

Neutral Citation Number: [2024] EWHC 620 (TCC)

Case No: HT-2022-000098

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (KBD)**

Rolls Building,  
London

Date handed down: 21 March 2024

**Before:**

**HIS HONOUR JUDGE STEPHEN DAVIES**  
**SITTING AS A JUDGE OF THE HIGH COURT**

**Between:**

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**SOUTH EAST WATER LIMITED**

**Claimant**

**- and -**

**ELSTER WATER METERING LIMITED**

**Defendant**

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**Clifford Darton KC and Lara Kuehl** (instructed by in-house solicitor) for the **Claimant**

**Richard Power and Sam Hussaini**  
(instructed by Dentons UK and Middle East LLP, London EC4M) for the **Defendant**

Hearing dates: 20-21 February 2024  
Draft judgment circulated: 14 March 2024  
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**APPROVED JUDGMENT**

Remote hand-down: This judgment was handed down remotely at 10am on 21 March 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**His Honour Judge Stephen Davies**

**His Honour Judge Stephen Davies:**

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**Introduction and summary of decision**

1. On 20-21 February 2024 I heard the application by the defendant, Elster Water Metering Limited (“Elster”), for strike-out and/or summary judgment against the claimant, South East Water Limited (“SEW”), on its claim. This is my judgment on that application.
2. In summary, SEW sues Elster to recover its claimed losses consequential upon the failure of automated meter reading (“AMR”) electronic units (also referred to as remote read radio modules) supplied by Elster to SEW pursuant to a framework agreement entered into in 2010, which made provision for the supply of water meters and AMR units. The framework agreement had a 5 year term, which was subsequently extended by a further 5 years. The AMR units were designed to allow water companies such as SEW remote access to the water meters which measure the amount of water supplied to individual properties within their region, facilitating meter reading for billing and other purposes. Remote access reduces the time and cost of having to gain physical access to each meter, typically located underground, on what is a six monthly basis. A substantial number of water meters and AMR units (some separate and some as part of a composite unit with the meters) were supplied over the lifetime of the framework agreement.
3. The essence of SEW’s case is that the AMR units were supplied with sealed in battery units which ought to have, but did not, in breach of contract, have a life of at least 10 years, comparable with the life expectancy of the water meters supplied by Elster. Accordingly, complains SEW, it will need to replace all of the water meters and AMR units supplied under the framework agreement and, as a result, has incurred and will continue to incur substantial direct and other related losses. SEW’s alleged losses are said to be very substantial, pleaded at between £19 million and £29 million, but it acknowledges that its overall recovery is subject to a contractual cap of £10 million.
4. Elster’s strike-out / summary judgment application, put briefly, is advanced on the principal basis that SEW’s claims cannot succeed because of two contractual provisions which, on Elster’s case, have the effect of: (a) preventing SEW from recovering anything more than the modest individual cost which Elster would incur in providing replacement AMR units and a specified contribution towards the replacement installation cost; and (b) excluding losses falling within

specified categories of irrecoverable loss. Elster raises other arguments, addressed below, but they are subsidiary to this principal argument.

5. SEW's primary submission is that the court should decline to entertain these arguments, because they cannot be resolved without an investigation into relevant disputed facts which, it says, cannot properly be performed at this summary stage. Its secondary submission is that if the arguments are entertained then the court, proceeding - as it must - on the basis that SEW will make out its factual case at trial, should be satisfied that SEW's case satisfies the modest requirement that it has a reasonably arguable prospect of success.
6. As to the first submission, reference to the frequently cited summary of the relevant principles by Lewison J in *Easyair Limited (Trading As Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch) establishes that: (a) the court cannot and should not conduct a mini-trial on disputed factual evidence on a summary judgment application, whereas (b) in appropriate circumstances the court can and should grasp the nettle and decide a short point of law or construction.
7. This is a case where, in certain respects, what Moore-Bick LJ said in *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 at paragraphs 12-14 is of particular relevance, namely that: (1) the respondent to an application for summary judgment, where the issue is one of the proper construction of the relevant contract, must put in evidence by witness statement which provides sufficient evidence of the surrounding circumstances so as to enable the court to see that those circumstances may have a bearing on the outcome; (2) sometimes it is possible to show by evidence that material not currently before the court is likely to exist and be available at trial and may have a bearing on the outcome and, if so, it would be wrong to give summary judgment; (3) but that it is not enough simply to argue that the case should go to trial because something may turn up which would have a bearing.
8. I have also been referred to two particular decisions of the Court of Appeal which are relevant to the same question in the specific context of: (a) whether SEW has a real prospect of showing at trial that it dealt with Elster on the latter's standard terms of business (*African Export-Import Bank v Shebah Exploration and Production Co Ltd* [2017] EWCA Civ 845); (b) the dangers of deciding the issue of reasonableness under the Unfair Contract Terms Act 1977 ("UCTA") on a summary basis rather than at trial (*Last Bus Ltd v Dawson Group* [2023] EWCA Civ 1297). I will refer to those decisions in more detail at the appropriate time.
9. Counsel for Elster and SEW respectively have argued their cases with skill and determination and I am grateful to them all.
10. Having considered their submissions, I have decided that: (a) I should investigate these arguments; and, having done so (b) I am satisfied that Elster is right and that: (i) SEW's claims as currently pleaded offend against the contractual provisions upon which Elster relies; (ii) UCTA does not apply to those provisions; and (iii) even if UCTA did apply they are, beyond any reasonable argument today or at trial, reasonable provisions upon which Elster can rely. It follows, in my judgment, that the paragraphs in the current Particulars of Claim which plead its particulars of loss and damage and its sums claimed under contractual indemnities (paragraphs 32 and 34) must be struck out and SEW must – assuming it wishes to do so - produce within a specified time any draft amended particulars of loss and damage which do not offend against the contractual provisions relied upon by Elster and which, if properly arguable and subject to any relevant considerations affecting the discretion to permit such amendments, may proceed to trial.
11. My reasons follow under the sections contained below. Before turning to the key document, which is the framework agreement, I should briefly introduce the parties, summarise the procedural history of the case and the application and the statements of case.

### The parties

12. SEW is the statutory water undertaker under the provisions of the Water Industry Act 1991 for parts of Kent, Sussex, Surrey, Hampshire and Berkshire.
13. Elster is a company, now part of the Honeywell International group of companies, whose business includes the supply of water meters and AMR units to water undertakers.

### Procedural history

14. The claim was issued on 24/3/22. SEW served Particulars of Claim dated 18/7/22. Elster served its Defence dated 14/12/22. SEW served its Reply dated 15/3/23. I shall refer to the detail of the statements of case below.
15. The present strike-out / summary judgment application is dated 18/10/23. No witness statement evidence was filed with the application. The reasons for the application appeared in the box for evidence in the application form, in particular in, paragraph 9.
16. At the first CCMC, held on 10/11/23 before Constable J, directions were given for further evidence to be filed in relation to the present application and case management directions were given down to an 8 day trial (now listed to commence on 8/5/25), including provisions for disclosure by 3/5/24, for witness statements by 14/6/24 and for expert evidence on the issues of liability and of quantum (if necessary) thereafter.
17. The evidence in support of the application served pursuant to such directions comprises: (a) a witness statement from Mr James Langley, a partner with Elster's solicitors; (b) a witness statement from Mr Richard Simko, the contract lead for Smart Energy, a company which forms part of the Honeywell International Group, in which capacity, he is responsible for the contractual relationship as between Elster and SEW. He was not, however, involved in the procurement or formation of the framework agreement and, hence, cannot speak as to matters relevant to the issues the subject of this application from personal involvement at the time.
18. In response SEW served a witness statement from Mr Fergus Poncia, its in-house solicitor, who was also not involved in the procurement or formation of the framework agreement and who, hence, also cannot speak to relevant matters from personal involvement at the time. It also served a witness statement from Mr Michael Moores, the current procurement manager at SEW, who was employed in a supporting role as a contract specialist in 2010, when the procurement process was run by a Mr Lee Allen. He gives evidence about matters relevant to the procurement and formation of the framework agreement, from which it may be inferred that he was personally involved at the time, at least to some extent, without actually either stating so in terms or identifying what particular involvement he had in the procurement exercise at the time.
19. Finally, in reply, Elster served further witness statements from Mr Langley and Mr Simko.

### The statements of case

20. I need only summarise the Particulars of Claim because, apart from the particulars of loss and damage, they do not feature to any great extent in the argument.
21. SEW pleads reliance upon various statements made by Elster in the course of pre-contract negotiations phase as containing representations to the battery life of the AMR units. This was the subject of a specific objection based on the well-estimated legal principle that a party cannot rely on statements made in pre-contract negotiations as part of the factual matrix. However, as Mr Darton KC clarified in his oral submissions, the statements are not relied upon as relevant to the construction of the contract, but as to: (a) what was known to both parties pre-contract, which is relevant to explain the commercial and business object of the contract and also to the factual

investigation which underpins any consideration as to whether or not the contractual limitation provision relied upon by Elster is reasonable under UCTA; and (b) the scope of Elster's obligations to supply AMR units which were of satisfactory quality and reasonably fit for their intended purpose. On that basis I am satisfied that – at least for the purposes of this application – the statements are admissible.

22. SEW relies upon the express terms of the framework agreement and individual supply agreements entered into thereunder as regards the specification of the AMR units, Elster's express contractual and statutory implied obligations as regards the AMR units and the remedies to which it was entitled in the event of breach. These are referred to below when addressing the relevant terms of the framework agreement and supply agreements.
23. SEW refers to various defects experienced in 2012 - 2013 after which, following an investigation, Elster agreed to replace a large number of AMR units free of charge and to monitor the remainder. After this, in 2015 SEW exercised its option to extend the framework agreement for a further 5 years on the terms of a supplemental deed which included the terms of the existing framework agreement and also made provision for a project to be undertaken to identify and replace further AMR units and meters where found defective. Little, if anything, has been said in evidence about this project, but it is apparent that SEW considers that it was not fully effective to remedy the problems which it says it has continued to experience.
24. Thus, SEW pleads that “a very high percentage [approximately 52%] of the Products/Meters that have been supplied to the Claimant both before and after the Supplemental Deed have failed in that they cannot be read remotely within a few years of being installed and/or provide inaccurate remote readings” and that Elster has failed to report back on the results of its further investigation. It pleads that in the circumstances Elster has breached its express and/or implied obligations by reason of the failures of the AMR units within a period far shorter than the minimum 10 year life which SEW was entitled to expect and the projected similar failure rate of those already supplied and still operational.
25. SEW's case as to loss and damage is pleaded at par. 30 onwards. Paragraph 32 is worth setting out in full:
  - “(i) Costs of exchanging those Products that have been supplied since 24/03/2016 and have since failed: £7,400,000
  - (ii) Costs incurred in testing these Products: £50,000
  - (iii) Costs incurred in manually reading these Products (meters) after they lost AMR (incurred to date, continuing): £1,932,000
  - (iv) Costs of dealing with customers owing to faulty meter readings In these Products, including costs of investigating erroneous AMR readings in these Products: £259,000
  - (v) Loss of revenue owing to faulty AMR readings in these Products: £3,500,000
  - (vi) Anticipated costs of replacing other Products supplied after 24/03/2016 based on above percentage failure rates: £6,000,046

GRAND TOTAL: £19,141,046”.
26. SEW also pleads an alternative claim, based on the express indemnities in the framework agreement, which, it is claimed, are not subject to the limitation period applicable to a claim for loss and damage and, hence, include replacement costs of over £22 million, as opposed to the £7.4 million pleaded above, producing a total of over £25 million.

27. However, as already indicated, SEW acknowledges that its claim is still subject to a £10 million contractual cap on liability and, thus, in paragraph 35, it limits its claim to that amount. Elster complains that this limitation is not carried through into the claim in the prayer for relief, which is plainly true and which should, thus, be amended in the amended Particulars of Claim to be provided by SEW following this judgment and consequential order.
28. I will not summarise the subsequent statements of case because insofar as they are relevant I will consider them when addressing the specific points as they were argued on the application and therefore now turn, without further ado, to the framework agreement itself.

### The framework agreement

29. I need to address separately: (a) the genesis of the framework agreement; (b) the genesis of what became Sched. 11 of the framework agreement; and (c) the terms of the framework agreement.

### The genesis of the framework agreement

30. In the light of the issues raised I need to begin by referring in a little detail to the genesis of the framework agreement. It is common ground that it came into being as a result of a procurement exercise conducted by SEW which was commenced in autumn 2009 by way of a formal invitation to tender document (entitled “SEW ITT 002 Supply of Meters (AMR)”). This made clear that it was a competitive public procurement exercise, to be carried out under the EU Procurement Directive as applicable to water utilities, using the negotiated procedure. The invitation to tender was dated October 2009 and provided a timetable for the tender exercise with a view to the contract commencing on 1/5/10. It included a draft framework agreement and required tenderers either to confirm acceptance of the terms or “list ... your proposed amendments / variation”, which SEW would then consider as part of the overall tender assessment.
31. It also permitted tenderers to submit requests for clarification and to provide compliant tender submissions but also variant tender submissions if they wished. In relation to any variant submissions tendered SEW stated that they would be evaluated, “providing they demonstrate a clear commercial or technical advantage” to SEW. It also stated that the AMR units “must allow for a minimum 10 year battery life” and, under Appendix 11, required (at paragraph 11.9) tenderers to provide details of battery life with supporting data.
32. An issue was raised at the hearing as to whether this was the correct version of the invitation to tender or whether it was another later version, which is dated January 2020, and was produced by Mr Simko with his first witness statement, and which did not contain the same reference to variant tender submissions. It is obvious in my judgment from the timeline of the award – as appears from the award letter (see below) - as well as the subject matter of the tenders, which was different, that the later version related to a different – albeit similar – product. Nothing however of key significance turns on this point.
33. The draft framework agreement was in substantially the same terms as that entered into in due course. It included 9 schedules of which the first, headed Specifications, and the seventh, headed Products and Prices, were left blank.
34. The response to Appendix 11 of the invitation to tender (see paragraph 31 above) stated that Elster would source all components and manufacture within the group. It now appears from Mr Simko’s first witness statement that Elster did not in fact manufacture the AMR units. This has caused SEW some disquiet, although Elster has contended that it made SEW aware that this was the case in subsequent correspondence. As I indicated at the hearing, insofar as this is a relevant fact – which I doubt - I will assume it in SEW’s favour for present purposes. The response also,

in reply to paragraph 11.9, stated its “minimum battery life specifications” for its 2 existing products as being 12 years and 15 years respectively.

35. The letter from SEW to Elster dated 19/4/10, confirming the award of the contract to Elster, stated that the terms and conditions should be as contained in the invitation to tender as amended by the specified correspondence identified in the letter. This letter was accepted by Elster via its letter dated 20/4/10.
36. One of the items of correspondence identified was a letter from Elster dated 17/3/10, responding to various tender clarification requests submitted by SEW. Having provided its responses to those requests the letter also included two further “clarifications”. The first was a confirmed price reduction for a specific product and the second, headed “warranty and fault attribution”, contained the details of what Elster was proposing by way of warranty proposal. This proposal subsequently became Sched. 11 to the framework agreement, so I shall refer to it in more detail below. However, it is worth observing that there are four material differences between this proposal and what became Sched. 11:
- a. first, it is described as “a warranty as proposed in the table below” (emphasis added; the reference to this being something which is proposed does not appear in Sched. 11 itself);
  - b. second, it only included two worked examples, whereas Sched. 11 included another worked example;
  - c. third, it included the words “we are happy to discuss extended warranty subject to an additional charge”, which words also did not carry through to Sched. 11;
  - d. finally, whilst both the letter and Sched. 11 concluded with 9 conditions to which the warranty was made subject, in the letter this section was headed “below conditions already stated in the original commercial response - warranty in respect of Goods & Services and Defects Liability, to be subject to”, which text did not appear in Sched. 11.
37. The award letter refers to 5 further communications between the parties preceding the award letter itself. Only two, dated 9/4/10 and 15/4/10, have been adduced in evidence through being produced by Mr Moores. The other three are self-evidently, from their described subject-matter, of no relevance to the issues in this case.
38. It follows that there is currently no documentary evidence evidencing any specific SEW response to this clarification, nor is there any oral evidence of any response. This is despite Mr Simko saying in his first witness statement that he had been “involved in enquiries undertaken in recent months within the business to identify further details about the negotiation of the Framework Agreement” and Mr Moores also giving extensive evidence about this topic.
39. In paragraph 19 of his witness statement Mr Moores states that he had “reviewed the tender submissions<sup>1</sup> and associated email chains, not all of which have been as yet fully searched and recovered from our computer archive” and, having done so, had been able to produce Elster’s letter dated 17/3/10 referred to above and to confirm his belief that what became Sched. 11 was first introduced by Elster in this letter.
40. Mr Moores states that his understanding at the time (which he believes was shared by everyone else within SEW) was that this was “just an additional re-assurance, or warranty item, offered by Elster to make their tender more attractive – i.e., in addition to SEW being able to sue under the contract for any loss if the products did not meet the specification, Elster would also replace any defective products free of charge or at a discounted cost”. He does not suggest that this

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<sup>1</sup> He refers in his evidence to submissions from other tenderers.

understanding was also communicated to him or anyone else at SEW as being a shared understanding by Elster. Instead, what he says is that he does not recall any negotiation in relation to the Sched. 11 warranty; he says: “I believe that Elster offered the warranty in Schedule 11 to make its tender more attractive and SEW ultimately decided to award the contract to Elster (which would have involved taking into account many factors including the price and the fact that Elster was willing to offer replacements on the terms in Schedule 11)”. He confirms his belief that there was “no negotiation of Schedule 11 after it was offered by Elster”.

41. In his responsive witness statement Mr Simko confirms that he has no direct knowledge of these matters and also that no-one directly involved in the process still works at Elster. In short, apart from his suggestion that there must have been “some additional negotiation of Sched. 11 beyond what was initially proposed on 17 March 2010” he can add nothing.
42. It is clear that there must have been some communication from SEW to Elster that it accepted the warranty proposal and that at some stage before the framework agreement was concluded it was then reworded to make the changes referred to above. Beyond that, however, there is no positive evidence about the fact or nature of any actual negotiation. Since it is clear from Mr Moores’ evidence that his belief, confirmed by his review of the documentary evidence, is that there was no such negotiation, I must proceed for present purposes on that basis, which is the most favourable to SEW. Also, no-one has suggested any explanation for the reference in the 17/3/10 letter to the statement “below conditions already stated in the original commercial response - warranty in respect of Goods & Services and Defects Liability”. Again, therefore, in the light of Mr Moores’ evidence that he believes that there was no previous reference in the “commercial response”, whatever that might have been and whether it even related to this tender, I must proceed for present purposes on that basis.

*The genesis of what became Sched. 11*

43. This is an important issue in the context of the argument about whether or not UCTA arguably applied to the framework agreement because, by s.3(1) of that Act, the requirement of reasonableness only applies as between contracting parties “where one of them deals . . . on the other’s written standard terms of business”.
44. SEW submits that it is at least reasonably arguable that at trial it will be able to establish that Sched. 11 does form Elster’s written standard terms of business. Whilst I will deal with the law later, a key question I must consider at this point is the nature of the evidence, both the evidence before the court on this application and any evidence, not currently before the court but which is likely to exist and to be available at trial, which may have a bearing on the outcome of this issue, to see whether SEW has a reasonably arguable case on this point.
45. It is worth beginning with how this issue came to arise. SEW pleaded reliance on UCTA in paragraph 6 of its Reply. In this paragraph it did not plead a positive case that Sched. 11 comprised Elster’s written standard terms of business. It did, however, in paragraph 8 of its Reply, in the context of reliance on the *contra proferentum* rule of construction, plead that “the Framework Agreement was prepared by the Defendant and incorporated its standard terms and conditions”. As Mr Power observed in his submissions, it is surprising – to say the least – that SEW could ever have pleaded this as a positive case, given the clear and overwhelming evidence (see above) that it was SEW which produced the framework agreement as part of the invitation to tender. As he says, this pleaded allegation must also be struck out from the amended Particulars of Claim to be provided following this judgment.
46. In his witness statement Mr Poncia has confirmed that this was a mistake and apologises to the court for that mistake, given that he signed the statement of truth on the Reply. His explanation



is that “having now carried out further research and seen the documents associated with the procurement process whereby economic operators were invited to tender to provide water meters for SEW’s Amp5 Metering Programme, it appears that I was mistaken in the statement that the whole of the Framework Agreement was prepared by Elster” (*emphasis added*). This, I must say, is neither as full nor as unreserved an admission as it should have been. It is not simply a question of it appearing that he was mistaken – he plainly was mistaken and he ought to have said so in clear terms. It also fails to provide any explanation as to how he came to allow the Reply to be filed and served in that form, with his statement of truth attached, with such an obvious error in it. It does not appear that he could have conducted the enquiries, or ensured that such enquiries, obviously relevant to this issue, which needed to be made at the time were conducted. It is not as if SEW had not already had plentiful time and opportunity to make these enquiries before it came to prepare its Reply.

47. This approach is relevant to the issue now before the court because Mr Poncia continued in this section of his witness statement, without giving any further explanation, to say: “I apologise to the Court for the mistake and, if necessary, SEW seeks the Court’s permission to amend paragraph 8 of the Reply to state that Schedule 11 was prepared by the Defendant and that SEW believes that the provisions of Schedule 11 relied upon by Elster as limiting its liability constituted Elster’s written standard terms of business at the time” (*emphasis added*). Again, it seems to me to be obviously necessary that this would have to be done, and his reluctance to accept this in clear terms is less than impressive, but of more importance to the current application is the basis for SEW’s stated corporate belief – whatever is meant by that expression.
48. At paragraph 43 of his witness statement he says, correctly, that it is “common ground that Schedule 11 probably originated from Elster rather than from SEW” and also that Mr Moore believes that it was not negotiated. He then continues: “Mr Simko has not provided any documentary evidence for his assertion that Schedule 11 was “bespoke” (and he has no personal direct knowledge of how Schedule 11 was produced). As such, there remains an important (and disputed) live issue of fact as to whether or not Schedule 11 (or even just the relevant provisions within Schedule 11) constituted Elster’s standard terms of business”.
49. The highest he gets to giving reasons for why this is a disputed issue is in paragraph 45 of his witness statement, where he says: “So far as I and indeed the senior management at SEW understand it, Elster has sold a lot of AMR water meters to other water companies/utilities both in the UK and in the US. It was and is a substantial business within this field and, as such, is likely to have prepared its own draft terms for the purposes of this business and particularly in relation to the replacement of “faulty” units where it would be carrying out the necessary work and would have a greater understanding of the process involved and its costs”.
50. This statement is plainly in my view entirely speculative. He does not even identify the senior management to whom he refers or the other water companies or utilities in the UK or US to which he refers. Nor does he give any grounds for asserting that it is likely to have prepared its own draft terms, either generally or specifically in relation to the replacement of faulty units. However, it is this apparent belief – and only this apparent belief - which forms the foundation for his submission at paragraph 46 that “a proper search must be carried out for similar (alleged) exclusion provisions in other contemporaneous contracts entered into by Elster and a disclosure statement must be given by a suitably authorised person from Elster setting out the extent of the search and confirming that disclosure has been given of relevant documents”.
51. Even though Mr Moores is now a procurement manager and was, at the time, a contract specialist who might, presumably, have been able to search for any further tenders submitted by Elster,

whether to SEW or to the other water companies / utilities referred to, Mr Moores has nothing at all to say on this subject.

52. Mr Poncia made this witness statement having already seen Mr Simko's first witness statement in which Mr Simko had said, at paragraph 19, that he had "been provided with and reviewed some other comparable contracts which Elster entered into with other customers. Those contracts contain different warranty provisions, and none of them contains a schedule which closely resembles Schedule 11 of the Framework Agreement". At paragraph 20 he said that he had "also not located any Elster standard terms and conditions which contain provisions similar to Schedule 11". He accepted that in other contracts he had reviewed "Elster was seeking to put in place a warranty regime that provided protection for it in line with expectations around how products would perform over time". He gave reasons in paragraph 23 for stating that the terms of Sched. 11 appeared to be "bespoke", because "the product replacement regime based on the year of failure is specific and tied to the particular products supplied under the Framework Agreement (i.e., the AMR modules and the meters)". Mr Poncia did not engage in any way with this evidence in his witness statement.
53. In his second witness statement Mr Simko, responding to Mr Poncia's witness statement on this point, attached copies of four agreements concluded with other water suppliers from around the same period as this framework agreement (these being contracts dated 16 July 2009, 10 May 2010, 1 April 2011 and 3 May 2011 respectively), noting that none contain provisions of any resemblance to Schedule 11 as, neither, does Elster's standard product warranty for 2014 which, he says, is the earliest standard product warranty located.
54. SEW has not sought permission to file any further evidence in response to this second witness statement nor, indeed, has it asked any further questions on this point and nor has it made any submissions in relation to these agreements other than to repeat its submission that this remains an open factual issue pending formal disclosure by Elster. From my review of these agreements what they indicate, as indeed might be expected in contracts made with water supply companies, is that: (a) they appear to be based on the individual water suppliers' own particular standard terms; and (b) there is no indication of there being any warranty similar in any way to that which appears at Sched. 11 in the instant contract.
55. The end result, in my judgment, is that SEW has no positive evidence whatsoever that Sched. 11 can be said to be Elster's standard terms of business. There are only two possibilities. The first is that SEW has made no attempt to investigate this point, despite having pleaded a positive – albeit erroneous – case as to the contract as a whole being Elster's standard terms, in March 2023, and despite having known what Mr Simko was saying in his first witness statement since 5 December 2023. The second is that it has and that its investigations have revealed nothing of assistance to it and it has chosen to say nothing about this its evidence, which may explain Mr Moores' silence on a point which one might expect him, rather than Mr Poncia, to cover.
56. In comparison, Mr Simko, assisted by others, has conducted an investigation into other comparable contracts which has revealed nothing in the same terms as Sched. 11. He accepted from his investigations that Elster would seek to include a protective warranty regime into other contracts but, as he said, none which closely resembled Sched. 11. When challenged by Mr Poncia to provide documentary evidence to this effect he did so in his second witness statement. The best that Mr Poncia can say – and indeed the best that could be said by Mr Darton KC in submissions – is that pending disclosure this is a point of evidence which should not be determined against SEW at this summary stage.
57. However, I should remind myself that Mr Simko has provided not just one but two witness statements, both verified by statement of truth. There is no good reason to conclude that it is

even arguable that Mr Simko or anyone assisting him has: (a) consciously only chosen to search for contracts which they already knew did not contain anything like Sched. 11; or, worse still, either (b) suppressed the results of searches actually made which did reveal that contracts were made in or around 2010 which did include the same terms as Schedule 11; or (c) falsely stated that nothing like Sched. 11 was in existence at the time, when they knew that it was in existence, that Elster always tried to include it in contracts, but failed to succeed in the contracts referred to and attached to his second witness statement.

58. Instead, the documentary evidence which is available shows that: (a) Elster did not even put the first draft of what became Sched. 11 to SEW until a relatively late stage in the tender process and, then, only on the relatively tentative basis of a proposal; (b) Sched. 11, whether in its first draft or eventual form, does not have anything like the appearance of standard terms of business, in that it is: (i) limited to one specific subject, i.e. warranty and fault attribution for one specific event, namely a faulty device being identified in the field; and (ii) clearly very much bespoke to that specific event, where the fault device is that of the AMR unit (including) battery and meter, rather than the whole suite of products offered by Elster – some of which can be seen from the other contracts.
59. If, as Mr Moores asserts, there was no previous reference to this warranty and fault attribution provision in the previous tender correspondence, then the only other possible explanation for the reference in the draft to “below conditions already stated in the original commercial response - warranty in respect of Goods & Services and Defects Liability” is that these conditions and thus, presumably, the accompanying warranty itself, were produced and sent in respect of some earlier contractual negotiation, either with SEW or some other business. Even assuming this, as the most favourable analysis to SEW, it still does not go anywhere near proving that Sched. 11 was Elster’s standard terms of business. Apart from anything else, the words “warranty in respect of Goods & Services and Defects Liability” is completely different from the words “Meter AMR Warranty and Fault Attribution” used in this contract and, from a comparison, appears to deal with a different – albeit a related - subject matter.
60. In the circumstances, in my judgment it is not even reasonably arguable that at trial SEW will be able to establish that Sched. 11 was Elster’s written standard terms of business.
61. Whilst I will address UCTA later, I should at this stage refer to the decision of the Court of Appeal in *African Export-Import Bank v Shebah Exploration and Production Co Ltd* [2017] EWCA Civ 845, because it is relevant to and has informed my approach to this evidential issue. The facts of the case are not important for these purposes. It is what Longmore LJ – with whom Henderson LJ agreed - said about the approach to be taken where this issue is raised by a respondent to a summary judgment application which is of relevance here. What he said was that:
- a. The onus of proof is on the party [*seeking to rely on UCTA*] to prove that (i) the term is written; (ii) the term is a term of business; (iii) the term is part of the other party’s standard terms of business; and (iv) that the other is dealing on those written standard terms of business (paragraph 18).
  - b. The third requirement that the term is part of the other party’s standard terms of business means that it has to be shown that that other party habitually uses those terms of business. It is not enough that he sometimes does and sometimes does not (paragraph 20).
  - c. “A party who wishes to contend that it is arguable that a deal is on standard business terms must, in my view, produce some evidence that it is likely to have been so done.

This cannot be difficult in a proper case since anonymised requests about prospective terms of business can be made and participants in the credit market may well have knowledge of how particular lenders go about their business. It cannot be right that any defaulting borrower can just assert that business is being done on standard terms and that the lender then has to disclose the terms of other (how many other?) transactions he has entered into before he is entitled to summary judgment” (paragraph 33).

62. Applying that general approach, which cannot be said to be specific to the particular market in that case, the credit market, the same onus of proof rests upon SEW, even though in the context of the summary judgment application overall the onus of proof lies on Elster to show that SEW does not have a reasonably arguable case. Evidence, such as has been adduced here and is consistent with the evidence about the genesis of Sched. 11, that Elster did not habitually use Sched. 11 in other contracts at the time is fatal to SEW’s case. SEW must either produce some evidence that Elster did habitually use Sched. 11 at the time or some evidence showing grounds for a belief that such evidence is likely to be available at trial.
63. As I have stated, whilst what evidence is required in any individual case is of course fact-specific, in this case SEW could have at least attempted to do so by way of enquiry of other contracting water companies / utilities. There is no evidence that this has even been attempted or reason to think that such companies would have had any good reason not to assist if they had been approached and able. Instead, SEW having raised the issue, Elster has done what Longmore LJ suggested was not even required in that case, by providing disclosure of other transactions which demonstrates that it did not habitually use Sched. 11 in similar transactions at around the same time.
64. In short, in my judgment this is a case of mere assertion by SEW which, on the evidence now available and likely to be available at trial, is not sufficient to show a real prospect that it will succeed on this issue at trial. This is a substantial value claim and SEW is a well-resourced company with access to extremely competent legal advice. It cannot complain if the court takes the view that it ought, at the hearing of a 2 day application coming on 5 months after the application was issued, and having had sufficient time to appreciate the importance of the point and undertake investigations, have more to show or say than mere surmise and hope that something will turn up, in the face of clear evidence from Elster - made by witness statement verified by statement of truth and backed up by disclosure of relevant documents - which shows that its case is not reasonably arguable.

*The terms of the framework agreement*

65. The framework agreement itself was signed on behalf of the parties on 26/4/10. Before referring to the key terms upon which the parties rely it suffices simply to summarise its general terms and provisions.
66. It was a 5 year contract commencing 30/4/10 which SEW was entitled to extend by a further 5 years if it wished: clause 5.1, but it was also terminable by 3 months’ notice by SEW: clause 5.4. It was not an exclusive supply agreement nor was there any minimum quantity provision: clause 2.4. This is relevant when one considers the question of reasonableness. SEW was not tied into the agreement and not obliged to purchase AMR units and meters only from Elster.
67. It was also the case, as recorded by recital (C), that Elster was required to supply the products (defined by reference to Sched. 7, which contained a long list of products and prices) not only to SEW itself but to its subcontractor companies “on the terms and conditions of this Agreement and the standard terms of supply attached as Schedule 2”.

68. Clause 1.1 contained a list of definitions, including – helpfully – the definition of the “agreement” as being “the main body of this Agreement together with the Schedules”. It is also defined an “Order” as being the instruction from SEW or its subcontractor to supply the goods which should incorporate the Sched. 2 supply conditions.
69. Clause 1.2.2 featured in argument because Mr Darton argued that the heading to Sched. 11 was irrelevant for the purposes of its interpretation. However, what this clause said was that “the clause headings are included for convenience only and shall not affect the interpretation of this Agreement”. It is clear from this and the preceding clause that this was not intended to extend to schedule headings, although it is common ground that – as summarised by Sir Kim Lewison in *The Interpretation of Contracts* 8<sup>th</sup> edition section 13 – “a heading to a clause may be taken into account in construing the clause, but it cannot override clear words in a clause or create an ambiguity where, but for the heading, none would otherwise exist. Where the contract so provides, headings should not be taken into account”.
70. The main body of the framework agreement contained 11 clauses and there were 13 separate Schedules, covering such topics (as relevant to this case) as specifications (sched.1), conditions of supply (sched.2), delivery time and performance (sched.5) and meter AMR warranty and fault attribution (sched.11).
71. Clause 2 made clear that the supply of the products was to be “upon the terms of this Agreement”. Given the definition of Agreement as stated above, it is plain that this included not only the supply conditions in Sched. 2 but all of the terms of the framework agreement itself, including all of the terms of the 13 Schedules thereto. This disposes of the argument raised by Mr Darton in reliance upon clause 3, which stated: “All Products purchased pursuant to this Agreement shall be subject to the Supply Conditions. All other terms and conditions are expressly excluded from this Agreement pursuant to clause 11.1 of this Agreement”. Mr Darton submitted that this excluded Sched. 11 from the terms applicable to individual supply orders. However: (a) clause 11.1 is an entire agreement clause which applies to the framework agreement as a whole and, hence, is irrelevant to the individual supply contracts; and (b) the first sentence does not purport to exclude the terms of the framework agreement as a whole, including therefore the other schedules. Indeed, since the other schedules includes the specifications of the products and provisions for delivery time and performance it would make no sense – and would indeed be inconsistent with SEW’s reliance upon the contractual specification – for this to be the case.
72. Clause 8.1 required Elster to maintain public and product liability for at least £5 million “per event or series of connected events”. It did not say anything about the prescribed terms and, in particular, whether any excess for any individual claim should not exceed any specified amount. This is possibly relevant to the question of reasonableness under UCTA, insofar as SEW may contend that Elster was required to be insured against product liability. Whilst obviously true, it cannot be assumed one way or another either that such insurance would have covered against premature failure of the AMR units or batteries therein (and normally liability undertaken by the specific terms of a contract is not included in such policies) or – given the relatively modest value of the individual AMR units (comfortably less than £100) – that the combined replacement and installation cost would not have fallen largely within any excess.
73. Clause 9, entitled “Liability”, included the following sub-clause 9.4: “In any event, and notwithstanding anything contained in this Agreement, in no circumstances shall the Company or the Supplier be liable under this Agreement, in contract, tort (including negligence or breach of statutory duty) or otherwise howsoever, and whatsoever the cause thereof, (i) for any loss of

profit, business, goodwill, contracts, revenues, or anticipated savings, or (ii) for any special or indirect or consequential damage of any nature whatsoever”.

74. There is a live dispute as to the meaning and effect of this clause, which I shall address later when considering the individual heads of claim to which Elster contends that it applies. However, SEW is unable to, and does not, contend that UCTA even arguably applies to this clause, given that it is part of the framework agreement introduced by SEW itself and also given that it benefits both parties.
75. It is worth observing in passing clause 9, which contained detailed provisions as to the financial and other consequences of delays in delivery of the products, because it shows that in principle SEW was willing to propose and/or agree to provisions specifying its entitlements and limiting its rights in relation to breach by Elster.

***Sched. 1***

76. The first schedule in issue is Sched.1: Specifications, which stated that the “the [AMR] module must allow for a minimum 10 year battery life ...”.
77. SEW has pleaded that this imposed a contractual obligation on Elster that the AMR units would have a minimum 10 year battery life. This is contested by Elster, who submits that the words “must allow for” do not connote an absolute requirement for a minimum 10 year battery life. I can see much force in this submission. It seems to me to be more akin to a contractual requirement that the batteries should have a minimum 10 year battery design life than an unqualified warranty for a minimum battery life. However, for present purposes I am prepared to assume that SEW’s case is reasonably arguable as, also, is its case that for the AMR units to comply with their requirements as to quality and fitness for purpose they needed to have a product life of at least 10 years, and that this application should be approached on that basis.

***Sched 2***

78. The second relevant schedule is Sched. 2: Conditions of supply, which as I have already explained govern, although not exclusively, the terms of each individual order.
79. By cond. 3, headed “quality and defects”, Elster undertook express obligations, including, by cond. 3.2, that the products should be “fit for the purpose for which they are supplied, of the best quality, material and workmanship, be without fault or defect and conform in all respects with the Order and Specifications and/or other characteristics set out in the Schedules to the Framework Agreement”. These rights were said, in what appears to be a belts and braces provision, to be “in addition to the statutory conditions implied in favour of the Purchaser by the Sale of Goods Act 1979”: cond. 3.4. In the event of non-compliance with cond. 3 the purchaser was given the remedies specified in cond. 13.
80. Cond. 13.1 gave the purchaser various specified and non-exhaustive rights, including the right to rescind the contract, to reject the products and obtain a refund, and, importantly on SEW’s case: (a) “at the Purchaser’s option to give the Supplier the opportunity at the Supplier’s expense either to remedy any defect in the Products or to supply replacement Products and carry out any other necessary work to ensure that the terms of the Contract are fulfilled” (cond. 13.1.3); (b) to carry out works to make the products compliant at Elster’s expense (cond. 13.1.5); and (c) to “claim such damages as may have been sustained in consequence of the Supplier’s breach or breaches of the Contract” (cond. 13.1.6).
81. Further, by cond. 13.2, it was provided that: “For the avoidance of doubt and without prejudice to any other right or remedy which the Purchaser may have, if any Products are not supplied in accordance with, or the Supplier fails to comply with, any of the terms of the Contract the

Purchaser shall be entitled [sic] recover any additional cost incurred by the Purchaser in sourcing similar products from an alternative supplier”.

82. One of the most important issues of contractual interpretation in this case is how these provisions in clauses 3 and 13 dovetail with Sched. 11, which I shall address once I have referred to that Schedule.
83. Cond. 16, headed “liability”, contained the same suite of provisions as found in clause 9 of the main framework agreement, including cond. 16.4 in the same terms as clause 9.4.
84. Finally, under cond. 5 Elster was required to indemnify the purchaser against “all liabilities, losses, damages, injuries, costs and expenses (including legal and other professional fees and expenses) suffered or incurred by the purchaser ... arising as a result of or in connection with: 5.1.3 any breach of any warranty given by the Supplier in relation to the Products; 5.1.4 any defective workmanship, quality or materials, non-conformity of the Products with the Order or the Specifications or other characteristics set out in the Schedules to the Framework Agreement; and 5.1.5 any act or omission of the Supplier or its employees, agents or sub-contractors, or any direct or indirect breach or negligent performance of the terms of the Contract by the Supplier”. However, by cond. 5.2, this liability was limited to £5 million “per event or series of connected events”.

***Sched. 11***

85. Schedule 11 is, as I have said, entitled “meter AMR warranty and fault attribution”, this being in bold type and appearing in a prominent position at the top of the page. The same words appear in bold and capitals in the Index of Schedules which appears before Sched. 1.
86. Sched. 11 began with these words: “Should a faulty device be identified in operation; the cost of an equivalent, replacement device & any incidental costs shall be limited to the warranty as set below”.
87. There then appears the following table and explanatory comment:

<b>Year of Failure</b>	<b>AMR Transponder (Inc Battery)</b>	<b>Meter</b>
1	FOC plus £40	FOC plus £40
2	FOC plus £40	FOC
3 to 5	FOC	Nothing
6 to 15	Discounted replacements	Nothing

“Discounted replacement formulae = purchase price prevailing at time of failure multiplied by (15 minus number of years since shipment date) divided by 15 years.”

88. Under a section headed “clarification of warranty table” FOC is said to denote “replacement of complete meter & AMR device free of charge (Elster meter)” and £40 being the “payment contribution for installing the replacement AMR meter”.
89. It then provided three worked examples to explain how the table works in practice. Most relevant here is the second example which states:

“AMR device fails to transmit in year 8 due to a premature battery failure ~ the Supplier will supply complete ‘Elster meter & AMR device at the following price:  $(15 - 8) / 15 = 47\%$  discount of purchase price (at the time)”.

90. Finally, it states that this warranty is subject to 9 specified provisos, including the first which requires the products to have been installed and operated according to supplier instructions, and an assurance that replacements will have the same or better functionality as the original.
91. It is apparent that Sched.11 was not drafted by a lawyer in legal language. It is clearly intended to provide a practical arrangement as to how the particular problem of meter AMR devices proving faulty in operation is to be resolved by a free replacement and monetary contribution in years 1 and 2, by a free replacement with no monetary contribution in years 3 to 5, and by a discounted replacement with no monetary contribution in years 6 to 15.
92. There is an apparent contradiction between the table and the worked examples, in that the table states that the AMR units will be provided free of charge in years 1 to 5 but nothing will be provided in relation to the meter in years 3 to 15, whereas worked examples 2 and 3 state that even in years 4 and 8 Elster will also provide a replacement meter and worked example 3 states that even in year 4 the AMR unit will be a discounted replacement cost. It is probable that the first contradiction is explained by the commercial reality, which is that Elster would replace both AMR unit and meter in any case where it had to replace the AMR unit, and that the second contradiction is simply an error in example 3. These contradictions had not been identified by the parties and, whilst they will need to be resolved in due course, they are not material for present purposes.

*The proper interpretation and effect of Sched. 11*

93. It is common ground that the well-known and well-understood principles of contractual construction apply and there is no need for me to re-tread this well-trodden path, conveniently and recently summarised by Coulson LJ in A & V Building Solutions Ltd v J & B Hopkins Ltd [2023] EWCA Civ 54 at paragraph 45.
94. It is an unusual feature of this case that the primary case advanced by both parties was that Sched. 11 was not, on its true construction, an exclusion or limitation clause. However, their reasons for so contending pointed in completely different directions.
95. For Elster, it was submitted that the meaning and effect of Sched. 11 are plain from their opening words: “Should a fault device be identified in operation; the cost of an equivalent, replacement device & any incidental costs shall be limited to the warranty as set below”. It was submitted that Sched. 11 is not, therefore, an attempt to exclude or to limit liability for any and every breach of contract which Elster might commit but, instead, to provide a limited and nuanced allocation of responsibility and liability for the specific situation identified.
96. For SEW, it was submitted that Sched. 11 is a collateral or additional warranty that sets out the terms on which Elster would provide replacement AMR units and meters if SEW, in accordance with its rights under Schedule 2, paragraph 13.1.3, chose to give it the opportunity to supply replacement products. It was submitted that it does not exclude or limit SEW’s other rights and remedies, either under the general law or as expressly conferred by Sched. 2 conds. 3, 5 and 13.1. It is submitted that Sched. 11 is subordinate to Sched. 2 and, if and insofar as there is a conflict, then Sched. 11 can and should simply be severed.
97. Before addressing these points I should also address further arguments advanced by SEW which, in my view, are not properly open to it to argue.
98. First, insofar as Mr Moores referred in his witness statement to the subjective belief of those at SEW as to the intention behind Sched. 11 and as to its effect as understood at the time by SEW that is, on well-established principles of contract construction, completely irrelevant to the actual



effect of Sched. 11, which is to be determined on an objective basis by reference to the well-established principles of contract construction already referred to.

99. Second, that position is not changed by reference to SEW's case that, had it believed at the time that Sched. 11 had the effect of limiting Elster's liability for failing to supply AMR units with a 10 year battery life, it would have had to re-run the tender process to allow other bidders to tender on the same basis. Whether or not that is in fact correct as a matter of procurement law is not a matter for me to determine in the context of this application. Even if it is correct, and even if that is what SEW believed at the time, there is no evidence to suggest that there was any contemporaneous communication between Elster and SEW in which either said or did anything capable, even arguably, of leading to the conclusion that this was a common shared assumption, or that Elster was aware that SEW was operating under a mistake as to its effect or that it believed SEW must have been operating under a mistake because otherwise it would have re-tendered the tender process.
100. Thus, at the end of paragraph 27 of his witness statement Mr Moores says, without providing any supporting detail: "I believe that Elster was fairly experienced in tendering for contracts from water companies and would have known that the procurement process would not permit one supplier to introduce into the contract a limitation of liability that was not offered to other suppliers". This seems to me to be complete speculation on his part. Moreover, SEW has not pleaded or advanced a case for rescission for mutual mistake or for rectification based on some alleged common intention or understanding, or for estoppel by convention, notwithstanding the purported reservation of rights in paragraph 38 of Mr Poncia's witness statement. I am unable to place any weight on what is plainly a throwaway comment, made without any supporting evidence to justify it, by Mr Moores.
101. Returning then to the objective interpretation of Sched. 11, I have no doubt that Elster is correct as to what it says is its plain and obvious meaning from the clear words used, although – as I shall explain below - I do not accept that this means that it is not a limitation clause. As Mr Power submits, the heading does not simply say "AMR warranty" but also "& fault attribution". Whilst these words in isolation do not necessarily indicate with complete clarity the intended effect of the schedule, the words appearing immediately after that make it quite clear that it is intended to have the effect of limiting SEW's entitlement in respect of any claim in relation to a faulty AMR unit identified in operation to the cost of an equivalent replacement device and any incidental costs to the warranty set out below. It is, frankly, hard to see how its wording could have been improved in terms of conveying its intended effect to the intended reader. It has the undoubted merit of simplicity and clarity instead of being concealed in a thicket of legal boilerplate.
102. It is of course true that it must be read as part of the whole agreement, in accordance with the general principle recorded by Coulson LJ in *Hopkins* at paragraph 46. SEW relies upon Sched. 2 and cond. 13 in particular to seek to argue its contrary interpretation. However, in my judgment it is simply not possible to read Sched. 11 as being a mere adjunct or alternative to the right conferred on SEW at its election under cond. 13.1.3 of Sched. 2 to give Elster the opportunity to supply replacement products at its own expense. Apart from anything else, Sched. 11 cannot be read as only applying in the limited case where SEW elected to invoke its cond. 13.1.3 remedy because: (a) it is not stated to depend on SEW choosing this option; and (b) the extent of Elster's obligations under Sched. 11 are plainly less than the which rights which SEW would have under clause 13.1.3, namely to require Elster to supply replacement products and to carry out any other necessary work entirely at its own expense.

103. SEW suggests that clearer words would have been needed to exclude the full panoply of rights conferred by cond. 13. However, as Elster contends, there is no need to make it explicit in cond. 13 that it is subject to Sched. 11. As Mr Power observes, the rights conferred by cond. 13 are already circumscribed by clause 9.4 of the framework agreement, even though neither cond. 13 nor clause 9.4 expressly refer to each other. Although, as I have said, SEW's alleged belief at the time is irrelevant anyway, it is frankly difficult to conceive how anyone reading Sched. 2 and Sched. 11, even as a non-lawyer and even only briefly, could ever have believed that Sched. 11 was intended only to give SEW an additional and optional right or remedy.
104. SEW also contends that clause 3 of the framework agreement operates as some form of order of precedence clause by which the Sched. 2 conditions are to have more weight than anything contained in Sched. 11. But there is no basis for reading clause 3 in this way. To the contrary, I prefer Elster's submission, based on the further principle of contract construction also summarised in paragraph 46 of *Hopkins*, that "where a contract contains general provisions and specific provisions which potentially contradict each other, the specific provisions will be given greater weight". I was also referred in this context to the decision of the Court of Appeal in *Yarm Road Ltd v Hewden Tower Cranes Ltd* [2003] EWCA Civ 1127 and, in particular, the judgment of Laws LJ at paragraph 41. It is undoubtedly the case that Sched. 11 deals with the specific case of a faulty device being identified in operation, whereas cond. 13 deals with the more general case of any failure of products supplied to accord with the terms of the contract. It follows that Sched. 11 should apply in precedence to cond. 13 in the specific circumstances where it does apply, which include the current case.
105. In conclusion, I am satisfied that this is a straightforward point of contract construction and that there is no credible possibility of my decision being affected by any of the factual issues identified by SEW which, insofar as relevant and arguably credible, I have proceeded to assume in SEW's favour anyway. For the reasons given, I am satisfied that Sched. 11 has the meaning contended for by Elster.

#### *The variation and supplemental deed*

106. It is common ground that the framework agreement was extended for a further 5 years by means of the supplemental deed, with its provisions continuing as varied by the deed.
107. It is also recorded in the recitals that SEW had elected to extend the framework agreement even though "following certain issues raised by SEW in its letters dated 13 February and 2 March 2015, the parties have agreed to undertake a special survey of the meters and radio transmit (AMR) modules supplied by Elster to SEW under the Framework to date (approximately 240,000 units) ("Meters") and to embark on a process of replacement of defective Meters identified by such survey in accordance with the terms of this Deed". This process was defined as the "Project" and involved the agreement of Elster to supply new products where the existing were identified as defective as well as its agreement to pay certain specified contributory costs. Nonetheless, Sched. 11 was left unaffected and, indeed, clause 2.5 provided that Elster's agreement in this respect was "without admission of any liability and without prejudice to any limitations of its obligations set out in the Framework as amended by clause 3 below, including those related to warranties provided in respect of the Meters".
108. It is common ground that the construction of the framework agreement ought, as regards products supplied pursuant to the framework agreement as varied, to take into account any relevant variations introduced by the deed. However, neither party identified any variation of particular relevance, save only that by clause 3.3 a new clause 9.5 of the framework agreement and clause 5.2 of Sched. 2 was introduced which limited Elster's total aggregate liability to £10 million. Although there was some tentative suggestion by SEW that it is difficult to see why this

should have been introduced if Sched. 11 had the effect now contended for, such an argument would have been hopeless even without clause 2.5.

### The Unfair Contract Terms Act 1977

109. I must next address the arguments regarding the application and effect of UCTA in this case.
110. I can do this shortly because I have already concluded, in the section above entitled “the genesis of what became Sched. 11”, that in proffering Sched. 11 so that it became a part of the framework agreement Elster was not, even arguably, dealing on its written standard terms of business. It follows that UCTA can have no application to this case and Sched. 11 has effect according to its express terms.
111. It is, therefore, strictly speaking, unnecessary to go further. In particular, this is not the place to engage in a detailed analysis of the interesting question as to whether or not a company in the position of Elster could properly be described as dealing on its written standard terms of business by proposing a limited warranty and limitation provision such as Sched. 11 for inclusion into a detailed framework agreement which appears to comprise SEW’s written standard terms of business.
112. However, since the question of reasonableness has been much debated before me and since: (a) I have formed a clear view that there is no reasonable prospect of Elster failing to discharge the burden of showing that it is a reasonable clause; and (b) this is a further and independent reason for my deciding that Sched. 11 should be upheld in accordance with its proper construction, I should set out my reasons for reaching this conclusion in the context of a strike out / summary judgment application.
113. I should however begin by saying that if I had been persuaded that Elster was, arguably, dealing on its standard terms as regards Sched. 11, I would also have been satisfied that it was, at the very least, reasonably arguable that Sched. 11 was a limitation clause to which UCTA applies. It does not seem to me to be obviously either a genuine liquidated damages clause or a clause closely akin to such. The reality is, it seems to me, that if there was a claim that the AMR unit was faulty and that this was a breach of contract which justified replacement, then the warranty would at least arguably offer less than the full cost of removal and replacement, notwithstanding that the warranty also offered more than the 10 year battery life (arguably) required by the specification.
114. I should also make clear that in forming the clear view that Sched. 11 is, beyond reasonable argument, a reasonable clause in relation to UCTA, I have done so not without having due regard to the cogent reasons expressed about the dangers of making a final determination on such a question on a summary basis as explained by Philips LJ in *Last Bus Ltd v Dawson Group* [2023] EWCA Civ 1297 at paragraph 53.
115. I have proceeded on the basis that I should consider the question of reasonableness on the factual basis most favourable to SEW and having due regard to what further relevant factual material favourable to SEW might also reasonably be expected to be available at trial. If I am satisfied that even on this basis there is no reasonable prospect of Elster being unable to show that the clause is reasonable under UCTA, then on that basis it is proper for me to determine the issue summarily as against SEW.
116. The starting point is that Sched. 11 operates as a clause limiting rather than excluding Elster’s liability in the circumstances where it applies. It is also a clause the reasonableness of which has to be determined in the light of its proper construction in the context of the framework agreement as a whole, also properly construed.

117. Two very important factors in this respect are as follows. First, as I have said, it only applies in the relatively narrow case of a faulty device being identified in operation, rather than to all cases of breach. Second, whilst it applies in the context of SEW having the benefit of wide ranging rights as regards the obligations owed by Elster and the remedies enjoyed by SEW in relation to the quality of and defects in the products, such remedies are also effectively limited in relation to claims falling within clause 9.4 of the framework agreement, and thus including claims for loss of profit, business, goodwill, contracts, revenues, anticipated savings, or special or indirect or consequential damage of any nature whatsoever.
118. Surprisingly, given the substantial value pleaded as to the replacement costs incurred and estimated to be incurred, SEW has not chosen to place any evidence before the court as to the actual cost of replacing a faulty AMR unit or meter on top of the cost of the replacement product itself. Thus, there is no positive evidence that the cost would be significantly more than the £40 contribution provided for by Sched. 11. Given Mr Moores' evidence as to what he (and others in SEW) believed at the time was the intent and effect of Sched. 11 at the time of contracting, he would undoubtedly have said so had it been the case that £40 was a very low figure for what appears to have been a relatively straightforward operation.
119. In the first 5 years the AMR units are supplied free of charge. In the first two years the meters are also supplied free of charge. As I have said, the position is not entirely clear as regards the meters in years 3 onwards. However, if the position is governed by the examples, which it seems to me it must be since they were put forward by Elster with a view to explaining the meaning and effect of the table, the meters would be replaced free of charge as part of a composite meter and AMR device. After year 5 the replacement cost contribution for the AMR unit (and meter, applying example 2) is a sliding scale which bears a linear correlation to the age of the unit. Although Mr Darton argued that this is allowing SEW less than its contractual entitlement to recover the full cost of a replacement without having to give credit for the full use already made of the unit in the preceding years, that seems to me to be moot. The benefit of the Sched. 11 warranty is that it provides a sensible commercial arrangement, based on a straight line discounting approach, to arrive at the value of replacement units up to a 15 year end point. It is difficult to see how this could be viewed as in any way unreasonable, especially when the contract specification was only for a 10 year battery life.
120. SEW's failure to put forward any positive evidence on the cost of replacing units is compounded by its resolute refusal to provide particulars of its pleaded case for existing and future replacement costs, so as to permit any comparison between its pleaded case and the impact of Schedule 11 on its recovery of replacement costs. In Elster's solicitors' letter dated 2 February 2024 they referred to the fact that it had requested information about replacement costs as long ago as April 2023, which was not provided, even though the pleaded claim included specific figures in relation to such claims. In that letter it repeated its request for information as to how the sums claimed had been calculated, saying that the information was required so that it could be placed before the court at the hearing of this application. In its letter of reply dated 16 February 2024 SEW declined to do so, giving no reasons which in my view justified this refusal. It appears from the evidence served by SEW that the real reason is because the pleaded costs are based on a diminution in value basis rather than a cost of replacement basis. It follows in my judgment that SEW cannot complain if, for the purposes of determining reasonableness, the court is not in a position to make a finding one way or another as to the disparity between actual replacement costs as they would have been anticipated at the time the framework agreement was entered into and the value of the warranty provided in Sched. 11.
121. Finally, as I hold below, the substantial consequential loss claims advanced by SEW in paragraphs 32(iii) and 32(v) of the Particulars of Claim are excluded anyway by clause 9.4 of the

framework agreement. For completeness, it is also worth pointing out that the need to prove that a device has been identified as faulty in operation is obviously far less onerous in many cases than the need to prove a breach of contract.

122. The reasonableness test, as explained in s.11 UCTA, requires that the term should have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made. The guidelines appear in Schedule 2.
123. In my judgment the most compelling feature in this case is that it is difficult to conceive of a case where a faulty device being identified in operation could lead to anything more than a need to replace the faulty device, assuming a request for a replacement was made without undue delay and addressed in the same way (and, if it was not, then SEW would have a separate claim for consequential losses caused by a failure by Elster to meet its Sched. 11 obligations in a reasonably timely manner). It is difficult to conceive, for example, of a faulty device causing a catastrophic loss, whether to SEW or to some third party to whom SEW might incur some liability. Thus, the limitation of liability is not obviously disproportionate to the actual likely loss. This is not, therefore, a case where issues relating to resources, insurance or ability to pass claims down the line are of significance.
124. Further, the manner in which the relevant term was incorporated and brought to the attention to the other party, as well as its clarity, are very significant factors. Here, there is no question of this term being buried in a mass of small print. It was introduced quite openly in a letter written in response to a request for clarification during the course of contract negotiations. It is, as I have said, about as clear as one could hope for in terms of its language and effect. It is concise. It occupies its own separate schedule and its impact is clearly explained in the heading and the first sentence. If SEW misunderstood its effect, as I have said I find that extremely surprising and on any view there is no suggestion that this was known to Elster, i.e. this is not a sharp practice case.
125. Finally, although of course UCTA applies as between businesses as well as between businesses and consumers, well-known authorities such as *Watford Electronics v Sanderson* [2001] EWCA Civ 317 emphasise that a clause, freely negotiated between businesses of approximately equal bargaining power, is likely to be held reasonable in the absence of some particularly cogent reason to the contrary. Here, SEW was conducting a tender exercise and there were other tenderers against whom Elster was in open competition. The letter introducing what became Sched. 11 made clear that the provision was a proposal and introduced the option of negotiation. SEW does not suggest that Elster was the only tenderer who supplied a compliant tender or that there was some feature of Elster's tender which meant that it was the only available option for SEW, let alone that Elster knew of this and exploited this to its own advantage. There is evidence from SEW that the other tenderers also insisted on similar or even more wide-ranging limitation clauses.
126. There is no evidence or argument from SEW identifying what, if any, other material facts could be placed before the court at any trial which SEW has not already had the opportunity to place before the court at the hearing of this application. It is again worthy of note that this case has been listed and argued over 2 days with plentiful opportunity for both parties to adduce evidence beforehand. Thus, although SEW can say that it has not had the benefit of disclosure or cross-examination, those are really the only differences between the position in this case and the position in many other cases, such as the *Goodlife* case referred to in *Last Bus*, where reasonableness under UCTA is tried as a preliminary issue. It is difficult to see, and SEW has not identified, what difference disclosure and/or cross-examination could reasonably be expected

to make in a case such as the present where, in my judgment, the position is so clear cut in Elster's favour.

127. In the circumstances, it seems to me to be wholly unrealistic that any trial judge could find that Elster had not discharged the burden of showing reasonableness, regardless of any further evidence which SEW has any realistic prospect of adducing at any trial. In the circumstances this is another reason for finding in favour of Elster on this application.

**The individual particulars of loss and the extent to which they are reasonably arguable in the light of the proper effect of Sched. 11 and clause 9.4**

128. This is the final issue with which I have to deal.

129. It is apparent that paragraphs 32(i) and 32(vi) of the Particulars of Claim as well as paragraph 34(i) – which makes essentially the same claim for the cost of replacing failed products – cannot succeed as pleaded given that they plead claims going far above and beyond the claims which can be maintained in accordance with Sched. 11 and will have to be struck out as they stand. However, the question which arises is whether or not SEW can maintain a damages or other monetary claim based either on any alleged failure by Elster to comply with its Sched. 11 obligations or on the claim being limited to the cost to Elster of complying with its Sched. 11 obligations. Such issues can only be determined if, as and when an alternative pleaded case is advanced.

130. Paragraph 32(ii) – and paragraph 34(ii) - cannot succeed as they are claims for incidental costs which are excluded under Sched. 11 and must also be struck out. Again, as with paragraphs 32(i) and (vi), if there is a viable alternative case to be pleaded then SEW will have the opportunity to do so, although it is less obvious how that could be the case here.

131. Paragraph 32(iii) – and paragraph 34(iii) - cannot succeed as they are also claims for incidental costs which are excluded under Sched. 11. They are also obviously claims for a loss of anticipated savings and, hence, barred by clause 9.4, since the whole purpose of the AMR units was to save the need for manually reading the meters. The same comment as under paragraph 32(ii) applies to this and to all of the other claims addressed below.

132. Paragraph 32(iv) – and paragraph 32(iv) - cannot succeed as they are also incidental cost claims excluded under Sched. 11.

133. Finally, paragraph 32(v) – and paragraph 32(v) - cannot succeed as they are also incidental cost claims excluded under Sched. 11 and also obviously claims for loss of profit or revenue and, hence, barred by clause 9.4. Although there has been some attempt to re-categorise these claims as for the cost of supplying water which could not be charged for, whether at all or as envisaged through using a remote read meter, on any view that is still in substance a loss of profit or revenue or, if not, a loss of anticipated savings and, hence still excluded.

134. I will deal with the timetable for SEW to formulate any proposed amendments and for Elster to respond and as to how any disputes are to be resolved upon handing down judgment. It may well be, however, that the parties should be encouraged – if not ordered – to engage in ADR at that point since as a result of this judgment the parties should both know the likely parameters of the claim which can now be made.