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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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2015/034342

IN THE COUNTY COURT FOR NORTHERN IRELAND

SITTING IN BELFAST

BETWEEN:

Crash Services Limited

Plaintiff

and

AXA Insurance Limited

Defendant

District Judge Gilpin

Introduction

[1] The Plaintiff in this case, Crash Services Limited (“Crash”), is a well-known accident management company while the Defendant, AXA Insurance Limited (“AXA”) is an equally well-known insurer.

[2] They are no strangers to litigating against each other in the civil courts in this jurisdiction as they seek to protect the interests of both claimants and alleged tortfeasors respectively.

[3] They usually feature only in the background to proceedings as they exercise rights of subrogation. However, in these proceedings they have joined in battle directly.

[4] The court has been informed that the backdrop to these proceedings concerns a road traffic collision which occurred on 4 January 2015 when a vehicle driven by a Helena Gribben collided with one driven by an Anne Campbell.

[5] The court has yet to hear any evidence in relation to the factual circumstances of the collision but instead has been invited by Crash and AXA to determine certain matters of law by way of a preliminary issue.

[6] In short compass the court has effectively been asked by Crash to make a declaration that a term in a policy of insurance AXA issued to Helena Gribben should not be binding.

[7] Once the court has determined whether the impugned term is binding it will still be left having to resolve the issues arising out of the collision.

[8] For the purpose of dealing with the preliminary issue the parties agreed certain facts be put before the court in relation to what happened in relation to the collision.

Background

[9] On 18 January 2014 Helena Gribben from Armagh renewed her comprehensive car insurance policy for her Lexus IS 220 for a period of 12 months with AXA.

[10] The insurance policy running to some 35 pages contained, as would be expected, a great many terms most of which are not of concern to the parties in these proceedings.

[11] The substantive provisions are contained in nine sections covering such matters as 'Liability to Others' (Section 5) and 'Foreign Use' (Section 6).

[12] Section 1 entitled "loss and damage to your car" deals with a number of issues that may arise following a collision including the repair of a damaged vehicle.

[13] The provisions relating to the repair of a damaged vehicle as set out in Section 1 provide as follows:

"What is covered?"

We will pay for:

- *Loss of or damage to your car, and its accessories while in your car, up to the market value of your car;*
- *The reasonable cost of protecting and removing your car to the nearest competent repairer; and*
- *If your car is repaired, the reasonable cost of delivering your car back to your address in Northern Ireland.*

This will involve:

- *Repairing your car in an AXA Approved Repairer or one of your choice; or*
- *Replacing what is lost or damaged, if the cost of repairing it would be more than it costs to replace; or*
- *Paying the cost of the loss or damage to you or the legal owner if we are told that your car belongs to someone else. [Hereinafter I will refer to the foregoing as “the indemnity term”]*

We will choose which option is appropriate.

- *If we choose to repair your car but you choose not to use an AXA Approved Repairer*
- *We will not provide you with a courtesy car for the duration of the repairs, and*
- *We will only pay what our engineer states it would have cost to repair your car in an AXA Approved Repairer, if the cost of repairs in the garage you choose are higher.*

.....

We may use parts that have not been made by the car’s manufacturer, but they will be of a similar standard. If any lost or damaged parts are no longer available, we will pay an amount equal to the costs shown in the manufacturer’s latest price guide, together with reasonable fitting costs.” [Hereinafter I will refer to the foregoing as “the impugned term”]

[14] On 4 January 2015 almost a year after Helena Gribben entered into her policy of insurance with AXA she was involved in a road traffic collision.

[15] Helena Gribben’s car was damaged in the collision. It is agreed that Helena Gribben was responsible for the collision.

[16] As her vehicle required to be repaired Helena Gribben wanted to invoke her insurance policy with AXA to provide for the costs of repair.

[17] In order to put all this into effect Helena Gribben made contact with Crash to assist her. In writing to Helena Gribben in connection with the assistance they offer

Crash stated their aim was to ensure Helena Gribben encountered “a stress free situation at a time” they suggested that “can be of great distress.”

[18] Helena Gribben wanted to have her vehicle repaired by Gribben Motors of Keady Road, Armagh.

[19] It would appear that what Crash then had in mind to assist Helena Gribben was to arrange for a Motor Engineer to inspect her damaged vehicle; thereafter to authorise Gribben Motors to carry out the necessary repairs and finally to make a claim against AXA for reimbursement of the costs charged to have the vehicle repaired.

[20] To this end on 6 January 2015 Crash notified AXA of the claim when they wrote

“Please find attached details of a new claim to be lodged under a mutual client’s insurance policy. We are currently arranging to furnish you with an estimate for vehicle repairs. If you wish to arrange an inspection of the client’s vehicle in the meantime, you should contact us to arrange.”

[21] On the same day, 6 January 2015, AXA wrote not to Crash but directly to Helena Gribben

“You have chosen to get your vehicle repaired at your own garage Gribben Motors. Please note that AXA will only pay what our engineers have calculated to be the cost of repairs to your car. This will be based upon our Approved AXA network rates. It will be necessary for your garage to forward us:

- *Photographs of the damage, please ensure images include vehicle identification.*
- *A detailed estimate in respect to repairs.*

You have decided not to avail of the AXA Approved network. You may wish to consider the following:

- *We will require photographs of vehicle showing the extent of the damage.*
- *We believe that using the AXA Approved Network is a more streamlined process as it takes significantly less time to inspect and repair.*
- *Your policy states we will only pay what our Engineer states it would have cost to repair your car in an AXA Approved Network garage, if the cost of repairs in the garage you choose are higher.*

- AXA will not guarantee any work carried out by your repairer.
- Payment will be made to your garage on receipt of the final invoice. Please also bear in mind that the repairs work may be subject to further inspection.

.....

The Benefits of using an AXA Approved Network are:

*The provision of a courtesy car if your car is repairable.
 Speedy repairs with no waiting time for estimates.
 AXA provide a 3 year guarantee in relation to workmanship and faulty materials. The manufacturers warranty will not be affected.
 Your policy Excess is £350.00 and is payable to the garage.
 Professional and friendly staff who will be in contact with you during the course of repairs.
 AXA Approved garages act on behalf of AXA Insurance.*

.....”

[22] On 15 January 2015 Tim Bonnar, a Consulting Engineer, instructed by Crash, inspected Helena Gribben’s vehicle to assess what repairs would be necessary. He carried out his inspection at Helena Gribben’s chosen repairing garage, Gribben Motors.

[23] Also on 15 January 2015 Helena Gribben entered into an Assignment with Crash. What she assigned was not the insurance policy itself but rather the right of recovery under the policy in respect of the collision that had occurred on 4 January 2015.

[24] What Crash appear to have had in mind was that they would arrange for the repair of the damaged vehicle with the repairing garage and Crash would then settle their costs within 24 hours of receipt of their invoice subject to a factoring rate of 5%.

[25] In turn Crash would then, relying on the Assignment, seek reimbursement of the full amount of the invoice charged by the repairing garage from AXA.

[26] On 22 January 2015 Tim Bonnar produced his report following his earlier inspection. He estimated the costs of repair to be £4002.00 inclusive of VAT.

[27] On 31 January 2015 Gribben Motors carried out the repairs to Helena Gribben’s vehicle. On that same day they issued their invoice amounting to £4092.88 inclusive of VAT to cover the work they had carried out. The invoice was made out to Helena Gribben. Presumably Gribben Motors were paid 95% of their said invoice on or before 1 February 2015.

[28] On 26 February 2015 Crash emailed the Gribben Motors' invoice to AXA and sought payment of it from them.

[29] On 4 March 2015 AXA requested that Crash provide them with a copy of the estimate for repair, images of the vehicle and an invoice for the parts that had been used. They also requested that they could inspect Helena Gribben's vehicle.

[30] On 9 April 2015 Crash issued and served the proceedings which are before the court in which they seek reimbursement of the repair costs charged by Gribben Motors namely £4092.88.

[31] On 16 June 2016 AXA estimated the amount they would have been prepared to pay to their Approved Repairers by using the Audatex estimating platform at £3,163.73.

[32] The difference between the parties in the instant case therefore amounts to £929.15.

[33] The court is aware that this case is but one of a considerable number that Crash have brought against both AXA and other insurers arising out of similar circumstances. These other proceedings have not yet been determined and await the outcome of the instant case.

The Hearing

[34] Mr McCollum QC and Mr Damien O'Neill BL appeared on behalf of Crash while Mr Simpson QC and Mr Bernard Fitzpatrick BL appeared on behalf of AXA.

[35] Each side provided some evidence by way of affidavits and over the duration of these proceedings filed several skeleton arguments which were then augmented by helpful oral submissions.

Unfair terms in consumer contracts

[36] As a result of concern that without legal restraint being imposed there is a risk that some terms in contracts will be unfair to one of the parties to it the United Kingdom has for some time enacted laws to afford some level of protection to the parties.

[37] Prior to 1993 these restraints were focused chiefly around terms in contracts which sought to exclude liability.

[38] This situation changed radically when the Unfair Contract Terms in Consumer Contracts Directive of 5 April 1993 (EC Directive 93/13/EEC) ("the Directive") required the United Kingdom to introduce into domestic legislation

restraint in a great many types of contract terms beyond those that sought to exclude liability.

[39] The Directive was first implemented in the domestic legislation of United Kingdom by means of The Unfair Terms in Consumer Contracts Regulations 1994 (“the 1994 Regulations”).

[40] However, in order to more closely reflect the wording of the Directive the 1994 Regulations were revoked and replaced by The Unfair Terms in Consumer Contracts Regulations 1999 (“the 1999 Regulations”). The 1999 Regulations govern contracts made between 1 October 1999 and 30 September 2015.

[41] Given the insurance contract Helena Gribben entered into was concluded on 18 January 2014 it is the 1999 Regulations that are in play in the instant case.

[42] For the sake of completeness contracts made from 1 October 2015 are now governed by the provisions of the Consumer Rights Act 2015.

[43] While the domestic legislation is of primary significance in this case the Directive remains of importance even after its requirements have been implemented in domestic legislation as the domestic courts must, where possible, give effect to its purposes and its terms and of course the relevant decisions of the Court of Justice of the European Union (“CJEU”).

The 1999 Regulations

[44] The 1999 Regulations came into force on 1 October 1999.

The 1999 Regulations apply to terms in contracts made between a consumer and a seller or supplier:

“These Regulations apply in relation to unfair terms in contracts between a seller or a supplier and a consumer [Regulation 4(1)]

“consumer” means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession; [Regulation 3(1)]

“seller or supplier” means any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned; [Regulation 3 (1)]”

[45] Since the focus of the Directive was not on protecting a consumer from a bad bargain they had struck but instead on protection from specific terms which are

unfair the 1999 Regulations differentiate between two categories of terms that fall to be considered in different ways:

- (1) Core terms being those terms which go to the heart of the bargain that had been struck; and
- (2) Non-core terms being all other terms.

Core terms

[46] Regulation 6(2) deals with what are commonly termed “core terms.” It provides

“In so far as it is in plain and intelligible language, the assessment of fairness of a term shall not relate -

(a) to the definition of the main subject matter of the contract, or

(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.”

[47] Thus, if a term comes within the reach of Regulation 6(2) it is a core term.

[48] As long as such a term is in plain and intelligible language it will be binding. A need for fairness is not a consideration when one is looking at the legitimacy of a core term.

Non-core terms

[49] Regulations 5 and 6(1) deal with what are commonly called “non-core terms.”

Essentially they provide that if a term is a non-core term and it:

- has not been individually negotiated and
- it fails certain tests to determine fairness

it shall be regarded as unfair.

[50] A need for fairness is therefore a consideration when one is looking at the legitimacy of a non-core term.

[51] In opening the case for Crash Mr McCollum invited the court to determine the preliminary issues by considering a number of questions sequentially. Reframing and re-ordering these slightly it seems to me there is merit in such a sequential approach and thus in this judgment I intend to address five questions.

The 1999 Regulations

- (1) Is Crash, as a non-consumer, precluded from arguing the impugned term is unfair by reason of the 1999 Regulations?
- (2) Is the impugned term a core term?
- (3) If the impugned term is a core term is it written in plain intelligible language?
- (4) If the impugned term is not a core term:
 - 4.1 was it individually negotiated?; and
 - 4.1 is it fair?

Uncertainty

- (5) In any event is the impugned term void for being uncertain?

Is Crash as a non-consumer precluded from arguing the impugned term is unfair by reason of the 1999 Regulations?

[52] Helena Gribben entered into her insurance policy with AXA on 18 January 2014.

[53] The accident giving rise to these proceedings occurred on 4 January 2015.

[54] On 15 January 2015 Helena Gribben assigned to Crash the right she enjoyed under the policy of insurance to recovery of her losses from her own insurers, AXA.

[55] In these proceedings Crash seek to argue that under the 1999 Regulations the impugned term is unfair and should not therefore be available to AXA to avail of.

[56] The 1999 Regulations and the Directive made provision for what Lord Steyn referred to in *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 498 as

“...a dual system of ex casu challenges and pre-emptive or collective challenges by appropriate bodies.”

[57] Regulation 12 makes provision for the “pre-emptive or collective challenges” by empowering those bodies listed in Schedule 1 to apply to the court for injunctive relief to prevent the continued use of a particular term in a contract. Crash is not one of the Qualifying Bodies listed in Schedule 1 and therefore cannot invite the court to consider the impugned term via that route of challenge.

[58] Rather the instant case comes before this court by reason of what Lord Steyn called an ex casu challenge.

[59] As noted above the 1999 Regulations regulate contracts made between a consumer and a seller or supplier. A consumer is defined in Regulation 3 as:

“‘consumer’ means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession,”

[60] AXA argue that Crash as both a limited company and, furthermore, one acting for business purposes does not satisfy this definition of a consumer and therefore cannot rely on the 1999 Regulations to ground its case. Mr Simpson drew the court’s attention to a number of recitals in the Directive which he suggests emphasise the aim of the statutory intervention into this area was to offer consumers and only consumers protection.

[61] However, Crash argue that the date the court must consider whether the impugned term was unfair is the date the contract was concluded namely when Helena Gribben, a consumer, was still a party to it. In this way they submit the 1999 Regulations are applicable to the court’s consideration.

[62] Crash then argue that if the court determines that the impugned term is unfair at the date of inception of the contract it should, from that date onwards, be deleted from the insurance policy and thus AXA are thereafter not permitted to rely on it even when a subsequent assignment to a non-consumer takes place.

[63] In a case, such as the instant one, where loss has occurred before assignment of an insurance policy is in place it is well settled that the assignment operates as an assignment of the existing right to an indemnity or the proceeds.

[64] Thus, in *Lloyd and another v Fleming and Spence* [1872] L.R. 7 Q.B. 299 the court held an assignment of a policy of marine insurance after the loss had been incurred entitled the assignee to sue upon it in his own name.

[65] As to what the state of the insurance policy was at the date of the assignment it is my view that the date when the assessment of fairness is to be carried out is at the date the contract is concluded and not at any later date.

[66] Support for such a view can be found in Regulation 6(1) of the 1999 Regulations which, when setting out a number of factors that are to be taken into account when determining fairness, makes it clear this assessment is to be carried out:

“... at the time of conclusion of the contract...”

[67] Therefore, in my judgment the exercise the court should embark on in this case is to consider the impugned term at the time the policy of insurance was taken out namely on 18 January 2014.

[68] On that date it was clearly made between a consumer and a supplier and thus the 1999 Regulations are applicable.

[69] If the court determines that the effect of the 1999 Regulations is such that the impugned clause should be excised from the insurance policy such excision would operate from the date the policy commenced.

[70] Regulation 8 of the 1999 Regulations provides:

“(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.”

[71] Therefore, if the court is of the view the impugned term is to be deleted from the contract any subsequent assignment to Crash would not include the impugned term.

[72] Therefore, the court must consider the impugned term in light of the 1999 Regulations.

Is the impugned term a core term?

[73] In his submissions Mr McCollum stated this was the crucial question the court had to determine.

[74] In *Director General of Fair Trading v First National Bank Plc* [2002] 1AC 481 the House of Lords adopted a restrictive approach when interpreting Regulation 6 (2) of the 1999 Regulations as to whether a term might be considered to be a core term of the contract.

[75] In that case Lord Bingham at 491 said:

“The object of the Regulations and the Directive is to protect consumers against the inclusion of unfair and prejudicial terms in standard-form contracts into which they enter, and that object would plainly be frustrated if regulation 3(2)(b) [a reference to the 1994 Regulations which this case was concerned with] were so broadly interpreted as to cover any terms other than those falling squarely within it.”

[76] Two decisions of the CJEU in the context of consumer credit disputes are of some assistance in this area namely the decisions in *Kasler v OTP Jelzalogbank Zrt* (C-26/13) (“Kasler”) and *Matei v SC Volksbank Romania SA* (C-143/13) (“Matei”).

[77] *Kasler* concerned a contract for consumer credit denominated in a foreign currency. The impugned term was one concerning how the instalment calculation was determined.

[78] Not long after the decision in *Kasler* was handed down the CJEU handed down its decision in *Matei*. *Matei* again concerned a contract for consumer credit. In this case the challenge was to terms providing for a ‘risk charge’ and the alteration of the rate of interest under certain conditions.

[79] Echoing the sentiments expressed by Lord Bingham in *First National Bank* the CJEU in both *Kasler* and *Matei* held that what might be considered as a core term should be interpreted strictly.

[80] The CJEU recognised that while, it is for the domestic courts to determine whether a term is considered to be a core term, the CJEU

“has jurisdiction to elicit from the provisions of Directive 93/13, in this case the provisions of article 4(2), the criteria that the national court may or must apply when examining a contractual term; see Kasler’s case” [Matei at para 53].

[81] In relation to the criteria the CJEU considered three types of terms are relevant:

- (1) A term which concerns the main subject matter of the contract. (Regulation 6 (2)(a) of the 1999 Regulations).
- (2) A term which relates to the adequacy of the price or remuneration, as against goods or services supplied in exchange (Regulation 6(2)(b) of the 1999 Regulations) and
- (3) A term which falls within the indicative list (Schedule 2 of the 1999 Regulations).

[82] A term which relates to the adequacy of the price or remuneration, as against goods or services supplied in exchange is not in issue in the instant proceedings.

[83] In relation to the main subject matter of the contract the CJEU held that those terms:

“that lay down the essential obligations of the contract and, as such, characterise it.” [Kasler para 49]

are to be considered core terms while terms:

“ancillary to those that define the very essence of the contractual relationship cannot fall within the notion of the “main subject matter of the contract...” [Kasler para 50]

[84] In relation to the terms falling within the indicative list unsurprisingly the CJEU took the view such a term should not be considered a core term since if such a term was considered a core one the indicative list would:

“to a large extent be deprived of effectiveness.” [Matei para 60].

[85] In its 2015 judgment in *Van Hove v CNP Assurances SA* [C-96/14] (“*Van Hove*”) the CJEU again returned to the issue of what constituted a core term but this time in relation to a contract of insurance. The CJEU following its earlier approach in *Kasler* and *Matei* required impugned terms to be considered through the prism of whether they speak to the essential obligations of the contract or are simply ancillary terms.

[86] Applying this approach in the context of considering a contract of insurance the court in *Van Hove* held firstly that,

“the essentials of an insurance transaction are that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of the materialisation of the risk covered, with the service agreed when the contract was concluded.” [paragraph 34].

and

“Secondly, as regards a contractual term contained in an insurance contract concluded between a seller or supplier and a consumer, the nineteenth recital in the preamble to Directive 93/13 states that, in such contracts, the terms which clearly define or circumscribe the insured risk and the insurer’s liability shall not be subject to an assessment of unfair character since those restrictions are taken into account in calculating the premium paid by the consumer.” [paragraph 35]

[87] Thus, in an insurance contract a court in considering whether an impugned term is a core term in that it addresses the essential obligations of the contract must consider does it:

- (1) Provide that since the insured has paid a premium he will receive from the insurer the service agreed when the contract was concluded if a trigger event occurs; or
- (2) Define or circumscribe the insured risk and the insurer's liability.

[88] In Van Hove the CJEU held that the impugned term in that case might be considered to constitute part of the essential obligations of the contract but left this issue for the national court in France to determine by taking into account the

“nature, general scheme and the stipulations of the contract and its legal and factual context.” [para 37].

Crash's argument on core term

[89] Crash argue that the indemnity term in the policy is a core term while the impugned term is a non-core term.

[90] Crash argue that the essential obligation in a contract of insurance is the commitment of the insurer to indemnify the insured when loss and damage occurs. Crash characterise the essence of the contract as being one of indemnity. This they say is fulfilled simply by the indemnity term.

[91] They argue however that the impugned term is merely ancillary to the indemnity term as it does no more than to set out the method by which the indemnity term is fulfilled. Crash argue the impugned term does not define the scope of what is insured but merely how indemnity is to be achieved.

[92] They suggest there is no evidence before the court that the premium the insured pays to the insurer is affected by the presence in the contract of the impugned term despite what Mr McCollum referred to as the bald assertion unsupported by evidence by AXA in their skeleton argument that it does. To that end Mr McCollum asked the court to note that AXA motor insurance policies brokered by Hughes Insurance Services Limited do not contain the impugned term yet there is no evidence the premium to be paid for a Hughes brokered policy is different because of this. However, there is no evidence before the court to support this assertion and as such I discount it.

[93] Crash drew the court's attention to some examples of terms in insurance contracts that the courts have held to be non-core terms:

- (1) A term in a holiday insurance contract for reporting incidents that may result in a claim under the policy Bankers Insurance Co Ltd v South [2003] EWHC 380.

- (2) A term in a holiday insurance contract that an insured must provide certain documentation to the insurers Bankers Insurance Co Ltd v South [2003] EWHC 380.
- (3) A term in a motor insurance contract imposing an obligation on an insured to pay to an insurer any outlay the insurer had by law incurred but which they were not liable to indemnify the insured in respect of Pearl Insurance v Kavanagh [2001] C.L.Y. 3832.

[94] Crash suggest the impugned term is similar to these terms where the courts have found them to be non-core and thus urge this court to find in respect of the impugned term also.

AXA's argument on core term

[95] AXA argue that the impugned term is an integral part of the core term of the contract. AXA's argument is that the impugned term, which they refer to as "the repairing clause," is not ancillary to the indemnity term but rather is an integral part of the essential obligations they owe to their insured and thus it is a part of the core term of the contract.

[96] They argue that part of the essential obligation in a motor insurance policy is to provide the insured with indemnity to ensure the repair of the vehicle and the impugned term is part of that.

[97] Mr Simpson relies on a passage in McGillivray on Insurance Law 13th edition where at paragraph 10-020 the authors state

"It seems that clauses in policies which define the scope of cover and measure of indemnity will be read as core terms, including exceptions clauses, suspensive conditions and limitations on liability."

[98] Mr Simpson submitted that what he described as the various restrictions within the impugned term are taken into account when an insurer calculates a premium. There is no evidence before the court to support this assertion and as such I discount it.

Conclusion on whether the impugned term is a core-term

[99] Keeping in mind the requirement to approach Regulation 6(2) in a restrictive fashion and taking account of the nature, general scheme and the stipulations of the insurance contract in play in these proceedings and the legal and factual context I am not satisfied that the impugned term is part of the essential obligations of the contract such as to characterise it a core term.

[100] Rather it seems to me that the essence of the contract is one of indemnity which finds expression in the indemnity term.

[101] What one finds in the impugned term is ancillary to the indemnity term and is the mere outworking of it. In short it sets out some of the detail and practicality as to how the indemnity term is to be satisfied.

If the impugned term is a core term is it written in plain intelligible language?

[102] Since the court has determined that the impugned term is not a core term it is strictly speaking not necessary to address the question whether it is “in plain intelligible language.”

[103] However, given this case has been selected as a test case it may be of some assistance if this court nevertheless considers whether the impugned term is “in plain intelligible language.”

[104] In addressing the second question referred to it by the national court in *Kasler* the CJEU examined what are the requirements of “plain intelligible language.”

[105] The CJEU explained that the need for what it termed “transparency” is based:

“on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, in particular as regards his level of knowledge, the requirement of transparency must be understood in a broad sense.” [Kaiser paragraph 72]

The CJEU stated that plain intelligible language requires:

“not only that the relevant term should be grammatically clear and intelligible to the consumer, but also that the economic reasons for using that term and its relationships with other contractual terms should be clear and intelligible to him.” [Kaiser paragraph 60]

In *Kasler* the CJEU held that the domestic court must consider the impugned term as would:

“the average consumer, who is reasonably well informed and reasonably observant and circumspect...” [paragraph 74]

[106] In the instant case neither *Crash* nor *AXA* argue that the impugned term falls shy of being formally or grammatically clear. I agree with them.

[107] However, Crash suggest that the impugned clause fails the second part of the requirement expressed in paragraph 60 of Kasler in that it does not allow the consumer to understand its practical economic significance.

[108] The exacting nature of the requirement for transparency can be seen in the insurance case of Van Hove. In that case the CJEU decided that the term “activity, paid or otherwise” was “extremely broad and vague” while the term “total incapacity for work” may not have been correctly understood by a consumer. In Van Hove the CJEU left it to the domestic court to determine whether the average consumer would in fact properly understand these terms and their financial consequences.

[109] In the instant case Mr McCollum argued that the essential obligation of the contract was to provide an insured what he characterised as a “full indemnity” but the effect of the impugned term was to provide what he described as a “lesser form” of this.

[110] His criticism focused on the absence in the impugned clause of certain information concerning the AXA Approved Repairer including their identity, location, level of competency, cost and methodology of working. He argued that in the absence of this information the consumer could not properly understand whether they were in fact receiving the “full indemnity” the policy was designed to provide him with.

[111] I do not agree with Mr McCollum that the essential obligation was a “full indemnity” if by that it is meant that whatever loss was claimed AXA would have to meet it. At the very least the indemnity term expressly limits the extent of AXA’s liability as being “up to the market value” of the insured vehicle.

[112] I also do not agree with Mr McCollum that in the absence of the information he suggested the impugned term should have contained it fails in the requirement for transparency. What is abundantly transparent within the impugned term is the methodology that will be deployed if a vehicle is to be repaired and the insured wishes this repair to be carried out by a non-AXA approved repairer. What is absent from it are the specific implications for the insured that would arise if a collision occurred and repairs to the vehicle were then found to be necessary. However, given that at the time the contract of insurance is entered into there are a myriad of unknowns about what the personal circumstances of an insured will be at a time in the future a collision occurs that necessitates repairs being carried out; the nature of what those repairs might be and what non-AXA Approved Repairer options will then be available the information Mr McCollum says needs to be included would in my view add nothing to the evaluation an insured would make at the date of conclusion of the contract as to its consequences for him.

[113] For these reasons I am of the view the impugned clause is expressed in plain intelligible language.

If the impugned term is not a core term was it individually negotiated?

[114] In determining the fairness of a term in a contract the court can only consider terms which have not been individually negotiated between the seller or supplier, in the instant case the insurer, AXA, and the consumer, in the instant case, the insured.

[115] In the instant case there is an acceptance by both parties that the impugned term was not individually negotiated. Again I agree with this.

If the impugned term is not a core term and was not individually negotiated is it fair?

[116] Given my conclusions on the impugned term not being a core term and not having been individually negotiated it is therefore necessary to consider whether the impugned term is fair.

[117] The legislative architecture on which a court must base its assessment as to whether a clause is unfair is quadripartite. An assessment of fairness requires four elements to be considered:

- The significant imbalance element
- The good faith element
- The specified factors element
- The indicative list element

All four elements are set out in Regulations 5 and 6 of the 1999 Regulations.

Regulation 5 (1) of the 1999 Regulations provides that:

“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.” [underlining added]

Regulation 6 (1) provides that:

“... the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all of circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.”

Regulation 5 (2) provides that:

“Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.”

The significance imbalance element

[118] In *Director General of Fair Trading v First National Bank plc* [2002] 1AC 481 at 494 Lord Bingham said:

“The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour. This may be by granting to the supplier of a beneficial option or discretion or power, or by imposing on the consumer of a disadvantageous burden or risk or duty.... But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the Regulations seek to address.”

[119] In *Director General of Fair Trading v First National Bank plc* there was found to be no significant imbalance in a term requiring a borrower to pay to the bank interest on outstanding amounts, even after judgment had been given against him for the principal sum. The court held that neither the bank nor the borrower could have supposed that the bank would willingly forgo any part of its principal or interest. Furthermore the borrower's obligation to repay the principal in full with interest, was clearly and unambiguously expressed in the loan agreement.

The good faith element

[120] The application of a requirement that there be ‘good faith’ is one that might seem curious in a common law jurisdiction. Perhaps its presence might be explained by its origins in German legislation which was influential in the formulation of the Directive and consequentially the 1999 Regulations.

[121] Recital 16 of the Directive provides some explanation as to the requirement that there be good faith if a term is to be considered fair:

“Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved: whereas this constitutes the requirement of good faith; whereas, in making an assessment of

good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account."

[122] This would appear to mean that there is a need for the court in considering the fairness of a term to always conduct "an overall evaluation of the interests involved."

[123] In *Director General of Fair Trading v First National Bank plc* [2001] 1 AC 481 at 494 Lord Bingham said of good faith:

"The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the consumer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position...."

The specified factors

[124] The specified factors as set out in Regulation 6 (1) are:

- the nature of the goods or services
- all the circumstances attending the conclusion of the contract
- all the other terms of the contract or of another contract on which it is dependent

The indicative list

[125] Schedule 2 of the 1999 Regulations provides an "indicative and non-exhaustive list of terms which may be regarded as unfair."

[126] While a term which falls to be included within one or more of the indicative terms may be regarded as unfair inclusion within the list does not give rise to a presumption that a term is in fact unfair.

[127] However, in *Nemzeti v Invitel* [2012] 3 CMLR 1 the CJEU emphasised the importance of the list when it said:

“If the content of the annex [to the Directive] does not suffice in itself to establish automatically the unfair nature of a contested term, it is nevertheless an essential element on which the competent court may base its assessment of the unfair nature of that term.” [paragraph 26]

Crash’s argument on fairness

[128] Where a vehicle is to be repaired rather than replaced Crash argue that the essence of the contract the insured and insurer enter into is one that will put the insured back to where he was prior to the loss occurring which would include permitting the insured to forego having the vehicle repaired and take cash in lieu of the repair.

[129] Therefore, they argue that an insured has a choice as to whether to get his vehicle repaired or alternatively he may receive a lump sum from the insured. Either way they suggest the obligation on the insurer is to ensure they provide monies to match in financial terms the loss that has arisen.

[130] In these circumstances Crash argue that if the insured decides to have the vehicle repaired he should have available to him such monies that match the loss that has arisen thus enabling him to choose a garage of his choice to carry out the repairs.

[131] Crash contend that the effect of the impugned clause however is to deprive the insured of funds that match the loss that has been suffered. It is this deprivation they argue that introduces the significant imbalance into the contract which causes the impugned term to be unfair.

[131] In support of this they argue that the deprivation and thus significant imbalance caused to the insured by the impugned clause is:

- (1) To reduce the value of the indemnity the insurer is otherwise obliged to pay namely the reasonable costs of repair, to the costs that an AXA engineer assesses it would have cost to have the vehicle repaired by an AXA Approved Repairer. They contend that this sum is likely to be insufficient to cover the costs of repair by a non AXA Approved Repairer. The essence of Crash’s argument appears to be that AXA’s Approved Repairers carry out AXA work at such competitive rates that to use these rates as the touchstone for determining the reasonable costs of repair is unsatisfactory. Furthermore Crash are concerned that it is an AXA motor “engineer” and not an independent one who is the arbitrator of what the reasonable costs of repair are to be.
- (2) To increase the amount of the excess the insured has to pay if they use a non AXA Approved Repairer from zero to whatever the stated excess is.

- (3) To remove the entitlement to a courtesy car during the period of repair.
- (4) To remove the choice that an insured would otherwise have to insist on a non-AXA approved repairer using parts made by the car's manufacturer and instead to require the AXA approved repairer to use parts made other than by the car's manufacturer if AXA so insist.

[132] In relation to good faith Crash set out in their skeleton arguments that it regards this to mean the impugned term must be "designed, negotiated and entered into in a fair and open way." Crash did not however develop the point further by suggesting with particularity how in the instance case AXA had breached the requirement that there be good faith.

[133] In relation to the specified factors element of the assessment Crash invite the court to take into account

- that the essential term of the contract is one of indemnity in respect of loss or damage to a vehicle
- that the consumer can appoint a repairer of their choice
- that the Service Level Agreement AXA enter into with their Approved Repairs is a contract the court should take into account and
- that the principle of indemnity is governed by the concept of reasonableness which is an objective concept

[134] Turning to the indicative list Crash argue that the court should view the impugned term as falling foul of three of the types of terms that are set out in Schedule 2 of the 1999 Regulations which may be regarded as unfair.

[135] From the indicative list of potentially unfair terms set out in Schedule 2 the three Crash submitted in issue are:

"Schedule 2

1. *Terms which have the object or effect of –*
 - (b) *inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;*
 - (c) *making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject*

to a condition whose realisation depends on his own will alone;

- (i) irrevocably binding the consumer to the terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract."*

[136] In relation to Schedule 2(1)(b) Crash suggest that the impugned clause, for the reason set out above, limits the extent of the insurer's liability to the consumer to indemnify the insured by placing limits on the extent of the insurer's liability and therefore leads to the partial non-performance of the insurer's contractual obligations to provide a full indemnity.

[137] In relation to Schedule 2(1)(c) Crash suggest that the insurance contract is a contract for the provision of services by the insurer to the insured and that it falls within this indicative term since the decision as to how the indemnity is to be realised depends solely on the decision of the AXA motor engineer as to how much of the insurers financial resources he is willing to authorise be paid.

[138] In relation to Schedule 2(1)(i) Crash suggest that in what Mr McCollum termed "the practical world in which we all live" an insured would not have any real opportunity to consider and understand the impugned term before entering into the contract. He suggested my conclusions on the issue of transparency noted above would have some read across into my consideration of whether the impugned clause falls foul of Schedule 2(1)(i).

[139] Crash therefore suggest that when the court weights the impugned clause in the balance in light of the significant imbalance assessment, the good faith assessment, the specified factors element and the matters set out in the indicative list the court should find it wanting and thus conclude it is unfair.

Axa's argument on fairness

[140] AXA argue in a case of repair the essence of the contract struck between the insurer and the insured is not as Crash have sought to characterise it but rather reflecting what Mr Simpson suggests is "industry standard" it is an indemnity to provide for the repair of the damaged vehicle limited to the cost which AXA could arrange for one of their Approved Repairers to effect the repairs. However AXA do not insist an insured must use an Approved Repairer.

[141] AXA rely on a passage in Merkin & Smith, *The Law of Motor Insurance* 2nd edition 2015 para 3-117:

"Where repairs to a damaged motor vehicle are appropriate, in that the damage to the vehicle is not such that the vehicle has been written off by the insurers and the insurers have exercised their right to repair the vehicle, they are under a duty to

indemnify the assured for the cost of the repairs. Different mechanisms may be found. In some cases the insurers authorise the assured to enter into a repairing contract and agree to indemnify the assured for costs incurred. In other cases the insurers often have a network of repairers. Subject to any term to the contrary, the assured is entitled to use a repairer of his own choice rather than a repairer nominated by the insurers although the insurers may refuse to pay sums greater than those charged by their own nominated repairers. Whatever the procedure, insurers are not liable to indemnify the assured for sums which they have not authorised or which exceed the reasonable cost of repairs."

[142] Mr Simpson relies on this passage as authority for the proposition that the essential element of indemnity is to provide a mechanism that allows for repairs to be affected which can include paying no more to a non-approved repairer than would be to an approved one.

[143] AXA place reliance on reports made by various bodies charged, in part, with upholding the rights of consumers in the British Isles namely:

- (1) Competition and Markets Authority
- (2) Financial Ombudsman Service
- (3) Competition Authority of Ireland

as support for its argument that the impugned clause is fair.

[144] Thus, AXA rely on various extracts from the Competition and Markets Authority Report entitled "Private Motor Insurance Market Investigation - Final Report" dated 24 September 2014 namely:

"Principle of insurance

- 1.3 *The principle underlying insurance is that, in return for payment of a premium, the insurer undertakes to indemnify the policyholder for the losses caused by the risks specified in the insurance policy.*

Claiming under the contract: general principles

- 1.4 *The terms of an insurance policy will set out what risks are covered as well as how and in what circumstances the policyholder can claim for such losses. The policy may have exclusions for certain types of loss or conditions for being able to claim.*

- 1.5 *The policy might include restrictions for where and how a repair is conducted. For example, some policies require the use of the insurer's network of repairers and some policies state that non-original equipment manufacturer (OEM) parts will be used in the repair.*

....

At-fault claims

- 1.33 *Claims by the at-fault party are handled pursuant to the provisions of the insurance contract. Repairs to the at-fault driver's vehicle are usually managed by the at-fault insurer, sometimes using an outsourced CMC [Claims Management Company] Most policies allow the owner to have their vehicle repaired at a repairer of their choice but the insurer retains a right to approve the repair estimate prior to the work being undertaken. Some PMI [Private Motor Insurance] policies contain incentives for at-fault claimants to use the insurer's approved repairers, such as the provision of a courtesy car or repairs only being guaranteed if the repair is carried out by an approved repairer, or the payment of an additional excess if a non-approved repairer is used."*

[145] Furthermore, AXA place reliance on a decision the Financial Services Ombudsman Service made in a specific complaint under Reference Number 1315-9086/KN/IS17. The Complainant in this case had, inter alia, complained to the Ombudsman, when AXA relied on the impugned clause and limited the amount they were willing to pay to allow the Complainant's car to be repaired.

[146] On 28 November 2014 the Ombudsman dismissed the Complainant's complaint and in doing so commented:

"My view from the outset was that it is not reasonable for a consumer to select a garage that charges more than an approved repairer for the same amount of work, and expect the insurer to pay the higher sum, without good reason"

and commenting further on her initial assessment of the case the Ombudsman continued:

"I was minded to conclude that Mrs B was made aware of the policy limitation by AXA and that it would not be reasonable to require it to pay the higher costs charged by her repairer, in the absence of compelling justification. Terms limiting what an insurer will pay for a non-approved repairer are common in motor insurance policies. "

and so the Ombudsman concluded:

“In my opinion, in this case AXA acted reasonably in relation to the repair costs.”

[147] AXA quite properly concede the decision of the Ombudsman in this case is not in any sense binding on this court. However, they do argue it is instructive.

[148] Finally, AXA drew the court’s attention to the Competition Authority of Ireland’s Guidance Note of December 2012 entitled “Preferred Repairer Arrangements in the Insurance Sector” in which it was stated:

“Preferred repairer arrangements help insurance companies to control the costs of insurance claims by harnessing competition between repairers. This can yield benefits for all consumers of insurance products.

• • •

• From a policyholder’s perspective: The arrangements offer clarity and certainty regarding the cost of repairs. This means that policyholders do not have to spend time and effort seeking quotes from different service providers to repair the damage. In such cases the insurer must also certify that the property has been restored to the condition it was in prior to the damage.”

[149] After considering approved repairer arrangements in light of, inter alia, the competition law obligations contained in Article 101 of the Treaty of the Functioning of the European Union, the Competition Authority concluded that approved repairer schemes do not offend these obligations.

[150] In relation to good faith AXA contend that on any fair reading of the impugned clause none of the concealed pitfalls or traps that Lord Bingham spoke of in *Director General of Fair Trading v First National Bank plc* are to be found and thus there is no basis for suggesting good faith is absent in the instant case.

[151] AXA deny that the impugned term falls to be considered as being within three of the indicative potentially unfair terms as set out in Schedule 2 to the 1999 Regulations as Crash sought to suggest.

[152] In respect of Schedule 2(1)(b) AXA submit that the impugned term does not come within this indicative term because they suggest it neither limits the rights of the insured nor has the insurer failed to perform its contractual obligations.

[153] In respect of Schedule 2(1)(c) AXA submit that the impugned term does not come within this indicative term in that the contract is not a contract for services nor

they argue has Crash made any suggestion that AXA has in any way acted in default of its contractual obligations. AXA rely on the guidance on the 1999 Regulations published by the Office of Fair Trading issued in September 2008 where in relation to this indicative term they comment:

“This is a very narrowly defined form of unfairness. It applies (a) only in contracts for services, (b) only where the consumer is bound to go on paying (not where he or she is merely prevented from seeking compensation) in the event of the supplier’s default, and (c) only where the supplier can get out of performing his obligations by quoting some circumstance which is in practice under his control.”

[154] In respect of Schedule 2(1)(i) AXA submit that the impugned term does not come within this indicative term in that the impugned term is contained in AXA’s Policy Booklet and there is no complaint made that the impugned term was unknown when the insured entered into the contract of insurance with the insurer.

[155] To this end AXA again rely on the guidance on the 1999 Regulations published by the Office of Fair Trading issued in September 2008 where in relation to this indicative term they comment:

“Terms which have the effect of making consumers agree to accept obligations of which they can have no knowledge at the time of contracting are open to serious objection. It is a fundamental requirement of contractual fairness that consumers should always have an opportunity to read and understand terms before becoming bound by them.”

The court’s conclusion on fairness

[156] As will be seen from the competing arguments of the parties set out above there is a difference of opinion as to what is the nature of the indemnity the policy of insurance provides.

[157] The indemnity the policy of insurance provides is one that commits the insurers to provide for the reasonable cost of repair to a damaged vehicle. If AXA are suggesting that an insured must actually effect these repairs I do not agree with that suggestion. In my view once the reasonable cost of repairs has been determined it is a matter of choice for the insured as to whether to have them carried out or take ‘cash in lieu.’

[158] What is really in dispute in the instant case is whether the mechanism the impugned term introduces into the policy of insurance places such a limitation on determining the cost the insurers are obliged to pay as to deprive the insured receiving the reasonable costs of repair and thus rendering the impugned term unfair.

[159] Having considered the competing arguments advanced by the parties in this case I have concluded that the impugned term is not unfair since in my view it provides for a procedure that allows for the fulfilment of the obligation to cover the reasonable costs of repair.

[160] In my judgment the allegations that the imbalances set out above, that Crash allege the impugned term introduces into the contract, are not well founded.

[161] While it may be, and in the absence of evidence on this point I put it no higher, that the AXA Approved Repairer would have charged less to repair a vehicle than a non-AXA Approved Repairer I do not accept it therefore follows that the insurer in only committing to pay the AXA Approved Repairer rate is somehow failing to cover the reasonable costs of repair. An insured can have their vehicle repaired by an AXA Approved Repairer or an insured can use a non-AXA Approved Repairer who is willing to do the work for the same amount as the AXA Approved Repairer.

[162] As to the concern that it is an AXA Motor Engineer who determines what is to be the reasonable costs of repair I do not accept this is unfair. It is true that while the initial decision on what the reasonable costs might be is taken by the AXA Motor Engineer an insured unhappy with his decision has a number of options if he wishes to challenge any assessment of value made. The policy provides for a two-fold regime for internal complaints being first to the "AXA Branch or Broker" and in the absence of being satisfied by complaining thereafter to AXA "Customer Care." Furthermore as the policy document makes clear if the internal complaints mechanism does not bring satisfaction an insured can have recourse to the Financial Services Ombudsman's Bureau. Finally of course the insurer cannot oust the jurisdiction of the courts to adjudicate on any dispute between the insured and the insurer.

[163] In my view it is wrong to consider that the reduction of an insurance excess and the provision of a courtesy car if an insured chooses to have his vehicle repaired by an AXA Approved Repairer in some way reduces the obligation on the insurer to meet the reasonable costs of repair. These matters may be incentives to use the AXA Approved Repairer but they do not harm the indemnity the insurer must provide.

[164] Finally, the fact that the impugned term may, where the insurer opts to have an AXA Approved Repairer effect the repairs, cause the insurer's car to be repaired using parts made other than by the vehicle's manufacturer does not necessarily mean that the insured is receiving less than the indemnity he has contracted for. Such parts may well be perfectly satisfactory. If the insured is dissatisfied with the parts that are to be used he can invoke the various complaint mechanisms and judicial processes noted previously. Any such challenge will no doubt take cognisance of the provisions of the Service Level Agreements AXA enter into with their Approved Repairers which make specific reference to parts in Schedule 1.

[165] If there is any concern by Crash that the impugned term falls foul of the need that there be good faith I can find no evidence or argument to support this in the instant case.

[166] In relation to the four matters concerning the specified factors element of the assessment that Crash invited the court to take into account, it will be noted that reference to all of these forms part of my consideration of fairness.

[167] In relation to whether the impugned clause can be brought within any of the three indicative clauses set out in Schedule 2 for which Crash contend it does I am not persuaded that this is so.

[168] In relation to the exclusion or limitation example at Schedule 2(b) I do not agree that the impugned clause either limits or excludes an insured's legal entitlement. The insured has a legal entitlement to have the reasonable costs of repair met and nothing in the impugned clause excludes much less limits this.

[169] In relation to the potestative condition example at Schedule 2(c) since I do not consider that the effect of the impugned term is to give the insurer an effective choice to do or not to do anything under the contract of insurance even on the case advanced by Crash the impugned term does no more than reduce but not extinguish obligations that rest on the insurer.

[170] Finally, in relation to the need for acquaintance example at Schedule 2 (i), I have already set out the reasons why I regard the impugned clause as being both grammatically correct and, in terms of its practical economic significance, understandable. Furthermore as the impugned term is set out in extenso in the Policy Document which the insurer provides to the insured the insured has the opportunity if they choose to avail of it of becoming acquainted with the impugned term.

[171] In my view it is instructive that the statutory bodies in these islands to whom Mr Simpson drew the court's attention and who have a responsibility for ensuring fairness in the market place do not appear critical of the type of arrangement set out in the impugned term.

[172] For the reasons set out above I do not find the impugned term to be unfair.

In any event is the impugned term is void for being uncertain?

[173] Alongside the challenge to the lawfulness of the impugned term by reason of the 1999 Regulations Crash also argue that it is void by reason of common law uncertainty thus rendering it unenforceable.

[174] From time to time a court will be invited to conclude that a term in a contract is so uncertain or vague that it lacks contractual force.

[175] In *G. Scammell and Nephew Limited v Ouston & another* [1941] AC 251 at 268 Lord Wright set out two bases upon which a court might hold a contract to be void for uncertainty:

“The first is that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention; and

... the other reason, which is that the parties never in intention nor even in appearance reached an agreement, is a still sounder reason against enforcing the claim.”

[176] However, to hold a contract void for uncertainty is very much a remedy of last resort.

[177] In *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 1 QB 933 Lord Denning M.R. referred to such a remedy as:

“a counsel of despair.”

While in *Greater London Council v Connolly* [1970] 2 Q.B. 100, 108 he said:

“... the courts are always loath to hold a clause invalid for uncertainty if a reasonable meaning can be given to it...”

[178] Therefore, it seems to me that if a court is satisfied that a term in a contract was intended to create legal obligations, respect for the concept of freedom of contract demands that the court must attempt to give effect to the intention of the parties by interpreting the term in a way that gives it both practical and legal effect. In furtherance of this the courts have developed a number of qualifications to the requirement for certainty. Thus, for example it is not sufficient reason to hold that a clause be void for uncertainty because the parties have chosen to express an obligation in broad and evaluative language. That having been said it is of course not the role of the courts to make a contract for the parties.

[179] Alongside the traditional argument for uncertainty as set out above in this case *Crash* advance a more nuanced uncertainty argument. They suggest that where a contract is subject to a condition that leaves fundamental questions of liability under the contract to be determined by only one of the parties this too renders it uncertain and thus it should be declared void.

[180] In *Brown & others v GIO Insurance Limited* [1998] CLC 650 the Court of Appeal considered certain issues arising out of a policies of reinsurance. One issue

before the court was whether a clause in the reinsurance contracts which made one party, the reassured, the sole judge of questions of fact and law was valid. The impugned clause in that case read:

“The Reassured shall be the sole judge as to what constitutes each and every loss and/or one event”.

[181] In *Brown* the court recognised the general rule that a contract which purports to oust the jurisdiction of the court to determine questions of law is against public policy and thus void.

[182] However, the court was of the view that the question of what constituted an “event” was a question of fact as well as law and thus binding on the parties. Moreover, the reinsurance policy did not oust the courts' jurisdiction as it was accepted that the courts had jurisdiction over whether the reassured acted in good faith and reasonably in applying the clauses governing the aggregation of losses.

Crash’s argument on uncertainty

[183] Crash argue that Section 1 in the policy of insurance headed “loss and damage to your car,” is void for uncertainty on both the traditional and the nuanced grounds noted above.

[184] In relation to the traditional ground Crash argue that that as the phrase an AXA “Approved Repairer” is not defined which repairers are deemed to be approved is so uncertain as to render the impugned term void.

[185] In relation to the nuanced ground Crash take issue with the impugned term as they suggest it effectively reserves to AXA alone decisions on a number of scenarios that might arise following a claim being made against the policy. These include whether a vehicle is to be written off or repaired; whether it is to be repaired or a payment in lieu made to the insured; whether it is to be repaired by an AXA Approved Repairer or not and finally how much will AXA agree to pay towards the costs of the repair.

AXA’s argument on uncertainty

[186] AXA argue that the court is so severely constrained in relation to reaching a finding of uncertainty that Crash have simply failed to identify any contract uncertainties that would justify the court declaring the contract void for uncertainty. Furthermore they argue that the mere fact that one party has the right to choose certain options under the contract is again insufficient to permit a finding of uncertainty.

The court's decision on uncertainty

[187] In relation to the suggestion by Crash that the failure to define who is an AXA Approved Repairer renders it uncertain I take cognisance of the need to be slow to find a term in a contract void for uncertainty where a reasonable meaning can be given to it. It seems to me that any lack of clarity as to who is an AXA Approved Repairer can readily be resolved by recourse to extrinsic evidence. In affidavit evidence before this court on behalf of AXA two of their employees John Daly, Engineer and Alan Foster, Motor Engineer gave evidence that to be an Approved Repairer a repairer must enter into a Service Level Agreement with AXA which sets out certain standards of service AXA require a repairer to adhere to. Therefore it seems to me that if it is of importance to know who an AXA Approved Engineer is this can be ascertained by identifying those repairers that have subsisting Service Level Agreements with AXA.

[188] In relation to the suggestion by Crash that given the insurance policy reserves solely to AXA the right to make certain decisions following a loss arising renders it void I also reject this argument. It seems to me that the decisions AXA have reserved unto itself are matters of fact as well as law and thus binding on the parties. This is in accordance with the decision in Brown referred to above and also with that in Durham Tees Valley Airport Limited v Bmibaby Limited [2011] EWCA Civ 485. In that case the court noted without criticism that

“It is not uncommon in commercial life for parties to enter into a contract by which one party is to conduct an operation over which it has a large degree of discretion”

[189] In both Brown and Durham Tees the courts did not consider that the impugned terms in the respective contracts unlawfully reserved a right of determination to one party.

[190] In the instant case I find nothing amiss in AXA reserving unto itself the decisions Crash have identified. If it is considered that AXA have acted improperly in then making any decision there is nothing to prevent that decision being challenged and redress sought through the internal or external procedures referred to previously including seeking relief from the courts.

Conclusion and disposal

[191] For the reasons set out above I have concluded that the impugned term in the contract of insurance is not unfair nor is it void for uncertainty.

[192] It thus continues to form part of the agreement between Crash, in its capacity as the assignee of Helena Gribben's interest of a right of recovery under her insurance policy, and AXA.

[193] Having reached this conclusion on the preliminary issue I invite the parties to consider how they wish to deal with the remainder of the case.