Neutral Citation Number: [2020] EWHC 87 (QB)

Case No: D90MA176

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Manchester Civil Justice Centre
1 Bridge Street West
M60 9DJ

Date: 24/01/2020

Before :

MRS JUSTICE FARBEY

- -

Between :

FINE LADY BAKERIES LIMITED	**Appellant**
- and -	
(1) EDF ENERGY CUSTOMERS LIMITED (FORMERLY EDF ENERGY CUSTOMERS PLC)	**First Respondent**
(2) E.ON UK ENERGY SERVICES LIMITED	**Second Respondent**

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- -

Tom Mountford (instructed by **DLA Piper UK LLP**) for the **Appellant**
Gerard Rothschild (instructed by **Dentons UK and Middle East LLP**) for the **First Respondent**
Michael Watkins (instructed by **Pinsent Masons LLP** for the **Second Respondent**

Hearing date: 17 October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 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.

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MRS JUSTICE FARBEY

Mrs Justice Farbey :

1. This is an appeal, brought with the permission of O'Farrell J, against two orders of Deputy District Judge Masheder sitting at the Manchester District Registry on 11 February 2019. In one order, the DDJ allowed the application of EDF Energy Customers Ltd (the first defendant below and the first respondent in this appeal; hereafter "EDF") for summary judgment against Fine Lady Bakeries Ltd (the claimant below and the appellant in this appeal; hereafter "the claimant"). In the second order, the judge allowed the summary judgment application of E.ON UK Energy Services Ltd (the second defendant below and the second respondent in this appeal; hereafter "EON") against Fine Lady Bakeries. As a result, the claimant's claims against EDF and EON were dismissed. A counterclaim by EDF against the claimant was allowed.

2. Before me, as below, Mr Tom Mountford appeared for the claimant; Mr Gerard Rothschild appeared for EDF; Mr Michael Watkins appeared for EON. I am grateful to counsel for their helpful submissions.

3. The grounds of appeal are numerous but fall into three principal categories. First, it is submitted that the judge made a serious procedural error because his judgment incorporated the defendants' skeleton arguments to an impermissible degree. Secondly, the judge failed to recognise that the claims against EDF and EON were not suitable for summary determination. Thirdly, the judge failed to consider the claimant's argument that there was some other compelling reason for trial on account of the complexity of the issues, their interaction with the regulatory framework governing the supply of electricity to consumers, and their potentially wide significance in the energy market. Other, specific grounds of appeal raised in relation to EDF are (in summary) that the judge was wrong to interpret the contractual documents as meaning that EDF had no liability to the claimant and was wrong in concluding that exclusion clauses on which EDF relied were reasonable under sections 3 and 11 of the Unfair Contract Terms Act 1977. The judge was wrong to conclude that the claimant's claim for unjust enrichment must fail. In relation to EON, the grounds of appeal maintain that the judge misinterpreted the exclusion clause on which EON relied and erred in concluding that the clause was reasonable under the 1977 Act.

Factual background

4. The claimant, which was set up in Banbury, supplies bakery products to supermarkets, wholesalers and the sandwich manufacturing industry. Over the course of 2009-2010, the claimant built a new production site in Manchester including the construction of a substation that was needed to supply electricity to the site. The principal period with which the claim is concerned begins in September 2010 and ends in July 2014. During that period, EDF (one of the so-called Big 6 energy companies operating in the United Kingdom) supplied electricity to the Manchester site. The contractual relations between the claimant and EDF were governed by a series of supply agreements.

The EDF contracts

5. On 28 October 2010, the claimant contracted for the supply of electricity for a minimum period of six months at a forecasted cost of £250,775.97. That first supply

agreement was made on EDF's written standard terms for industrial and commercial business customers (version 1.0 dated 15 March 2010). A copy of the first supply agreement and the standard terms was before the judge and is before me. In around April 2011, the claimant and EDF entered into a second agreement, again on EDF's written standard terms, for the continuation of the supply of electricity for a minimum period of six months with a forecasted cost of £337,439.05. That second supply agreement was before the judge and is before me. Version 2.0 of the standard terms and conditions came into effect on 2 June 2011. A copy was before the judge and is before me.

6. On 16 August 2011, the claimant and EDF entered into contractual arrangements for the continued supply of electricity on written special conditions. In the event of any conflict between the special conditions and the standard terms and conditions, the former were to prevail. I have seen a copy of the special conditions which show that the earliest termination date was 30 September 2024 and which are said by EDF and EON to be bespoke. Neither the judge nor this court has seen a third set of standard terms and conditions, and there is no evidence of a fresh forecasted cost.

The EON contracts

7. On 18 June 2010, the claimant had signed a Meter Operation Agreement with EON for the installation and maintenance of an electricity meter for the Manchester site, in consideration of an annual payment of £309. According to the documents before me, the meter was installed by an EON engineer on about 26 August 2010. The engineer configured the meter so that its current transformer (CT) ratio was 800/5. That was wrong: the ratio ought to have been 400/5. The CT ratio determines the amount of electricity recorded by the meter as having been used. According to the claimant, the EON meter erroneously recorded twice the volume of electricity supplied to the claimant by EDF.

8. A third party (on EON's case) thereafter collected data from the meter annually and had the task of performing a visual safety check. The incorrect CT ratio was not identified until 16 July 2014 when EON (or more accurately a successor company to the second respondent which for present purposes I need not describe) informed EDF of the misconfiguration and reconfigured the meter to the correct CT ratio. The same inspection revealed that the meter had never been commissioned (the purpose of Commissioning being to ensure that the energy flowing across a defined metering point is accurately recorded by the meter). The meter at the Manchester site was commissioned only after the 2014 inspection which thereafter led (indisputably) to accurate meter readings.

The parties' statements of case

9. The claimant's case, put simply, is that the errors as to CT ratio and commissioning caused it to be overcharged by EDF for electricity that it did not consume. The total overcharge is said to be £1,643,129. Following a partial refund by EDF and by ENW (the relevant distribution network operator which had received an onward payment from EDF), the remaining overpayment is said to be £748,696.

10. By a claim form issued on 17 July 2017, the claimant sought to recover the remaining overpayment from the defendants. In relation to EDF, the Particulars of Claim raise

two causes of action: breach of contract and a claim in unjust enrichment for the recovery of payments made under mistake. As regards breach of contract, the claimant's case is that, on the proper interpretation of the material parts of the contractual documents, EDF was obliged to charge for electricity that was actually consumed as opposed to electricity recorded as consumed by the meter.

11. The Particulars of Claim rely also on what are said to be implied contractual terms. In particular, the claimant contends that certain of EDF's regulatory obligations – particularly under what is known as the "Balancing and Settlement Code" (hereafter "the BSC") - give rise to implied obligations under contract. I shall return to the BSC and to the more general regulatory framework below.

12. As regards the claim against EDF in unjust enrichment, the Particulars of Claim contend that overpayments were made as a result of mistaken consumption figures and that EDF had been unjustly enriched as a result.

13. In relation to EON, the claim is breach of contract. The Particulars of Claim state that, in breach of the Meter Operation Agreement, EON failed to install or commission the meter properly; but the claimant contends that EDF is also legally responsible for the failures of EON "on account of the relationship of agency between EDF and EON under the applicable regulatory framework". The pleaded breaches of contract against EON were therefore also advanced as breaches by EDF through EON as its agent under the BSC.

14. EDF filed a Defence on or around 11 September 2017 in which it admitted that the invoiced sums were not calculated by reference to the claimant's actual consumption of electricity but denied any breach of contract because (in very short terms) the invoices were properly raised in accordance with the meter readings. EDF was under no duty to reconcile the sums charged against actual consumption. The BSC was of no relevance to the claim because it concerns responsibilities as between the parties to the BSC only.

15. The claim of unjust enrichment was denied on the basis that the claimant had not made any overpayments to EDF and no mistake had been made: EDF had invoiced the claimant in accordance with the relevant contractual terms and the claimant had made payments in accordance with its contractual duties. EDF denied any unjust factor. It claimed in addition that the claimant was estopped from claiming that EDF had been unjustly enriched because under the applicable contractual terms the claimant had agreed to indemnify EDF in respect of claims resulting from meter faults or from a meter not complying with statutory or other requirements.

16. EDF's Defence went on to say that, having received the funds from the claimant, it had disposed of the funds and thereby changed its position:

> "To the extent that EDF has in good faith changed its position in reliance on receipts from FL Bakeries, namely to the extent of approximately 97% of the un-refunded payments which EDF received from FL Bakeries, EDF has made payments in respect of the electricity recorded by the Meter as having been consumed, in particular to utility companies responsible for generation, distribution and transmission, to Elexon Limited (which is responsible for

managing the NETA trading system) and to the Government (in respect of the climate change levy)."

17. EDF's Defence also alleged that EON had breached the Meter Operation Agreement. EDF denied that EON was EDF's agent. Irrespective of the terms of the BSC, EON was not an agent of EDF in the normal contractual sense.

18. By a counterclaim, EDF claimed an indemnity from the claimant for any liability for the claimant's loss in reliance on a term of the contract that EDF would be indemnified against any loss caused by the claimant's failure to procure the maintenance of the meter in good working order and on the grounds that the overpayment was caused by meter failures for which those other than EDF were responsible. In so far as the counterclaim would extinguish any claim, the claim failed for circuity of action.

19. EDF also claimed a contribution from EON in respect of any liability on the grounds that EON had breached the Meter Operation Agreement with the claimant and had not installed, commissioned or maintained the meter in accordance with the regulatory requirements in the BSC.

20. EON filed a Defence on around 14 September 2014 in which it admitted that the use of the incorrect CT ratio was likely to have led to the claimant paying for more electricity than it consumed. Liability was denied on the basis that EON's responsibilities under the Meter Operation Agreement had been transferred to a successor company such that EON had ceased to be a party to the Agreement on 1 April 2011. In any event, EON denied any breach of duty. There was nothing to indicate to a reasonably competent installer that the CT ratio was incorrect. The CT ratio could reasonably be encountered for the authorised supply capacity of the site.

21. The losses claimed by the claimant were excluded by EON's standard terms of and conditions. The exclusion and limitation provisions were reasonable terms to have included in a contract between sophisticated commercial parties, pursuant to which EON was paid a modest sum of £309 per annum in return for the limited services that it agreed to perform. In any event, the claimant's losses had been caused by ENW for various reasons which I need not elaborate here.

22. EON also filed a notice of additional claim for an indemnity from EDF. EON had performed services under the Meter Operation Agreement at EDF's request and as "Party Agent" for EDF under the BSC. EDF's regulatory duties meant that ultimate responsibility for the installation, commissioning and maintenance of the meter rested with EDF under the BSC. EDF would otherwise be able to retain payments in relation to electricity that had never been supplied. An implied contract thereby came into existence between EDF and EON pursuant to which EDF was obliged to indemnify EON in respect of all losses that EON might suffer by reason of a claim by the claimant. Alternatively, an entitlement to an indemnity or contribution arose at common law: if EON were required to refund the claimant, rather than EDF, the latter would have been unjustly enriched.

23. Thereafter the claimant filed a Reply to EDF's Defence and a Defence to EDF's counterclaim, and a Reply to EON's Defence. At that stage, pleadings closed.

24. The case was then stayed by consent in order to enable the parties to try to settle the case or narrow the issues. On 26 March 2018, EDF made an application for summary judgment under CPR Part 24. EON applied for summary judgment on 11 April 2018.

The terms of the third supply agreement

25. As I have mentioned, the parties have provided a full copy of the first and second supply agreements. The third supply agreement contained both special and standard terms. In the absence of evidence that the version 2 standard terms were sent to the claimant at the material time, the claimant does not accept that the version 2 terms formed part of the third supply agreement. In the absence of a copy of any third set of standard terms and conditions, Mr Mountford submitted that the court cannot be satisfied as to the whole of the contract between the claimant and EDF at all material times. The scope of the third contract (over and above the special conditions) is a matter of fact to be determined at trial after a full disclosure process: summary judgment is in the circumstances inapposite.

26. Mr Rothschild criticised (with some justification) the lack of effort on the part of the claimant to get hold of the third set of standard conditions, for example by making a request of EDF to inspect relevant documents under CPR 31.14. The version 2 standard terms were brought into effect on 2 June 2011. There would be no reason to suppose that EDF would have produced a third and different set of terms at the time of the third supply agreement (barely two months later) and no reason to suppose that any third version might appear if only a disclosure order were made. On instructions, Mr Rothschild told me (but did not tell the judge) that the June 2011 standard terms were not changed until December 2011, so that the version 2 terms were still in force when the third supply agreement was made in August 2011.

27. While the chain of contracts is less than fully evidenced, I do not accept that there was realistically any confusion about the terms on which the claimant purchased electricity at any time. I will proceed on the basis that all the relevant contractual terms and conditions are contained in the documents before the court.

28. None of the parties drew my attention to any material difference between the version 1 and version 2 standard terms. For that reason, I shall therefore refer to them hereafter simply as the standard terms and conditions. In so far as material, they are as follows:

> 3.7 All electricity discovered or reasonably and properly assessed to have been consumed (whether recorded or not recorded by a Meter for whatever reason) by you [i.e. the claimant] at a Supply Point during the Term shall be deemed to be supplied under the terms of the Agreement.
>
> 4.6 We [i.e. EDF] will prepare our invoices using consumption data recorded by the Meter unless:
>
> 4.6.1 we have not been provided with consumption data, or it has not been provided to us in the required timeframe in accordance with clause 14.12; and
>
> 4.6.2 having made reasonable efforts, we do not retrieve consumption data; or

4.6.3 we reasonably believe the consumption data to be wrong,

in which case we may prepare an invoice using our reasonable estimate of the electricity supplied to you. We shall reconcile such estimate against actual consumption data once this is available and credit or debit you (as applicable) the amount of any underpayment or overpayment by you in the Invoice for the Changing Period immediately following the Charging Period in which we conduct the reconciliation.

14.1 You represent, warrant and undertake to us that the Supply at each Supply Point will be measured by a Meter, which must be:

…

14.1.2 operated and maintained by a Meter Operator;

14.1.3 in proper working order and suitable for measuring the Supply at the appropriate Measurement Class;

…

14.1.5 subject to clause 14.2 compliant with all legislation, regulation and codes of practice applicable from time to time.

…

14.14 If and to the extent that a Meter is owned or controlled by you, or by a third party contracted by you, you shall, or shall procure that the relevant third party shall, at all times during the Term maintain such Meter … in good and substantial repair and in good working order and you shall Indemnify us in respect of any loss of any nature incurred by us as a result of a breach of this clause 14.14.

14.23 Except as is otherwise provided in this clause 14, you shall be responsible for, and shall bear all costs associated with, all Meters and you shall indemnify us in respect of all costs, charges, expenses, claims, proceedings, losses, demands or liability of any nature (including any liquidated damages we have to pay under the BSC) which we may suffer or incur as a result of any fault or failure in a Meter, or any act or omission of you, your Agents or the Local Network Operator, or any delay in you, your Agents or the local Network Operator performing any obligation under the BSC to the standard we reasonably require, or any Meter not complying with any relevant statutory or electricity industry requirements…

17.6 Subject to clauses 17.7, 17.11 and 17.13, we shall only be liable to compensate you for a breach by us of the Agreement to the extent that such breach:

17.6.1 directly results in physical damage to your property, or the property of your officers, employees or agents; and

17.6.2 such physical damage was reasonably foreseeable as at the date of the Agreement.

17.7 Subject to clauses 17.11 and 17.13, our total liability to you whether in contract, tort (including negligence and breach of statutory duty), statute, or otherwise in relation to an incident or series of related incidents in any twelve (12) month period shall not exceed one million pounds (£1,000,000) in aggregate.

17.8 Subject to clause 17.9, if and to the extent that we are able to recover, and do recover, in respect of matters forming the subject of the Agreement, from a Local Network Operator, the Transmission Licensees or any third party, monies in respect of loss suffered by you, we shall account to you for the amount so recovered, less any reasonable costs and expenses (including professional fees and expenses) we incur in effecting the recovery.

17.10 Subject to clauses 17.11 and 17.13, neither us, nor our officers, employees or agents, will be liable to you in contract, tort (including negligence and breach of statutory duty), statute or otherwise for any:

17.10.1 economic or financial loss, loss of profit, revenue, use, business opportunity, agreement or goodwill;

17.10.2 indirect or consequential loss;

17.10.3 loss resulting from your liability to any other person; or

17.10.4 loss resulting from loss, corruption or damage to any computer or electronically stored data or any operating systems, computer programs, interfaces or other software.

17.11 Notwithstanding any other provisions of the Agreement, nothing in the Agreement shall exclude or limit our liability to you where such exclusion or limitation is not permitted by law.

17.12 Subject to clauses 17.11 and 17.13, the rights and remedies provided by the Agreement to each party are exclusive and exhaustive and replace all substantive rights or remedies, express or implied, and provided by common law or statute in respect of the subject matter of the Agreement, including any rights either party might otherwise have in tort.

17.13 Nothing in the Agreement shall exclude, restrict, prejudice or affect any of the rights, powers, duties and obligations of either party or the Authority or the Secretary of State conferred or created by the Act, or any subordinate legislation made from time to time under the Act, or any licence granted to us under the Act.

17.14. So far it excludes liability, this clause 17 overrides any other provision in the Agreement except where otherwise expressly provided, and each clause of this clause 17 shall survive termination of the Agreement.

The EON contract

29. The Meter Operating Agreement between the claimant and EON was made on EON's standard written terms of business. By clause 12, EON purported to exclude (in so far as relevant to the present case) liability for anything other than loss arising from a foreseeable breach resulting in physical damage to property.

The Deputy District Judge's judgment

30. The summary judgment applications came before the Deputy District Judge for hearing on 20 November 2018. He heard submissions from all parties but there was no time to hear submissions by EDF and EON in reply to the claimant. The case was adjourned part-heard until 11 February 2019. On that second day, counsel's submissions were completed and the judge gave an ex tempore judgment finding for EDF and EON on all issues.

31. The transcript of the judgment runs to 13 paragraphs of which three set out the procedural history and one sets out the facts. The judge summarised the claimant's submissions as being: "the claim is complicated, discovery has not yet taken place and…it is inappropriate to determine the claims on a summary basis". He commented on the "very full pleadings" as well as the "wealth" of documents such that there would not be "more to come" if the case went to trial.

32. As regards EDF's application, the judge sought merely to "highlight certain matters". He dealt with the application as follows:

> "7….It is argued that liability is excluded by EDF's contractual terms. This brings into issue the question of reasonableness, and in my view FLB is a substantial commercial enterprise, perfectly capable of negotiating contractual terms. There are three agreements in total, and the third agreement contained bespoke terms.
>
> 8. Furthermore, the clauses substantially mirror clauses contained in the intra-industry Balancing and Settlement Code. The profit margin for EDF is less than three per cent. I conclude that the clauses in the particular circumstances satisfy the test of reasonableness.
>
> 9. In relation to the argument of circuity of action, this has in my view been clearly made out. Furthermore, the argument that FLB has no cause of action has also in my view been made out. EDF's standard terms of contract allow it to charge what the meter says, see clause 4.6. Bills are, therefore, sent out based upon consumption recorded by a meter.
>
> 10. Insofar as unjust enrichment is concerned, my view is there was no mistake or legally no mistake, because responsibility for the configuration of the meter lay with the claimant."

33. The judge then said that, in order to avoid a reserved judgment and the consequent increase in costs, he would adopt EDF's skeleton argument. He was satisfied on this basis that EDF was entitled to summary judgment on both the claim and the counterclaim.

34. In relation to EON's application, the judge took a similar approach, seeking to highlight certain matters. He said:

> "11. …E.ON seeks to rely on its own exclusion clause and a meter operation agreement with FLB dated 20 August 2010. E.ON maintains that the exclusion clause in its contract is fair and reasonable. It is clear that FLB is a sophisticated commercial enterprise, having an annual turnover in excess of £83 million, and in

> my view is clearly able to form a view as to the reasonableness of the relevant limitation clause.
>
> 12. The relevant part of clause 12 provides for the recovery of losses which are foreseeable and which result in physical damage to the property of the party. In the circumstances, FLB's claim is, in my view, excluded. There then arises the question of whether clause 12 is fair and reasonable. As previously stated, FLB was familiar with contracting on standard terms and was able to negotiate alternative contractual arrangements if it so wished. The clause must also be viewed in the light of the fact that the remuneration received by E.ON was only £309 per annum. In my view, this clause represents a fair allocation of a risk under the contract.
>
> 13. Furthermore, the exclusions and mutations appear to be industry-standard. Again, I have come to the conclusion that the clause was a fair and reasonable term for the parties to agree on.

35. The judge repeated that, in order to avoid the costs of a reserved judgment, he would adopt the second defendant's skeleton argument and was satisfied that EON was entitled to summary judgment. In a multi-party, multi-issue case, the judge took a short-cut by incorporating the skeleton arguments of both EDF and EON (apparently in toto) into his judgment.

Legal framework

36. A judgment must make it apparent to the parties "why one has won and the other has lost" (*English v Emery Reimbold & Strick Ltd*, Practice Note, [2002] EWCA Civ 605, [2002] 1 WLR 2409, para 16). There is no duty on a judge to deal with every argument presented by counsel on each side (*English v Emery*, para 17). However "the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment" (*English v Emery,* para 19).

37. In *Crinion v IG Markets Ltd* [2013] EWCA Civ 587, the Court of Appeal considered appeals which had nothing to do with the merits of the underlying claims but were based solely on the fact that almost all of the judgment below had been taken - word for word - from the respondent's closing submissions. The court criticised the judgment as risking the impression that the judge had not performed his task of considering both parties' cases independently and even-handedly. There could be nothing inherently wrong in his making extensive use of counsel's skeleton argument, with proper acknowledgement, whether in setting out the facts or in analysing the issues or the applicable legal principles or indeed in the actual dispositive reasoning. A judge should, however, take care to make it clear that he or she has fully considered each party's submissions and has brought independent judgment to bear (per Underhill LJ, para 16).

38. Sir Stephen Sedley observed, at para 38, that unequivocal acceptance of one party's case has always posed a problem for judges. The adoption of one party's submissions – however cogent – is to overlook what is arguably the principal function of a reasoned judgment, which is to explain to the unsuccessful party why they have lost.

Such an omission is "not generally redressed by a perfunctory acknowledgement" of the unsuccessful party's arguments: a losing party is entitled to the measure of respect which a properly reasoned judgment conveys.

39. The court in *Crinion* emphasised that a defective judgment does not necessarily entail that the party has been subject to an injustice which requires the appeal to be allowed. The court may be able, by careful analysis of the judgment, to satisfy itself that the judge has properly performed his or her judicial function (per Underhill LJ, para 17). In that case, the court was able to conclude that the judge had performed his essential judicial role and that his reasons for reaching his conclusion were sufficiently apparent from the judgment. On that basis, the appeal was dismissed.

40. The Privy Council considered *Crinion* in *Ramnarine v Ramnarine* [2013] UKPC 27. In delivering the judgment of the Board, Lord Wilson observed:

> "It is not, of itself, bad practice for a judge who has considered the rival contentions on a discrete issue, such as credibility, to decide that the contentions which he prefers have been expressed by counsel in terms upon which he cannot improve and which he should therefore incorporate into his judgment. But the Board indorses the recommendations of Longmore LJ in the *Crinion* case…that their incorporation should be expressly acknowledged and accompanied by a recital of the other party's contentions and an explanation of their rejection."

41. CPR 24.2 states that the court may give summary judgment against a claimant on the whole of a claim or on a particular issue if (a) it considers that the claimant has no real prospect of succeeding on the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial. In considering whether the claimant has no real prospect of success, the relevant question is whether the claim has a realistic, as opposed to a fanciful, prospect. This means "better than merely arguable" (*ED&F Man Liquid Products Ltd v Patel & anr* [2003] EWCA Civ 472, para 8). The burden of proof rests upon the defendant to establish that the claimant has no real prospect of success (*ED&F*, para 9). The court need not take at face value and without analysis everything that a claimant says in statements before the court but must not conduct a "mini-trial" (*Easyair Ltd v Opel Telecom Ltd* [2009] EWHC 339 (Ch), para 15).

42. Points of construction of a contract may be suitable for summary judgment. In *ICI Chemicals and Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725, para 12, Moore-Bick LJ (with whom Buxton LJ and Ward LJ agreed) expressed this suitability as follows:

> "It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better."

43. He went on to say, at para 14, that it would be wrong to give summary judgment in a case where it is possible to show by evidence that material not currently before the court is likely to exist and can be expected to be available at trial. However:

> "it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

44. The courts have previously considered whether contractual clauses excluding or limiting a party's liability can be found to be reasonable under section 11 of the 1977 Act on a summary basis. In *Lalji v Post Office Ltd* [2003] EWCA Civ 1873, para 17, Brooke LJ (with whom Sedley LJ as the other member of the court agreed) observed that it would be for the Post Office to show at trial that a contractual term passed the "reasonableness" test in section 11 of the Act which would be essentially a matter for the trial judge to determine. The question of reasonableness is fact-sensitive and so "particular caution is needed before concluding, without awaiting disclosure and witness evidence at trial…that the test of reasonableness is plainly satisfied" (*Macquarie Internationale v Glencore* [2008] EWHC 1716 (Comm), [2008] 2 CLC 223, para 84).

45. In *Barclays Bank plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm), [2015] 1 CLC 180, Cooke J was willing to find that the section 11 reasonableness test was satisfied on an application for summary judgment. On the facts of that case, he was satisfied that there was no basis upon which any new factors could emerge at trial such that he was in as good a position to resolve the matter as any trial judge would be. That is entirely consistent with the earlier case law which does not go as far as to say that no question of reasonableness should be the subject of summary judgment.

The parties' submissions

46. Mr Mountford submitted that the judge had failed to address the issues raised by the claimant properly and had failed to give a properly reasoned judgment. He had failed to provide any conclusions or any reasons in respect of important issues. He had failed independently to analyse the issues, inappropriately adopting the defendants' skeleton arguments wholesale as constituting the court's reasoning. The judgment was therefore unjust on account of serious procedural irregularity under CPR 52.21 (3) (b).

47. Mr Mountford placed considerable reliance on the BSC and various other aspects of the scheme for regulating electricity supply in the United Kingdom which are pleaded at length in the Particulars of Claim. Mr Mountford contends that the regulatory scheme determines or is relevant to the contractual relations between the claimant and EDF through the mechanism of implied terms.

48. I do not propose to set out in this judgment the details of the sophisticated and complex regulatory scheme which is to be found in primary legislation, electricity supplier licence conditions, subordinate agreements and codes of practice: the recitation of everything that was drawn to my attention would make this judgment unduly dense. In summary, the Electricity Act 1989 prohibits the unlicensed supply of electricity (section 4) and provides that the Gas and Electricity Markets Authority may licence a person to supply electricity to premises (section 6(1)(d) and (3)).

49. Licences to supply electricity are subject to standard licence conditions, which by virtue of section 8A of the Electricity Act are incorporated by reference into each licence granted. The standard licence conditions applying to electricity suppliers, including EDF, provided at the material time that the licensee must be a party to and comply with the BSC which makes multi-lateral provision in relation to the operation of electricity networks in which many different commercial actors have a part to play. Licensees were required to become a party to the BSC Framework Agreement (hereafter "the Framework Agreement") which is (in effect) a contract between industry participants.

50. Mr Mountford took me to various parts of the regulatory scheme in order to submit that EDF was EON's agent for the purpose of metering. EDF was the "registrant" (as defined in the BSC) of the metering equipment at the Manchester site and, as such, subject to "registrant responsibilities" which included a duty to install and commission the Manchester meter as well as to maintain and operate it according to applicable levels of accuracy. By virtue of section 5.5.2 of Code of Practice 4 to the BSC, a commissioning test ought to have been performed on the site to confirm the correct CT ratio.

51. Section J of the BSC required EDF to appoint a Party Agent as Meter Operator Agent (in this case EON) whose functions were to perform for EDF the installation, commissioning and maintenance of the meter. Section J made EDF responsible for every act, breach, omission, neglect and failure of EON as Meter Operator Agent. EDF was under a positive obligation to take such actions and provide such information as was reasonably necessary to enable EON to discharge its functions (paragraph 1.2.6 of Section J). The obligation to carry out specified activities through an agent was without prejudice to EDF's responsibility to perform those obligations (paragraph 1.2.7 of Section J).

52. Mr Mountford submitted that the regulatory regime was highly germane to private law issues. The court should impute to EDF's regulatory obligations the ability of consumers to have redress against a single and known utility company (in this case, EDF) in a liberalised energy market in which different utility companies provide different services to the same consumer. As a matter of public policy, the courts should not countenance contractual terms having the effect of removing EDF's liability as this would undermine statutory regulation.

53. The regulatory scheme defined the relationship between EDF and EON in relation to metering services (and their respective duties) which could be implied into their contractual relationship. The scheme was part of the background knowledge which would have been available to EDF and the claimant when entering into supply agreements. It was part of the factual and commercial context from which the court is entitled to interpret the contract (*Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, para 15). If that context, and the responsibilities placed on EDF in relation to meter accuracy under the regulatory scheme, were to fall out of the equation, the supply agreements could entitle EDF to charge its customers on the basis of deemed consumption according to meter readings and not on the basis of actual consumption (see clause 3.7 above). It would shift responsibility for accurate meter readings away from specialist agents acting in accordance with a specialist and calibrated regulatory regime and onto private companies with no relevant specialist knowledge. That

would defy common sense and fairness, and so would not have been the bargain struck.

54. From the regulatory scheme, Mr Mountford submitted that it was an implied term that EDF would exercise reasonable skill and care to ensure that the charges invoiced to the claimant represented the metered supply which had been provided to the claimant in the relevant period. It was also an implied term that EDF would discharge its regulatory obligations as registrant of the metering system and would exercise reasonable skill and care in the discharge of those obligations.

55. The question of the relevance of the regulatory scheme to the implied terms of the contract with EDF had not been the subject of any discussion in the judgment below. The judge ought to have recognised that the claims arose in a developing area of jurisprudence which made it inappropriate to decide them on a summary basis, without the benefit of full evidence including expert evidence as to relevant industry practice and as to the applicable regulatory regime. The effect of the regime gave rise to factual issues suitable for trial after the disclosure process.

56. Irrespective of how I might view the merits of the argument at this stage, the regulatory arguments provided a compelling reason for the case to go to trial as it would raise important issues for the regulator and the regulatory scheme. It would have wide significance in relation to other energy contracts, not only those of EDF customers but potentially also in relation to standard terms of other major energy companies.

57. Mr Mountford submitted that the various exclusion clauses on which EDF relied did not have the meaning for which EDF contended and did not have the effect of excluding liability for refunding sums overpaid because of erroneous meter readings - for which the claimant was not and could not be responsible. Alternatively, the exclusion clauses were unreasonable under section 11 of the 1977 Act. Not least, EDF could be expected to protect itself through insurance.

58. Mr Mountford further submitted that the unjust enrichment claim could not be summarily dismissed because EDF could not lawfully transfer its regulatory responsibility for meter configuration to the claimant. As to EDF's counterclaim, the proper construction (in the proper commercial and regulatory context) of the contractual documents was not such as to render the claimant liable to EDF. It would be nonsensical to suggest that the parties objectively intended that the claimant would relieve EDF of the obligation to repay sums which the claimant had itself overpaid as a result of the defective installation and commissioning of the meter.

59. Mr Mountford made similar submissions in relation to EON, namely that clause 12 on the Meter Operation Agreement did not on a proper interpretation exclude liability or, alternatively, the clause was unreasonable under section 11 of the 1977 Act. EON could be expected to protect itself through insurance whereas it was not realistic to expect electricity consumers to insure themselves against the negligence of specialist meter operators.

60. On behalf of EDF, Mr Rothschild submitted that the judgment under appeal was correct in law and adequately reasoned. For the sake of efficiency, the judge was entitled to incorporate by reference EDF’s skeleton argument. The claimant’s

argument amounted to saying that the judge was under a duty to address every submission made to the court, contrary to the *English* case. The reasons given by the judge were concise but clear. A short judgment was a proportionate and prudent course, consistent with the overriding objective in CPR 1.1.

61. Mr Rothschild submitted that the case had been suitable for summary judgment. The claimant had failed to say with any particularity what further evidence might emerge before trial. The application for summary judgment relied on conventional principles of law and there was no support for the contention that it concerned a developing jurisprudence. Even if it did, the answer was clear and there was no bar to summary judgment. There was no other compelling reason for trial.

62. Mr Rothschild submitted that the judge was correct and made no error in concluding that the contractual terms of the various supply agreements allowed EDF to charge for electricity by reference to the meter reading, even if erroneous. The meaning of the relevant contractual terms was plain. Neither disclosure nor evidence at trial would be apt for the legal exercise of interpreting them. The regulatory framework did not affect contractual relations and was irrelevant as a matter of private (as opposed to regulatory or public) law.

63. It was further submitted on EDF's behalf that the exclusion clauses in the contractual documents (clauses 17.6 and 17.10 above) were reasonable: the size and sophistication of the claimant made it capable of negotiating contractual terms for the supply of electricity and made the relative size of EDF inconsequential. The claimant's argument against circuity was an attempt to rewrite contractual clauses.

64. There was no realistic claim for unjust enrichment because there had been no legally relevant mistake. The claimant had at all times made payments in accordance with the commercial bargain that had been struck. As payments had been made in accordance with the supply agreements, there was no room for a claim for restitution: it could not realistically be unjust for the claimant to be held to contractual terms.

65. On behalf of EON, Mr Watkins echoed Mr Rothschild's submissions and added that the losses which the claimant sought to recover from EON were excluded by the terms of the contract between the claimant and EON. The construction of clause 12 was clear, and it was plainly fair and reasonable under the 1977 Act. This was a plain case for summary judgment. A full trial would be a significant waste of money and court resources.

Analysis and conclusions

66. I agree with Mr Rothschild supported by Mr Watkins that no hard and fast rule required the judge to set out the test for summary judgment, which was not in dispute and which is well-established as a matter of law. Setting out the test would perhaps have assisted the judge to deliver a more structured judgment but I am not prepared to infer that the judge did not have it in mind. I also accept Mr Rothschild's submission that the judge's failure to mention the burden of proof does not appear to have led in itself to injustice.

67. Nor was the judge obliged to deal with every aspect of Mr Mountford's submissions. Brevity, however, should not come at the expense of giving proper reasons and of demonstrating the application of independent analysis to the critical issues in the case.

68. Mr Rothschild emphasised that the parties are commercial entities represented by specialist solicitors and counsel. There was no need to set out the legal issues which would have been known to the parties after the detailed legal arguments that had been ventilated fully in court over the course of more than one day. The judge's reasoning was truncated but, upon analysis, comprehensible and adequate to enable the sophisticated parties to understand how he had reached his conclusions.

69. I reject Mr Rothschild's submissions. The sophisticated nature of litigants who may be parties to a claim does not mean that they are not entitled to a properly reasoned judgment. The claimant in this case was entitled to a judgment telling it why the defendants had won and why the claimant had lost. That entitlement was not diminished because the claimant had the resources to seek legal advice after judgment in order for its lawyers (however specialist and skilful they may be) to read between the lines of a judgment and to fill in the gaps in an endeavour to explain why the case had been lost. In any event, the judgment failed to deal with the claimant's side of the arguments and so its lawyers would have been unable to give such advice.

70. In my judgment, the approach of the Deputy District Judge was inadequate. He relied on, or incorporated, the defendants' skeleton arguments within his judgment to an impermissible degree and at the expense of his own reasoning. Having made bare and perfunctory reference to the claimant's submission that the case was complex and to the claimant's reminder that disclosure had not yet taken place, he thereafter failed to set out, consider or deal with any of the claimant's arguments: the judgment is silent about what Mr Mountford submitted to the judge and silent as to the judge's consideration of Mr Mountford's submissions. This is not a case where the judge has dealt with the main points raised by the claimant succinctly but decided that it would be disproportionate to deal with every submission. In this case, the judgment does not demonstrate how the judge brought independent judgment to bear on any of the claimant's arguments.

71. Nothing in the CPR's overriding objective, mentioned by the judge, justified the failure to exercise independent judgment. The CPR – including the overriding objective – are designed to promote the just disposal of cases. Concerns about the slow progress of the case and the use of court time cannot override the duty to give a proper judgment. The CPR themselves provide ample case management tools which the judge could have used to mitigate his concerns.

72. I turn to consider whether the defective judgment has given rise to an injustice. In relation to the contractual claim against EDF, the judge concluded that EDF's liability was excluded by contractual terms. Despite the truncated nature of the judgment, I am prepared to infer that the judge considered the question of reasonableness under section 11 of the 1977 Act, together with the checklist at Schedule 2 to the Act (which the parties agreed was relevant to liability arising in contract: *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371, para 60). He concluded that the claimant "is a substantial commercial enterprise, perfectly capable of negotiating contractual terms" on the basis that there "are three agreements in total, and the third agreement contained bespoke terms". Mr Rothschild interpreted the judge as reaching

conclusions on the relative strength of the bargaining positions of the claimant and EDF, which is the first element of the Schedule 2 checklist. The judge meant that the claimant's bargaining position was strong enough to negotiate a bespoke departure from EDF's standard provisions if it so wanted. Such a conclusion would be justified by the special terms of the third contract and by the finding later in the judgment that the claimant "is a sophisticated commercial enterprise, having an annual turnover in excess of £83 million".

73. In my judgment, the determination of relative bargaining positions (on which the judgment below seems to turn) raises questions of fact which are appropriately decided at trial and which are not appropriate for summary judgment. Both EDF and the claimant emphasised the evidence favourable to their case. Mr Mountford emphasised that the claimant's 2017 turnover of £88.3m was much smaller than EDF's turnover of £6 billion. There was no evidence that the claimant had been able to negotiate bespoke terms in any way that would be relevant to the issues in the case. He asked me to infer an inequality of bargaining power. In response, Mr Rothschild emphasised that the claimant's turnover is very substantial and that it produces in excess of three million loaves of bread each week, asking me to imply sufficient bargaining power to strike fair contractual terms.

74. Mr Mountford emphasised that the claimant specialises in baked goods and does not specialise in energy supply so that, even if its electricity supply was subject to special terms, it was in a weak position to negotiate bespoke terms on metering. In response, Mr Rothschild supported the judge's reasoning that the claimant's size and the nature of its business would make it a sophisticated customer able to strike reasonable bargains. Baked goods cannot be produced without significant use of electricity, as demonstrated by the construction of an on-site substation. The forecasted prices in the contractual documents demonstrated the very significant volumes of electricity which the claimant had expected to use (the claim for damages being comparatively small when looked at in this context). Mr Rothschild submitted that the greater size and turnover of EDF did not give rise to a correlative increase in EDF's bargaining power: otherwise EDF would never succeed in persuading a court that its standard terms were reasonable.

75. These are important factual questions but this court does not have the evidential basis to determine them. Nor did the Deputy District Judge. EDF bears the burden of proof. In my judgment, EDF's assertion that the size, turnover and nature of the claimant's business rendered it capable of negotiating different or bespoke terms (in a way that would be relevant to the issues in the case) is not evidenced. The court has no evidence as to how the supply agreements came to be negotiated. There is no evidence of what other terms could have been obtained by the claimant – whether by way of market practice or by way of the claimant's own bargaining power or otherwise. This is a complex issue raising questions of fact suitable for trial and not suitable for summary judgment.

76. Similarly the ease or otherwise with which the parties could obtain insurance in respect of loss from erroneous meter readings is relevant (section 11(4)(b) of the 1977 Act and cases reviewed by Coulson LJ in *Goodlife*, paras 64-67). However, the question of insurance is one of fact and is in this case inapt for summary judgment. For these reasons, I have reached the conclusion that the judge was wrong (under

CPR 52.21(3)(b)) to allow EDF's summary judgment application on the basis of the EDF exclusion clauses.

77. Turning to implied terms and the regulatory framework on which Mr Mountford founds this part of his case, there was no evidence before the judge (and there is none before this court) that the regulator has taken any interest in these proceedings or will do so in the future. I reject Mr Mountford's submission that the importance for the regulator of whether a utility company could effectively achieve a reversal of its regulatory responsibilities by swingeing contractual terms would provide a compelling reason for trial. The regulator's interest in either the progress or the outcome of these proceedings is speculative.

78. Nor am I in a good position to decide whether this case would have wide significance in relation to other energy contracts beyond EDF customers. I do not have the documents before me that would enable me to reach a conclusion about non-EDF customers. Nor did the judge who cannot be criticised on this front.

79. On the present documents, it is not clear to me that the regulatory arguments will provide Mr Mountford with the knockout blow that he seemed to ascribe to them. Mr Rothschild relied on clause 17.12 which purports to define the entire agreement between the parties as being the express terms of the contract – thereby removing any argument that there are any further, implied terms (as in *AXA Sun Life Services Ltd v Campbell Martin Ltd* [2011] EWCA Civ 133, 2 Lloyd's Rep 1, para 49). He took me to sections 25 and 27 of the Electricity Act which (he submitted) exclude redress under the law of contract in relation to failure to comply with the regulatory scheme (see especially section 25(3)(b)). Nevertheless, in my judgment, Mr Mountford has done enough properly to raise an arguable and undoubtedly complex issue. His principal argument is that EDF may only enter into consumer contracts on the basis of its licence, which in turn obliges it to comply with the regulatory scheme such that it cannot lawfully pass contractual liability to the claimant in a way which would reverse its own regulatory duties. None of the parties took me to any relevant case law and Mr Mountford submitted that the arguments raise novel points of law, unsuitable for summary judgment as being part of developing jurisprudence.

80. Mr Rothschild regarded as no more than hubris the submission that these regulatory arguments are part of developing jurisprudence: he pointed out that the lack of previous judgments on these questions may be a sign of their weakness not strength. That may yet turn out to be the case, but the claimant raises issues of fact and law that do not lend themselves to summary determination. They are worthy of further investigation and should not have been the subject of summary determination.

81. In relation to unjust enrichment, the judge held - without any proper reasoning and without any independent scrutiny of the question beyond adopting Mr Rothschild's skeleton argument - that "responsibility for the configuration of the meter lay with the claimant". That is an inadequate treatment of this complex issue. Contrary to Mr Rothschild's submissions, I am not persuaded that the restitutionary claim of unjust enrichment must, in this case, stand or fall with the determination of the question of who is responsible for the proper working of the meter under the supply agreements. Mr Mountford's regulatory argument may have some purchase here: it would chime with ordinary notions of justice which (as I raised in argument) may favour a claimant

which has arguably done no wrong act but which has been left to pay for something it did not use.

82. As to EDF's counterclaim and its arguments about circuity, EDF rely on clause 14.14 cited above. I agree with Mr Mountford however that it is far from plain that the claimant owns or controls the meter. The documents suggest that EON owned it, and it is not natural to regard a consumer as controlling meter readings (at least where tampering is not suggested). More importantly, it is not obvious that the meter was not in "good and substantial repair" or not in "good working order". There is presently no evidence that the meter was faulty or not working: it had simply been set to the wrong configuration and had not been commissioned.

83. Clause 14.23 refers to an indemnity as regards acts or omissions in relation to the meter. Clause 17.13, however, stipulates that nothing shall "exclude, restrict, prejudice or affect any of the rights, powers, duties and obligations of either party" conferred by the Electricity Act or subordinate legislation or any licence granted to EDF under the Act. In my judgment, the interpretation of clause 14.23 when read with clause 17.13 does not give rise to the sort of "short point of law or construction" envisaged by *ICI Chemicals*. There are real issues about who was responsible for the configuration and commissioning of the meter, such that the circuity argument was not suitable for summary determination.

84. Turning to EON, its position goes at least some way towards supporting the claimant's case that the claimant ought not to shoulder the responsibility as its Defence refers to EDF as being responsible for the meter. The EON Defence refers in more than passing terms to the regulatory scheme.

85. I am not confident on the basis of the present documents that the claimant entered into a bargain which enabled EON to do something other than install a meter which would record the claimant's electricity consumption. The purpose of an electricity meter is to measure the consumption of electricity for which a customer should be charged. That remains the central purpose of metering irrespective of whether the customer is domestic or commercial. The judge should not have rejected in a summary determination the argument that it is an inherently improbable construction of the Meter Operation Agreement that it would exclude EON from liability for installing the meter in a way which failed to capture the essential purpose of having it installed.

86. Irrespective of its proper interpretation, EON accepts that clause 12 is an exclusion clause and that it was necessary under the 1977 Act for EON to prove that it was fair and reasonable having regard to the circumstances which were or ought reasonably to have been known to the parties when the contract was made. In relation to EON's submissions on the reasonableness of its exclusion clause, I have reached similar conclusions as in EDF's case. There has been no proper assessment of the relative strength of the bargaining positions of the claimant and EON – which raises factual matters suitable for determination at trial and not suitable for determination in the procedure for summary judgment. The likelihood of the claimant negotiating bespoke terms may depend on industry practice of which there is no evidence one way or the other. There has not as yet been any disclosure by EON as to what insurance it had in place or whether it could have protected itself by insurance.

87. Mr Watkins relied on the claimant's ability to negotiate special or bespoke terms with EDF as evidence of an ability to obtain non-standard terms from EON as and when it wished. That submission is speculative. There is no evidence before me that the claimant could have negotiated bespoke terms with EON. There is no sound inference that the claimant's bargaining power in relation to EDF (which the claimant disputes) should carry over to its contractual relations with EON.

88. The implication of EON's position is that a company which procured and then used an electricity meter that was not properly installed is liable to pay for electricity which it has not used. I am far from persuaded that either the price of EON's services (which was tiny in comparison with the damages claimed) or the commercial nature of all parties to all bargains enabled the judge to conclude on a summary basis that the claimant's case was bad in law and that clause 12 was a fair and reasonable allocation of risk between the parties.

89. The submissions of both respondents have the consequence that a business that has paid for unused electricity and complied with the available inspection regime in successive years cannot ventilate legal or factual questions at trial. It seems to me that the judge, and indeed this court on appeal, would need to be on sure and firm ground before reaching such a surprising conclusion. For reasons set out above, the defendants have not provided this firm ground.

90. Much of the oral argument before me was concerned with a word-by-word interpretation of the various relevant terms of the contracts. It is not desirable in the course of a challenge to a summary judgment for me to enter into an authoritative interpretation of clauses in the standard business terms of such large energy companies which would presumably affect many other customers. That exercise is better left to the trial judge who will have all relevant information.

91. The Deputy District Judge's judgment will be set aside and the applications for summary judgments will be dismissed. I will allow time before handing down this judgment so that Counsel may endeavour to agree the terms of an order that includes case management directions for trial.