howden Yard. On 2 November 2021 Ben Carvey, a senior engineer at the claimant, emailed Michael Duncan, the defendant's sales manager, in the following terms:

*"Hi Michael,*

*Thanks for meeting me on site today.*
*If you could kindly provide a quote and the RAMS for the project it would be appreciated."*

There is nothing in the evidence to suggest that anything of contractual significance happened at the site meeting. RAMS stands for Risk Assessment and Method Statement. These are two separate documents.

10. On 3 November 2021 Mr Duncan replied by email. He said:

*"Hi Ben,*
*Contract Lift quote as requested. Please send order number and on receipt will start the RAMS."*

The attached quote is headed "QUOTATION FOR CPA CONTRACT LIFT CRANE HIRE". The first page of the quote sets out a breakdown of the estimated costs of the 2 day hire based on 8 hours per day. There is no reference on the first page to the contact being subject to the CPA terms. The second page of the contract is headed "CPA Contract Lift." As the defendant relies upon page 2 as notice of the application of the CPA agreement, and limitation of liability clause, within, it is necessary to quote the text in full. This page reads:

*"Under the terms of a standard CPA contract lift, the crane/equipment, operator and all personnel supplied with the crane (including the Appointed Person) are the responsibility of the Crane Owner.*

*The Crane Owner is responsible for all aspects of the planning and execution of the lift and will provide the following insurance cover:*

- *Loss of or damage to plant/equipment caused solely by the owner's negligence in the performance of the lifting contract.*

- *Loss of or damage to Third party property caused solely by the owner's negligence in the performance of the lifting contract subject to:*
    - *A maximum liability of £10,000 in respect of goods being lifted.*
    - *A maximum liability of £2,000,000 in respect of loss of or damage to third party property or death/injury to 3rd party persons.*
    - *(These limits can be increased on request and additional premiums will be charged accordingly.)*

*It Is important to note that a CPA Crane Hire agreement only becomes a CPA Contract Lift when the crane owner supplies the appointed person and hence, access liability for planning and supervising the lift.*

*Under Contract Lift Conditions, the customer still retains certain liabilities and therefore must have the adequate Public Liability/Hired in Plant insurance in place at all times.*

*Specifying the correct type of contract will ultimately improve safety and ensure that the correct system of work is adopted.*

*The hirer is fully responsible in every way for ensuring that ground conditions are suitable for vehicles to travel over and work on. This specifically includes site access and travelling to and from the working position. The working operation of the crane may cause damage to the ground surface and facilities below, especially tarmac areas, pavements, manholes, mains, cables or pipes.*

*Any damage caused  is the responsibility of the hirer who should take all necessary precautions to protect such surfaces. Any damage to vehicles, tyres or lifting equipment whilst on site is also the responsibility of the hirer.. Rigging and de- rigging of cranes will be charged as working time without exception.*

*We need to make you aware that if we organise additional equipment on your behalf and you then choose to move the date of the hire you could still be eligible for the cost of this service as some services are payable in advance. The 80 is chargeable if applicable.*

*yours faithfully,*

*M. Duncan"*

11. On 4 November 2021, Ian Newham, the claimant's project manager for this job requested their procurement department to issue a Purchase Order to Mr Duncan at Bray Cranes. They did so by email the same day, providing a purchase order number. The order provided that all invoices had to be sent to the Admin@dunelm.co.uk account.

12. Ian Newham sent a chaser email to Mr Duncan on 5 November, asking for the RAMS and lift plan as soon as possible, as they need to be signed off by the Port of Tyne that day. He also asked for the details of the defendant's staff who would attend site so that they could be sent a link for an online induction. At 14.51, the same day, Mr Duncan sent Mr Newham the RAMS. The subject line of the email referred to the order number provided on 4 November. The Method Statement part of the 5 November RAMS has not been produced in evidence. On receipt. Mr Newham emailed Mr Duncan, pointing out that the defendant's lift plan

provided for a weight per sq metre double that specified by the Port of Tyne.

13. On 8 November 2021 the defendant sent to the email address from which it had received the purchase order. The email states:

*"Thank you for your hire with BRAY CRANES, please find attached your hire contract. If there are any issues with the details given please contact us immediately.* There were two documents attached to the email, one described as "Hire Details" the other *"CPA-Contract -Lifting -Services Conditions."* The Hire Contract carries the claimants order number. There is a charge for insurance under which the hirer is informed that this does not cover ground conditions, those being the responsibility of the hirer. Under the heading "PLEASE NOTE" the document states, amongst other matters:

" WE ACCEPT CPA HIRE AND BRAY CRANES LIMITED TERMS AND CONDITIONS WITHOUT EXCEPTIONS…WE RESERVE THE RIGHT TO SUPPLY ALTERNATIVE OR RE-HIRED CRANAGE SUITABLE FOR THE CLIENT'S REQUIREMENTS..

THE RECEIPT OF THIS HIRE TICKET IS CONSIDERED ACCEPTANCE OF THE RELEVANT CPA TERMS AND CONDITIONS AND THE BRAY CRANES LIMITED TERMS AND CONDITIONS. ON THE DAY OF HIRE THE OPERATOR WILL REQUIRE THE COMPLETION OF OUR SITE ACCEPTANCE FORM PRIOR TO ANY LIFTS TAKING PLACE."

The CPA conditions supplied comprised of a copy of the 2011 Construction Plant-Hire Association terms for Contract Lifting Services, which included the provision as to limitation of liability.

Later, on 8 November, the defendant prepared an amended method statement which Mr Newham accepts he received. Under the hearing "INTRODUCTION" it states:

*"It is the aim of this Method Statement to define and describe the equipment and safe procedures which are to be employed by Bray Cranes to carry out the lifting operations in accordance with the following:"*

Below that is a table setting out the titles of 5 pieces of legislation relevant to safe working practices, 2 British Standards codes of practice and after that, it reads:

*"BRAY CRANES GENERAL CONDITIONS and CPA Standard Conditions for a contract for the Lifting and Movement of Goods Involving Crane Operations."*

There is a tick against each item in the list.

*14.* The last document in the chain, to which reference has been made, is a Bray Cranes' pro-forma dated 9 November 2021. The top half is entitled "ON SITE ACCEPTANCE." After re-iterating the hirer's responsibility for ground conditions and who is to pay the cost of rigging and de-rigging, it states:

*"Acceptance of our crane on site will be deemed as acceptance of the relevant CPA terms and conditions and the Bray Crane Limited terms and conditions which together take precedence over any other conditions."*

The document is signed by D Commer against the entry "(Hirer's Representative)." Mr Commer was the claimant's engineer on site. The date of signature is unclear though it seems to be agreed that this must have happened when the machine was delivered to site. He also signed the bottom of the form, on what must have been a later occasion, to confirm the days and hours for the attendance of the crane on site.

15. I heard evidence, for the claimant, about the making of the contract from Ian Newham, the engineer for the project, and James Huntington, the claimant's managing director, and for the defendant, from Michael Duncan, who was the Appointed Person for the job as well as the defendant's sales manager.

16. Mr Newham said that at the time he received the defendant's quotation he was not aware of the CPA standard terms and conditions and that when he saw the reference on the quotation to "CPA Contract Lift Hire" he thought that was a reference to Bray Cranes being responsible for the whole of the lift. He was aware, from his experience as a project engineer of 13 years standing, there always has to be an individual, termed the Appointed Person, in charge of a particular process on site. It was not something he had learned from the definition section of the CPA terms. He said he did not expect to see the terms of the contract to be provided at a later date but with quote. Neither did he know whether it as an industry standard to send the terms and conditions after the quote and purchase order. He had not come across the CPA conditions when hiring plant previously. He was asked if he would have expected to see terms concerning how the contract could be brought to an end or dispute resolution, to which he said that in some quotes he might expect to see

that, but not if he went to a regular supplier as he expected them to be on the claimant's approved list, in which case their rates and terms and conditions were on file.

17. Mr Newham's account as to how he came to hire from Bray is that he checked the approved supplier list, but Bray Cranes were not on the list. He had not hired a crane before, so he asked around the office. Another project engineer, Brian Laycock, told him he had hired from Bray before, that was in 2018, and the job had gone smoothly.

18. In connection with his claimed lack of knowledge of the CPA standard terms, he was challenged by Ms Jayakumar as to his assertion that the claimant rarely required crane hire, whereas Mr Huntingdon said, in his statement, that they only do 3 of 4 jobs like this a year, i.e. requiring a pontoon. Mr Newham explained that his company do hundreds of jobs a year, from which it must follow that 3 or 4 would count as rare. Not every job involving a pontoon required a crane. He estimated that the claimant would hire in a crane about once a year. Mr Huntingdon's evidence confirmed that not every job involving the use of a pontoon requires a crane.

19. There was much cross-examination of Mr Newham by reference to the that part of the Particulars of Claim which identified the Method Statement as being one of the documents comprised in the contract and an allegation that there was a contractual obligation to perform the works in accordance with the legislation listed in the statement, the breach of which resulted in the accident. He said that he viewed the method statement as a document describing the safe procedure to be followed to carry out the work and believed that the defendant would have to comply with the law as it governed the lifting operation in any event. He had not

received the CPA Terms and Conditions as the email of 8 November was sent to the procurement department who would have filed it. He said that the sending out of the purchase order in acceptance of the quotation was how the contract was made.

20. Mr Huntingdon was asked about his familiarity with the CPA standard terms. He said that he had not come across the initials CPA even though the claimant uses many contractors. The only construction plant which the claimant had hired were excavators, but he had not come across the CPA terms in that connection. The majority of the equipment hired in is not construction plant. There is no set of standard terms and conditions in the industry in which the claimant operates, which must be ground surveys. His company does not use standard terms. Sometimes suppliers do, as do some of the claimant's customers. He was not involved in the day to day management of this hire, but he said he did look at the quotation and noticed that the defendant said it had £2 million of cover for third party damage. He thought that would be enough. The claimant's public liability insurance excludes liability for damage by cranage as it does not employ persons qualified to supervise such operations.

21. Mr Huntingdon described the claimant's procedure when contracting with a supplier. They have to produce insurances and certificates of competence to be used by the claimant. Once that had been done, they would be placed on the approved suppliers list. Annual questionnaires would be sent out to regular suppliers so as to update the information necessary to retain approval. As he is now aware that Bray Cranes were used by the claimant in 2018, a fact he discovered as a result of these proceedings, he would expect that they were placed on this list, though if they were not used again, their listing would not be up to date. It was in the light of that evidence, which came out as a result of cross-

examination, the claimant applied, and was permitted, to recall Mr Newham who gave evidence to the effect that this may be the procedure, but that is not what always happened and that the reason he had to ask around the office for the name of a crane company was that there wasn't a local one, such as Bray, on the list.

22. Mr Huntingdon was also asked why Mr Laycock had not been called to give evidence about his dealings with Bray in 2018. He said that he could have asked him to give evidence but he had not been asked about what he recalled of the 2018 hire from Bray and he, Mr Huntingdon did not know whether he had a recollection, i.e. beyond what he had said to Mr Newham.

23. Both Mr Newham and Mr Huntingdon gave evidence to the effect that Mr Commer did not have the claimant's authority to enter into, or vary contracts with suppliers. His job was to supervise what went on at the site. In final submission, Ms Jayakumar conceded that there was no evidence of consideration for a variation of the hire contract to incorporate the CPA terms at the acceptance on site stage. Accordingly, it is not necessary to recite the claimant's evidence on the subject of authority. It is sufficient to say that had I been required to determine the issue, the defendant would not have satisfied me that someone in Mr Commer's position had apparent authority to contract with the defendant on the claimant's behalf. Further, there was no evidence of express authority.

24. Mr Duncan gave some useful evidence. He has worked for Bray Cranes since 2010 and first worked in cranage in 1988.He deals with 4 or 5 contracts a day. He says that after the site visit the quote is sent to the client with details of the terms of the contract. Once a quote is sent out he

awaits an acceptance from the client. He does not start work on the RAMS until the acceptance has been received. The reason for this is that in the past he has started work on the RAMS before receipt of the purchase order and the client has subsequently said they did not wish to proceed. If they were caught in that position there would be a risk that they would not be paid for the work they had undertaken. As far as he was concerned the parties had entered into the contract once the claimant's order was placed.

25. In his witness statement, Mr Duncan said that the claimant had hired from Bray Cranes twice in 2009 and 2011. He was unable to find the documentation for those hires and could not assist as to the contractual terms which were agreed. When he started in 2010, Bray Cranes had a paper based system and required a signature to accept incorporation of the CPA terms. It was so long ago, the defendant no longer keeps the paperwork generated by those hires.

26. Mr Duncan was able to give more detailed evidence about the 2018 hiring as he found the documents for the hire. From that he concluded that there was a quote, purchase order and method statement and that later documents referred to the CPA Contract Lift Terms, a copy of which were provided to the claimant. He said that the format of the 2018 quote is different to that used in 2021. He can't recall a reason for the change other than that customers found it difficult to follow the breakdown of charges. The 2018 quotation is in evidence. Each page of the quote has at the foot the following caption "*All Equipment is Supplied in Accordance with the Relevant C.P.A. Conditions."* The last page of the quote states *"This quotation is based upon the Bray Cranes general conditions for a contract lift and the C.P.A. model conditions for the Hiring of Plant under contract lift."*

27. As regards the documentation used in 2021, Mr Duncan said that "*As the CPA terms and conditions are relatively lengthy, we did not want to set out the full terms on the back of the quote as we wanted it to be user friendly. We therefore set out the summary of the key points arising from the CPA standard terms and conditions on the back of the quote. The full copy of the CPA Terms is sent to the customer with the hire Contract once the quote is accepted for completeness. "* As is apparent from the above recital of the contents of the quote, there is no reference to the limitation of liability clause.

28. In cross-examination Mr Duncan said that the terms and conditions are sent to the client the day before the hire is due to start; that is consistent with the email traffic relating to both the 2018 and 2021 hire. He was asked, but could not explain, why CPA terms were no sent with the quote. He said that had the claimant contacted the defendant on receipt of the terms, i.e. the day before the hire, to say they would not agree to those terms, the defendant would not send the crane to site and would treat the claimant as the contract breaker for having cancelled the hire. He declined to be drawn on whether the client would still be expected to pay for the crane, saying that was a matter for the office. A reading of clause 3.2 of the CPA Terms indicates that a client who cancels is liable for the full contract price unless the defendant agrees to the termination in writing.

29. Mr Duncan said that the defendant would only hire cranes on CPA terms. As far as he is aware the incorporation of CPA terms is standard across the industry and he is not aware of any contractors who do not operate subject to CPA terms. He suspected, he said, that given the nature of Dunelm's business they would hire plant on a regular basis and would be

familiar with what is meant by a CPA Contract Lift and that CPA terms apply to plant hire contracts.

The Law

30. Ms Jayakumar has referred me to 5 cases on the issue of incorporation. **Circle Freight International Limited (Trading as Mogus Air) v Medeast Gulf Exports Limited (Trading as Gulf Export) [1988] 2 Loyd's Rep 427, Balmoral Group Ltd v Borealis (UK) and others [2006] 2 CLC 220, S.I.A.T. di Del Ferro v Tradax Overseas S.A. [1978] 2 Lloyd's Rep 470, Trasnformers and Rectifiers Ltd v Needs Ltd [2015] EWHC 269, British Crane Hire v Ipswich Plant Hire [1975] 1 QB 303 and Addax Energy SA v Petro Trade Inc [2002] EWHC 237 (Comm).** I was also referred to relevant extracts from Chitty. It is unnecessary to refer to each of judgment in detail as this area of the law is well settled. In addition to this list of cases, I invited the parties to look at **E.Scott (Plant Hire) Ltd v British Waterways Board [1982] Lexis Citation 440,** a case in the Court of Appeal concerning the incorporation of CPA standard terms. which, having seen the papers here, I recalled attending with my pupil master DP O'Brien, later QC, some 41 years ago. The case is useful in explaining **British Crane Hire.**

31. It is common ground that there is no requirement that the terms of the contract are provided to the party to be bound before contracting, provided they have had reasonably sufficient notice before or at the time the contract is concluded. If they do not have sufficient notice by that stage, the terms are of no effect; **Olley v Marlborough Court Ltd [1949] 1 K.B. 532.** There are a variety of ways in which terms may become incorporated into a contract. At the heart of each lies the proposition that:

*"Whether or not one party's standard terms are incorporated depends on whether that which each party says and does is such as to lead a reasonable person in their position to believe that those terms were to govern the legal relations. The Court has to determine what each party was reasonably entitled to conclude form the acts and words of the other."* See per Christopher Clarke J, as he then was, in **Balmoral** at 348.

To this he added. At [348] :

*"The question is one of fact to which prior authority may form an uncertain guide.*

32. This proposition, which is derived from the Scottish text book Gloag on Contract, was relied upon in **Circle Freight** to support a finding of incorporation where there had been a course of dealing between commercial parties in which 11 invoices had been sent, giving notice that business was conducted on identified terms; in that case those of the Institute of Freight Forwarders; see per Taylor LJ, as he then was at 433 where he said:

*"I consider that the defendant's conduct in continuing the course of business after at least 11 notices of the terms and omitting to request a sight of them would have led and did lead the plaintiffs reasonably to believe the defendants accepted their terms."*

33. In **Ipswich Plant Hire,** Lord Denning MR placed reliance upon this proposition in holding that, the then version of, the CPA terms were incorporated into a contract for the hire of a crane by the owner to another crane hire company, but this did not depend on them both in the same business and the party bound habitually using the same conditions, but upon the fact that they were *"thoroughly familiar not just with the fact*

*that the contract was one to which conditions of this sort attached were normally applied, but with the actual framework and wording of the conditions themselves."* See **E Scott(Plant Hire) Ltd** per Oliver J at p.10, explaining the ratio of **Ipswich Plant Hire** in that judgment at 310 D to 311 E.

34. In **Circle Freight,** at 433, Taylor LJ said:

"*It is not necessary to the incorporation of trading terms into a contract that they should be specifically set out provided that they are conditions in common form or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and they are available on request."*

Although that was a case of incorporation resulting from a course of dealings, this obiter followed a review of the authorities and has not been doubted since and is consistent with the proposition taken from Gloag.

35. There are examples of inadequate notice recited in Chitty 34th Ed Ch 15-011, such as where conditions are printed on the back of the document without any reference on its face such as "for conditions see back", or where such a reference appears on the front of the document but none are printed on the back.

36. Where what is sought to be incorporated is an unusual and onerous term the party seeking to rely upon it must show that it was fairly and reasonably brought to the attention of the other party, which may include drawing their attention to it.**; see Interfoto Picture Library Ltd v Stilleto Visual Programmes Ltd [1989] QB 433** at 438G-439B per Dillon LJ.

37. The question as to what constitutes course of dealing sufficient to give rise to incorporation is also highly fact dependent, as examples taken from the cases illustrate. In **Ipswich Plant Hire**, at 310 A-B Lord Denning MR, doubted that two transactions many months prior to the relevant hire, in the course of which the CPA conditions were supplied, would be sufficient. In **E Scott Plant Hire** Oliver LJ , at p.11, accepted Mr O'Brien's proposition that if there were only 2 or 3 hires, followed by receipt to the owner's terms, the hirer could legitimately have returned them stating they were not bound as they had come after the contract. In **Circle Freight** 11 transactions were sufficient. Ms Jayakumar argued that the course of dealings does not have to be extensive, relying upon an a passage in the judgment of Edwards-Stewart J in **Transformers & Rectifiers Ltd v Needs Ltd** , where, at [42], he said:

*"Where there is reliance on a previous course of dealings it does not have to be extensive. Three or four occasions over a relatively short period may suffice: see Balmoral at 356 and Capes (Hatherdon).*

38. Some care has to be exercised in relying on this passage on the question as to the number of transactions required to establish a course of dealing. First, because it is described as one of a set of principles *"From my rather brief review of some of the relevant principles"*, and second because in **Balmoral** , whilst it is difficult to ascertain how many invoices Balmoral had received containing Borealis's standard terms and conditions prior to the time when they were found to be incorporated, there must have been at least two as there had been two deliveries by that stage each of which had been invoiced, see [27] of the judgment, the case also turned upon written notice of the existence of the terms as on 18 January 1995 Borealis *"made it plain that its prices were quoted subject to normal terms and to current conditions of sale."* See per Christopher

Clarke J at [358], Furthermore, [356] to which reference was made was obiter.

39. Secondly, in **Capes (Hatherden) Ltd v Western Arable Services Ltd [2010] 1 Lloyd's Rep 477**, the other case to which reference was made, HH Judge Havelock-Allen QC, sitting as a judge of the High Court, was dealing with the issue of the incorporation of the Agricultural Industries Confederation (AIC) standard terms into a contract of sale between a farmer and a grain merchant for the sale of the former's barley crop where there had been four oral contracts in one year, with an interval of 5 months between the last of them and the 2 disputed contracts. After each of the initial four transactions the buyer received a contract note from the seller stating *"Terms: AIC Contract No 1/04 for grain and pulses"*, that being a reference to the AIC terms. The judge held that this was insufficient to amount to incorporation by a course of dealing. He said:

> *"In my judgment these facts are right on the borderline. If there had been any persuasive evidence, either that the terms of Contract 1/04 were the usual terms on which grain merchants purchase grain from UK producers, or that Mr. Capes knew that grain merchants commonly employed standard terms which provided for disputes to be settled by arbitration, I would have been likely to hold that Contract 1/04 was incorporated. In the absence of such evidence, I do not think that the previous contracts justify the conclusion that the AIC terms were incorporated. To put it another way, the limited course of dealing between the parties is not in my view such that an impartial observer would conclude that the parties had reached a common understanding that Contract 1/04 applied."*

The contentions

40. Ms Jayakumar says that there was clear notice given of the application of the CPA to this hire in the Quotation by the use of the words CPA Contract Lift. She asked me to disbelieve the claimant's witnesses when they said they did not have knowledge of the CPA Contract Lift standard terms and were not aware the reference in the Quotation was to those terms. She said they must have come across them as they hire plant and Mr Duncan had said that all plant hirers, which he later described as "all crane companies", use these terms. Relying upon inconsistencies in the claimant's evidence as to whether Bray was on the approved supplier list, she argued that they must have been, together with details of their terms of hire.

41. At one stage Ms Jayakumar sought to argue that the claimant should be bound as they were used in their "the industry." I asked her to which industry she was referring, as regards the claimants, who are geotechnical engineers and not engaged in construction. She responded that she could not say that the claimant and defendant were in the same industry but nevertheless they must have known of the terms. She argued that the fact that Mr Newham said he knew what a crane lift contract was as well as the meaning of an Approved Person at the time of the quotation is information he must have obtained from reading the standard terms and conditions upon which defendant relies. She says that Mr Newham's acceptance that there was nothing in the quotation referring to how the contract was to come to an end or alternative dispute resolution indicates that he expected to receive more contractual documents from the defendant setting out the terms of the agreement.

42. The second source relied upon as notice of the terms is the Method Statement. Ms Jayakumar argues that the CPA terms were incorporated by this document because (a) it was one of the documents which Mr Newham expected to see and it contains a reference to the CPA terms, (b) if not incorporated on the basis that Mr Newham recognised that the defendant's terms binding the claimant were to follow the purchase order, the terms did not come too late as the contract was not concluded until the receipt of the acceptable method statement on 8th November, on which day the defendant supplied the CPA terms document. Further, she argues that as the claimant pleads that the contract was comprised in a number of documents, including the method statement, and that compliance with the statutory and other standards set out in the statement were express terms of the contract, the CPA terms must have been incorporated as they are referred to in the statement.

43. Ms Jayakumar argues, in the alternative to this being a notice case, that the terms were incorporated by the course of dealings between the parties, which she alleges incorporated the CPA Terms on each occasion. These were the hires of 23 and 29 September 2009, 4 and 6 January 2011 and 9 November 2018. In this she relies upon the evidence of Mr Duncan. Though he has no knowledge of the 2009 hires and no recollection of the 2011 hires, albeit he says that at that time a paper-based signature was required to accept the incorporation of the terms, he claimed that that the format of the Terms and Conditions remained the same, as it did in 2009.

44. I do not need to recite Mr McHugh's submissions on incorporation as I agree with much of what he said and to do so would result in unnecessary duplication.

Discussion and Conclusion

45. I start by considering the time at which the contract was made. I have no doubt that this occurred when the purchase order was received by the Defendant. Whilst the subjective view of the parties is not the test, it is telling that Mr Duncan said he was not prepared to start work on the RAMS until the purchase order was received as he had previously faced the situation where a potential customer had cancelled after work on the RAMS was done. That leads to the relevance of the preparation of the RAMS. This was requested in the email asking for the quote. The defendant's email in response attached the quote, requested an order number and indicated that the RAMS would start on receipt. The objective inference from this exchange is that the preparation of the RAMS is part of the contract works, not part of the contract. Once the Purchase Order had been provided there was nothing further that needed to be done to complete the agreement. The RAMS would need to be suitable for the task to be undertaken but the contract was not contingent on the production of such RAMS. Rather, its production was subject to the implied term of skill and care as applied to the remainder of the contract works.

46. Albeit that the Particulars of Claim pleaded that the contract was comprised in documents which included the Method Statement and alleged that certain entries in the method statement became express contractual terms, that allegation is unarguable. The document describes what it is, namely a document, the aim of which is *"to define and describe the equipment and safe procedures which are to be employed to carry out the lifting operations in accordance with"* the legislation, codes and Terms and Conditions listed. It is a document which is relevant to the performance of the contract, in that a failure to follow what are identified as safe procedures would be evidence of a breach of the implied terms as

to skill and care but it does not contain a set of express terms by which either party is bound.

47. Still less is the Method Statement notice to the Claimant that it is bound by the terms of the CPA Standard Terms or Bray General conditions. The reference to these conditions is in the context of how the lifting operations are to be carried out, which is work to be undertaken by the Defendant. Albeit that the statement refers to the client providing access to the site, safe ground conditions, information about ground conditions and their Risk assessment, the lifting operations are being carried out by the Defendant.

48. This conclusion leads to the question as to whether the CPA Terms and Conditions were incorporated prior to the receipt of the purchase order by the provision of reasonably suitable notice. They were not. Page 1 of the quote says nothing about the work supplied under the quote being subject to any terms and conditions. It makes a reference to CPA Contract Lift Crane Hire but does not say that this is shorthand for a standard set of terms and conditions which are to apply to the contract.

49. The second page of the quotation does not state that the contract is subject to the CPA Terms and Conditions. The first part of the page is descriptive of what the hirer receives under the terms of a standard CPA Contract Lift and contrasts that with a CPA Crane Hire agreement. It goes on to advise that it is important to specify which type of service the hirer wants so as to ensure that the correct system of work is adopted. In essence, it seems to be saying that if the hirer wants Bray to be responsible for all aspects of the lift, with the benefit of the insurance cover stated, they should ask for a CPA Contract Lift. Although it refers to the hirer retaining certain liability even under the Contract Lift, it does

not say what that is. The only part of the document which could lead the objective observer to conclude that there are contract terms which apply is that part of second page which states that the hirer is responsible for ground conditions. As this follows the passage about the hirer retaining certain liabilities, the objective observer would reasonably conclude that this had something to do with its responsibility for the state of the ground on which the crane was to operate.

50. Mr Duncan's description of what appears on this page as an attempt to make the quote user friendly and to set out the key points of the CPA Standard Terms and Conditions could hardly be wider from the mark. If anything, it obscures the fact that there are a set of further terms which the reader should be on notice are to apply to the contract and encourages them to think that the reference is limited to identifying the type of service required. I was troubled by the discrepancy between Mr Duncan's witness statement, which said that the full set of Terms are only sent after the quotation is accepted and his evidence in cross-examination that he did not send the Terms with the quote as he thought the claimant knew about them. Later in evidence he said that the terms are sent out the day before the hire, which is what happened here, so it was not the acceptance of the quote that triggered their transmission but the fact that the hire was to take place the following day, by which time, on any view, it would be very disruptive to the claimant if it wished to take issue with the terms.

51. It would have been easy to email the Terms with the quote. Mr Duncan said he did not know why this was not done. As the allegation was not put squarely to Mr Duncan that the defendant was deliberately obscure about the detail of the terms to be applied as in most cases it eased the path of the transaction, I do not make such a finding. Nevertheless, in a world of electronic communication, where there is no apparent reason for

not sending the terms with the quote and nothing on the quotation to state that the crane was hired subject to a set of standard terms and conditions which were available on request or in some other way, such as on the defendant's website, I am not persuaded that unless the claimant was aware what the CPA Standard Terms for Contract Lifting Services were and that they would be applied by crane hirers such as Bray, they ought to have concluded from the quotation that they were being offered a contract subject to these terms.

52. Mr Duncan's evidence that all crane hire companies use these terms and that all contractors know what they are does not persuade me that those dealing with the contract at the Claimant's end did. He is likely to believe that everyone knows about it because the crane hire business is the world in which he operates, but he cannot know this to be the case and I have to be cautious in accepting what is, on this point, anecdotal evidence. I am not convinced that Mr Duncan is as knowledgeable as to the CPA as he believes himself to be. He claimed in his evidence that the CPA is a government body as a result of which all crane hire is transacted on its terms. In fact, the CPA is a trade organisation, so there is no imperative requiring the use of these terms. At one point he seemed accept that there may be hirers who have not heard of the terms as he said that he expected that those who did not would contact him to find out what CPA meant.

53. I do not accede to Ms Jayakumar request that I should disbelieve the claimant's witnesses as to their knowledge of the CPA and its terms. Both witnesses seemed to be honest. The criticism of Mr Newham's evidence about Bray's absence from the approved supplier's list is misplaced. True, it came after that of Mr Huntingdon, who had said that if Bray had been used in 2018 it should have been on the list, but that had been

preceded by Mr Newham's evidence that he asked around the office for the name of a local crane company. There would have been no need for him to do so had Bray been on the list. The fact that Mr Newham knew of the term 'Appointed Person' is unsurprising given that he had 13 years' experience as a project engineer and will have come across the role of Appointed Person on many sites, as is his evidence. His knowledge of the term does not signify that he first learnt of it by having read the CPA terms for crane lifts on a previous occasion.

54. I also do not accept Ms Jayakumar's suggestion that the claimant's witnesses must have had knowledge of the terms because the claimant hires excavators. There is no evidence that the CPA terms for excavator hire are the same as those for crane lifts, so even if I did not accept their evidence, which I do, that they had not come across such terms, it would not follow that that knowledge of excavator terms is to be equated to that for crane lifts.

55. On the evidence, there is no reason why Mr Newham or Mr Huntingdon should have come across the CPA Crane Lift Conditions as crane hire by the claimant is extremely limited, said to be about once per year. Furthermore, if other crane hire companies are as coy as the defendant in providing the terms and conditions, there would be a good reason for them not coming to the attention of Mr Newham; his evidence was that when the terms were provided, they will have gone to the procurement section and would not have been passed to him. Thus, unless something happens which causes the crane owner to rely on the terms they would not, in the ordinary course, come to his attention.

56. I do not see a basis for drawing an adverse inference from the fact that Mr Laycock was not called by the claimant. Ms Jayakumar referred me to

Phipson on Evidence, 20th ed Ch 45-35 which sets out the circumstance in which inferences may be drawn from the non-calling of a witness. The defendant has not begun to establish a basis for drawing the inference, which the editors of Phipson recognise is rare. The defendant has not identified the point on which the inference is sought or identified the inference. The fact that Mr Laycock had used Bray in 2018 does not establish that he had material evidence as to the claimant's knowledge in 2021 of the CPA crane lift terms and no explanation has been forthcoming as to why the defendant could not be expected to call Mr Laycock. His sole input into the 2021 hiring was, I accept, to answer Mr Newham's request for the name of a local crane hire company and to vouch for their worth.

57. I have concluded that there was insufficient notice of the CAP terms as a whole. Had I concluded otherwise, I would have had to consider Mr McHugh's point that whatever the position as to the other terms, there was insufficient notice of the term upon which the defendant places reliance, clause 7.2.2, as it was an onerous and unusual term which, following **Interfoto Picture Library**, required something more than a reference to a set of terms in the quotation if the defendant could satisfy the court that this term had fairly and reasonably been brought to the attention of the claimant.

58. The guiding principle is *"that the more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given."* See I**nterfoto** per Bingham LJ at 443 C. The threshold for the requirement of greater notice is, therefore, not fixed but depends upon the content of the term and it's impact in the circumstances.

59. Ms Jayakumar, points me to the observations of Coulson J, as he then was, in **Elvanite Full Circle Cement Ltd v AMEC Earth & Environmental (UK) Limited [2013] EWHC 1191 (TCC)** at 288 (d) indicating that it is not uncommon for contracts for services to limit liability for consequential loss as the supplier of services will have no way of ascertaining what the consequential losses of the service user may be, albeit this was said when considering the reasonableness of such a term. She says that Clause 7.2.2 does not get onto the spectrum which would require notice beyond a reference to the set of terms and conditions in which they are found.

60. I agree with Ms Jayakumar. The limitation on liability in Clause 7.2.2 is of a type which would not surprise a service user for the reasons given in **Elvanite**. It is not buried away in the small print. Had the claimant been given notice that the CPA Crane Lift terms applied and from where a copy could be obtained, they would have had sufficient opportunity to appraise themselves of contents of Clause 7.2.2. and, on placing the purchase order, would have acted so as to lead the defendant to understand that they agreed to be bound by the term, either because they were sufficiently curious to find out what they said or because they were prepared to contract without informing themselves. Accordingly, had I found that the defendant had given sufficient notice of the standard terms, that would have been sufficient notice of Clause 7.7.2.

61. The case on incorporation by a course of dealings cannot succeed. First, there were an insufficient number of transactions, in a relatively short proximity of each other, after which notice of the relevant terms had been provided, for the defendant reasonably to conclude that the claimant had agreed to be bound by the CPA Contract Lift terms. The significance of a requirement that the transaction should take place over a limited period of

time is that the longer between transactions, the less likely it is that the party to be bound will recall what the earlier terms were and the belief that they may not be the same terms, unless that is expressed, is more justified. Furthermore, over time parties may change the way in which they present their quotation which may not give a consistent indication as to what terms apply.

62. The present is a case in point. The defendant, itself, cannot find the terms which it said it used in 2009 and 2011. Whilst Mr Duncan says they were in a similar form to those in 2018, that is not to say that the terms were identical. They are unlikely to have been the same in 2018 and 2009 as the current terms being used show a copyright date of 2011. Further, the defendant could not reasonably conclude that over a span of 10 to 12 years, or even 3 years, the corporate memory would be such that it could have reasonably concluded that by entering into a transaction in 2021 the claimant's were saying, *"Of course we are contracting on the 2009 terms, or their 2011 or 2018 equivalents."*

63. The defendant has not dealt with the incorporation of the terms consistently. According to Mr Duncan, whose evidence I do not doubt on this point, when he joined the defendant in 2010 his employer required the hirer to sign a document to evidence that they accepted the terms. At some point, he cannot tell when, that changed. The 2018 Quote made express reference to the CPA terms applying to the supply of the plant at the foot of each page and in more detail at the end of the quote.. The 2021 documentation is completely different, and does not make it clear that the relevant terms and conditions are to bind the hirer, as explained above, it does the opposite.

64. Finally, whilst all cases turn on their facts and there is no room for precedent in establishing how many transactions are required for incorporation by a course of dealing and over what time, the gaps in time between 2021 and the earlier dealings and the lack of any recent dealings is so out of step with any of the reported cases to which I have been referred in which such incorporation has been established, that this case must be very far to the wrong side of the boundary. If all that the evidence shows is that there were a series of transactions after each of which the existence of the standard terms was brought to the counterparty's attention, it is not usually accepted that dealings of fewer than 3, over a period of a few months, would justify the conclusion that the hirer has, by continuing to contract, agreed to the incorporation of the owner's terms; see the references to this issue, above, in **Ipswich Plant Hire, E. Scott Plant Hire and Transformers and Rectifiers Ltd.**

The Unfair Contract Terms Act 1977 (UCTA)

65. If I am wrong as to the absence incorporation, the question arises as to whether Clause 7.2.2 is an unfair contract term. It being common ground that the term, if incorporated, is to be found in the defendant's standard terms, it cannot by reference to the term restrict its liability for breach of contact unless it satisfies the requirements of reasonableness; s.3 UCTA. The requirement as to 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."* s.11(1). It is accepted that the burden of proving reasonableness lies with the defendant.

66. In **Elvanite,** at [285] –[286], Coulson J, said:

*"285…It is conventional to work through schedule 2 of UCTA in order to consider whether or not the terms are reasonable, although that is not an exhaustive list: see* ***Overseas Medical Supplies Limited v Orient Transport Services Limited*** *[1999] 2 Lloyd's Rep 273.*

*286. I take as my starting point in my consideration of UCTA the judgment of Chadwick LJ in* ***Watford Electronics v Sanderson CFL Limited*** *[2001] EWCA Civ 317 where*

*he said:*

> *"Where experienced businessmen representing substantial companies of equal bargaining power negotiate an agreement, they may be taken to have had regard to the matters known to them. They should, in my view be taken to be the best judge of the commercial fairness of the agreement which they have made; including the fairness of each of the terms in that agreement. They should be taken to be the best judge on the question whether the terms of the agreement are reasonable. The court should not assume that either is likely to commit his company to an agreement which he thinks is unfair, or which he thinks includes unreasonable terms., Unless satisfied that one party has, in effect, taken unfair advantage of the other – or that a term is so unreasonable that it cannot properly have been understood or considered - the court should not interfere."*

67. As I was not prepared to find that the late supply of the CPA was a ploy to pressure the claimant not to protest about the terms, there is no basis for concluding that the defendant was taking unfair advantage of the

claimant. Were it otherwise, it could result in such a finding, which the defendant may wish to bear in mind in future when considering the timing of the transmission of the text of the terms.

68. Turning to the Schedule 2 considerations, neither party addressed me on the significance of each of the factors there set out. Without such assistance I have had to consider them without reference to any authority. In applying these considerations, I do so on the counter-factual basis that the claimant had sufficient notice of Clause 7.2.2 for incorporation, for otherwise the claimant would not be bound.

    a. The parties' bargaining position was equal. The claimant could have engaged another crane company and Bray could have refused to quote. The fact that, according to Mr Duncan, every other crane hire company would have insisted upon the same terms should not have an impact on the issue of bargaining capacity unless those terms were so intrinsically unfair that it was unreasonable for anyone to have to contract upon them.

    b. The relevance of inducement must depend on whether it is a benefit, such as a reduced price, or something untoward, such as unfair pressure. In the former it could be said that the party relying on the term has purchased its exclusion, whereas the later would be a factor pointing to unreasonableness. Neither apply here.

    c. For the purposes of applying the Schedule 2 factors I have assumed that the claimant can be taken to have known of the terms, had they wished to. This does not point towards unreasonableness.

    d. This is a term limiting liability which, as already seen, is not uncommon in supply contracts.

69. Mr McHugh asked me to take into account the ability to insure. The evidence on this was vague in the extreme. Mr Huntingdon said that the claimant's public liability insurance excluded damage due to the operations of cranes but that is far from establishing that it cannot obtain insurance for a specific lift. Whilst it is for the defendant to prove reasonableness, if the claimant wishes to advance a positive case that it cannot insure, it must prove it. In any event, the ability to insure does not arise under the Schedule 2 guidelines as to reasonableness, but under the reasonableness test in s.11(4), and then only where the term seeks to restrict liability to a specific sum, which Clause 7.2.2 does not. For these reasons, the issue of who can insure if of no assistance in deciding whether the defendant has proved that the inclusion of this term was reasonable.

70. Having regard to the considerations set out in the above 3 paragraphs I am satisfied that, had the term been incorporated, it would have been reasonable for it to be included in the contract. The principal reason for coming to this conclusion is that the defendant was not party to the arrangements between the claimant and the Port of Tyne or any of its sub-contractors. It would have no way of knowing the potential liability for consequential loss if something went wrong with the lift. It would not know, for example, that it was difficult to obtain pontoons and drilling engineers, so that they may have to stay on site idle whilst the Port of Tyne decided how to proceed, or that the port authority required that pontoons had to be staffed at all times. The claimant, however, did know about these matters and was, alone, in a position to assess the potential magnitude of consequential loss and, if possible, take measures to mitigate the risk of such losses. In those circumstances it is only

reasonable that the financial risk of such losses eventuating should fall on the claimant.

The quantification of loss and the counterclaim

71. The defendant accepts that it is liable for the cost of repairing the equipment damaged by the accident, the pontoons and hyrdraulic hose, which it puts at £7,649.71. From that sum it seeks to set off the 2 day original hire period in the sum of £2,300 plus VAT. It has made no charge for the two extra days it remained on site at the request of the claimant.

72. It is convenient to get the counter-claim out of the way so as to calculate the amount of set-off.

73. The claimant argues that the defendant should be paid nothing because it repudiated the contract by dropping part of the load into the Tyne. It is, however, settled law that for the claimant to be discharged from further performance of the contract due to the defendant's repudiatory breach, it must notify the defendant, in words or conduct, that it is electing to treat the breach as terminating the contract. Even then, it does not escape lability for contractual liabilities to the defendant incurred prior to notice of termination. In this case, the claimant did not give notice of its election to terminate. On the contrary, it requested the defendant to remain on site for two additional days beyond the period of hire and requested that it produce a RAMS to retrieve what had been dropped. Far from terminating the contract for breach, the claimant affirmed its continuance. The defence to the counter-claim, therefore, is unsustainable and the defendant is entitled to is hire charges for the first 2 days on site.

74. The claimant produced invoices to support the expenditure incurred to rectify the damage caused by the accident, insofar as payments were made to third party sub-contractors. The payment of these invoices was verified by Mr Newham in evidence. I am satisfied on this evidence that the claimant has paid out the invoiced amounts. It was not suggested to him otherwise. In addition, the claimant seeks to pass on its own costs in keeping staff on site. To that it adds a claim for loss of profits. I shall deal with each head of claim in turn.

Payment to third party contractors

North East Safety Boats (NESB)

75. NESB were the owners of the pontoon onto which the drilling rig was to be lifted. The amount claimed on the invoices from NESB totals £89,319.64 to which is to be added VAT. This is said to exclude the quote for the original work. I heard from Mr Newham that this claim is based on the NESB invoices S1-539 for £50,000, from which must be deducted the works originally ordered of £19,164, leaving a balance of £30,838. S1-545 for £52.461.64 and S1-561 for £6,020.00. He said that the pontoons were on site for 6 weeks, which took in the time that the Port of Tyne halted the work when investigating what had happened and what was to be done to put matter right and completing the job. The invoices as said to relate to the following:

    i. The pontoon appears to be made up of a number of sections. Mr Newham told me that the damaged sections were taken away and were replaced by NESB. This produced repair costs, hire charges for the pontoons whilst they were out of action and additional transport costs. This is reflected in S1-561.

ii. Invoice S1-539- Mr Newham said that this was for the first 3 weeks of hire, including 24 hour staffing.

iii. Invoice S1-545- Me Newham said that this was the next 3 weeks of hire and staffing. It also included, as appears on the invoice, charges related to the removal of the damaged sections of pontoon, the hire for two replacement pontoon sections and charges made by NESB for having to hire in 4 pontoon sections to use on another contract in Leeds as a result of being short due to damage to the pontoons requiring repair and the pontoons which they supplied as replacements. The invoice also covered the replacement of damaged hydraulic hose and demobilisation costs.

76. Both of the claimant's witness were asked about the period the pontoons were on site. Mr Newham said that the extended period over which the pontoons were kept on site were due to the Port of Tyne making the claimant pause its works whilst the accident was investigated. The Port also required that the pontoons be staffed 24 hours a day as a precaution against them casting adrift in a live shipping lane. Mr Newham said the claimant had paid NESB because the accident was no fault of their own. Both the claimant's witnesses accepted that they had not produced a copy of the contract with NESB concerning who should pay for damaged pontoons. Mr Huntingdon said the claimant had paid NESB to keep them on site and maintain a relationship with them for the future. Had they not paid, they would have removed their pontoons and the job could not have been completed. There are very few pontoon suppliers in the UK so they are fortunate when pontoons become available.

77. Ms Jayakumar argues that the dating on the invoices should cast doubt on the claimant's evidence as to the connection between these charges and accident. The invoices, however, identify that they relate to the pontoons on the Tyne, thus their dates are more likely to be the product of NEBS system of invoicing than an indication that they relate to some other work in respect of which the claimant is trying to pass off the invoices.

78. I am also unmoved by the argument that there is no documentation from the Port of Tyne indicating that it required the defendant to cease work during its investigation. That may have been relevant if the defendant had alleged that there was a failure to mitigate loss by keeping the pontoons on site for no good reason, but no such allegation has been pleaded. It is also inherently improbable that the claimant would have continued running up charges for the pontoons and their staffing, and paid such charges, had it not felt under an obligation or that it was in its commercial interests to do so.

79. I am satisfied by the evidence of Mr Newham and Mr Huntingdon that costs claimed on the NEBS invoices related to losses naturally flowing from the damage to the pontoons by the negligent lift. That is to say, the damaged sections and hose would need to be repaired, replacements obtained, transport provided to move sections about and re-imbursing NEBS for the loss of use of the sections which had to be repaired and their replacements. Further, as these were pontoons which were hired with 24 hour staffing, it was foreseeable that if they had to remain on site longer than anticipated whilst the cause of the accident was investigated by the Port of Tyne, these costs were also likely to be incurred. These were all foreseeable losses. The fact that the claimant cannot prove that they were under a contractual obligation to re-imburse NESB, but chose to do so to protect goodwill and ensure that they would be able to have

the pontoons when they needed the to complete the job, does not render the loss too remote. The claimant's real complaint here is that the pontoons were hired for an over lengthy period. I value the claim for the NESB invoices as pleaded at £89,319.64.

RD Drilling

80. The claim relates to the retention of the drilling rig and crew. They had been expected to be on site for 2 days but they were there for 6 weeks. Mr Newham gave evidence that they stayed on site, with their rig, part on the pontoon and part of which had fallen into the Tyne, until they completed the sampling, after the port authority had allowed works to commence. He said they were kept on site because it is hard to get drillers and if they had been asked to leave and come back later, there was no guarantee of when they could have been brought back to site to complete the works. Furthermore, part of their rig was damaged and part had to be recovered from the Tyne. I accept his evidence as to the motivation for keeping RD on site. I am, again, persuaded by the improbability that the claimant would run up expenses which could have been avoided, in relation to the employment of RD.

81. The invoices support a claim for additional costs of £19,100. Mr Newham was challenged about this head of claim on the basis that there was no evidence that the Port of Tyne required RD to remain on site and the contract with RD was not produced or any evidence that RD had other work to pursue instead of leaving their men on site. Again, these may all have been good points if it were alleged that the claimant failed to mitigate its loss by keeping RD on site, but as it is not, and the only issue is causation and whether this is recoverable damage within the rule in Hadley v Baxendale. The question for me is whether this is loss that was

reasonably foreseeable in the events which happened. I have no difficulty in coming to the conclusion that it was. The damage to the rig would delay the work with the result that the claimant would have to complete the sampling work at a later stage. RD were on site waiting to commence the works because the claimant believed that to let them leave would cause a problem in getting them back. Whether or not this motivation was reasonable is a mitigation point, not one of foreseeability or causation. I therefore assess this loss as claimed at £19,100.

Bray Cranes

82. The Particulars of claim seek the recovery of £2,817 in respect of the two additional days Bray Cranes were on site. As the defendant has not charged for the two extra days the claim is not pursued,

Ainscough Crane Limited

83. This company was employed in place of Bray. Mr Newham was challenged on the bases that the Ainscough invoices charge for 8 hours and include an overnight charge when the company is based in Stockton. He said that the contract with Ainscough was for a minimum of 8 hours per day, and that was normal for plant hire. He did not know why Ainscough levied an overnight charge. The Ainscough invoice supports what Mr Newham says about the 8 hour minimum charge as that is what is claimed, albeit there is evidence the crane was on site for a lesser period. Mr Duncan, who professed to be highly knowledgeable about crane hire did not suggest that Mr Newham was wrong. The fact is that whether or not Ainscough were justified in including an overnight charge and charging for 8 hour days, that is the sum the claimant was required to pay to employ Ainscough to provide cranage. I assess this loss as claimed in the Ainscough invoices at £7,650.

Port of Tyne

84. Mr Newham explained that the claimant paid Port of Tyne £923 for a workboat to assist in loosening spud legs attached to the pontoons as these had become stuck in sediment and the longer they were left the more difficult they would be to remove. He was not challenged on this. I have seen the relevant invoice. I am satisfied that this loss is recoverable in the sum of £923.

Engineer's costs

85. The claim is for keeping an engineer on site for 28 days rather than 4. Mr Huntingdon told me that the schedule recording the time spent by the claimant's engineer on site was taken from time sheets on which there was a job number linking the sheet to this job and the hours worked. Mr Newham said that had the engineer not been on this site, they would have been charged out elsewhere. Mr Newham gave much the same evidence and the chargeable day rate for these engineers of of £375 plus VAT.

86. Both of the claimant's witnesses were challenged on the basis that the site diary had not been produced showing what work these engineers were doing and neither were their worksheets. Mr Newham said that the claimant had to keep an engineer on site as they had equipment on site and on the river and that this was required by the Port of Tyne. As principal contractor, the claimant was responsible for overall supervision of the site. That is a plausible explanation.

87. Given that the pleaded challenge to the schedule of loss was simply to put the claimant to proof, it is understandable why the claimant would think it unnecessary to produce site diaries and worksheets unless they were required as being adverse documents. Had the defendant wanted to

investigate whether the engineer actually was on site it was open to them to ask for further disclosure. It runs counter to the' cards on the table approach' in litigation to wait till trial to complain that documents never requested have not been produced to support witness evidence being advanced to deal with a 'put to proof' defence.

88. I accept the evidence of Mr Newham that the claimant's engineer remained on site from the beginning to the end of the job and, as a result, the claimant was put to the cost of keeping an engineer on this site. Mr Huntingdon told me that the claimant books work 'back to back' so that their engineers are deployed on rigs every day. Time spent by engineers on this job is time they would have spent elsewhere at a daily rate of £375. There was no challenge to this part of his evidence and I accept what he says. I also accept Mr Huntingdon's explanation as to the transfer of information from the time sheets to the schedule. I assess this loss as claimed in the sum of £8,625. VAT is not recoverable on this amount as it is not a taxable supply.

Recovery

89. Mr Newham told me that the claimant had to employ a dive team to recover the part of the rig lying on the riverbed as it was a potential risk to users of the river. NESB recommended Briggs Marine. There were several parts of the rig at the bottom of the river and these were recovered by Briggs. The claim for this work, £2,640, is supported by an invoice dated 08/12/21. Mr Newham was asked when the dive was undertaken but was unable to give a date. It was suggested that this would be in the site diary if it happened and was asked why this has not been produced. He said he did not know. These answers to do not alter the fact that it is not disputed that part of the lift was dropped into the Tyne. There is logic

in Mr Newham's explanation as to the need to retrieve what was dropped and there is an invoice from Briggs for the cost of recovering a length of casing from the river. On balance, I accept that this expense was a natural consequence of the accident and the sum claimed is recoverable. I assess damages for this as per the invoice in the sum of £2,200.

Welfare costs

90. Mr Newham and Mr Huntingdon explained that they had to keep welfare facilities on site which provided toilets and somewhere to take lunch breaks and coffee facilities. . The minimum hire period is one week. The hire period was extended from the original one week to several weeks. The invoices produced show that there was a charge for hire to 10 December 2021. These invoices do not include the first week. They total £1,155.40 plus VAT. There was no challenge to these invoices other than as to why staff and contractors were on site for an extended period, which I have already dealt with. I find that the welfare costs were incurred as a direct result of the accident and are recoverable in the sum claimed of £1,155.40.

Lost Hours

91. The claim under this head is for the cost of the project manager and health and safety specialists dealing with the original incident. The value of their time which could have been spent on other work was £5,040. The sums which total this figure can be found on the schedules which Mr Huntingdon prepared from the work sheets. There was no challenge to this head of claim. It is obvious that this type of work had to be done in the aftermath of the accident and, on the accepted evidence of Mr Huntingdon, the engineering staff engaged in these activities would have been engaged on other projects had they not been required at Port of

Tyne. I assess damages in accordance with the schedule, taken from the worksheets, in the sum of £5,040.

Loss of profit

92. The claim is for £28,300. Both Mr Newham and Mr Huntingdon were asked to explain how it was computed. Mr Newham deferred to Mr Huntingdon and the latter said it was produced by the finance director. There are elements of the claim that are unsustainable, such as it has included the profit cost of extra labour which is claimed at the full rate, i.e. includes the profit element, elsewhere in the schedule. A further unsatisfactory feature of the claim is that in calculating the VAT, the claimant has included loss of profit albeit that this is not a VATable supply.

93. There is none of the basic information a court would expect to see in a loss of profit calculation, such as actual profitability for a reasonable period before the incident supported by company accounts. It is for the claimant to prove its loss. As both of the claimant's witnesses were unable to explain how the loss of profit has been computed, I am not satisfied that the claimant has lost profit in this sum. Furthermore, it is not for the court to speculate as to what else the loss of profit may be or to devise some basis of calculation which the claimant has not produced. This head of claim has not been sufficiently proved.

94. The total of damages does not include VAT as I have been informed that the claimant has reclaimed VAT paid.

a. NESB charges 89,319.64
b. RD Drilling 19,100.00
c. Ainscough Cranes 7,650.00

| | | |
|---|---|---|
| d. | Port of Tyne | 923.00 |
| e. | Engineers costs | 8,625.00 |
| f. | Briggs Marine | 2,200.00 |
| g. | Welfare cost | 1,155.40 |
| h. | Lost Hours | 5,040.00 |
| | Sub-Total | £134,013.04 |
| | Less counterclaim | £2,760.00 |
| | Total balance due | £131,253,04 |

95. As this is the judgment in my last trial before retirement, I shall allow myself the indulgence of observing that it is striking, and somewhat dispiriting, that 41 years after **E. Scott (Plant Hire) Ltd**, where technology is now such that the owners of plant can transmit standard terms and conditions to prospective clients instantaneously, there are still cases where the owner has to rely upon referential notice of the conditions or a course of dealings. I was not told if there is a CPA standard for the provision of terms, but it would avoid a lot of confusion if it were to advise its members to send the full terms with the quote.

96. My other reflection on the **E. Scott** case is that one can detect, through the judgment, the sophistication of the arguments and, in that, the rising stars of counsel for the appellant, D P O'Brien, to take silk the following spring, and Rupert Jackson, to become such a force in the Technology and Construction Court, later the Court of Appeal and civil justice generally.

97. Finally, I should like to thank Mr McHugh and Ms Jayakumar for their assistance and industry in this case and causing me to reflect on that time 41 years ago when I embarked on a career in the law.