

THE HIGH COURT

COMMERCIAL

[2024] IEHC 338

[Record No. 2019/4140 P]

BETWEEN

BIOMASS HEATING SOLUTIONS LIMITED

PLAINTIFF

AND

GEURTS INTERNATIONAL BV

DEFENDANT

JUDGMENT of Mr. Justice Denis McDonald delivered on 6th June 2024

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Introduction

1. In these proceedings, the plaintiff seeks damages against the defendant arising from an alleged breach of a number of contracts relating to the supply of heat exchangers for use on poultry farms. These heat exchangers were designed and manufactured by the defendant. They formed an inherent part of systems supplied by the plaintiff to farmers for the purpose of converting untreated poultry manure into energy. These systems have been referred to in the proceedings as the “*BHSL Units*”. The plaintiff is an Irish company carrying on an agri-tech biomass fuel business in County Limerick. The defendant is a company organised and existing under the laws of the Netherlands and is based in Leiden. The defendant designs and manufactures heat exchangers which transfer heat from one substance to another. In the context of the BHSL Units, the plaintiff contends that the purpose of the heat exchangers supplied by the defendant was to assist in converting the heat generated from the burning of poultry manure into heat in the form of hot water or steam which could then be used to provide heating to poultry farms and also to produce electricity.
2. The plaintiff alleges that there were defects in the heat exchangers supplied by the defendant which, in turn, caused major problems in some BHSL Units supplied by the plaintiff to a number of substantial poultry farms in the United Kingdom. The

plaintiff claims that, as a consequence, the plaintiff had to compensate its own customers. The plaintiff contends that it has suffered quantified losses amounting to €3,657,147.00. It also claims that it has suffered significant reputational damage to its business.

3. The plaintiff's allegations are strongly denied by the defendant. The defendant also maintains that, in any event, the contracts between the parties were governed by its terms and conditions which significantly limit its liability and which required the plaintiff to bring any claim against it within a period of twelve months from the date on which the alleged damage occurred or could have been discovered. On the basis that these proceedings were not brought within that relevant twelve month-period, the defendant contends that, pursuant to its terms and conditions, the claim for damages brought by the plaintiff is now time barred. The defendant also counterclaims for the sum of €967,238.91 in respect of unpaid invoices. In this context, it should be noted that, prior to commencement of these proceedings, the defendant had, in July 2018, brought proceedings against the plaintiff in the District Court of The Hague seeking payment of these unpaid invoices. However, following a challenge to jurisdiction by the plaintiff, the court determined that there was no sufficient evidence that the parties had agreed that the courts of the Netherlands would have jurisdiction to hear and determine the claim. I am not asked, at this point, to determine whether that decision by the District Court of The Hague gives rise to any form of issue estoppel or *res judicata*. As described further below, the sole issues that fall for consideration at this time relate to the contractual terms which govern the relationship between the parties.

4. These proceedings were originally listed for trial on a unitary basis (i.e. on the basis that all issues would be heard and determined together). However, following an application made by the defendant, Quinn J., in a judgment delivered on 8th February

2023 ([2023] IEHC 66), directed that the proceedings should be tried on a modular basis. In para. 98 of his judgment, Quinn J. indicated that the first module should be concerned with the terms and conditions which apply to the contracts. He identified this as an issue which is “*squarely at the centre of the case*” and that determination of the issue would inform a number of questions including whether the law of the Netherlands or Irish law governs the case and also whether the defendant can rely on the exclusions and limitations of liability contained in its general terms and conditions.

5. At the hearing which subsequently took place before me, the parties were agreed that the following issues required to be determined in the first module:-

- (a) Are any of the individual contracts between the parties subject to the defendant’s general terms and conditions?
- (b) If the defendant’s terms and conditions govern any of the individual contracts between the parties, do the exclusion of liability and limitation clauses apply?
- (c) Are any of the contracts governed by the plaintiff’s terms and conditions as set out in the long form purchase order terms (described below)?
- (d) If neither the plaintiff’s nor the defendant’s terms and conditions apply to any of the individual contracts between the parties, what terms govern those contracts?
- (e) If the defendant’s terms and conditions apply to any of the contracts between the parties, are any of those terms disapplied under the law of the Netherlands?

6. The parties are agreed that each of questions (a) to (d) above should be determined in accordance with Irish law principles. In order to determine these issues, it will be necessary to examine each of the individual contracts between the parties and

the exchanges between the parties which led to the formation of each of those contracts. The parties are agreed that, save in relation to issue (e), the applicable principles are as described by Sanfey J. in *Glanbia Foods Ireland t/a Glanbia Agribusiness (plaintiff) v. E D & F Man Liquid Products Ireland Ltd* [2022] IEHC 666 (“*the Glanbia case*”). In the *Glanbia* case, Sanfey J. considered the principal authorities in relation to what is often described as the “*battle of the forms*”. These include the decisions of the Supreme Court in *James Elliot Construction Ltd v. Irish Asphalt Ltd* [2014] IESC 74 and *Noreside Construction Ltd v. Irish Asphalt Ltd* [2015] 1 ILRM 229.

7. In summary, the following principles emerge from the judgment of Sanfey J.:-
- (a) In the first place, 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 of the terms which they regarded (or which the law requires) as essential for the formation of legally binding relations¹;
 - (b) The court must assess the objective meaning of the relevant words or conduct against the backdrop of the commercial or practical context in which the agreement was intended to operate. The agreement must be construed by reference to how it would be objectively understood at the time it was agreed rather than to approach its interpretation through the lens of the dispute which has arisen later²;
 - (c) Where a contract has been concluded in the course of correspondence, it is necessary to look at the correspondence as a whole³;

¹ See para. 97 of the judgment.

² Again, see para. 97.

³ See para. 102 of the judgment citing *RTS Flexible Systems Ltd v. Molkerei Alois Muller* [2010] 1 WLR 753.

- (d) Where each party has attempted to contract on its own terms, it is necessary to review the correspondence by reference to a traditional “*offer and acceptance analysis*”. For this purpose, it is important to keep in mind a number of basic and well-established principles as follows: 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. An offer is to be distinguished from an invitation to treat. The latter is a communication by which a 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 assent to its terms. In turn, an acceptance is a final and unqualified expression of assent to the terms of an offer. An acceptance can be signified by word or conduct. It is important to consider whether a response to an offer is truly an acceptance or whether it amounts to a counter-offer which would be treated as a rejection of the original offer⁴;
- (e) Where, in the course of their communications, the parties exchange offers on conflicting terms, what is known as the “*last shot*” doctrine may apply. As its name suggests, this principle may well apply where there are conflicting terms and conditions proposed on both sides and where, after the last written exchange between the parties, delivery takes place without any indication of dissent from the party in receipt of the last piece of correspondence from the opposing party proposing that the latter’s terms and conditions should apply. For example, an offer to buy

⁴ See para. 79 referring to *Chitty on Contracts*.

containing the purchaser's terms which is followed by an acknowledgment of purchase containing the seller's terms which is followed by delivery of the goods by the seller without any corresponding rejection of the seller's terms by the purchaser will frequently, in accordance with this doctrine, result in a contract on the seller's terms⁵;

- (f) However, the last shot doctrine will not apply where the buyer makes clear before delivery that its terms and conditions are to apply and the seller does not sufficiently dispute that⁶;
- (g) It is important to keep in mind that, even if parties have reached agreement on all of the terms, they may intend that the contract should not become binding until some further condition has been fulfilled (for example, where it is "*subject to contract*") or they may intend that the contract shall not become binding until some further term or terms have been agreed⁷;
- (h) On the other hand, parties may intend to be bound immediately even though there are still some further terms to be agreed or some further formality to be fulfilled. If the parties fail to reach agreement on those further terms, the existing contract will not be invalidated unless the failure to reach agreement on those terms renders the contract as a whole unworkable or void for uncertainty⁸;

⁵ See para. 80 of the judgment citing *Tekdata Interconnections Ltd v. Amphenol Ltd* [2009] EWCA Civ 1209.

⁶ See para. 80 of the judgment citing the decision of the Court of Appeal of England & Wales in *Butler Machine Tool Co. Ltd. v. Ex-Cello Corpn. (England) Ltd.* [1979] 1 W.L.R. 401

⁷ See para. 102 citing *RTS Flexible Systems (citation in FN 3 above)*.

⁸ Again, see para. 102.

- (i) Terms can be incorporated into a contract by reference. However, there must be an appropriate reference to the terms that makes it plain that they are to govern the contract. Furthermore, as the decision of the Supreme Court in *James Elliott Construction Ltd v. Irish Asphalt Ltd* [2014] IESC 74 makes clear, the reference to a party's terms and conditions must be made in a document of a nature which a reasonable person in the position of the parties would expect to contain contractual conditions. For that reason, reference to terms and conditions in a document such as a delivery docket intended to do no more than record delivery of goods would not ordinarily suffice. In addition, if the terms are not in a form that is in common use in the relevant industry or sector, reasonable notice of the conditions must be given such as by printing them on the reverse of a document issued by the party seeking to rely on them⁹;
- (j) If any of the conditions in a set of printed terms is particularly onerous or unusual, the party seeking to enforce such a condition must show that the particular condition was fairly brought to the attention of the other party¹⁰.

8. In due course, it may be necessary to look at the *Glanbia* case in more detail. It will also be necessary to consider some other authorities including the judgment of the Supreme Court in *Noreside Construction v. Irish Asphalt* on which both parties placed significant emphasis. Notwithstanding the parties agreement that the *Glanbia* principles

⁹ See paras. 161 and 163 citing, *inter alia*, the decision of the Supreme Court in *Noreside Construction Ltd v. Irish Asphalt Ltd*. [2015] ILRM 229. The decision in *Noreside Construction* was the focus of extensive legal argument at the trial of these proceedings. As will be seen in due course, the parties were wide apart in their respective interpretations of this Supreme Court judgment.

¹⁰ See para. 165 of the judgment citing the decision of the Supreme Court in *James Elliot Construction Ltd v. Irish Asphalt Ltd*. [2014] IESC 74

applied, they advanced quite different interpretations of the effect of the *Noreside* judgment on which the *Glanbia* judgment was, in part, based. I will defer addressing the parties' submissions until a little later in this judgment. I believe that consideration of the parties' arguments in relation to the case law is best done in the context of a concrete example of one of the contracts between them. I will therefore return to the case law when I come to consider the first of the contracts in issue – namely the contract in respect of BHSL Unit 14.

9. In order to determine the issues which arise, it will be necessary to carefully review the relevant contractual communications between the parties in some considerable detail. However, before addressing the correspondence, I must first consider one aspect of the oral interactions between the parties during the course of which the defendant contends its terms and conditions were physically made available to the plaintiff. This is alleged to have occurred in the course of a meeting which took place at the plaintiff's premises in Limerick on 25th March 2010. This took place more than five years before the first of the contracts in issue. As will be seen presently, the first supplies by the defendant following this meeting were made not to the plaintiff directly but to a Northern Irish company which acted as the plaintiff's manufacturer in relation to the early BHSL units.

The meeting in Limerick in March 2010

10. The meeting in March 2010 took place at a time when the plaintiff was investigating how to produce BHSL Units. While both parties accept that the meeting took place in March 2010, there is a conflict between their evidence as to whether the defendant's terms and conditions were provided at that time. According to Mr. Harm Slump who gave evidence on behalf of the defendant, he provided a copy of the defendant's terms and conditions at the meeting. The plaintiff produced its own minutes

of that meeting which were prepared in the immediate aftermath of the meeting. There is no reference to terms and conditions in the minutes which principally appear to have addressed issues of design. However, as described in more detail below, Mr. Slump has given very specific evidence that he provided a copy of the terms and conditions at that meeting. By way of background, I should explain that Mr. Slump is a mechanical engineer. He was employed by the defendant as general manager and he was the sole shareholder of the defendant from 1995 until 2016. In October 2015, he sold his shares to the current owner. He remained with the company for a year after that and provided some consultancy services in the period after 2016.

11. The meeting of March 2010 took place in the following circumstances. In December 2009, Mr. Slump was approached by Mr. Jack O'Connor of the plaintiff. Mr. O'Connor has been involved with the plaintiff since its foundation in March 2004. He was chief executive officer ("*CEO*") of the plaintiff until April 2009 and he became chief technology officer ("*CTO*") in 2008. Since 2013, he has been involved in a research and development role. Mr. O'Connor started investigating the concept of what he described as "*on farm FBC units as far back as 1998*". FBC is an acronym for fluidized bed combustion units. Such units are made up of three key parts; a furnace, a heat exchanger and a bag filter. He was aware that the heat exchanger element gave rise to complex issues. In particular, the use of poultry manure as a fuel in an FBC unit resulted in large volumes of ash passing through the heat exchanger. He said that this was a major challenge in terms of the development of the units. He, therefore, came to the conclusion that it was essential that a suitably qualified supplier could be found who would have the technical capability to produce a heat exchanger of the kind required. It was in that context that the defendant was identified. Mr. O'Connor confirmed that he became aware of the defendant through online searches and he made contact with Mr.

Slump by email on 8th December 2009. The email was sent using the biomass.ie email address of the plaintiff. An exchange of emails took place between Mr. Slump and Mr. O'Connor which culminated in a two-page quotation dated 10th December 2009, sent by Mr. Slump to Mr. O'Connor at the latter's biomass.ie email address. The quotation bore the words "*All our agreements are subject to our general terms and conditions for sale*" in a footer at the bottom of both pages. There were further email exchanges between Mr. Slump and Mr. O'Connor which led to a subsequent proposal from Mr. Slump on behalf of the defendant on 8th February 2010. This provided a technical description of the products to be supplied, the scope of supply and, under the heading "*Commercial Terms and Conditions*", it gave a price, a delivery time and set out payment terms. It also identified that there would be a guarantee for "*12 months after startup max 18 months after delivery*". Again, a footer appeared on the bottom of each page of the letter bearing the words "*All our agreements are subject to our general terms and conditions for sale*". It is important to note that none of these exchanges gave rise to any agreement between the parties.

12. Following these exchanges between Mr. Slump and Mr. O'Connor, the latter invited Mr. Slump to visit the plaintiff in Limerick. As noted above, that meeting took place on 25th March 2010. The meeting was attended by a number of representatives of the plaintiff together with Mr. Ian Turkington, Mr. Ryan Turkington and Mr. Wesley Cotton, who were all representatives of Turkington Engineering based in Northern Ireland. In the course of his evidence, Mr. O'Connor explained that Turkington Engineering were the plaintiff's manufacturers at that time. In his second witness statement, Mr. O'Connor stated that Turkington Engineering later "*became*" Renewable Energy Manufacturing Ltd ("*REM*"), although he acknowledged, in the

course of his oral evidence, that REM was not in existence as of the date of this meeting. He confirmed that REM was not established until June 2010.

13. When I first read Mr. Slump's witness statement, I was initially sceptical as to how he could recall handing over terms and conditions in the course of a meeting which took place such a long time ago. However, when he came to give his oral testimony, Mr. Slump gave remarkably detailed evidence in relation to the meeting in March 2010. Notwithstanding the long time which has elapsed since that meeting, he was able to give a detailed description of the premises in which the meeting took place. He was also able to recall details of his journey from the hotel and the difficulty he had in finding the industrial area where the plaintiff was located. He also described how he stopped at a shop to ask for directions and spoke to the shopkeeper. When ultimately he found the premises, he said that there were two other cars parked in the carpark ahead of him, including one four-wheel drive. He described a rather dusty office and how Mr. O'Connor started to make some coffee and how they afterwards went for a walk among the machines to the rear of the premises. After that inspection, he described how they went back into the office (which was a shared office space). He was glad to get inside because he had not brought an overcoat and it was quite cold outside. They discussed technical matters and they were also joined by others. It is unnecessary to set out all of his evidence in relation to the detail of the meeting here. It is sufficient to record that he appears to have an extensive recollection of events surrounding the meeting.

14. Among the events which Mr. Slump says he can recall was the task of assembling the documents which he decided to bring with him to the meeting in Limerick. In that context, he said that, prior to travelling to Limerick, he assembled a number of leaflets relating to the defendant's business and products (including its terms and conditions) in an arrangement which he described as a "*double A4 which is folded*

and there are two sideslips which you fold so you make a kind of envelope, so you can put it in an A4 and it doesn't fall out". He described how he assembled the package of material. He said that he had a cabinet in his own office in the Netherlands with twelve A4 trays. In the top tray, he had the printed terms and conditions and, in the other trays, he had leaflets in relation to each specific type of heat exchanger or application supplied by the defendant. When visiting a customer, he said that he always went to this cabinet to retrieve the relevant materials for the purposes of the discussion with that customer. He then described that he always brought each relevant leaflet (including the terms and conditions) to the meeting with that customer. He said that this is what he did when he visited the plaintiff in Limerick. On this occasion in March 2010, he said that he left the leaflets on the desk in the office in which the discussions took place and that he did not take them back to Holland with him. He said that, at the time, Mr. O'Connor, Mr. Patrick Dight and Mr. Ted Molyneaux were all present. He also confirmed that there was no discussion about the terms and conditions at the meeting. The height of his evidence, therefore, is that the terms and conditions were enclosed in the A4 arrangement described above. There is no evidence to suggest that he brought the terms and conditions specifically to the attention of anyone on the plaintiff's side at the meeting.

15. Mr. Slump was closely cross-examined by counsel for the plaintiff. It was put to him that he gave far more detail of the events of March 2010 in the course of his oral evidence than he had given in the witness statement delivered prior to the hearing. He explained that he did so in circumstances where, in the course of the opening by counsel for the plaintiff, I had expressed some scepticism about a witness' ability to remember detail going back that far. He also rejected the suggestion that he was simply giving evidence as to what his usual practice was rather than giving evidence as to what he

actually recalled. He acknowledged, however, that there is no email or letter ever sent to Mr. O'Connor or anyone else within BHSL in which he made reference to handing over the terms and conditions at the March 2010 meeting. Instead, some of the correspondence sent thereafter by the defendant to the plaintiff indicated that a copy of the defendant's terms and conditions could be made available to the plaintiff on request.

16. On the other hand, Mr. O'Connor, in the course of his evidence, refuted the suggestion that any terms and conditions were handed over at the meeting of March 2010. In his direct evidence, he said that no such document was handed over. He also said that, if such a document had been handed over, it would have been filed by the plaintiff and he confirmed that nothing had been found among the plaintiff's files. He also drew attention to the way in which the terms and conditions are not mentioned in the minute prepared by the plaintiff. However, as was demonstrated in the course of Mr. O'Connor's cross-examination by counsel for the defendant, there are a great number of details of the meeting of 10th March 2020 which are not recorded in the minutes. The meeting lasted several hours but the minutes extend to no more than 1.5 pages. It is also important to note that, in answer to a question from me, Mr. O'Connor made clear that his evidence as to what was or was not handed to him at the meeting in 2010 (including his statement that he had not received the terms and conditions) were based on two principal facts. In the first place, there was no reference made to the handing over of terms and conditions in any of the subsequent correspondence or exchanges between the parties. Secondly, his evidence was based on the fact that the terms and conditions were not found following a search for the purposes of these proceedings in the plaintiff's premises.

17. Mr. O'Connor also accepted that, in the years after the meeting, there were a number of communications made by the defendant to the plaintiff which bore the words

which referred to the defendant's general terms and conditions and that he never asked for a copy of those even though the plaintiff had no terms and conditions of its own as of 2014. In this context, he was cross-examined about what he had said in para. 19 of his witness statement to the effect that he would not have ignored terms and conditions if they had been brought to his attention. Notwithstanding the various references in correspondence from the defendant to its terms and conditions, Mr. O'Connor was unable to explain why he had never asked for copies of the defendant's terms and conditions. It was put to him by counsel for the defendant that he had not asked for them because he already had them from the meeting in March 2010, but he emphatically rejected that suggestion.

18. Later, in the course of his closing submissions, counsel for the plaintiff questioned how Mr. Slump could have such a clear recollection of the meeting of March 2010. He highlighted a number of points. First, he drew attention to the fact that Mr. Slump was first asked to recall what occurred at that meeting no more than two months prior to the trial. Counsel also highlighted that Mr. Slump had no minutes or notes of the meeting. Nor did he have any email or letter that referred to what happened at the meeting. Next, he highlighted that it was never pleaded in the defendant's defence and counterclaim that the defendant's terms and conditions were handed over at the meeting. Third, counsel placed some emphasis on the fact that Mr. Slump admitted that he had never instructed the defendant's legal team in relation to the minutiae of the events that occurred in the course of the visit to the plaintiff in March 2010. I acknowledge that these are factors that arguably tell against the reliability of Mr. Slump's evidence as to what transpired at the meeting. Nevertheless, having considered the evidence of both sides, I believe that, in light of the detailed evidence given by Mr. Slump, it is probable that he did provide a copy of the terms and conditions in the

manner which he described. In reaching that view, I was impressed by the ability of Mr. Slump to recall very specific details of the events of the day and of his impression (which was not favourable) of the condition of the plaintiff's premises. While many others would not be in a position to recall events at such a distant remove, I was persuaded by Mr. Slump's evidence that he had a real and very clear memory of what occurred. I, therefore, find as a fact that Mr. Slump provided a copy of the terms and conditions in the folder of material which he left on the desk in the shared office space described by him. However, importantly, it is clear that he did not take the terms and conditions out of the folder of material. Instead, he simply left the folder on the table. He did not mention that the folder contained terms and conditions. Nor did he bring the terms and conditions to the attention of the plaintiff in any other way. It is, therefore, not surprising that Mr. O'Connor did not realise that the terms and conditions had been handed over. It seems to me to be clear that Mr. O'Connor was simply not conscious of the material in the folder which had been left on the table by Mr. Slump. There is no evidence that the folder of material was ever opened by anyone on the plaintiff's side either in the course of the meeting or afterwards.

The initial contracts were between the defendant and REM

19. Not long after the meeting in March 2010, a number of supplies were made by the defendant. However, these transactions were not with the plaintiff directly but with REM. While the plaintiff was directly involved in the interactions with the defendant in relation to the equipment to be supplied, the relevant contracts were entered into between the defendant and REM. Although he initially sought to suggest that he always understood that the contracts were with the plaintiff, the true nature of the contractual relationship was ultimately acknowledged by Mr. Slump, under cross-examination, on

Day 2 of the hearing¹¹. The fact that the contract was between REM and the defendant is plain from the documents. REM was the company which issued the purchase order to the defendant even though most of the communications prior to the purchase order were made between the plaintiff and the defendant.

20. The role of REM was described in the evidence of Mr. O'Connor. He explained that the plaintiff's initial work in respect of the development of BHSL Units was done in conjunction with REM. The plaintiff did not have the capacity or capability at that time to produce its own BHSL Units and, in those circumstances, turned to REM to manufacture the units. Mr. O'Connor further explained that, in September 2008, the Turkington family from Northern Ireland agreed to invest in the plaintiff and they later established REM in 2010 to build units which would be designed by BHSL. It was in those circumstances that, in the case of the first number of heat exchangers used in BHSL Units manufactured by REM, the relevant contracts were entered into between the defendant and REM directly. However, in circumstances where the plaintiff acted as designer of the units, much of the pre-contract communications in relation to those heat exchangers took place directly between Mr. Slump or his colleague Mr. Thomas van den Berg and Mr. O'Connor of the plaintiff. Even the order confirmations were sometimes emailed directly by the defendant to Mr. O'Connor. For example, in the case of the first order placed by REM with the defendant (which was installed at a farm in Wimpstone, England, which became known as BHSL Unit 7), the relevant order was discussed in email exchanges between Mr. Slump and Mr. O'Connor between 8th and 15th July 2010. The order confirmation was then emailed to Mr. O'Connor by Mr. van den Berg on 20th July 2010. Nonetheless, although it was emailed directly to Mr. O'Connor, the order confirmation was, by its own terms, directed to REM as the

¹¹ See p. 56 of the transcript.

purchaser and marked for the attention of Mr. Ryan Turkington, albeit that the confirmation commenced with the words “*Dear Mr. Jack O’Connor*”. The covering email addressed directly to Mr. O’Connor stated:-

“All our requests for quotation and all our orders are subject only to the general terms and conditions for purchase of Geurts International BV. A copy of the general terms and conditions can be send to you on request. All other terms and conditions are rejected.”

21. The attachment to the email (which was described in the text of the email as “*the order confirmation*”) was addressed to REM “*Attn. Ryan Turkington*” at REM’s address in Cookstown, County Tyrone. Notwithstanding that it was addressed in that way, the document commenced: “*Dear Mr. Jack O’Connor*”. It commenced by thanking Mr. O’Connor for the trust placed in the defendant “*with your order*”. It then stated that the defendant confirmed that “*We will handle your order*”. A price, delivery time and payment terms were all set out. These were followed by what were described as “*Conditions*” in the following terms:-

“On all orders, the generals terms and conditions for sale of Geurts International are applicable. A copy can be send to you on request. Purchasers terms and conditions are not applicable.”

22. In addition, the document also contained a heading “*Liability*” under which the following was stated:-

“Our liability is limited to manufacturing and materials defects on the equipment as supplied by us and is limited in value to the order value on this confirmation.”

23. At the foot of the order confirmation, there was a statement: “*All our agreements are subject to our general terms and conditions for sale*”.

24. In my view, it is clear from this document and from the surrounding circumstances that, notwithstanding the reference to Mr. O'Connor, the contract was entered into between the defendant and REM. Moreover, in an email exchange between Mr. O'Connor and Mr. Slump on 12th July 2010, it was specifically stated by Mr. O'Connor to Mr. Slump that "*the official order will be from REM*" which he said would be completed in the "*days ahead*". Mr. Slump did not indicate any difficulty with that arrangement in subsequent emails exchanged between Mr. O'Connor and himself over the following three days. Subsequent to the order confirmation of 20th July 2010, there was a change made to the order and it is clear that this change was made at the request of REM. This is apparent from the relevant order for the heat exchanger which was subsequently placed by Colin Turkington of REM by email dated 27th July 2010 in which REM asked the defendant to supply the heat exchanger "*to the specification you have agreed with Jack O'Connor of BHSL in your e mail dated 23rd July*". The reference to the specification agreed on 23rd July 2010 confirms that some change must have been made to the order the subject of the confirmation of 20th July 2010. A response to the order from REM was not included in the papers before the court.

25. There was a similar course of conduct in relation to subsequent orders placed by REM with the defendant, albeit that Mark Boyle, the REM general manager was also involved. For example, in the case of the heat exchangers supplied in respect of BHSL units 8 and 9, the relevant purchase order was sent by Mr. Boyle of REM to Mr. Slump by email of 2nd February 2011. In some of this material issued by REM, it was explicitly stated that REM's standard purchase order terms and conditions apply. For example, this was expressly stated in the REM purchase order dated 21st February 2011 addressed to the defendant which stated that the terms and conditions were available at www.remeurope.com. A similar statement was contained in a subsequent purchase

order dated 2nd August 2012 sent by REM to the defendant which identified the shipping address as that of the plaintiff. The purchase order also stated that: *“Acceptance of this order is acceptance of REM’s Terms and Conditions.”* The relevant response from the defendant was not included in the papers before the court.

26. Mr. O’Connor stated that no issue was ever raised by the defendant with him in respect of these references to REM terms and conditions. In the course of his evidence, Mr. Slump said that he always understood that he was dealing with the defendant and not REM but he accepted that the purchase orders were received from REM. Mr. Slump was unsure whether the defendant’s terms and conditions were ever supplied to REM but he drew attention to the purchase confirmation described above which made it clear that they were available on request. Under cross-examination, Mr. Slump tried to maintain that he was dealing with the plaintiff at all times but he ultimately conceded that the initial contracts with the defendant in relation to heat exchangers were with REM rather than with the plaintiff. In my view, he was right to make that concession. Despite the frequent references to Mr. O’Connor, the documents exchanged with the defendant plainly show that the contracts in question were between REM and the defendant.

The commencement of a contractual relationship between the plaintiff and the defendant

27. As Mr. O’Connor confirmed on Day 1 of the hearing, the relationship between REM and the plaintiff ceased in 2013. Mr. O’Connor also acknowledged, under cross-examination, that any dealings between the plaintiff and the defendant subsequent to 2013 were in the context of a direct contractual relationship between the parties. His attention was drawn, in this context, to a letter dated 7th May 2014 from Mr. Slump addressed to him in relation to a heat exchanger which is not in issue in these

proceedings. His attention was drawn to the fact that, on each page of this letter, it was stated in a footer that “*All our agreements are subject to our general terms and conditions for sale*”. Mr. O’Connor accepted that, at that time, the plaintiff had not sought to adopt general terms and conditions of its own. That said, the letter of 7th May 2014 from the defendant to Mr. O’Connor set out very detailed terms in relation to the supply of the exchanger by the defendant. In addition to all of the necessary technical details, the scope of supply was described and commercial terms and conditions were set out as to price, delivery time, payment terms and the validity of the offer up to 7th June 2014. Thus, even though the plaintiff had no general terms and conditions of its own at that time, all of the essential terms of a contract for the supply of goods were set out in the text of the letter itself. Accordingly, it was not necessary that any other terms and conditions be agreed. However, it is unnecessary to form any final view in relation to that issue. The arrangement between the parties as reflected in the letter of 7th May 2014 is not one of the contracts in issue in these proceedings. Nonetheless, the letter has some relevance because it establishes that, even prior to the communications between the parties in relation to the contracts in issue in these proceedings, the plaintiff (in its capacity as a contracting party with the defendant) was in receipt of correspondence which expressly stated that all agreements are subject to the defendant’s terms and conditions of sale.

The defendant’s general terms and conditions

28. A key issue to be determined in this case is whether the defendant’s general terms and conditions were incorporated into the contracts between the parties in relation to the individual heat exchangers supplied. As will be seen, these terms and conditions contain a number of significant limitations on liability insofar as the defendant is concerned. An obvious issue arises as to whether, in those circumstances, those

elements of the terms and conditions were sufficiently brought to the attention of the plaintiff as to make them terms of the contracts in issue. For that reason, it may be helpful, at this point, to identify the relevant terms and conditions on which the defendant seeks to rely.

29. Before identifying the terms and conditions in question, I should explain that, at one point in the course of the hearing, there was some doubt as to whether the terms and conditions brought by Mr. Slump to the meeting in March 2010 were the same as those which had been specifically relied upon by the defendant in its defence and counterclaim and which were, in turn, included in the booklet of contractual documents before the court¹². The latter terms and conditions are not dated. A doubt arose as a consequence of the evidence given by Mr. Slump himself. Before concluding his direct examination, he was asked to confirm that the terms and conditions which he brought with him to Limerick are those which are contained in the agreed booklet of contractual documents. In response to the question put to him by the defendant's counsel, Mr. Slump said he did not understand how the document in question does not bear a date. He said that the defendant's terms and conditions were first adopted when he became owner of the defendant in 1995 and that they were subsequently modified "*a few times*". In light of this evidence, an obvious doubt arose as to whether the terms and conditions which Mr. Slump contended had been handed over at the meeting in March 2010 were the same as those now relied upon by the defendant in these proceedings. It also raised a doubt as to whether the terms and conditions which may have applied at the time of conclusion of each of the relevant contracts, the subject matter of these

¹² In the course of responding to para. 2(ii) of the plaintiff's notice for particulars dated 7th February 2020, the defendant confirmed that the version of the terms and conditions now contained in the booklet of contractual documents was the same as that alleged to have been provided by Mr. Slump at the meeting in Limerick in March 2010. In para. 2(ii), the defendant was asked to provide a copy of the terms and conditions mentioned in para. 2 of the defence and counterclaim and the copy supplied in response is the same as that included in the booklet of contractual documents.

proceedings, were the same as those which are relied upon by the defendant in its defence.

30. Subsequently, on Day 4 of the hearing, counsel for the defendant indicated that his side had made enquiries in the Companies' Registry of the Netherlands and had identified that the defendant's terms and conditions (in the form relied upon in the defence and counterclaim) had been filed with the registry in 2008. Counsel for the defendant applied, at that stage, to call an in-house legal advisor as an additional witness on the part of the defendant. This legal advisor had first been engaged in 2015 by the defendant and I was informed that he would give evidence to the effect that the version registered in the Dutch registry were also the terms and conditions which were in force at the time of his appointment in 2015. This was a very belated application on the part of the defendant, particularly in circumstances where I had specifically raised an issue at an early point on Day 1 of the hearing as to whether there was anything to date the version of the defendant's terms and conditions which had been included in the core book of contractual documents. The in-house legal advisor in question was present throughout the hearing and it was, therefore, very puzzling that the issue was not sought to be addressed until the conclusion of the evidence on Day 4. However, the matter was ultimately resolved on the basis that the plaintiff was prepared to accept that the terms and conditions in question had been filed in the Companies' Registry in the Netherlands in 2008 and that they were the same as those encountered by the in-house legal advisor upon his appointment in 2015. On that basis, it was submitted by counsel for the defendant that, as a matter of probability, the terms and conditions on which the defendant relied in its defence and counterclaim were one and the same as those brought by Mr. Slump to the meeting in Limerick in March 2010. Given that the filing in the registry predates the meeting in Limerick, that seems to me to be a reasonable and

logical inference to draw from the facts agreed between the parties. I, therefore, find as a fact that the terms and conditions which were included in the folder of material which Mr. Slump left on the table in the plaintiff's premises are identical to those now sought to be relied upon by the defendant in these proceedings.

31. For present purposes, it is unnecessary to set out all of the defendant's terms and conditions. It is sufficient to identify the most relevant terms. The document is described as "*General terms and conditions*". There are a number of misspellings and also a number of instances of incorrect use of English but these are not material.¹³ Part 1 is headed "*GENERAL*". Clause 1(b) deals with the effect of the acceptance of the defendant's proposal or the placing of a purchase order. By its terms, clause 1(b) purports to apply the defendant's terms and conditions and to disapply the terms and conditions of the buyer. It provides as follows:-

"The acceptance of this Proposal or the placing of a purchase order for the Goods, includes the acceptance of the following conditions, which shall govern any agreement resulting Proposal and any subsequent or further agreements unless otherwise specifically agreed to in writing by Seller. General Conditions Buyer will not apply."

32. Clause 6 of the terms and conditions deals with time of acceptance and effective date. Clause 6(a) is potentially relevant for present purposes. By its terms, clause 6(a) envisages that a proposal will be made by the defendant which can be accepted by the buyer unless the defendant amends or withdraws its proposal prior to acceptance of it by the buyer. Clause 6(a) provides as follows:-

¹³ In the passages from the terms and conditions quoted in this judgment, I have repeated the words used *verbatim* including the misspellings.

“The price and terms quoted in the Proposal are subject to acceptance by Buyer within thirty (30) days of the date of this Proposal. However, Seller reserves the right to amend or withdraw its Proposal at any time, prior to the moment Seller receives the formal acceptance by Buyer.”

33. Clause 6(b) then provides that the effective date of the contract is the date the defendant signs and accepts *“such documents”*. That seems to suggest that, notwithstanding the terms of clause 6(a), the effective date of the contract is deferred until there is an acceptance by the defendant of the buyer’s acceptance of the defendant’s proposal. I have to say that I find it difficult to reconcile the terms of clause 6(b) with clause 6(a). As I read clause 6(a), the defendant is bound by the terms of its proposal once it is accepted by the buyer.

34. Clause 7 deals with the guarantee available to the buyer. Although described as a guarantee, it is clear that the clause is intended to limit the liability of the defendant. The guarantee available is limited in time. By its terms, the guarantee will expire either within six months from the date on which the goods supplied are put into operation or twelve months from the date of shipment (whichever is the earlier). This is subject to the proviso that the buyer must notify the defendant in writing as soon as a defect is discovered. The guarantee is also limited to defects that are due solely to faulty design, material or workmanship. In addition, under clause 7(c), the guarantee is stated to be in lieu of all other obligations and liabilities including merchantability and fitness for purpose. The full terms of clause 7 are as follows:-

- “(a) Seller warrants to Buyer that the Goods will be first quality and free from defects in material and workmanship.*
- (b) Seller will, at its option, repair or replace FOB point of manufacture Goods which are proven to be defective within six months from the time*

such Goods are put into operation, but no longer than twelve months from the date of shipment, whichever is the earlier, provided Buyer notifies Seller in writing as soon as such defect is discovered and provided further that such defects are due solely to faulty design, material or workmanship furnished by Seller hereunder. Seller assumes no liability for damage as a result of improper transport and/or improper storage and/or improper erection and/or improper operation or maintenance by Buyer and/or Owner, nor for erosion or corrosion, nor for any Goods which have been subjected to misuse, neglect, accident, repairs of alterations by other than Seller's Employees, nor for damage which is not due to reasons solely attributable to Seller.

(c) *The guarantee set forth in this article 7 is expressly in lieu of all other guarantees, warranties, obligations and liabilities, express or implied by Buyer's inquiry or by law, including but not limited to those for merchantability and fitness for a particular purpose.*"¹⁴

35. Clause 8 seeks to further limit the liability of the defendant. There are a number of limitations provided for. In the first place, the defendant's liability for damages or loss is stated to be limited to the repair or replacement of the defective part or parts of the goods supplied. There is no liability for delay and certain other matters. Furthermore, the defendant's liability in respect of all its obligations (including the guarantees) under the purchase order is limited to 10% of the price. There is also a very important time limitation in that any claims for damages against the defendant are stated to be barred and to be "*null and void*" after twelve months from the date on which

¹⁴ Again, it should be kept in mind that I have quoted the language of the terms and conditions *verbatim*.

damage occurred or on which the damage could have been discovered. Clause 8 is in the following terms:-

“8. *LIMITATION OF LIABILITY*

- a) *Seller's liability for damages and/or losses, regardless of what the cause thereof may be, shall be limited to repair or replacement of the defective part or parts of the Goods as aforesaid. Without prejudice to the foregoing and for the avoidance of doubt, it is expressly noted and mutually agreed upon that Seller shall not be liable to Buyer and/or Owner for damages and/or losses arising out of or connected with delays (other than mutually agreed liquidated damages), curtailment of plant operations, process failure, pollution and environmental damage, occupational disease and toxic torts, conditions at Owner's job site, loss of profits, loss of productivity, other cost removing any parts or equipment to be repaired or replaced, transportation and/or installation charges in connection with the repair, replacement nor shall Seller be liable for any contingent liability and/or consequential damages and/or losses, however caused.*
- b)) *Seller's cumulative liability in the aggregate for all obligations such as but not limited to warranties guarantees, liabilities, penalties and indemnifications, under the purchase order or at law, whether express or implied, including but not limited to*

those of merchantability and/or fitness for a particular purpose is limited to ten percent (10%) of the price.

- c) *Buyer and/or Owner shall defend hold harmless and indemnify Seller against any liability for damages vis-a-vis third parties (including but not limited to, Owner in case Buyer is not the Owner) who claim to have suffered any loss or damage in connection with/or resulting from any agreement between Seller and Buyer or any Goods delivered or services rendered by Seller pursuant thereto.*

- d) *Claims for damages from Buyer against Seller shall be barred and be null and void after twelve (12) months have elapsed from the day on which the damage occurred or could have been discovered.”*

36. The defendant’s terms and conditions also contain clauses dealing with governing law and jurisdiction. Insofar as governing law is concerned, the following appears in the terms and conditions:-

“15. GOVERING LAW

a) This Proposal and any agreement resulting there from shall be construed and given effect according to the law of the Netherlands, however, with the exclusion of the United Nations Convention on Contracts for the International Sale of Goods.”

37. Insofar as jurisdiction is concerned, the following is stated:-

“18. APPROPRIATE JUDGES

Any dispute arising between Seller and Buyer will, if it cannot be settled amicably, be brought before the appropriate judge in the District court of the Hague. Buyer shall reimburse Seller for all judicial and extra judicial costs which seller may incur when exercising Seller's rights under this proposal against Buyer."

38. While the subjective intention of Mr. Slump or the defendant is not relevant for present purposes, it should be noted that the defendant's terms and conditions were developed by Mr. Slump with the assistance of his wife who, he said, is a lawyer. They were partly based on terms and conditions which he took from a previous employer. Thus, the defendant's terms and conditions are not based, *per se*, on any industry-wide terms. Nor did the defendant adopt the terms and conditions of a well-known or internationally recognised trade association. However, as will become clear at a later point in this judgment, the defendant has argued that the terms are broadly consistent with the ORGALIME general conditions which the plaintiff sought to introduce at a later stage in its relationship with its own customers.

39. There is no evidence that the defendant's terms and conditions were ever produced to the plaintiff other than the evidence of Mr. Slump in relation to the meeting in Limerick in March 2010 at which the terms and conditions were left in a folder of documents on a desk in the plaintiff's office. As noted previously, Mr. Slump accepts that there was no discussion about the terms and conditions on that occasion.

40. It should also be noted that, as will become apparent in due course, some of the communications issued by the defendant to the plaintiff expressly referred to limitations on liability and to guarantees which are not always consistent with the full terms outlined above. The plaintiff relies on this inconsistency to exclude the application of the defendant's general terms and conditions. The plaintiff also makes the case that the

defendant is not entitled to rely on such express provisions in circumstances where the defendant failed to rely on them in the pleadings. The plaintiff draws attention to the fact that it is solely the general terms and conditions which are relied upon in the pleadings. With regard to the various references in the correspondence to the defendant's terms and conditions, the plaintiff says that the mere reference to the defendant's home-made or bespoke terms and conditions in the footers of the documents is not sufficient to incorporate them into the contract between the parties. The plaintiff submits that such a reference is insufficient unless the terms and conditions are supplied. In the absence of supply, the plaintiff says that a reference to the existence of terms and conditions is not enough unless the reference is to well-known or recognised terms and conditions common in the industry. In the alternative, the plaintiff argues that the defendant's references to its home-made terms and conditions is not sufficient to incorporate any of the terms and conditions which limit the extent of the defendant's liability. The plaintiff also maintains that, even if the terms and conditions were contained in the folder of material left by Mr. Slump in the plaintiff's office at the March 2010 meeting, this is insufficient to incorporate them into the contractual relationship between the parties. That is principally for two reasons: First, the terms and conditions were never discussed or raised by Mr. Slump at that meeting. Second, no contractual relationship arose between the plaintiff and the defendant at that time. In his closing submissions, counsel for the plaintiff emphasised that the meeting in March 2010 was not a contractual meeting but was an "*introductory meeting*". Counsel also submitted that no contractual relationship arose between the parties until several years later and that, in those circumstances, any supply of the terms and conditions at an earlier time would not lead to their incorporation into the contractual relationships entered into several years later. In this context, counsel for the plaintiff argued, by

reference to the well-known decision in *Parker v. Southeastern Railway Company* (1876-77) L.R. 2 C.P.D. 416 (at p. 420) that the relevant terms and conditions have to be either made available or, at the very least, identified in the course of “*making a contract*”. In this case, he submitted that, in circumstances where no contract was entered into between the plaintiff and the defendant until several years later, it could not be said that the meeting of March 2010 arose in the course of making a contract between the defendant and the plaintiff.

41. On the other hand, counsel for the defendant emphasised that, at the time of the March 2010 meeting, REM was not then in existence. The implication of this argument appeared to be that, if REM was not in existence, the contract must have been with the plaintiff. However, I do not believe that the fact that REM was not then in existence is of any real significance in circumstances where the relevant contracts only came into existence after June 2010. There is no doubt that those contracts were between REM and the defendant. I have already described the documents relevant to those contracts (to the extent that they were made placed in evidence) in paras. 19 to 25 above. In any event, it is not unusual for contractual discussions to take place (or even for contracts to be formed) prior to the incorporation of one of the relevant contracting parties. For example, in the case of Irish companies, 45(1) of the Companies Act 2014 recognises, subject to certain conditions, the legality of pre-incorporation contracts¹⁵. The way in which such contracts can subsequently become binding on the relevant company (once formed) is well illustrated by the decision in *HKN Invest v. Incotrade* [1993] 3 I.R. 152. Accordingly, there is nothing surprising or unusual about pre-contractual discussions taking place prior to the incorporation of one of the contracting parties. In those circumstances, I do not believe that the non-existence of REM at the time of the March

¹⁵ Similar provisions are known to exist in the United Kingdom (where REM is incorporated).

2010 meeting demonstrates that the handing over of any terms and conditions must have been in the context of a contractual relationship to be formed between the plaintiff and the defendant. As noted in para. 24 above, the documents giving rise to the formation of those contracts plainly show that REM was the contracting party rather than the plaintiff.

The individual contracts between the parties

42. There are a number of individual contracts between the parties. They did not all follow the same pattern and, for that reason, it will be necessary to examine each one of them individually. I address each of them chronologically in para. 43 and following paragraphs below. In the case of the first contract (in respect of Unit 14), I will also examine the relevant legal issues which arise and the case law on which both parties rely. Notwithstanding their agreement that the *Glanbia* principles apply, the parties have put forward diametrically opposed submissions based on the *Noreside Construction* judgment. For that reason, the section of the judgment which follows in relation to the contract for Unit 14 appears disproportionately long. However, it should not be necessary to repeat that exercise in respect of the remaining contracts although it will be important, in each case, to apply the legal principles to the particular circumstances of each individual contract.

The contract for BHSL Unit 14 (PO 1094)

43. In the case of this contract (which had a value of €66,740), the relevant communications between the parties which were placed before the court commence with two letters from the defendant addressed to the plaintiff. It appears to be clear from these letters that there must have been prior discussions between the parties outlining the plaintiff's requirements. This resulted in the two letters in question which are in very similar terms: the first is dated 4th November 2015 and the second is dated 5th

November 2015. In his evidence on Day 2, Mr. Slump confirmed that the second letter is the final one. There is no significant difference between these two letters other than in relation to price. I, therefore, believe that it is sufficient to examine only one of them, namely the letter of 5th November 2015.

44. There is a dispute between the parties as to whether the letter constitutes an offer to supply goods to the plaintiff which was subsequently accepted by the plaintiff in its purchase order (PO 1094) or whether it is no more than an invitation to treat. The plaintiff makes the case that it should be construed as an offer to sell. In contrast, the defendant argues that it was no more than a quotation that did not go so far as to constitute an offer. The defendant submits that the subsequent purchase order issued by the plaintiff on 6th November 2015 constitutes the first offer in the relevant exchange between the parties. The defendant argues that, in response to the plaintiff's offer to buy, the defendant made a counter-offer on different terms in a subsequent letter issued by it on 12th November 2015. The defendant maintains its letter of 12th November 2015 was the "*last shot*" in the exchanges between the parties and that its counter-offer was subsequently accepted by the plaintiff when it accepted delivery of the heat exchanger in question without contesting the terms proposed by the defendant in its letter of 12th November.

45. In order to resolve this dispute between the parties, it is necessary to consider the documents in question in order to reach an objective determination as to what was the intention of the parties as disclosed in the documents exchanged between them resulting in the delivery of the heat exchanger to the plaintiff. As noted above, the first letter in the sequence of exchanges between the parties is the defendant's letter dated

5th November 2015¹⁶ in which the defendant referred to a drawing (which was not produced to the court) sent by the plaintiff on 28th October 2015. The letter then continued in the following terms:-

“We herewith quote to you 6 bundles for the fluegas / steam and 2 x bundles for the ECO section inclusive casing and internal insulation + one combustions APH (inclusive casing but exclusive insulation) in addition we supply the steam drum excl. circulation pump, condensate pump, instrumentation, (relieve) valves except 6 x DN15 valve from bundle to steam drum, and exclusive control cabinet and level indicator..”

46. The plaintiff argues that, by its terms, this constitutes an offer to supply the equipment there described. The plaintiff submits that, by its language, the defendant was expressing a willingness to supply the equipment on the terms set out in the letters. The plaintiff’s case is that all it had to do was to accept the offer made on those terms. In this context, it is true to say that the letter included many of the details which one would expect to see in a contract for the sale of goods. The letter included a detailed technical description of the equipment to be provided which took up more than two pages of the three-page letter. In addition to this technical description, the letter contained what the plaintiff argues are the essential commercial terms of the agreement. They are so described under the heading *“Commercial Terms and Conditions”* as follows¹⁷:-

“FIRM PRICE

<i>Total price</i>	<i>EURO</i>	<i>63.820,-</i>
<i>Optional price coating</i>	<i>EURO</i>	<i>1.380,-</i>

¹⁶ As noted earlier, the letter of 4th November 2015 is in substantially similar terms and does not require separate analysis.

¹⁷ As in the case of the terms and conditions, the letter is quoted *verbatim* including the obvious misspellings.

Option DDP delivery **EURO** **1.540,-**

Price includes third party inspection by Loyds according to PED (design Rtod)

Firm Price

Prices is firm delivered ex works Holland, exclusive VAT.

Delivery time

We can deliver the bundles & casing + APH week 6 2016 if we receive your written order this week .

Payment terms

30 % at order confirmation

70 % after inspection at the workshop and release note for transport

All payments within 30 days after receipt of our invoice

Validity *valid until December 4 2015*

Guarantee *12 months after start up max 18 months after delivery.*

We trust to have made you a suitable quotation. If you have any questions regarding this quotation, please feel free to contact us.

Kind regards” ”¹⁸

47. At the bottom of that page there is a footer (which also appears at the bottom of pp. 1 and 4) in the following terms: “*All our agreements are subject to our general terms and conditions for sale*”.

48. A significant issue arises as to whether this reference to the defendant’s terms and conditions in the letter of 5th November 2015 (and many similar subsequent references) are sufficient to incorporate those terms and conditions into the contract

¹⁸ This is a direct transcription of what is said in the letter. The misspelling and errors in syntax appear in the original.

which was put in place between the parties in relation to this transaction. In particular, are these references sufficient to incorporate the restrictive or limiting provisions of the defendant's terms and conditions? That is a central issue in the proceedings and one to which I will return presently. Before doing so, the immediate issue that arises is as to the status of the letter of 5th November 2015. Was it an offer to sell the equipment there described? Or, was it no more than an invitation to treat?

49. As noted above, the letter is in very detailed terms, both in relation to the technical specification of what was to be supplied and also in relation to the total price, the delivery time, the payment terms and the guarantee. But counsel for the defendant emphasised that, in the letter, the defendant was careful to use the language of “*quotation*”. He argued that a quotation of this kind could not be regarded as an offer to sell. There was no detailed argument about this at the hearing. However, it is the case that, as the authors of *McDermott & McDermott “Contract Law”, 2nd Ed., 2017*, at para. 2.40, observe, a quotation will not usually be regarded as an offer. That is not invariably the case and, in that context, the authors refer to the decision of Meredith J. in *Dooley v. Egan* (1938) 72 ILTR 155, where he held that a document may constitute an offer notwithstanding that it is described as a quotation. In taking that approach, Meredith J. departed from a previous decision of the Irish King's Bench Division in *Boyers & Co. v. Duke* [1905] 2 I.R. 617. It will, therefore, be necessary to review these authorities in order to determine whether the letter of 5th November 2015 constituted an offer to supply or was merely an invitation to treat. As noted in para. 7(d) above, a communication by which a party is invited to make an offer is regarded as an invitation to treat. It is distinguishable from an offer because it is not made with the intention that it is to become binding as soon as the person to whom it is addressed communicates assent to its terms. A potentially complicating factor here is that the defendant did not

expressly make it clear that no contract would come into existence until the defendant accepted any order that might be placed on foot of the proposal made in the letter of 5th November 2015. Before addressing this issue in more detail, I believe it is necessary to look at the next steps in the communications between the parties. As *Glanbia* makes clear, the whole of the correspondence in relation to the conclusion of a contract must be considered.

50. The next step in the exchanges between the parties was the plaintiff's purchase order (PO 1094) dated 6th November 2015¹⁹. That purchase order contains no reference to any terms and conditions other than the price for the supply of the heat exchanger "*as per Quote no. 4-6265R2*" together with the price for the optional extras set out on p. 3 of the letter of 5th November 2015, namely the painting/coating of the heat exchanger and the cost of shipping to site. All of this is consistent with the terms of the defendant's letter of 5th November 2015. In addition, it identifies the expected delivery as 12th February 2016. Again, that date is consistent with the terms quoted in the letter of 5th November 2015 which confirmed that delivery would take place in "*week 6 2016*" if the written order was received in the same week. The written order clearly was received in the same week. By my calculation, 12th February 2016 was the last working day of week 6 of 2016. The purchase order also stated that credit terms were 30 days. This is also consistent with the relevant element of the defendant's letter of 5th November 2015 quoted above which stated that all payments were to be made within 30 days after receipt of an invoice. While the purchase order did not expressly deal with the payment terms of 30% at order confirmation and 70% after inspection of the workshop and release note for transport, it did not dissent from those terms. The

¹⁹ There were, in fact, two purchase orders issued on the same day, one marked "*reserved*" and the other marked "*complete*" but there is no difference in substance between them.

purchase order was sent to the defendant by Mr. Michael McEnery of the plaintiff on 6th November 2015 under cover of an email which stated:-

“Please find attached the Po for the Heat Exchanger as Quoted.

Can you confirm receipt of Po.

Also when will you have an as Built Drawing for Approval.”

51. The terms of this email clearly suggest that the plaintiff was prepared to purchase the heat exchanger on the terms quoted by the defendant in its letter of 5th November 2015. As previously noted, the letter of 5th November 2015 is in very detailed terms in relation to the equipment to be supplied. It also addresses the key issues of price, date of delivery and payment terms. The plaintiff emphasises these features. The plaintiff submits that the exchange between the parties on 5th and 6th November 2015 shows that all of the essential terms of a purchase and sale contract had been agreed. Moreover, while the covering email from Mr. McEnery enclosing the purchase order asked the defendant to confirm receipt of the purchase order, it did not seek anything more from the defendant. It is not unusual for one party in contract negotiations to ask the other party to acknowledge receipt of an important communication. It does not, in any sense, suggest that there was any doubt about the other party’s intention; it merely suggests that the party seeking confirmation of receipt wants to be sure that the communication in question has, in fact, been duly received.

52. On the other hand, the defendant highlights the language used in the letter of 5th November 2015 and, in particular, the use of the words “quote” and “quotation” in the opening and closing paragraphs (respectively). The defendant also draws attention to the use of similar language in the plaintiff’s purchase order and covering email. The

plaintiff, in its purchase order, referred to the letter of 5th November 2015 as a “Quote”. The covering email also used the words “as Quoted” in relation to the purchase order. However, as discussed in more detail below, the plaintiff submits that the labels used by the parties are not determinative.

53. It will be necessary to consider the arguments on both sides in the context of the case law mentioned in para. 49 above. But, before doing so, it is necessary to keep in mind that the exchange of communications between the parties did not cease with the purchase order from the plaintiff. Again, it is essential to consider the entire correspondence between the parties. In advance of delivery, the defendant responded to the plaintiff’s purchase order on 12th November 2015 in the following terms²⁰:-

“We kindly thank you for the trust placed in Geurts International with your order with a.m. number for the FBC 1200 Steam heat exchanger. We herewith confirm that we will handle your order for the supply of of the heat exchnager, with our confirmation number 15-10-20-1 1

1 x Steam heat exchanger FCB 1 200

Including steam drum, economiser and air preheater

Unit price € 63.820,--

1 x External coating € 1.380,-

1 x DDP delivery € 1.540,--

In accordance with our quotation 4-6265R2 from November 5 last with reference F9349 The steam heat exchnager will be manufactured and supplied in accordance with PED 97/23/EC including CE marking

Delivery conditions:

Order value: € 66.740,--(excluding VAT)

²⁰ This is quoted *verbatim* including all misspellings.

Delivery time: *Week 6, 2016*

Delivery: *DDP UK*

Payment: *30 % nett at order confirmation within 30 days after
date of invoice*

*70 % nett at delivery within 30 days after date of our
invoice*

Conditions: *On all orders the general terms and conditions for sale
of Geurts International are applicable. A copy can be
sent to you on request. Purchasers terms and conditions
are not applicable*

Liability: *Our liability is limited to manufacturing and materials
defects on the equipment as supplied by us and is limited
in value to the order value on this confirmation.*

*Whenever there are questions regarding this confirmation, please feel free to
contact us.”²¹*

54. It will be noted that, for the first time, this document expressly referred to a limitation of liability. Because this introduced a new term, counsel for the defendant argued that this made the letter of 12th November 2015 a counter-offer. The law is clear that a counter-offer constitutes a rejection of an offer and cannot therefore function as an acceptance. That is plainly a crucial question. However, a number of other aspects of the letter should also be kept in mind. The express provision purporting to limit the liability of the defendant was significantly more generous than that contained in para. 8(b) of the defendant’s general terms and conditions. Under clause 8(b), the defendant’s

²¹ For completeness, it should be noted that the words “*All our agreements are subject to our general terms and conditions for sale*” appeared at the foot of both pages of the order confirmation. I will return to the significance of this later. It should also be noted that the misspellings or “*typos*” in the quotation are a direct transcription from the original letter.

liability was said to be limited to 10% of the price. It should also be kept in mind that the order confirmation provides no details of the restrictions contained in clause 7(c) (which provides that the “*guarantee*” is in substitution for all other obligations including those in relation to merchantability and fitness) or clause 8(a) (which limits the defendant’s liability for damage to the repair or replacement of the defective part or parts) or the provisions of clause 8(d) which contains a twelve-month limitation period for claims for damages against the defendant. At a later point in this judgment, I will return to the significance of these aspects of the letter of 12th November 2015. At this point, my concern is to identify the documents or steps which constitute the relevant offer and acceptance that together can be said to constitute the contract for the sale of the equipment delivered to the plaintiff in respect of P.O. 1094.

55. There was no response from the plaintiff to the order confirmation from the defendant. It appears to be the case that the plaintiff did not pay much attention to the order confirmation. This can be seen from the evidence of Mr. McEnery described in para. 84 below. But that does not mean that the document had no legal effect. As previously noted, in assessing the legal effect of the communications between the parties, the court takes an objective approach; it does not carry out its assessment by reference to the subjective views of the parties. The goods were subsequently supplied and the defendant argues that, by accepting the goods, the plaintiff accepted the terms set out in the defendant’s order confirmation of 12th November 2015 including the reference to the defendant’s general terms and conditions for sale. For the purposes of the offer/acceptance analysis, the defendant therefore makes the case that the order confirmation constitutes the relevant offer while the acceptance of delivery of the goods by the defendant constitutes the relevant acceptance of that offer.

The contractual status of the defendant's letter of 5th November 2015 in respect of the contract relating to BHSL Unit 14

56. Against the backdrop of the full extent of the exchanges between the parties (as described above), I now return to the letter of 5th November 2015 in order to assess its contractual significance. Was it an offer to sell or was it no more than an invitation to treat? While counsel did not refer to any relevant case law in the course of the hearing, I subsequently identified, on consulting *McDermott & McDermott*, that there are two relevant Irish authorities on the contractual status of a quotation. In those circumstances, I asked the parties to deliver additional written submissions addressing these authorities and also the decision of the Privy Council in *Harvey v. Facey* [1893] A.C. 552 which predates the Irish cases.

57. The facts of *Harvey v. Facey* were quite different to the present case. *Harvey v. Facey* was concerned with the sale of a large house and lands in Kingston, Jamaica. The plaintiffs sent a telegram to the defendant (a joint owner of the property in question) asking two questions, first whether the defendant would sell the property and, second, requesting him to name the “lowest cash price”. The defendant replied by telegram: “Lowest price for Bumper Hall Pen £900” but he did not say anything directly in response to the first question. The plaintiff replied: “We agree to buy Bumper Hall Pen for the sum of nine hundred pounds asked by you. Please send us your title deed in order that we may get early possession”. The Privy Council, unsurprisingly, took the view that this exchange did not amount to a contract to sell the property to the plaintiff. It was held that the telegram from the defendant merely indicated the lowest price for the property and did not express agreement to sell. On that basis, it could not be construed as an offer to sell the property. Lord Morris, at p. 555, explained the position as follows:-

“Their Lordships cannot treat the telegram from L. M. Facey as binding him in any respect, except to the extent it does by its terms, viz., the lowest price. Everything else is left open, and the reply telegram from the appellants cannot be treated as an acceptance of an offer to sell to them; it is an offer that required to be accepted by L. M. Facey. The contract could only be completed if L. M. Facey had accepted the appellant’s last telegram.”

58. The decision of the Privy Council was subsequently considered by the King’s Bench Division in Ireland in *Boyers v. Duke* [1905] 2 I.R. 617. In that case, the plaintiffs, the operators of Boyers’ department store in North Earl Street in Dublin, wrote to the defendants in Scotland on 23rd February 1904 seeking a quotation for 3,000 yards of canvas and enquiring about the shortest time for delivery. The defendants were manufacturers of canvas. The defendants replied on the following day in the these terms:-

“We enclose sample No. B 3932, nearest we have to match yours also enclosed. Lowest price, 32½ inches wide, is 4½s/d. per yard, 36 inches measure. Delivery of 3000 yards in 5/6 weeks.”

59. This prompted the plaintiffs to respond on 3rd March 1904 as follows:-

“Please get made for us 3000 yards canvas, 32½ inches wide, as per your quotation, February 24, at 4½s/d. per yard ; deliver same as quickly as possible. Also please quote us for same 52 inches wide for quantity of about 20,000 yards annually. As we have not had the pleasure of doing business with you before, we give you as reference Messrs. Baxter, Brothers, Dundee ; Messrs. Richards, Limited, Aberdeen. Canvas No. B 3932.—BOYERS & Co. Also please quote us for canvas to enclosed sample 52 inches, and oblige.”

60. Subsequently, on 7th March 1904, the defendants wrote to the plaintiffs that they had made a clerical error in quoting four pence and five farthings as the price per yard of the canvas. They indicated that the price they should have quoted was 6 pence and 5 farthings per yard. The plaintiffs had already sold 3,000 yards of the canvas on the basis of the quotation of 24th February 1904 and contended that the defendants' letter of 24th February 1904 constituted an offer to sell which they had accepted in their response of 3rd March 1904. The plaintiffs' case was dismissed by direction of Wright J. The plaintiffs sought to have this order set aside by the King's Bench Division comprising Lord O'Brien L.C.J. and Gibson and Madden J.J. but the court held that Wright J. was correct. Lord O'Brien L.C.J. noted, at p. 621, that, while the response from the defendants of 24th February 1904 specified the quantity, price and time of delivery, the letter was nothing more than:-

“than a statement of their ability to turn out the subject-matter at a certain price at a certain time, and not an offer to sell it at the price, and to deliver it within the time, mentioned. It amounted to nothing more, in my opinion, than a quotation in reply to a request for one.”

61. Gibson J. was of the same view. At p. 623, he said:-

“When I read the letters first, I thought, as all the ingredients of an offer were present, the Court should place that meaning on the document, which, read by itself, would seem to be an offer to sell. Serjeant Dodd, however, relies on the following points, as repelling the inference of final offer: –(1) The letter of February 23rd asks for a quotation, and is addressed to a manufacturer ; (2) the letter of February 24th, in reply, must be taken as giving the required quotation ; it does not prescribe a time for acceptance ; it does not profess to sell ; and the period of delivering, five or six weeks, may be reckoned as from

the date February 24th; (3) the letter of March 3rd is not phrased as an acceptance ; it purports to be an order as per quotation ; asks delivery ‘ as quickly as possible,’ without any express reference to five or six weeks ; and in the final clause offers a reference. This proposed reference, which appears in a separate paragraph of the letter, relates (it is said) to the 3000 yards as well as to future business.”

62. In his judgment, Madden J. explained why a quotation from a manufacturer would not normally be construed as an offer to supply. Having referred to the decision in *Harvey v. Facey*, Madden J., at pp. 624-625 said:-

“The principle on which this was decided applies with a great force to mercantile transactions than to an application for a statement of the price of a single parcel of land. It is a matter of common knowledge that quotations of process are scattered broad-cast among possible customers... Wholesale dealers have not in stock an unlimited supply of the articles the prices of which they quote to the public at large. This stock usually bears some proportion to the orders which they may reasonably expect to receive. Transactions of the kind under consideration are intelligible and business-like, if we bear in mind the distinction between a quotation, submitted as the basis of a possible order, and an offer to sell which, if accepted, creates a contract, for the breach of which damages may be recovered.

These observations seem to apply with special force to a quotation furnished by a manufacturer, in the position of the defendants, stating the terms on which he is prepared to work, as to price and time for completion. He may receive and comply with many applications for quotations on the same day. If his reply in each case can be turned into a contract by acceptance, his looms might be

burdened with an amount of work which would render it impossible for him to meet his engagements. In my opinion, a merchant, dealer, or manufacturer, by furnishing a quotation invites an offer which will be honoured or not according to the exigencies of his business. A quotation based on current prices usually holds good for a limited time. But it remains a quotation, on the basis of which an offer will not be entertained after a certain date. I have arrived at this conclusion irrespective of the terms of the letter of the 3rd of March, as to which I will only say that it suggests to my mind that the writer knew well that he was giving an order, not accepting an offer for sale.”

63. A different conclusion was reached by Meredith J. in *Dooley v. Egan* (1938) 72 I.L.T.R. 155. In that case, an issue arose as to whether a contract had been formed in Dublin or in Cork. The plaintiff was a Dublin based supplier of medical instruments and equipment while the defendant carried on business in Cork as a distributor of medical and surgical instruments and hospital equipment. The plaintiff had commenced proceedings in the Dublin Circuit Court but the Circuit Court judge took the view that the relevant contract was in fact made in Cork with the result that the Dublin Circuit Court had no jurisdiction. On appeal to the High Court, Meredith J. overturned the decision of the Circuit Court judge and held that the contract had been made in Dublin. He came to that conclusion on the basis that the contract was made by posting the acceptance by the plaintiff (in Dublin) of an offer made by the defendant. The contract was concluded in the place where the acceptance occurred²². The relevant facts were as follows. In June 1937, the defendant received enquiries from potential customers as to

²² Although not specifically addressed in the report, this conclusion must have been reached on the application of the so-called postal rule which applies where (as was frequently the case before the advent of fax machines and emails) the parties intended that contractual communications would be sent by post. Under the postal rule, a contract is deemed to be concluded when the offeree posts the letter of acceptance. In *Dooley*, the letter of 22nd June 1937 described below was posted in Dublin. Thus, the contract was made in Dublin.

the defendant's ability to supply medical instrument cabinets of a particular kind. On 18th June 1937, the defendant wrote to the plaintiff enquiring as to the ability of the plaintiff to supply the cabinets in question. They received a response dated 22nd June 1937 from the plaintiff in which the plaintiff quoted a price, invited an order and stated that delivery would take place within three or four weeks. Importantly, the letter also stated the following:-

“All quotations are for immediate acceptance only and are subject to change without notice. The delivery of all orders accepted by me shall be contingent upon strikes, fires, accidents, delays of carriers and other causes unavoidable or beyond my control. I will not be responsible for damages due to any delays whatever. Clerical errors are subject to correction. Orders accepted by me cannot be countermanded without my consent and upon terms which will indemnify me against all loss.”

64. The defendant replied immediately by letter dated 24th June 1937 in which they enclosed an order for two cabinets and indicated that they would like to have delivery as soon as possible. The attached order simply set out the catalogue number for the relevant cabinets and the price. In turn, the plaintiff wrote to the defendant on 26th June 1937 accepting the order. The question which arose was whether the letter of 22nd June 1937 from the plaintiff to the defendant was an offer which was accepted by the defendant by their letter of 24th June or whether the latter constituted an offer to purchase which was accepted by a subsequent letter from the plaintiff dated 26th June 1937. The plaintiff argued that the quotation of 22nd June 1937 was not an offer but only a statement of terms on which it was prepared to discuss the question of sale. The plaintiff relied on *Boyers v. Duke*. However, this argument was rejected by Meredith J. who said, at p. 156:-

“In the argument a good deal was made out of the sentence in the ‘Quotation’: ‘All quotations are made for immediate acceptance only and are subject to change without notice.’ The interpretation that I put upon that was this ‘quotation’ was an offer subject to immediate acceptance; but that if it were not accepted immediately it became subject to contingencies which made it vague and if it was not accepted immediately the decision in [1905] 2 I. R. at 617 would apply... . I will therefore take this ‘Quotation’ to be a definite offer.”

65. As will be seen, the matter was dealt with quite cursorily by Meredith J. However, it was a notable feature of that case that, as the passage quoted in para. 63 makes clear, the plaintiff’s letter of 22nd June 1937 expressly stated that *“all quotations are for immediate acceptance only...”*. This plainly suggested that the quotation could be accepted by the party to whom it was addressed. In other words, the quotation was inviting an acceptance rather than requesting the defendant to make an offer. But for that fact, it appears likely that Meredith J. would have applied the approach taken by the King’s Bench Division in *Boyers v. Duke*. This is consistent with the views expressed by the authors of *McDermott & McDermott*. Thus, the authors state, at para. 2.40, that a quotation will not usually be regarded as an offer. Nonetheless, at para. 2.42, they observe, in the context of the decision in *Dooley v. Egan*, that the wording of a particular quotation *“may convince a court that it was intended to be binding if accepted”*. The authors also observe that, in *Dooley v. Egan*, the crucial phrase in the letter was *“All quotations are made for immediate acceptance only and are subject to change without notice”*. They say that Meredith J. *“interpreted this as meaning that ‘this “quotation” was an offer subject to immediate acceptance; but that if it were not accepted immediately the decision in [Boyers v Duke] would apply’”*. That seems to me to accurately describe the approach taken by Meredith J.

66. In the additional submissions delivered at my request, the defendant argues that the *Boyers* judgment is on all fours with the sequence of events which occurred in the context of the contract in respect of BHSL Unit 14. The defendant highlights that the letter of 5th November 2015 (and the letter in similar terms of the previous day) are described as quotations and use the language of quotations. In addition, the defendant draws attention to the way in which the letters refer to prior communications and drawings as basic preparatory steps and the letter of 5th November 2015 also refers to a follow up conversation about coating which must have taken place after the letter of 4th November 2015 had been faxed. The implication appears to be that, because there was ongoing discussion between the parties prior to the defendant faxing the letter of 5th November 2015, it would not be reasonable to think that such a letter could constitute a “*definite offer*” to sell with the intention that it is to become binding on the parties as soon as the plaintiff communicated its assent to its terms.

67. In contrast, the plaintiff, in its supplemental submissions, argues that the labels used in the letter of 5th November 2015 are not determinative. The plaintiff relies in this context on the judgment of Sanfey J. in *Glanbia*, at para. 128, and on the approach taken by Meredith J. in *Dooley* where he declined to treat the letter of 22nd June 1937 as a quotation notwithstanding that it was so described by the plaintiff in that case. Paraphrasing Sanfey J. in para. 127 of *Glanbia*²³, the plaintiff says that the critical factor is whether the “*offer*” document “*pulled together the various threads*” of a previous negotiation. The plaintiff stresses that, in the case of the letter of 5th November 2015, all of the necessary details as to the nature of the products to be supplied, their

²³ It should be noted that the sequence of communications in *Glanbia* was different. The offer document described in para. 127 of the judgment was in response to an email from the purchaser setting out the purchaser’s requirements. In para. 20 of his judgment, Sanfey J. described this email as conveying the message that the purchaser required a specific quantity of product. The defendant’s response on the same day quoting the price and thanking the plaintiff for confirming the volume was then held to be an offer.

quantities, technical descriptions, delivery times and commercial terms were fully set out. The plaintiff also highlights that the letter referred to a validity period up to 4th December 2015 which the plaintiff submits should be read as the period prescribed for acceptance of the defendant's offer to sell. The plaintiff submits that it is significant that, in contrast to *Boyers*, the parties here were familiar with each other and had been dealing with each other since 2010. Unlike *Boyers*, it could not be said that, in this case, "quotations are scattered broad-cast among possible customers"²⁴. The letter of 5th November 2015 is far removed from the widely distributed quotation or priced catalogue discussed in *Boyers*. The plaintiff submits that the defendant's letter is a highly bespoke document specific to the needs of the plaintiff which was expressly based on previous discussions between the parties.

68. I fully accept that the language of a document of this kind does not conclusively determine whether it constitutes an offer to sell or merely an invitation to treat. I also accept that the court must construe the document against the relevant factual backdrop. That backdrop includes the communications between the parties as a whole and also the fact that, prior to sending the letter of 5th November 2015, the parties had been involved in discussions about the specific requirements of the plaintiff. This is not a case where a request was made for a quotation out of the blue. I must also keep in mind that there is no evidence that the defendant was in receipt of numerous requests for quotations. For that reason, the rationale articulated by Madden J. in *Boyers* does not apply here. However, that rationale is not the sole basis of the decision in that case. It is clear from the approach taken by Lord O'Brien L.C.J. and Gibson J. that they placed significant emphasis on the fact that the defendants there were responding to a request

²⁴ See the extract from the judgment of Madden J. quoted in para. 62 above.

for a quotation and that the ensuing order from the plaintiff was not framed as an acceptance.

69. It is also true that the letter of 5th November 2015 contains all of the necessary terms on which to conclude a contract. The letter contains a very comprehensive description of the goods to be supplied, the price to be paid, the manner in which payment is to be made and the time for delivery. Thus, absent anything in the letter to the contrary, the letter is plainly capable of constituting an offer to sell on the goods so described at the price and on the terms set out in the letter. However, as the case law shows, the language of the letter is nonetheless very relevant even if it is not determinative. Furthermore, as the case law also demonstrates, the letter must be read in the context of the communications as a whole.

70. The task of the court is to objectively construe the document in context and to form a view as to the intention of the document. Was it sent to the plaintiff with the intention that it was to become binding as soon as it was accepted by the plaintiff? Or was it sent with a view to inviting an offer to purchase from the plaintiff? The first point to note is that the language of the letter expressly speaks in terms of quotation rather than offer. The upshot of the decision in *Boyers* is that, as the authors of *McDermott & McDermott* have indicated, a quotation will not usually be regarded as an offer²⁵. While the letter is extremely detailed, and while it would, in the absence of language to the contrary, be sufficient to constitute an offer to supply, the language expressly used by Mr. Slump in the letter is consistent with the language of a quotation rather than an offer to sell. This is made clear, in particular, by the opening paragraph of the letter in which Mr. Slump said: “*We herewith quote to you...*”. This is also confirmed in the

²⁵ As noted in para. 69 above, this is always subject to the proviso that the language is not determinative. As *Dooley* demonstrates, there may be other aspects of the communications between the parties that indicates that, in truth, the document is in fact an offer notwithstanding that its author has used “*quotation*” as a label.

final paragraph of the letter where he said: “*We trust to have made you a suitable quotation. If you have any questions regarding this quotation, please feel free to contact us.*” It is also significant that, in response, the plaintiff, in its purchase order, also referred to the letter in the same way. I have already quoted the language of the purchase order in para. 50 above. In my view, this is significant particularly in light of the previous dealing between the parties. If the plaintiff considered that the letter of 5th November 2015 was truly an offer to sell, it is odd that the plaintiff would itself use the language of quotation with reference to it. Both the order confirmation itself and the covering email are consistent in this regard.

71. While the letter does not expressly state that no contract will come into existence unless an order placed by the plaintiff is confirmed by the defendant, that does not seem to me to be a critical feature of the letter in circumstances where it uses the language of quotation. Moreover, the section of the letter dealing with payment terms expressly envisages that there will be an order confirmation. The relevant terms are quoted in para. 46 above and they make clear that 30% of the price is to be paid “*at order confirmation*”. That suggests that there will be an order from the party to whom it is addressed (i.e. the plaintiff in this instance) which will then be subject to an order confirmation which will trigger the obligation to pay the first part of the payment due.

72. It is the case that, as the plaintiff highlights, the letter speaks of a validity period up to 4th December 2015. At first sight, that might appear to create a parallel with *Dooley* where the relevant letter required an immediate response. But, crucially, in *Dooley*, the letter stated that all quotations “*are made for immediate **acceptance** only ...*”²⁶. For the reasons outlined in para. 65 above, that plainly suggested that the sender of the letter envisaged that it could be accepted by the person to whom it was addressed.

²⁶ Emphasis added.

As noted in the same paragraph, this is also the view taken by *McDermott v. McDermott* who described those words as the crucial phrase in the letter in issue in that case. The words used in the letter in issue in that case chimed precisely with the classic definition of an offer as outlined in para. 7(d) above.²⁷ One can therefore immediately understand why Meredith J. came to the conclusion that, notwithstanding the language of quotation used in the letter, it was, in truth, an offer to sell. In contrast, in the defendant's letter of 5th November 2024, there is no equivalent language suggesting that it was open to the defendant to simply accept its terms. As the plaintiffs have noted, it does refer to validity up to 4th December 2015 but that is in a section of the letter dealing largely with price and, in particular, in the section which follows the heading "**FIRM PRICE**".²⁸ In my view, the more obvious way in which that would be understood by commercial operators in the position of the parties is that the price would remain valid up to 4th December 2015. To my mind, it is stretching it too far to suggest that the intention was the same as that in *Dooley*.

73. Moreover, the response of the plaintiff to the letter of 5th November 2015 is telling. As in *Boyers*, it is not framed as an acceptance. It is framed as an order. That was one of the factors that Gibson J. took into account in *Boyers*. Thus, in addition to the way in which the plaintiff, in that order, itself referred to the letter as a "*Quote*", this further suggests that a party in the position of the plaintiff would not understand the defendant's letter to be an offer to sell. This is important given that, as *Glanbia* makes clear, the whole of the correspondence must be considered.

74. I am, accordingly, of opinion that counsel for the defendant was correct to characterise the letter of 5th November 2015 as a quotation which fell short of

²⁷ i.e. the definition taken from *Chitty on Contracts*.

²⁸ Bold in original.

constituting an offer to sell. It therefore seems to me that the purchase order placed by the plaintiff constitutes the relevant offer to purchase the equipment necessary for BHSL Unit 14 which was subject to an acceptance from the defendant. The purchase order in this case was clearly placed on the basis of the terms proposed in the quotation of 5th November 2015. However, the order confirmation sent by the defendant was materially different (at least insofar as the limitation provision was concerned). In those circumstances, it seems to me that counsel for the defendant was correct in suggesting that it constituted a counter-offer rather than an acceptance of the offer made by the plaintiff in the purchase order. As noted in para. 7(d) above, an acceptance requires to must be an unqualified expression of assent to the terms of an offer. The letter of 12th November 2015 did not satisfy that criterion. In circumstances where the plaintiff subsequently accepted the delivery of the goods supplied by the defendant without demur, it seems to me to follow that the acceptance of the goods constituted acceptance of the terms proposed in the counter-offer of 12th November 2015. On that basis, it follows that the contract in respect of this particular transaction comprised the defendant's letter of 12th November 2015 and the subsequent acceptance of the goods by the plaintiff. In light of this conclusion, it is unnecessary to address the alternative argument made on behalf of the defendant that the letter of 12th November 2015 constituted the "*last shot*" in the exchanges between the parties²⁹.

75. In light of my conclusion that the contract is constituted by the letter of 12th November and the subsequent delivery without objection by the plaintiff to the terms of that letter, it follows that the terms governing this transaction are those proposed by the defendant in the letter of 12th November 2015. That said, a separate issue now arises

²⁹ See the brief description of the so called "*last shot*" principle in para. 7(e) above.

as to whether, in addition to the express terms set out in the letter of 12th November 2015, the defendant's general terms and conditions also apply.

Were the defendant's general terms and conditions incorporated into the contract in respect of BHSL Unit 14?

76. As noted in para. 7(i) above, terms can be incorporated into a contract by reference. However, there must be an appropriate reference to the terms that makes it plain that they are to govern the contract. Furthermore, if the terms are not in a form that is in common use in the relevant sector, reasonable notice of the conditions must be given such as by printing them on the reverse of the relevant contractual documents issued by the party seeking to rely on them. In this context, the defendant seeks to rely on the fact that (as I have found) Mr. Slump left a folder of materials containing the terms and conditions on a desk in the defendant's office in Limerick in the course of the meeting in March 2010. However, I do not believe that this was sufficient to incorporate the terms and conditions into the subsequent contract between the parties entered into in 2015. In my view, the gap in time between the contract of November 2015 and the meeting in March 2010 is simply too great. While the meeting of March 2010 involved a discussion of a proposed business relationship, the relevant contractual relationship which was entered into following the interaction between the parties in March 2010 was not between the plaintiff and the defendant, but between a separate legal entity (namely REM) and the defendant. It is striking that no one on the defendant's side gave any intimation to the plaintiff in November 2015 that the contract was to be governed by terms and conditions which had been left in the plaintiff's office more than five years previously. Putting myself in the position of the parties at the time of the negotiation of the contract in November 2015, I do not believe that reasonable business people in the position of the parties would consider that their contract was to

be governed by terms and conditions which had been handed over so long beforehand. I believe that reasonable business people would expect that the vendor would, at minimum, alert the purchaser to the fact that the terms and conditions on which it sought to rely had been provided previously. That is not what the defendant did here. The defendant said nothing in 2015 that they had been handed over in 2010. On the contrary, the letter of 12th November 2015 expressly stated that a copy of the defendant's terms and conditions could be "*send (sic) to you on request*".

77. Moreover, even if it could be said that there a sufficient nexus between the meeting in March 2010 and the subsequent contract of more than five years later, Mr. Slump made clear in his evidence that he did not draw the attention of the plaintiff to the existence of the terms and conditions in the folder of documents which he left on the desk in the meeting room. That seems to me to fall far short of what is required. Some form of reference to terms and conditions is required³⁰. This is clear from the decision of the Supreme Court in *Noreside Construction*. If no reference was made to them in March 2010 when Mr. Slump's folder of documents was left in the plaintiff's office, it is impossible to accept that the same event was sufficient to satisfy the *Noreside* requirement in November 2015 (when, again, no mention was made of the fact that they had been left with the plaintiff in 2010).³¹

78. However, that does not dispose of the issue as to whether the defendant's terms and conditions were incorporated in the contract concluded in November 2015. While the meeting of March 2010 does not assist the defendant, the issue of incorporation nonetheless falls to be considered by reference to the exchanges between the parties in November 2015. The defendant argues that it is clear on the face of the letter of 12th

³⁰ The nature of the reference required is explored in more detail below.

³¹ For completeness, it should be noted that there appears that there were a number of contracts entered into between the parties prior to November 2015 but they were not addressed in the course of evidence given at the hearing.

November 2015 (which I have held to be the relevant offer to supply) that the defendant was offering to supply goods on the basis of its general terms and conditions. Not only is that stated on the footer on both pages of the letter, but it is also stated in explicit terms under the heading “*Conditions*” which I have already quoted in para. 53 above. The defendant argues that these references are sufficient to incorporate its terms and conditions into the November 2015 contract.

79. A number of issues arise in this context. In the first place, it is necessary to consider whether the reference to the terms and conditions was made in a document that was intended to have contractual force. This is clear from the decision of the Supreme Court in *James Elliott Construction Ltd v. Irish Asphalt Ltd* [2014] IESC 74 where MacMenamin J. said, at para. 109:-

“109. What emerges from the authorities is that, to be a contractual document, the document 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.”

80. The issue which MacMenamin J. was addressing in that paragraph was whether delivery dockets would be understood by a reasonable man to contain contractual conditions. Earlier, MacMenamin J. had referred, in para. 103 of his judgment, to an extract from *Treitel on The Law of Contract* in which the author stated, at para. 7-006, that:-

“The document will have such effect if the party to whom it was handed knew it was intended to be a contractual document or if it was handed to him in such circumstances as to give him reasonable notice of the fact that it contained conditions. It will also be contractual if it obvious to a reasonable person that

it must have been intended to have this effect. This will be the case if the document is of a kind that generally contains contractual terms. Whether a document falls into this class depends on current commercial practice, which may vary from time to time.”

81. MacMenamin J. also referred to *Chitty on Contracts* which made clear that the document containing the terms and conditions relied upon “*must be of a class which either the party receiving it knows, or which a reasonable man would expect, to contain contractual conditions... ”*”.

82. In this case, I believe that it is plain that a reasonable person in the position of the parties would understand that the defendant’s letter of 12th November 2015 was a document which contained contractual terms. It is, therefore, not of the same kind as the delivery docket of the defendant discussed by MacMenamin J. in this part of the judgment in *James Elliot Construction*. This is made very clear from what he said in the remainder of para. 109:-

“The Court is satisfied that the delivery dockets, signed by Mr Hannay for the most part, on behalf of Elliott Construction, were for the purpose of recording the type of material delivered, the date of delivery and quantity delivered, and did not set out the terms and conditions of the contractual arrangement between the parties. They are not documents which ‘generally contained contractual terms’, as it is put in Treitel, or documents of a class which the party receiving it or which a reasonable man would expect to contain contractual conditions as Chitty on Contracts describes it. Accordingly, having regard to the facts and circumstances of this case, the Court rejects the contention that the delivery notes are contractual documents in the sense contended for by Irish Asphalt.”

83. In circumstances where the letter of 12th November 2015 was clearly intended to have contractual force, the next issue which arises (and which is probably the most contentious issue in the case) is whether the reference to the defendant's terms and conditions in the letter was sufficient to incorporate the terms and conditions into the contract between the parties notwithstanding that a copy of the terms and conditions themselves were not made available. In this context, both sides sought to rely upon the decision of the Supreme Court in *Noreside Construction Ltd v. Irish Asphalt Ltd.* [2015] 1 ILRM 229. The plaintiff argues that, unless the terms and conditions were actually supplied by the party seeking to rely upon them or unless they are known industry-wide terms, the effect of the judgment of the Supreme Court is that the terms and conditions cannot be relied upon. On the other hand, the defendant argues that the judgment shows that a reference to the terms and conditions is sufficient.

84. In this context, I should make clear that the plaintiff never asked for a copy of the defendant's terms and conditions and paid no attention to the reference to them in the letter of 12th November 2015. This is clear from evidence of Mr. McEnery on Day 1 of the hearing. Under cross-examination, he accepted that the reference to the defendant's terms and conditions was clear on the face of the order confirmation, but he said that it did not strike him at the time and that he did not make any enquiry with anyone about the defendant's terms and conditions. He said:-

“Q. Yes, the document is an order confirmation. I'm not asking about what the document is, I'm asking you about what it says.

A. It says -- I can see here what it says.

Q. And did you recall that striking you at the time?

A. No.

Q. Did you make any inquiry with anybody?

A. *No.*

Q. *About the terms and conditions of Guerts?*

A. *No.*

Q. *It was clear to you, reading the letter, that there were such terms and conditions, isn't that right?*

A. *Yeah, from my point of view all I was looking for from these documents was yeah, they had my order, great. I didn't read -- I didn't really take any notice of the terms and conditions or liability text on it because it was very ad hoc, we'd get these, so the communication between us was ad hoc at best.*

Q. *I understand. It's pretty clear to anybody reading it, isn't it, that Guerts have a set of terms and conditions that they are saying are applicable and that no other terms and conditions are applicable?*

A. *Again it's written on the document but I didn't take any notice at the time."*

85. While the subjective view of Mr. McEnery is not relevant in terms of the objective exercise to be carried out by the court, it is therefore clear that the plaintiff took no notice of what was said by the defendant in the order confirmation of 12th November 2015 about its terms and conditions. It also follows (and I so find as a fact) that the plaintiff was unaware of the content of the defendant's terms and conditions at the time of conclusion of the contract in November 2015. The plaintiff would however be deemed to be aware of the terms and conditions set out in the text of the letter of 12th November 2015. There was no dispute between the parties a party will be bound by terms and conditions set out in a contractual document accepted by them even where they have not been read. The legal analysis that follows must be read in that context.

86. In order to understand the respective positions of the parties in relation to the incorporation of terms and conditions which have not been supplied, it is necessary to carefully consider the judgment of Dunne J. in the *Noreside* case and the judgment of MacMenamin J. in *James Elliott Construction Ltd.* There are passages in the judgment of Dunne J. in *Noreside* which the defendant relied on in support of its contention that reference to the terms and conditions is sufficient so long as the terms and conditions are available on request.

87. The first passage in the judgment of Dunne J. which, at least at first sight, provides support for the defendant's position is at p. 243, where the judge quoted from "*The Interpretation of Contracts*" by Lewison L.J. who said: "*It is not necessary to the incorporation of trading terms into a contract that they should be specifically set out provided that they are conditions in common form or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and they are available on request. 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. ...*" Read on its own, this passage suggests that it is not necessary to furnish the terms and conditions if they are identified and are in common or usual form in the relevant business.

88. Having cited *Lewison*, Dunne J. went on to deal with the issue of reasonable notice of terms and conditions. At p. 243, Dunne J. said: "*In the event that the delivery dockets were found not to be contractual document and thus incorporated by signature into the contracts between the parties, Irish Asphalt contends that the delivery dockets provided on some 1,190 occasions to Noreside constituted reasonable notice of their terms and conditions and thus were incorporated into the contract between the parties. 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 M.R. in the case of *Thornton v Shoe Lane Parking* [1971] 2 Q.B. 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.’”* The plaintiff placed reliance on this passage in support of its contention that, even if the reference to the defendant’s general terms and conditions was sufficient to incorporate them, that did not extend to those elements of the terms and conditions which purport to limit the defendant’s liability.

89. However, the defendant argued that the plaintiff was misreading the judgment of Dunne J and that, instead, the judgment recognised that it was sufficient that notice was given of the existence of the terms and conditions and it was made clear that the terms and conditions were available on request. The defendant argued that this is precisely what the defendant did in the letter of 12th November 2015. At first glance, the following passage in the *Noreside* judgment appears to provide some support for the position of the defendant where Dunne J. said, at pp. 245-246:-

“In Circle Freight International Ltd v Medeast Gulf Exports [1988] 2 Lloyd’s Rep. 427 the invoices each stated in small print at the bottom:

'All business is transacted by the company under the current trading conditions of the [IFF] a copy of which is available on request.'

This was in the words of Bingham L.J. both 'clear and legible' and 'placed immediately below the price where the eye would naturally alight on it'. The exporters never requested a copy and none was sent. Having reviewed the authorities, Taylor L.J. concluded:

*'... 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.** [1988] 2 Lloyd's Rep. 427, 433.'*

*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. In that case, there was a clear reference to the IFF terms on invoices created for the purpose of the contracts between the parties. Taylor L.J. added in the course of his judgment (at p.433) the following observation:*

'Here, the parties were commercial companies. There had been a course of dealing in which at least eleven invoices had been sent giving notice

that business was conducted on the IFF terms at a place on the document where it was plain to be seen. Mr Zacaria knew that some terms applied. He knew that forwarding agents might impose terms which would frequently be standard terms and would sometimes or frequently deal with risk. He never sought to ask for or about the terms of business. The IFF conditions are not particularly onerous or unusual and, indeed, are in common use. In these circumstances, despite Mr Gompertz's clear and succinct argument to the contrary, I consider that reasonable notice of the terms was given by the plaintiffs. Putting it another way, I consider that the defendants' conduct in continuing the course of business after at least eleven notices of the terms and omitting to request a sight of them would have led and did lead the plaintiffs reasonably to believe the defendants accepted their terms. In those circumstances it is irrelevant that in fact Mr Zacaria did not read the notices.'

Thus, it was held that the IFF conditions were incorporated in the contract. It is noteworthy that the invoices relied on made specific reference to IFF conditions. Therefore, the plaintiffs had, in the view of the court, given adequate notice identifying the conditions they relied on."³²

90. Read on its own, that passage appears to support the submission of the defendant that all that is required is that notice of terms and conditions be given to the party against whom they are sought to be enforced and that it is not necessary that the terms and conditions should be supplied. The passages quoted in para. 89 above which I have highlighted in bold suggest that it is sufficient if terms and conditions are identified and

³² Emphasis added.

are available on request and that it is not necessary that the terms and conditions be copied to the party against whom they are sought to be enforced.

91. I accept that, if one reads this element of the judgment on its own, it might appear to support the position taken by the defendant. However, it is difficult to reconcile that interpretation with the balance of the judgment. There are a number of elements of the judgment in *Noreside Construction* that require consideration. At p. 244, Dunne J. referred to an extract from *McMeel's "The Construction of Contracts"*, 2nd Ed., 2011, which, in turn, refers to a passage from the judgment of Mellish L.J. in *Parker v. South Eastern Railway Company* in which it was said that it is sufficient to provide a copy of the terms and conditions even if they are never read. At p. 245, Dunne J. said that this passage suggests "*that in the ordinary case it is sufficient to prove that a document containing terms was provided by one party to or sent to the other and was retained without demur...*". Read on its own, that would suggest that a copy of the terms and conditions would have to be provided. However, I accept that, at this point in her judgment, Dunne J. did not necessarily go that far. This passage is followed immediately by the passage quoted in para. 89 above. In those circumstances, there was some force in the suggestion made by counsel for the defendant that the statement in *McMeel* was not intended to be exhaustive. As previously noted, the passage from the judgment of Dunne J. quoted in para. 89 above would suggest that adequate notice of terms and conditions is sufficient once the terms and conditions are available on request.

92. A further important passage appears at pp. 238-239 of the judgment where Dunne J. dealt with the decision of the House of Lords in *British Road Services Ltd v. Arthur V. Crutchley & Co. Ltd* [1968] 1 All E.R. 881. It will be seen from the passage, taken as a whole, that Dunne J. was of the view that, unless a copy of the terms and conditions was supplied, the terms and conditions would not apply save where they

were in a well-known form, in which case, there could be no doubt as to what the governing terms and conditions were. Dunne J. explained the House of Lords decision in this way:-

“Following a long established course of business between the plaintiff carriers and the defendants, delivery notes for goods transported by the plaintiffs and delivered at the defendants’ warehouse would be handed back to the plaintiffs’ lorry drivers, on the defendants receiving the goods stamped “Received on AVC [that is the defendants’] Conditions”. Lord Pearson at p.816 of the judgment in that case commented as follows:

‘Now I come to the terms of the contract between the plaintiffs and the defendants. It was not proved that the plaintiffs’ conditions of subcontracting were ever sent to the defendants, and the defendants in evidence denied that they were subcontractors to the plaintiffs. The plaintiffs’ form of delivery note contained the words:

‘All goods are carried on the [plaintiffs’] conditions of carriage, copies of which can be obtained upon application to any office of the [plaintiffs].’

Under the long established course of business between the parties, however, the plaintiffs’ driver brought his delivery note into the defendants’ office at the Cotton Street warehouse and asked in effect if he could bring his load into the warehouse. If there was room in the warehouse, the permission would be given, and the delivery note would be rubberstamped by the defendants with the words ‘Received under AVC Conditions’, followed by the date and the address of the warehouse. The delivery note, thus converted into a receipt note, would

be handed back to the plaintiffs' driver and he would bring his load into the warehouse as instructed by the warehouse foreman. If this had only happened once, there would have been a doubt whether the plaintiffs' driver was their agent to accept the defendants' special contractual terms. This, however, happened frequently and regularly over many years at this and other warehouses of the defendants. Also the defendants' invoices contained the words: 'All goods are handled subject to conditions of carriage copies of which can be obtained on application'. It may perhaps be material to add that the defendants' conditions of carriage were not peculiar to them, but were the conditions of carriage of Road Haulage Association Limited. At any rate, I agree with the decision of the judge that the plaintiffs' conditions were not, and the defendants' conditions were, incorporated into the contract between these parties. The effect was that, while the nature of the defendants' liability as bailees to the plaintiffs was unaffected, the liability was limited in amount to £800 per ton, which, when credit is given for sixty bottles of whisky recovered after the theft, produces a total in this case of £6,135.'

*At first glance it may be difficult to see why there was a different approach taken to the plaintiffs' terms and conditions in that case and those of the defendants. However, the reason is clear from the judgment of Lord Pearson – it was not proved that the plaintiffs' conditions of sub-contracting were ever sent to the defendants; by contrast **the defendants' terms and conditions, although not peculiar to them, were the conditions of carriage of the Road Hauliers Association Ltd and were incorporated into the contract by reference to the***

rubberstamping of the words “Received under AVC Conditions” on the delivery note. In other words, there could have been no doubt as to what the terms and conditions were.”³³

93. The explanation given by Dunne J. of the approach taken by Lord Pearson in the *British Road Services* case plainly suggests that a mere reference to the party’s terms and conditions is not sufficient unless those terms and conditions are a recognised set of terms and conditions in use in the relevant sector. It would appear to follow that a reference to terms and conditions which are not well recognised will not be sufficient if those terms and conditions have not been supplied.

94. The same rationale appears to underlie the following passage from the judgment of Dunne J. which runs from p. 246 to p. 247:-

“The essence of the argument of Irish Asphalt is that the proviso on the delivery dockets, ‘This material is sold subject to the terms and conditions available on request’, was reasonable notice of the terms and conditions applicable. I cannot agree. 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. However that did not happen in this case and, accordingly, in my view, Irish Asphalt failed to give reasonable notice of its terms and conditions to Noreside.

Further, this is not a case in which the course of dealing between the parties could be relied on by Irish Asphalt to incorporate its terms and conditions into

³³ Emphasis added.

*the contracts between the parties. The fact that the proviso is contained in a large number of delivery dockets does not assist Irish Asphalt in circumstances where Irish Asphalt has never given any reasonable notice of its terms and conditions to Noreside. Obviously, if Irish Asphalt had on numerous occasions supplied copies of its terms and conditions to Noreside but on a particular occasion had failed to do so, then in the context of a breach of contract on that occasion, it would be very difficult for Noreside to argue that it was not aware of the terms and conditions. **The fundamental problem in this case for Irish Asphalt is that over the entire period of dealing between the parties, Irish Asphalt never supplied its terms and conditions to Noreside and in those circumstances I fail to see how it could be said that Irish Asphalt's terms and conditions could have been incorporated into the series of contracts between the parties by a course of dealing.***"³⁴

95. Again, this very clearly suggests that, unless the terms and conditions are in a form which is well known or well recognised in a particular sector or trade, a reference to terms and conditions will not be sufficient of itself unless those terms and conditions have been supplied to the counterparty. This interpretation of the judgment of Dunne J. is also consistent with the judgment of MacMenamin J. in *James Elliott Construction Ltd v. Irish Asphalt Ltd*. In that case, the Supreme Court held that the reference to the defendant's terms and conditions in the defendant's delivery dockets was not sufficient because the dockets in question were not intended to have contractual force; they were merely intended to record the quantities of goods delivered. In those circumstances, it was not strictly necessary for the Court to go further and decide whether the terms and conditions were (or were not) incorporated. However, MacMenamin J. went on to

³⁴ Emphasis added.

consider the authorities on the issue of incorporation and, in doing so, he expressed views which chime with those of Dunne J in *Noreside* quoted in paras. 92 and 94 above³⁵ At para. 117, he said:-

*“In the present case, the documents relied on to argue that the terms and conditions were incorporated by signature are the delivery notes. The delivery notes did not contain the terms and conditions. **They contained a proviso that ‘the material is sold subject to the terms and conditions available on request’, but, in the view of the Court as explained previously, this is not sufficient for the purpose of incorporation by signature. The party, to be bound, must know what the terms and conditions are (for example, by reference to specific, well known, industry wide terms and conditions on the contractual document, such as the A.V.C. conditions in the British Road Services Ltd v. Arthur case) or by setting out the specific terms and conditions relied on in the document to be signed. A bland reference to terms and conditions alone cannot suffice. It could not be said that the inclusion of such a proviso on a delivery docket is reducing the terms of the contract to writing. How is one supposed to know what those terms and conditions are? As McMeel put it, ‘a signature is binding because it demonstrates assent to the terms above it.’”***³⁶

96. Taking the observations of MacMenamin J. in *James Elliott Construction Ltd.* (quoted in para. 95 above) and those of Dunne J. in *Noreside* (quoted in para. 92 and 94 above), it seems to me that the Supreme Court has made it very clear that mere reference to terms and conditions in a contractual document will not be sufficient to

³⁵ See para. 110 and following paragraphs of the judgment of MacMenamin J. It should be noted that the composition of the Supreme Court in *James Elliott Construction Ltd.* and in *Noreside* was the same namely O’Donnell, MacMenamin and Dunne JJ. Judgment in both cases was also delivered on the same day.

³⁶ Emphasis added.

incorporate such terms and conditions into a contract. The terms and conditions must either be provided or they must be “*known industry wide terms*”³⁷ or “*specific, well-known, industry wide terms*”³⁸.

97. However, there is an earlier decision of the Supreme Court where the Court might arguably be said to have taken a different approach namely the decision in *Leo Laboratories Ltd v. Crompton BV* [2005] 2 I.R. 225. That case concerned an issue as to whether a jurisdiction clause was incorporated into the contract between the parties for the purposes of Article 23 of the Brussels Regulation.³⁹ Under Article 23, a jurisdiction agreement in favour of a particular Member State will be treated as conferring exclusive jurisdiction on the courts of that Member State. Article 23 prescribed three ways in which such an agreement could be made. For present purposes the most relevant of those was “*an agreement ... in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.*” In the *Leo Laboratories* case, an order placed by the plaintiff was accepted by the defendant manufacturer by means of a form confirming acceptance of the order. In the form in question, the defendant stated that it had accepted the order subject to “*subject to our general terms and conditions of sale and delivery as stated on the back hereof*”. Although the terms were not in fact printed on the reverse of the form of acceptance, the High Court held (and its decision was, in turn, upheld by the Supreme Court) that the plaintiff was bound by the terms and conditions, even though it claimed not to have been aware of them. At p. 236, Fennelly J. (speaking for the Supreme Court) said:-

³⁷ To use the language of Dunne J. in *Noreside*.

³⁸ To use the language of MacMenamin J. in *James Elliott Construction Ltd*.

³⁹ Regulation 44/2001 since replaced by Regulation 1215/2012 under which the equivalent provision is Article 25.

“It is not in dispute that the plaintiff was on notice of the standard terms and conditions upon which the defendant traded. The defendant’s order confirmation referring to them was exhibited in the plaintiff’s own affidavit. Indeed, the plaintiff purported to rely on standard conditions of its own. I am quite satisfied that O’Higgins J was correct to conclude that the plaintiff was fixed with the general terms and conditions of sale. It was put expressly on notice of their existence and thus put on inquiry as to their terms. The parties were engaged in international trade. It is a very general practice of suppliers in international trade to impose conditions relating to applicable law and jurisdiction.”

98. In the course of writing this judgment, I was concerned that the decision in *Leo Laboratories* suggested that mere reference to terms and conditions could, in some circumstances be sufficient to incorporate them into a contract. For that reason, in addition to asking them to address *Boyers v. Duke* and *Dooley v. Egan*, I also asked the parties for further written submissions in relation to *Leo Laboratories*. In response, the defendant relied on the passage quoted in para. 97 above, to argue that reference to terms and conditions was sufficient. The defendant also cited the decision the High Court in *Mount Juliet Properties v. Melcarne Development Ltd.* [2013] IEHC 286 in which Laffoy J. (in reliance on the decision of O’Hanlon J. in *Sweeney v. Mulcahy* [1993] ILRM 289 and on the Supreme Court decision in *Leo Laboratories*) held that the plaintiff was bound by an arbitration clause in a contract which referred to services being provided in accordance with SE9101 published by the Institute of Engineers of Ireland even though no copy of SE9101 had been provided to the plaintiff.

99. In contrast the plaintiff sought to distinguish the decision in *Leo Laboratories* on the ground that it was decided by reference to an autonomous EU law issue which

is “*wholly separate from the question of contract formation as a matter of Irish law.*”

The plaintiff also highlighted that *Leo Laboratories* predates the decisions in *Noreside* and *James Elliott Construction*.

100. Having considered the position further, I have come to the conclusion that the decision in *Leo Laboratories* should be seen in the particular context of Article 23 of the Brussels Regulation (as it then was). In particular, it must be seen in the light of the specific terms of Article 23 which envisaged that, in the context of an international commercial relationship, a party will be bound by a jurisdiction agreement which is in a form which accords with a “*usage of which the parties are **or ought to have been** aware ...*”⁴⁰. That test expressly embraces not only terms which were known to the party against whom they are sought to be enforced but also terms of which that party ought have been aware. The observations of Fennelly J. that the plaintiff “*was put expressly on notice of their existence and **thus put on inquiry as to their terms***”⁴¹ must be seen in that context. That is quite different to the approach that is taken in the context of the incorporation of terms under the ordinary principles of Irish contract law as explained in *Noreside* and *James Elliott Construction Ltd*. I therefore believe that there is no inconsistency between the approach taken by the Supreme Court in *Leo Laboratories* and the later decisions in *Noreside* and *James Elliott Construction Ltd*. The latter authorities are dealing with ordinary contract law principles while *Leo Laboratories* was concerned with the application of a quite different EU law test which is not applicable here.

⁴⁰ Emphasis added.

⁴¹ Again, emphasis added.

101. I have also come to the conclusion that the decision of Laffoy J. in *Mount Juliet* can also be distinguished. Like the earlier decision in *Sweeney v. Mulcahy*⁴², it was concerned with the incorporation of an arbitration clause in a well-known set of industry wide terms. In *Mount Juliet*, the clause was part of a set of terms published by the Institute of Engineers of Ireland. While Laffoy J. placed reliance on the decision in *Leo Laboratories* in holding that the plaintiff was bound by the arbitration clause, she also referred, at pp. 21-22 of her judgment, to the observations of the authors of *Russell on Arbitration* to the effect that, if “*the document sought to be incorporated is a standard form of conditions, the courts are more likely to accept that general words of incorporation will suffice.*” It seems to me that the decisions⁴³ in both *Mount Juliet* and *Sweeney* are, in fact, consistent with the approach taken by the Supreme Court in *Noreside* and *James Elliott Construction Ltd.* in that, in both of the High Court cases, the relevant contractual exchanges specifically referred to well-known and industry specific terms and conditions. Having regard to the respective observations of Dunne J. and MacMenamin J. (quoted in paras. 92, 94 and 95 above), the reference to terms and conditions of those kinds were plainly sufficient to incorporate the terms (including the relevant arbitration clause) into the contracts in question.

102. The same principle cannot, however, be said to apply to the terms and conditions created by the defendant here. These are not industry wide terms and conditions. They were created by the defendant itself. As explained in para. 38 above, the terms and conditions were created by Mr. Slump himself with the assistance of his wife (who happens to be a lawyer) and were partly based on terms and conditions which he took

⁴² In *Sweeney*, the relevant contract was stated to be governed by the R.I.A.I. standard terms. These were not supplied at the time of the conclusion of the contract but O’Hanlon J. nonetheless concluded that the plaintiff was bound by the arbitration clause contained in them.

⁴³ Even if the reasoning underlying them is not entirely on all fours with *Noreside* and *James Elliott Construction. Ltd.*

from a previous employer. Accordingly, they cannot be said to constitute specific, well-known, industry wide terms and conditions⁴⁴ such as the A.V.C. conditions addressed in *British Road Services v. Arthur V. Crutchley & Co. Ltd.* [1968] 1 All E.R. 881 or the IFF conditions addressed in *Circle Freight International v. Medeast Gulf Exports* [1988] 2 Lloyd's Rep. 427. To paraphrase MacMenamin J. in *James Elliott Construction Ltd.*⁴⁵, the plaintiff, to be bound by the defendant's terms and conditions, must know what the terms and conditions are; a bland reference to them is not sufficient⁴⁶.

103. The defendant, nonetheless, submits that the “*repeated*” reference to its terms and conditions on the face of “*various documents*” incorporated those terms and conditions even though they were not included with such documents. It argues that these references put the plaintiff on enquiry as to the terms particularly in circumstances where the parties were engaged in international trade and where there is said to be a general practice to impose conditions relating to applicable law and jurisdiction. In my view, that argument fails for a number of reasons. In the first place, there is no evidence of an extensive course of dealing between the parties in the period prior to the agreement of November 2015. While there was evidence of previous dealings between the defendant and REM in which officers of the plaintiff were involved (in a design and specification role), the contracts in question were entered into between the defendant and REM. It is true that there was reference in the course of the evidence to other contracts between the plaintiff and the defendant which pre-date November 2015, but my attention was not drawn to any of the exchanges between the parties leading to the

⁴⁴ To use the language of MacMenamin J. in *James Elliott Construction Ltd.*

⁴⁵ At para. 117.

⁴⁶ I address further below a related argument made by the defendant that, although its terms and conditions are not those of a trade body, its terms and conditions are, nonetheless, of a kind that are usual in the industry and that they should be incorporated on that basis.

formation of those contracts. In the case of the November 2015 contract in respect of BHS Unit 14, I therefore do not believe that there is any sufficient evidence before the court to prove a course of dealing of the type alleged. Second, the submission of the defendant appears to me to be largely based on the approach taken in the *Leo Laboratories* case and I have already sought to explain why that approach is mandated by the express provisions of the Brussels Regulation dealing with jurisdiction agreements which must be given an autonomous EU meaning. As the decisions in *Noreside* and *James Elliott Construction Ltd.* illustrate, that approach appears to me to be different to that taken under Irish contractual law in so far as the incorporation of terms is concerned. Third, and most importantly, the approach advocated by the defendant is, in my view, inconsistent with the decisions in *Noreside* and *James Elliott Construction Ltd.* as the extracts from the judgments of Dunne and MacMenamin JJ. (quoted in paras. 92, 95 and 95 above) demonstrate.

104. A further argument advanced on behalf of the defendant submits is that its terms and conditions are of a similar type to those in common use in the industry. In making this argument, the defendant relies on the observation by *Lewison* (quoted by Dunne J. in *Noreside*) to the effect that it is not necessary to the incorporation of trading terms 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.*”

105. In support of this argument, the defendant contends that its terms and conditions are very similar to the ORGALIME (SI 14) terms and conditions⁴⁷ which the plaintiff itself adopted in 2016 in its contracts with its own customers. These are described in the text of the ORGALIME (SI 14) as general conditions for the supply and installation

⁴⁷ Issued in Brussels in 2014.

of mechanical, electrical and electronic products. Section 8 of the plaintiff's own terms and conditions reads as follows:

“Biomass Heating Solutions Limited (BHSL) subscribed to the European Engineering Industries Association ‘Orgalime SII4 General Conditions for the Supply and Installation of Mechanical, Electrical and Electronic Products’.
This is a widely accepted and endorsed set of general conditions that provide a balance of risk sharing and responsibilities between supplier and purchaser.
A copy of the Orgalime SII4 General Conditions has been provided alongside this quotation...”⁴⁸

106. The defendant also highlights the evidence of Mr. Jack O’Connor on Day 1 of the hearing who said⁴⁹, under cross-examination, that he expected that the ORGALIME terms and conditions are a widely accepted and endorsed set of general conditions. In addition, attention was drawn to the concession made under cross-examination, by Mr. Donal O’Donnell that clause 69(a) of the ORGALIME terms and conditions was similar to clause 8(b) of the defendant’s terms.⁵⁰ It will be recalled that clause 8(b) of the defendant’s terms and conditions purports to limit its cumulative liability for all obligations (including those under guarantees and warranties and those that arise in respect of merchantability and fitness for purpose) to 10% of the purchase price. The limitation of liability is different under clause 69(a) of the ORGALIME terms and conditions. It is 15%. The terms of clause 69 are also different. The only real similarity is that there is an imposition of a limitation of liability albeit 50% more generous than that sought to be imposed by the defendant. However, as the defendant subsequently

⁴⁸ Emphasis added.

⁴⁹ See p 104 of the Day 1 transcript. However, contrary to the submission made by the defendant, Mr. O’Connor did not say that he accepted that the terms were widely accepted. His evidence was that “*I expect they are*”.

⁵⁰ See pp. 140-142 of the Day 1 transcript.

argued in its supplemental written submissions, clause 71 of the ORGALIME conditions is somewhat similar in effect to clause 8(b) of the defendant's terms and conditions in that it provides that, save as expressly provided elsewhere in the conditions, the supplier will not be liable for defects. But that is expressly subject to the important qualification (which is absent in the defendant's terms and conditions) that the limitation of liability does not apply where the supplier has been guilty of gross negligence. This seems to me to be a significant point of distinction between the ORGALIME terms and conditions and the defendant's terms and conditions. It applies not only to the 15% limit of liability but also to the provisions of (*inter alia*) clause 59 which limits the supplier's liability to defects which appear within one year from taking over the products supplied. There is no equivalent provision in clause 8(d) of the defendant's terms and conditions albeit that, in one sense, clause 8(d) is more generous to the customer in that the 12 month limitation period prescribed by it runs from the date the damage occurred or could have been discovered rather than from the date when the customer takes control of the products supplied.

107. I accept that there are some similarities between the ORGALIME terms and conditions and those of the defendant⁵¹. But I am not persuaded that the terms and conditions are sufficiently similar to attract the potential application of the principle identified by *Lewison*. There are three quite significant difference namely the level of limitation of liability, the period for taking action against the supplier and, most importantly, the lack in the defendant's terms of any relief from the limitations imposed by those terms in circumstances where the defendant is guilty of gross negligence. Moreover, this submission of the defendant faces the very substantial problem that,

⁵¹ Including the small number of similarities identified in the defendant's supplemental written submissions.

since it chose to adopt its own tailor made form of terms and conditions (rather than adopting well known trade terms) and since it chose not to send them with its letters of 4th, 5th or 12th November 2015, it cannot show that the plaintiff knew what its terms and condition contained. Having regard to the views of Dunne J. and MacMenamin J. (quoted in paras. 92, 94 and 95 above), it is clear that, to be bound, the customer must know what the terms and conditions were. That requirement could have been met if the defendant had opted to adopt the ORGALIME terms and conditions or those of some other trade body or organisation. That requirement could also have been satisfied if it had sent its terms and conditions with its correspondence. But, since it chose not to take either of those courses, the bland reference to its own terms and conditions told the plaintiff nothing. The plaintiff did not, for instance, know that the defendant was seeking to impose a 10% limit of liability rather than the industry accepted 15% limit (as evidenced by the ORGALIME terms. Nor did the plaintiff know that there was no exception for gross negligence notwithstanding that this was provided for in the industry terms published by ORGALIME in 2014. In addition, the plaintiff did not know that a different time bar was sought to be imposed by the defendant to that which applied under the industry standard ORGALIME terms.

108. In all of these circumstances, I have come to the conclusion that the defendant has failed to establish that its terms and conditions were incorporated into the contract in relation to Unit 14 concluded between the parties in November 2015. If I am wrong in that conclusion, it seems to me that there is a further reason why the limitation of liability provisions⁵² do not apply. Those provisions are undoubtedly onerous conditions which are required to be brought to the attention of the party against whom they are sought to be enforced. As summarised in para. 7(j) above, it is clear from the

⁵² i.e. those on which the defendant seeks to rely.

judgment of Sanfey J. in *Glanbia*⁵³, that onerous or unusual conditions must be brought to the attention of the party against whom they are sought to be enforced. There can be no doubt that the terms and conditions in question are onerous. Furthermore, for the reasons outlined in para. 107 above, I cannot accept that the terms in question were usual in the trade. There is no evidence at all that the defendant ever attempted to bring these onerous terms and conditions to the attention of the plaintiff. In those circumstances, I do not believe that they are enforceable against the plaintiff even if it could be said that the terms and conditions were otherwise incorporated into the contract between the parties.

My conclusion in relation to the terms and conditions applicable to the contract in respect of BHSL Unit 14

109. Having held that the defendant's general terms and conditions do not apply to the November 2015 contract, it is now necessary, in accordance with the agreed question described in para. 5(d) above, to determine what terms and conditions govern that contract. I deal with this question entirely without prejudice to the plaintiff's position that the defendant has never pleaded any reliance on the express terms of the letter of 12th November 2015. Nothing I say is intended in any way to undermine any pleading point that the plaintiff may wish to make at the main trial. I deal with the question solely because I have been asked to address it in the list of agreed questions identified in para. 5 above.

110. I have already held that the defendant's letter of 12th November 2015 constituted the relevant offer that led to the formation of the PO 1094 contract and that the subsequent acceptance (without demur) by the plaintiff of the equipment supplied by the defendant constituted the relevant acceptance. It follows that the express terms

⁵³ And from the judgments in *Noreside* and *James Elliott Construction Ltd.* on which Sanfey J. relied.

governing the contract are those that were set out in the text of the defendant's letter of 12th November 2015. That letter set out all of the essential terms. It described the products to be supplied; it set out the price and the payment terms; it set out the time scale for delivery and the manner of delivery (DPD UK); and it set out very clearly that the defendant's liability is limited to "*manufacturing and materials defects on the equipment as supplied by us and is limited in value to the order value of the confirmation.*"

The contract in respect of BHSL Unit 15 (PO 1298)

111. The next relevant contract between the parties is in respect of BHSL Unit 15 in the amount of €126,500. The first document in the sequence of documents relating to this contract is an email dated 31st May 2016 from Mr. Slump to Mr. McEnery which was copied to Mr. Jack O'Connor. The email is in relatively tentative terms:-

"As discussed this morning we would like to suggest the following:

We supply the following scope of supply:

- *6 x evaporator bundles, 2 x eco bundles (including PED / CE marking), this will be produced in The Netherlands*
- *Casing + internal insulation + Air preheater + external painting, this will be produced in Sereď (SK)*
- *We will ship the bundles from NL to SK to built these inside the casing*

The (time overrun) for us was the steam drum and the piping / tubing assembly / prefabrication.

We have send out the supply of this drum to special vessel manufacturing companies, hopefully they come with a better price than what we can do, you are free to use our drawing and to find a supplier in your network. As soon as we get the quotes in we will send these proposals to you.

Further we suggest to change the design for the steam piping from the bundles to the drum partly to tubing from Swagelock or Parker, this works much easier and saves hours, we however suggest that you will do it yourself or find a skid supplier who is used to work with this type of equipment.

Summerized we can do our scope of supply for 2 x steam set for +/- € 75.000,- per set for future identical repeat orders this price can go down to € 70.000,-, this price is ex works Sered (SK).

For the steam drum the material cost is € 2.828,- and for the piping / tubing € 870,-. We have spend 260 hours on the steam vessel, production of piping and assembly further some money is involved in Non Destructive Testing and third party cost of a NOBO. So lets estimate this will cost you +/- € 15.000,-

Please let us know if this will fit into your budget, if yes we can work out a proposal based on this.”

112. In my view, this plainly was not an offer to supply goods. It was a very preliminary indication of the price range at which the defendant would be able to supply the equipment described in the first three bullet points in the email. The last sentence in

the email makes it perfectly clear that this is in answer to a preliminary enquiry and that more work would require to be done if the price range was acceptable to the plaintiff.

113. Mr. McEnery replied to Mr. Slump's email on the same day. He thanked Mr. Slump for his email, asked him certain questions in relation to the prices quoted by Mr. Slump and also asked for a lead time for delivery. He further indicated that he hoped to place an order for two units. He said:-

"I hope to place the order on Friday for 2 units , will decide in the coming days which option to proceed with.

Thank you for your help with these options."

114. This was followed by an email from Mr. McEnery to Mr. Slump on 8th June 2016 enclosing a purchase order for two heat exchangers, one with a casing and insulation and one without. In the covering email, Mr. McEnery also asked Mr. Slump to give him the cost of delivery to Ireland. In the attached purchase order (PO 1298), the plaintiff placed an order for the two sets of heat exchangers, one at a price of €75,000 and the other (without the casing and insulation) at €51,500. The purchase order did not include delivery charges but stated that delivery was expected on 12th August 2016. It also stated: "*Credit Terms: 30 Days*".

115. In contrast to the contract in respect of Unit 14, there was no immediate response in writing from the defendant to the plaintiff's purchase order. Subsequently, on 2nd August 2016⁵⁴, Mr. Vico Adriaanse of the defendant wrote to Mr. McEnery This letter followed a similar form to the letter of 12th November 2015 in respect of Unit No. 14. The letter stated:-

⁵⁴ The copy of this letter in the book of core contractual documents is dated 9th May 2023. However, that appears to be the date on which the letter was printed for the purposes of inclusion in the book for use in court. It was confirmed in the witness statement of Mr. Slump that, in fact, this letter was sent on 2nd August 2016.

“We kindly thank you for the trust placed in Geurts International with your order with a.m. number for the FBC 002 Steam heat exchanger. We herewith confirm that we will handle your order for the supply of the heat exchanger, with our confirmation number

16-06-03

1 x Steam heat exchanger FCB002

6 evaporator bundles, 2 economiser bundles and air preheater

Installed in internally insulated casing Painted RAL 6018

Unit price € 75.000,--

1 x FBC002

6 evaporator bundles, 2 economiser bundles and air preheater

Excluding insulated casing

Unit price € 51.500,--

In accordance with our quotation 4-6265R2 from November 5 last with reference F9349 The steam heat exchanger will be manufactured and supplied in accordance with PED 97/23/EC including CE marking

Delivery conditions:

Order value : € 126.500,--(excluding VAT)

Delivery time: Week 33, 2016

Delivery : Ex works

*Payment : 30 % nett at order confirmation within 30 days after
date of invoice*

70 % nett at delivery within 30 days after date of our invoice

Conditions : On all orders the general terms and conditions for sale of Geurts International are applicable. A copy can be sent to you on request.

Purchasers terms and conditions are not applicable

Liability : Our liability is limited to manufacturing and materials defects on the equipment as supplied by us and is limited in value to the order value on this confirmation.

Whenever there are questions regarding this confirmation, please feel free to contact us."

116. This letter appears to have been sent relatively close in time to the date of delivery of the heat exchangers in question. It will be recalled that, in the purchase order, the plaintiff had inserted 12th August 2016 as the expected date of delivery of the exchangers. On 3rd August 2016, the defendant sent an email to Mr. McEnery who appears to have been in touch with the defendant about the delivery of the order. The email enclosed the first invoice seeking payment of €37,950 which equates to 30% of the total order value. This is consistent with the payment terms set out in the letter of 2nd August 2016 which also made clear that the balance was to be invoiced on delivery. As that letter also made clear, delivery was due in week 33, 2016, which, by my calculations ran from 15th August 2016 to 21st August 2016. Thus, notwithstanding the gap in time between the date of the purchase order in June 2016 and the letter of 2nd August 2016, the latter was sent in advance of delivery.

117. While the plaintiff has sought to argue that the purchase order of 8th June 2016 represents the terms of the contract between the parties, it seems to me, on the basis of the materials before the court, that it was no more than an offer to purchase. There is no evidence to suggest that, in advance of the purchase order, the plaintiff offered to sell the equipment described in the purchase order for the prices specified in that order. While there was a significant gap in time between the placing of the purchase order and the response on 2nd August 2016 from the defendant, the latter was sent in advance of delivery of the heat exchangers and clearly set out, for the first time, detailed terms for the supply of the heat exchangers. There is no evidence that that the plaintiff ever objected to those terms. In my view, the letter of 2nd August 2016 cannot be seen as an acceptance of the purchase order. It went much further than accepting the purchase order. It set out specific terms in relation to price, time for payment, and limitation of liability (to the value of the order). It also specifically stated that the general terms and conditions of the defendant were applicable. This was stated not only on the footer at bottom of both pages of the letter, but was also stated next to the heading “*Conditions*” on p. 2 of the letter of 2nd August 2016.

118. On the basis of the exchanges between the parties, I am of the view that the plaintiff’s email of 8th June 2016 enclosing the purchase orders was an offer to purchase the equipment described therein. However, the defendant’s letter of 2nd August 2016 cannot be said to constitute the acceptance of the plaintiff’s offer. It went further in its terms and, accordingly, constituted a counter-offer which was subsequently accepted by the plaintiff when it accepted delivery of the equipment without expressing any dissent from the terms set out in the defendant’s letter of 2nd August 2016.

119. However, for the reasons already discussed in respect of the November 2015 contract in respect of Unit 14, I am of the view that the failure of the defendant to supply

a copy of its general terms and conditions⁵⁵ means that those terms and conditions were not incorporated into the contract between the parties. Unlike in the case of terms and conditions in a known and recognised form (such as the ORGALIME terms) it was not sufficient to say that the defendant's (home-made/bespoke) terms were available on request. It follows that the terms governing this contract are those set out in the text of the defendant's letter of 2nd August 2016. That letter sets out all of the essential terms including the products to be supplied, the price, the payment terms, the delivery terms and it also includes a clause limiting the defendant's liability in a similar way to the letter of 12th November 2015 in respect of the first contract described above. The latter finding is entirely without prejudice to any pleading point that the plaintiff may wish to pursue at trial in respect of any failure by the defendant to rely on the limitation of liability provision set out in the letter of 2nd August 2016. As previously noted, the plaintiff maintains that the defendant has not sought to rely, in its defence and counterclaim, on the provisions of the letter of 2nd August 2016.

The contract in respect of Units 12, 16, 17, 18, 19 and 21 (PO 1662)

120. This contract has a value of €473,577.75. The relevant exchanges between the parties in respect of this contract follow a different pattern to those which took place in relation to Units 14 and 15. The relevant sequence of interactions between the parties commenced with the plaintiff's detailed specification document dated 23rd September 2016 described as a "*request for quotation*" in respect of heat exchangers for a poultry farm near Wolverhampton, England. This was in respect of units 16, 17 and 18. While not admissible evidence for the purposes of interpreting the exchanges between the parties, Mr. Donal O'Donnell (the operations director of the plaintiff) explained that

⁵⁵ It should be recalled that I have already held that the inclusion of the terms and conditions in the folder of materials left on the plaintiff's desk in March 2010 (without explanation or comment by Mr. Slump) at that time was not sufficient for this purpose.

the purpose of creating this document was to define the scope of any supply to be made to the plaintiff. It was not designed specifically to deal with transactions with the defendant. Mr. O'Donnell explained that, in a previous stage of his career, he had used a similar document in the course of business in the Middle East. He described it as a "*typical document*" in the industry and one which he introduced for the purposes of the plaintiff's business following his appointment by the plaintiff.

121. In his evidence, Mr. O'Donnell said that discussions had been ongoing for a number of months with the defendant in respect of the supply of heat exchangers to the plaintiff for the purposes of BHSL units to be installed in a number of farm locations in England and Scotland. Because the plaintiff's document dated 23rd September 2016 was not the final version of the request for quotation ("*RFQ*") sent by the plaintiff to the defendant, it is unnecessary to set out all its terms. It was subsequently refined in the later versions of the RFQ and in the combined purchase order later placed by the plaintiff with the defendant not only for the equipment the subject of this iteration of the RFQ but also for the equipment required for each of BHSL units 12, 16, 17, 18, 19 and 21.

122. At this point, it is sufficient to note a number of aspects of this iteration of the RFQ. Mr. O'Donnell confirmed that this was the first time the plaintiff had used such a document in its dealings with the defendant. The RFQ provided for payment terms with a downpayment of 25% on placing the purchase order, 50% when the equipment was ready for dispatch and 25% on delivery. It did not contain either a choice of law clause or a jurisdiction clause. It provided for a warranty for a minimum period of twelve months. This was in the following terms:-

“The contractor shall provide warranty of the material to be free from defects in materials or workmanship for a minimum of 12 months after signature by BHSL Client of BHSL Takeover Certificate.

Supplier replacement, repair, or labour associated with the rectification of defective components or equipment shall be included in the warranty.

Authorized manufacturers’ representatives must perform all warranty and service.”

123. Mr. O’Donnell accepted, under cross-examination, that the terms of this proposed warranty and guarantee had not been discussed with the defendant. However, as noted above, the first RFQ was supplanted by a subsequent RFQ (revision 3) dated 8th October 2016. Revision 3 of the RFQ followed the same pattern of the previous RFQ dated 23rd September 2016 save that the programme dates were somewhat later and clause 16 (dealing with the warranty/guarantee) provided for a 24-month period rather than a 12-month period.

124. There is nothing in the written exchanges between the parties to suggest that the defendant engaged with the detail of the terms proposed in the RFQ. Instead, the response of the defendant dated 10th October 2016 followed a very similar pattern to the letter of 5th November 2015 in respect of Unit 14. It set out a price for the equipment to be supplied. It had different payment terms to those set out in clause 21 of the RFQ. Instead of a 25% downpayment at purchase order, 50% on readiness for dispatch and 25% on delivery to site, the letter provided for 30% at “*order confirmation*”, 50% after inspection at the workshop and release note for transport and the remaining 20% after delivery. It stated in brief terms that the guarantee was for twelve months after start up “*max 18 months after delivery*”. Unlike the letter dated 5th November 2015 in respect Unit 14, there was no reference to the defendant’s terms and conditions and there was

no indication that liability was limited to the order value. However, the letter used the language of quotation. It concluded with the words:-

“We trust to have made you a suitable quotation. If you have any questions regarding this quotation, please feel free to contact us.”

125. Subsequently, on 14th October 2016, the plaintiff issued a further RFQ in respect of heat exchangers intended for use in a BHSL Unit to be installed at a farm at Stranraer in Scotland (Unit 16). This was in similar form to revision 3 of the RFQ for the units at the farm near Wolverhampton.

126. The next step in the exchanges between the parties was a purchase order dated 15th June 2016 (PO 1662) in respect of heat exchangers and related equipment at a price of €473,557.90. This was in similar form to those issued in respect of Units 14 and 15 and went no further than identifying the equipment to be supplied, the price, the expected delivery date and credit terms. However, it was followed by a much more detailed document described as a Purchase Order in respect of Units 16, 17 and 18 on 16th October 2016. This contained many of the terms contained in the RFQ. In addition, it stated in para. 26 that: *“The laws of Republic of Ireland will apply to this contract. This contract supersedes all previous agreements and is binding on both parties.”* The purchase order also repeated the previous payment terms proposed in the RFQ.

127. Subsequently, on 24th October 2016, Mr. O’Donnell emailed Mr. Slump asking whether an additional heat exchange box could be supplied to a location in the United Kingdom in January 2017 (this has been referred to as Unit 21). In response to this enquiry and in response to the RFQs described above, four letters were received from the defendant. Two are dated 31st October 2016 and two dated 1st November 2016. The letters dated 31st October 2016 are given a project number 6-7103R1 and 6-7148R0 respectively. The letters dated 1st November 2016 are both given a project number 6-

7143R2. They are described by Mr. O'Donnell in his witness statement as "*quotations*". They each follow a similar format to the letter of 5th November 2015 in respect of Unit 14 (described in para. 45 above). However, they say nothing about the defendant's terms and conditions other than they each refer to a guarantee described as "*12 months after startup max 18 months after delivery*". Each of the letters also ends with the same formula of words, trusting to have made the plaintiff a "*suitable quotation*" and indicating that, if the plaintiff has any questions regarding the "*quotation*", contact should be made with the defendant. In my view, for all of the reasons previously discussed in respect of the letter of 5th November 2015 (sent in the case of Unit 14), this language indicates that these letters fell short of offers to sell and should instead be regarded as invitations to treat. Moreover, even if it could be said that these letters constituted offers to sell the equipment described in them, the response of the defendant (as described in para. 128 below) was to place an order for purchase on different terms. It could not be considered to be an acceptance of the terms proposed in the letters of 31st October and 1st November 2016.

128. Following receipt of the letters of 31st October and 1st November 2016 from the defendant, the plaintiff submitted a combined purchase order (in similar format to the order dated 16th October 2016 described in para. 126 above) in respect of Units 12 and 16-21 albeit that it now addressed all of the units. It seems to me that this combined purchase order was plainly sent in substitution for the previous order which addressed a smaller number of units. This purchase order was sent under cover of an email from Mr. McEnery to Wietse Klinkenberg (the defendant's then commercial director) in which Mr. McEnery requested the defendant to revert in relation to early delivery. Mr. Klinkenberg responded on 3rd November 2016 to say that early delivery would not be

possible but that he would check with “*our fabrication*” to see if there was any prospect of doing so.

129. There are a number of features of the combined purchase order which should be noted:-

- (a) In the first place, the contract price is set out in clause 2. It refers to each of the four letters described in para. 127 above and it gives the relevant “*quote ref.*” of the defendant for each of them (namely 6-7103R1, 6-7134R2⁵⁶ and 6-7148R0);
- (b) Clause 3 deals with the scope of supply and makes clear that it includes the design of the heat exchanger and certain other equipment and that delivery is to be made to the plaintiff’s plant at Listowel, County Kerry, or to a site in the United Kingdom;
- (c) The specification for the equipment is identified in clause 4. Importantly, clause 4 again refers to the four letters described in para. 127 above, which it describes as “*Quotations*” and again gives the “*quote ref.*” for each of those four letters;
- (d) In clause 13, there is a reference for the first time to a “*performance guarantee*”. Clause 13 provides that all equipment supplied and installed would be “*fit for purpose*” and that the life of the equipment is “*20 years with proper maintenance*”. This did not appear in the RFQ. Under cross-examination, Mr. O’Donnell confirmed that, in advance of sending the purchase order, the performance guarantee had not been the subject of negotiation with the defendant but he maintained that such a

⁵⁶ Two of the quotations bear this reference.

guarantee would be normal in “*a specialist engineering supply like Guerts*”;

- (e) Similarly, clause 14 dealing with “*delays*” was not contained in any version of the RFQs and Mr. O’Donnell accepted that it had not been the subject of negotiation with the defendant but he, again, maintained that it would not be unusual for a penalty to apply in respect of late delivery in a “*special engineering supply*”. He also sought to make the point that the purchase order was, in any event, accepted by the defendant. For completeness, it should be noted that clause 14 stated:-

“Given the importance of this project and the associated deadline for completion and take over, a delay penalty of 2% per week will apply to the full contract value for any delays associated with the supplier failure to meet the timescales as outlined in this contract. The maximum penalty will be 10% of the total contract value.”;

- (f) Clause 18 dealing with erection and commissioning on site is also new. It was not in the RFQ and Mr. O’Donnell maintained, under cross-examination, that it had been inserted by mistake. It stated that the supplier has:-

“included for complete installation and commissioning of the ORC system including all pipework and accessories.”;

- (g) Similarly, clause 19 was not in the RFQ. It dealt with training but Mr. O’Donnell said, under cross-examination that it had been included by mistake and that training was not required. He also accepted that it had

not been the subject of negotiation with the defendant in advance of its inclusion in the purchase order. Clause 19 stated:-

“The supplier will train BHSL and Client staff in the operation and basic maintenance (daily/monthly checks) during the commissioning period on site.”;

- (h) Similarly, clause 20 was also new. It required the defendant to supply full details of the equipment supplied and maintenance requirements in both soft and hard copy. While not a significant term in itself, the fact that it is new is relevant;
- (i) There was an addition to clause 21 dealing with the warranty/guarantee. In addition to the terms of para. 16 of the RFQ (dealing with the 24-month warranty/guarantee), clause 21 states that the warranty will be provided by *“both Guerts parent company on company headed letterhead with authorised signatory”*. Mr. O’Donnell confirmed that this was never produced. He also accepted that it had not been the subject of negotiation with the defendant in advance of submission of the purchase order;
- (j) Clause 26 provided that:-

“The laws of Republic of Ireland will apply to this contract. This contract supersedes all previous agreements and is binding on both parties.”;
- (k) Clause 27 contained different payment terms to those set out in the RFQ. Clause 27 provided for a downpayment of 30% on signature of the purchase order, 50% following inspection at workshop and release note for transport and 20% on delivery to the plaintiff. These terms coincide

with the payment terms set out in the defendant's quotations of 31st October 2016 and 1st November 2016 and also in the subsequent order confirmations of 9th November 2016 discussed below. Mr. McEnery explained that he modified the payment terms in the purchase order relative to those which had been set out in the RFQ because the defendant had reverted, following the delivery of the RFQ, that it would only provide products on its own payment terms. Mr. McEnery suggested that no issue was raised by the defendant in the course of his discussions with them in relation to any of the other terms in the RFQ. However, Mr. McEnery confirmed, under cross-examination, that he was not in a position personally to confirm that any discussion had taken place with the defendant in respect of the terms of the purchase order other than the payment terms.

130. Four documents described as order confirmations were received by the plaintiff from the defendant in respect of the heat exchangers and related equipment which were the subject of the combined purchase order dated 1st November 2016. However, it should be noted that two of these order confirmations bear dates which predate the purchase order of 1st November 2016. This anomaly was not explained at the trial. In his witness statement, Mr. McEnery of the plaintiff said that he did not know why two of the order confirmations were dated 21st October 2016 and 26th October 2016 respectively. Two of them post-date the combined purchase order; one is dated 9th November 2016, the other is dated 10th November 2016.

131. In his witness statement, Mr. McEnery also drew attention to the difference in form of these order confirmations when compared to the letters of 12th November 2015 and 2nd August 2016 (in relation to Units 14 and 15 respectively). With some

justification, he said that the order confirmations were “*in a fundamentally different form to prior order confirmations*” received from the defendant. Each of these order confirmations follows a similar form. They are single-page documents. They contain much less detail than the order confirmations that were sent in respect of Unit 14 or Unit 15. The order confirmations in question comprise the following:-

- (a) Order confirmation 161002 (referring to quotation number 6-7103R1). This is dated 21st October 2016. It is headed in large lettering “*ORDER CONFIRMATION*”. Those words appear in much larger typescript than the rest of the print on the page. The total value of the order confirmation was €229,182.75. Consistent with the plaintiff’s purchase order, this was broken down into three instalments, the first instalment was for 30% for design and manufacturing, the second instalment was 50% due after inspection at a workshop and a release note for transport, and 20% due in the third instalment after delivery to the plaintiff’s assembly plant. At the bottom of the order confirmation, it was stated, in very small print:-

“All our agreements are subject to our general terms and conditions for sale.”
- (b) The second order confirmation is dated 26th October 2016 and is given an order number 161003. It is stated to relate to quotation number 6-7134R2. The total value is stated to be €107,445.00. In all other respects, it is in similar terms to the first order confirmation (albeit that it relates to different equipment);
- (c) The third order confirmation is dated 9th November 2016 and it is given an order number 161013. The total value is €109,250.00. Again, the

order confirmation is in very similar terms to the first order confirmation above;

- (d) The fourth order confirmation is dated 10th November 2016. It is given an order number 161014 and is in the sum of €27,680.00. Save to that extent, it follows the same form as the other order confirmations described above.

132. Notably, the defendant, in sending these order confirmations, said nothing about the detailed terms proposed by the plaintiff in its purchase order. No express indication was given that any of the proposed terms were unacceptable to the defendant. However, counsel for the defendant argued that the confirmations are inconsistent with the purchase order and that, for that reason, they constitute counter-offers which the plaintiff subsequently accepted by taking delivery of the equipment without objection to the terms of the counter-offers. In making that submission, counsel relied on the reference in the footer on each confirmation to the effect that all agreements “*are subject to our general terms and conditions for sale*”. I cannot accept that argument. It seems to me that there is a very significant difference between the exchanges between the parties in respect of Units 14 and 15, on the one hand, and Units 12 and 16-21, on the other. In the case of the former, the purchase orders issued by the plaintiff were in very bald terms. In contrast, the order confirmations issued by the defendants in response provided much more detail in respect of the terms and conditions on which the defendant was prepared to supply the equipment in question. In addition, the defendant expressly proposed for the first time a term limiting its liability. In those circumstances, the order confirmations could not be construed as accepting the bald terms of the plaintiff’s purchase orders. To any reasonable person in the position of the parties, the order confirmations were plainly proposing different and more expansive

terms. It is therefore entirely reasonable to conclude that the failure of the plaintiff to take issue with those terms and its subsequent acceptance of delivery of the equipment should be construed as an acceptance by the plaintiff of the terms proposed in the order confirmations.

133. In contrast, the reverse is the position in the case of the exchanges between the parties in respect of Units 12 and 16-21. There, all of the detail of the proposed terms of supply was provided by the plaintiff and it was the defendant who stayed silent in response. As outlined above, the plaintiff first provided the defendant with details of its proposed terms in its extensive RFQs. The evidence establishes that the only element of push back it received from the defendant was in respect of the payment terms. It is true that there is no evidence that there was any negotiation in respect of any of the remaining terms proposed by the plaintiff in its RFQs. Likewise, there is no evidence that there was any negotiation between the parties in respect of the additional terms included in the plaintiff's purchase order over and above those signalled in the RFQs. But, the key point is that the terms in the purchase order were furnished to the defendant and the defendant therefore had the opportunity to consider them before proceeding to supply the equipment and, in the event that it had any difficulty with any aspect of them, to raise that difficulty with the plaintiff and to propose different terms.

134. I appreciate that the defendant maintains that, in response to the purchase order, it did, in fact, propose its own terms as set out in the footer at the bottom of each of the four single page order confirmations. However, I do not believe that reasonable people in the position of the parties would regard this generic reference in small print on what appears to be a standard form document prominently described as an "*ORDER CONFIRMATION*" as a sufficient indication that the defendant was seeking to reject the terms proposed in such detail by the plaintiff. The more obvious and reasonable

impression created by the confirmations is that the defendant was confirming its acceptance of the order made by the plaintiff. If the defendant had a difficulty with the detailed terms of the purchase order, one would expect that this message would be conveyed very clearly. It would have been a very simple matter for the defendant to revert to the plaintiff to say in clear terms that the terms proposed in the purchase order (or indeed those previously proposed in the RFQs) were unacceptable and were rejected. This could have been done in a covering letter or in an email or it could have been said orally. It is striking that the defendant came back to the plaintiff to express disagreement in respect of the payment terms originally proposed by the plaintiff. There was no reason why it could not have done the same in respect of the remaining terms proposed by the plaintiff. The very fact that it expressly reverted in respect of the plaintiff's proposal in respect of payment terms – but did not do so in respect of other terms – makes it all the more plausible that a reasonable person in the position of the plaintiff would be led to believe that the vendor did not have a difficulty with the other terms proposed by the plaintiff. I am of the view that a reasonable person in the position of the parties would expect that, if the defendant had a difficulty with those terms, it would have reverted to expressly contest their applicability and to alert the plaintiff to that fact. That message does not seem to me to have been sufficiently conveyed by the footer in small print at the base of a document which was expressly described by the defendant as an "*ORDER CONFIRMATION*". Moreover, the footer appears to be part of the background text of the confirmations next to the obviously pre-printed detail of the defendant's address, telephone and fax numbers, email address and banker's details. This is in contrast to the inserted text in the body of the confirmations describing the equipment to be supplied and the payment terms. The background text does not convey the impression that it is a significant element of the response to the specific purchase

order proposed by the plaintiff. Furthermore, the terms and conditions were not attached to the order confirmations. Had they been attached, there might be a plausible basis to conclude that this would have been sufficient to convey to a reasonable purchaser that these were the terms proposed by the vendor and that they differed from those proposed by the purchaser. But, notably, they were not attached.

135. The defendant has also made the case that the terms proposed by the plaintiff were not the subject of negotiation in advance of the transmission of the purchase order. In light of the fact that there is no evidence that there was any negotiation in respect of the defendant's terms and conditions, that is a surprising argument for the defendant to advance and, in any event, it does not affect the position. Crucially, the plaintiff expressly brought its proposed terms to the attention of the defendant by including them in its purchase order. That is no different to the approach taken by the defendant itself in its letters of 12th November 2015 and 2nd August 2016 in respect of Units 14 and 15.⁵⁷ Just as it was for the plaintiff to revert to those letters in the event that it was unhappy to accept those terms, it behoved the defendant to do likewise if it had a difficulty with the terms set out so clearly and unambiguously in the plaintiff's purchase orders (and the RFQs which preceded them) in respect of Units 12 and 16-21. In this context, I have not overlooked the fact that, as Mr. O'Donnell conceded under cross-examination, some of the terms included in the purchase order were inserted by mistake. That does not seem to me to alter the position. The terms in question are plainly not essential to the operation of a contract of this kind and there is no reason to suppose that

⁵⁷ This is so at least in respect of the terms expressly set out in the text of those letters. For the reasons previously discussed, I have concluded that the defendant's general terms and conditions were not incorporated. Unlike the approach taken by the plaintiff in respect of Units 12 and 16-21, the defendant did not supply its general terms and conditions to the plaintiff at the time of negotiation of the contracts in respect of Units 14 and 15.

the contract would not operate entirely successfully on the basis of the remaining terms set out in the purchase order.

136. For all of the reasons outlined above, I reject the argument made by the defendant that its order confirmations constitute counter-offers. In my view, the order confirmations would be construed by a reasonable purchaser as a confirmation of the order placed by the plaintiff in its detailed purchase order. It follows that the contract in respect of Units 12 and 16-21 is governed by the plaintiff's terms and conditions as set out in the combined purchase order dated 1st November 2016.

Contract in respect of the supply of various items at a cost of €136,555 (PO 2130)

137. The relevant documents that exist in relation to this contract commence with the defendant's letter dated 1st November 2016 addressed to the plaintiff for the attention of Mr. Donal O'Donnell. The letter follows the same format as the letter of 5th November 2016 (discussed in paras. 45 to 49 above) but there is no reference to the defendant's terms and conditions. There is nothing to indicate that there is any limitation on liability. There is a reference to a "*guarantee*" which is in similar terms to some of the later correspondence, namely "*12 months after start up max 18 months after delivery*". Like the letter of 5th November 2015, it provides a detailed description of the equipment and it also contains details in relation to commercial terms and conditions including price, delivery time, payment terms and validity. In common with the letter of 5th November 2015, it uses the language of quotation in that the second sentence of the letter opens with the words "*We herewith quote to you...*" and it concludes in a similar way: "*We trust to have made you a suitable quotation. If you have any questions regarding this quotation, please feel free to contact us.*"

138. On 24th January 2017, Mr. Michael McEnery emailed the defendant with a purchase order for the equipment in question. The purchase order made no reference to

the plaintiff's terms and conditions (such as those contained in the RFQs discussed above or in the detailed purchase order dated 1st November 2016 in respect of Units 12 and 16-21. The purchase order simply identified the equipment in question together with the price. It gave the purchase order number PO 2130 and identified 17th April 2017 as the date of expected delivery. It said nothing about payment terms. The total price stated in the purchase order is €136,550.00.

139. On behalf of the defendant, Wietse Klinkenberg replied to Mr. McEnery by email dated 26th January 2017 thanking him for the purchase order and stating that: "*We will proceed into work preparation and fabrication of those deliveries.*" According to Mr. McEnery, he has no recollection of ever receiving an order confirmation from the defendant. He was closely cross-examined in relation to this issue and he confirmed on Day 1⁵⁸ that this was based upon the fact that, following a search undertaken by him in 2019, he could not find any order confirmation. However, there is an order confirmation in the book of contractual documents before the court. The order confirmation is dated 25th January 2017 and is in somewhat similar terms to those which were issued in respect of Units 12 and 16 - 21. It identifies the equipment in question in relatively brief terms. It also identifies the payment terms being 30% (€40,966.50) due "*1st term*", 50% (€68,277.50) due "*2nd term*" and 20% (€27,311.00) due "*3rd term*". In a similar way to those that were issued in respect of Units 12 and 16-21, the order confirmation also states in small print at the bottom: "*All our agreements are subject to our general terms and conditions for sale.*"

140. Subsequently, three invoices were issued by the defendant, the first being for €40,966.50 on 31st January 2017 which was stated to be 30% due upon acceptance of the order confirmation; the second was for €68,277.50 which was issued on 3rd April

⁵⁸ See p. 164 of the Transcript.

2017 and which stated that it was for the second instalment of 50% which was said to be due after inspection at workshop and release for transport; and the third invoice was for €30,789.00 which issued on 6th April 2017 and was stated to be the last instalment of 20% due after delivery to the plaintiff's assembly plant.

141. It is clear that a more casual approach was taken by the parties in relation to the paperwork for this contract than that taken in respect of the previous contracts. While the plaintiff's witnesses sought to suggest that they proceeded on the basis that the detailed terms set out in the plaintiff's purchase order of 1st November 2016⁵⁹ would also apply to this contract, there is no evidence that anyone on the plaintiff's side ever signalled this to the defendant. In the circumstances, the terms of that purchase order do not apply. That purchase order was very specifically put forward for the purposes of Units 12 and 16-21.

142. It is equally the case that the defendant's general terms and conditions do not apply. There is no evidence of any attempt by the defendant to suggest to the plaintiff that they should apply other than in the order confirmation. However, there is no evidence that the order confirmation was ever sent to the plaintiff. Even if it had been sent, that would not, in my view, be sufficient to incorporate those terms into this contract. I have already explained the basis for this view in relation to the contract in respect of Unit 14 (PO 1094) and it is unnecessary to repeat that here.

143. What then are the terms and conditions that apply? In my view, the letter of 1st November 2016 would ordinarily be treated as no more than a quotation. It is expressly couched in the language of a quotation. However, it is important to keep in mind that it does set out detailed terms of the kind described in para. 137 above, including a detailed description of the equipment to be supplied and clear terms as to price, delivery time

⁵⁹ i.e. the purchase order discussed above in respect of Units 12 and 16-21.

and time for payment. Importantly, the purchase order sent by the plaintiff expressed no disagreement with the terms expressed in the quotation. While there is no evidence that a confirmation order was subsequently sent by the defendant, there is no dispute that the equipment was delivered by the defendant. It therefore seems to me that, even if there never was an order confirmation, the defendant plainly accepted the order by delivering the equipment ordered and the contract was concluded, at the latest, when delivery took place. While neither the order nor the delivery specifically referred back to the quotation of 1st November 2016, I believe that, considering the exchanges as a whole, reasonable business people in the position of the parties would clearly regard the purchase order as having been placed on the terms of the quotation. Unlike Unit 14⁶⁰, there was no inconsistent document issued by either party that suggested that either of them had any difficulty with the commercial terms proposed in the quotation. I accordingly conclude that this particular contract was concluded on the terms proposed in the quotation which, in my view, proposed all of the essential terms of a contract of this kind, namely a description of the goods to be supplied, the price, delivery time and payment terms⁶¹. By subsequently making an offer – in response to that quotation – to purchase that equipment without dissenting from those proposed terms, the plaintiff should be regarded as having agreed to them.

Contract for heat exchanger spare bundles (PO 2350)

144. This contract was for equipment with a total price of €107,370.00. The relevant exchanges between the parties commence with the defendant’s letters of 21st and 28th February 2017. Each of these letters is headed “*Quotation spare bundles*”. Each of them details the equipment in question and sets out commercial terms and conditions.

⁶⁰ It should be recalled that, in the case of Unit 14, the order confirmation of 12th November 2015 was inconsistent in a number of respects with the earlier quotation.

⁶¹ That is not to exclude the possibility that there may be additional terms implied by law but that is not an issue which the Court has been asked to address at this stage.

Other than the terms and conditions expressly set out in the letters, there is no reference to the defendant's general terms and conditions. In the letter of 21st February 2017, the commercial terms and conditions are set out as follows:-

"1. COMMERCIAL TERMS AND CONDITIONS

FIRM PRICE

<i>FBC750 Hot water bundle SS309</i>	<i>EURO 5.420,-/unit</i>
<i>FBC1200 Hot water bundle SS 309</i>	<i>EURO 7.055,-/unit</i>
<i>FBC1400 Steam bundle SS 309</i>	<i>EURO 7.125,-/unit</i>
<i>FBC1400 Eco bundle SS 316</i>	<i>EURO 6.531,-/unit</i>
<i>FBC995 KW Hot water bundle SS309</i>	<i>EURO 7.500,-/unit</i>

Firm Price

*Prices is firm, at undivided order, delivered ex works Sered SK, exclusive VAT.
Price includes third party inspection by Lloyds according to PED (design Rtod).
For a delivery DAP, P/a Kerry Mechanical Engineering in Kilmeaney freight costs will be invoiced on actual base, estimated € 3.800 total.*

Delivery time

We can deliver all mentioned items within 6-7 weeks after receipt of written order. In case

Payment terms

30 % at order confirmation

50 % after inspection at the workshop and release note for transport

20 % after delivery

All payments within 30 days after receipt of our invoice

Validity valid until February 28,2017

Guarantee 12 months after start up max 18 months after delivery.

We trust to have made you a suitable quotation. If you have any questions regarding this quotation, please feel free to contact us.”

145. The letter of 28th February 2017 followed the same pattern. The section dealing with commercial terms and conditions was identical to that set out in the letter of 21st February 2017, save that there were some differences in pricing and the validity period was slightly different, namely 8th March 2017.

146. In response to these letters, the plaintiff issued a purchase order dated 28th February 2017 (PO 2350). The purchase order was a one-page document which simply listed the equipment ordered and the prices and also the expected delivery date, namely 10th April 2017. It also gave a delivery address in England and stated that credit terms were 30 days. There was no equivalent to the RFQ of the kind discussed above. Nor was there any detailed purchase order such as that used in the case of Units 12 and 16-21. The defendant issued a one page order confirmation in similar terms to that issued in response to PO 2130. Mr. McEnery gave evidence that he could not recall receipt of this order confirmation. However, in the course of her evidence, Ms. Posthumus-Meyjes (a sales engineer employed by the defendant) confirmed that she had emailed it to the plaintiff. In light of that positive evidence by Ms. Posthumus-Meyjes, I believe

that it is probable that the order confirmation was emailed to the plaintiff. The order confirmation simply lists the equipment to be supplied and the price. It also sets out the payment terms (which are consistent with those proposed in the letters of 21st and 28th February 2017). It also specifies that the delivery method is “*Ex Works*” and, at the foot of both pages of the order confirmation, there is a similar statement (in small print): “*All our agreements are subject to our general terms and conditions for sale*”.

147. In my view, there is a very clear parallel between the circumstances pertaining to this order as those which I have previously considered in respect of PO 2130. It seems to me that precisely the same analysis applies. Thus, applying the same rationale, I find that the terms and conditions governing this contract are those which are set out expressly in the letters of 21st and 28th February 2017.

Contract for various items to the value of €42,505 (PO 2652)

148. This contract is unusual in that there is no letter from the defendant providing a quotation in advance. Nor is there any order confirmation from the defendant. In the course of her evidence, Ms. Posthumus-Meyjes said that the defendant was unable to identify that an order confirmation had actually been sent to the plaintiff in respect of its purchase order. There is, however, a purchase order issued by the plaintiff.

149. The purchase order dated 19th April 2017 sent by the plaintiff to the defendant is in a short form. It comprises no more than one page. It identifies the equipment, the price and the expected delivery, namely 21st May 2017. It also states that credit terms are 30 days. Counsel for the plaintiff submitted that the purchase order contains all of the essential terms of the contract.

150. The only subsequent document which issued from the defendant in relation to this contract was the invoice dated 31st May 2015 for €44,502.00, the difference of €1,997.00 being the cost of transport. The cost shown for the equipment was the same

as that in the purchase order. Counsel for the defendant, in his closing submissions, properly accepted that this contract is governed by the basic terms set out in the purchase order together with any terms which might be implied by law.⁶² I agree. There is nothing else before the Court to suggest that the parties went any further in respect of this particular contract. I therefore confirm that this contract comprises the offer made in the purchase order and the defendant's acceptance of that offer signified by its delivery of the equipment identified in the purchase order. The contract is governed by the terms of the purchase order and any additional terms that may be implied by law.

Contract for various items to the value of €48,020 (PO 2653)

151. The circumstances in relation to this contract are virtually identical to those that arise in relation to PO 2652. There is no quotation from the defendant in advance. Nor is there any order confirmation. The only documents which were put before the court were the purchase order of the defendant dated 19th April 2017. It identifies the equipment to be supplied and the price. It also identifies an expected delivery date of 28th May 2017 and a place of delivery in Staffordshire in England. The defendant subsequently issued an invoice on 31st May 2017 in the amount of €49,205.00, the difference being the cost of delivery at €1,185.00. Counsel for the defendant accepted that the terms of this contract are as set out in the purchase order. He submitted that the purchase order constituted an offer to purchase which was accepted by the defendant by means of delivering the equipment.

152. It is unnecessary to spend time on this contract. The circumstances are the same as those which apply in respect of PO 2652 and I reach an identical finding in relation to it. The contract is governed by the express terms set out in the purchase order and any additional terms that may be implied by law.

⁶² See Day 5 at pp. 73-74.

Contract for various items for a total price of €77,170 (PO 2846)

153. The relevant exchanges between the parties in relation to this contract commence with a letter dated 5th May 2017 from Ms. Posthumus-Meyjes of the defendant to Mr. Donal O'Donnell of the plaintiff. The heading of the letter indicates that it is in respect of air pre-heaters for 750kW units. It also gives a project number 97220160. The letter then commences in the following terms:-

“Dear Mr. O'Donnell,

In this document we provide the proposed design and price for the Air Preheaters heaters (APH). They will be installed after the current water bundles and before the current bag filters. The proposed design is based on the 1200 kW steam unit APH installed in Uphouse. The new APH's are for the 750kW Baxter and Williams unit and the 1200 kW Seisdon unit. The available dimensions for the APH's and the 20 mm spacing between the tubes were specified by BHSL. It is required that the APH's cool the flue gas to 150/160 °C. Geurts checked the cooling capacity of the specified APH. The future inlet flue gas temperature is estimated for when these units operate at full capacity. The operation scenario was considered with the primary air flow through the new APH unchanged from the current installed APH's in the units.

The heat transfer calculations as given in the process conditions, were done with HTRI software. The calculations were done for a 90° cross flow of flue gas and air without taking into consideration the heat transfer in the u-tube. A baffle plate is going to be installed between the two legs of the u-tube, resulting in cross flow over first set of u-tube legs, counter current flow in u-bend and counter current flow in half of the second u-tube leg. From the current operation

of the APH installed like this in Uphouse, it seems that the APH is much more efficient with this set-up and the flue gas temperature will be lower than the temperature calculated.”

154. The letter then contained a detailed specification of the units. This runs over two and a half pages. The scope of supply is then addressed on a separate page. The letter concludes on p. 5 with commercial terms and conditions as follows:-

“COMMERCIAL TERMS AND CONDITIONS

FIRM PRICE

<i>Price APH 750 kW</i>	<i>EURO</i>	<i>8,930.-- /unit</i>
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*(4 units. One for Baxter, one for Williams
and two for Kantoher)*

<i>Price APH 1200 kW</i>	<i>EURO</i>	<i>9,600.-- [unit</i>
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(3 units for Seisdon)

<i>Price APH 1400 kW</i>	<i>EURO</i>	<i>11,500.-- [unit</i>
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(1 unit for Pillaton)

<u><i>Total</i></u>	<u><i>EURO</i></u>	<u><i>76,020.-- [unit</i></u>
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<i>Total with Discount</i>	<i>EURO</i>	<i>70,250. --/unit</i>
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Prices *are firm basis delivered ex works 'Sered (SK), undivided order, and exclusive VAT.*

Delivery time *to be confirmed at order date.*

Payment *25 % at order confirmation, and first issue of engineering package*

50 % after main materials in the shop

25 % at delivery

All payments within 30 days after receipt of our invoice

Validity *valid for 2 weeks after date of quotation*

General conditions *all our agreements are subject to our general conditions for sale*

We trust our quotation meets your expectations.”⁶³

155. In my view, for the same reasons as I have previously sought to explain in the context of the contract for Unit 14, the defendant’s letter of 5th May 2017 should be construed as an invitation to treat rather than as an offer. Even if that were not so, its terms were never accepted by the plaintiff. Instead, the plaintiff made a proposal on different terms as outlined in the purchase order described below. There was no RFQ from the plaintiff in relation to this transaction but there was a detailed purchase order. Having identified the contracting parties in clause 1 of the purchase order, clause 2 deals with contract price. The price is not the same as that given in the defendant’s letter dated 5th May 2017 which suggests that there must have been some interaction between

⁶³ Bold in original.

the parties in the period between the letter of 5th May 2017 and the date when this purchase order issued on 29th May 2017. The total price given is €77,170. It then goes on, in clause 3, to provide different details about the scope of supply to those which are set out on p. 4 of the defendant's letter of 5th May 2017. However, the specification in clause 4 expressly links back to the "quotations" provided by the defendant. There are also provisions in relation to codes and standards, insurance, health and safety. Paragraph 13 contains a performance guarantee in similar form to the purchase order discussed in para. 129 above. Clause 14 is also in similar terms insofar as liability for delay is concerned. In addition, the terms of the warranty/guarantee in clause 21 are similar to the purchase order discussed in para. 129(i) above.

156. The purchase order also contains, in clause 24, a detailed programme or schedule and expressly provides that the defendant must meet that schedule in terms of the dates for delivery of the equipment. Clause 26 specifies that the laws of the Republic of Ireland apply to the contract and that the contract supersedes all previous agreements. Clause 27 provides that the purchase order is based on the plaintiff's terms and conditions only. In the same clause, the payment terms are also different to those set out in the letter of 5th May 2017 from the defendant. The relevant breakdown of the payment terms are as follows:-

<i>"Down Payment at PO signature</i>	<i>25%</i>
<i>Inspection at workshop and release note for transport</i>	<i>25%</i>
<i>Delivery to Site</i>	<i>25%</i>
<i>On commissioning and design criteria met</i>	<i>25%</i>
<i>Total</i>	<i>100%</i>

157. Under cross-examination, Mr. McEnery agreed that the detailed provisions proposed in the purchase order had not been negotiated between the parties. That is

certainly true. However, the same can equally be said of the terms of some of the order confirmations received from the defendant including the order confirmation of 12th November 2015. I have already addressed a similar argument in para. 135 above, so it is unnecessary to repeat those observations here.

158. A two-page order confirmation was subsequently issued by the defendant. Although this is dated 29th May 2017, Mr. McEnery stated in para. 58 of his witness statement that it was received by the plaintiff on 8th June 2017. Like the purchase order, the order confirmation, again, identified the equipment in issue and the price of €77,170.00. It follows an identical format to the single page order confirmations addressed earlier. The only reason the document extends to two pages on this occasion is that description of the equipment (and pricing) extends over more than one page. Both pages of the order confirmation had a footer which gave the contact details of the defendant, its registration and VAT numbers and bank IBAN and BIC and also bore the words in small print: *“All our agreements are subject to our general terms and conditions for sale”*. However, although this formula of words was set out in a footer on both pages, the order confirmation also stated just above the description of the equipment:-

“We hereby confirm receipt of your purchase order 2846 for engineering, production and delivery of 8 air preheaters and 1 evaporator water/steam bundle.”

159. In addition, in contrast to the terms of the letter of 5th May 2017, the payment terms proposed were as follows:-

“Payment terms:

- 25% at order confirmation

- 25% on receipt of materials at workshop

- 25% after inspection at workshop and release note for transport

- 25% after delivery on site”

160. Those payment terms were not identical either to the letter of 5th May 2017 or to the purchase order, albeit that both the order confirmation and the purchase order envisaged the price being paid in four intervals each at a rate of 25% of the total sale price. One puzzling feature of the payment terms proposed in the order confirmation is that Mr. McEnery stated in para. 55 of his witness statement that the payment terms proposed in the purchase order had been the subject of discussion with the defendant. One would therefore suppose that the payment terms in the order confirmation would match those in the purchase order. The problem for the plaintiff is that they do not match and no one has explained how the discrepancy between the two documents arose.

161. The defendant argues that, because the order confirmation contained new terms (namely the reference to all agreements being subject to the defendant’s terms and conditions and different terms in relation to payment), it represents a counter-offer and cannot be considered to be an acceptance of the purchase order. Counsel for the defendant also submitted that the purchase order could not conceivably be considered to be an acceptance of the quotation of 5th May 2017 since it introduces a significant number of new terms. He submitted that the order confirmation, being a counter-offer, was accepted by the plaintiff by accepting delivery of the goods without any expression of dissent in respect of the terms of the order confirmation.

162. On the other hand, the order confirmation in this case raised no specific objection to any of the terms set out in the purchase order submitted by the plaintiff. On the contrary, the opening words of the order confirmation (quoted in para. 158 above) expressly confirm receipt of the purchase order without any expression of dissent from

its terms. It is remarkable that a vendor would respond in that way if it was not prepared to accept the terms of the purchase order.

163. Ms. Posthumus-Meyjes was cross-examined about the receipt of this purchase order and also a subsequent purchase order PO 2847 (discussed below). While her subjective intention is not relevant for present purposes, her evidence in this regard is revealing since it demonstrates that the defendant had fully considered the terms of the purchase order and yet did not dispute it. Ms. Posthumus-Meyjes accepted that she read the terms and conditions proposed in the purchase order. She said that she spoke to a colleague about it but the colleague told her not to worry about it in circumstances where the defendant's terms and conditions would apply. The relevant exchange between counsel for the plaintiff and Ms. Posthumus-Meyjes was as follows:-

“Q. Well, can we just take that in a couple of steps. In your evidence to Mr. McCullough in respect to PO 2846, you agreed that this document, certainly that 2846 set out terms and conditions. I mean these are terms and conditions, do you dispute that?”

A. ...But I did receive this document, I went through this document, and if you see these terms and conditions then, yes, I did saw it, I did read it, and I did mention it to a colleague, and the colleague said that it doesn't matter because our general terms and conditions apply.

Q. And who was that colleague?”

A. I am unsure because -- yeah, I am unsure exactly because it was verbally, it was not on e-mail so I can't pinpoint the name. It's not written down.

Q. Very good. So clearly when you received this document, are we talking about specifically document PO 2847 or...

A. *Yes.*

Q. *We are speaking specifically of 2847?*

A. *2847 and 6 because it is really very specific in what they wanted in terms of what you call their terms and conditions, it was very specific. And of course I have only started with the company so I did ask someone, it would be really negligent not to ask it why and they said that Guerts' general terms and conditions always apply.*

Q. *And you say it would have been negligent not to mention to someone?*

A. *Yeah.*

Q. *And why do you think it would have been negligent not to mention it to someone?*

A. *Because I didn't have experience in commercial law and commercial issues, so I have just started in 2017. So if I saw something, I would go and ask.*

Q. *And when you say something, what was it particularly about this document that caused that concern?*

A. *It was the Irish law specifically, and because -- yeah.*

Q. *Why did the Irish law cause you difficulty?*

A. *Because I knew that we had Dutch law that makes it more complicated if it's in a different country.*

Q. *I think if -- I don't necessarily want to take you back to it again but you have described as of 2017, you'd a degree of familiarity with the Guerts terms and conditions. I think I took you to the choice of law clause in the Guerts terms and conditions?*

A. *Yeah, the Netherlands."*

164. Were it not for the fact that the payment terms in the order confirmation are framed in somewhat different terms to those in the purchase order, I believe that a similar conclusion should be reached here as I have previously reached in relation to the effect of the exchanges between the parties in respect of Units 12 and 16-21. I have already sought to explain that conclusion in paras. 132 to 136 above and it is therefore unnecessary to repeat the analysis here. If there were no difference in the payment terms, there would be even a stronger basis for reaching the view that this contract was concluded on the terms of the plaintiff's purchase order. The opening words of the text of the order confirmation strongly suggest that the defendant was not taking issue with the terms of the purchase order. However, the fact that there is a difference in the payment terms as between the purchase order and the order confirmation means that the circumstances pertaining to this contract are not on all fours with that relating to Units 12 and 16-21. In the case of this contract, the order confirmation cannot be said to constitute an acceptance of the purchase order. As a matter of law, it constitutes a counter-offer. In circumstances where the equipment (or some of it)⁶⁴ was subsequently accepted by the plaintiff without dissent from the terms of the counter-offer, that acceptance of delivery constitutes acceptance of the counter-offer recorded in the order confirmation and completes the contract. But, for all of the reasons already discussed in respect of the contract for Unit 14, I hold that the references in the order confirmation to the defendant's general terms and conditions for sale are insufficient to incorporate those terms into the contract between the parties. This means that the terms of the contract are governed solely by the terms of the order confirmation which sets out the basic terms required for a sale of goods namely an identification of the parties and the

⁶⁴ According to Mr. McEnery, not all of the equipment was delivered but it is clear that some of it was. Thus, the fact that such delivery was accepted without contesting the terms of the counter-offer appears to me to constitute acceptance of the counter-offer.

goods to be sold, the price and the payment terms. The order confirmation does not identify a date for delivery but that is something that can be implied by law. It is not a prerequisite to the formation of a contract for the sale of goods that a delivery date be specified. At this point, the Court has not been asked to address what terms should be implied into the contract between the parties so it would be premature to make any findings of that kind. It is sufficient to find that the contract was made on the terms of the order confirmation and any additional terms that may be implied by law.

Contract for €41,800 for various items of equipment (PO 2847)

165. This follows a very similar pattern to PO 2846 (discussed above). The first written communication between the parties was a letter dated 29th May 2017 from Ms. Posthumus-Meyjes of the defendant to Mr. Donal O'Donnell of the plaintiff. The letter commenced in the following terms:-

“Subject: 300 kW Containerised Unit. RFQ 001

Dear Mr. O'Donnell,

We refer to your request for quotation for the design of a horizontal FBC250 heated water unit with 4 bundles operating in parallel. We herewith quote to you 4 bundles for flue gas / water and one combustion APH (inclusive casing but exclusive insulation) as a separate item. The design is based on a previous 250 kW project with number 11-12-20-04”

166. The letter then contains a detailed description of the equipment and the scope of supply and concludes with the following details in relation to commercial terms and conditions:-

“COMMERCIAL TERMS AND CONDITIONS

Firm Price

<i>Price FBC250 bundles</i>	EURO	19,500.-- / unit
<i>Price Air preheater</i>	EURO	10,800.-- / unit
<i>Price carbon steel casing with refractory</i>	EURO	13,700.--I unit
<i>Price delivery to Birdgnorth Shropshire UK</i>	EURO	1,100.--I unit
<u>Total Price</u>	EURO	45,100.--I unit
Total Price with Discount	EURO	41, 800.--/ unit

Price is firm delivered DAP, exclusive VAT.

Delivery time

Delivery for casing with refractory is 6 weeks after approval of drawing.

Delivery for APH is 6 weeks after approval of drawing.

Delivery for bundles is 8 weeks after approval of drawing.

Payment terms

25 % at order confirmation

50 % at readiness for dispatch

25 % at delivery

All payments within 30 days after receipt of our invoice

Validity *valid for 2 weeks after date*

Guarantee *12 months after start up max 1 8 months after delivery.*

*We trust to have made you a suitable quotation. If you have any questions regarding this quotation, please feel free to contact us.*⁶⁵

167. I take the same view of the contractual status of this letter as I did in respect of the equivalent letter in relation to PO 2846. The plaintiff issued its purchase order on 29th May 2017. The purchase order follows the same format as that in respect of PO 2846. It also contains similar terms dealing with delay, the warranty/guarantee, the performance guarantee, applicable law and payment terms. In particular, it provided for payment by four instalments payable at the same stages as those proposed in the case of PO 2846.

168. The relevant order confirmation was issued by the defendant on 30th May 2017 and it provided for delivery on 17th July 2017. The price of €41,800 coincided with the purchase order and the opening words of the order confirmation were in similar terms to those in respect of PO 2846, i.e. confirming receipt of the order. Furthermore, the confirmation also contained the same footer stating that all agreements were subject to the defendant's terms and conditions. Again, the description of the stages at which each of the four part payments of the purchase price were to be made differed from those specified in the purchase order. Counsel for the defendant argued that, because this contradicted the terms of the purchase order (insofar as it provides for the application of the defendant's terms and conditions), it must be treated as a counter-offer.

169. Given that there is no difference in substance between the documents and circumstances pertaining to this contract and those relating to PO 2846, I reach the same conclusion in relation to it. For precisely the same reasons, I conclude that this contract does not incorporate the defendant's general terms and conditions but is otherwise

⁶⁵ Bold in original.

governed by the terms expressly set out in the order confirmation and any terms that may be implied by law.

The position under the law of the Netherlands

170. As identified in para. 5(e) above, I am asked to consider whether, if the defendant's terms and conditions apply to any of the contracts between the parties, any of those terms are disapplied under the law of the Netherlands. In light of my findings that the defendant's general terms and conditions do not apply to any of the contracts in issue, it is, strictly speaking, unnecessary to address the issue. I nonetheless propose to consider it for completeness.

171. This question arises by virtue the approach taken under the Dutch Civil Code which recognises that certain onerous conditions of contracts can be disapplied in certain very limited circumstances. In this context, the Dutch law experts, called on both sides, cited the provisions of Article 6.248 of the Dutch Civil Law Code (*"the Dutch Code"*) in their respective expert reports. Article 6.248 provides as follows:-

- "1. An agreement not only has the legal effects which parties have agreed upon, but also those which, to the nature of the agreement, arise from law, usage (common practice) or the standards of reasonableness and fairness.*
- 2. A rule, to be observed by parties as a result of their agreement, is not applicable insofar as this would, given the circumstances, be unacceptable to standards of reasonableness and fairness."*⁶⁶

172. The expert witnesses as to Dutch law were both very experienced and expert lawyers. Mr. Maarten Vink gave evidence on behalf of the plaintiff and Mr. Jan

⁶⁶ The defendant's Dutch law expert had also referred to Article 6.23(2) but he agreed on Day 4 that this did not apply to the contracts in issue.

Spanjaard gave evidence on behalf of the defendant. While there was a considerable measure of agreement between them in relation to the applicable principles there was, nonetheless, some difference in emphasis between the expert witnesses in relation to how the Dutch law principles are applied in practice and as to the effect of a number of decisions of the Courts of the Netherlands. In the course of their evidence, questions were asked of both witnesses by reference to a very useful text on Dutch contract law by R.J. Tjittes “*Commercial Contract Law*” (2022) (“*Tjittes*”) which both experts agreed was a well-known and well-respected textbook among lawyers practising in the Netherlands in this area.

173. In the course of her closing submissions, counsel for the defendant, very helpfully, identified a number of principles that emerge from *Tjittes* and from the evidence of the experts as follows:-

- (a) While it is the case that an exemption clause may be disapplied by a court where it would be unacceptable to permit a party to rely upon it according to standards of reasonableness and fairness, this is a strict test that calls for restraint by the court in its application. At p. 636, *Tjittes* says:-

“The Supreme Court emphasises that this is a strict test that calls for restraint. The Supreme Court has regularly censured judgments of factual courts that have loosely ruled that reliance on a contractual clause is ‘not reasonable’ or insufficiently motivated their judgment in this regard.²⁴⁵ The Supreme Court says in a stern tone:

‘Not reasonable’, however, constitutes a different standard from that expressed in the more restrained

words 'unacceptable according to the standards of reasonableness and fairness' in Article 6:248(2)."

- (b) The author emphasises that this is especially so where both parties to a contract containing such a clause are commercial enterprises. At p. 649, *Tjittes* says:-

"If there is a commercial contract concluded between equivalent professional parties (in terms of dominance and/or expertise), there is no reason to consider an exoneration clause soon unacceptable.³⁰⁹ The use of exoneration clauses in commercial contracts usually implies a measured allocation of risk related to price and insurance possibilities. An intervention in an exoneration clause therefore implies an intervention in that contractual risk allocation. Professional parties conclude contracts (with the application of general terms and conditions) more often and, unlike consumers, are aware of the presence of exoneration clauses. They often also use them themselves. Where the power position of professional parties is more or less equal, there is no reason to treat exoneration clauses in commercial contracts with suspicion."

- (c) One recognised circumstance where an exemption clause may be treated as unacceptable is where the party entitled to avail of it has inflicted damage intentionally or recklessly. At p. 641, *Tjittes* says:-

"...intent or deliberate recklessness will require more than 'ordinary mistakes', namely mistakes that should not have been made."

- (d) Counsel also submitted that both witnesses agreed that, at least in the majority of cases, the reason why an exemption clause was disappplied by the court was the presence of intentional conduct or gross negligence on the part of the party seeking to rely on the exemption clause. However, this is subject to the qualification made by Mr. Vink under cross-examination that, even in the absence of gross negligence or intentional wrongdoing, there can be circumstances in which a liability clause could be held to be unacceptable according to the standards of reasonableness and fairness. In this context, it will be necessary to consider the decision of the Supreme Court of the Netherlands in the *Kuunders/Swinkels* case (which I address further below).
- (e) Counsel for the plaintiff also submitted that, insofar as the contract imposes a time limit on making a complaint, such provisions are usually enforced by the Dutch courts so long as the defect was capable of being identified within the relevant complaint period. Mr. Spanjaard expressed that view in para. 21 of his witness statement. Under cross-examination, Mr. Vink initially appeared to agree with that proposition but he was not prepared to go so far as to agree with a further proposition advanced by Mr. Spanjaard in para. 24 of his witness statement where he had expressed the opinion that, in business-to-business litigation, “*relatively short terms*” can be relied upon. Mr. Vink said that he did not know whether that was so.
- (f) Counsel for the defendant also drew attention to the evidence of the experts in relation to the proposition that Dutch courts are more sympathetic to time limitations clauses than they are to clauses that

exclude damages entirely. Mr. Spanjaard expressed that view in para. 25 of his witness statement and Mr. Vink, under cross-examination, indicated that it did not sound to him to be wrong although he qualified that by saying that he had not done extensive research on the issue.

- (g) Counsel for the defendant also relied upon a further statement by *Tjittes* at p. 647 where the author said:-

“The Supreme Court considers the mere fact that a shortcoming concerns the core of the performance manifestly insufficient to consider an exoneration clause in this respect unacceptable according to standards of reasonableness and fairness.”

However, there was a disagreement between the experts in relation to this issue. Mr. Vink expressed the view that this was not correct. He referred to a decision of the Netherlands Supreme Court in *Bart’s Retail* (considered further below) where it was decided that a court must consider all of the circumstances.

- (h) With specific reference to the defendant’s terms and conditions in this case, counsel for the defendant highlighted an aspect of Mr. Spanjaard’s evidence, where he said⁶⁷:-

“Q. I’m just asking you about a case in which it isn’t the position that there is intent, but it is the case that there is a limitation clause which imposes a significant liability. How do the Dutch courts weigh one against the other? What’s the likely result of that?”

⁶⁷ See Day 3, at pp. 106-107.

A. *The likely result of that is that the limitation of liability is upheld.*

Q. *And just tell us as briefly as you can, why?*

A. *Because -- and as I have cited, the NCC, the Netherlands Commercial Court, in paragraph 18 of my affidavit, page 994, Pacta sunt servanda is paramount. So, commercial contracting parties are allowed to incorporate into the contract whatever they want, however they want. I heard Mr. Vink acknowledging the same fact. And since pacta sunt servanda is so paramount, taking away that from parties has to be applied really restrictively, and as a rule of thumb, if there is no wilful intent or gross negligence, the default setting would be upholding the clause unless it would be onerous to the other party. And that has to be -- that's such a high threshold that you normally wouldn't reach it, not for a simple, an ordinary mistake.*

Q. *MR. JUSTICE McDONALD: And is that so even where there are general terms and conditions which aren't specifically brought to someone's attention?*

A. *Yes, even if they are not specifically brought to someone's attention because, unlike at least England, and I think Ireland as well, in the Netherlands we don't have the red hand rule. So, there is no rule under Dutch law that says, if there are terms and conditions that can burden so heavily on the parties they should actually be written in*

a red font, having a red hand pointing to them. We don't have that rule.”

A similar proposition was put to Mr. Vink in the course of his cross-examination. It was suggested to him that, if there was no wilful intent or gross negligence, there was a strong likelihood that a Dutch court would uphold a limitation clause even where it imposed a significant limitation on the damages recoverable and even though it had never specifically been brought to the attention of the other party. Mr. Vink responded: *“I don't know. I really can't tell. I really can't tell. Because case law is so -- all the cases are so different that I think -- I find it really difficult to answer this in general.”* At one point, it was submitted by counsel for the defendant that this somewhat inconclusive answer should be weighed against the positive answer given by Mr. Spaanlard. The implication appeared to be that the Court should make a finding of fact in the terms of Mr. Spaanlard's evidence. It is, of course, the case that issues of foreign law are to be treated as matters of fact for the purposes of the Court's findings. However, I do not accept that a Court could properly proceed in the way suggested by counsel without examining the basis for the respective views advanced by the experts. In circumstances where both experts had referred, in their reports, to a number of decisions of the courts of the Netherlands, I therefore indicated that I would need to consider those decisions in reaching my findings as to the effect of Dutch law. Moreover, the answer given by Mr. Vink is entirely understandable in circumstances where, as the Dutch case law illustrates, all relevant circumstances should be taken

into account. Given that many of the facts and circumstances here will not be resolved until the main trial, it is unsurprising that Mr. Vink was not prepared to offer a more definite view.

174. I was referred to a number of decisions of the Dutch courts. However, of those decisions, there were two which are particularly relevant. Both are decisions of the Supreme Court of the Netherlands, namely *Kunders/Swinkels* (18th June 2004) and *Bart's Retail* (29th January 2021). In *Kunders/Swinkels*, the plaintiff operated a pig breeding and fattening farm. The pigs were maintained in a number of houses or sheds which required artificial ventilation in order to supply sufficient fresh air to the pigs. Electrical work was carried out in June 1997 by the defendant. After carrying out repairs, the defendant left the premises. The defendant was unable to remember whether, before doing so, he had switched on the alarm that was intended to alert the plaintiff in the event that the artificial ventilation system failed. A few days later, the ventilators failed as a consequence of an earth fault leading to the suffocation of 764 pigs. The plaintiff sued the defendant for damages. In turn, the defendant sought to rely upon an exemption clause in the defendant's terms and conditions of trading. Under that exemption clause, the defendant's liability was fixed at 15% of the contract sum. The Court of Appeal held that the defendant was liable because the defendant had failed to reactivate the alarm following the carryout of works. The Court of Appeal ruled that there was no question of intent or gross negligence on the part of the defendant and that, in those circumstances, the defendant was entitled to rely upon the clause limiting its liability to 15% of the contract price. The plaintiff appealed to the Supreme Court.

175. The plaintiff in *Kunders/Swinkels* argued that reliance on the exemption clause was unacceptable by reference to the standards of reasonableness and fairness and the plaintiff relied on a number of circumstances in this context including a contention that

the proper functioning of the alarm was vital for the pigs; it was also alleged that the failure of the defendant to reactivate the alarm was a gross error, the exemption clause was not negotiated with the plaintiff, the plaintiff was not aware of the attendance of the defendant on the particular date in question and the defendant had liability insurance. The plaintiff argued that the Court of Appeal erred by merely assessing the question of whether or not there was gross negligence without also taking these other considerations into account. The Supreme Court agreed.

176. The Supreme Court said, at paras. 3.6 to 3.7 of its judgment:-

“3.6 When assessing the plea, the first thing to be considered is that an exemption clause should not be applied to the extent that its application in the given circumstances would be unacceptable according to standards of reasonableness and fairness, which will generally be the case if the damage is due to intent or deliberate recklessness of the debtor or of persons in charge of the management of his business (Supreme Court 12 December 1997, no. 16397, NJ 1998, 208). In doing so, the court will have to take into account all circumstances invoked by the party wishing to have the clause disapplied. In particular, in a case such as the present, it will have to take into account how reprehensible the omission that should lead to liability was, what the consequences of this omission are and to what extent, if any, the damage caused as a result is covered by insurance.

3.7 In view of the criterion mentioned in 3.6 above, the opinion of the Court of Appeal erred in law or was insufficiently motivated. The Court of Appeal erred in law if it held that it was sufficient to answer the question

whether there was gross negligence on the part of [the defendant] without taking all the circumstances referred to above into account. If the court of appeal had used the correct standard, it should have included in its reasoning why the circumstances relied on by [plaintiff] could not lead to the opinion that reliance on the exoneration clause was unacceptable by the standards of reasonableness and fairness. However, the court did not include some of these circumstances in its reasoning. The contentions of [plaintiff] mentioned above in 3.4 and 3.5 did not only imply that the functioning of the alarm was of vital importance to the pigs staying in the barn, but also that [defendant] should have realised that - because [plaintiff] was not aware that [defendant] was carrying out work - he was not allowed to neglect to pay attention to the fact that the alarm was switched on again and functioning properly, because [plaintiff] would not (have to) be aware that extra attention would have to be paid to it. Therefore, according to [plaintiff's] contentions, [defendant] had a special duty of care, which the court did not address. Furthermore, the court should have paid attention to the circumstances put forward by [plaintiff] with regard to the exemption clause, including in particular the fact that [defendant's] liability was, in principle, covered by insurance. The related complaints of parts 1 and 3 are successful, so that part 2 needs no further consideration.”

177. The reference by the court in para. 3.7 of its judgment to the contentions of the plaintiff is a reference to the allegations identified in para. 175 above. What the decision shows very clearly is that, in considering whether an exoneration or exemption clause

(or a clause limiting damages) is acceptable by reference to the standards of reasonableness and fairness, a court must consider all of the circumstances.

178. The most recent Supreme Court authority to which I was referred is the decision in *Bart's Retail*. In that case, Bart's Retail was a franchise bakery business. It entered into a franchise agreement with the respondent in respect of the period 3rd January 2011 to 31st December 2016. In addition, it entered into a lease of premises for the same period from which the respondent was to operate the "*Bakker Bart*" shop which was the trading name of the franchise. Asbestos was subsequently found in the building which required the shop to be closed down. Barts Retail agreed to pay the respondent a weekly amount while the building was remediated. The relevant remediation works were completed at the end of April 2013. Discussions then took place in relation to the continuation of the operation of the business in the shop premises. A final proposal was made by Barts Retail in May 2013 which proposed that the preexisting agreements should be dissolved if the respondent did not accept that proposal by 14th June 2013. As it transpired, the respondent did not accept the proposal. Barts Retail ceased making weekly payments to the respondent from 14th June 2013. The respondent then sought a declaratory judgment that the franchise agreement and lease agreement had not been terminated. In response, Barts Retail sought to rely on a number of provisions of the lease. In particular, it sought to rely on Article 4 which provided that the landlord was not liable for the consequences of defects of which the landlord was not aware and could not have known, and also on Article 11 which was to similar effect. Article 11 also stated that the landlord was not liable for business losses of the tenants. However, under Article 11.9, these provisions regarding loss of profits by the tenant did not apply in case of damage as a result of gross negligence of the landlord regarding the condition of the rented property. The respondent's position was upheld by both the court of first

instance and the Court of Appeal. In doing so, the Court of Appeal held that the attempted reliance by Bart's Retail on the exclusions of liability was unacceptable according to standards of reasonableness and fairness. In reaching that conclusion, it took the view that making the lease premises available as a Bakker Bart's shop was "*the core of the performance*" and that, without this provision, the lease agreement and franchise agreement would cease to have any meaning. The Court of Appeal held that the presence of asbestos meant that the shop could not be operated and this went to the core performance of the contract. Bart's Retail appealed to the Dutch Supreme Court. It argued that the mere fact that the exoneration related to a failure at the core of the performance of the contractual arrangements did not mean that reliance on the exoneration clause was unacceptable by the standards of reasonableness and fairness. This was particularly so in circumstances where Bart's Retail did not know and could not have known about the existence of asbestos. It also relied upon the fact that Bart's Retail had compensated the respondent on a weekly basis. The Supreme Court agreed. In para. 3.1.2 of its judgment, the Supreme Court said:-

"Article 11.9 of the general provisions belonging to the lease contract implies that the limitations of liability provided for therein do not apply to damage as a result of gross negligence or gross negligence on the part of the lessor with regard to the condition of the leased property, nor with regard to loss of profits resulting from a defect in the leased property that the lessor knew or should have known about at the time of entering into the lease (see above in 2.1 under (vi)). In view of this and against the background of Bart's Retail's assertion that it neither knew nor should have known about the defect, which assertion the court of appeal did not reject, as well as in the light of the established fact (see above in 2.1 under (xv)) that the remediation of the shop premises had been

completed at the end of April 2013, the court of appeal, in its opinion that the reliance of Bart's Retail on the exoneration clauses is unacceptable according to the standards of reasonableness and fairness, disregarded the restraint with which the yardstick of Section 6:248(2) of the Dutch Civil Code should be applied, or was that opinion insufficiently substantiated. The circumstances mentioned by the Court of Appeal that the shortcoming concerns the essence of the performance, that without making the leased property available, not only the lease agreement but also the franchise agreement would lose all meaning, and that Bart's Retail has compensated [defendants] weekly during a certain period, do not make it sufficiently clear why the reliance on the exoneration clauses in the lease agreement is unacceptable according to standards of reasonableness and fairness.”

179. In those circumstances, the Supreme Court ruled that the matter would have to be assessed again taking into account all the circumstances of the case before any conclusion could be reached as to whether the reliance on the exemption clauses was or was not unacceptable according to standards of reasonableness and fairness.

180. The decision in *Barts Retail* illustrates that, in the case of a business relationship, Dutch law will not readily disapply contractual provisions which limit the liability of one of the parties to a contract. But, in common with *Kunders/Swinkel*, it also illustrates that all circumstances must be taken into account before a court can reach a conclusion as to whether a limitation clause should be disappplied. It follows that, even it could be said that the defendant's terms and conditions were incorporated in any of the contracts between the parties, it would be wholly premature, at this stage of these proceedings, for the Court to reach any conclusion on whether Dutch law would or would not disapply those elements of the defendant's general terms and conditions

which purport to limit its liability. Such a conclusion could only be reached after all findings of fact have been made not only in relation to the terms of the contracts but also in relation to the underlying facts in relation to the defendant's performance of the contracts and in relation to any other relevant circumstances.

181. In these circumstances, I have come to the conclusion that any finding in relation to this issue will have to be deferred until the main trial.

Conclusion and next steps

182. In circumstances where there is such a large variety of different terms and conditions governing the individual contracts between the parties, no useful purpose would be served in attempting to summarise each of the findings I have made. What is clear is that, in no case, do the defendant's general terms and conditions apply. My preliminary view is that this finding is likely to have significant consequences for the decision on costs. Without prejudice to any appeals that may be taken on either side, I direct the parties, between now and the next occasion when the matter is listed before me, to liaise with each other in respect of costs and any other issues which arise with a view to trying to reach agreement in relation to the orders to be made on foot of this judgment.

183. I will list the matter for mention before me at 2.00 p.m. on Monday 24 June 2024. If the parties have been unable to reach agreement in relation to the orders to be made on foot of this judgment, I will give such further directions on that occasion as may be necessary to resolve any outstanding issues between the parties. I will also fix a hearing date for the main trial and give any ancillary directions that may be appropriate to allow that trial to proceed as early as possible.
