SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2019] SC EDIN 56

EDI-CA19-18

JUDGMENT OF SHERIFF N A ROSS

in the cause

DIFFERENCE CORPORATION LIMITED

Pursuer

against

UNITEL DIRECT LIMITED

Defender

Pursuer: Docherty
Defender: Boni

Edinburgh 29 June 2019

The sheriff, having resumed consideration of the cause, finds the following facts to be admitted or proved:-

1. The pursuer trades as supplier of telephone call management software and support services. It resells and adapts a standard product manufactured by a third party, namely 8x8 Corporation. The defender trades as provider of call centre services for the sale of telecom and internet services. As part of the defender's operation it requires to make and receive telephone calls, a process significantly speeded up by the use of dialling software.

2. In about 2014 the defender entered into a contract with the pursuer for provision of dialling software and support services, and the provision of such goods and services continued until 2017. The pursuer was aware that their goods and services were of central importance to the efficient operation of the defender's business. In about 2017 the defender

informed the pursuer that they were considering switching provider, and contract negotiations followed.

3. On 3 July 2017 the parties entered into a new replacement contract for the provision by the pursuer to the defender of the ContractNow platform for telephone call management, at a lower price than the previous contract. The contract was formed by the pursuer's purchase order form dated 13 June 2017 which was electronically signed by Mr Wilkinson of the defender on 3 July 2017.

4. The pursuer's purchase order form was sent electronically. It contained a live link via the internet to the pursuer's standard terms, accessed by clicking on the link. Mr Wilkinson received the order form electronically and signed it electronically on 3 July 2017. The link to the pursuer's standard terms was in close proximity to the signature line. The link was in working order, and Mr Wilkinson was able to read the pursuer's standard terms if he elected to do so. The defender knew or ought to have known that the pursuer intended that the contract be regulated by the pursuer's standard terms, and by accepting the offer agreed to that. The defender knew or ought to have known in particular that such terms would limit liability for, amongst other things, consequential and indirect loss caused by any breach of contract by the pursuer.

5. The existence of the pursuer's standard terms was thereby fairly brought to the defender's notice. Those terms formed part of the parties' contract. Although the pursuer intended in 2014 that those terms would apply to the parties' relationship from 2014 onwards, it is not proved that the defender was aware of these prior to 2017, or that subsequent actings were in reliance thereon. Notwithstanding this, the said terms did regulate the July 2017 contract.

6. The relative financial standings of the parties are set out in the financial records lodged in process. The parties are not of equal size, but they are not in an unequal bargaining position, and the contract terms were not unfairly imposed on the defender. The terms were not otherwise unfair as between the parties when the contract was made.

And finds in fact and law as follows:

1. The parties' contract was regulated by the pursuer's standard terms, and in particular clause 8.2 thereof.

2. It was fair and reasonable to incorporate the pursuer's standard terms, and in particular clause 8.2, into the contract, and the effect thereof was not excluded in terms of the Unfair Contract Terms Act 1977.

Therefore sustains the pursuer's third plea-in-law to the principal action and first plea-in-law to the counterclaim to that extent; appoints the cause to a case management conference on a date to be afterwards fixed, for consideration of expenses, identification of averments to be deleted, and further procedure.

Note

[1] This was a preliminary proof to establish whether (a) the pursuer's standard terms and conditions were incorporated into the parties' contract, and (b) if they were, whether those founded upon were fair and reasonable in terms of the Unfair Contract Terms Act 1977.

[2] As this was a preliminary proof, I have limited the scope of the findings in fact to the minimum necessary, to allow full consideration of any future evidence.

The contract

[3] This was an electronic contract. Parties agree that it was entered into by the pursuer sending its purchase order form to the defender, and the defender electronically signing and returning a copy to accept the offer. The contract was for the pursuer to provide a direct dialler product to the defender, who would use it to make sales calls. The contract price was £2,025 per month, together with call charges per call depending on use, for a period of 24 months.

[4] The contract operated from July 2017 onwards. The defender began to allege a variety of problems, with which this preliminary proof is not concerned. It ceased to make payment after a few months, and sought an alternative supplier. On 2 January 2018 the pursuer gave notice that it was treating the defender as in breach of contract, and suspended the services. The pursuer claims arrears of payment together with loss of profit for the remainder of the contract period. The defender counterclaims on the basis of an alleged breach of the Sale of Goods Act 1979. It claims repayment of sums paid, together with a claim for call-out charges and loss of profit. These claims include consequential and indirect loss.

[5] The pursuer relies on its standard terms to repel the counterclaim, on the basis that the terms exclude such liability. The defender disputes that the terms were incorporated, and separately avers that in any event the standard terms relied upon are unfair in terms of the Unfair Contract Terms 1977 Act (the '1977 Act') and are therefore of no effect.

[6] The relevant clause is clause 8.2:-

> "Save only as is otherwise specified in this clause 8.2, the entire liability of Difference in with (sic) the Services or this Contract, whether in contract, tort or otherwise or for consequential or indirect loss, is excluded. Non exhaustive illustrations of consequential or indirect loss would include loss of profit, revenue, contracts or business, damage to property of the Customer or anyone else and anticipated

> savings or profits. Difference accepts liability for death or personal injury resulting from it's negligence and, where the Customer deals as a consumer, Difference accepts liability for death or personal injury and for any breach of its obligations implied by statute."

[7] Parties referred to *Montgomery Litho Ltd* v *Maxwell* 2000 SC 56, *Interfoto Picture Library Ltd* v *Stiletto Visual Programmes Ltd* [1988] 1 All ER 348, *Noreside Construction Ltd* v *Irish Ashpalt Ltd* [2014] IESC 68, *Goodlife Foods Ltd* v *Hall Fire Protection Ltd* [2017] EWHC 767 (TCC); *Parker* v *South Eastern Railway Co* (1877) 2 CPD 416, McBryde: *Law of Contract in Scotland* (2nd edn) chapter 7, *McCutcheon* v *David Macbrayne Ltd* [1964] 1 WLR 125 *Langstane Housing Association Ltd* v *Riverside Construction (Aberdeen) Ltd* 2009 SCLR 639, *HIH Casualty* v *New Hampshire Insurance Co* [2001] EWCA Civ 735, *Amiri Flight Authority* v *BAE Systems Ltd* [2003] EWCA Civ 1447 and *JP Morgan Chase Bank* v *Springwell Navigation Corp* [2008] EWHC 1186.

[8] The foregoing cases vouch a number of principles, but have a common theme that each case must be examined on its own facts. The Inner House in *Montgomery Litho Ltd*, approving the approach of the Court of Appeal in *Interfoto Picture Library Ltd*, stated:-

> "We see no reason to doubt that the general principle…that the failure by the *proferens* fairly to draw attention to a particularly onerous and unusual provision may disable him from effectually founding on it, represents also the law of Scotland" (Lord Sutherland at p59).

[9] The question of whether a standard term is incorporated into a contract is one of fairness in the circumstances. If a drafter is careful, a contract will often contain clear and repeated references to standard terms, and may require a signature acknowledging their incorporation. Such devices, however, have no specific contractual significance, but are important for their evidential value. The court looks for evidence that the standard terms were sufficiently brought to the attention of the other party to fairly conclude that the other party intended to (or, where the other party did not heed them, should nonetheless) be

bound by them. It follows that the absence of a signed acknowledgement, or of specific highlighting or express acknowledgement, are by themselves not fatal, but may mean a failure to prove that the other party was fairly put on notice. The degree of notice required will vary according to the onerousness of the relevant provisions.

[10] The courts recognise the realities of business, and that contracting parties do not always pay sufficient attention to what they are agreeing:-

> "…it was and still is the case that people hardly ever trouble to read printed conditions on a ticket or delivery note or similar document. Therefore it is necessary, if the terms are to incorporated into a contract between the parties, that the recipient should have had it brought to his attention that the document contains contractual terms. But, as Dillon LJ [in *Interfoto Picture Library Ltd* v *Stiletto Visual Programmes Ltd*] goes on to say, even if people notice that there are printed conditions, they tend to assume that they are not of any great importance…" (Langside Housing Association, above).

[11] Evidence was led from the principals of each party, and I record this as follows:-

The Evidence

[12] **Trevor Geraghty** is the director of the pursuer, and spoke to the following facts:- The pursuer's 2018 accounts are lodged at 6/3/3 of process, and show a turnover in excess of £3 million a year and annual profit approaching £500,000. The pursuer supplies dialler software platforms, which are automated systems which reduce dialling times and allow increased productivity and compliance for businesses which depend on high numbers of outgoing telephone calls. He described how these work. The pursuer does not manufacture the product, but supports and delivers a product developed by 8x8 Corporation, which they resell. The pursuer has a consultative sales process, designed to improve the client's processes, and supplying the dialler software is only one aspect of this process.

[13] The parties have a business relationship that commenced in 2014, and grew in the intervening years. These had always been subject to the pursuer's terms and conditions, copies of which are lodged. In 2017 the defender was expanding, and wanted the best price on a further dialling product. The parties were in a good trading relationship at that stage. The pursuer sought better terms from 8x8 Corporation, and the defender sought a competing quote from a competitor. The parties negotiated a further agreement in July 2017 for a duration of 24 months, and some emails are produced evidencing the discussions.

[14] Mr Geraghty spoke to the formation of the parties' new contract. The pursuer supplied a purchase order form dated 13 June 2017, a copy of which is lodged. It set out a pricing proposal for the branded dialling product, and a table of prices. It went on to say:-

a. "The above quotation is subject to agreement of a 24 month contract.
b. Terms and conditions can be seen via www.[website]/terms
c. The agreement above is subject to payment via Direct Debit."

[15] It then contained a signature line: "I confirm that I am authorised to agree the terms of this offer on behalf of the business", which had been subsequently signed electronically by Chris Wilkinson, the director of the defender, on 3 July 2017.

[16] The purchase order form was delivered by a proprietary secure uploading service, which sent the form to only the intended recipient, namely Mr Wilkinson. It allowed the pursuer to know when the form had been accessed, and when it had been signed. The form had been accessed and signed by Mr Wilkinson on 3 July 2017, and he would have received an immediate copy of the signed agreement.

[17] The defender's standard terms were available on the link provided. They were the same terms and conditions as had applied to previous contracts. A copy of these is lodged.

[18] Mr Geraghty commented on some standard terms under the BT General Terms, and the defender's own standard terms. It was noted that each was designed to restrict liability

in certain respects. Mr Geraghty spoke to the reasonableness of excluding liability for consequential loss, because only certain elements of the transaction were under their control. The pursuer provided a high quality service, and were not attempting to institutionalise bad practice. The pursuer would expect to put right anything arising from, for example, poor workmanship on their own part. My understanding was that Mr Geraghty did not intend clause 8.2 to operate as a blanket exclusion of liability howsoever arising, but only in relation to consequential and indirect loss.

[19] In cross-examination, he accepted that the parties' businesses were different in focus, but said there were areas of commonality in the focus on calls and lines with a view to more efficient services. He was not familiar with the defender's financial background, but had no reason to doubt the published accounts. He had not sent a copy of the standard terms, but these were available online. He did not know if standard terms had ever been verbally discussed. He gave evidence about the reasonableness of some other terms, such as customer indemnity for charges where the pursuer was in effect lending money by installing equipment and incurring liability for charges.

[20] He did not accept that the dialler software was a standard product, because all customers had different requirements and their service was tailored to suit. The business did involve resale of products supplied by 8x8 Corporation, but with additional services involving day-to-day interaction with the customer. He had explained to the defender the involvement of 8x8 in supply.

[21] **Christopher Wilkinson** gave evidence. He is based in Stockton-on-Tees and is the sole director and shareholder of the defender. He spoke to the defender's accounts, which are lodged. The defender provides call centre services and a functioning telephone service is vital. The use of dial-up software speeds up the process of calling customers, and also in

allowing inward calls. In 2017 the parties had an existing commercial relationship in relation to such products. The pursuer had supplied a dialler system since 2014. Various functions had been added to that system over the years. There were problems with the existing system, and he was looking for a lower price and for them to address any problems. The goods and services were to remain the same, but it was a new contract at a new price. No discussion of terms and conditions took place at any time.

[22] He agreed he had electronically signed the purchase order form. It was sent on 13 June 2017, but it wouldn't open, and he asked for it to be resent. On resending on about 3 July 2017, he opened the form, and added his electronic signature. He spoke to opening the form on his phone, and feeling "rushed" to send it back, because the sales person asked for it to be returned. He accepted, however, that he had the option to delay sending back the acceptance if he had wished to read the terms. He accepted that he was an experienced businessman. He has been responsible for the defender's trading since 2009.

[23] Mr Wilkinson set up a direct debit to make contractual payments. He was in no doubt the pursuer knew how important a functioning system was to the defender. He had not heard of 8x8 Corporation, and was not aware it was a resold system. He had obtained a competing quote from another software provider before agreeing to the new 2017 contract with the pursuer.

[24] He spoke to the defender's own standard terms, which are lodged. They have a clause regulating liability, subject to a £1 million cap. He rejected any comparision between BT and the pursuer, as they provided different services. He was not aware of the pursuer's standard terms, but accepted that there was a link on the purchase order form.

[25] He accepted that he would expect a customer contract to contain terms and conditions. The defender's procedure was to highlight these to their own customer, and

have a face-to-face meeting to allow the customer to read the contract. He accepted that the defender's own terms sought to exclude (rather than limit) liability in certain respects, but he pointed out that the customers were given a chance to read these first, and that the businesses were different, with different risks.

[26] I had no reason to doubt the evidence of either witness, which I accept as honestly given, credible and substantially reliable in each case. Where these accounts differ I have set out my findings in fact above. Their evidence and their views were entirely consistent with their respective positions, and there was no material dispute on the facts.

Whether the pursuer's standard terms were incorporated

[27] In my view the pursuer's standard terms were incorporated into the parties' contract. The incorporation of terms in a contract is in every case a matter of facts and circumstances. Leaving aside unusually onerous terms (discussed below), in general terms the exercise involves considering what terms were proposed and accepted. I have considered the following factors:-

[28] The means of constitution is one factor. Some mechanisms give clearer notice and fairer opportunity to challenge than others, ranging from the ticket-type cases (where one party is given minimal notice of terms or opportunity to challenge the standard terms) to the fully-negotiated written contract (where parties have the opportunity, if they wish to take it, to consider and negotiate the terms). In the present case, the purchase order comprised a single page, drafted in very simple terms. It largely comprised a table of charges. Below that table were three sentences. One sentence stated it would be a 24 month contract. Another sentence required payment by direct debit. The third sentence stated that the terms and conditions could be seen at an external link, which was accessed by a hyperlink on the form

itself. The signature line appeared immediately below those three sentences. It was all but impossible for anyone, far less an experienced businessman, to claim that they did not realise that the pursuer intended its own standard terms to regulate the contract. The defender did not challenge these terms or supply competing terms. The signature line referred to being "authorised to agree the terms of this offer…". The only terms in the offer were those of the pursuer, together with the limited narrative on the face of the purchase order itself. There was no need, and it would be incongruous, to post or deliver a written copy of the standard terms. The contracting process was entirely electronic. The terms and conditions were readily available on a hyperlink. Sending them by email or other method would have added nothing to the defender's state of knowledge or awareness. The terms were a click away from perusal.

[29] Another factor is the events surrounding the act of signature. Mr Wilkinson suggested that he was being rushed to conclude the contract. I do not accept that he was genuinely subject to such pressure that he was preventing from delaying signature, had he wished to inspect the pursuer's terms. He identified no objective need for haste in concluding the transaction. There was no time, financial or other source of pressure. The parties were not at any disadvantage to each other. The defender had obtained a quote from another supplier. No question of monopoly or undue pressure arises. The parties were of different sizes and resources, but not so as to render their bargaining position unequal or unfair.

[30] There are no other reasons to identify that Mr Wilkinson did not understand, or by his signature and actings accept, that the pursuer's terms and conditions applied. For completeness, I do not accept as proved that these terms were incorporated as part of a course of trade since 2014, because there was insufficient evidence that the defender was

aware of these terms prior to 2017, or that the parties acted in reliance upon them. I also do not accept that the subsequent actings of the defender showed that they had read the conditions, because acts such as setting up a direct debit are routine and do not demonstrate special knowledge. These points are irrelevant, because I accept that the terms were sufficiently brought to the defender's attention in 2017, and were accepted without having been read.

[31] It is recognised, however, in the case law that in some circumstances an act of acceptance is not necessarily enough to incorporate a standard term, if that term was unduly onerous. It is necessary also to consider the terms of the clause founded upon.

Whether clause 8.2 was unduly onerous

[32] "The point is not whether the standard terms and conditions which may be voluminous have been read in whole or in part by one of the parties. The question really is whether a particular condition is of such an unusual nature that it should specifically be drawn to the attention of the other party rather than being left simply as part of a large collection of other terms and conditions which are of a fairly standard nature." (*Montgomery Litho* Ltd v *Maxwell*).

[33] The case law cited describes such unusual provisions in a variety of ways:-

> "If there is some condition which is of particular importance, in the sense of departing in a material way from the terms usually incorporated into that type of contract, then, by a parity of reasoning, the recipient of the document should not only be made aware that the document contains contractual terms but should have his attention drawn to that condition. This has been described in the cases as applying to unusual, onerous, exorbitant or draconian conditions, but I do not think that anything turns on the epithet. The important characteristic is that the condition departs in a material way from the terms which would reasonably be expected to apply to that type of contract." (Lord Glennie in *Langstane Housing Assoc Ltd* at para [40]).

[34] I respectfully agree with and adopt Lord Glennie's analysis. The question is whether the condition departs in a material way from the type of condition to be expected.

[35] Clause 8.2 is an exclusion clause, misdescribed as a limitation clause. It is somewhat poorly drafted (including referring to 'tort' in a Scottish contract), and apparently goes beyond what Mr Geraghty described as his intention. He said that he intended to exclude consequential and indirect loss. It became evident to him during his evidence that the clause went somewhat further than he anticipated. I accept his evidence as uncontroversial that it is entirely usual in commercial contracts to exclude or limit liability for consequential loss and indirect loss, because such heads of loss tend to be beyond both the knowledge and the control of the other party, and within the power of the damaged party to identify and to cover by insurance. Clause 8.2 appears to exclude liability for every type of loss, barring personal injury or loss of life. It is properly described as onerous. However, the purpose of standard terms is to shift liability, and most standard terms could be described as onerous. I note that the case law tends to go beyond 'onerous' to descriptions such as 'particularly onerous or unusual' (*Montgomery Litho Ltd*, above), or 'very onerous, unreasonable and extortionate' (*HIH Casualty and General Insurance Ltd*, above at para 211).

[36] Is limitation of liability unduly onerous in itself? In my view it is not. A clause which limits liability to some degree is not only to be expected but might be said to be the whole purpose of including standard terms. In a commercial transaction where the accepting party is an experienced person of business, as Mr Wilkinson accepted he is, a limitation of liability could not be regarded as unexpected or unfair. The extent of such liability thereafter becomes a matter of degree. The defender did not lead any evidence to contradict Mr Geraghty's position that the limitation was fair.

[37] In assessing the degree of unfairness or disadvantage, by reference to the case law, there appears to be a clear distinction between those cases where standard terms impose an unexpected liability (*Montgomery Litho Ltd*, which imposed personal liability on the

accepting party; *Interfoto Picture Library Ltd*, which imposed an extortionate daily financial penalty) and where they restrict liability on the performing party. In the former cases, the courts are much more willing to exclude such a clause, because it is unforeseen and therefore unlikely to have been agreed to. In the present case, the clause seeks to restrict liability on the performing party. I accept Mr Geraghty's evidence, which was not contradicted in this respect, that it is reasonable to restrict liability for the uncertainties and extent of consequential loss claims.

[38] The terms of clause 8.2 appear to be comprehensive in attempting to exclude liability. I note that the exclusion is restricted to the Contract and the Services, as defined, so it is not beyond doubt that the clause excludes other types of claim. In my view exclusion rather than limitation is not fatal to its incorporation, and does not by itself elevate this clause into one which requires to be brought specifically to the notice of the accepting party. For example, in *Goodlife Foods Ltd* (above) the High Court was able to decide that a "wide-ranging" exclusion clause was not unduly onerous because there was, in effect, little difference between total exclusion (subject to limited warranty) and the more typical limitation of liability to the contract price offered by other suppliers. *Goodlife Foods Ltd* is distinguishable from the present case on the facts, but serves to illustrate the point. Were clause 8.2 to be drafted to apply only to consequential and indirect loss, it is not obvious that the practical effect would be materially different. If liability were to be capped instead of excluded, the defender would still be subject to that limitation.

[39] Separately, the proportionality of the competing interests is relevant. If the potential liabilities are disproportionately high compared to the contract price, a greater degree of limitation or exclusion is more likely to be reasonable. Here, the contract price was £2,025 per month, plus charges. The defender has counterclaimed for a total of approximately

£56,000. The extent of any consequential loss to the defender was, at the time of the contract, unknowable. No turnover figures are published in the statutory accounts. It is not possible to say that, in these circumstances, the exclusion of liability for consequential and indirect loss was unduly onerous or unfair.

[40] Further, this case is one where the accepting party had the opportunity to read and negotiate such a clause, had he so wished, against a background in which a limitation clause was not only foreseeable but almost inevitable. The transaction was a written agreement between commercial parties:-

> "However, I share the doubts, which have been expressed in the cases…as to whether that principle [of requiring particular notice of unduly onerous terms] can have any application to the case of a written agreement, between commercial parties, and where the parties have had the opportunity of considering the proffered terms before deciding whether or not to proceed." (*Langstane Housing Assoc*, above).

[41] In my view, this case is similar to the facts in *Langstane Housing Association*, which considered the incorporation of standard professional terms. The defender had the opportunity to consider the terms.

[42] Some reliance was placed in submission on the availability of insurance, but this was not the subject of sufficient evidence for me to make any finding. The defender also founded to an extent on the pursuer's knowledge of how important this software was, but accepted that it could have been sourced elsewhere, and this point is of little relevance.

[43] For all these reasons, I find that clause 8.2 was sufficiently drawn to the defender's attention as one of the standard terms which applied to the contract, and that there was no requirement for further specific notice. The defender knew or ought to have known that such a condition would be introduced, and therefore that challenge or negotiation would be required if it were to be resisted. This view is supported by the fact that the defender did not seek to claim that, had he read clause 8.2, that he would have regarded it as unusually

onerous. He did not seek to claim that it would have led to his refusing to contract on that term.

[44] Accordingly, at common law, clause 8.2 applied to the parties' contract. That leaves the separate, but somewhat overlapping, statutory defence of unfairness.

Is the effect of clause 8.2 excluded under statute?

[45] The parties do not dispute that the contract qualifies as a standard form contract, and the defender as a "customer", under the Unfair Contract Terms Act 1977 (the "1977 Act"). The defender relies on section 17 of the 1977 Act which provides:-

> "(1) Any term of a contract which is a …standard form contract shall have no effect for the purpose of enabling a party to the contract –
>
> who is in breach of a contractual obligation, to exclude or restrict any liability of his to the customer in respect of the breach…
>
> …if it was not fair and reasonable to incorporate the term in the contract."

[46] The 1977 Act sets out various tests for reasonableness at section 24. It is for the pursuer to demonstrate that clause 8.2 was fair and reasonable in the circumstances (section 24(4)).

[47] Section 17 refers to excluding liability "in respect of the breach". It therefore does not serve to strike down the clause, which remains in the contract and requires to be considered afresh in the event of a separate breach. Fairness and reasonableness require to be considered in connection with the particular breach in question: in the present case, the alleged breach is, in summary, that the software did not work properly and caused consequential loss.

[48] The pursuer's position is that clause 8.2 is fair in relation to the losses claimed, because they are beyond the control or the knowledge of the pursuer, and the purchase price is relatively modest in relation to the possible extent of such a claim.

[49] The defender raised a number of factors which, it claims, tend to show unfairness and unreasonableness. These include the following:-

[50] One factor is inequality of bargaining power (1977 Act Schedule 2(a)). The defender led evidence about the difference in size between the parties. The defender's most recent balance sheet shows net assets of £160,210 (down from £275,000 in 2017). The pursuer's most recent accounts show net assets of £491,559 and turnover of £3.223 million. The pursuer is larger than the defender. That, however, is of limited relevance, as there is no evidence that the inequality of size led to an inequality of bargaining power. The defender was under no pressure to sign an agreement, and had a competing quote lined up. Mr Wilkinson did not demonstrate any restriction on his freedom to choose between suppliers. His evidence was to the effect that he simply did not check. As he said when asked if he'd queried the terms and conditions – "why would I?". He was able to negotiate what seems to have been a significant discount on price. I therefore do not accept that there was any bargaining inequality between the parties.

[51] A second factor was that this was a resale of a product supplied originally by 8x8 Corporation (1977 Act schedule 2(e)). The pursuer aimed to exclude liability for a product which they did not produce and which they did not control. The defender did not know of the existence of 8x8 or that this was a resold product. The pursuer also provided services. These points do not appear to affect fairness. Neither side led evidence to show that it was unreasonable to exclude liability for products not under the pursuer's control.

[52] A third factor was that the defender submits that the import of clause 8.2 was to exclude characteristic performance under section 14 of the Sale of Goods Act 1979 (1977 Act section 20). This argument does not advance matters, because section 20 applies the same fair and reasonable test.

[53] A fourth factor was the foreseeability of the clause (1977 Act schedule 2(c)). I am unable to make findings relating to the course of trade between 2014 and 2017, or the inclusion of terms then, because the evidence was insufficient. However, the exclusion of liability is likely to be one of the main purposes of standard terms, and the attempted exclusion of liability for consequential loss is highly likely, to the point of inevitability. The limitation was entirely foreseeable.

[54] A fifth factor was the inherent reasonableness of limiting consequential, and otherwise unlimited, losses. I accept as self-evidently correct Mr Geraghty's evidence that it was reasonable to attempt to exclude loss which he could not foresee or control or quantify in advance.

[55] A sixth factor was comparison with the practices and contractual terms of other telecoms companies. Parties led evidence about the standard terms of BT and of the defender. It appears, however, that these companies operate different businesses from the pursuer, and therefore detailed comparison is not particularly informative. One point which such comparison highlights is that limitation of liability clauses appear in all the standard terms: they are therefore not only to be anticipated, but vary from business to business and, by extension, require some careful consideration in each case.

[56] A seventh factor is the extensive nature of clause 8.2, and its overlap with the pursuer's force majeure clause. It is plain that clause 8.2 attempts to limit a wide range of liabilities, to the point of exclusion, but that does not inevitably lead to a finding of

unreasonableness. The relatively modest contract price points to a limited financial return on this project, compared to a potentially high liability if a defective product leads to loss of business and other consequential loss. The risk/reward balance does not indicate that the wide exclusion is unfairly imposed.

[57] Further, the effect of section 17 is not to delete clause 8.2 or prevent it having effect in relation to every claim. The effect is to render a term of no effect in relation to a particular breach. The reasonableness of section 17 falls to be assessed every time there is a claim of breach, and in relation to the nature of the claim. Here, the claim is for consequential loss arising from an allegedly defective product. That is exactly the type of loss which the pursuer intended to impose, which is entirely foreseeable, and which appears on the face of matters to be fair and reasonable for a contract with a limited financial reward against the unlimited nature of potential risk.

[58] Overall, the exercise is one to be considered on all the circumstances of the case. It is a matter for the court to balance a range of considerations and decide on which side the balance comes down (*George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] 2 All ER 737). On the basis of the evidence to date and the parties' submissions, I have identified the foregoing to be the relevant factors. Having assessed these together, and bearing in mind the onus of proof lies on the pursuer, I conclude that the incorporation of clause 8.2 was fair and reasonable in all the circumstances of this claim. It is therefore not excluded under the 1977 Act in relation to this claim.

Disposal

[59] In my view, clause 8.2 is effective to displace the counterclaim for consequential loss. It is not, however, effective to displace the claim for repetition of sums paid under the

contract, the relevancy of which is still to be tested. I will therefore refuse probation to those averments which support the second crave of the counterclaim, but not those averments which tend to support the first crave. There is some overlap on these averments, and I will defer identification of these until the matter can be discussed at the next case management conference. I will sustain the pursuer's third plea-in-law to the principal action and first plea-in-law to the counterclaim to that extent. There are no further pleas-in-law expressly dealing with the points raised. The present debate does not otherwise advance the pursuer's principal claim.

[60] I will fix a further case management conference on a date to be afterwards fixed, and the deletion of averments, the question of expenses, and the identification of further procedure can be carried out then.