Neutral Citation Number: [2024] EWHC 152 (KB) **Appeal No CH-2022-000016**

IN THE HIGH COURT OF JUSTICE **Claim No E53YX611**

KING'S BENCH DIVISION

MANCHESTER DISTRICT REGISTRY

BEFORE :

MR JUSTICE CONSTABLE

- -

B E T W E E N:

COSTCUTTER SUPERMARKETS GROUP LIMITED

Claimant/Appellant

- and -

AMEET KUMAR VAISH

First Defendant/First Respondent

- and -

PRADEEP KUMAR VAISH

Second Defendant/Second Respondent

- -

- -

Quentin Tannock (instructed by Flint Bishop LLP) for the Applicant

Pepin Aslett (instructed by Ralli Solicitors LLP) for the First and Second Respondents

Hearing date: 24 January 2024

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 16:00 on Monday 29th January 2024.

MR JUSTICE CONSTABLE:

Introduction

1. In a judgment dated 14 October 2022 ('the Judgment'), HHJ Sephton KC held that two identical limitation of liability clauses in two agreements precluded any recovery by the Appellant, Costcutter Supermarkets Group Limited ("Costcutter"), for goods delivered to two convenience stores, in Bramhall (operated by the First Respondent Mr Ameet Vaish ('AV')), and Offerton (operated by the Second Respondent Mr Pradeept Vaish ('PV')), that were part of the Costcutter franchise. Costcutter appeals, pursuant to permission granted by Mrs Justice Heather Williams on 9 March 2022.

2. The Judgment found, however, that PV was liable to Costcutter for the sum of £108,637.18 plus interest (£133,921.56 in total) in respect of goods delivered to the second of PV's convenience stores, located in Tytherington. The relationship between PV and Costcutter in relation to this store was governed by a contract which did not contain the relevant limitation of liability clause. The Judge made an order for PV to pay this sum to Costcutter ('the Order to Pay'), against which PV cross-appeals. Pursuant to an Order I made on 10 January 2024 the application for permission to cross-appeal and the substantive application to appeal were rolled up into the existing hearing on Costcutter's appeal.

3. I thank both Mr Tannock, for the Appellant, and Mr Aslett, for the Respondents, for their admirably clear and efficient submissions.

Background

4. I set out the background to this claim largely by reference to some of the facts as set out by HHJ Sephton KC at paragraphs 5 to 26 of his judgment, which are not the subject of controversy in this appeal.

5. Costcutter (through its predecessor in title) entered into a written trading agreement with PV on 15 July 1997 in respect of the convenience store located at Tytherington Shopping Centre, Macclesfield, Cheshire (the "1997 Agreement"). On 9 January 2009, Costcutter entered into a second trading agreement signed with PV in respect of the convenience store at 7-9 Turnstone Road, Offerton, Stockport SK2 5XT (the "2009 Agreement"). On or about 14 August 2012, Costcutter entered into a third trading agreement with AV in respect of the convenience store at 77-81 North Park Road, Bramhall, Stockport SK7 3LP (the "2012 Agreement").

6. The business model Costcutter had at the time when the contracts, in this case, were made, was that it sourced most of its goods supplied to retailers from the National

Independent Supermarkets Association ("NISA"). NISA was able to offer keen prices because it bought in bulk for a large number of independent retailers. At this time, Costcutter made its money by charging a very modest commission equivalent to 1% of actual costs on the supplies, together with a number of fees.

7. In around 2014, Costcutter changed its business model. Goods previously supplied by NISA were now supplied by P&H. Costcutter stopped taking commission, and although the 2009 and 2012 Agreements referred to the entitlement to a 'Service Charge', this was no longer made. Costcutter made its money instead by an arrangement with P&H. The relationship between the parties broke down because in the years after 2014, P&H was largely incapable of providing a reliable service. Whilst there were periods during which its performance was adequate, there were long periods during which the service levels were much lower than 95%, the level of service generally expected by retailers. In particular, a very significant problem was that P&H were not fulfilling orders for goods on which Costcutter was running promotions. For example, a three-week promotion would be advertised in advance but the store would not receive stock to sell the promotion until the third week. As such a customer, disappointed in his search for a particular item in the store, might choose to do all of his shopping elsewhere. Missing stock implied lost sales, not only of the missing item but also of other goods.

8. This level of service led to complaints from AV and, in particular, PV, and by May 2017, they decided that they would leave Costcutter, and, in future, would join the SPAR symbol group. On 14 June 2017, Costcutter learned that the defendants had cancelled their direct debit mandates. Costcutter responded, setting out the sums it said were due for goods which had been delivered to the stores but for which no payment had been received. This claim for payment formed the basis of Costcutter's claim against the Respondents. The Respondent's counterclaimed for its profits lost by reason of the poor service, although that counterclaim was rejected by HHJ Sephton KC, and no appeal is brought against the rejection of the counterclaim.

The Pleadings

9. The Amended Particulars of Claim set out relevant terms of the three Agreements pursuant to which claims for payment were brought. I set these out in the following section. It is of note, however, that (perhaps unnecessarily), the pleader alleged an implied term as follows:

> '*…the 1997 Contract and/or the 2009 Contract and/or the 2012 Contract contained implied terms (implied because they were so obvious as not to require express statement or necessary to give business efficacy) that the Defendants or each of them would pay for the goods that they ordered from the Claimant and which were delivered.*'

10. The Amended Particulars of Claim thereafter set out the plea that AV and PV had purchased but failed and refused to pay for goods under each of the Agreements. In respect of each store and related Agreement, the Amended Particulars of Claim then advanced a claim in debt and, in the alternative, damages.

11. The Defence and Counterclaim ('DCC') related the narrative underlying AV and PV's dissatisfaction with Costcutter. In relation to the terms of the Agreement(s), the Respondents averred (in essence) that there was an implied term as to the existence of the 95% service level identified above (which it then contended had been breached, giving rise to the losses claimed by way of counterclaim).

12. In setting out the business model underlying the Agreements in general terms at paragraph 10 of the DCC, the Respondents pleaded:

> '*The Claimant would order and pay for goods from the trading supplier at a shop owner's request, and the shop owner would then pay the Claimant the actual cost of such delivered goods, together with a commission or service charge.*'

13. In relation to both the 2009 Agreement and the 2012 Agreement, the Respondents pleaded, respectively (at paragraphs 23.5 and 27):

> '*it is admitted that by various clauses, consistent with the business model set out above, but for the set off and/or counterclaim below, [AV/PV] would be liable to pay sums to the Claimant, representing the actual cost of goods ordered and delivered and commission on such.'*

14. Similarly, in relation to the implied term, the Respondents pleaded (at paragraph 44):

> *'As set out above, it is admitted that, under the Contracts, but for the set off and/or counterclaim below, Pradeep and/or Ameet would be liable to pay sums to the Claimant, representing the actual cost of goods ordered and delivered and commission on such.'*

15. A similar plea is made at paragraph 47.2, that '*but for the counterclaim and/or set off below, [AV and PV] would be liable to pay such sums as could be established'*.

16. In addition, as is relevant to the cross-appeal, AV and PV clearly put Costcutter to proof of its claims for payment. Paragraph 46 stated:

> '*…the Claimant is put to strict proof of each and every matter in paragraphs 16 to 18, including but not limited to the following:*

46.1 specification of the goods alleged to have been ordered and delivered and when such is said to have occurred;

46.2 proof that such were delivered; and

46.3 proof that such were paid for by the Claimant.'

17. Paragraph 50 of the DCC referred to paragraph 19.2:

> *'Yet further, if, which is denied, there has been any breach, under the terms of the 2009 and 2012 Contract, which were entered into on the Claimant's own standard terms as set out above, and clause 19.2 thereof, any claim of the Claimant would be limited to five times the Service Charge for the Contract Year before the alleged breaches took place as defined in those contracts.'*

18. I note that Clause 19.2 was not therefore relied upon to defeat the claim for the debt, as opposed to the claim for breach of contract.

The Agreements

19. The relevant terms of the Agreements, which were in materially identical terms for the purposes of the issues in this appeal, are as follows:

(1) Clause 4:

'*4.1 On behalf of the Retailer, the Consultant [i.e. Costcutter] shall purchase and pay for such Goods as the Retailer from time to time may order from the Consultant and shall arrange for the delivery of such Goods to the Retailer's Premises in accordance with the Retailer's reasonable instructions, The consultant shall charge the Retailer and the Retailer shall pay the Service Charge and the Actual Cost to the Consultant of such Goods.*'

(2) Clause 13:

'*13.1 Within seven days of receipt of any invoice or account from the Consultant in respect of any sum payable to the Consultant from the Retailer pursuant to this Agreement the Retailer will pay to the Consultant without deduction and by means of direct debit the sum demanded therein and forthwith will complete and sign all necessary mandates authorising such direct debits. If a direct debit is returned for whatever reason the Retailer will, without prejudice to the Consultants other rights and remedies be charged the Administration Fee.*

...

13.3 Title to the Goods shall only pass to the Retailer upon the happening of any one of the following events:-

(a) The Retailer having paid to the Consultant all sums (including any default interest) due to the Consultant under this Agreement…

...

13.8 Notwithstanding that the property in the Goods has not passed to the Retailer, the Consultant shall be entitled to maintain an action for the price of the Goods.'

(3) Clause 19:

'*19.1 Notwithstanding any other provision in this Agreement, neither party excludes or limits its liability for fraud or for personal injury or death caused by the negligence of its employees or any other liability which cannot be excluded or limited by applicable law.*

19.2 Subject to clause 19.1 and 18.1 the total liability of either party shall in respect of all acts, omissions, events and occurrences whether arising out of any tortious act, breach of contract or statutory duty or otherwise arising in any particular Contract Year in no circumstances exceed a sum equal to five (5) times the Service Charge paid by the Retailer to the Consultant in respect of the Contract Year immediately prior to the Contract Year in which such claim was made.

*19.3 Subject to clause 19.1, the Consultant shall not be liable for any costs, claims, damages or expenses (**Losses**) of the following nature, whether arising out of any tortious act or omission, any breach of contract or statutory duty to the extent that the same are:*

(a) loss of revenue;
(b) loss of actual or anticipated profits;
(c) loss of contracts;
(d) loss of use of money;
(e) loss of anticipated savings;
(f) loss of business;
(g) loss of opportunity;
(h) loss of goodwill;
(i) loss of reputation;
(j) loss of damage to or corruption of data;
(k) any indirect or consequential loss; and/or

(l) *to the extent the same has been made good or the Retailer is otherwise compensated, even if such Losses were foreseeable and notwithstanding that the Retailer had been advised of the possibility that such Losses were in the contemplation of the Consultant or any third party.*'

<u>The Judgment below</u>

20. Having outlined the facts underlying the dispute, the Judge turned to the evidence provided by Costcutter to support its claim for sums due under the Contract. At paragraph 22, the Judge said:

> '*There is no evidence before the Court about precisely what was delivered to the defendants and when it was delivered. Ameet told me that delivery notes would be retained until any disputes about them had been resolved. No delivery note has been disclosed by the defendants. There are electronic delivery notes. None of these has been disclosed by either side. The information the Court has consists of summaries of invoices. The goods delivered are not identified except in the most general manner. I can infer from the dates of the invoices that some of the goods were probably delivered many weeks before 14 June 2017. For example, there is an entry on the summary for the Tytherington store in week 22 that identifies an invoice from Frank Roberts dated 13 April 2017. I am reasonably confident in concluding that this delivery was made in April; at the latest, early May. It is probable that any dispute about the quantity delivered had, by then, been resolved. I am much less confident about the entry for the invoice from Frank Roberts dated 11 June 2017 that appears on the summary for the Tytherington store for week 25.*'

21. At paragraph 24, he rejected the oral evidence of AV and AP that at the conclusion of the relationship with Costcutter, they had to pay some of their suppliers for goods delivered under the Costcutter regime, on the basis that this was never referred to in contemporaneous correspondence and had not been supported by documentary evidence which ought to have existed.

22. At paragraphs 25, the Judge made reference to a spreadsheet ('the Spreadsheet'), which he later relied upon and which lies at the heart of the cross appeal. He said:

> *'The defendants prepared a spreadsheet setting out what losses they alleged had resulted from the poor performance rendered by P&H. I heard that this document was prepared by Pradeep following a discussion with Ameet. Ameet's witness statement refers to and relies upon the spreadsheet. It contained a small table which sets out the sums claimed by Costcutter in relation to each of the stores. There is a column headed "Actually owed". I find that the figures in this column accurately represent the figures that Ameet and Pradeep thought were owed by the defendants to Costcutter. Both men were astute businessmen who were aware of what stock they held in their stores. I reject the*

alternative explanation that Pradeep gave me for these figures that the "Actually owed" column was information provided by Mr Davison. Pradeep was quite unable to demonstrate when Mr Davison had given these figures. It was, in my judgment, a late and unconvincing invention.'

23. In paragraphs 27 to 32, the Judge dealt with the claim. The Judge noted at [27] that the Respondents admit that some goods were delivered but put Costcutter to proof about what was delivered and what it was worth.

24. At paragraph 28, the Judge echoed various prior comments (listed at paragraph 3.3 of the Respondent's Skeleton Argument for Permission to (Cross-) Appeal), and concluded in clear terms that the documentation provided by Costcutter was inadequate to enable the Court to reach a conclusion on what goods were delivered. It is clear that if no other evidence existed, Costcutter would have failed to prove their claim on the basis of the evidence they tendered.

25. However, at paragraph 29, the Judge returned to the spreadsheet referred to earlier in his judgment. He then said:

> '*I have found that Pradeep and Ameet set out what they believed they owed in the spreadsheet referred to earlier in this judgment. I found that Pradeep and Ameet are astute businessmen who are and were aware of what was going on in their business. I find that the value of goods in respect of which Costcutter sues was as set out in the spreadsheet. Thus, in respect of the 1997 contract, £108,867.34. The claim was only for £108,637.18, and is, therefore, limited to that amount. In respect of the 2009 contract, £33,616.81, and in respect of the 2012 contract, £84,110.78.*'

26. This finding of fact is the subject of the Respondents' cross-appeal.

27. At paragraph 30, the Judge sets out clause 19.2. He briefly analyses the effect of the clause at paragraphs 31 and 32 as follows:

> *'31. The general effect of this clause appears to me to limit the liability of both parties. The words "either party" make this clear.*
>
> *32. Mr Tannock submitted that this clause could not limit the defendants' liability in respect of the debt owed by Costcutter. I disagree. In my view, a debt constitutes an omission to pay the price due under a contract. It arises out of a "breach of contract… or otherwise". Accordingly, it seems to me, the defendants' liability under the 2009 contract and the 2012 contract is limited to five times the service charge paid in the year preceding the claim by Costcutter. As I understand it, no service charge was made in 2016, the year preceding the claim. It follows that these claims are limited to zero.*'

28. It is this construction of clause 19.2 which is the subject of Costcutter's appeal.

The Appeal

29. The appeal turns on the proper construction of Clause 19.2.

30. Both Mr Tannock and Mr Aslett referred to various parts of the well-known Supreme Court decisions relating to the approach to the construction of contracts, and in particular Arnold v. Britton [2015] UKSC 36 [2015] AC 1619, Rainy Sky SA v. Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900, and Wood v. Capita Insurance Services Limited [2017] UKSC 24.

31. The following is a short summary of the necessary approach:

(1) The court construes the relevant words of a contract in their documentary, factual and commercial context.

(2) The court considers (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense.

(3) The court disregards subjective evidence of any party's intention, or facts or circumstances which were not known or reasonably available to both parties that existed at the time that the contract or order was made.

(4) The starting point is usually the language used, and where the parties have used unambiguous language, the court must apply it. This is so even if the outcome is improbable or appears to be extremely commercially disadvantageous for one party to have signed up to. It is not the function of a court when interpreting an agreement to relieve a party from a bad bargain.

(5) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

32. Whilst Mr Tannock emphasised (5) above, and Mr Aslett emphasised (4), there was, unsurprisingly, no substantive disagreement about how the Court should construe a contract.

33. Clause 19.2 is a limitation of liability clause. Whilst neither side referred me specifically to those authorities which relate specifically to the construction of such clauses, I also remind myself of the recent guidance of the Supreme Court in *Triple Point Technology, Inc v PTT Public Company Limited* [2021] UKSC 29, in which Lord Leggatt explained:

> '*108. The modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation. It also remains necessary, however, to recognise that a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law (and often now codified in statute). These comprise duties imposed by the law of tort and also norms of commerce which have come to be recognised as ordinary incidents of particular types of contract or relationship and which often take the form of terms implied in the contract by law. Although its strength will vary according to the circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations*.
>
> …
>
> *111. To the extent that the process has not been completed already, old and outmoded formulas such as the three-limb test in Canada Steamship Lines Ltd v The King [1952] AC 192, 208, and the "contra proferentem" rule are steadily losing their last vestiges of independent authority and being subsumed within the wider Gilbert-Ash principle. As Andrew Burrows QC, sitting as a Deputy High Court Judge, said in Federal Republic of Nigeria v JP Morgan Chase Bank NA [2019] EWHC 347 (Comm); [2019] 1 CLC 207, para 34(iii):*
>
> > *"Applying the modern approach, the force of what was the contra proferentem rule is embraced by recognising that a party is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words. And as Moore-Bick LJ put it in the Stocznia case, at para 23, 'The more valuable the right, the clearer the language will need to be'. So, for example, clear words will generally be needed before a court will conclude that the agreement excludes a party's liability for its own negligence."'*

34. At the heart of Mr Tannock's principal submission is the distinction between a claim in debt and a claim in damages. This distinction is set out clearly in *Chitty on Contracts* 35th Edn at 30-010:

> '*There is an important distinction between a claim for payment of a debt and a claim for damages for breach of contract. A debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition; damages may be claimed*

from a party who has broken his contractual obligation in some way other than failure to pay such a debt. It is also possible that, in addition to a claim for a debt, there may be a claim for damages in respect of consequential loss caused by the failure to pay such a debt at the due date. The relevance of this distinction is that rules on damages do not apply to a claim for a debt, e.g. the claimant who claims payment of a debt need not prove anything more than his performance or the occurrence of the event or condition on which the sum becomes payable; there is no need for him to prove any actual loss suffered by him as a result of the defendant's failure to pay; the whole concept of the remoteness of damage is therefore irrelevant; the law on penalties does not apply to the agreed sum, save where the sum is payable on breach of contract; the claimant's duty to mitigate his loss does not generally apply; and the claimant will usually be able to seek summary judgment.'

35. The obligation to pay is a primary obligation. It is well established that the liability to pay damages is a secondary obligation. Mr Tannock referred the Court to the case of AB v CD [2015] 1 WLR 771 in which the distinction was considered in the context injunctive relief, and the relevance of an exclusion clause to the question of adequacy of damages as part of the *American Cyanmid* test. Underhill LJ said:

> '*The primary obligation of a party is to perform the contract. The requirement to pay damages in the event of a breach is a secondary obligation, and an agreement to restrict the recoverability of damages in the event of a breach cannot be treated as an agreement to excuse performance of that primary obligation.*
>
> *…*
>
> *The primary commercial expectation must be that the parties will perform their*
>
> *obligations. The expectations created (indeed given contractual force) by an exclusion or limitation clause are expectations about what damages will be recoverable in the event of breach; but that is not the same thing.*'

36. Whilst, of course, each clause must be construed according to its own terms, it is instructive to look at the clause being relied upon in AB v CD. It stated (emphasis added):

> *'… in no event will either party be liable to the other party or any third party for loss of data, lost profits, costs of procurement of substitute goods or services, or any exemplary, punitive, indirect, special, consequential or incidental damages, under any cause of action … either party's total liability in contract, tort, negligence or otherwise arising out of or in connection with the performance or observance of its obligations, or otherwise, in respect of this agreement shall be limited to a sum equal to the total amount RevShare entitlement ….'*

37. In AB v CD, it was not necessary for the Court to, and it did not, construe the clause in any detail. However, for the purposes of this judgment it is sufficient to note that broad exclusion clauses aimed at '*any cause of action*' are not the same as an agreement to excuse performance of the primary obligation.

38. In the present case, the primary obligation to make payment was clear from clause 4.1, which set out the key primary obligations on both parties. Costcutter's obligation was to purchase and pay for Goods that the Retailer ordered and arrange for them to be delivered. Costcutter would charge the Retailer and the Retailer had an express obligation to '*pay the Service Charge and the Actual Cost to the Consultant of such Goods.*' An action for the price of the Goods arises upon non-payment, namely an action for the enforcement of the primary obligation in debt. It is unrelated to the separate cause of action arising out of the fact that the omission to pay was also a breach of contract. Indeed, Clause 13.8 expressly envisages the entitlement of Costcutter to maintain an action for the price of the Goods notwithstanding the fact that (pursuant to Clause 13.3) title will not have passed to the Retailer.

39. Against this background, it is clear that the Judge fell into error by failing to recognise the importance of this distinction when construing clause 19.2.

40. Mr Aslett did not dispute that a debt claim and a damages claim were different. He also did not dispute that Costcutter's primary claim was properly characterised as a claim in debt. However, he said that both were 'claims' or 'causes of action' and both types of claims were excluded by the wording of Clause 19.2. In particular, he argued that the Judge was right to consider that the claim in debt itself was a '*liability …in respect of* [an] *omission….arising out of any … breach of contract…or otherwise'*. It was therefore caught by the clause. He did not demur from the fact that the consequence of this was that the Retailer could therefore accept delivery of the goods, refuse to pay, and its primary obligation to pay the Actual Cost was immediately replaced by a liability only to pay such sum as was calculated by reference to 19.2.

41. In my judgment, it is clear that the words within clause 19.2 are not directed at removing the primary obligation upon the Retailer to comply with its obligation to pay for goods received. The clause is directed expressly to acts or omissions arising out of any tortious act, breach of contract or statutory duty. The phrase, in the present context, '*breach of contract*' is clear. The claim to enforce the primary obligation of payment is not a claim for breach of contract (although such a claim would sit alongside such a claim). The fact that damages for breach of contract are expressly limited does not prevent the action in debt in respect of the primary obligation. The words '*or otherwise*' are not sufficiently clear to have the effect of excluding any claim relating to the enforcement of primary obligations, even if the purported

exclusion of the liability to perform the primary obligation could ever exist meaningfully in an effective contract.

42. Mr Tannock also argued, that as a matter of language, Clause 19.2 was directed at limiting the consequences of a breach of contract, such as a loss of profit claim, by emphasising the phrase '*arising out of*'. I do not consider that this argument is correct. Clause 19.2 deals squarely with claims for direct losses caused by breaches of contract. Clause 19.3 deals with consequential losses.

43. I would add that my analysis above is not driven by the particularly stark factual position in this case where the Service Charge in the relevant years was zero. The effect of this, as indeed the conclusion of the Judge demonstrated, was that the limit of liability calculated by reference to clause 19.2 was zero. The conclusion I arrive at is driven by the clear distinction between the nature of an action in debt to enforce a primary obligation, which is not excluded by a clause which is plainly drafted to limit secondary obligations arising in damages. However, it might also be said that even if this were not the correct analysis, any construction which led to the conclusion that upon delivery of goods, the contract regime effectively permitted the recipient to avoid both primary liability to pay, and there was no liability for damages, is so extreme that the clearest of wording would be required to achieve such an improbable outcome. Clause 19 is not drafted so as to achieve such an end.

44. Finally, whilst it is sufficient to deal with this appeal simply on the basis of the error of law relating to the construction of clause 19.2, I note that the Judge's conclusion appears in addition to contradict the Respondents' admissions on the pleadings that, subject to their set-off and counterclaim (and subject to putting the Claimants to proof) they *'would be liable to pay such sums as could be established'*. The reference in the DCC to clause 19.2 seems on its face (and rightly so, for the reasons I have set out above) to be directed towards the (alternative) claim for breach of contract. It was not suggested that the clause was applicable to exclude or limit the claim in debt, and I consider that the Judge was wrong in law in concluding that the Clause had such an effect.

45. The Judge concluded that the Respondents' spreadsheet set out the value of goods delivered for which, but for the effect of clause 19.2, the Respondents were liable to Costcutter. For the reasons set out above, the Judge should not have determined that sums due under the 2009 and 2012 contracts were limited by clause 19.2. Subject to the cross-appeal, the Judge, but for his error relating to clause 19.2, would have found PV liable to Costcutter under the 2009 contract for £33,616.81 plus interest and AV liable to Costcutter under the 2012 contract in the sum of £84,110.78.

The Cross- Appeal

46. Ground 1 avers that the Judge failed to consider the reality of the burden of proof. Ground 2 relies upon CPR Rule 16.5(4) in underlining what a Claimant must prove in a monetary claim. Ground 3 concerns the Judge's treatment of the Spreadsheet as some form of admission or waiver of proof. Ground 4 related to the Judge's overall weighing of the evidence, in respect of which the Judge fell into serious error.

47. In oral argument, Mr Aslett realistically accepted the cross-appeal was not based upon an error or errors of law, in that the Judge failed to recognise or direct himself properly that the burden of proof was and remained upon the Clamant to prove its claim. Instead, the thrust of the cross-appeal as advanced by Mr Aslett was that, having found that Costcutter had not proved its claim by reference to its own documents (essentially invoice summaries), the Judge was wrong to conclude as a matter of fact, having failed appropriately to weigh the evidence and in particular the limited proof offered by the Costcutter's own documentation tendered during the trial, that Costcutter had discharged its burden of proving its claim by reference to the spreadsheet produced by the Defendant.

48. Technically, the Defendants' application before me is an application for permission to appeal. I have however considered the substance of the Defendants' appeal. Where the appeal is against the factual findings of the Court, there is a high threshold on the appellant. The law and relevant key cases were recently summarised in <u>Deutsche Bank AG v Sebastian Holdings</u> [2023] EWCA Civ 191:

> *'48. The appeal here is against the judge's findings of fact. Many cases of the highest authority have emphasised the limited circumstances in which such an appeal can succeed. It is enough to refer to only a few of them.*
>
> *49. For example, in <u>Henderson v Foxworth Investments Ltd</u> [2014] UKSC 41, [2014] 1 WLR 2600 Lord Reed said that:*
>
>> *"67. ... in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."*
>
> *50. We were also referred to two more recent summaries in this court explaining the hurdles faced by an appellant seeking to challenge a judge's findings of fact. Thus in <u>Walter Lilly & Co Ltd v Clin</u> [2021] EWCA Civ 136, [2021] 1 WLR 2753 Lady Justice Carr said (citations omitted):*
>
>> *"83. Appellate courts have been warned repeatedly, including by recent statements at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not*

only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach are many. They include:

(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;

(ii) The trial is not a dress rehearsal. It is the first and last night of the show;

(iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;

(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping;

(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence);

(vi) Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done. …

…

85. In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows:

(i) Where the trial judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support;

(ii) Where the finding is infected by some identifiable error, such as a material error of law;

(iii) Where the finding lies outside the bounds within which reasonable disagreement is possible.

86. An evaluation of the facts is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and appellate courts should approach them in a similar way. The appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the trial judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.

87. The degree to which appellate restraint should be exercised in an individual case may be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial judge, whether from a thorough immersion in all angles of the case, or

from first-hand experience of the testing of the evidence, or because of particular relevant specialist expertise."

51. *Another recent summary was given by Lord Justice Lewison in Volpi v Volpi [2022] EWCA Civ 464, [2022] 4 WLR 48:*

"2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."'

49. The Spreadsheet was referred to in the witness evidence of both AV and PV. The purpose of the Spreadsheet was to prove the losses AV and PV claimed in their counterclaim against Costcutter. The Spreadsheet was a single page and is included as Annex A to this judgment. PV referred to it at paragraph 21 of his witness statement. AV's second witness statement cross-referred to it at paragraph 24. At the beginning of his examination in chief, PV was taken specifically to the Spreadsheet and he confirmed that, to the best of his knowledge and belief, it was true.

50. The Spreadsheet contained the following information:

	Sums Claimed	Actually Owed
Tytherington	£108,637.18	£108,067.34
Bramhall	£107,312.03	£84,110.78
Offerton	£34,800.91	£33,616.81

51. Unsurprisingly, PV was cross-examined about these entries, on the basis that they represented PV's true analysis of the sum they accepted was owed to Costcutter, as against the sums claimed (and, of course, subject to the set-off and counterclaim). PV stated that he produced the spreadsheet towards the end of 2017, and that it was then updated with actual figures from accounts. PV denied that figures represented his analysis of what was actually owed, however, and contended instead that they were '*figures I plucked out from emails, exchanges*' with a representative from Costcutter. PV was then cross-examined on a number of emails, and it was put to him again that the figures in the second column were indeed his analysis of the sum actually owed, which proposition he again denied.

52. The Judge clearly considered this exchange in paragraph 25 of the Judgment, set out in paragraph 22 above. It is plain that the trial Judge was best placed to consider the document and the reliability of the explanation given by PV. He was entitled to reject that explanation, and given the ordinary meaning of the words used in the Spreadsheet, it could not be said that the Judge's conclusion that this spreadsheet represented what PV considered was 'actually owed' was in any way irrational or perverse. This is particularly so in light of his assessment that both PV and AV were astute businessmen who were aware of what stock they held in their stores.

53. Whilst the burden of proof was and remained upon Costcutter to prove its claim, itcould, in the ordinary way, rely upon all the evidence before the Court to do so. There is plainly no principle that, in considering whether at the end of trial, a party has discharged its burden of proof, the Court must restrict its consideration to just the documentation or other evidence tendered by the party bearing the burden. Indeed, Mr Aslett did not suggest any such principle.

54. CPR16.5(4) does not add to the analysis. It relates to what may be regarded as in issue given what might be left unaddressed in a pleading. It is simply not relevant to how a Judge is to weigh all the evidence at the end of a trial to determine whether a party has discharged the burden of proof upon it.

55. Neither does an analysis through the prism of 'informal admission' assist the Respondents. There was a debate between Mr Tannock and Mr Aslett as to whether section 4 of the CEA 1995, which relates to the admissibility of hearsay evidence, was engaged in relation to the Spreadsheet. It is not obvious why it would be – the Spreadsheet was a document prepared by a witness containing information that they had collated from their own documents and in respect of which they gave first hand evidence confirming the truth of the contents of the document. Moreover, it was not

suggested to the Judge below that the provisions were relevant to the assessment of the evidence. However, even if the checklist of matters set out in section 4 of the CEA 1995 was relevant, it is far from obvious how any of the factors would have impacted the assessment of the Judge in this case. No particular consideration arising out of a particular sub-provision of section 4 was suggested by Mr Aslett.

56. Mr Aslett also suggested that this was a 'quantum' document, and could not be taken as evidence relevant to all the aspects of both liability and quantum required to be proven by Costcutter. This forms part of his submission that the Spreadsheet was regarded as a 'waiver of proof'. However, this is unrealistic. There was no dispute that deliveries had been made entitling Costcutter to payment of the actual cost (subject to the set off and counterclaim). It was the extent of goods delivered and their cost which were the material elements in respect of which Costcutter was put to proof. The Respondents' own analysis of '*Actually owed*' (as the Judge was entitled to find the Spreadsheet contained), is plainly evidence, tested in cross-examination, the Judge was entitled to take into account in finding whether the Costcutter had proved what the amount was it was owed.

57. For these reasons, it would be wrong for this Court to interfere in the Judge's factual finding about the value of the sums due by way of debt on account of goods delivered to the Respondents. The cross-appeal fails (and no permission is given in respect of it).

Conclusion

58. The appeal succeeds. The cross-appeal fails. Accordingly, in addition to PV's liability under the 1997 Contract as found by the Judge, PV is liable to Costcutter under the 2009 contract for £33,616.81 plus interest; and AV is liable to Costcutter under the 2012 contract in the sum of £84,110.78 plus interest. I leave it to Counsel to draw up the appropriate Order having agreed the interest calculations.

ANNEX A – THE SPREADSHEET

Tytherington

Year	Sales Ex vat	Projected Increase	Projected Sales		Loss of sales	Loss of Profit	
June 2013	£2,534,495						Shop Refit completed Oct 2013
June 2014	£2,514,040	£253,450	£2,787,945	£0	£273,905	£76,693	At the cost £400K
June 2015	£2,607,437	£139,397	£2,927,342	£0	£319,905	£89,573	
June 2016	£2,456,269	£146,367	£3,073,709	£0	£617,440	£172,883	
June 2017	£2,463,333	£153,685	£3,227,394	£0	£764,061	£213,937	
					Total Loss	**£553,087**	

Bramhall

Year	Sales Ex vat	Projected Increase	Projected Sales		Loss of sales	Loss of Profit	
June 2013	£1,472,825						Shop Refit completed July 2013
June 2014	£1,779,858	£368,206	£1,841,031	£0	£61,173	£17,129	At the cost £200K
June 2015	£1,785,647	£92,052	£1,933,083	£0	£147,436	£41,282	
June 2016	£1,787,022	£96,654	£2,029,737	£0	£242,715	£67,960	
June 2017	£1,660,352	£101,487	£2,131,224	£0	£470,872	£131,844	
					Total Loss	**£258,215**	

Offerton

Year	Sales Ex vat	Projected Increase	Projected Sales	Loss of sales	Loss of Profit	
Sept 2013	£997,262					
Sept 2014	£937,617	£49,863	£1,047,125	£109,508	£20,807	
Sept 2015	£827,568	£52,356	£1,099,481	£271,913	£54,383	
Sept 2016	£708,930	£54,974	£1,154,455	£445,525	£93,560	
Sept 2017	£731,378	£57,723	£1,212,178	£480,800	£100,968	Estimated
				Total Loss	**£269,718**	

Total trading loss across all three shops	£1,081,019
Accumulated Development fund	£55,000
Total Claim	**£1,136,019**

	Sums Claimed	Actually Owed
Tytherington	£108,637.18	£108,067.34
Bramhall	£107,312.03	£84,110.78
Offerton	£34,800.91	£33,616.81