THE HIGH COURT

COMMERCIAL

[2022] IEHC 666

[Record No. 2022/823P]

BETWEEN

GLANBIA FOODS IRELAND LIMITED T/A GLANBIA AGRIBUSINESS

PLAINTIFF

AND

E D & F MAN LIQUID PRODUCTS IRELAND LIMITED

DEFENDANT

JUDGMENT of Mr Justice Mark Sanfey delivered on the 30th day of November 2022.

Contents

Introduction

1. This judgment relates to an application by the defendant ('ED&F') to set aside service on it of the plenary summons on the basis that the courts of Ireland have no jurisdiction to hear or determine the dispute which is the subject of the proceedings. It also seeks an order pursuant to Article 8 of the UNCITRAL Model Law on International Commercial Arbitration referring the parties to arbitration in respect of the dispute.

2. The defendant applies on the basis that the contract between the plaintiff and the defendant which is the subject of the dispute "is as set forth in the Grain and Feed Trade Association (referred to herein as 'GAFTA') contract". As there is a considerable number of GAFTA contracts, the defendant contends that the applicable contract is GAFTA contract number 109 ('GAFTA 109'), even though that particular contract was not specified between the parties. GAFTA 109 has a "domicile" clause

which states that the contract "shall be deemed to have been made in England and to be performed in England", and that the contract "shall be construed and take effect in accordance with the laws of England". The contract also has an arbitration clause in respect of "any and all disputes arising out of or under this contract".

3. The plaintiff ('Glanbia') on the other hand contends that the contract between Glanbia and ED&F is subject to Glanbia's standard terms and conditions which are available on Glanbia's website. These terms and conditions provide that any dispute arising out of or in connection with them "shall be governed by and construed in accordance with the laws of Ireland and shall be subject to the jurisdiction of the Irish courts…".

4. The application therefore requires the court to decide whether the plaintiff's or the defendant's terms and conditions – or possibly neither – govern the contract between them. This in turn requires an analysis of the facts surrounding the formation of the contract, and a decision as to the point at which it could be said that a binding contract between the parties was concluded. Accordingly, the parties agreed that there should be cross-examination on the affidavits of each side's main deponent so that there would be further evidence as to the factual circumstances surrounding the dealings between the parties.

5. The application was complex and closely fought over five days. In addition to cross-examining each other's deponent, the parties proffered lengthy written submissions and several volumes of case law, much of it dealing with what has come to be known as "the battle of the forms".

The parties and the proceedings

6. The plaintiff is a private company limited by shares registered in this jurisdiction. It has a registered office in Kilkenny, and carries on the business of, *inter*

alia, production and/or manufacture and/or supply of equine feed. The defendant is also a private company limited by shares and registered in this jurisdiction with a registered office in Dublin. The defendant is an Irish company which offers cane molasses, beet molasses and a range of molasses-based liquid products and specialises in the sourcing, shipping, storage and distribution of molasses, molasses blends and liquid products.

7. The defendant supplies molasses for use in animal feedstuffs, including the following products which are relevant to the present proceedings: -

(i) Sumol 71, a standardised sugar cane molasses product with 71% dry matter ('Sumol 71');

(ii) Sumol 72, a standardised sugar cane molasses product with 72% dry matter ('Sumol 72'); and

(iii) GAIN Hi Oil Molglo ('Molglo'), a value-added product which was specifically formulated for the plaintiff and contains molasses, soybean oil, additives, preservatives and caramel flavour.

8. The plaintiff issued the present proceedings on 2nd March, 2022, and delivered a statement of claim. On 15th March, 2022, solicitors acting for the defendant entered a conditional appearance "solely for the purpose of contesting the jurisdiction of this Honourable Court to hear and determine the proceedings and without prejudice to any of the rights of the defendant, all of which are fully reserved". As is usual in such situations, the defendant has not delivered a defence to the statement of claim, but issued a notice of motion on 6th April, 2022, seeking the relief to which I have referred in the first paragraph of this judgment above.

9. On 24th April, 2020, Glanbia issued three "purchase contract confirmations", numbered 9205, 9206 and 9207, to ED&F. These documents related to the purchase

of 2000 metric tonnes of Sumol 72, 200 metric tonnes of Sumol 71, and 200 metric tonnes of Molglo respectively. The statement of claim pleads that these purchase contract confirmations were subject to the plaintiff's standard terms and conditions and sets out a number of clauses of those conditions which the plaintiff contends comprise express contractual terms, duties and warranties in relation to the supply of the goods and the consequences which would ensue if the goods were not of the requisite quality. At para. 8 of the statement of claim, the plaintiff pleads as follows: -

> "At all material times, the defendant, its servants and/or agents knew the plaintiff purchased the molasses products for the purposes of producing feed including equine horse feed for use by equine owners including those owning and/or training horses trained for equine sports including racing. It was an implied term [of the purchase contracts] that the molasses products to be supplied would not contain any substance the presence of which was banned in the EU and prohibited for use in animal feed, including equine feed".

10. The plaintiff goes on to plead that the 9205 and 9207 consignments – for some reason, there is no reference in my copy of the statement of claim to consignment 9206 – "…were defective due to the wrongdoing of the Defendants and each of them their respective servants and/or agents in that they contained the banned substance Zilpaterol hydrochloride" ('Zilpaterol'), which the plaintiff states is a "performance enhancing agent" which is "prohibited in equine feed including gain equine feed". It is alleged that, in or about October 2020, the French horse racing authority *France Galop* announced that five horses had tested positive for Zilpaterol, and subsequently, a further thirteen horses were confirmed as having tested positive by *France Galop*. The plaintiff was directed to take actions by an agricultural inspector of the Feedingstuffs, Fertiliser, Grain and Poultry division of the Department of Agriculture,

Food and the Marine to detain any feeds that might contain Zilpaterol and to embark upon various tests and investigations of what had occurred. Ultimately, a compliance notice was served by the department on the defendant, which performed a product recall of contaminated molasses.

11. The plaintiff has pleaded extensive particulars of alleged wrongdoing by the defendant, contending that the defendant its servants or agents "were guilty of breach of contract, breach of warranty, misrepresentation, negligence, negligent misstatement, and breach of duty (including breach of statutory duty)". The plaintiff identifies losses in the sum of €9,015,479 which it alleges is incurred by it but contends that the losses are continuing. At the hearing, the court was informed that proceedings have been initiated in the commercial division of the High Court by a stud farm against the plaintiff for losses which it alleges have been incurred due to its horses ingesting the contaminated feed. Those proceedings intimate, among a number of claims, a loss of "approximately €30m" in the breeding value of a particular horse. The plaintiff in the present proceedings anticipates that there may be other claims from parties affected by the contaminated feed.

12. The plaintiff claims in the present proceedings that the defendant is obliged to indemnify the plaintiff for all losses associated with the alleged defect in the products supplied under the purchase contracts, and that, in the alternative, it is entitled pursuant to the provisions of part III of the Civil Liability 1961 and/or at common law to recover a contribution from the defendant in the amount of a complete indemnity in respect of the alleged losses.

13. For the reasons explained, the defendant has not delivered a defence to the plaintiff's statement of claim. The grounding affidavit for the present application is sworn by Peter McGann on 6th April, 2022. Mr McGann is the "Commercial

Director" of the defendant. He avers that he has worked for the defendant for twenty-four years, and in his current role is responsible for the business activities of the defendant on the island of Ireland. Mr McGann's affidavit acknowledges that three separate products were ordered, rather than the two referred to in the statement of claim, and deals at length with the negotiations leading to the conclusion of the agreement for sale of the products to Glanbia. At para. 77 of his affidavit, he acknowledges the substantive dispute between the parties but, as is appropriate in such an application, does not engage with the plaintiff's allegations, confining his averments to matters relevant to the reliefs sought.

The factual background to the dispute

14. There is little dispute between the parties as to what actually occurred as regards the negotiation by the parties of the terms of the supply of product by the defendant to the plaintiff. However, each side exhaustively examined the dealings between the parties, and particularly the documentation generated as a result, as part of the analysis of offer and acceptance which the parties accepted must be conducted in order to determine the point at which it could be said that a binding contract had been concluded.

15. It will be necessary therefore to look in granular detail at the dealings between the parties, and the text of the relevant documentation.

16. At para. 8 of his grounding affidavit, Mr McGann avers that the defendant "has supplied molasses products to the Plaintiff since 2011". This is accepted by the plaintiff at para. 13 of the replying affidavit of Chris Miller, sworn on 11th May, 2022. Mr Miller is the nutrition manager of *GAIN Animal Nutrition*, the division of Glanbia that was involved in the contract at issue. By an email of 9th December, 2019, Eileen O'Donnell, the plaintiff's milling and quality systems manager, wrote to Mr Seán

Hearn of the defendant enclosing the plaintiff's "Expectations Manual and Supplier Questionnaire" for completion by the defendant. Mr McGann responded to Ms O'Donnell by email of 28th January, 2020 enclosing a completed supplier questionnaire and other documents. Both sides had much to say in submissions about the significance of this questionnaire and manual, and I shall return to it later in this judgment.

17. The sequence of events leading to the conclusion of a contract between the parties began in late April 2020. Mr McGann explains at para. 7 of his grounding affidavit that "the defendant operates two contractual seasons for orders: a summer season with contracts being concluded in April/May; and a winter season with contracts being concluded in September/October". In anticipation of placing the order for the summer season, Mr Miller emailed Mr Hearn and Mr McGann on 20th April, 2020 at 11.37am stating that the plaintiff's finance department wanted to change the payment terms included in future contracts to "month end 90 days". Mr McGann avers that, prior to this email, the plaintiff was required to make payments within 35 days of an invoice.

18. Mr McGann replied to this email on 22nd April, 2020 at 15.56, confirming that the defendant could offer "60 day payment terms for new business going forward". Mr Miller replied by email at 17.20 thanking Mr McGann and indicating that he would "report back".

19. On 24th April, 2020 at 3.25pm, Mr Miller emailed Mr McGann with the subject line "May-Sept Glanbia", and the following content: -

> "Peter,
>
> May-Sept volumes:
>
> - M72 2000 @ €227.5 del

- M71 200 @ €225.5 del
- MGP 200 @ ”

20. This email conveyed that Mr Miller required 2000 metric tonnes of Sumol 72, and 200 metric tonnes of Sumol 71 at a price of €227.50 to include delivery to Glanbia. The price in relation to Molglo was left blank.

21. Mr McGann replied to Mr Miller on 24th April, 2020 at 17.00, the substantive text of which email was as follows:

> “Hello Chris,
>
> Thanks for confirming summer volumes, this business with Glanbia is much appreciated.
>
> Please note, the GHOM [*i.e.* Molglo] is price €390pt delivered.
>
> I will issue contracts on receipt of PO’s.
>
> Kind regards…”

22. There followed three emails from Glanbia to ED&F personnel at 17.18, 17.23 and 17.25 attaching respectively documents entitled “purchase contract 9205 confirmation”, “purchase contract 9206 confirmation” and “purchase contract 9207 confirmation”. These documents related respectively to the purchase of 2000 metric tonnes of Sumol 72; 200 metric tonnes of Sumol 71; and 200 metric tonnes of Molglo. Each of the three purchase contract confirmations were in the same format and set out the appropriate quantity and unit price, which in each case included an extra €12.50 per metric tonne for delivery. This was signified by the legend “DELIVERED” featured prominently on the document. The quantity and unit price were extrapolated to give a total price in each case. Underneath the details of quantity and unit price was the phrase “Comments: - Includes 12.5 delivery”, and underneath the total price in each case was the following statement: -

"This purchase contract is subject to Glanbia's standard terms and conditions of purchase which are available at www.glanbia.com.

Supplier terms and conditions are strictly excluded."

23. The 24th April, 2020 was in fact a Friday. On the following Tuesday – 28th April, 2020 – Mr McGann emailed Mr Miller at 12.25 with the subject line "Sales Confirmations – ED&F Man Liquid Products Ireland Limited", and stated in the body of the email as follows: -

"Hello Chris,

Please find enclosed our sales confirmations for new business agreed.

Our official sales contracts will be issued soonest.

We thank you for this business.

Stay safe and well.

Kind regards…"

24. The "sales confirmation" in each case stated at the outset "…Further to our recent discussion, we have pleasure in confirming the following sale:…". There was however difference between the terms of the "sales confirmation" furnished by the defendant for Sumol 72, and the purchase contract confirmation in respect of the same product. Whereas the latter document had specified that the 2000 tonnes of Sumol 72 would be delivered, the sales confirmation issued by the defendant in respect of that sale specified: "…Delivery Terms: Ex-Tank", and specified the price as €215 per metric tonne. This appeared to suggest that the parties had agreed that, rather than the defendant delivering the 2000 metric tonnes of Sumol 72 to the plaintiff and being paid €12.50 per metric tonne for this service, the plaintiff would be responsible for collecting the molasses from the defendant's tank and delivering it to its own premises.

25. Each of the "sales confirmations" concluded, after setting out the details of the sale, by stating "[O]ur official contract will be sent to you soonest. We thank you for this business."

26. On Tuesday 28th April, 2020, Mr McGann sent three documents to Glanbia which the defendant refers to as "sales contracts". These documents bore the contract numbers SO1574, SO1573 and SO1572, relating to the sale of the Sumol 72, Sumol 71 and Molglo respectively. These documents bore the dates of 24th April, 2020, 24th April, 2020 and 25th April, 2020. In his evidence, Mr McGann said that the data would have been entered on Friday 24th April, 2020, but there may have been some detail altered on the Molglo contract which caused it to bear the date of 25th April, 2020. In any event, these documents were not sent to Glanbia until 28th April, 2020.

27. Each of these documents was in the same format as the others, the only difference between the three being the different mode of delivery in respect of Sumol 72 (ex-tank as opposed to delivery by the defendant), with the consequent change in price. The details therefore in each case mirrored those in the corresponding "sales confirmation". It is necessary to consider the full substantive text of these sales contracts, and accordingly I set out below the text of the Sumol 72 document ('SO1574.000'): -

> "Contract number: SO1574.000 Contract date: 24th April, 2020
>
> Dear Sirs,
>
> We have pleasure in confirming the following sale to you subject to the terms and special conditions enclosed hereon and to all other conditions imposed on us by our supplier save and to the extent that the same are inconsistent with the

terms and special conditions of this sales contract. Our suppliers' contract is as set forth in the Grain and Feed Trade Association Contract.

Quantity	2,000 Metric Tonne.
Product(s)	
Sumol min. 72% dm	@ €215.00 per Metric Tonne.

Payment terms:	60 days after date of invoice.
Period:	May 2020 to September 2020.
Delivery terms:	Ex-Tank.
	PO.9205

The validity of this contract is unaffected by the non-return of a signed copy of this contract.

We thank you for this business.

Kind regards, We sign for acknowledgement and receipt
ED&F Man Liquid Products Ireland Limited Glanbia Food Ireland Limited.

[signed] [signed]

Seán Hearn Peter McGann"

28. It appears that the first consignment of molasses was collected on 13th May, 2020 in respect of Sumol 72. The first consignment of product in respect of Molglo was delivered on 19th May, 2020. The first consignment in respect of Sumol 71 appears to have been delivered on 27th August, 2020. On 31st July, 2020 there was a meeting between Mr McGann and Mr Miller, in which the parties agreed that the contracts in respect of Sumol 72 and Molglo should be "topped up" by an increase in

the tonnage in each case. This was confirmed by letter from Mr McGann to Mr Miller on 5th August, 2020.

The affidavits

29. The affidavits sworn by the deponents in support of or against the motion set out in general terms the issues arising from this factual background. These issues can be briefly summarised, and were expanded upon by the parties in their written and oral submissions.

Mr McGann's grounding affidavit

30. Mr McGann asserts in his grounding affidavit that each of the sales confirmation documents made it clear that an "official contract" would be provided "soonest" by way of a separate document. He then refers to the paragraph at the start of the sales contract in each case quoted at para. 27 above, and avers as follows: -

> "30. The wording of the Defendant's sales contract documents was adapted from wording previously used in sales contracts made on behalf of the defendant by a sales agent up until 2011. After the Defendant ceased to use that sales agent, the Defendant chose to incorporate the wording into its own sales contracts. The second sentence of the first paragraph of the sales contracts incorporated the terms and conditions set out in the relevant grain and feed trade association contract into the defendant's contracts with its customers. The reference to *'(o)ur suppliers' contract'* is a reference to the Defendant's contract as the supplier of goods to its customers.
>
> 31. The Grain and Feed Trade Association have produced a number of well-known standard form contracts in the feed industry which I believe would be readily recognised by sellers and buyers of feed products in Ireland. At the time of contracts 1574, 1573 and 1572, there were in the region of 80 to 100

such standard form contracts in effect. However, the Grain and Feed Trade Association contract no. 109 (‘**GAFTA contract no. 109’**) was (and continues to be) the relevant contract in respect of the contracts between the Plaintiff and the Defendant. Contract no. 109 is the contract relevant to sales of feedstuffs made on a bulk ex-store/silo basis, which obviously applies to a bulk liquid feed product like molasses. GAFTA contract no. 109 is the relevant contract for sales made on a bulk ex-store/silo basis which is the method by which the defendants sold and delivered the molasses to the Plaintiff.”

31. Mr McGann refers to the fact that the contracts for Sumol 72 and Molglo were “topped-up” by agreement of the parties, and to the letter of 5th August, 2020 in which he confirmed this arrangement to Mr Miller, noting that “the terms and conditions of the contract are unchanged”. He points out that this statement “was never refuted by Mr Miller or the Plaintiff” [para. 58], although he fairly acknowledges that the “goods received notes” issued by Glanbia in relation to the various consignments stated that:

“All sales of goods are on the basis of Glanbia’s terms and conditions of sales set out overleaf;

I/we agree to purchase the goods specified above subject to Glanbia’s terms and conditions of sale set out on the reverse side of this invoice”. [Para. 74].

32. The net position of the defendant is as stated by Mr McGann at para. 81 of his affidavit: -

“I believe and am advised that while the Plaintiff’s purchase orders amounted to offers by the Plaintiff to enter into contracts with the Defendant on the Plaintiff’s standard terms and conditions, those offers were never accepted on those terms by the Defendant. As such, the Plaintiff’s standard terms and

conditions were not incorporated into the contracts between the parties, being contracts 1574, 1573 and 1572 as set out above."

33. Indeed, at paras. 81 to 89 of his affidavit, Mr McGann sets out the basis for the defendant's contention that its terms and conditions, rather than the plaintiff's, govern the agreement. At para. 88, he states as follows: -

> "…the contractual exchanges between the Plaintiff and the Defendant, as outlined above, were entirely in accordance with the ordinary course of dealings between the parties since 2011. To the best of my knowledge, on each occasion, the exchange of contractual documents concluded with the issuance of the Defendant's Sales Contract document which incorporated the terms and conditions of GAFTA Contract no. 109. The Plaintiff would then issue intake orders and accept delivery of the molasses products from the Defendant."

Mr. Miller's replying affidavit

34. Mr Miller swore a replying affidavit on behalf of the Plaintiff on 11th May, 2022. He comments at para. 7 of that affidavit that "…the Plaintiff has never been provided by the defendant with a copy of GAFTA 109 and has never completed or signed a copy of GAFTA 109 whether in relation to the contracts at issue in these proceedings, or in respect of any contract for the supply of molasses products by the Defendant…this Honourable Court will search in vain for a reference to GAFTA 109 in any of the contractual documents relied upon by the Defendant". He refers at para. 8 to the use of the phrase "our supplier's contract" in the second sentence of the opening paragraph of the Defendant's sales contracts quoted at para. 27 above, and avers that "…as I understand the position, the Defendant's supplier did not, in fact, supply molasses to the Defendant on GAFTA terms".

35. Mr Miller avers at para. 9 that "…GAFTA 109 is intended for use in relation to the supply of feeding stuffs in bulk ex-store/silo and is therefore manifestly not intended for use in relation to the supply of liquid products, stored in tanks, such as molasses…GAFTA 109 is wholly inappropriate for use in relation to the supply of GAIN Hi Oil Molglo Plus…which is a product made to the Plaintiff's specifications".

36. At para. 17 of his affidavit, Mr Miller examines the sequence of exchange of documentation from the plaintiff's point of view. At para. 17(vi), having commented on the import of the purchase contract confirmation and the defendant's sales confirmation document, he avers as follows: -

> "…I say and believe that the *sales confirmation* constituted acceptance in writing of the Purchase Contract for the purposes of cl. 1.1 of the Glanbia Terms and Conditions although I am advised and so believe that such acceptance was not necessary for the Glanbia Terms and Conditions to be incorporated in the purchase contract. Accordingly, the Glanbia Terms and Conditions were and remain the operative Terms and Conditions relating to the contracts the subject matter of these proceedings. Clause 13.11 of Glanbia Terms and Conditions stipulates that any dispute or claim arising out of or in connection with the contract shall be governed by, and construed in accordance with, the laws of Ireland and shall be subject to the jurisdiction of the Irish courts."

37. While the parties agreed at the hearing that any statement by Mr McGann or Mr Miller as to their subjective understanding of the contractual arrangements would be inadmissible, Mr Miller's averment reflects the position adopted by the plaintiff in its written submissions: in referring to the purchase contract confirmations, the plaintiff states that "material terms had, thus, been agreed and the sales confirmations

constituted written acceptance by ED&F of the GT&C's…" [para. 27 submissions]. In oral submissions, counsel for the plaintiff expressed the view that the purchase contract confirmation was "…either…a confirmation of terms already agreed; so it's evidence of the conclusion of the contract through the email exchange…or alternatively, it's an offer which was then accepted by the issue of the Sales Confirmations". [Day 4, p.13, lines 5 to 16].

38. Mr Miller addresses the fact that the purchase contract confirmation for Sumol 72 referred to a price (€225pmt) which included delivery, whereas both the sales confirmation and the sales contract issued by the plaintiff in respect of this product referred to delivery "ex-tank" and excluded the delivery element from the price. The defendant contends that this demonstrates that the essential terms of the contract were not in fact agreed either by the exchange of emails on 24th April, or by the issue of the purchase contract confirmation by the plaintiff. Mr Miller avers at para. 19 of his affidavit that the mode of delivery "was not a material term in the context of a bulk order and, in any event, was not something that could be determined at the time of ordering in bulk". He goes on at para. 21 of his affidavit to point out that "the destination Mill [of the plaintiff] determines the method of delivery…the course of dealing allowed for flexibility at the point of notifying a specific intake".

Mr. McGann's second affidavit

39. Most of the remainder of Mr Miller's affidavit is devoted to expanding on the reasons why the defendant's application should be refused. As these matters were comprehensively addressed in counsel's written and oral submissions, I do not propose to dwell on them here. Mr McGann swore an affidavit on 30th June, 2022 in reply to Mr Miller's affidavit. While it is a lengthy affidavit, its primary purpose is to put before the court the defendant's response to the arguments made by Mr Miller in

his affidavit. Again, I do not propose to summarise or address these arguments, which were canvassed comprehensively by counsel.

40. There were some points in Mr McGann's affidavit however which do merit specific mention. He reiterates at para. 8 that "…of the standard form contracts produced by the Grain and Feed Trade Association, GAFTA 109 was (and continues to be) the most relevant. The Grain and Feed Trade Association Contract [sic], including GAFTA no. 109 are well-known standard form contracts and were readily available to the plaintiff".

41. At para. 9 of his affidavit, Mr McGann avers as follows: -

> "At paragraph 8 of his affidavit, Mr Miller asserts that sales contracts 1574, 1573 and 1572 refer to the Grain and Feed Trade Association Contract on an *'erroneous factual basis*'. Mr Miller appears to regard the sales contract as incorporating GAFTA no. 109 on the basis that this is the contract on which the defendant contracts with its supplier. While it is correct that the defendant does not contract with its supplier on terms reflecting GAFTA no. 109, I disagree with the interpretation of the wording of the Defendant's Sales Contract which Mr Miller suggests. As explained at para. 30 of my first affidavit, the sentence in the sales contract which reads *'*[o]ur *suppliers' contract is as set forth in the Grain and Feed Trade Association contract'* is a reference to the defendant's contract as the supplier of its goods to its customers. The sentence informs the customer that the contract will be in the form of the relevant Grain and Feed Trade Association contract, which is GAFTA no. 109."

42. Mr McGann avers at para. 10 that "…GAFTA no. 109 relates to feeding stuff in bulk and does not exclude liquid products", and at para. 11 that Molglo "…is a feeding stuff irrespective of its specifications and ingredients".

43. Both Mr Miller and Mr McGann swore further brief affidavits which did not add significantly to their previous averments. Mr McGann exhibited his diary entries for the period 20th to 24th April, 2020. He acknowledges that he and Mr Miller had a call on 23rd April, 2020, but there is no indication as to what was discussed. A diary entry for 24th April shows that the Molglo price of €390pmt was agreed by that date.

The 'framework agreement'

44. At para.11 of his first affidavit, Mr Miller contended that "…the course of dealing between the parties which was adopted in relation to the contracts the subject matter of proceedings, occurred within an overall framework agreement represented by a quality requirements and expectations manual and completed supplier questionnaire, as to the quality and composition of the relevant products". Mr Miller went on to develop this theme in his affidavit.

45. Mr McGann roundly rejected the plaintiff's position in this regard. At para. 14.1 of his second affidavit, he averred as follows: -

> "14.1 The assertion of Mr Miller that there was a framework agreement between the parties represented by the Quality Requirements and Expectations Manual and completed Supplier Questionnaire is without substance. The Quality Requirements and Expectations Manual (the 'Manual') was not a framework agreement and it does not define the contractual and/or legal framework governing the commercial relationship between the parties. The Manual was effectively redundant insofar as it set out requirements to which the Defendant was already subject under EU Feed Legislation. Moreover, the

> Supplier Questionnaire reflected ordinary supplier evaluation procedures which are common in the grain and feed industry. Such documents do not ordinarily purport to have a contractual status or specify a governing law or jurisdiction clause".

46. Mr McGann addressed the topic further at paras. 16 to 19 of his affidavit, stating at para. 17 that "…neither the Manual nor the related Supplier Questionnaire were contractual documents and Mr Miller is incorrect in asserting that they created or involved a framework agreement between the parties".

47. Counsel for the defendant addressed the issue of whether or not there could be said to be a "framework agreement" in the sense contended for by the plaintiff, concluding that "…there is no version of this document [*i.e.* the Manual] which allows one to conclude that this amounts to, in its own terms, or in conjunction with the questionnaire, a framework agreement between the parties…". Counsel went on to say that "…the Manual and the Questionnaire have no bearing on any of the central issues that arise for determination as to whether the products were supplied on the basis of the plaintiff's contracts or the Defendant's contracts or neither party's contracts…" [day 3, p.13, line 24 to day 3, p.14, line 14].

48. Counsel for the plaintiff did not disagree with this latter point; he said "…I am not relying on the framework agreement to incorporate my terms and conditions into the contracts between the parties. I am saying they incorporate terms in relation to quality, that's all I am saying about those". [Day 4, p.83, lines 15 to 19].

49. It seems to me that I do not have to decide the issue of the extent to which – if at all – the manual and questionnaire are relevant to the contract between the parties. That is properly a matter for the ultimate determination of the issues, whether by a court or by an arbitrator. It does not impinge on the narrower issue of whether the

plaintiff's or the Defendant's terms and conditions govern the contract, and I express no view on the relevance, if any, of the manual and questionnaire to the contract.

Irish law or English law?

50. The defendant considered it necessary to produce an affidavit sworn on 6th April, 2022 by a Queens Counsel of the Bar of England and Wales, exhibiting an expert's report by that counsel as to the English law which would govern the present application. This prompted the production by the plaintiff of an affidavit sworn on 20th May, 2022 by another Queens Counsel of the Bar of England and Wales exhibiting an expert's report as to that counsel's view of the English law pertaining to the dispute. The defendant's expert swore a further affidavit on 1st July, 2022 responding to the report of the plaintiff's expert.

51. The position of which law governed the application was the subject of submissions at the outset of the hearing. It was suggested by counsel for the defendant that the appropriate principle was that questions relating to the existence and terms of a contract are governed by the putative proper law. As the court pointed out, the question was how to decide what that law is when the defendant contends for a contract governed by English law, and the plaintiff contends for a contract governed by Irish law. Counsel acknowledged this "conundrum", and stated that there was authority for the proposition that, where there were competing putative laws, the law of the forum – in the present case, Irish law – applies to the resolution of the issue. Counsel said that he would approach the matter on this basis, although he posited a number of scenarios in which the court could come to a view that English law applied.

52. Counsel for the plaintiff complained about this approach, pointing out that, if the *lex fori* applied, the "expert evidence is just inadmissible in its entirety". It was pointed out that the respective experts' reports each dealt with the question of contract

formation and the incorporation of terms and conditions. There would be no cross-examination of the experts, and while there was much common ground between them, they disagreed with each other as to how the general principles would be applied as a matter of English law. Counsel submitted that, if English law applied, bearing in mind that the burden of proof in the application was on the defendant, any disputed issues between the experts would have to be resolved against the defendant. [Day 4, p.160, lines 2 to 27].

53. Counsel did however state that the plaintiff was content to proceed on the basis that the law of the forum applied [day 4, p.163, lines 2 to 6]. Having taken instructions, counsel for the defendant confirmed that the defendant's position was that Irish law could be applied to the determination of the issues on the application [day 5, p.101, lines 7 to 15]. For the purpose of this judgment, I have therefore considered only the submissions of the parties as to Irish law and have not taken into account the reports of the English law experts.

The oral evidence of the deponents

54. Mr McGann, during the course of the motion, swore affidavits on 6th April, 2022, 30th June, 2022 and 14th September, 2022. Mr Miller swore affidavits on 11th May, 2022 and 21st July, 2022. As they were the persons conducting the negotiation between the plaintiff and the defendant, it was accepted by the parties that they should each be cross-examined as to the circumstances surrounding the negotiation in order to provide context, which both parties accepted the court is entitled to take into account in accordance with well-established principles. Equally, both parties accepted that the subjective views expressed by the witnesses in their evidence as to when the contract between the plaintiff and the defendant was concluded were inadmissible.

55. I propose to summarise below as concisely as possible the main points of the oral evidence of the deponents, as they relate to the legal submissions made. I have of course considered all of the affidavit evidence and the oral evidence, and have had the benefit of reading transcripts of the latter.

Mr Miller

56. Mr Miller was cross-examined first by Mr Eoin McCullough SC for the defendant. He explained that, of the three products delivered by the defendant "…two of the products were molasses and one of them was a manufactured feed including molasses and other ingredients…" [day 1, p.48, lines 6 to 8]. He acknowledged some familiarity with "individual GAFTA contracts" but did not look them up in relation to the contract with the defendant. He pointed out that GAFTA 109 was not mentioned in the documentation [day 1, pp. 50 to 51].

57. Mr Miller accepted that, on each occasion in previous years when contractual documentation had been received from ED&F, it had referred to the GAFTA contract, and that Glanbia had never on any occasion written to ED&F to assert that it was not contracting on the basis of a GAFTA contract [day 1, p.53, lines 2 to 16].

58. Mr Miller was questioned about the questionnaire, which he had averred at para. 16 of his first affidavit "…formed parts of the overall framework agreement within which contracts for the purchase of molasses products from the Defendant were to be completed". While there was some argument between counsel as to the extent to which Mr Miller was entitled to express a view as to what did or did not comprise the contract between the parties, Mr Miller in his evidence expressed the view that the framework agreement was relevant to the contracts but acknowledged that "…the contracts stand alone; they are individual purchase contracts…" [day 1, p.68, lines 11 to 16]. As we have seen, it was ultimately clarified by counsel for the

plaintiff that he was not relying on what he termed the "framework agreement" to incorporate Glanbia's terms and conditions into the contract.

59. Counsel cross-examined Mr Miller closely as to the level of agreement on the terms of the three contracts. He was asked as to when he considered that agreement had been reached between the parties as to the terms. Mr Miller stated that he believed "that the contract is formed when we issue the purchase contract confirmation to our supplier and the supplier acknowledges receipt of it" [day 1, p.84, lines 14 to 16]. Mr Miller was cross-examined at length as to the differences between the various documents in terms of matters such as quantity or price; he acknowledged, in response to counsel's questions, that notwithstanding the statement on the "Purchase Contract Confirmation" issued by Glanbia on 24th April, 2020 that "this purchase contract is subject to Glanbia's standard terms and conditions of purchase…supplier terms and conditions are strictly excluded…", he knew that Mr McGann intended to send the defendant's sales contracts: "…we were expecting the purchase contract confirmation and what ED&F call the official contract" [day 1, p.115, line 20 to day 1, p.116, line 20].

60. Mr Miller acknowledged that GAFTA 109 is "a very common contract", and that his opinion was that it applied to "dry goods out of ex-store or silo". He expressed the view that GAFTA 109 did not apply to liquids: "…the molasses contracts are ex-tank, they're not ex-store…" [day 1, p.118, line 18 to day 1, p.119, line 25]. He accepted that the defendant has "a purpose-built storage facility for storing molasses", which is referred to as a "tank farm", and which he characterised as a "liquid storage tank system"- [day 1, p.120 line 14 to day 1, p.121 line 4].

61. Counsel put to Mr Miller a schedule, compiled by the defendant's solicitors, of the various GAFTA contracts effective in April 2020, of which there were eighty in

number. Mr Miller accepted that the "great majority" of the contracts could be excluded "because they self-evidently refer to different types of business", but that all of the various contracts contained the domicile and arbitration clauses which the defendant says are applicable to the present dispute [day 1, p.124, lines 14 to 18, day 1, p.126, lines 4 to 16]. Mr Miller was adamant however that GAFTA 109 applied only to "dry goods", as he had only ever seen the contract used in this context [day 1, p.128, lines 13 to 28]. He also expressed the view that GAFTA 109 was "designed for the international trade in grains, spices and other materials. It's not for manufactured branded products… [such as the products in the present case] …" [day 1, p.132, line 20 to p.133, line 9]. Mr Miller did accept however that the Molglo product was a "feeding stuff" [day 1, p.134, lines 1 to 7].

Mr McGann

62. Mr McGann gave evidence in relation to the three products in question. He acknowledged that Sumol 72 and Sumol 71 were made to a specification, and that they contained dry matter of 72% and 71% respectively, hence the names. He accepted that these products had to be adjusted so that a "standardised" product which met the plaintiff's specifications could be delivered [day 1, p.152, line 15 to day 1, p.153, line 5]. GAIN Hi Oil Molglo is a product specifically formulated for Glanbia to its particular specifications [day 1, p.153, line 18 to day 1, p.155, line 5]. Mr McGann accepted that this was a product which had to be produced in compliance with various aspects of European and Irish legislation applicable to foodstuffs [day 1, p.158, lines 12 to 20], and expressed a similar view in relation to Sumol 71 and Sumol 72 [day 2, p.4, line 17 to day 2, p.5, line 27].

63. Mr McGann was examined by Mr Declan McGrath SC for the plaintiff as to ED&F's engagement with the supplier questionnaire, and accepted that the standards

and requirements set out in it had to be met by the defendant in order to continue as a supplier to the plaintiff [day 2, p.12, lines 1 to 17]. The requirements of the "expectations" manual were fulfilled by returning the questionnaire to Glanbia [day, 2, p.18, line 23 to day 2, p.19, line 4].

64. Mr McGann was cross-examined in detail about his interaction by email and phone call with Mr Miller. He did not recall what was discussed between them in the phone call of 23rd April [day 2, p.30, lines 21 to 22]. He accepted that, when he sent the email at 17.00 on 24th April, he "knew that once Mr Miller had confirmed those values…this order would be placed by Glanbia with the [defendant]…". He "knew that [the defendant] would be supplying these products to Glanbia" … [day 2, p.33, lines 2 to 14].

65. Mr McGann gave evidence as to the input of the data agreed with Glanbia to generate a "sales confirmation" and a "sales contract" for each product. He said that the purpose of the sales confirmation was to confirm the details of the sale to the customer, who would then have an opportunity to raise any discrepancy between those details and what was agreed. If there was no response from the customer, the sales contract would issue [day 2, p.41, lines 2 to 15]. He accepted that the data would have been entered in the system by him on the 24th, although one of the contracts, which bore the date of the 25th, may have had some slight amendment made to it the following day [day 2, p.42, lines 4 to 11].

66. The witness was asked about the incorporation in the sales contracts of the paragraph referring to the GAFTA contract quoted at para. 27 above. The following exchange then took place between counsel for Glanbia and the witness: -

"Q. And that formula of words, where did that come from?

A. The formula of words was – this was used previously by our agent, R&H Hall. So for a number of years before 2011 R&H Hall was our agent in the Republic of Ireland for the sale of our molasses. So basically this was copied over from the R&H Hall contract, the contract that they used to use.

Q. And I take it from what you said earlier, Mr McGann, that what happened was you took that formula of words, you put it into your system and then the system automatically incorporates that when you print out these official sales contracts, is that right?

A. That is correct, yes.

Q. It's a template, it's a standard form template that you use?

A. It's a template." [Day 2, p.46, line 16 to day 2, p.47, line 3].

67. Mr McGann clarified that R&H Hall were then and are still a substantial supplier of various commodities in the Irish market, including at that time dry goods as well as molasses. A sales contract of 12th January, 2009 between R&H Hall and Glanbia was presented to the witness. It included the following paragraph: -

> "We have pleasure in confirming the following sale to you subject to the terms and special conditions endorsed hereon and to all other conditions imposed on us by our supplier save where and to the extent that the same are inconsistent with the terms and the special conditions of this sales contract. Our suppliers' contract is as set forth in the Grain and Feed Trade Association contract."

68. This contract between R&H Hall and Glanbia included a term that "all goods are sold subject to the special conditions printed overleaf". No conditions were printed on the document presented to the court, and the defendant was unable to confirm whether there had been any such conditions on the original [day 5, p.77, lines 15 to

26]. Mr McGann acknowledged that the supplier to R&H Hall was a company which was a predecessor to the defendant company, and that the supplier to the defendant in respect of the contracts the subject of the present dispute was a Dutch company, ED&F Man Molasses BV. Mr McGann stated that "…our supplier doesn't impose any special conditions on us because it's an intercompany transaction so we would buy on the basis of price, tonnage, quality of the product in terms of dry matter and sugars, and on the basis of a delivery period". [Day 2, p.55, lines 5 to 9]. Mr McGann accepted that he had no personal knowledge as to whether or not the GAFTA contract referred to in the R&H Hall contract was GAFTA 109.

69. It was agreed by Mr McGann that GAFTA was "an international trade association", the aim of which was "to promote international trade in agricultural commodities, spice and general produce", according to the GAFTA website. He accepted that GAFTA contracts were used in international trade, and that the defendant did not appear to be a member of GAFTA [day 2, p.61, line 24 to day 2, p.62, line 17]. He also accepted that molasses were always stored in a tank whereas GAFTA 109 referred to "ex-store/silo". Mr McGann agreed that GAFTA 115, which specifically related to the sale of molasses – although in a manner which made it clear that it could not apply to the present circumstances – referred to tanks and not stores or silos [day 2, p.68, lines 24 to 29]. Mr McGann however insisted that the molasses were kept in a storage facility, notwithstanding that they were stored in tanks [day 2, p.69, line 16 to day 2, p.70, line 4].

70. In his second affidavit sworn on 30th June, 2022, Mr McGann had taken issue with Mr Miller's assertion in his affidavit of 11th May, 2022 that GAFTA 109 was unsuitable to govern the contracts between the parties, although he conceded in his affidavit that certain clauses in GAFTA 109, such as clause 5 (quality), 7 (terms of

delivery), 10 (payment) and 17 ('circle') – relating to the repurchase of goods by sellers from buyers – did not apply to the contract between the parties. He was cross-examined extensively in relation to each of the remaining clauses in GAFTA 109; it was put to him that it was "clear from going through that contract that nearly all of the provisions are either incapable of application to molasses or else were just simply not operated here at all?" Mr McGann replied that "…I don't think we are bound by all the provisions within the contract…" [day 2, p.109, lines 17 to 23].

71. In re-examination by counsel for ED&F, Mr McGann referred to having discussed with Mr Seán Hearn, the previous commercial manager and Mr McGann's predecessor, "…which was the most appropriate contract from the GAFTA contracts, and at that time we deemed that 109 was the most appropriate contract". Mr McGann confirmed that this was in 2011 [day 2, p.120, lines 7 to 22]. As it did not appear that Mr McGann had referred to this conversation either in his affidavits or in cross-examination, counsel for Glanbia was permitted by the court to cross-examine in relation to this matter. Counsel suggested to Mr McGann that, if there had been a conscious decision to select GAFTA 109, that contract would have been specified thereafter by ED&F. The court put it to Mr McGann that counsel's point was "why not put GAFTA 109 rather than just refer to GAFTA?". Mr McGann responded "I understand that, I can't answer that, I don't know" [day 2, p.132, lines 2 to 4].

The issues

72. Counsel for the defendant – Mr Douglas Clarke SC – helpfully formulated a table of six issues which he contended fell to be decided. The first issue related to the issue of whether or not there was a "framework agreement", and if so, the consequences flowing from that. As we have seen, the parties now agree that the issue of the significance or otherwise of the manual, and of the questionnaire proffered by

the plaintiff and completed by the defendant, does not impinge on the issues the subject of the present application.

73. The second, third and fourth issues related to the question of when or at what point the contract between the parties could be said to have been concluded, with the consequence of one or other of the parties' chosen contractual terms and conditions applying to the agreement – the so-called "battle of the forms" issue. The fifth issue related to whether or not, assuming that the second and fourth issues were resolved in the defendant's favour, the GAFTA 109 terms, and in particular the arbitration and jurisdiction clauses included in those terms, were incorporated in the contract. The final issue addressed the orders to be made consequent upon the fifth issue being resolved in the defendant's favour.

74. At the start of his oral submissions, Mr McGrath identified four issues, the first two of which were, firstly, at what point the contracts must be deemed to be concluded, and secondly, what terms were incorporated in the contracts. The third and fourth issues addressed the question of what orders should be made if GAFTA 109 were deemed to be incorporated in the contract.

75. It is clear therefore that there are two main issues, the resolution of which will govern the court's view as to what consequences flow from these issues, and what orders are to be made: -

(i) *At what point must the contract between the parties be regarded as concluded?*

In this regard, counsel for the plaintiff submitted that there were three points in time at which the court could conclude the contract had been made: firstly, at the conclusion of the email exchange on April 24th, the purchase contract confirmations simply confirming the agreement between the parties; secondly, when ED&F issued the sales

confirmations on 28th April; or thirdly, the point for which the defendant advocated, *i.e.* that the contracts came into being when they were performed [day 4, p.12, lines 16 to day 4, p.13, line 27]. The defendant's position, as set out in counsel's table of issues, is that the sales contracts constituted counter-offers which were "accepted by the plaintiff by its subsequent conduct in accepting the molasses products supplied by ED&F…".

(ii) *If the defendant's terms and conditions governed the agreement, were the terms of GAFTA 109 incorporated?*

Strictly speaking, this issue only arises if the first issue is decided in the defendant's favour, *i.e.*, in a way that excludes the plaintiff's terms and conditions. However, my intention is to address this issue in this judgement regardless of the way in which the first issue is decided.

When was the contract concluded? Legal principles

76. Happily, the parties agree as to the principles governing the question of when a binding contract may be regarded as having been concluded, and also that there is in fact no significant difference between Irish and English law in this regard. The case law often deals with the opposing claims of parties, each contending that their own terms and conditions have been incorporated into the concluded contract; such situations have become colloquially known in the case law as "the battle of the forms". Generally, an analysis of the process of offer and acceptance is conducted to determine when the contract was concluded and might be regarded as binding; as Lord Clarke JSC of the UK Supreme Court put it in *RTS Flexible Systems Limited v Molkerei Alois Muller GMBH & Co KG* [2010] 1 WLR 753 at para. 45:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have

> agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement".

77. The court's role in interpreting contracts has been the subject of a number of decisions in recent times, and the principles to be applied are clear. The court ascertains the objective meaning of the words or conduct in question, considering the communications and conduct of the parties in the context of the relevant factual known background known or reasonably available to the parties at the time. As O'Donnell J (as he then was) put it in *Law Society v Motor Insurers Bureau of Ireland* [2017] IESC 31 at para. 12: -

> "…agreements are intended to express in a clear and functional manner what the parties have agreed upon in respect of their relationship, and agreements often do so in a manner which gives rise to no dispute. But language, and the business of communication is complex, particularly when addressed to the future, which may throw up issues not anticipated or precisely considered at the time when an agreement was made. It is not merely therefore a question of analysing the words used, but rather it is the function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider

> they had agreed. In that regard, the court must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement. All of these are features which point towards the interpretation of the agreement and in complex cases, a court must consider all of the factors, and the weight to be attributed to each. The reasonable person who is the guide to the interpretation of the agreement is expected not merely to possess linguistic skills but must also have, or acquire, a sympathetic understanding of the commercial or practical context in which the agreement was meant to operate, and perhaps even an understanding of the many ways in which even written, formal and legal communication falls short of the standard clarity and precision set by the early editions of Fowler's Modern English Usage".

78. Where each party has attempted to contract on its own terms *i.e.* where there is a "battle of the forms", "…the traditional offer and acceptance analysis will generally be adopted": *Tekdata Interconnections Limited v Amphenol Limited* [2009] EWCA CIV 1209 per Dyson LJ at para. 25.

79. As regards the process of offer and acceptance, the parties accept the basic principles set out in "Chitty on Contracts", 34th Edition as follows: -

(i) An offer is an expression of willingness to contract on specific terms made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed: Chitty para. 4-003;

(ii) An offer is to be distinguished from an "invitation to treat", which is a communication by which another party is invited to make an offer, but which

is not made with the intention that it is to become binding as soon as the person to whom it is addressed communicates their assent to its terms: Chitty, para. 4-010;

(iii) An acceptance is a final and unqualified expression of assent to the terms of an offer: Chitty, para. 4-031. An offer may be accepted by words, but it may also be accepted by conduct/performance: Chitty para. 4-034. Conduct will only amount to acceptance if it is clear that the offerees' alleged act of acceptance was done with the intention (ascertained objectively) of accepting the offer: Chitty, para. 4-035;

(iv) If an offer is met by an offeree making its own offer, relating to the subject matter of the original offer but on different terms, that is a counter-offer. A counter-offer is a rejection of the original offer, which is thereby terminated: Chitty, para. 4-121.

The "last shot" doctrine

80. In considering principles of offer and acceptance in a "battle of the forms" case, there is sometimes reference to what is known as the "last shot" doctrine: where the parties exchange offers on conflicting terms, acceptance by conduct of the last offer in time will result in a concluded contract. Thus, "…an offer to buy containing the purchaser's terms which is followed by an acknowledgement of purchase containing the seller's terms which is followed by delivery will (other things being equal) result in a contract on the seller's terms" (per Longmore J, para. 1, *Tekdata*). However, circumstances can exist which would suggest that the party's objective intention is that the "last shot" doctrine should not prevail. An example of such circumstances may be found in *Butler Machine Tool Company Ltd. v Ex-Cello Corporation (England) Ltd*. [1979] 1 WLR 401 In that case, following an inquiry by

the buyer, the seller made a quotation for the sale of a machine. This offer was stated to be subject to the seller's terms which "shall prevail over any terms and conditions in the buyer's order". The buyer responded by placing an order on its own terms and that order included a portion which was to be torn off, signed, and returned by the seller. The seller duly returned the signed acknowledgement under cover of a letter referring back to the terms of its quotation. Lawton LJ held that the contract was concluded by the return by the seller of the signed acknowledgement, as this amounted to the seller accepting the buyer's terms.

81. In *TRW v Panasonic Industry Europe GMBH* [2021] EWCA CIV 1558, Coulson LJ, at para. 29 of his judgment, referred to the "last shot" doctrine as follows:

> "Disputes where each party is seeking to rely on its own terms and conditions, to the exclusion of the other side's terms and conditions, have long been known as the 'battle of the forms'. In such cases the courts have endeavoured to apply the traditional concepts of offer and acceptance. This has led to what is sometimes called the 'last shot' doctrine: in other words, the party whose terms and conditions are in play and unanswered at the time that the work is done or the goods delivered is often said to have fired the last shot, with its terms and conditions found to have been accepted by the fulfilment of the substantive contract".

82. However, in that case an employee of the plaintiff had signed Panasonic's customer file document which set out on the back thereof Panasonic's general conditions. These terms and conditions stated that they would "apply exclusively to the entire business relationship…particularly to all agreements for deliveries and services, unless different conditions, particularly conditions of purchase of the contracting party, have expressly been confirmed by us in writing". The court

considered that this wording enabled Panasonic to avoid the consequences of the "last shot" doctrine.

Application of principles to the facts: the defendant's perspective

83. At para. 36 of the defendant's written submissions, the defendant sets out in a series of numbered sub-paragraphs the factual matters it highlights to illustrate that Glanbia's terms and conditions were not accepted by ED&F and that the contracts were concluded on ED&F's terms and conditions. These points were developed during the course of oral submissions.

84. The defendant submits that it is clear from the evidence that the contracts were not concluded by virtue of the telephone calls between the parties, and relies on the email at 17.00 on 24th April, 2020 from Mr McGann, in which he stated *inter alia* that "I will issue contracts on receipt of PO's". It is submitted that Mr McGann was indicating by this that he awaited receipt of purchase orders, at which time he would issue ED&F's contracts, which would contain ED&F's terms and conditions. The defendant does not consider that the "purchase contract confirmation" documents were capable of comprising or reflecting concluded contracts; Mr McGann's view was that the "true nature" of these documents was that they were in fact purchase orders.

85. Heavy reliance is placed by the defendant on the sales confirmations sent by Mr McGann to Mr Miller on 28th April, 2020 which, having identified a number of material terms of sale, stated "…our official contract will be sent to you soonest". Mr McGann's email of 28th April, 2020, which enclosed the sales confirmations, stated "…please find enclosed our sales confirmations for new business agreed. Our official sales contracts will be issued soonest".

86. The defendant submits that the phrase "our official contract will be sent to you soonest" makes it clear that the Sales Confirmation was not acceptance of the plaintiff's offer to contract on the terms referred to in the purchase order. The defendant is adamant that, "on any objective, reasonable and commercial reading of the sales confirmations, the statements therein (and in the email under cover of which they were sent to Glanbia) that ED&F's official contracts/official sales contracts would be sent to Glanbia thereafter cannot be reconciled with Glanbia's core contention that the sales confirmations involved acceptance by ED&F that Glanbia's contractual terms were to govern the contracts between the parties". [Para. 36.7 written submissions].

87. The defendant's position is that the sales confirmations were in fact counter-offers, and they note that the sales confirmation for contract 1574 recorded different terms to the terms recorded in Glanbia's purchase order. It is also submitted that the purchase contract confirmations did not set out all the terms of the contracts, as the payment term of 60 days after invoice was not referred to in any of the documents.

88. The defendant also draws attention to the fact that the parties had been in a commercial relationship since 2011 and … "on each occasion on which a Sales Confirmation was issued by the Defendant, it was followed by ED&F's Sales Contract". [Paragraph 36.11 written submissions, referring to Mr McGann's second affidavit at para. 35.2].

89. The defendant relies on the sales contracts sent on 28th April, 2020, which it submits plainly did not involve acceptance of Glanbia's terms and conditions. It is submitted that Glanbia did not reject the terms set out in the Sales Contract, and that "…viewed objectively and against the backdrop of the course of dealing between the parties, its actions involved acceptances by conduct of ED&F's counter-offers…by

accepting delivery of the molasses goods provided by ED&F in this way, Glanbia accepted ED&F's terms and conditions". [Written submissions, para. 36.14].

90. The defendant also points out that the goods received notes issued by Glanbia which purported to incorporate Glanbia's terms and conditions are irrelevant to the contractual analysis, as those documents were issued after performance of the contracts, and in any event only applied if Glanbia was a seller of goods.

Applications of principles to the facts: the plaintiff's perspective

91. While counsel, in identifying the issues from the plaintiff's perspective, had posited the possibility of the court concluding that there was a concluded contract following the email exchange on 24th April, the real thrust of counsel's submissions was to the effect that the Glanbia purchase contract confirmations were offers that sought to incorporate Glanbia's general terms and conditions, and that the sales confirmations issued by ED&F were acceptances of the plaintiff's offers. As the written submissions of the plaintiff put it:

> "57…the terms of the Sales Confirmation must be interpreted on the basis of a text in context approach. The Sales Confirmation responded to the Glanbia Purchase Contract Confirmations by accepting the order, by confirming the sale and by agreeing the material terms. No new material terms were introduced. The threads regarding the price, the mode of delivery, the term of delivery, and the payment terms were not of significance…. The sales confirmation in each case was a final and unqualified expression of assent to the terms of the offer to which it responded. On a proper construction of the sales confirmation, it constituted acceptance, it was not subject to contract, nor was it a counter-offer".

92. In his oral submissions, Mr McGrath stated as follows: -

> "I think there can be no doubt but that the Purchase Contract Confirmations that were issued by Glanbia were offers in that sense, and I don't think there is any dispute between myself and Mr Clarke about that. And really then, the key question becomes: was the offer constituted by those Purchase Contract Confirmations accepted by the issue of the Sales Confirmations or were they counter-offers? …" [Day 4, p.35, lines 1 to 10].

93. At para. 56 of the plaintiff's written submissions, a number of points – made in fact by the plaintiff's English law expert in his report, which as evidence would be inadmissible, but adopted for the purchase of submissions as to Irish law by the plaintiff – are made as to the status of the sales confirmations. The plaintiff submits that all material terms were set out in the purchase contract confirmations, and that both parties agreed that the confirmations were offers capable of acceptance. It is submitted that the wording of the sales confirmations "display an intention to have the immediate effect of concluding binding contracts…". The plaintiff stresses the use of the word "confirmations" and emphasises the use of the phrase "further to our discussion, we have pleasure in confirming the following sale". The plaintiff draws attention to the covering email from Mr McGann, which states "please find enclosed our sales confirmations for new business agreed…". The plaintiff points out that this sentence uses the past tense "and not words such as 'to be agreed'".

94. It is submitted that the words "official contract will be sent to you soonest" are not sufficient to displace or qualify what the plaintiff contends is the immediate and binding effect of the defendant's acceptance in the sales confirmations of Glanbia's offers. The plaintiff submits that some terminology such as "subject to contract", alerting the plaintiff to the fact that further terms were yet to be agreed or finalised, would have had to have been used. Counsel referred to a number of authorities in his

oral submissions as to a distinction to be drawn between the contract which confirms or formalises an already existing concluded contract, and a contract which is intended by the party relying upon it to have contractual effect. Counsel referred to the dicta of Gibson J in *Thompson v The King* [1920] 2 IR 365 – [day 4, p.58 lines 1 to 28]: -

> "The relevant principles of law are clear, the only difficulty in each case is as to their application. Where an offer and acceptance are made subject to a subsequent formal contract, if such contract is a condition or a term which, until performed keeps the agreement in suspense, the offer and acceptance have no contractual force. On the other hand, if all the terms are agreed on, and a formal contract is only contemplated as putting the terms in legal shape, the agreement is effectual before and irrespective of such formal contract. Where there is correspondence in the course of which it's alleged that the contract has been created, the whole correspondence should be read, but if it appears that a final agreement was come to at any stage, subsequent attempts to introduce new and varied terms must be disregarded. Subsequent letters however debating as to terms already discussed may be material in considering whether there is any previous concluded bargain".

95. Counsel for the plaintiff referred to the foregoing passage from *Thompson* as a "neat summary" of the position and went on to refer to a number of cases which it was suggested supported the proposition that, where the evidence suggested that a contract had been concluded, a subsequent attempt to introduce new terms must be disregarded. Counsel's contention was that, the contracts having been concluded by the sales confirmations proffered by the defendant, the introduction of new terms thereafter by the defendant was impermissible in the absence of some clear indication by the defendant that the sales confirmations were not meant to be an unqualified

acceptance of the plaintiff's purchase contract confirmations, such as would have been signified by a phrase modifying the acceptance of the plaintiff's terms, such as "subject to contract".

96. In a comprehensive and helpful reply, counsel for the defendant submitted that each of the decisions relied upon by the plaintiff in this regard was distinguishable as being based on facts which were not on all fours with the present case. Indeed, it is true that the cases in this area are heavily fact-dependent, and one must be careful in eliciting principles from, or drawing analogies with, cases which may be significantly different in terms of their facts.

The process of analysis

97. The parties agree that, as the decision in *RTS Flexible* would suggest, the issue of whether a binding contract has been concluded depends on what was communicated between the parties by word and conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. The court must ascertain the objective meaning of the relevant words or conduct, considering all of the factors and the weight to be attributed to each, and do so applying, as O'Donnell J put it in *Law Society v MIBI* at para.12., "…a sympathetic understanding of the commercial or practical context in which the agreement was meant to operate…". The agreement and background context must be seen "…as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later". [O'Donnell J, *Law Society v MIBI*, para. 14].

98. The sequence of communications relevant to the formation of the contract is summarised in detail at paras. 17 to 28 above. The following points seem to me to have particular relevance to what was objectively intended by the parties: -

- As of the 3.25pm email from Mr Miller to Mr McGann on 24th April, 2020, the plaintiff had specified the nature of the products, the "May-Sept volumes", *i.e.*, the quantity of those products, and the price to include delivery of the Sumol 72 and 71 products.
- in the 17.00 email later that day from Mr McGann to Mr Miller, Mr McGann thanked Mr Miller for "confirming" summer values, and confirmed the price for the required Molglo product at "€390pmt delivered". He then stated "I will issue contracts on receipt of POs".
- the emails sent by the plaintiff on 24th April at 17.18, 17.23 and 17.25 to the defendant by "Millwheel", the plaintiff's automated system for generating contractual documentation, each had a subject line "contract [9205/9206/9207]" and stated "attached please find contract number [9205/9206/9207]" …;
- attached to each of these emails was the corresponding "PURCHASE CONTRACT [9205/9206/9207] CONFIRMATION", the details of which are set out at para. 22 above;
- the three emails accompanying the "sales confirmations" sent by Mr McGann on 28th April, summarised at paras. 23 to 25 above, referred to "sales confirmations" … "for new business agreed…", and stated "our official sales contracts will be issued soonest".
- the sales confirmations themselves

- each stated "we have pleasure in confirming the following sale…";
- each gave a "contract reference" [SO1574.000/SO1573.000/ SO1572.000];
- stated that delivery for Sumol 72 was now "ex-tank", with an accordingly reduced price of €215pmt;
- each had the statement "our official contract will be sent to you soonest".

- The "sales contracts" were as described at paras. 26 to 27 above, and corresponded with the sales confirmations as regards the essential details of the sales, save in two respects: the "payment terms" were specified on the sales contracts in each case as "60 days after date of invoice"; and the "period" was specified as "May 2020 to September 2020".
- The three sales contracts appear to have been sent only by post on Tuesday 28 April, 2020; see paras 33,44 and 55 of Mr McGann's grounding affidavit of 6th April, and Mr McGann's oral evidence on day 2 page 45 line 11 to day 2 page 45 line 11, although Mr McGann confirmed in that passage of his evidence that the sales confirmation, and the sales contacts "… were … created in physical form at roughly the same time…". Mr. McGann also confirmed that he and Ms Ann Raleigh signed the sales contract on the 28th April [day 2 p. 45 lines 21 to 28].

99. While it is perhaps a stateable proposition that there was a concluded contract between the parties on receipt by the plaintiff of Mr McGann's email at 17.00 on 24th April – one would have to consider the effect on such a proposition of the statement in that email that Mr McGann would "issue

contracts on receipt of POs" – it seems to me that the more obvious and natural battleground between the parties is as to whether the three purchase contract confirmations, which were sent out a matter of minutes after receipt of Mr McGann's email and which for the first time referred to Glanbia's terms and conditions, constituted offers from the plaintiff which were accepted by the sales confirmations sent by the defendant on the 28th, or whether, as the defendant contends, the sales confirmations did not accept the plaintiff's offers, with the subsequent sales contracts constituting counter-offers which were accepted by the plaintiff through its performance of the contracts.

When was the contract concluded? Case law

100. The defendant, in support of its contention that the sales contracts were counter-offers which were accepted by the plaintiff through performance, relies heavily on the references to contracts being issued by the defendant in Mr McGann's email of the 24th April at 17.00, his email of 28th April at 12.25 accompanying the sales confirmations, and the sales confirmations themselves. In order to reach a conclusion as to when the contract was concluded, it is necessary to consider some of the cases to which reference was made by the plaintiff in particular.

101. The plaintiff made reference to a number of cases which dealt with "battle of the forms" situations, in which the issue was as to the point at which the contract had been concluded. It is necessary to consider these cases in order to determine their applicability to the circumstances of the present case.

102. As we have seen, the principles in this type of case were considered in *RTS Flexible Systems*, in particular at paras. 45-56 of that judgment. At para. 49 of the judgment of the court, Lord Clarke JSC stated as follows: -

> "49. In his judgment in the Court of Appeal in [*Pagnan SpA v Feed Products Limited* [1987] 2 Lloyds Rep 601] Lloyd LJ (with whom O'Connor LJ and Stocker LJ agreed) summarised the relevant principles in this way, at p.619:
>
> > '(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole…
> >
> > (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case.
> >
> > (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed…
> >
> > (4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled…
> >
> > (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.
> >
> > (6) It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous.

> If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the court regards as important as opposed to a term which the court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge [at p.611] 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'".

103. In *Jayaar Impex Limited v Toaken Group Limited (t/a Hicks Brothers)* [1996] 2 Lloyds Law Reports 437, agreement for the sale of 47 tonnes of Nigerian Gum Arabic had been reached between the seller and the buyer in telephone conversations which took place on October 17th and 19th 1994. The issue between the parties was whether the contract was concluded by that exchange, or varied by reference to a written contract of October 21st 1994 which was on a standard printed form with "conditions" which included the phrase "IGPA [International General Produce Association] Spot terms and conditions to apply", and which included a term which stated that disputes arising out of the contract were to be "settled by arbitration in

accordance with the above rules and conditions". The only reference to the IGPA conditions was to be found in the written contract form.

104. In the Queens Bench Division (Commercial Court), Rix J held that the contract was made orally on the telephone and "…was final and binding and not subject to anything further by at latest October 19th. Even if the parties did contemplate their contract being reflected in the seller's contract form, it was not subject to written expression or to execution of such a document" [p.441].

105. Counsel for the plaintiff draws attention to this passage, suggesting that the authorities distinguish between an agreement which is confirmed in a subsequent written agreement, and where the agreement is subject to the agreement or execution of a subsequent written document. Counsel submitted that, once the agreement was concluded between the parties, and not made contingent on some further set of terms and conditions governing the agreement by the use of some phrase such as "subject to contract", the court must give effect to the concluded contract. Counsel for the defendant on the other hand submits that the present case is fundamentally different from the facts in *Jayaar* in that ED&F did not accept the Glanbia offers, but rather made counter-offers by way of the sales confirmations and sales contracts, which were ultimately accepted by Glanbia by virtue of its performance of the contracts.

106. In *Sterling Hydraulics Limited v Dichtomatik Limited* [2007] 1 Lloyds Law Reports 8, the purchaser ('SHL') asked the defendant ('DL') to quote for a quantity of seals for use with hydraulic brake fluid. On 11th April, 2003, DL faxed its quotation to SHL. On 14th April SHL faxed a purchase order to DL, stating "…please supply the following subject to the terms and conditions as set out below and overleaf". The terms and conditions were set out on the second page of the fax and provided *inter alia* that payment should be made on the last day of the calendar month, two months

following the month in which the goods were received. On 16th April, DL faxed an acknowledgment of the order to SHL. This acknowledgement was printed by computer onto two blank sheets of paper bearing DL's printed letterhead. The first page contained the words "terms of payment: by the end of the month of delivery plus two months". The second page was a continuation of the first which, after repeating the heading on the previous page, stated "with best regards, Dichtomatik Limited". Most of the rest of the second page was blank, apart from the words at the foot of the page: "delivery based on our general terms of sale". The seals were delivered to SHL in batches on 3rd June and 26th September, 2003, in each case accompanied by a delivery order which stated "delivery based on our general terms of sale". DL subsequently issued invoices containing the words "delivery based on our general terms of sale". A number of terms were printed on the reverse of the page under the heading "sales and delivery conditions", which were standard terms used by DL at the material time.

107. A large number of the seals failed in operation, as they had been made with the wrong material. The court had to decide whether the defendant's standard terms were incorporated into the contract and if so, the true construction of various provisions of the contract excluding or restricting liability.

108. HH Judge Havelock-Allan QC, sitting as a judge of the High Court, summarised, under the heading – the "battle of forms" – the task of the court in the following terms: -

> "11. The key lies in identifying precisely when the contract was concluded. But that involves analysing the exchanges between the parties in terms of offer and acceptance. For the purposes of such analysis it is often necessary to decide the meaning and effect of the rival terms in order to determine (1)

whether the response of party B to the offer of party A was an acceptance of the offer or was a counter-offer, and (2) whether either party did enough to bring its terms to the attention of the other for those terms to be incorporated into the contract. The more radical the term, the greater the notice required if it is to become part of the contract. As Denning LJ remarked in *Spurling v Bradshaw* [1956] Lloyds Rep 392 at 396 Col 2…some clauses would need to be printed in red ink on the face of the document with a red hand pointing to them before the notice could be held to be sufficient."

109. The court concluded that the acknowledgement was not a counter-offer, but was an acceptance of the offer to purchase contained in SHL's purchase order; the contract was made when the acknowledgement was sent by fax, and it was a contract on SHL's standard terms. As the court explained: -

"21. …the test of consensus is an objective one. On the face of it a contract is concluded when a purchase order is sent which contains all the essential terms for a contract, and that order is accepted by a written acknowledgement. For the acknowledgement not to result in a contract it must be plain to anyone reading the two documents that the acknowledgement introduces fresh terms which so add to, modify or contradict the terms in the order that the two sets of terms cannot form part of a binding agreement without further assent from the purchaser. In my judgment DL did not take sufficient steps to make clear to SHL that this was its intention when it sent the acknowledgment in this case. This is not one of those cases where victory goes to the party who fired the last shot. The first shot is the only one which counted. The 'battle of forms' was barely a skirmish".

110. Counsel for the plaintiff submitted that this decision was closely analogous to the present case; there was an onus on a party that was not accepting an offer to make it reasonably clear that it was not accepting the offer and was in fact making a counter-offer; the sales confirmations indicated that there was agreement to the offer made by Glanbia in its purchase contract confirmations [day 4, p.48 line 5 – p.49, line 9]. Counsel for the defendant on the other hand submitted that making it reasonably clear that it was not accepting Glanbia's offer was "exactly what the defendant did here by their references to the sending of the official sales contracts, the significance and terms of which were apparent to Glanbia and both parties at all material times" [day 5, p.25, lines 7 to 14]. The defendant's official contract did not involve a "memorialising of the terms of an agreement that had been reached when the sales confirmation document was sent on 28th April…", as "…the official sales contracts were plainly materially different to the Glanbia contracts, and at all material times they were understood by the parties to be different contracts…" [day 5, p.34, lines 7 to 27].

111. The plaintiff relied particularly on the decision of the UK Court of Appeal in *Immingham Storage Company Limited v Clear plc* [2011] EWCA Civ 89. This case involved what counsel for the plaintiff characterised as "a close enough analogy" to the facts of the present case.

112. The plaintiff in *Immingham* provided storage facilities for petro-chemical products at its terminal in Immingham, Lincolnshire. The defendant enquired about storage for three to four thousand cubic metres of "derv" – diesel oil for road vehicles – in October 2008. On 19th December, 2008, the plaintiff emailed the defendant setting out terms and attaching a quotation headed "subject to board approval and tankage availability". The quotation set out the details of the proposed agreement,

including the products to be stored, the commencement date and minimum storage period, the monthly charge, and the method of handling. The quotation contained a statement that "all other terms will be as per our "general storage conditions" version 2008 which shall be deemed to apply to this quotation". The final sentence of the document was "a formal contract will then follow in due course". It was signed by the plaintiff's representative and contained space for signature by the defendant under the words "we hereby accept the terms of your quotation subject to your board approval".

113. The quotation was signed by the defendant and returned to the plaintiff on 5 January, 2009. On 9 January, 2009, the plaintiff emailed the defendant with the subject heading "contract confirmation", setting out the details – "…we are delighted to be able to accept your offer…" – and stating "…in further confirmation of the above, our full contract for this business will now be raised over the next few days by our head office and sent for your signature and return". On 23rd January, 2009, contracts were sent to the defendant, with the plaintiff's legal adviser stating "…the contract will formalise the existing situation between us as detailed in our quotation to you".

114. The contract was not in fact returned by the defendant, who in the event was unable to source the appropriate fuel and made no delivery to Immingham. The plaintiff invoiced the defendant for monthly storage charges, claiming that a contract was made by the acceptance in the email of 9th January, 2009 of the offer constituted by the return by the defendant of the signed quotation on 5 January, 2009. The defendant claimed that this return of the quotation was not an offer capable of acceptance because of the inclusion in the quotation of the sentence "…a formal contract will then follow in due course…", and because of the statement in the

plaintiff's email of 9 January, 2009 that "…our full contract for this business will now be raised…and sent for your signature and return".

115. In referring to the trial judge's decision that a contract had been concluded in the email exchanges between the parties, the Court of Appeal (Richards J) stated as follows: -

> "18. There was before the judge no real issue as to the applicable legal principles. As regards the significance of a provision for the execution of a further written contract, the judge cited from the judgment of Parker J in *Von Hatzfeld-Wildenburg v Alexander* [1912] 1 CH 284 at 288: -
>
> > 'It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract, contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to, will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract entering into a contract. In the latter case, there is a binding contract and the reference to the more formal document may be ignored'".

116. The Court of Appeal stated that the only terms to which the quotation was expressed to be subject were board approval and confirmation of tank availability, both of which "…were certain, required no further discussion or negotiation between the parties and required action only by the respondent…the judge was right to draw attention to the absence of a condition such as 'subject to contract'. The terms on

which the quotation was signed ('we hereby accept the terms of your quotation subject to your board approval') made clear the limited conditionality" (para. 25). As the court stated: -

> "26. These factors point, overwhelmingly in our judgment, to an intention to create a contract if the claimant accepted the defendant's offer. Set against those factors, the provision that a 'formal contract will then follow in due course' does not indicate that the claimant's acceptance of the signed quotation will be no more than an agreement subject to contract. It is, as stated by Parker J in *Von Hatzfeld-Wildenburg v Alexander*, "a mere expression of the desire of the parties as to the manner in which the transaction already agreed to, will in fact go through".

117. The Court of Appeal went on to state as follows: -

> "29. The defendant's second submission is that the provision in the claimant's email of 9 January, 2009 for a subsequent "full contract" precluded the conclusion of a contract at that stage. It is said that not only did it make any agreement conditional on signature of a full agreement, but it also introduced a variation to the terms of the offer. It was neither unqualified nor corresponded with the offer, and so could not be an effective acceptance. This submission is not well-founded. The reference to sending a 'full contract' did no more than carry forward the provision in the quotation that 'a formal contract' would follow in due course. It did not introduce a variation to the terms of the offer, but corresponded with them. Just as the provision for 'a formal contract' did not prevent the signed quotation from being an offer to contract, so the reference to a subsequent 'full contract' did not prevent the email of 9 January,

2009 from being an acceptance of the offer which immediately created a contract."

118. Counsel for the plaintiff conceded that the decision in *Immingham*, which dismissed the defendant's appeal in that case, was "obviously not on all fours" with the present case, but claimed that the decision "gives fairly short shrift to the argument that there was no concluded agreement because of this reference to a formal contract, or a full contract, and I would suggest that if the language had been "official contract" the conclusion would have been exactly the same on the facts" [day 4, p.65, line 27 to p.66, line 18].

119. Counsel for the defendant replied in detail in relation to the plaintiff's submissions regarding the applicability or otherwise of the decision in *Immingham* – see day 5, pp. 39 to 48. He submitted that *Immingham* was "plainly distinguishable from the circumstances of this case". It was submitted that there was no acceptance in the present case of the Glanbia offer comparable to the signing by the defendant in *Immingham* of the plaintiff's quotation by which the defendant expressly accepted the quotation's terms. It was clear from the circumstances that the "formal" contract in *Immingham* was to be a mere formalisation of the deal already agreed; a similar conclusion, it was contended, could not be reached in the present case, particularly in the light of the various references by the defendant to the sending of contracts. The defendant makes the point that *Immingham* did not involve a consistent course of dealings between the parties, unlike the present case. Counsel also submitted that *Immingham* was "not authority for the proposition that the defendant could only have communicated that it was prepared to contract on the basis of its terms or its contract by stating 'subject to contract'…" [day 5, p.47, lines 20 to 25].

120. The last "battle of the forms" authority to which counsel for the plaintiff made substantial reference was the decision of Males J of the Queens Bench Division in *Air Studios (Lyndhurst) Limited (trading as Air Entertainment Group) v Lombard North Central plc* [2013] 1 Lloyds Law Reports 63. In that case, the defendant sought to sell equipment used in television production which it had leased to a company which had gone into liquidation. In negotiation between the plaintiff and the defendant, the plaintiff indicated it would be prepared to increase a previous offer "subject to contract". The defendant enquired as to what was meant by "subject to contract"; the plaintiff replied that the offer was "not conditional but there will have to be a sale contract". Shortly after this, the defendant replied as follows: "…if you are successful in your bid, which we will convey to you after 12 noon today, the selling process will be conducted by the issuing of an invoice with our standard terms and conditions as attached, with the additional comments outlined above…". Later that day, at 15.08, the defendant emailed the plaintiff, stating: -

> "(1) Please accept this email as confirmation that you have been successful with your offer of £100,000 plus VAT for the assets covered by the three agreements [contract numbers given].
>
> (2) Please provide an order confirming your agreement to progress with the sale based on the terms and conditions provided to you within the previous email below, please confirm the invoice address and I will raise a VAT invoice and email a copy to you today.
>
> (3) …".

121. The defendant did not perform the contract. The plaintiff made the case that it had made a firm offer to purchase the equipment for £100,000, which offer was accepted by the email sent at 15.08. The defendant denied that the plaintiff had made

a firm offer as it had stated that "there will have to be a sales contract". The defendant also argued that there had not in any event been acceptance because any contract would have to have been on the defendant's stated terms, a point which the plaintiff had not accepted.

122. The court cited the passage from *RTS Flexible Systems* quoted at para. 76 above, and the principles enunciated by Lloyd LJ in *Pagnan*, quoted in the *RTS* judgment and referred to at para. 102 above. Among the cases examined by the court were the decisions of Parker J in *Von Hatzfeld – Wildenburg* and the *Immingham* decision referred to above. At para. 12 of his judgment, Males J stated as follows: -

> "Because the existence of a binding agreement needs to be determined objectively and does not depend on the parties' subjective state of mind, evidence from the parties about what they intended by or understood from their written communications is of little or no relevance. There was a certain amount of such evidence from the witnesses on both sides in this case, despite the fact that the objective nature of the question was common ground, but such evidence was of no real assistance when all of the parties' relevant exchanges were in writing. The evidence was, however, relevant in informing me of the background against which the parties' negotiations took place".

123. In the event, the court held that the email at 15.08 was a "clean acceptance of Air Studios offer to purchase the equipment which gave rise to a binding contract…", and referred particularly to para. 1 of the email quoted at para. 120 above, "…which refers unequivocally to confirmation that Air Studios had been successful with its offer…". Males J stated as follows: -

> "55…if in fact the message [*i.e.* the 15.08 email] is read as going on to say that further steps would be necessary before any contract would be concluded, that

> opening statement would be highly misleading. In my judgment the better reading of the message, which gives effect to it as a whole and also makes commercial sense, is that Air Studios' offer was accepted with immediate binding effect, and that Lombard went on in the remainder of the email to indicate the further terms which it hoped to agree and the process which it wished to follow in order to implement what had been agreed, but that these matters were not intended to constitute conditions precedent to the conclusion of a binding contract…".

124. Counsel for the defendant did not disagree with the Air Studios' decision, but submitted that it was clearly distinguishable from the present case, in which the sales contracts "…were not mere formal contracts formalising what had been already agreed" [day 5, p.52, lines 6 to 14].

Application of principles to the facts

125. It will be apparent from the survey of the applicable legal principles at paras. 76 to 82 and 102 to 124 above that, as Gibson J commented in *Thompson,* "…the relevant principles are clear, the only difficulty in each case is as to their application". The various statements of principle in the cases to which reference is made above clarify the process of analysis of offer and acceptance which must be conducted in order to discern the objective meaning of the agreement. The dicta of Lloyd J in *Pagnan* in particular, quoted above at para. 102 and cited with approval by the UK Supreme Court in *RTS Flexible Systems,* provide a helpful guide to the task of interpretation of the dealings of the parties with a view to determining when a contract is concluded.

126. These dealings must be examined in the "commercial or practical context in which the agreement was meant to operate…" [O'Donnell J in *Law Society v MIBI*:

see para. 97 above], and the context and background circumstances must be those that pertained at the time the agreement was made. As Andrew Smith J put it in *Bear Sterns Bank plc v Forum Global Equity Limited* [2007] EWHC 1576 (Comm) at para. 171, in a passage quoted with approval by Males J in *Air Studios*: -

> "The proper approach is, I think, to ask how a reasonable man, versed in the business, would have understood the exchanges between the parties. Nor is there any legal reason that the parties should not conclude a contract while intending later to reduce their contract to writing and expecting that the written document should contain more detailed definition of the parties' commitment than had previously been agreed".

127. It seems to me that the purpose of the purchase contract confirmations sent out by the plaintiff within minutes of Mr McGann's email of 17.00 on April 24th, 2020 was to pull together the various threads of the email negotiation between Mr Miller and Mr McGann and put to the defendant what they had agreed as a formal offer. Each of those documents was expressed to be a "confirmation" of a "purchase contract" which by that stage had been allocated a specific number [9205/9206/9207], and each stated that the purchase contract was "subject to Glanbia's standard terms and conditions of purchase…supplier terms and conditions are strictly excluded".

128. The defendant does not demur from the suggestion that the purchase contract confirmations each constituted an offer to the defendant which it could accept or reject; Mr McGann's evidence, at para. 19 of his affidavit, was that "while the document described itself as a 'purchase contract', it was not a contract and was actually what would normally be termed a 'purchase order'". As we have seen, the defendant responded in each case on Tuesday 28th April, 2020 with a sales

confirmation and an accompanying email, the details of which are set out at paras. 23 to 25 above.

129. The dispute between the parties essentially concerns the nature of these sales confirmations and accompanying emails. The plaintiff contends that, taken together, they each constitute an acceptance of the corresponding purchase contract confirmation, such that a contract must be regarded as having been concluded. The defendant contends that the references by Mr McGann, firstly in his email at 17.00 on 24th April, and then in both the sales confirmation in each case together with the email which accompanied it, to the "official sales contract" or "official contract" being issued or sent "soonest", made it clear that the offer of the plaintiff was not being accepted, but was subject to the terms of the "official contract" in each case which subsequently issued.

130. The defendant submits at para. 36.8 of its written submissions that the sales confirmations "clearly involved counter offers and, in particular, counter-offers to contract pursuant to ED&F's official contracts/sales contracts". The defendant points out that "as regards the Sumol 72 purchase (contract 1574), the sales confirmation recorded different terms in relation to delivery and price compared to those contained in the corresponding purchase contract confirmation". The defendant also refers to the fact of two additional terms being referenced on the sales contracts as set out at para. 98 above, *i.e.* the reference to "payment terms" and the "period" specified as "May 2020 to September 2020", as being inconsistent with the sales confirmations constituting an acceptance of the plaintiff's terms.

131. I do not consider that these points assist the defendant. The context of the agreement was that the plaintiff was ordering quantities of molasses-based products for the summer season. It is clear that Mr Miller and Mr McGann were focussed

primarily on two things: volumes and price. As regards volumes, it was understood by the parties that further quantities might subsequently be required, and the parties did in fact agree a "top-up" to the volumes at the end of the following July.

132. As regards price, Mr Miller's evidence, which was not contradicted by Mr McGann, was that it was understood by both parties – who, one must recall, had had a lengthy trading relationship – that there would be a standard extra charge to the unit price per metric tonne if the product was required by the plaintiff to be delivered to its premises by the defendant. This charge was not the subject of negotiation, and both parties understood that it would ultimately be applied or not applied by the defendant to the invoiced price, depending on whether or not delivery took place.

133. The fact that the sales contract stated the payment terms – "60 days after date of invoice" – does not signify the introduction of a new term. As we have seen, the payment terms were the subject of discussion between Mr Miller and Mr McGann, with the former seeking an increase in the credit period to "month end 90 days" from the previous period of "within 35 days of an invoice" [see para. 12 of Mr McGann's grounding affidavit]. In his email of 22nd April at 15.56, Mr McGann stated that the defendant could offer "60 day payment terms for new business going forward". As this issue was not addressed in the subsequent emails, or in any subsequent documentation until the sales contracts, it seems clear that it was not the subject of active negotiation. There was no correspondence subsequent to the sales contracts in which the plaintiff sought to revisit the issue.

134. In the circumstances, it seems to me that, as a matter of probability, the plaintiff had accepted the defendant's proposal of "60 days" after it was made. Even if it had not, I do not think that the absence of agreement on that issue would be so

fundamental to the formation of the contract that a court should take the view that, all things being equal, the court should be regarded as not having been concluded.

135. When one considers the documentation generated by the parties, from the exchange of emails between Mr Miller and Mr McGann up to and including the sales confirmations, in my view one must conclude that, taken on their own terms, they are consistent only with a concluded contract coming into existence on the issue by the defendant of the sales confirmations and accompanying emails. All of the essential terms of the contracts had been agreed: the goods to be purchased, the quantities of same, the price to be paid. There was no misunderstanding between the parties as to how or at what price delivery would be effected.

136. Further, the language used by the plaintiff in its purchase contract confirmations, and by the defendant in its sales confirmations and accompanying emails, is entirely consistent with the existence of a "done deal". The defendant's emails of 28th April enclosed "our sales confirmations for new business agreed". The sales contracts themselves stated "we have pleasure in confirming the following sale…". This use of terms such as "confirmation" and "agreed" in relation to the terms indicates that the defendant, in commercial terms, regarded itself as having concluded a sale.

137. The defendant however contends that the repeated references to the "official contract" to be sent "soonest" make it clear that the defendant was still reserving its position until the "sales contract" issued.

138. As Lloyd LJ in *Pagnan* stated at point 4 of the principles adopted by the UK Supreme Court in *RTS Flexible Systems* and set out at para. 102 above, the parties "…may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled…". The position was neatly expressed

by Parker J in *Von Hatzfeld – Wildenberg v Alexander* [1912] 1 CH 284 as cited by Richards J in *Immingham* and quoted at para. 115 above.

139. The question is whether, construing the dealings between the parties objectively, the references to the "official contract" would have indicated "to the reasonable man, versed in the business" that, notwithstanding the measure of agreement to date, no contract should be regarded as having been concluded until the sales contract to be issued had been accepted by the plaintiff. I do not think the dealings can be construed in this way. There was no conditionality intimated by the defendant in the phrases referring to the official contract; it could not be readily inferred that the agreement of an "official contract" must take place before the agreement could be said to be concluded. The references to the "official contract" were somewhat neutrally expressed. It was not expressly suggested that the proposed "official contract" would be a mere formalisation of the terms already agreed; however, neither was it evident from the references by the defendant to the "official contract" that a sales contract was regarded by it as a *sine qua non* of a concluded deal.

140. If the references to an "official contract" being sent "soonest" were intended to imply that such contracts would be regarded as a counter-offer made by the defendant, this is entirely inconsistent with the language of agreement and confirmation used by the defendant in the sales confirmation documents. I do not think that any reasonable, objective perusal of the documentation would regard those references as a rejection of the offer in the plaintiff's purchase contract confirmations, and the precursor to a counter-offer by way of the sales contracts; every indication was that the essential terms of the contract had been agreed, so that any "official contract" to follow would not be inconsistent with the deal already done. Indeed, the very use of the word

"official" might well have suggested to a reasonable and objective observer that the contract to follow – particularly given the complete absence of qualifications or conditionality – was far more likely to be in the nature of a confirmation or memorialisation of the commercial terms already agreed than a counter-offer which effectively rejected those agreed terms.

141. If the agreement specified in the sales confirmations were intended to be conditional upon the agreement of a sales contract to be issued by the defendant, this could easily have been made clear in those documents. The most obvious and common expression of conditionality in such a situation is the phrase "subject to contract" commonly used by parties negotiating the sale of property. This phrase makes it clear beyond argument that the party using it does not regard itself as bound by the negotiations until a written contract is concluded between the parties. The defendant submits that the references to the "official contracts" in Mr McGann's final 17.00 email and the sales contract confirmations and accompanying emails are sufficient indicators of conditionality such that it should have been clear that these confirmations could not be regarded as acceptances of the plaintiff's offers. I cannot agree that this would be the likely conclusion of the reasonable and objective observer who was aware of the context and surrounding circumstances.

142. In particular, it seems to me that some expression of conditionality in the sales confirmations was required given the unequivocal incorporation in the purchase contract confirmations of Glanbia's terms and conditions, and the statement that "supplier terms and conditions are strictly excluded". Given the language of confirmation and agreement used by the defendant in the sales confirmations, which clearly gave the impression that all essential matters had been agreed, it was incumbent on the defendant in those documents to make it clear that the incorporation

of the plaintiff's terms and conditions, and the exclusion of the defendant's, were unacceptable. The failure to do so in the sales confirmations would, in my view, suggest to the objective observer that the essential terms of the contract were accepted by the defendant, and that the parties intended to be bound by the deal they had concluded "…even though there [were] further terms still to be agreed or some further formality to be fulfilled…" [Lloyd LJ in *Pagnan*, as adopted by the UK Supreme Court in *RTS Flexible Systems*: see para. 102 above].

143. The defendant submits that, while the analysis of the negotiations and the process of offer and acceptance is important, one must also consider the general context and, in particular, the course of dealings between the parties in the past. There are several points of relevance in this regard which must be considered.

144. The undisputed evidence of the defendant was that the parties had been in a commercial relationship since 2011 and that, on each occasion on which a sales confirmation was issued by the defendant, a sales contract would follow referring to different terms and conditions [para. 35.2 of Mr McGann's affidavit sworn on 30th June, 2022]. In his evidence, Mr Miller acknowledged that he understood from Mr McGann's email of 17.00 on 24th April that Mr McGann envisaged issuing contracts as he had done in previous deals [day 1, p.93, lines 10 to 26, day 1, p.94, lines 8 to 15]. He also acknowledged that his expectation would have been that ED&F's sales contract would arrive before delivery or collection of the goods [day 1, p.113, lines 9 to 13]. Mr Miller accepted that there had been about thirty occasions since 2016 where this had occurred [day 1, p.114, lines 13 to 24].

145. As we have seen, the components of the deal between the plaintiff and the defendant were typically, as on this occasion, worked out between the plaintiff's and defendant's respective representatives by email and telephone. Mr Miller's evidence

was that, once a deal had been concluded, the details would be entered into "Millwheel", a computer software package which generated the appropriate contractual documentation. It was this system which generated the purchase contract confirmations issued within minutes of Mr McGann's email at 17.00 on 24th April. Likewise, the defendant had a corresponding software package – "ITAS" – which generated the sales confirmations and sales contracts for issue to the plaintiff. Mr McGann's evidence was that this was done on 24th April, so that two of the three sales contracts bore this date, with the third being dated 25th April, due, Mr McGann surmised, to some amendment made by him to this documentation on Saturday 25th April, 2020.

146. It is clear that the documentation generated by the respective software packages was from standard templates, into which the specific contractual data such as price, volume *etc* were inserted. There was no suggestion in the evidence that Mr Miller or Mr McGann had ever discussed or contemplated the significance of the exchange of documents, or which party's terms and conditions governed the agreements between them. The documents were generated by rote and, while the parties do not appear to have given them much thought or consideration, as the court pointed out in the course of submissions, "…nothing had ever gone wrong before". Neither party had ever addressed the other's insistence that its own terms and conditions would apply.

147. It may be of some small significance to note that, while the purchase contract confirmations and sales confirmations were exchanged by email, the sales contracts were sent to the plaintiff in hard copy by post. They appear to have been signed and sent on Tuesday 28th April, and there is no suggestion by the plaintiff that it did not receive the contracts by post in the normal way. The contracts therefore were not part

of the continuum of negotiation and exchange by email of contractual documentation, even though Mr McGann's evidence is that they were created on 24th April.

148. The defendants submit that there was "a consistent course of dealing" over "many years" involving the same or similar documentation, and rely on Mr Miller's acknowledgement that he was aware of the defendant's sales contracts and indeed had been expecting them. There was reference in the submissions to what Mr Miller considered to be the contractual position and thus the significance of the defendant's sales contract; however, such evidence is not admissible, any more than Mr McGann's evidence in this regard. The defendant's point however is that the reference by it to "official sales contracts" must be considered in the light of Mr Miller's familiarity with the sales contracts typically generated by the defendant on previous occasions.

149. While there is a superficial attraction to this argument, I do not think that it affects the analysis which must be brought to bear on the negotiations between the parties regarding the point at which the contract must be regarded as having been concluded. For the reasons set out above, the reasonable person with knowledge of the context and surrounding circumstances would in my view regard the sales confirmations as an acceptance of the offers contained in the plaintiff's purchase contract confirmations. I do not think that the fact that a similar set of circumstances had occurred on a number of occasions before leads to a different conclusion. The exchange between the parties, viewed objectively, suggests that they had concluded all of the essential elements of the deal when the sales confirmations were sent by the defendant. The language of the sales confirmations and accompanying emails, and the absence of any conditionality in the mention of the official sales contracts, lead inexorably to this conclusion.

150. In those circumstances, any attempt by either of the parties to introduce further terms after the conclusion of the deal which are inconsistent with the terms of the concluded deal is futile and of no effect. The sales contracts were not counter-offers, as the contracts had been concluded by issue of the sales confirmations, which unequivocally accepted the offers contained in the plaintiff's purchase contract confirmation.

151. I am fortified in this conclusion by the fact that the purchase contract confirmations expressed the contracts to be "subject to Glanbia's standard terms and conditions", and anticipated any future attempt by the defendant to incorporate its own terms and conditions by stating "…supplier terms and conditions are strictly excluded". Given that such an emphatic position was being adopted by the purchaser, it was in my view incumbent on the seller, if it wished to reject the purchaser's position on terms and conditions, to do so clearly and in such a way as to leave no doubt that the purchaser's terms and conditions were not accepted. However, the sales confirmations do not do this; they "confirm" and "agree" the offer made by the plaintiff, with only a neutral reference to the "official contract". It does not seem to me that any reasonable objective view of the sales confirmations could regard them as rejecting the plaintiff's terms and conditions, or as constituting other than an acceptance of the plaintiff's offers.

152. In those circumstances, Mr Miller's knowledge of what terms the sales contract might contain, based on past experience, is irrelevant to the question of contract formation. In any event, as we have seen, there is no evidence to suggest that anyone from either the plaintiff or the defendant had ever paid attention to the issue of whose terms and conditions would apply; the contractual documents were generated by the parties' respective software systems, and the issue would not appear to have

been addressed in the way that the essential terms of the contract were thrashed out by email and telephone. One can only draw conclusions as to what the parties intended from an objective appraisal of the contractual dealings between the parties; in my view, one cannot regard the sales confirmations as other than an unqualified acceptance of the plaintiff's offers as set out in the purchase contract confirmations.

Incorporation of GAFTA 109

153. The findings set out above in relation to the point at which the contract must be regarded as fully formed and binding on the parties leads to the conclusion that Glanbia's terms and conditions, which were readily available on the Glanbia website, were incorporated in the contract, and that the defendant's terms and conditions were not applicable. This determination means that the defendant's application cannot succeed, and must be dismissed.

154. However, given the substantial arguments so ably made by counsel for the defendant, and in the event that I am incorrect in my view that the sales confirmations were a conclusive acceptance of the offers of the plaintiff, I propose to address the second issue in the application set out at para. 75 above: if the defendant's terms and conditions governed the agreement between the parties, were the terms of GAFTA 109 incorporated in that agreement?

Legal principles regarding incorporation

155. As with the legal principles concerning the conclusion of the contract, there is no substantial difference between the parties as to the principles governing the inclusion in a contract or otherwise of the standard terms set out in another contract. I shall attempt to summarise the principles below, prior to considering their application to the facts of the present case.

156. In *Circle Freight International Limited (trading as Mogul Air) v Medeast Gulf Exports Limited (trading as Gulf Export)* [1988] 2 Lloyds Law Reports 427, the defendant exporters had used the plaintiff, which was a freight forwarding agent, on a number of occasions. When the plaintiff sued for monies owed, the defendant counterclaimed that a quantity of their goods, which had been collected by the plaintiff for export, was stolen from the plaintiff's van which had been left unattended in a street in London. The plaintiffs argued that any liability in this regard was excluded under the standard trading conditions of the Institute of Freight Forwarders ('IFF'). These conditions excluded liability for negligence in performing the company's obligations unless the loss was due to wilful neglect of the company or its employees.

157. The contracts between the parties had been concluded orally, although invoices had been issued by the plaintiffs on eleven previous occasions which stated that all business was transacted under the current trading conditions of IFF which were available on request.

158. Having reviewed some relevant authorities, Taylor LJ of the Court of Appeal stated as follows: -

> "…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. Other considerations apply if the conditions or any of them are particularly onerous or unusual…it is not necessary that notice of the conditions should be contained in a contractual document where there has been a course of dealing" [at p.433].

159. The court found it significant that the parties were commercial companies, and that there had been a course of dealing in which at least eleven invoices had been sent giving notice that business was conducted on IFF terms. The IFF conditions were "not particularly onerous or unusual and, indeed, are in common use…" [Taylor LJ at p.433]. Accordingly, the court was satisfied that the terms had been effectively incorporated.

160. In *Transformers and Rectifiers Limited v Needs Limited* [2015] BLR 336, Edwards-Stuart J, in considering a "battle of the forms" case, set out a summary of principles which addressed the issue of incorporation of standard terms as follows: -

> "(iv) Where trade or industry standard terms exist for the type of transaction in question, it will usually be easier for a party contending for those conditions to persuade the court that they should be incorporated, provided that reasonable notice of the application of the terms has been given: see *Circle Freight*.
>
> (v) A party's standard terms and conditions will not be incorporated unless that party has given the other party reasonable notice of those terms and conditions: see *Circle Freight.*
>
> (vi) It is not always necessary for a party's terms and conditions to be included or referred to in the documents forming the contract; it may be sufficient if they are clearly contained in or referred to in invoices sent subsequently: see [*Balmoral Group Limited v Borealis (UK) Limited* [2006] EWHC 1900 (Comm)] at paras. 352, 356…" [at para. 42].

161. Edwards Stuart J went on to state as follows: -

> "…it seems to me that a seller who wishes to incorporate his terms and conditions by referring to them in his acknowledgement of order – thus making it a counter-offer – must, at the very least, refer to those conditions on

> the face of the acknowledgement of order in terms that make it plain that they are to govern the contract. Having done that, if the conditions are not in a form that is in common use in the relevant industry, the seller must give the buyer reasonable notice of the conditions by printing them on the reverse of the acknowledgment of order accompanied by a statement on the face of the acknowledgment of order that it is subject to the conditions on the back" [at para. 49].

162. The defendant submits that the *Circle Freight* judgment was cited with approval by the Supreme Court in *Noreside Construction Limited v Irish Asphalt Limited* [2015] 1 ILRM 229. The plaintiff in that case was a construction company, and the defendant operated quarries from which it supplied products for the construction industry. Following a number of exchanges between the parties, a purchase order was faxed by the plaintiff to the defendant on March 26th 2003, and subsequently the original was sent by post. This original was date-stamped as received by the defendant on March 28th, 2003. The plaintiff's terms and conditions were printed on the reverse side of the purchase order although there was no reference to those terms and conditions on the face of the purchase order. Deliveries of aggregate by the defendant took place between March 27th 2003 and May 2005, and each delivery was accompanied by a delivery docket signed by an employee of the plaintiff or by a haulier, with each delivery docket containing on its face the statement that material was sold, "subject to the terms and conditions available on request".

163. The plaintiff draws attention to the following passage in *Noreside* from the judgment of Dunne J.:

> "A number of points emerge from the passages referred to above. First of all, although one can be bound by terms and conditions that one has not read, the

> document relied on by the party asserting the terms and conditions should actually contain either the conditions themselves or in some other way identify the terms and conditions relied on. As Taylor L.J. concluded in *Circle Freight,* it is not even necessary for the conditions to be set out specifically. He pointed out that it would be sufficient if adequate notice was given identifying and relying upon the conditions… [at p.245]".

164. In *Noreside*, a simple reference to terms and conditions being available on request was found insufficient to constitute reasonable notice of the terms and conditions which were applicable. As Dunne J commented at p.246: -

> "At no stage was Noreside ever provided with a copy of Irish Asphalt's terms and conditions. The terms and conditions were not identified in any shape or form or specified by reference to any known industry-wide terms and conditions. The position could have been otherwise if the proviso had identified some specific terms and conditions such as the IFF conditions referred to in the *Circle Freight* case….".

165. In the earlier decision of *James Elliott Construction Limited v Irish Asphalt Limited* [2014] IESC 74, the Supreme Court was satisfied that terms and conditions could be incorporated by reference to the specific terms and conditions in common use in the applicable industry. However, as the court commented at para. 109 of its judgment, "…to be a contractual document, the document [referring to the incorporated contract terms] must be one which contains contractual conditions or a reference to specific terms and conditions well known in a particular industry. It is not sufficient to refer in general terms to unspecified terms and conditions…". The court went on at para. 134 of its judgment to refer to a passage from Lewison in the *Interpretation of Contracts* (at p.127) which contained the following excerpt from the

judgment of Dillon LJ in *Interfoto Picture Library Limited v Stiletto Visual Programmes Limited* [1989] QB 433: -

> "It is in my judgment a logical development of the common law into modern conditions that it should be held … that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.
>
> In the present case, nothing whatever was done by the plaintiffs to draw the defendants' attention particularly to condition 2; it was merely one of four columns' width of conditions printed across the foot of the delivery note. Consequently condition 2 never, in my judgment, became part of the contract between the parties."

166. While, as is so often the case in litigation nowadays, both sides cited a plethora of cases in support of their respective submissions, the cases to which I have referred above make clear the general principles involved. It is appropriate at this point to have regard to the clause in the sales contracts which purports to incorporate GAFTA 109 ('the incorporation clause') to get a sense of how these principles apply to the facts of the case.

The incorporation clause

167. While I have set out the full text of the sales contract which contains the clause purporting to incorporate GAFTA 109 at para. 27 above, for ease of reference, and given its central importance to this issue, I think it is worthwhile to set out the terms of the relevant clause again: -

> "We have pleasure in confirming the following sale to you subject to the terms and special conditions enclosed hereon and to all other conditions imposed on

us by our supplier save and to the extent that the same are inconsistent with the terms and special conditions of this sales contract. Our suppliers' contract is as set forth in the Grain and Feed Trade Association contract".

168. The genesis of this clause, and how it came to be incorporated in the sales contract, was explored in the examination of Mr McGann, who explained that the formula of words had been used previously by the defendant's agent R&H Hall – see paras. 66 to 68 above. Counsel for the plaintiff put to Mr McGann a "sales contract" of 12th January, 2009 on R&H Hall notepaper, addressed to Glanbia. This contract contained the R&H Hall version of the incorporation clause, which is quoted at para. 67 above and which is slightly different to the clause relied upon by the plaintiff in the present proceedings: it refers to the terms and special conditions "endorsed hereon" – as opposed to "enclosed hereon" – but is in all other respects in materially the same terms. The plaintiff was unable to confirm whether the original of the R&H Hall document had terms or special conditions endorsed on the back of the contract, which on the copy presented to the court was blank, although the document stated "all goods are sold subject to the special conditions printed overleaf". The "commodity" on the contract was stated to be "Hibernian Molasses", although it appeared from the evidence that this was the identification of the supplier to R&H Hall, rather than the product. The contract set out the quantities and price at which the goods were being sold by R&H Hall to Glanbia.

169. Mr McGann's evidence was that "Hibernian Molasses" was in fact an entity which was a predecessor of the defendant; it was incorporated as Westway Hibernian Holdings Limited and ultimately became ED&F Man Liquid Products Ireland Limited, the defendant in the present case. R&H Hall, prior to 2011, "…acted as our agent and placed our molasses on the Irish market…" [day 2, p.49, lines 1 to 14]. Mr

McGann acknowledged that he had no personal knowledge of which GAFTA contract was being referenced in the R&H Hall contract [day 2, p.56, line 27 to day 2, p.57, line 1].

170. A notable feature of the incorporation clause in the plaintiff's sales contracts is that, while it refers to "the Grain and Food Trade Association contract", it does not specify the particular GAFTA contract on which reliance is placed. In the course of examination of Mr Miller, a document was produced by the defendant entitled "Evaluation of the applicability of all GAFTA contracts effective in April 2020". This document was compiled by the defendant's solicitors, Messrs A&L Goodbody LLP. It appears from the document that there may have been as many as 203 different GAFTA contracts operated by that association; by April 2020, some 80 contracts appear to have been still operative.

171. The document sought to analyse the 80 contracts with regard to their possible applicability to the contracts between the plaintiff and the defendant. The vast majority of them were plainly inapplicable, as they dealt with other products or matters. Five contracts were of general application, with terms applicable to all contracts. The survey identified only one contract – GAFTA 109 – which the defendant's solicitors deemed appropriate to the circumstances of the contract between the plaintiff and the defendant. The details identified in the summary by the defendant's solicitors were:

Title:	Feedingstuffs – ex-store/silo
Effective from:	January 2020
Summary of contract:	Contract for feeding stuffs in bulk ex-store/silo.
ALG comments:	Correct product and delivery method.

Jurisdiction and arbitration clauses: 22, 23

172. Both Mr Miller and Mr McGann were examined closely in relation to the applicability of GAFTA 109 to the circumstances of the parties' agreement; in this regard, see paras. 53 to 71 above. Counsel for the plaintiff attempted to demonstrate that the contractual terms of GAFTA 109 were completely inappropriate to the agreement which the parties had concluded. Counsel drew particular attention to the terminology and methodology in GAFTA 115 in this regard.

173. GAFTA 115, unlike GAFTA 109, deals specifically with molasses, although both parties agree that it is concerned with the export of molasses, and involves "free on board" terms which do not apply to the parties' circumstances. The plaintiff however attaches significance to the fact that GAFTA 115 refers to the molasses as being stored in "tanks", whereas there is no reference to tanks in GAFTA 109, which refers to the goods being transferred from a "store" or "silo". The plaintiff's contention is that GAFTA 109 was intended to refer to dry goods which can be "stored" and that if that contract was intended to encompass liquid feedstuffs such as molasses, it would have referred to "tanks" rather than a store or silo. The defendant's position is that there is no significance in the terminology "ex-store/silo"; the defendant "stores" molasses in a "tank farm". The plaintiff also drew attention to provisions in GAFTA 115 which were specific to molasses, which did not have any equivalent in GAFTA 109.

Interpretation of the incorporation clause itself

174. The incorporation clause comprises two sentences. The first sentence expresses the sale to be subject to the terms and conditions "enclosed hereon", and "to all other conditions imposed on us by our supplier", save to the extent that such conditions are "inconsistent with the terms and special conditions of this sales

contract". The second sentence then says "our supplier's contract is as set forth in the Grain and Feed Trade Association contract". There are a number of difficulties in interpreting this clause.

175. Firstly, there are no terms and conditions "enclosed" with – or on – the contract. As we have seen, the original R&H Hall contract contains the words "endorsed hereon" and refers to "the special conditions printed overleaf". Is one to interpret "enclosed hereon" as intended to be "endorsed hereon", as per the R&H Hall contract? If so, are the "terms and special conditions" those referred to on the face of the contract, *i.e.* terms regarding quantity, price, delivery *etc*? If so, why is a reference to "special conditions" necessary at all?

176. Secondly, the reference in the first sentence to "our supplier" is clearly a reference to the suppliers of the goods to the defendant ("…imposed on us by our supplier…"). However, the defendant contends that the reference in the second sentence to "our supplier" does not bear the same meaning; "our supplier" in the second sentence, according to the defendant, is a reference to the defendant itself. It is contended therefore that the phrase "our supplier" bears different meanings in successive sentences.

177. Both parties accept that, whatever about R&H Hall's position in 2009, no GAFTA terms were imposed on the defendant by its supplier, an affiliated company. Mr Miller acknowledged as much in his first affidavit, although there was no evidence to suggest that this was known to the plaintiff in 2020. Counsel for the defendant accepted in any event that it was not necessary to draw conclusions about what would be reasonably ascertainable by Glanbia personnel about the terms on which ED&F had acquired the molasses; a reasonable person could only construe the second

sentence as "an attempt to convey to the person receiving the products that the GAFTA terms are applicable". [Day 5, p.84, line 5 to p.85, line 22].

178. Reliance was placed by the defendant on the decision of the UK Court of Appeal in *Modern Building Wales Limited v Limmer* [1975] 1 WLR 1281. In that case, an order from a contractor to a nominated subcontractor required certain work to be carried out "in full accordance with the appropriate form for nominated sub-contractors (RIBA, 1965 edition)". The Royal Institute of British Architects had no form of contract between a contractor and a nominated sub-contractor. The National Federation of Building Trades Employers and the Federation of Association of Specialists and Sub-Contractors had issued a form of contract in 1963 ('the green form') to be used by contractors and nominated sub-contractors, which was headed "for use where the sub-contractor is nominated under the 1963 edition of the RIBA form of main contract". The defendant gave evidence that the phrase used in the order would be understood in the trade as referring to the green form. The court held that the words "(RIBA 1965 edition)" were not intended to restrict the preceding words which were "evidently intended to be the governing words of definition…the right way to construe this order form is to ignore the words in brackets altogether…and to accept that the reference to the appropriate form for sub-contractors is a reference to the green form, that being the only form to which it is suggested that these words could apply and the form to which it is said that anybody in the trade would understand them as applying" [Buckley LJ at p.1288, D-H].

179. Counsel for the defendant referred to a passage from Lewison in *The Interpretation of Contracts* at p.127 cited with approval by Dunne J in *Noreside*:

> "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. Clear words of reference suffice to incorporate the terms referred to. Other conditions apply if the conditions or any of them are particularly onerous or unusual…".

This quotation, while attributed to Lewison, draws heavily on the passage from the judgment of Taylor L.J. in *Circle Freight* quoted at para. 158 above.

180. Counsel drew a distinction between cases such as *Noreside* and *Elliott*, where the issue concerned the degree of notice given of the terms and conditions peculiar to one of the parties, and cases where reference is made to terms which are "in common form or usual terms in the relevant business". It was submitted that the terms in GAFTA 109 were terms "in common form", in that it is a standard form contract, the terms of which are readily accessible and ascertainable from the GAFTA website. Counsel submitted that "the purpose of this analysis in this test is to ensure that the person receives appropriate notice of the relevant terms…" [day 5, p.90, lines 19 to 21], and that, in the present case, although GAFTA 109 was never specifically identified as the applicable contract, it was clear from a perusal of the GAFTA contracts that GAFTA 109 was the only GAFTA contract which could govern the agreement between the parties. In any event, a perusal of the GAFTA contracts would make it clear that they all contained jurisdiction and choice of law clauses similar to those contained in GAFTA 109. It was submitted that, in the circumstances, adequate notice of the incorporation of GAFTA 109's terms had been given to the plaintiff.

181. In relation to the question of whether GAFTA 109 could be categorised as "usual terms in the relevant business", Mr Miller was asked by the plaintiff's counsel in re-examination whether the plaintiff contracted with any other supplier of molasses

on the basis of GAFTA 109. Mr Miller responded that there were only two molasses traders in Ireland – ED&F and another supplier – and that while Glanbia did business with both of them, that other supplier did not "include GAFTA in any communication" [day 1, p.143, lines 21 to 29].

The incorporation clause – reasonable notice?

182. Essentially, the task facing the court is to determine whether the defendant gave the plaintiff adequate notice that the terms of GAFTA 109 were incorporated into the contract. Applying the principles set out in cases such as *Analog Devices BV v Zurich Insurance Company* [2005] 1 IR 274, *Emo Oil Limited v Sun Alliance & Lender Insurance plc* [2009] IESC 2 and *Law Society v MIBI* (cited above), it is clear that: -

- this task is to be conducted objectively, and without regard to the previous negotiations of the parties or their subjective intention or understanding;
- the court must interpret the written contract by reference to the meaning the contract would convey to a reasonable person having all the background knowledge which would have reasonably available to the parties at the time of the conclusion of the contract;
- the court must consider, not just the words of the contract, but the factual and legal context at the time that the contract was put in place;
- this context includes any objective background facts or legal provisions which would affect the way in which the language of the contractual documents would have been understood by a reasonable person.

[See the judgment of McDonald J in this regard in *Brushfield Limited (trading as The Clarence Hotel) v Arachas Corporate Brokers Limited and*

AXA Insurance Designated Activity Company [2021] IEHC 263, para. 110].

183. The first task in assessing the effectiveness of the incorporation clause is to determine what it actually means. One must have regard to the equivalent clauses in the R&H Hall contract with the plaintiff of 12th January, 2009. The evidence was that R&H Hall supplied molasses to the plaintiff for many years prior to 2011, and that it did so as a principal importing the molasses from an entity that was a predecessor of the defendant. On a plain reading of the text, it is difficult to interpret the clause in the R&H Hall contract as indicating to a reasonable person anything other than that "our supplier" referred to in the second sentence of the incorporation clause is the same as "our supplier" in the first sentence; *i.e.* that Glanbia is being informed that its contract with R&H Hall may be subject to any terms imposed on R&H Hall by Hibernian Molasses by virtue of the contract between those parties, which "is as set forth in the Grain and Feed Trade Association contract".

184. The defendant contends that the equivalent clause in its sales contracts with the plaintiff would be interpreted differently by a reasonable person having all the background knowledge reasonably available to the parties at the time of the contract, and that the second sentence is clearly, on any view of the commercial reality between the parties, a notification of the incorporation of GAFTA terms.

185. It is not at all clear to me that an objective perusal of the clause and context would lead to this conclusion. A plain reading of the clause, with its use of the phrase "our supplier" in successive sentences, strongly suggests that the "contract" referred to in the second sentence is that between the defendant and its own supplier. While the court must have regard, not just to the words used, but also to the surrounding context, and must also have regard to the possibility that a party may have

unintentionally used ambiguous or plainly inappropriate words to convey what is actually intended – see paras 9 and 10 of the judgement of O'Donnell J. in *Law Society* in this regard – it seems to me that where a party seeking to argue that a plain reading of a contractual clause proffered by the party itself does not reflect the actual intentions of the parties, whether through loose or imprecise wording or otherwise, there is a corresponding onus on that party to demonstrate, by reference to the evidence of the surrounding context, that the interpretation suggested by the plain reading is not warranted. Where that interpretation is clear and compelling, as it is here, the onus to persuade the court that the interpretation should not be followed may be correspondingly heavy.

186. If GAFTA terms were very obviously the appropriate standard terms in common form – as the IFF terms clearly were in *Circle Freight* – which would apply to a contract for the sale of molasses, it might be easier to view the incorporation clause as intending to convey that it was the contract between the plaintiff and the defendant which was subject to GAFTA terms, rather than the contract between the defendant and its supplier. In *Circle Freight*, the reference to the IFF contract left no one in any doubt as to what contract was intended. Likewise, in *Modern Buildings v Limmer*, the court was satisfied on the evidence that the reference to "RIBA, 1965 edition" was a misdescription, but that "the appropriate form for nominated sub-contractors" must be a reference to the "green form"; "…that being the only form to which it is suggested that those words could apply and the form to which it is said that anybody in the trade would understand them as applying".

187. There are several difficulties with the contention that these cases are analogous to the present case, and that the objective commercial reality was that GAFTA 109 was to govern the contracts between the parties: -

(1) The sales contract does not specify GAFTA 109, and the undisputed evidence was that GAFTA 109 was never raised or mentioned between the parties as being the contract to which the incorporation clause intended to refer;

(2) GAFTA is an organisation which is concerned with international trade; the plaintiff and the defendant are both Irish companies. There was no international element to the contracts;

(3) Glanbia bought molasses from only one other supplier apart from ED&F; that supplier does not trade with Glanbia on GAFTA terms. It is therefore difficult to classify GAFTA 109 terms as "usual terms in the relevant business";

(4) GAFTA 109 is plainly not a contract which relates specifically to the purchase of molasses; it is of more general application, applying to "feeding stuffs ex-store/silo"; and

(5) GAFTA has a contract which does relate to the sale of molasses – GAFTA 115 – but the defendant does not rely on this contract.

188. If an attempt is made to incorporate terms and conditions by reference to a standard industry contract, it seems to me to be the case that the contract must be clearly identified, well known, in common use in that industry, and patently capable of application to the circumstances of the contract. This was the case with the IFF contract in *Circle Freight*, and the "green form" contract which the court found to be applicable in *Modern Buildings*.

189. In the present case, Mr Miller was aware in general terms of GAFTA 109, which he accepts is a commonly used contract for the purchase of dry goods; however, he regards GAFTA 109 as being solely for this purpose, and not for liquid

feedstuffs. He considers that his interpretation is borne out by the fact that the contract is expressed to be "ex-store/silo", referring prominently to "cake" and "meal" – terms which have no application to liquids – and containing no reference whatsoever to storage in tanks. His view of GAFTA 109 is strongly disputed by the defendant, which submits that the phrase "ex-store" relates to any feedstuffs which are stored, whether in tanks or otherwise.

190. However, it is clear from the terms of GAFTA 109 itself, which were explored in the examination of Mr McGann by counsel for the plaintiff, that the overwhelming majority of the clauses are either inappropriate or were never operated or applied between the parties. It is often the case that a standard form contract which governs the contractual relationship between two parties will be tailored by the parties to suit their individual circumstances. There is no reason in theory why the parties could not have chosen a GAFTA contract and modified it by agreement in this way. Even where the parties do not agree bespoke modifications, it may be that a standard form contract will contain some clauses inappropriate to the parties' circumstances while the majority of terms apply.

191. The difficulty for the defendant in the present case is that virtually none of the clauses in GAFTA 109 were applicable to the contract, leaving the domicile and arbitration clauses to be applied almost in isolation, untethered from the substance of the contract. Even accepting the defendant's position that a contract in relation to "feeding stuffs – ex-store/silo" is capable of applying to the sale of molasses, GAFTA 109 cannot in my view be reasonably regarded as a standard industry contract appropriate to the sale of molasses generally, or the particular circumstances of the contract between the parties.

192. There are two further points in relation to the adequacy of the notice given by the defendant of incorporation of the GAFTA 109 terms. The first is the obvious point that the defendant at no point referred to GAFTA 109, but only to "the Grain and Feed Trade Association contract". This left the task of identifying the appropriate contract to the plaintiff, in circumstances where there are 80 live GAFTA contracts, among which is a contract specifically dealing with the sale of molasses. It is one thing being directed to a specific standard contract which is readily accessible on an institution's website; it is quite a different thing to have to sift through 80 contracts, and then be required to decide which is the contract to which the other party is referring. The fact that the only one of the 80 contracts which concerned the sale of molasses – GAFTA 115 – was clearly inapplicable would have compounded the plaintiff's difficulty. In my view, the failure to specify GAFTA 109 rendered the notice in the sales contracts entirely inadequate.

193. Secondly, if there are particularly onerous or unusual terms, there may be a greater onus on the party relying on such terms to bring them to the attention of the other party. As Dunne J stated at para. 37 of *Noreside*: -

> "Generally, terms and conditions contained in an unsigned written document will not be incorporated into a contract unless the party to be bound had reasonable notice of those terms and conditions. The reason for this is straightforward. Terms and conditions relied on by a party in the context of an alleged breach of contract will often limit or exclude liability. They may provide for any contractual dispute to go to arbitration. There may be other important terms, for example, in relation to retention of title. It has been said that the more onerous an exemption clause contained in terms and conditions is, the greater the requirement for notice. This was graphically explained by

Lord Denning MR in the case of Thornton v. Shoe Lane Parking [1971] 2 QB 163, at 170, where he stated of an exemption clause:

> '…it is so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way. …In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it - or something equally startling.'"

194. *Noreside* concerned the incorporation of terms drafted by one of the parties, rather than contained in a standard form agreement. Here, the defendant's position is that a domestic contract between two Irish companies with no connection whatsoever to England "…shall be deemed to have been made in England and to be performed in England, notwithstanding any contrary provision, and this contract shall be construed and take effect in accordance with the laws of England…the courts of England shall have exclusive jurisdiction to determine any application for ancillary relief…" [clause 22]. Further, any disputes in relation to the contract "…shall be determined by arbitration in accordance with the GAFTA arbitration rules…" [clause 23].

195. In my view, clauses 22 and 23 of GAFTA 109 were both unusual and onerous clauses given the circumstances in which the plaintiff and the defendant were contracting. It is doubtful if adequate notice of these clauses could be said to have been given even if the sales contracts in the present case had referred specifically to GAFTA 109; in circumstances where that contract was not mentioned, the notice to the plaintiff of those onerous clauses was entirely inadequate. It is no answer to say that all of the GAFTA contracts contained these clauses; the plaintiff could only have discovered that by carrying out the exercise performed by the defendant's solicitors of going through each of the 80 live GAFTA contracts. It is not adequate notice of

unusual or onerous conditions if the party to be notified is required to do a considerable amount of detective work to attempt to discover the true contractual position.

196. Finally, counsel for the plaintiff submitted that there is a special principle applicable to arbitration clauses that requires an arbitration clause to be specifically drawn to the attention of the plaintiff before it can be incorporated from another contract, and cited a number of cases in support of that proposition. In reply, counsel for the defendant made the point that the defendant was not seeking to do this; the defendant was not importing the arbitration clause from a contract with another party, but was simply importing the terms of a standard contract. This submission seems to me to be correct, although given my conclusions in relation to the question of notice, I do not have to decide the issue.

Conclusions on the incorporation clause

197. In summary, it seems to me that a reasonable person having all the background knowledge which would have been reasonably available to the parties at the time of issue of the sales contracts, or indeed the later performance of the contract, would take the view that: -

- Viewed objectively, reference in the final sentence of the incorporation clause to "our supplier's contract" was to the contract between the defendant and its supplier, rather than the contract between the plaintiff and the defendant;
- the wording of the clause and the surrounding context do not support the defendant's contention that the intention of the parties was that a GAFTA contract, much less GAFTA 109, would govern the parties' contractual relationship;

- the absence of reference to GAFTA 109 in the incorporation clause or anywhere else in the communications between the parties renders any attempted notification of the defendant's reliance on the terms of that contract entirely inadequate;
- GAFTA 109 is not in any event a standard contract suitable for incorporation of standard terms by reference to it in a contract for the sale of molasses; and
- given that the contracts were entirely domestic and had no connection with England, the domicile and arbitration clauses were both unusual and onerous and were required to be brought specifically to the attention of the plaintiff. This was not done.

Conclusions and orders

198. In the foregoing circumstances, even if I am mistaken in my view that the sales confirmations issued by the defendant constituted acceptances of the plaintiff's offers as contained in the purchase contract confirmations, I am satisfied that the terms of GAFTA 109 were not incorporated in the contract. I consider that the incorporation by Glanbia of its own standard terms and conditions was effected by the acceptance by the defendant of the offers contained in the purchase contract confirmations of the plaintiff.

199. In the circumstances, the defendant's application for orders setting aside service of the plenary summons and referring the parties to arbitration must be refused. The plaintiff having been entirely successful in resisting the application, it seems to me that the costs of the application must follow the event. If either party wishes to apply for an order other than a dismissal of the application with costs to the plaintiff to be adjudicated in default of agreement, I will grant the parties liberty to

file written submissions of not more than 1000 words within ten days of delivery of the judgment, after which I shall make appropriate orders without further recourse to the parties.