Neutral Citation Number: [2022] EWHC 2971 (Comm)

Case No: CL-2020-000203

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 28/11/2022

Before :

MR JUSTICE ANDREW BAKER

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Between :

LAST BUS LIMITED **(trading as Dublin Coach)**	**Claimant**
- and -	
(1) DAWSONGROUP BUS AND COACH LIMITED **(formerly Dawson Rentals Bus and Coach Limited)** **(2) EVOBUS (UK) LIMITED**	**Defendants**

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- -

Nigel Jones KC and Edward Rowntree (instructed by **Geldards LLP**) for the **Claimant**
Stuart Benzie (instructed by **Freeths LLP**) for the **First Defendant**
The **Second Defendant** did not appear and was not represented

Hearing date: 9 November 2022

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Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
Copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. The claimant ('Last Bus'), based in Dublin, operates a fleet of premium passenger coaches. The second defendant ('EvoBus') is a subsidiary of Daimler AG and carries on business as importer, distributor and after sales service provider for Mercedes Benz coaches and buses in the UK and Ireland. The first defendant ('Dawson') carries on business *inter alia* by way of hire purchase financing of coaches and buses.

2. This litigation concerns 30 Mercedes Tourismo coaches supplied by EvoBus to Last Bus on hire purchase finance terms provided by Dawson. The hire purchase agreements were written contracts between Last Bus and Dawson signed by their respective managing directors, John O'Sullivan and Paul Sainthouse, concluded on 15 July 2014 (two agreements, one for eight coaches and one for two coaches), 9 February 2016 (five coaches), 12 August 2016 (five coaches), and 24 February 2017 (ten coaches).

3. Last Bus had for many years operated Setra model coaches, and was very happy with them. However, the Setra was discontinued as part of the transition to compliance with Euro 6 emission standards. All discussions about whether the Tourismo would suit Last Bus in place of the Setra, and about its attributes or qualities generally, were conducted directly between Last Bus (acting by Mr O'Sullivan) and EvoBus (acting principally by its then managing director and interim CEO, Michael Beagrie).

4. The cost of each Tourismo, prior to financing charges, was c.£250,000. So the Tourismo orders by Last Bus represented an acquisition of coaches costing, in aggregate, c.£7.5 million.

5. The hire purchase agreements were on Dawson's terms and conditions. By s.10(2) of the Supply of Goods (Implied Terms) Act 1973 ('the 1973 Act'), it was an implied term of each of those agreements, unless validly excluded, that the coaches supplied would be of satisfactory quality ('the statutory implied term').

6. Clause 5(b) of Dawson's terms and conditions was as follows:

> "*The Customer agrees and acknowledges that it hires the Vehicle for use in its business and that no condition, warranty or representation of any kind is or has been given by or on behalf of the Company in respect of the Vehicle. The Company shall have no liability for selection, inspection or any warranty about the quality, fitness, specifications or description of the Vehicle and the Customer agrees that all such representations, conditions and warranties whether express or implied by law are excluded. Notwithstanding the foregoing provisions of this clause, nothing herein shall afford the Company a wider exclusion of liability for death or personal injury than the Company may effectively exclude having regard to the provisions of the Unfair Contract Terms Act 1977. The Customer acknowledges that the manufacturer of the Vehicle is not the agent of the Company and the Company shall not be bound by any representation or warranty made by or on behalf of the Vehicle manufacturer.*"

7. Last Bus alleges that some or all of the Tourismos supplied to it under the above arrangements were not of satisfactory quality, in breach of the statutory implied term. It alleges that in consequence, four of the Tourismos suffered fires, three of which it says were caused by a defective exhaust cooling system, and the fleet has required a more rigorous and expensive maintenance regime "*far in excess of that which should have been adopted*" (as Mr Jones KC put it in his skeleton argument). Loss and damage in excess of €10 million is asserted.

8. Last Bus claims damages against EvoBus, alleging breaches of contract and misrepresentations, and against Dawson, alleging exclusively breaches of the statutory implied term.

9. EvoBus denies that any of the Tourismos was defective and pleads, as regards the four alleged fires, that:

    (i) Tourismo 171-KE-1402 suffered a fire in or about its exhaust system on 10 February 2018 caused by contaminated fuel;

    (ii) Tourismo 142-KE-1194 experienced a thermal incident (which EvoBus does not admit developed into a fire) on 16 March 2018 because an air hose linked to the engine cooling system had been disconnected by Last Bus leading to excessive coolant consumption that Last Bus failed to do anything about;

    (iii) Tourismo 181-KE-1471 experienced a fire in the dashboard area on 17 March 2018, in and caused by additional electrical systems fitted by or on behalf of Last Bus after delivery;

    (iv) Tourismo 161-KE-4873's engine was destroyed, possibly on or about 21 April 2018 (EvoBus does not admit the date), when it was driven for about 1½ hours in defiance of a red warning light as the engine overheated due to a burst coolant hose.

10. Dawson says that whatever the rights and wrongs of any of that, it should not be in the litigation because Clause 5(b) is effective to exclude the statutory implied term. By an Application Notice dated 14 March 2022, Dawson seeks the summary dismissal of the Claim against it on the ground that Last Bus has no real prospect of avoiding that conclusion, because:

    (i) properly construed, Clause 5(b) purports to exclude the statutory implied term, and

    (ii) Last Bus has no real prospect of resisting Dawson's plea that Clause 5(b) satisfied the requirement of reasonableness under s.11 of the Unfair Contract Terms Act 1977 ('UCTA'). Dawson asks the court to assume for present purposes that Clause 5(b) is required to satisfy that requirement.

11. The requirement of reasonableness is that "*the term shall 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*" (s.11(1) of UCTA). By the operation of ss.6 and 11(2) of UCTA, regard must be had in particular to the matters specified in Schedule 2 in

determining whether Clause 5(b) satisfies that requirement in excluding the statutory implied term.

Clause 5(b) – Construction

12. The subject matter of Clause 5(b) is conditions, warranties and representations concerning the quality, fitness, specifications or description of the coaches to be supplied. The statutory implied term is a condition or warranty, implied by law, concerning quality. Clause 5(b) says that all such terms are excluded: "*all such representations, conditions and warranties whether express or implied by law are excluded*". Furthermore, by s.10(1) of the 1973 Act, there is no such implied term other than the statutory implied term.

13. Mr Jones KC submitted that it is "*immediately obvious that "implied by law" could bear two very different meanings. On the one hand it might be construed as meaning "implied by [common] law". On the other hand, it might be taken to mean "implied by law [and statute]."*" In my judgment, no such thing is obvious, or even sensibly arguable. The submission for Last Bus is a forensic creation designed to generate the appearance of ambiguity, not an argument of any substance on the contractual language used.

14. The contractual language is simply "*implied by law*". It does not refer to, that is to say it does not seek to distinguish between, different sources of law; and if one were to posit an intention to refer to a particular source of law, even though the contractual language does not trigger the thought, the conclusion would be that the intention was to refer to statute law. Statutes are the primary source of English law, and in this context the statutory implied term is the only implied term that by Clause 5(b) Dawson might be seeking to exclude.

15. The contention that Clause 5(b) does not, on its proper construction, purport to exclude the statutory implied term is not a serious argument and does not give Last Bus any real prospect of resisting Dawson's defence that the statutory implied term has been validly excluded.

Clause 5(b) – Reasonableness

Approach

16. The more recent authorities on UCTA in the Court of Appeal show a marked reluctance to interfere, by concluding that an exclusion clause has not been shown to satisfy the requirement of reasonableness, in substantial commercial transactions entered into by parties of equal bargaining strength. Thus, for example, it has been said that:

    (i) "*In circumstances in which parties of equal bargaining power negotiate a price for the supply of product under an agreement which provides for the person on whom the risk of loss will fall, … the court should be very cautious before reaching the conclusion that the agreement which they have reached is not a fair and reasonable one.*

Where experienced businessmen representing substantial companies of equal bargaining power negotiate an agreement, they may be taken to have had regard to the matters known to them. They should, in my view, be taken to be the best judge of the commercial fairness of the agreement which they have made; including the fairness of each of the terms in that agreement. They should be taken to be the best judge on the question whether the terms of the agreement are reasonable. The court should not assume that either is likely to commit his company to an agreement which he thinks is unfair, or which he thinks includes unreasonable terms. Unless satisfied that one party has, in effect, taken advantage of the other – or that a term is so unreasonable that it cannot properly have been understood or considered – the court should not interfere." (*per* Chadwick LJ in *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, at [54]-[55]).

(ii) "*The 1977 Act obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms.*" (*per* Tuckey LJ in *Granville Oil & Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570, at [31]).

(iii) "*... the trend in the UCTA cases decided in recent years has been towards upholding terms freely agreed, particularly if the other party could have contracted elsewhere and has, or was warned to obtain, effective insurance cover*" (*per* Coulson LJ in *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371, at [93]; see also at [60]-[63] and [88]-[93] generally).

(iv) "*... even where UCTA is applicable, at least in the case of commercial contracts between parties of broadly equal bargaining power, considerations of party autonomy and freedom of contract remain potent.*" (*per* Gross LJ in *Goodlife Foods*, *supra*, at [103], citing *Watford Electronics*, *supra*).

17. One theme of Mr Benzie's submissions for Dawson was that as, in the usual way, it had no involvement in the commercial discussions over what vehicles Last Bus might wish to order, for what purpose, with what specification, and no involvement of any kind with the vehicles, before or after delivery, but merely provided financing, it was inherently reasonable for it to seek to exclude the statutory implied term so that, as would have been the case if it had extended a loan rather than hire purchase finance, it had no responsibility regarding the quality of the Tourismos supplied to Last Bus. I agree with Mr Jones KC that that submission proves too much. A proposition that it is inherently reasonable, whatever the individual facts, for a hire purchase financier to exclude such responsibility (when not dealing with a consumer) cannot sit with Parliament's decision to impose the statutory implied term and require the reasonableness of any attempt to exclude it to be established on a case by case basis (when not dealing with a consumer).

18. Parliament so decided by ss.10 and 12(3) of the 1973 Act, read together, when enacting the 1973 Act; and that remains the legislative policy, currently enacted by s.10 of the 1973 Act, read together with s.6(1A) of UCTA.

19. In *Purnell Secretarial Services Ltd v Lease Management Services Ltd* [1993] Tr.L.R. 337, albeit a very different case on its facts to a case like the present, it was held, as Longmore J (as he was then) later summarised it in *Sovereign Finance Ltd v Silver Crest Furniture Ltd* [1997] 2 WLUK 468, that an essentially total exclusion of liability, like Clause 5(b) in this case, "*could not be reasonably relied on by a finance company merely because the finance company had not participated in the pre-contract negotiations and had not themselves inspected the goods.*" An exclusion of responsibility or liability in respect of the quality of the goods favouring their manufacturer/supplier that would not be reasonable in a direct sale by them to the purchaser is not rendered reasonable, when found instead as an equivalent exclusion favouring a finance house in a hire purchase arrangement interposed between the supplier and the purchaser, merely by reason that the commercial purpose of the interposition is to provide financing.

20. In *Purnell*, the judge at first instance had relied on an *obiter dictum* in *R & B Customs Brokers Co Ltd v United Dominions Trust* [1988] 1 WLR 321, at 332, by which Dillon LJ said he would have found that the requirement of reasonableness was satisfied in that case because the purchaser was not devoid of commercial experience and the finance company had never been in possession of or inspected the car. Nicholls V-C (as he was then) dealt with that as follows (*Purnell*, *supra*, at 346):

> "*In the instant case the judge seems to have been influenced by Dillon L.J.'s observations when finding that condition 5 was reasonable. The only reason the judge gave was the fact that LMS really had no part to play in this matter save as a finance house.*
>
> *I have to differ from the judge. I am unable to accept, as a general proposition, that an exclusion clause which would be unreasonable in a contract for sale by a supplier will be reasonable as between a hirer and a finance company because of the latter's non-inspection of the goods and its non-participation in the negotiations preceding the transaction. If there were such a general proposition, acquisitions by hire from a finance company rather than by purchase from a supplier would become a trap. A customer would not expect his rights regarding defects to differ according to which of these two acquisition routes he chooses to follow.*"

21. I agree with Mr Benzie that the ultimate decision in *Purnell* was to the effect that it was not reasonable of the finance company to seek to exclude liability for warranties as to quality relied on by the purchaser that had been given expressly by a sales agent who had been held, on the facts, to be ostensibly the finance company's agent. That does not mean the rejection of a general proposition that an exclusion clause unreasonable between seller and buyer is rendered reasonable between hire purchaser and finance house by reason of the latter's lack of involvement with the goods or the commercial negotiations is not part of the *ratio* of *Purnell*. Longmore J considered that it was part of the *ratio*, and I think he was right to do so. It therefore binds me, as Longmore J considered that it bound him.

22. In my view, the equal and opposite logic is also sound, namely that if in the individual case an exclusion by the manufacturer/supplier would have been reasonable for a direct sale, then other things being equal the equivalent exclusion by the hire purchase finance house will be reasonable. Absent some feature on the facts justifying a distinction in the particular case, as the Vice-Chancellor said in *Purnell*, the

purchaser/hirer would not expect their basic rights regarding quality defects to differ. If the nature and circumstances of the transaction are such that any implied term of satisfactory quality could be validly excluded under a cash sale, then the purchaser/hirer can be taken to expect that any such implied term could be validly excluded in a hire purchase arrangement used instead to enable them to finance their acquisition of the goods.

23. I mention for completeness that Mr Benzie referred me also to *Singer Co (UK) Ltd et al. v Tees and Hartlepool Port Authority* [1998] 2 Lloyd's Rep 164. In that case, a claim was made against the defendant port authority in respect of damage to drilling machinery occurring at its port. The port authority relied on a contractual restriction of liability to injury or damage arising from the negligence of its servants or agents, and if necessary upon a contractual limit upon liability of £800 per tonne (or pro rata). At 169 rhc, Steyn J seems to have considered that it favoured a finding of reasonableness under UCTA that the port authority had minimal knowledge of or control over the cargoes that would be handled at the port, and was frequently confronted with the problem of loading cargoes that were badly packed or crated, or badly described and marked, by others. I do not think that Steyn J's approach on the facts of that very different case provides any guidance as to the reasonableness or otherwise under UCTA of Clause 5(b) in the present case.

24. More generally, it was common ground that the requirement of reasonableness has reference to the facts as known to the parties, or that ought to have been known to them, when concluding the contract; that the burden of establishing that the requirement is satisfied is on Dawson; and that therefore its burden on this application is to persuade the court that it is bound to succeed at trial, in the summary judgment sense that there is no real prospect that it will not succeed in securing a finding that Clause 5(b) satisfied the requirement of reasonableness.

The Pleaded Case

25. I turn, then, to the case advanced by Dawson in support of the reasonableness of Clause 5(b). That case is pleaded at paragraph 34 of its Amended Defence ('Def'). It is that Clause 5(b) satisfies the requirement of reasonableness because:

(i) Last Bus is a significant commercial entity with extensive experience of purchasing buses and coaches pursuant to hire purchase agreements containing identical or materially similar exclusion clauses (Def at [34.1]).

(ii) Last Bus has considerable expertise in the purchase, use and maintenance of buses and coaches on which it relied in negotiating to purchase the Tourismos from EvoBus (Def at [34.2]).

(iii) Last Bus was therefore in a strong bargaining position and had alternative means by which its requirements could have been met (Def at [34.3]).

(iv) Last Bus was at all material times well aware of Clause 5 and was aware of its effect or able to seek legal advice on that (Def at [34.4]).

(v) There was a prior course of dealing between Last Bus and Dawson of hire purchase agreements on the same or materially similar terms that the subject

agreements continued (Def at [34.5]-[34.7]).

(vi) Last Bus has an independent contractual claim against EvoBus in respect of the alleged faults with the Tourismos (Def at [34.8]).

(vii) The acquisition of the Tourismos was a continuation of a long and good working relationship between Last Bus and EvoBus (Def at [34.9] & [34.10]).

(viii) Last Bus relied on representations by EvoBus concerning the quality of the Tourismos, and only on such representations (the real gist of which being that there was no reliance on any representations by Dawson, not that any such representations are alleged), and was bound by contract with EvoBus to buy them before the conclusion of the respective hire purchase agreements (Def at [34.9A] & [34.11]).

(ix) The transaction for the acquisition of the Tourismos by Last Bus was structured contractually as it was because "*[Last Bus] and [EvoBus], being very experienced in the commercial passenger vehicle market, knew and understood that [Dawson] would exclude all liability for defects … and that no reasonable finance provider would accept such liability. Consequently, [Last Bus] required the protection of contractual provisions as to fitness and suitability in the contracts with [EvoBus].*"

26. I shall consider those matters, as alleged by Dawson, in turn:

Last Bus is a significant commercial entity with extensive experience of purchasing buses and coaches pursuant to hire purchase agreements containing identical or materially similar exclusion clauses.

Last Bus has considerable expertise in the purchase, use and maintenance of buses and coaches on which it relied in negotiating to purchase the Tourismos from EvoBus.

27. Those are both indisputably true. Mr Jones KC submitted that the first of those matters is contentious and requires a trial. However, the only suggested basis for that was Mr O'Sullivan's evidence, referred to further below, that he had not read the terms of the contracts he had signed before the alleged problems with the Tourismos emerged. That does not render the objective reality unclear or in need of a trial to determine.

Last Bus was therefore in a strong bargaining position and had alternative means by which its requirements could have been met.

28. That is also indisputably true. However, if relevant, some care may be needed to understand how far it goes, by which I mean how far I can sensibly take it at this stage, without a trial. Thus:

(i) There appears to be no doubt that Last Bus could have obtained hire purchase terms from others. Dawson was not the only realistic option for Last Bus in that market. Last Bus preferred, and chose, to deal with Dawson after many years of successful dealings with Dawson. Mr Benzie submitted that the evidence as to that justified a finding that Dawson offered the best financing terms in the simple sense of the lowest APR; but the evidence at this stage

does not go quite that far, and for summary judgment purposes I could not proceed on the basis that that is what would be found at a trial.

(ii) In addition, it is Dawson's own case that Last Bus could not have obtained hire purchase terms from others without an exclusion of liability on their part materially similar to that of Clause 5(b). So Last Bus was not in a position to 'shop elsewhere' for hire purchase finance without that exclusion.

(iii) However, Last Bus was not obliged to use hire purchase finance at all. It was free to be a cash buyer. Last Bus has pleaded that it could never have paid cash for the Tourismos (Reply at [12.4], first sentence). But that plea is obviously unsustainable. It is contradicted by an admission in the next sentence that Last Bus might have been able to finance the purchase by bank lending, in which case it would have been a cash buyer. So what Last Bus appears to mean is that if it wanted to buy the Tourismos it needed either to borrow or to arrange hire purchase terms. I could not say for present purposes that Last Bus is wrong about that.

(iv) Last Bus further admits (in the guise of assertion) that if it had chosen to finance by bank lending, it would have had "*a clear and unequivocal contract with [EvoBus]*", i.e. a purchase contract. Last Bus and Dawson both say in respect of each of the Tourismos that Last Bus *did* have a purchase contract with EvoBus; and that it was not superseded by the applicable hire purchase contract. However, EvoBus denies that, and in context what I take Last Bus to mean by the plea that as a cash buyer it would have had a 'clear and unequivocal' contract with EvoBus is that EvoBus could not credibly have denied the existence of a direct contract of sale. This I consider admission rather than, or as much as, assertion, because it is thus Last Bus's case that it freely chose not to have a clear and unequivocal direct contract with EvoBus, if that is the position in fact, by preferring to pay for its acquisition of the Tourismos using hire purchase financing, which it ought to have appreciated would come with Clause 5(b), and in fact did so.

Last Bus was at all material times well aware of Clause 5 and was aware of its effect or able to seek legal advice on that.

There was a prior course of dealing between Last Bus and Dawson was of hire purchase agreements on the same or materially similar terms that the subject agreements continued.

29. The objective substance of those allegations is indisputably correct. In his witness evidence for this application, Mr O'Sullivan says that across 45 prior hire purchase contracts with Dawson over 20 years or so, all signed by him, covering about 200 vehicles, every one of which contained an exclusion of liability materially similar to Clause 5(b), he never once read the contract terms he was signing. I could not find on this summary judgment application that Mr O'Sullivan is wrong about that. But what matters is that there is no suggestion that Dawson was ever given the slightest hint that Last Bus, acting by Mr O'Sullivan, was unaware of or unhappy about the terms it was signing. Assessing the facts objectively, Last Bus had repeatedly, over many years, expressed free and informed consent to dealing with Dawson on the basis of Clause 5(b).

30. Mr O'Sullivan's evidence is that during that prior course of dealing, and one of the reasons why he liked dealing with Dawson, when problems had arisen on occasion, Dawson had sought to assist Last Bus to get any defects rectified by EvoBus. That does not indicate that Dawson accepted contractual liability for any defects, and Mr O'Sullivan confirms that Dawson likewise sought to assist in relation to the Tourismos by brokering meetings between Last Bus and EvoBus. On this occasion, however, EvoBus has not accepted that there was any relevant defect, or that it has any liability to Last Bus if there was.

Last Bus has an independent contractual claim against EvoBus in respect of the alleged faults with the Tourismos.

Last Bus relied on representations by EvoBus concerning the quality of the Tourismos, and only on such representations (the real gist of which being that there was no reliance on any representations by Dawson, not that any such representations are alleged), and was bound by contract with EvoBus to buy them before the conclusion of the respective hire purchase agreements.

31. Those matters are common ground between Last Bus and Dawson. They are disputed by EvoBus as against Last Bus, however. Mr Benzie confirmed that he was *not* asking me to determine this summary judgment application on the basis of these allegations. It was sufficient, he argued, that one way or another Last Bus was at all times able to secure, if it wanted them, such direct rights against EvoBus concerning the quality of the Tourismos as EvoBus was willing to offer. That was so, he submitted and I agree, because *either* those terms were available to Last Bus even if they used hire purchase finance via Dawson (and that indeed is what the contemporaneous documentary evidence seems to suggest was the position) *or* if they were only available to Last Bus if it did not use hire purchase finance, then *ex hypothesi* they were still available to it.

32. It seems highly likely on the documentary evidence that any terms offered by EvoBus would likewise have excluded any implied obligation of satisfactory quality or fitness for purpose, whether Last Bus bought directly from EvoBus, without hire purchase finance, or secured the benefit of a contractual warranty from EvoBus although not buying directly. Last Bus is in no worse position, therefore, for possibly not having direct contractual rights against EvoBus, unless that exclusion would fail to satisfy the requirement of reasonableness such that it would be unenforceable by EvoBus.

The acquisition of the Tourismos was a continuation of a long and good working relationship between Last Bus and EvoBus.

33. On the evidence for this summary judgment application, that appears to be indisputable. It adds nothing of substance to the previous point.

The transaction for the acquisition of the Tourismos by Last Bus was structured contractually as it was because "[Last Bus] and [EvoBus], being very experienced in the commercial passenger vehicle market, knew and understood that [Dawson] would exclude all liability for defects … and that no reasonable finance provider would accept such liability. Consequently, [Last Bus] required the protection of contractual provisions as to fitness and suitability in the contracts with [EvoBus]."

34. That will be highly contentious, and will require a trial, if it is to be pursued as pleaded. I wonder if it is more forensic flourish than serious factual plea. It also raises, but fails to grapple with, the point that the "*protection of contractual provisions as to fitness and suitability*", in contracts with EvoBus, in the sense that must be intended by the plea for it to be meaningful in context, was likely only to be available to Last Bus if the exclusion of such protection by EvoBus would fail to satisfy the requirement of reasonableness.

Schedule 2

35. As regards, then, the matters set out in Schedule 2 to UCTA:

    (i) There was no inequality of bargaining power between Last Bus and Dawson, and Last Bus's requirements could have been met by other means than contracting with Dawson (Schedule 2, paragraph (a)).

    (ii) I could not say that Last Bus received any inducement to agree to Clause 5(b), or that in accepting Dawson's terms it had an opportunity of entering into a similar contract with another that would not contain an equivalent exclusion (Schedule 2, paragraph (b)). I proceed on the basis that any hire purchase terms available in the market would have come with a materially similar exclusion.

    (iii) Last Bus ought reasonably to have known very well of the existence and extent of Clause 5(b), given the parties' extensive course of dealing (Schedule 2, paragraph (c)).

    (iv) Schedule 2, paragraph (d) does not arise ("*where the term excludes any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable*").

    (v) I could not say that the Tourismos were manufactured or adapted to the special order of Last Bus to any extent that might be relevant (Schedule 2, paragraph (e)). There is some evidence that at the request of Last Bus some minor extras were fitted to at least some of the Tourismos (additional USB ports at the seats), but I do not regard that as relevant to the reasonableness of a total exclusion of liability for the quality of the buses, and anyway it is not clear to me whether that was really a 'special order' matter or just a selection of an option offered by EvoBus.

36. In *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 1 All ER (Comm) 981, at [10], Potter LJ drew from previous authorities a series of eight propositions concerning how certain factors have been treated when considering whether any given exclusion or limitation of liability satisfies the requirements of reasonableness. I have reminded myself of them, but they do not add materially to the analysis in the present case.

Decision

37. The primary argument for Dawson on reasonableness therefore boils down to this, namely that it was fair and reasonable to include Clause 5(b) in the Tourismo hire purchase contracts, given that at the time of those contracts:

    (i) Last Bus was a substantial commercial party well able to acquire the Tourismos, if it so wished, without contracting on a hire purchase basis with Dawson. There is no suggestion, or basis for suggesting, that Dawson, in effect, took advantage of Last Bus, or that Clause 5(b) is so unreasonable that it might have occurred to Dawson that in signing up to it, Last Bus must have not properly understood or considered it;

    (ii) if Last Bus was not content with Dawson's exclusionary terms, it was in a position to secure such contractual assurances as to quality as EvoBus was willing to offer, either alongside the use of hire purchase via Dawson (or another finance house), or if necessary by buying directly;

    and

    (iii) there was a long and consistent prior course of dealing between Last Bus and Dawson, in which Last Bus had freely agreed to, and never once raised objection to or concern about, Clause 5(b) (or its materially equivalent predecessors).

38. Those factors mean that Dawson does not need to rely on the proposition rejected by the Court of Appeal in *Purnell*. There is more to its argument than the false claim that it is necessarily reasonable for it to exclude responsibility for the quality of the Tourismos because it is a finance house, interposed as intermediate seller because the financing machinery was that of hire purchase rather than loan.

39. Those factors are sufficient, the primary argument contends, to overwhelm the one factor that, so far as it goes and other things being equal, points away from the reasonableness of the term, namely that Last Bus did not have the option to contract with anyone else for hire purchase finance on terms that would not have involved an equivalent exclusion of liability.

40. Bearing in mind the approach taken in cases between substantial commercial parties of equal bargaining power (see paragraph above), I agree with Mr Benzie that there is no real prospect of Last Bus resisting Dawson's primary argument. In my judgment, it is compelling and sufficient. There is no need for a trial to see that Clause 5(b) satisfied the requirement of reasonableness. Upon indisputable matters of fact, that in my view is bound to be the finding in this case; and there is no reason, let alone a compelling reason, for keeping Dawson in this Claim if there is no realistic prospect of Last Bus avoiding that finding.

41. At a trial, Dawson might well succeed more simply, on the logic of paragraph above, since it might well be held reasonable for EvoBus to exclude liability in a manner equivalent to Clause 5(b) in a direct sale, providing to Last Bus only the manufacturer's warranties that Last Bus does not allege give it any claim here. However, I would not have regarded it as satisfactory to consider reaching a final conclusion about that, EvoBus having not sought summary judgment on that basis and having played no part in the summary judgment application brought by Dawson.

Disposal

42. For the reasons set out above, this application succeeds. I shall grant summary judgment dismissing the claim against Dawson.