IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2022/CLE/gen/01468

B E T W E E N

CHANDLER

Claimant

AND

(1) HISCOX DEDICATED CORPORATE MEMBER LIMITED

(2) CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING SEVERALLY ON GENERAL POLICY NO B1230GP04015A19

Defendants

Before: **The Honorable Madam Justice Carla Card-Stubbs**

Appearances: Ryan Brown of RBO Advisors for the Claimant

Kevin Moree and Andrew Smith of McKinney, Bancroft & Hughes for the Defendants

Hearing dates: 25 April 2024 and 23 January 2025

Limitation Clause in contract – Whether insured had notice of clause in policy – Role of insurance agent - Whether clause unusual and onerous – Whether clause in contravention of the Unfair Terms in Consumer Contracts Act

The Claimant owned a residence on a cay near Great Guana Cay, Abaco, The Bahamas. That residence was insured under a homeowner's policy that provided for coverage for loss caused by fire or explosion and for "direct loss by fire or explosion resulting from windstorm or hail". The policy excluded coverage for windstorm. The residence was destroyed during or after Hurricane Dorian in September 2019. The Claimant's case is that the residence was destroyed by fire or explosion. The Defendants' case is that it was destroyed by windstorm.

The Defendants relied upon Clause G, a condition under the policy requiring any action against the Defendants to be commenced within two years after the date of loss. It is not disputed that the proceedings were commenced after the expiry of two years from the date of loss. The Claimant argued that he did not know about the existence of Clause G and submitted, inter alia, that Clause G was not incorporated into the policy agreement, or alternatively was unenforceable, because it was not specifically brought to the Claimant's attention and was contrary to the Unfair Terms in Consumer Contracts Act. Both sides accepted that the policy was a collage of standard forms and boiler plate forms.

Held: The Claimant entered the insurance market by an insurance agent who negotiated coverage on the standard form contract and the Claimant was bound by the clause because his agent committed him to a contract on all the standard form terms of the insurance policy. Clause G was one of the standard form terms and was not shown to be sufficiently unusual or onerous to require special notice or separate prominence beyond the ordinary transmission of the policy through the Claimant's intermediary. Clause G did not require special prominence on the facts of this case. The Defendants were not required to take additional steps, beyond transmission of the policy through the Claimant's agent, to bring the standard terms and conditions, including Clause G, to the Claimant's attention.

Clause G was not in contravention of the provisions of the Unfair Terms in Consumer Contracts Act so as to render it ineffective or otherwise unenforceable. It was not unfair, nor did it create, a significant imbalance between the parties' rights.

Clause G was validly incorporated, was enforceable and barred the present proceedings.

RULING

CARD-STUBBS, J

INTRODUCTION

[1.] This judgment concerns the determination of preliminary issues in an insurance dispute arising out of the destruction of Mr. Chandler's residence during or after Hurricane Dorian in September 2019. Mr. Chandler is the Claimant.

[2.] The dispute arises under a homeowners' property policy effective from 2 January 2019 to 2 January 2020. The policy was underwritten by the Defendants as Underwriters.

[3.] The Claimant contends that the destruction of his house is covered by the terms of the policy. The cause of the destruction and whether the loss is covered by the policy are not the subject of this ruling. It is the Defendants' contention that the Claimant failed to file this action in time, pursuant to Clause G of the policy and that, as a result, it bars the present proceedings.

[4.] The issues now before the Court are preliminary issues only. They do not require final determination of the factual cause of the loss, although the parties' positions on that question provide part of the background. On June 4, 2026, this Court delivered its decision on the preliminary issues before it. This ruling sets out that decision as well as the reasons for the decision.

FACTUAL BACKGROUND

[5.] The Claimant owned a residence on a cay near Great Guana Cay, Abaco, an island in the Commonwealth of The Bahamas. That residence was insured under policy no. B1230GP04015A19. The policy excluded coverage for windstorm but provided for coverage for loss caused by fire or explosion and for "direct loss by fire or explosion resulting from windstorm or hail".

[6.] There is no dispute between the parties that the Claimant's residence was destroyed during or after Hurricane Dorian in September 2019. By writ of Summons, the Claimant plead that on September 4, 2019, after the Hurricane had passed, the Claimant "returned to the insured premises to find that all of the buildings were destroyed by fire." The Claimant's pleading is that the Defendants were notified "of the loss" and that, thereafter, "on or before 7 October 2019, agents of the Defendants inspected the residence premises and concluded that the loss was the result of wind and not fire or explosion despite the evidence to the contrary." The Claimant's case is that the residence was destroyed by fire or explosion. The Defendants' case is that it was destroyed by windstorm.

[7.] The Defendants rely upon Clause G, a condition under the policy requiring any action against the Defendants to be commenced within two years after the date of loss. The Claimant's pleading is that the Claimant returned to the premises to find that the premises were destroyed on September 4, 2019. His affidavit evidence is that on September 5, 2014, he informed the person through whom he placed the policy that "my house had burnt to the ground". The Claimant pleads that agents of the Defendants inspected the premises on or before October 7, 2019. The current proceedings were commenced by Writ of Summons filed on October 19, 2022. It is not disputed that these proceedings (the Bahamas proceedings) were commenced after the expiry of two years from the date of loss.

[8.] It is also not disputed that the Claimant commenced proceedings in Texas, United States, (the Texas action) within two years of the date of the loss. It is likewise not disputed that those proceedings were dismissed because of the policy's exclusive jurisdiction clause in favour of The Bahamas.

THE PRELIMINARY ISSUES

[9.] The issues for determination are as follows:

A. **Whether the Claimant is barred from commencing/continuing this action against the Defendants as a result of Clause G of "Section I – Conditions" in the Policy** ("the Limitation Clause") which reads:

> "G. Suit Against Us
>
> No action can be brought against us unless there has been full compliance with all the terms under Section I of this policy and the action is started within two years after the date of loss."

B. **Whether the following pre-requisites are necessary to give Clause G effect i.e. make it enforceable.**

(i) Whether it is necessary to bring Clause G to the attention of the policy holder at or before the commencement of the effective period of the General Policy or immediately thereafter in order to give effect to or to enforce Clause G

(ii) Whether the Defendant(s) must take steps in Homeowners 3-Special Form to give prominence to Clause G of "Section I-Conditions" in order to give effect to or to enforce Clause G

C. **Whether the following scenarios make Clause G ineffective i.e. render it unenforceable.**

(i) Whether or not Clause G of "Section I-Conditions" is a term that creates a significant imbalance between the parties' rights and obligations under General Policy B1230GP04015A19 to the detriment of a policyholder so as to render it ineffective and unenforceable.

(ii) Whether or not Clause G of "Section I-Conditions" which restricts the ability of a Plaintiff to commence legal proceedings within the period set out in section 5 of the Limitation Act is contrary to the provision of the Unfair Terms in Consumer Contracts Act so as to render it ineffective and unenforceable.

D. Whether General policy B1230GP04015A 19 that has been underwritten by the Defendants in favour of the Plaintiff covers direct loss by fire or explosion resulting from windstorm or hail.

ISSUE A

A. Whether the Claimant is barred from commencing/continuing this action against the Defendants as a result of Clause G of "Section I – Conditions" in the Policy ("the Limitation Clause") which reads:

> "G. Suit Against Us
>
> No action can be brought against us unless there has been full compliance with all the terms under Section I of this policy and the action is started within two years after the date of loss."

[10.] This issue addresses the construction of Clause G. I accept that the general principles of construction are as advanced by Counsel for the Claimant, relying on the case of **Green v Petfre (Gibraltar) Ltd (trading as Betfred)** [2021] EWHC 842 (QB)**.** In that case, Mrs. Justice Foster DBE considered the general principles of construction at paragraphs 15 to 17 and opined:

> 15 There is also no disagreement on the applicable principles of construction in this case. There was no particular nuance to the submissions that requires any extensive citation of authority. It suffices to say that the purpose of interpretation is to ascertain the objective meaning of the language in its documentary, factual and commercial context and I adopt the approach set out by Lord Hodge in **Wood v Capita Insurance Services Ltd** [2017] AC 1173:
>
> > "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of a particular clause but that the

> court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

> 16 The text must be assessed in the light of the natural and ordinary meaning of the words, but also in the context of any other relevant contractual provisions, and the overall purpose of the clause and the contract.

> 17 In the words of Lord Neuburger in **Arnold v Britain** [2015] UKSC 36:
> "When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties."

[11.] Mrs. Justice Foster DBE concluded at paragraph 18:

> 18 The essence is that the process of construction is unitary and iterative. The text of the contract must be assessed in the light of the natural and ordinary meaning of the words of any other relevant provisions of the contract, the facts and circumstances known or assumed by the parties at the time the contract was executed. The surrounding facts may be of more importance where the drafting is not particularly sophisticated.

[12.] In construing Clause G, this Court is required to read the clause objectively in its contractual and commercial context. I am required to construe "the objective meaning of the language in its documentary, factual and commercial context".

[13.] I now consider the text and context of Clause G. Clause G reads:

> "G. Suit Against Us
> No action can be brought against us unless there has been full compliance with all the terms under Section I of this policy and the action is started within two years after the date of loss."

[14.] Firstly, Clause G provides that "No action can be brought" unless:

i. there has been full compliance with all Section I terms; and
ii. the action is started within two years after the date of loss.

[15.] The natural reading is that these are cumulative preconditions to suit. The use of "and" links them conjunctively.

[16.] Secondly, the legal effect of Clause G is clear. The clause appears under the rubric "Suit Against Us" which is an aid in construction. The clause purports to set out the conditions in which a suit – or action – may be brought against the insurer.

[17.] The contractual and commercial context in this case is a policy of insurance placed for indemnity on a certain agreed event. The policy therefore anticipates a claim in the event of a loss. That claim would, necessarily, be made to, and of, the insurers. The clause is intended to regulate and limit how and when an action may lie against the insurers. On ordinary construction principles, and bearing in mind the contractual and commercial context, it is worded so as to operate as a contractual bar to proceedings if the stated requirements are not met.

[18.] Thirdly, the clause provides a trigger event. The clause runs from the "date of loss." That wording points to the occurrence of the loss event.

[19.] Fourthly, the scope of the clause is apparent. The words "No action can be brought against us" are broad and, on their face, apply to any action under Section I against the insurers.

[20.] In my judgment, the natural and ordinary meaning of Clause G is clear. It provides that no action may be brought against the insurers unless two conditions are satisfied. First, there must have been full compliance with all the terms under Section I of the policy. Secondly, the action must have been started within two years after the date of loss. The conjunction "and" makes plain that those requirements are cumulative.

[21.] The phrase "No action can be brought" is prohibitory and substantive. It is not merely directory or procedural. On its face, it is apt to create a contractual bar to proceedings if the stated preconditions are not met. In that respect, the clause is properly characterized as a contractual suit-limitation clause. The breadth of the clause is also plain. The words "No action can be brought against us" are general and unqualified. On their face, they are directed to any action brought against the insurers.

[22.] The trigger for the two-year period is likewise expressed in clear terms. Time runs from "the date of loss." On its ordinary meaning, the relevant period runs from the occurrence of the insured loss itself: **Quorum A/S v Schramm (No. 2) [2002] 2 ALL ER (Comm)**.

[23.] A contractual limitation clause, including a suit time-bar, is construed by the ordinary principles of contractual interpretation, but because it cuts down rights or remedies, the wording ought to be clear and unambiguous. I note that, as a matter of law, there is nothing that prevents contracting parties from providing a time-bar as a way to limit liability between them: **Smith v Motor Owners Mutual Insurance Association Ltd.** (Bahamas) [1983] BHS J No. 31. Clause G serves to effect a time-bar and, in my judgment, there is no ambiguity apparent in the text of the clause. The words used are clear.

Conclusion on Issue A

[24.] Accordingly, applying general principles of construction, Clause G is best construed as a clear contractual suit-limitation clause imposing two cumulative preconditions to suit: compliance with Section I and commencement of proceedings within two years after the date of loss. On construction alone, the clause is apt to bar a late claim. I also conclude that Clause G is clear and unambiguous in meaning. If Clause G forms part of the contract between the parties and is otherwise enforceable, it bars proceedings not commenced within two years after the date of loss and unless there has been full compliance with Section I.

[25.] In this case, the Claimant's challenge is substantially directed not to the meaning of the clause but to its incorporation and enforceability. I will now address the other issues before me in relation to Clause G.

ISSUE B

Whether the following pre-requisites are necessary to give Clause G effect i.e. make it enforceable.

(i) Whether it is necessary to bring Clause G to the attention of the policy holder at or before the commencement of the effective period of the General Policy or immediately thereafter in order to give effect to or to enforce Clause G

(ii) Whether the Defendant(s) must take steps in Homeowners 3-Special Form to give prominence to Clause G of "Section

I-Conditions" in order to give effect to or to enforce Clause G

Submissions of the parties

The Claimant's position

[26.] The Claimant submits that Clause G was not incorporated, or alternativel is unenforceable, because it was not specifically brought to the Claimant's attention, was buried in the policy wording, and was not separately signposted.

[27.] The Claimant's evidence is that he arranged the insurance coverage through Mr. Jim Braniff, insurance professional, paid the premium, and did not receive the policy before Hurricane Dorian. The Claimant's case is that Jim Braniff represented Hiscox or Lloyd's (i.e. the Defendants) and was not his agent for these purposes. His evidence also was that he did not know of Clause G before the loss and would not have agreed to a requirement to sue in The Bahamas or within two years had he known of it.

[28.] The Claimant submits that Mr. Jim Braniff should not be treated as his agent for the purposes of notice, and that delivery of the policy to Mr. Jim Braniff (or USI Insurance Services, Inc.) cannot cure the alleged lack of notice. The Claimant also relies on the fact that the standard wording was not individually negotiated and that the quotation itself was not produced.

[29.] In relation to the Texas action, the Claimant submits that the filing of those proceedings within two years does not prove prior knowledge of Clause G, especially in light of the evidence of the attorney with carriage of that matter (Mr. Michael Sydow) that he did not know of the clause.

The Defendants' position

[30.] The Defendants relied on the evidence of Mr. Paul Hasler's whose testimony was that Mr. Chandler approached Mr. Jim Braniff or USI Insurance Services, Inc. ('USI') to act on his behalf in placing the insurance, that USI contacted Thompson Heath & Bond Limited ('THB'), and that THB secured the placement with the Underwriters.

[31.] The Defendants' case is that the policy used standard forms known in the London or Lloyd's market and that Clause G appeared in the Homeowners 3 Special Form.

[32.] The Defendants submit that the policy, including Clause G, formed part of the insurance contract and was transmitted to the Claimant's side through Jim Braniff or USI and that the policy was attached to an email sent to Braniff or USI on 2 January 2019.They submit that Braniff or USI acted for the Claimant in obtaining the insurance and that notice to the Claimant's agent/intermediary is sufficient notice in law.

[33.] The Defendants, by Mr. Hasler's evidence, concede that the 2 January 2019 email which attached the policy did not specifically mention Clause G. He also conceded that the page containing Clause G did not have any separate signposting specifically identifying that clause. However, it is the Defendants' submission that Clause G was a standard market term, not unusual or onerous in the relevant sense, and that the law did not require separate signposting of that clause.

Evidence

[34.] The evidence relevant to the preliminary issues was given principally by the Claimant, Mr. Chandler, and by Mr. Paul Hasler for the Defendants. The Claimant also relied on affidavit evidence from Mr. Michael Sydow, the Claimant's attorney in the Texas proceedings.

LAW AND ANALYSIS

A contract of insurance

[35.] This is a case concerning a contract of insurance. An insurance contract is a specific specie of contract and is not readily explained by the usual analysis of offer and acceptance and consideration. At the outset, I accept the learning as set out in **MacGillivray on Insurance Law - Relating to all risks other than marine, Twelfth Edition, [Birds, Lynch, Milnes] ('MacGillivray')**. At para 2-003, the authors explain:

> 2-003 There is no rule of insurance law that there can be no binding contract of insurance until the premium has been actually paid or the policy has been issued. ***Once the terms of the insurance have been agreed upon by the parties, there is prima facie a binding contract of insurance, and the assured is obliged to pay a premium as agreed, while the insurers for their part must deliver a policy containing the agreed terms.*** If, therefore, insurers wish to guard against the eventuality of becoming bound to insure before they have secured payment of the premium, they must make it clear at the outset that there shall be no legally binding contract until some particular condition, such as payment of premium or issue of a policy, has been performed.

[Emphasis supplied]

[36.] Therefore, once the terms are said to have been agreed between the parties, there is a binding contract. This analysis serves to explain why, depending on the nature of the transaction, the effective period date i.e. date of coverage may precede any payment of premium and any delivery of a formal policy document. If an insured seeks coverage and the insurer agrees to provide that coverage on terms, then the insurer is obliged to provide a policy with the agreed terms. The agreed terms may be taken to be the usual terms of the insurer unless there is a term that is unusual, or peripheral, to the insurance coverage. At paragraph 2-010 of **MacGillivray**, the authors note:

> 2-010 **Insurers' usual terms**. A court will not require the parties to have reached separate agreement on all the terms of the insurance, apart from the essential terms described above, in order that a contract should be held to exist. It will readily be assumed that, when an applicant seeks insurance cover from particular insurers, ***he impliedly offers to take an insurance on the insurers' usual or standard, terms of cover, just as the insurers' interim cover note will be issued impliedly subject to the usual conditions contained in their policies.*** When, therefore, the insurers come to issue their policy, their only obligation is to issue it with the terms and conditions usually attached to their policies, in so far as these are not inconsistent with the express terms of the parties' preliminary contract.
>
> The assumption extends only to the implication of usual terms to cover and no more. Where a mutual company tendered to an applicant for fire insurance a policy which recited that he had agreed to become a member of the company, it was held that he was not bound to accept such a policy, as his proposal was for insurance only, and not also for membership in the company (Star Fire and Burglary Insurance Co v Davidson (1903) 5 F. 83)

[Emphasis supplied]

[37.] In the present case, the issue under consideration requires this Court to determine whether Clause G was incorporated at the time that the insurance policy came into effect, viz,

1. Whether notice of Clause G ought to have been given prior to, or immediately after the commencement of the effective period; and
2. Whether prominence should have been given to Clause G.

Notice

[38.] The incorporation of limitation and exclusion clauses into contracts is governed by the common law rules of contract formation and notice. Generally-stated, a party seeking to rely on such a clause must show that it was incorporated into the contract, either by actual knowledge, by reasonable notice before or at the time of contracting, or by a consistent course of dealing. In a case where one party claims to be unaware of the clause, and there is no prior dealings between the parties, it becomes a question of notice. The starting point is the established principle that, where contractual terms are said to be incorporated by notice, and not actual knowledge, reasonable steps must be taken to bring those terms to the attention of the other contracting party before or at the time of contracting: **Thornton v Shoe Lane Parking Ltd [1971] 1 All ER 686**.

[39.] It is also a principle of law that where a term is particularly onerous or unusual, special and prominent notice is required. This principle is well established in **Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433**, where the court held that the more unreasonable a clause, the greater the notice required for incorporation. **Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd** adopted the rule in **Thornton v Shoe Lane Parking Ltd** where the court found that a clause restricting statutory rights, embedded in lengthy wording, was not incorporated because adequate steps had not been taken to bring it to the customer's attention at or before contract formation.

[40.] In **Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd**, Lord Justice Dillon opined at page 436:

> Then in **Thornton v. Shoe Lane Parking Ltd**. (1971) 2 Q.B. 163 both Lord Denning M.R. and Lord Justice Megaw held as one of their grounds of decision, as I read their judgments, that *where a condition is particularly onerous or unusual the party seeking to enforce it must show that that condition, or an unusual condition of that particular nature, was fairly brought to the notice of the other party.*
>
> [Emphasis supplied]

[41.] At page 437, Lord Justice Dillon reasoned:

> In the ticket cases the courts held that the common law required that reasonable steps be taken to draw the other parties' attention to the printed conditions or they would not be part of the contract. It is in my judgment a logical development of the common law into modern conditions that it should be held, as it was in **Thornton v. Shoe Lane Parking,** that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.

[42.] In **Thornton v Shoe Lane Parking Ltd [1971] 1 All ER 686**, the court found that a clause exempting liability for personal injury, was so destructive of the Plaintiff's right and unusual in the context that the Defendants would have had to have given special notice of that condition to the Plaintiff in order for the Plaintiff to be bound by it.

[43.] Lord Justice Megaw traced the considerations for the principles of law respecting notice of terms of a contract. At pages 691 to 693, he reasoned:

> The essence of the decision in **Parker v South Eastern Ry Co** was expressed by Lord Hodson in **McCutcheon v David MacBrayne Ltd** ([1964] 1 All ER 430 at 433, [1964] 1 WLR 125 at 129), when he said:
>
> > 'That case, affirmed in *Hood* v. *Anchor Line (Henderson Brothers), Ltd*., established that the appropriate questions for the jury in a ticket case were: (1) Did the passenger know that there was printing on the railway ticket? (2) Did he know that the ticket contained or referred to conditions? and (3) Did the railway company do what was reasonable in the way of notifying prospective passengers of the existence of conditions and where their terms might be considered?"
>
> Now take those questions in relation to the present case. First, did the passenger know that there was printing on the railway ticket? Mocatta J has answered that question, being a question of fact, with the answer, yes. Therefore one moves on to the second question: did he know that the ticket contained or referred to conditions? Mocatta J made no express finding on that point. In my view there is the clearest implication from the way in which he stated and dealt with the third question that his finding on the second question was to answer it, no. …
>
> So I come to the third of the three questions. That question, if I may return to the speech of Lord Dunedin in **Hood v Anchor Line Ltd** ([1918] AC at 846, 847, [1918–19] All ER Rep at 103), was posed by him in this way:
>
> > 'Accordingly it is in each case a question of circumstance whether the sort of restriction that is expressed in any writing (which, of course, includes printed matter) is a thing that is usual, and whether, being usual, it has been fairly brought before the notice of the accepting party.'
>
> That though it is more fully stated by Lord Dunedin, is essentially the same question, I think, as was formulated by Mellish LJ in *Parker's* case ((1877) 2 CPD at 424, [1874–80] All ER Rep at 170) at the very end of his judgment, where he said that the question which ought to have been left to the jury was: whether the railway company did what was reasonably sufficient to give the plaintiff notice of *the condition*. (I emphasise the use by Mellish LJ of the definite article and of the word 'condition' in the singular.) **I agree with Lord Denning MR that the question here is of the particular condition on which the defendants seek to rely, and not of the conditions in general. When the conditions sought to be attached all constitute, in Lord Dunedin's words 'the sort of restriction … that is usual', it may not be necessary for a defendant to prove more than that the intention to attach some conditions has been fairly brought to the notice of the other party. But at least where the particular condition relied on involves a sort of restriction that is not shown to be usual in that class of contract, a defendant must show that his intention to attach an unusual condition of that particular nature was fairly brought to the notice of the other party. How much is required as being, in the words of Mellish LJ ([1918] AC at 846, 847,**

> **[1918–19] All ER Rep at 103), 'reasonably sufficient to give the plaintiff notice of the condition', depends on the nature of the restrictive condition.**
>
> In the present case what has to be sought in answer to the third question is whether the defendants did what was reasonable fairly to bring to the notice of the plaintiff, at or before the time when the contract was made, the existence of this particular condition. This condition is that part of the clause—a few words embedded in a lengthy clause—which Lord Denning MR has read, by which, in the midst of provisions as to damage to property, the defendants sought to exempt themselves from liability for any personal injury suffered by the customer while he was on their premises. Be it noted that such a condition is one which involves the abrogation of the right given to a person such as the plaintiff by statute, the Occupiers' Liability Act 1957. True, it is open under that Act for the occupier of property by a contractual term to exclude that liability. In my view, however, before it can be said that a condition of that sort, restrictive of statutory rights, has been fairly brought to the notice of a party to a contract there must be some clear indication which would lead an ordinary sensible person to realise, at or before the time of making the contract, that a term of that sort, relating to personal injury, was sought to be included. **I certainly would not accept that the position has been reached today in which it is to be assumed as a matter of general knowledge, custom, practice, or whatever is the phrase that is chosen to describe it, that when one is invited to go on the property of another for such purposes as garaging a car, a contractual term is normally included that if one suffers any injury on those premises as a result of negligence on the part of the occupiers of the premises they shall not be liable.** . Even if I were wrong in the view that I take that the third question has to be posed in relation to this particular term, it would still not avail the defendants here. In my view the learned judge was wholly right on the evidence in the conclusion which he reached that the defendants have not taken proper or adequate steps fairly to bring to the notice of the plaintiff at or before the time when the contract was made **that *any* special conditions** were sought to be imposed.
>
> [Emphasis supplied]

[44.] A distinction is to be made between ordinary background terms and those that are especially burdensome, unusual, or which are destructive of rights that a contracting party would not reasonably expect to lose. It is not the case that every exclusion, limitation, or time-bar clause is automatically to be treated as unusual or onerous. Whether a term is unusual or onerous depends on the nature of the contract, the market in which it is used, the parties involved, and the practical effect of the clause: **Goodlife Foods Ltd v Hall Fire Protection Ltd** [2018] EWCA Civ 1371.

[45.] A clause may therefore require special notice if it is truly out of the ordinary in the relevant contractual setting. But where a clause is part of standard market wording and is not shown to be exceptional in that context, ordinary notice principles are sufficient.

[46.] The notice principle is affected by the concept of agency. The Defendants raise the matter of agency. That matter is to be first determined.

Agency

[47.] In this case, I must also consider the question of agency. The evidence in this case shows that the insurance was placed through intermediaries. In the field of insurance, the law takes into account that cover is frequently placed through brokers and intermediaries on standard terms through brokers or retail agents. That commercial reality informs the assessment of both notice and incorporation in a market insurance context: **Super Chem Products Ltd v American Life and General Insurance Co Ltd** [2004] UKPC 2.

[48.] In **Super Chem Products Ltd v American Life and General Insurance Co Ltd**, the policy provided for the insured to bring an action within 3 months of the rejection of a claim. The insured argued that the provision was not binding on it because it had had no knowledge or notice of the provision. At first instance, the trial judge held that since neither the insured nor its brokers had actual knowledge of the limitation conditions, the limitation conditions were not incorporated into the consequential loss policy.

[49.] In considering the appeal, the Privy Council determined that a relevant issue for decision was "The correctness of the judge's conclusion that the limitation provisions contained in the consequential loss policy were not incorporated in the contract".

[50.] In that regard, Justice Steyn who delivered the judgment of the court, opined, at page 9:

> It is common ground that the consequential loss policy, which was in standard form, was prepared by the insured's brokers. A copy of that policy was placed before the Board. It contains the relevant limitation provision, and in particular Condition 4 which provided for 30 days' notice and Condition 5 which provided for a three-month limitation period running from the time of the rejection of a claim. It is common ground that a contract was concluded on the basis of the standard form. But at trial the judge was persuaded that Condition 4 and Condition 5 were not incorporated. Her reasoning was that in order to establish incorporation of the limitation provisions the insurers "must prove that the brokers knew about the condition upon which they [the insurers] now rely". She concluded:
>
> > "What the defendants have not shown in their attempt at agency, is that the conditions came to the knowledge of the brokers. Without that information, the knowledge cannot attach to the plaintiff at all. Insofar as [the consequential loss action] is concerned, the limitation point does not succeed."

> ***On this point the judge wrongly adopted a subjective approach to the formation of the contract. The decisive fact is that the brokers, whatever they may have known, committed the insured to a contract on all the standard form terms of the consequential loss policy. They unquestionably had authority to do so. Conditions 4 and 5 were validly incorporated. The judge erred.***
>
> [Emphasis supplied]

[51.] In the premises, the court in **Super Chem Products Ltd v American Life and General Insurance Co Ltd** held that the time bar (limitation) conditions had been validly incorporated, and took effect. The court rejected the notion that the Defendants had to prove that the broker knew of the condition that was under challenge. It was sufficient that the broker had authority to act on behalf of the insured and the broker had committed the insured to the standard form terms. The case is also authority for the proposition that where the intermediary is acting for the insured in obtaining the cover, delivery of policy documents to that intermediary is capable of amounting to delivery to the insured's side of the transaction.

[52.] In this matter, the Defendants' case is that Mr. Jim Braniff was Mr. Chandler's agent and that they sent the insurance policy to Mr. Jim Braniff and not to Mr. Chandler himself. The state of the evidence is that Mr. Chandler disputes ever receiving or signing the policy. There appears to be no dispute that the policy was not delivered to Mr. Chandler and no dispute that it was delivered to Mr. Jim Braniff. The Defendants insist that the policy was delivered to Mr. Chandler's agent, Mr. Jim Braniff.

[53.] The dispute concerns the role of Mr. Jim Braniff. Therefore I must determine whether Mr. Braniff received the policy and its terms as Mr. Chandler's agent.

Analysis of evidence – the role of Jim Braniff

[54.] ***Paul Hasler***

Paul Hasler, Property Claims Manager for Hiscox Syndicate Limited, a member of the Second Defendant, gave evidence on behalf of the Defendants. His Affidavits of 3 January 2024 and 26 February 2024 were treated as his evidence in chief. He was cross-examined largely on underwriting structure, brokers and agents, standard forms, the policy wording, Clause G, and the two-year limitation period. His evidence is that Mr. Chandler approached Mr. Jim Braniff at USI Insurance Services, Inc. ('USI') to act on Mr. Chandler's behalf in placing coverage, and that Mr. Braniff was Mr. Chandler's agent. His evidence at paragraphs 5 to 8 of his affidavit dated 3 January 2024 reads:

5. The Plaintiff approached a retail insurance agent, Mr. Jim Braniff III ("***Mr. Braniff***") at USI Insurance Services, Inc. ("***USI***"), to act on his behalf in placing property insurance coverage for his residence in Abaco, The Bahamas. The Plaintiff specifically asked for the coverage to be limited to fire/explosion.
6. Mr. Braniff, as the Plaintiff's agent, then contacted Thompson Heath & Bond Limited, which is now known as Amwins Global Risks, ("***THB***") an insurance broker which has business relationships with various underwriters and assists with placing risks.
7. THB then secured a market for the risk with Underwriters and sent Underwriters' proposed terms and conditions to USI which included the amount of the requisite premium to be paid if the coverage terms and conditions were accepted by the Plaintiff.
8. The premium was paid by the Plaintiff thereby consummating the contractual relationship between the Plaintiff and Underwriters on the terms and conditions proposed by Underwriters and binding the policy.

[55.] Mr. Hasler's evidence (by his affidavit dated 26 February 2024) is also that Mr. Aaron Isgur of USI contacted THB on September 14, 2017 requesting coverage on Mr. Chandler's home for "fire only" and that in December 2018, Mr. Jim Braniff sought and received information from Mr. Chandler in connection with the proposed coverage. The email exchange between Mr. Braniff and Mr. Chandler, dated December 27, 2018, is exhibited to Mr. Hasler's affidavit as "PH-2". That exhibit shows that Mr. Chandler sent Mr. Braniff relevant information for the coverage and that Mr. Braniff forwarded the information.

[56.] Mr. Hasler's further evidence is that the policy was attached to an email sent to Mr. Braniff on January 2, 2019. Mr. Hasler's evidence at paragraph 13 of his affidavit dated 26 February 2024 is:

> 13. On 2 January 2019, Mr. Jones emailed Mr. Braniff confirming that the requested coverage had been placed and the Policy (in an identical form to the document exhibited at "AKR-1" to the Affidavit of Alexandria K. Russell filed on 30 June 2023) was attached to that email. Mr. Braniff therefore received a copy of the Policy on 2 January 2019. Attached hereto and now shown to me marked "PH-3" is a copy of the referenced email thread.

[57.] The Defendants ask the court to conclude that Mr. Braniff acted as Mr. Chandler's agent and received the policy as such, on Mr. Chandler's behalf.

[58.] Evidence for the Claimant was given by himself and Michael Sydow.

[59.] ***Michael Sydow***

Michael Sydow is an "Attorney who has practiced law in the State of Texas for since [sic] 1976". Mr. Sydow represented Mr. Chandler in the Texas action against Mr. Jim Braniff and others. His evidence is that that suit "arose out of the loss of his

[Chandler's] house due to fire and explosion after Hurricane Dorian. That case was later dismissed in favor of The Bahamas court system."

[60.] At paragraphs 4 to 5 of his Affidavit, Mr Sydow avers:

> 4. In connection with that representation, I sought access to the policy of insurance issued by Lloyds London insuring the dwelling at issue. I obtained a copy of the homeowner's insurance policy B1230GP04015A19 from USI Insurance Services, Inc, Chandler's insurance agent in Houston, Texas after repeated requests. Chandler advised, upon his retention of the Sydow Firm, that at no time did he receive or have a copy of the homeowners insurance policy.
> 5. A copy of the policy that I obtained is at pages 1 to 51 of the paginated bundle of document. The policy covered the residence of the Claimant located on Great Guana Cay, Abaco, The Bahamas for a term of a year, commencing 2 January 2019. To be clear, the homeowner's insurance policy is not one single document. It is made up of a series of boilerplate documents that were created by or on behalf of the Defendants herein. There is no indication or expectation that the provisions contained in the documents were negotiated by Chandler.

[61.] Mr. Sydow's evidence is that he was not aware of Clause G at the time of the Texas proceedings but that his firm had "started the action in Texas within 2 years of the date of loss, so that was never an issue for us and was never brought up as a defense by the defendants in the Texas action."

[62.] Mr. Sydow described Clause G as not easy to discover and as buried in the general terms and conditions. His evidence confirms that the Texas action was filed within two years of the date of loss. Mr. Sydow also referred to USI as "Chandler's insurance agent in Houston".

[63.] ***Chandler***

Mr. Chandler's evidence is that he is a former and experienced businessman, formerly in the major restaurant business, who, at one time, owned and operated 27 restaurants. He was in the restaurant business for 17 years and, during that time, took out insurance policies, "probably liability policies and commercial insurance on the buildings" in relation to same. His Affidavits of 15 December 2023 and 23 February 2024 were treated as his evidence in chief.

[64.] In this case, he took out an insurance policy on his home in The Bahamas. Mr. Chandler's evidence is that he "contacted Mr. Jim Braniff, who was in Houston Texas at the time, in 2018, to seek coverage" for his home on Great Guano Cay, Abaco. Mr. Braniff was said to be in Texas at the time.

[65.] In relation to whether Mr. Braniff was his agent, Mr. Chandler first described Mr. Braniff as "an employee of the Defendants" (paragraph 7, Affidavit of 15 December 2023). By a later affidavit, Mr. Chandler's evidence was (paragraph 3 Second Affidavit filed February 23, 2024) that Mr. Braniff told him "he worked for Insurers at Lloyd of London and that they would insure my home". His evidence was:

> But to be clear, when I approached Jim Braniff, he stated he worked for insurers at Lloyd's of London and they would insure my home. To this day, I do not know the nature or the relationship or affiliation between Jim Braniff and the insurers who were defendants in this matter and agents.

[66.] On cross-examination, when asked whether Mr. Braniff was an employee of the Defendant, Mr. Chandler's response was (pages 22 – 23 Transcript):

Q. You alleged that you did not receive the policy.
A. Correct.
Q. And based on what you just described as your experience with previous insurers, why didn't you make inquiries for the same information that had been discussed before?
A. Because I knew Mr. Braniff as a personal friend and trusted him to be an honest and fair person.
Q. And he was representing you?
A. He represented Lloyd's of London and Hiscox, yes, sir.
Q. Mr. Chandler, please answer the questions that are being put to you. I did not say he represented Hiscox. I asked if Mr. Braniff represented you.
A. Mr. Braniff sold me a policy.
Q. I'm going to ask the question again, Mr. Chandler --
A. You can ask it again, sir. I don't know what you mean by representative. Mr Braniff is an agent in Texas. I called him and said I need an insurance policy. He said I represent these people, I can write you a policy. He wrote the policy.
Q. So when seeking insurance, did you ask for Mr. Braniff to act on your behalf to get that insurance?
A. He was the agent that issued the policy. I don't understand your question.
He is an insurance agent. I'm a client. What am I missing?
Q. The question that's being put to you, Mr. Chandler, and it's really just just a yes or no question.
When you instructed Mr. Braniff, was it on the

basis that he would represent you in connection with getting the insurance coverage for your property in Abaco?

A. He was the agent I talked to to get an insurance policy in The Bahamas.

[67.] And again (pages 35 – 36 Transcript):

Q. So to use that terminology, and specific to Braniff and USI, if they ought to have been acting in your best interest, do you then accept that they were your agents?
A. Qualify what's an agent? I bought a policy -- for the third time, I bought a policy from Jim Braniff. He told me he represented Hiscox and Lloyd's of London. That's as clear as I can make it, sir.
Q. Can we look, please, at the same bundle that you have open and just flip to page 169.
A. 169?
Q. Yes, sir. This is the same document. The plaintiff's first amended petition. And we're going to be looking at paragraph 4 on page 169. I'll read paragraph 4.
"Jim Braniff, III, is an insurance agent residing and officing in Harris County, Texas. He agreed to represent plaintiff in placing insurance on plaintiff's property in the Abaco Islands. Defendant Braniff is and at all times material hereto was the senior vice president of USI Insurance Services. He has been served and has appeared herein."
So, again, this is your document filed in the Texas action, and it states that you retained Mr. Braniff as an insurance agent; is that correct?
A. That sounds correct.
Q. And if we turn over to the next page on paragraph 5, there's an almost identical paragraph that this is in connection with one Aron Iscar [phonetic]. I won't read that paragraph, but we'll go into paragraph 6, which, again, is very similar, and this is about USI.
That paragraph reads: USI insurance services is an insurance broker organized under the laws of the state of Delaware, but doing business in the state of Texas. This cause of action arises out of its business done in the state of Texas. USI has been served and appeared herein.
So if we go down to paragraph 9 on that same page, it reads: In 2017, a mutual friend of plaintiff and Braniff suggested the plaintiff place his insurance

> coverage through Braniff. Mr. Braniff thereafter
> associated Mr. Iscar to assist in placing plaintiff's
> insurance."
> So without getting tied down by any legal
> terminology, in reviewing the description in your
> document of your relationship with Mr. Braniff, with USI
> with Mr. Iscar, who's also with USI, do you accept that
> they were your insurance agent for placing this
> coverage?
> A. Are you asking me did Jim Braniff represent
> the insurance people and agree to issue a policy to me?
> The answer is yes.

[68.] Faced with the description of his US attorney, Michael Sydow, of Mr. Braniff/USI as his agent, Mr. Chandler reluctantly relented and agreed that Mr. Braniff was his agent (at pages 42 – 43 Transcript):

> Q. So in paragraph 4 of Mr. Sydow, he swears in
> connection with that representation, I sought access to
> the policy of insurance issued by Lloyd's London
> insuring the dwelling at issue. I obtained a copy of
> the homeowner's insurance policy, and there's a long
> number, from USI insurance services, Inc. Chandler's
> insurance agent in Houston, Texas.
> So you you accept, Mr. Chandler, that your US
> attorney is confirming that USI was your insurance
> agent?
> A. That's what it says.
> Q. But to be clear, you don't agree with that?
> A. That's not what I said. You're asking me a
> technical question, sir. And I'm saying for the fifth
> time, I contacted Jim Braniff in Houston, Texas, to
> issue a policy on my house in The Bahamas -- let me
> finish. He said I represent Hiscox and Lloyd's of
> London. We went back and forth. He issued a policy,
> which he did not send to me. I sent him a check. End
> of comment.
> So if you're asking me -- Ask your question
> again.
> Q. Do you agree with your US attorney that USI
> was your insurance agent in connection with the policy
> for your property in Abaco?
> A. I assume my attorney in Houston is an
> intelligent, smart individual, and that's what he said.
> So I accept that that's what he said.
> If you're asking me specifically, do I know
> the answer to that, the answer is no.
> Q. So is it fair to say, then, that you actually
> can't say whether USI was or was not your agent? Is

that a fair comment?
A. If you're asking me specifically, have I seen
a document that said my agent is USI or Lloyd's or them,
the answer is no, because I never got a copy of the
policy.
Q. Mr. Chandler, I didn't mention any document.
A. I did mention the documents. You can't
qualify this without me seeing the document, sir.
Q. Mr. Chandler, I would ask you politely. I'm
I'm trying to be polite if you --
A. You're being polite, but you're asking me
questions that I cannot answer. Do I specifically --
You're asking me do I specifically know that USI is the
insurer? I would assume so. And I would assume Mr.
Braniff wrote the policy, but specifically do I know
that, no.
Q. That was not my question. I'm going to ask
you some short simple questions to confirm the position.
A. Much better.
Q. But I understand. You do not fully understand
what the term "agent" means because it's a legalistic
term; is that correct?
**A. I think an agent is someone that represents
somebody. Okay. If I'm a real estate agent, I
represent somebody selling real estate.**
**Q. Based on that definition that you just said,
do you accept that Mr. Braniff and USI were your agent
for the purposes of obtaining the insurance policy for
your property in Abaco?**
A. Yes.

[Emphasis supplied]

[69.] Mr. Chandler faced questions on what he expected Mr. Braniff to do in order to obtain insurance on the house.

[70.] Mr. Chandler's evidence was that "would assume that Mr. Braniff contacted somebody that wrote policies" (at page 49 Transcript):

Q. So when you spoke with Mr. Braniff to obtain insurance for your Abaco property, you knew that he would have to go to market, so to speak, to insurers, to find the party willing to provide the coverage; is that correct?
A. I would assume that Mr. Braniff contacted somebody that wrote policies.
Q. So when you spoke with Mr. Braniff to obtain insurance for your Abaco property, you knew that he would have to go to market, so to speak, to insurers, to find the party willing to provide the coverage; is that correct?
A. I would assume that Mr. Braniff contacted somebody that wrote policies.

[71.] Mr. Chandler's evidence is that he "went back and forth" with Mr. Braniff in arranging coverage for his house. He was hard-pressed to remember an email sent to Mr. Jim Braniff by which certain information was provided in relation to the insurance coverage. Faced with an email dated December 27, 2018 from Mr. Braniff which suggested correspondence between the two in the process of placing coverage on the house, Mr. Chandler's evidence was (pages 51 to 52 Transcript):

> Q. And the date of this e-mail is on the 27 of
> December 2018?
> A. Correct.
> Q. And it was sent to Jim Braniff. It says no
> physical damage losses in 2018, 10201941. Changed my
> name to Chandler and Harris County. Thanks, Jim.
> Appreciate your help.
> So this was in response to the e-mail at the
> bottom, which is from Mr. Jim Braniff. And he says,
> "Our our London underwriter has a few easy questions."
> And so, Mr. Chandler, do you do you accept
> now that you were asked certain questions by Mr. Braniff
> for insurers and you responded to the same?
> A. That's what it says here. You're asking me do
> I specifically recall having this conversation with Jim
> Braniff five years ago? The answer is no. I'm reading
> what you're reading.
> So what is your specific question? Do I
> recall --
> Q. Mr. Chandler, my question was: Do you recall
> having this correspondence with Mr. Braniff.
> A. No.
> Q. Again, it could just be yes or no. It doesn't
> have to be difficult.
> A. No. That's why you've provided me this
> information.
> Q. So, Mr. Chandler, how did you find out the
> amount of the premium associated with the insurance
> policy?
> A. How did I find out the amount?
> Q. Correct.
> A. I'm assuming Mr. Braniff either told me over
> the phone or sent it to me.
> Q. But you don't remember?
> A. No.
> Q. So is it possible you don't remember getting
> an e-mail with the policy?
> A. That's not possible.
> Q. It's possible that you don't remember how you
> got informed about the premium, but it's not possible
> you don't remember that you didn't get the policy.

A. If I received a 55-page document, insurance
policy by Fedex or by mail, I would remember it.
Q. What if you received it by e-mail, Mr.
Chandler?
A. Impossible.
Q. It's impossible that you would've been sent
the policy by e-mail?
A. Correct. It would have been on Adriana's
Ipad. She would have said, here's a document for you.
We live together, period. It is impossible.
Why don't you ask Mr. Braniff if he sent me an
e-mail or the policy, sir.

[72.] Mr. Chandler also faced questions to ascertain his understanding about what the notices attached to the policy sent to Mr. Braniff could mean. Mr. Chandler explained that such language was "gobbly goop" to him and that's why he had an insurance agent – so that the insurance agent could explain such things. His evidence is (at pages 60 to 61 Transcript):

Q. After reading the first sentence of the second
paragraph, the reference to sending notice to an
insurance broker, who in turn will notify Thompson,
Heath and Bond Limited. Do you understand that to mean
that there are two separate entities at play here?
A. Not necessarily. That's all gobbly goop to
me, sir. That's why I have an insurance agent. He does
that.
Q. And again, in terms of your notification
requirements, I mean, simply put, that's what your agent
should be telling you what you need to do; is that
correct?
A. That's your interpretation, sir.
Q. No. No. I'm I'm asking you. I mean, you
just mentioned, Mr. Chandler, that you have an insurance
agent, and essentially that's their job. So when you
need to do something in connection with your insurance
you rely on your agent?
A. Correct.

[73.] Notably, there is no evidence of any insurance personnel other than Mr. Jim Braniff, with whom Mr. Chandler had dealings.

Did Mr. Chandler receive a copy of the policy?

[74.] Mr. Chandler maintained that Mr. Braniff/USI did not give him a copy of the policy (pages 51 to 52 Transcript) nor did they point out certain clauses. His evidence is (page

34 Transcript):

> Q….So I ask you again, Mr. Chandler, your complaint against Mr. Braniff and USI in the Texas action was that they breached a duty to you; is that correct?
> A. They did not issue me a copy of the policy. They did not point out that a, if there was a claim, it had to be litigated in The Bahamas; and b, if it was litigated in The Bahamas, it had to be filed within two years.
> They did not give me a, give copy of the policy; and b, they did not say, oh, yeah, these are sort of unusual clauses in an insurance policy, would like to point these things out.

[75.] Mr. Chandler's evidence is that the policy was never sent to him and that he did not see the policy until he was in Miami and that either "Mr. Sydow or Braniff or somebody said to me that this thing has to go to The Bahamas". Mr. Chandler's evidence was that he never received a copy of the policy, that it was impossible for the policy to be Fedexed or sent to The Bahamas and that it had not been sent by email.

[76.] Nevertheless, by email dated June 12, 2020, Mr. Chandler wrote to Mr. Jim Braniff to say that he had received a copy of his policy in Miami and that "mine obviously burned up in the house". The relevant part of the email reads:

> "Jim; drive shown [sic] to Miami beach yesterday (in violation of the damn curfew) and went through my Insurance Stuff, again – I received two things from Miss Loretta;
> 1. A copy of the policy (mine obviously burned up in the house)
> 2. A copy of the 'amateurish' fire inspectors report…"

[77.] The natural meaning of the words used is that he had had a copy of the policy and that that copy had burnt up in the house which was the subject of the insurance.

[78.] Faced with the content of that June 12, 2020 email, Mr. Chandler's sought to explain the email thus (page 61 Transcript):

> Q. …
> So this is why my question to you, Mr. Chandler, was that you've admitted to having a copy of the policy prior to Hurricane Dorian?
> A. No. What I should have said in that e-mail, it burned up in my house, was that everything burned up

> in my house. And if I had had a copy of the policy, it burned up in my house.

[79.] I note that the words "mine obviously burned up in the house" in the email text appear alongside the information that Mr. Chandler had received a copy of the policy from Ms. Loretta. So placed, the words appear to be an explanation as to why he received/had to receive a copy of the policy. It is an unconvincing suggestion that the email assertion that the policy "obviously" burned up in the house should bear the meaning "if I had had a copy of the policy, it burned up…". I also consider that Mr. Chandler's evidence is that it was "impossible" for the policy to be sent to him and that he had not received it. Therefore, it is unclear why, in such a case, he would have proposed that "*if* I had had a copy of the policy, it burned up in my house." [Emphasis supplied]

Who suggested fire/explosion coverage?

[80.] Mr. Chandler's evidence is that it was Mr. Braniff that suggested fire/explosion coverage. At paragraph 7 of his Affidavit filed on December 15, 2023, Mr. Chandler avers:

> "On one of our telephone calls, Mr. Braniff suggested that I only needed fire and explosive coverage because my home was exceedingly strong and had shown no aversion to previous hurricanes."

[81.] Mr. Chandler does not deny that he is the author of email correspondence of June 12, 2020. By that email, Mr. Chandler writes to Jim Braniff, "vividly" recalling their "initial conversation re insurance on South Point." The relevant portion reads:

> I have paid huge hurricane premiums over a 17+ year span and NEVER had any major- damages- THIRTEEN Hurricanes in that time span.' I explained the $36,000 – I spent (Doubling the structural supports throughout my house) a month before I started constructions (against the advise of my architect 'a waste of money') I said to you THE ONLY THING that would possible destroy my home was a fire; you explained that those type policies were fire/explosion explosion/fire and were in force even if there were a hurricane (wind) or hail damage!!! …

[82.] Mr. Chandler's consistent evidence was that he had never suffered hurricane damage and that he negotiated the premium in this policy. His evidence is that Mr. Jim Braniff spent a week at his house and he showed him the structural reinforcements that he had made. The June 12, 2020 email which was authored before a lawsuit was initiated, is in stark contrast to the later post-action affidavit evidence of Mr. Chandler that Mr. Braniff was the one who suggested that type of coverage.

How well did Mr. Chandler know Mr. Braniff?

[83.] On his relationship with Mr. Braniff, Mr. Chandler by his affidavit of December 15, 2023 gave evidence that Mr. Jim Braniff stayed at his house "for a week and was impressed by it." His evidence also was that he and Mr. Braniff were close friends since about 1975 "or even before that".

[84.] The evidence before this court is that there is a suit that was commenced in Texas by Mr. Chandler and that Mr. Braniff was a named Defendant. When asked whether he had sued Mr. Braniff, Mr. Chandler's response was first a repetition of the question and then "I think that there was an action filed against Mr. Braniff." Yet Mr. Chandler did not answer with certainty when asked whether his friend from about 1975 "or even before that", whether the person that arranged insurance coverage for him, had been named as a defendant in the suit regarding the insurance coverage:

> Q. You're suing Mr. Braniff in The United States, aren't you, Mr. Chandler?
> A. Am I suing Mr. Braniff in the states?
> Q. That's the question, yes.
> A. I think there was an action filed against Mr. Braniff, and I think it got put on hold because the litigation had to come here. But that's lawyer terminology. I'm telling you what I know as a layman.
> Q. So presumably, Mr. Chandler, you do know the claims you at least initially made against Mr. Braniff in the US; is that correct?
> A. I read them some time ago, but since that case didn't go forward, that's not my focus right now.
> Q. But, Mr. Chandler, prior to reading any document that may have been prepared by an attorney, you would have had discussions and given instructions to that attorney; is that correct?
> A. I had discussions with my attorney in Houston.
> Q. And do you accept that the allegations that were filed on your behalf against Mr. Braniff and USI were for a breach of the duties that they owed to you?
> A. You'd have to show me a copy of that document. If you're asking that I sue Jim Braniff, the answer is yes.

[85.] The undisputed evidence is that there was an action brought by Mr. Chandler against Mr. Braniff and others in Texas. It strains credibility that Mr. Chandler could be unsure as to whether his close friend since about 1975 "or even before that", whether the person that arranged insurance coverage for him and who had spent time I his house, had been named in a suit that he instructed to be filed in relation to the insurance policy now under discussion.

[86.] Mr. Chandler asserted that the current policy was the only policy that Mr. Braniff assisted him with. In response to the content of an email from Mr. Braniff who represented that he had handled all of Chandler's "personal and commercial insurance requirements since 1975", Mr. Chandler's response was, "I cannot tell. That was 40 years ago." His evidence was (pages 23 to 25 Transcript):

> Q. I'll move on, Mr. Chandler. So you've indicated that you and Mr. Braniff were close friends, and that's since about 1975; is that correct?
> A. Or even before that.
> Q. So looking at about 50 years?
> A. I've known Mr. Braniff a long time.
> Q. He's actually even stayed at your home?
> A. Correct. My home in The Bahamas. Correct.
> Q. And Mr. Braniff assisted you not only with obtaining this insurance policy, but with other insurance policies in the past; isn't that right?
> A. No, sir.
> Q. This was the only insurance policy he's ever assisted you with?
> A. Yes, sir.
> Q. I'm going to refer you to an e-mail thread in the bundle of documents which starts at page 11. It's at tab 2 of the bundle of documents, but it's page 11.
> A. This one doesn't have page.
> Q. Does that say "bundle of documents" at the front, Mr. Chandler?
> A. Yes, sir.
> Q. If there are no tabs, then we're going to have to rely on the page numbers, which are at the center of the bottom of each page. And we're looking at it's near the beginning at page 11 of 383 it should say.
> A. I see it.
> Q. Starting near the top where it says "from", can you read who that e-mail is from, please?
> A. It says from Jim Brown to Loretta.
> Q. Yes. And can you please just read that e-mail for us. It begins, "here you go."
> A. His previous name was Robert Chandler. He was in a major restaurant business and decided officially and legally to change his name to the word Chandler. I've known him as a close friend and have handled all his personal and commercial insurance requirements since 1975. But it's not a true statement. I didn't have --

> If he wrote insurance policies on those restaurants, I don't remember. He possibly could, but when you have 27 restaurants and you're the sole operator, you conduct a lot of business.
>
> Q. So this gentleman is a close personal friend of 50 years, and you're telling us you can't remember whether or not he wrote more than one insurance or he assisted in obtaining more than one insurance policy for you?
>
> A. I cannot tell. That was 40 years ago.
>
> Q. Would Mr. Braniff have any reason to make a false statement in this e-mail to Loretta Trevino?
>
> A. Does he have any reason to? You'd have to ask Mr. Braniff that.

What did Mr. Chandler know about the policy?

- *A policy contains terms*

[87.] It is apparent that Mr. Chandler knew that the policy contained fire/explosion coverage. Mr. Chandler's evidence is that he paid the premium and assumed that Mr. Braniff had the policy. He was however aware that the policy was likely to contain terms. His evidence in relation to this was (at pages 54 to 55, Transcript):

> Q. So, Mr. Chandler, you confirmed that you operated in the restaurant business for 17 years and owned 27 restaurants; is that correct? My notes that I made.
>
> A. Those numbers are correct.
>
> Q. And with that experience under your belt, you did not think it was appropriate to request the terms of the policy if it had not been provided to you by the time you were paying the premium; is that your evidence?
>
> A. That's my evidence.
>
> Q. So what did you think the terms of the policy was?
>
> A. That if I had a fire explosion, my house was covered.
>
> Q. You thought there was one line in your insurance policy?
>
> A. You asked what I thought the policy said. I think the policy said if I had a fire explosion, I was covered.
>
> Q. And do you accept that there would have to be other terms in an insurance policy?
>
> A. As I found out later, it was 50-some-odd pages.

Q. In the litigation that you spoke to before, did you see a policy in connection with that matter?
A. Say that again.
Q. In the litigation you had mentioned before about your boat that sank.
A. Yes.
Q. Did you see the policy in connection with that matter?
A. I assume when I flew to Houston and engaged Mr. Sydow to sue Lloyd's of London, that at that point he had a copy of that policy, and we read it, but I'm assuming 'cause that was 27 years ago. Does that answer your question?
Q. Do you accept that insurance policies are generally quite a number of pages.
A. My experience has been there are quite a number of pages.
Q. And so beyond your specific request about fire coverage, you would have expected there to be a number of additional terms and conditions associated with the policy?
A. I didn't specifically ask for fire explosion coverage. So I'm going to correct you.
Mr. Braniff suggested after having been a guest at my house for a week and asking specific questions about my house, Mr. Braniff suggested that I only needed fire explosion insurance on my house in The Bahamas. Does that answer your question, sir?
Q. No. The question is: Do you accept that insurance policies have quite a number of terms and conditions associated with that?
A. Most do.

Exclusive jurisdiction – attempted Change of Venue

[88.] Mr. Chandler accepted "that it appeared" that he wrote an email dated April 9, 2020, using his girlfriend's email address. Writing to Jim Braniff, he said, *inter alia*,

> "Jim, taking a taking a long shot (and spending my $) to see if we can get a "change of venue" ruling n NYC (New York being the most friendly venue to attempt this). My now Nassau Lawyer says YEARS before we can get into THE ONLY COURT in Nassau - I should have known not to agree to litigation in the fuckin Bahamas."

[89.] Mr. Chander's explanation is that he only learnt of the exclusive jurisdiction provision after he received a copy of the policy in Miami and that, on learning about that clause, went "ballistic". That explanation does not address the meaning of "I should have known not to agree".

[90.] Mr. Chandler's evidence is that he meant (at page 65 Transcript):

> …So had I known that the litigation was in The Bahamas, would I have agreed to it? Absolutely not.
>
> Q. Well, I'm going to ask you a question about what you read just now.
>
> A. I answered the question.
>
> Q. You stated that I should have known not to agree to litigate in The Bahamas.
>
> So at this time, you were aware of the exclusive jurisdiction clause?
>
> A. When I got to Miami and got a copy of the policy, I was aware of it. This is like saying if you get a hot skillet off the stove and you pick it up and it burns you, you say wow, I should have known it was hot. I should have known that if the policy said litigation in The Bahamas, I would not do it.

[91.] I do not accept the evidence of Mr. Chandler that "he should have known not to agree" meant the same as "had he known he would not have agreed." I also reject his evidence that the email wording represents frustration "with the process that the Defendants were putting me through after having lost everything in a fire and/or an explosion that occurred during Hurricane Dorian."

[92.] The natural meaning of the words used is that he agreed to something and that he should have known better. What was it that he had already agreed to? He was referring to conducting litigation in the Commonwealth of The Bahamas. The context of the words used supports the ordinary meaning of the words which I find to be that he 'ought not to have agreed to conduct litigation in The Bahamas'. In other words, having agreed to litigate in The Bahamas, he regretted that choice and was prepared to spend money to "take a long shot" to see if he could litigate elsewhere.

[93.] The evidence also is that, prior to the suit in Texas, Mr. Chandler had lawyers lined up in both "Nassau and Houston" (by his email communication dated June 12, 2020). Taken together with the other strands of evidence, I find that Mr. Chandler knew that the policy contained the exclusive jurisdiction clause. This is not a finding of when he knew but it goes to his credibility about what he in fact knew of the policy terms.

Conclusion on agency

[94.] I found Mr. Chandler to be robust and forceful, despite his advanced age but he was evasive, flippant, and dismissive. He repeatedly attempted to deflect questions posed to him. His evidence was riddled with inconsistencies. In the round, I find that Mr. Chandler's evidence on key points was not credible.

[95.] I find that Mr. Chandler approached Mr. Jim Braniff, as he had done before, to place insurance coverage on his house in Abaco. He knew that Mr. Braniff would make contacts to find insurance coverage for him and that Mr. Baniff would have "contacted somebody that wrote policies". It is more probable that it was Mr. Chandler who indicated that he only wanted fire/explosion coverage because he had never suffered damage by a hurricane and had been paying premiums needlessly for that before. I find that Mr. Chandler negotiated the premium which means that Mr. Braniff negotiated the premium on his behalf. On being told the premium, Mr. Chandler paid it. If Mr. Chandler's evidence is to be believed, he paid the premium without seeing the policy. I make no finding as to when Mr. Chandler first saw the policy and no such finding is necessary because I am satisfied that Mr. Braniff served as Mr. Chandler's agent for these purposes.

[96.] I accept the evidence of Mr. Paul Hasler that the Defendants had been approached by Mr. Jim Braniff/USI on behalf of Mr. Chandler. I accept Mr. Hasler's evidence as to the operation of the insurance industry and that the dealings of the Defendants would be with the intermediary i.e. the agent of the client and that the policy had been sent to Mr. Braniff.

[97.] Notably, the legal adviser of Mr. Chandler refers to Jim Braniff/USI as Chandler's insurance agent. While this is not binding on the Court, it is good evidence of how the Claimant's legal adviser who was tasked with moving a lawsuit against several persons, including Mr. Braniff, viewed/treated Mr. Braniff. It is persuasive that the legal adviser considered that Mr. Braniff/USI's role was as agent for the Claimant.

[98.] In my judgment, Mr. Chandler's own impression of Mr. Braniff's relationship with the insurers does not alter the objective role Mr. Braniff or USI played in procuring the insurance for him. Although Mr. Chandler at times described Mr. Braniff as representing Hiscox or Lloyd's, his evidence on this issue was not consistent, and he ultimately accepted that Mr. Braniff /USI acted as his agent in obtaining the policy. I am satisfied that Mr. Braniff/USI acted on the Claimant's side in obtaining the insurance.

[99.] I find that the policy was sent to Mr. Braniff and that, in law and in fact, Mr. Braniff had the authority to bind Mr. Chandler to the terms of coverage. At the time that the policy was sent to Braniff, the type of coverage, length of coverage, subject matter of the coverage and the premium had been agreed. I am also satisfied that what was provided to Mr. Braniff was the Defendant's standard terms and that that is the policy that eventually made its way to Mr. Chandler.

[100.] I therefore find that Mr. Braniff/USI acted as the Claimant's agent for the purposes of the placement of coverage and that transmission of the policy to Braniff or USI was transmission to the Claimant's side of the transaction.

[101.] I find that Mr. Jim Braniff/USI negotiated coverage on the standard form terms of contract and that Mr. Chandler was bound by the clauses because his agent, Jim Braniff, whatever he may have known, committed Mr. Chandler to a contract on all the standard form terms of the insurance policy. I find that Mr. Jim Braniff had the actual and ostensible authority to do so.

Incorporation

[102.] I next consider whether Clause G formed part of the contract.

[103.] A summary of the Claimant's case on this point is set out in the Reply to the Defence of the First and Second Defendants filed 9 December 2023 and at paragraphs 6 to 7:

> 6. Reference is made at paragraph 13 of the First and Second Defendant's Defence to Clause G of "Section I - Conditions". General Policy B1230GP04015A19, which is subject to the Laws of The Bahamas, and all the Forms that are incorporated in same, are standard form contracts that were solely produced by the Defendants. At no material times did the Plaintiff and the Defendants negotiate the terms set out in the Homeowners 3 - Special Form, which is incorporated in or forms part of General Policy B1230GP04015A19. The Homeowners 3 – Special Form along with other documents that make up the aforesaid Policy were not provided to, negotiated by, or brought to the attention of the Plaintiff by the Defendants at the commencement date of the Policy. Likewise, Clause G of "Section I - Conditions" was not provided to, negotiated by, or to brought to the attention of the Plaintiff at the commencement date of the Policy.
>
> 7. Clause G of "Section I-Conditions" is not in a document that has been signed by the Plaintiff and the Defendants and no step has been taken by the Defendants to give it any prominence in the aforesaid Form.

[104.] The Claimant asserts that he did not personally receive the policy before the loss, relies upon the facts that the wording was not individually negotiated and that the quotation was not produced. In my judgment, those matters do not prevent incorporation.

[105.] I accept that the relevant legal principles are as set out in **Super Chem Products Ltd v American Life and General Insurance Company Ltd and Others** and by the authors of **McGillivray** as referenced before. To my mind, the applicable principles, subject to whether any clause requires special notice, appear to be as follows. For the standard terms of a policy to be deemed incorporated:

> (1) it is sufficient that the insured negotiated for a contract on the insurer's usual terms and that the insurer delivered the policy in accordance with those terms and
>
> (2) it is sufficient that where the insured negotiated for a contract through his intermediary, the insurer delivered the policy, containing those terms, to his intermediary.

[106.] I have already determined that Mr. Jim Braniff served as Mr. Chandler's agent in law and in fact. The policy was transmitted to Mr. Braniff on 2 January 2019. In circumstances where the insurance was placed through the agent, that is a matter of significance.

Standard Terms

[107.] Mr. Michael Sydow, Chandler's attorney, described the policy as "made up of a series of boilerplate documents that were created by or on behalf of the Defendants herein." Both sides accepted that the policy was a collage of standard forms and boiler plate forms. There is no suggestion that the policy delivered was otherwise than the terms usually offered for such coverage by the Defendants in such an instance.

[108.] The evidence of Mr. Hasler is that the policy is put together using standard forms. His evidence is (at pages 119 to 120 Transcript):

> Q. And these forms, how are they negotiated? How did they come about, more or less? That's a better question.
> A. So Lloyd's has been around for quite a while, and we use standard forms. So over many years, forms are created, and it becomes standardized, and then those forms are then put together to create a full policy.
> Q. Okay. What factors would influence which form

> is used to form a policy?
> A. Many many factors. Some of the basics, location, type of risk. And because you wouldn't have the same forms writing a liability loss, as you would a property loss; you wouldn't have the same forms writing a household loss, as you would a hotel; and you wouldn't have the same forms writing a hotel, as you would with an airplane.
> So all those industries have standard forms that we put on to create policies.
> Q. So would I be correct in Chandler's case when the quotation was agreed by them, then the EOC was created. The EOC was created by simply compiling these forms, these different forms based on the information in the declaration?
> A. So the quote before the EOC would have pulled these forms together. Okay. Yeah. So when we quoted, it said we charged you X amount of dollars, and the policy were written under these conditions.
> Q. And you have not provided that quote for us? It's not in evidence?
> A. I don't think -- I don't know. I don't recall that.

[109.] Mr. Hasler's evidence is that the policy was issued on standard wording forms and that the limitation provision was a part of the foundational standard form. His evidence is also that the request for fire-only coverage came through Mr. Chandler's agent, Mr. Braniff. His evidence at paragraphs 7 to 8 of his affidavit dated 26 February 2024 reads:

> 7. The forms which comprise the Policy are listed at pages 38 and 39 of my First Affidavit and includes form HO04941000 Windstorm and Hailstorm Exclusion "***the Windstorm Exclusion Form***". The Windstorm Exclusion Form was added as a direct result of the Claimant's request, through his agent Mr. Braniff, to have the Policy exclude loss by windstorm.
> 8. Windstorm peril is covered under a policy issued on foundational standard forms. Windstorm exclusions are only used to vary the standard policy terms at the request of the insured or their agents.

[110.] Mr. Hasler's evidence on cross-examination and re-examination is that these standard forms were common in the insurance industry and that such coverage could be offered outside of the London Market, including The Bahamas. Where such coverage was offered, it would be on the standard forms. I accept that evidence.

[111.] I also find that the policy provided to Chandler's agent, Mr. Braniff, was on standard forms common in the insurance industry and used by the Defendants in circumstances such as these. The Claimant submits that the Defendant has not shown that the clauses are usual in the local industry. I do not think that that is the test. The evidence is that those clauses are usual in the insurance industry. I note that the Claimant has not shown that the standard terms under review here are not used in the insurance industry in The Bahamas. The evidence is that for a home in The Bahamas, the Claimant sought out a United States - based agent that he had dealt with before and secured insurance coverage by underwriters in the United Kingdom for his home located in The Bahamas. There is no suggestion that the policy cannot cover homes in The Bahamas. The evidence of the Defendants is that these are the standard terms when used in the insurance market, with a few exceptions. Those exceptions are not relevant here.

[112.] Counsel for the Claimant also argued that the Defendants did not even provide USI with the quotation/Evidence of coverage (EOC) before it placed coverage over the Claimant's property thereby defeating the argument that knowledge, delegated, or otherwise, was passed to the Claimant. The Claimant argues that USI Inc could not commit the Claimant to the EOC that it did not agree. I note that the Claimant appears to use EOC as a reference to a quotation whereas the Defendant's evidence is that EOC can refer to "policy" (page 117 Transcript).

[113.] Using EOC as a reference to a quotation, it appears to me that the Claimant's argument is without merit. The rationale appears to be that there could be no contract concluded on terms unless the agent had had sight of the quotation. This contradicts the law and principle in **Super Chem Products Ltd v American Life and General Insurance Company Ltd and Others** and is contrary to the explanation in **McGillvray**, which I accept as an accurate representation of the law.

[114.] The parties must agree on certain terms for there to be a contract in place: (i) duration of the risk, (ii) rate of premium, (iii) amount and subject-matter of insurance and (iv) the insurer's usual terms. The evidence is that this information was provided to Mr. Braniff who arranged the insurance. Mr. Chandler was represented by an insurance agent but he was not a passive bystander. He indicated what coverage he wanted for his Great Guana Cay home - fire/explosion coverage because he had suffered no problems with hurricane. Hence the windstorm exclusion. Mr. Chandler followed up on the timeline for the placing of the coverage. He went "back and forth" with Mr. Braniff. He negotiated the premium. He was satisfied that this house had been covered for fire/explosion. The effective date as shown on the policy was not disputed. The policy, on the insurer's usual terms, was delivered to the insured's agent.

[115.] The fact that the policy was standard form and not individually negotiated does not, of itself, prevent incorporation. Standard form insurance contracts are commonplace. The law does not require each condition in such a contract to be separately negotiated in order to become binding. In this case, no quotation was produced in evidence. Mr. Hasler's evidence was that the policy used standard market forms and that Clause G was part of that standard wording. I accept that evidence.

[116.] I also consider that if the insurance contract were concluded prior to the transmission of the policy, it would not disturb this court's determination on the issue of notice. In the absence of evidence of the date of such a formation, or of agreed terms contrary to the insured's standard terms, then the contract would include the insurer's standard terms as set out in the policy subsequently transmitted. In other words, if the contract were concluded merely on the agreement of the essential terms, the assumption is that it was concluded on the insurer's usual terms, absent any express agreement to the contrary (**MacGillivray** paragraph 2-010). There is no quotation produced that shows any express agreement to the contrary. In this case, the evidence is that the policy was contracted through an agent. In the absence of any evidence produced in this court to the contrary, the policy is deemed to have been placed on the insurer's standard terms. The insured then becomes bound by those terms.

[117.] I find that in this case:

(1) Mr. Braniff, on Mr. Chandler's behalf, negotiated for a contract on the Defendants' usual terms and that the Defendants delivered the policy in accordance with those terms; and

(2) Mr. Chandler, having negotiated for a contract through Mr. Braniff, the Defendants delivered the policy, containing those terms, to Mr. Braniff.

[118.] I therefore conclude that Clause G formed part of the policy, subject to the further question as to whether it required a heightened degree of notice because of its character.

Whether Clause G was unusual or onerous

Submissions of the parties

[119.] The Claimant relies upon the fact that Clause G was not separately highlighted. The Claimant submits that Clause G was buried in the wording and difficult to find, and that this of itself supports the conclusion that it was unusual or onerous.

[120.] The Claimant contends that both the Unfair Terms in Consumer Contracts Act (UTCCA) and common law require that onerous or unusual clauses be brought to the consumer's attention at the time the contract is concluded, and that Clause G was not so brought to the Claimant's attention. The Claimant also argues that, by comparison, other exclusionary provisions in the policy were given prominence (e.g., terrorism, microorganism exclusions), whereas Clause G was not, suggesting deliberate omission of prominence for the limitation clause. The thrust of the Claimant's argument goes to the issue of whether Clause G was incorporated.

[121.] The Defendants argue there is no statutory or common law requirement to give prominence to the limitation clause or to bring it specifically to the insured's attention.

Law and Analysis

[122.] The principles of law in relation to a clause that is onerous or unusual relate to the question of notice.

Onerous or Unusual clauses

[123.] The starting principle is that "where a condition is particularly onerous or unusual the party seeking to enforce it must show that that condition, or an unusual condition of that particular nature, was fairly brought to the notice of the other party" (per Lord Justice Dillon, **Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd.** at page 437). Such clauses are to be clearly and specifically brought to the other party's attention, with the degree of notice increasing with the clause's onerousness or unusualness. The more onerous or unusual a clause is, the greater the notice which must be given of it: **Thornton v. Shoe Lane Parking; Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd.**

[124.] The case of **Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd.** involved a dispute between Interfoto Picture Library Ltd ('Interfoto')(a photographic transparency library) and Stiletto Visual Programmes Ltd ('Stiletto') (an advertising company) over a large holding fee charged for the late return of photographic transparencies. Stiletto had requested transparencies for a presentation and received 47 transparencies from Interfoto, along with a delivery note listing conditions. The transparencies were overlooked and returned late. Interfoto invoiced Stiletto with a high holding fee per a condition in the delivery note.

[125.] The main issue before the court was whether the holding fee condition was incorporated into the contract. The court considered that the holding fee was extremely high and unusual.

[126.] The court reviewed precedents, such as **Thornton v. Shoe Lane Parking**, holding that particularly onerous or unusual terms must be fairly and explicitly brought to the other party's attention to be enforceable. The court examined whether sufficient notice of this particularly onerous term had been given to Stiletto. The impugned condition was only printed among other terms at the bottom of the delivery note, with nothing special to highlight it. The Court of Appeal held that the holding fee condition was not sufficiently brought to Stiletto's attention and thus was not incorporated into the contract.

[127.] In **Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd.,** Lord Justice Dillon opined at page 437:

> It is in my judgment a logical development of the common law into modern conditions that it should be held, as it was in **Thornton v. Shoe Lane Parking**, that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.
>
> ***In the present case, nothing whatever was done by the plaintiffs to draw the defendants' attention particularly to condition 2; it was merely one of four columns' width of conditions printed across the foot of the delivery note.*** Consequently condition 2 never, in my judgment, became part of the contract between the parties.

[Emphasis supplied]

[128.] Lord Justice Bingham came to a similar conclusion and said at page 445:

> I am equally satisfied that no contract was made on delivery of the transparencies to the defendants before the opening of the jiffy bag in which they were contained. Once the jiffy bag was opened and the transparencies taken out with the delivery note, it is in my judgment an inescapable inference that the defendants would have recognised the delivery note as a document of a kind likely to contain contractual terms and would have seen that there were conditions printed in small but visible lettering on the face of the document. ***To the extent that the conditions so displayed were common form or usual terms regularly encountered in this business, I do not think the defendants could successfully contend that they were not incorporated into the contract.***
>
> The crucial question in the case is whether the plaintiffs can be said fairly and reasonably to have brought condition 2 to the notice of the defendants'. The judge

> made no finding on the point, but I think that it is open to this court to draw an inference from the primary findings which he did make. In my opinion the plaintiffs did not do so. They delivered 47 transparencies, which was a number the defendants had not specifically asked for. Condition 2 contained a daily rate per transparency after the initial period of 14 days many times greater than was usual or (so far as the evidence shows) heard of. For these 47 transparencies there was to be a charge for each day of delay of £235 plus VAT. The result would be that a venial period of delay, as here, would lead to an inordinate liability. ***The defendants are not to be relieved of that liability because they did not read the condition, although doubtless they did not; but in my judgment they are to be relieved because the plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention.***
>
> [Emphasis supplied]

[129.] A court must therefore determine whether a clause is onerous or unusual. Clauses that impose significant burdens, abrogate statutory rights, or are otherwise stringent, outlandish, or unexpected (such as a restriction that is not shown to be usual in that class of contract) may be classified as onerous or unusual: **Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd.**

[130.] Whether a clause is "onerous or unusual" is a contextual and fact-sensitive inquiry, taking into account, *inter alia,* the nature and effect of the clause; industry norms and commonality; whether it departs from standard or expected terms; impact of the clause – for example, whether it would take the other party by surprise or whether it affects the core of the transaction or whether it has nothing to do with the nature of the transaction; and the commercial and contractual context. So, for example, a clause that excludes liability for personal injury and abrogates a statutory right, is likely to be seen as unusual and thus requires special attention: **Thornton v Shoe Lane Parking Ltd.**

[131.] In **Thorton v Shoe Lane Parking**, Thornton, the Plaintiff, was injured after parking in Shoe Lane Parking, an automatic car parking garage run by the Defendant. The parking garage issued a ticket via an automatic machine, which contained conditions attempting to exempt the company from liability. The core issue before the court was whether the exemption clause on the ticket was part of the contract and enforceable.

[132.] The court found that the contract between Mr. Thornton and the Defendant was concluded when Mr. Thornton drove into the garage and received the ticket from the machine - before reading any conditions on the ticket. The exemption clause sought to exclude liability for personal injury caused by negligence, which involved statutory rights under the Occupiers Liability Act 1957. The court held that the exemption clause was too wide and destructive of rights, and had not been sufficiently brought to Mr.

Thornton's attention. The court found that the garage failed to take reasonable steps to notify Mr. Thornton of the exemption clause. The contract was concluded before Mr. Thornton could have read or understood the conditions.

Reasonably sufficient notice

[133.] **Thornton v Shoe Lane Parking** [1971] 1 All ER approved the formula posited in Parker and South Eastern Ry. Co. [1874-80] All ER Rep 166 and, in particular, the test by Mellish LJ of "reasonably sufficient notice." Reasonably sufficient notice depends on the situation. In **Thornton v Shoe Lane Parking,** Megaw LJ opined (at page 692):

> I agree with Lord Denning MR that the question here is of the particular condition on which the defendants seek to rely, and not of the conditions in general. When the conditions sought to be attached all constitute, in Lord Dunedin's words 'the sort of restriction ... that is usual', it may not be necessary for a defendant to prove more than that the intention to attach some conditions has been fairly brought to the notice of the other party. But at least where the particular condition relied on involves a sort of restriction that is not shown to be usual in that class of contract, a defendant must show that his intention to attach an unusual condition of that particular nature was fairly brought to the notice of the other party. How much is required as being, in the words of Mellish LJ, 'reasonably sufficient to give the plaintiff notice of the condition', depends on the nature of the restrictive condition.

[134.] In **Thornton v Shoe Lane Parking**, the Court of Appeal highlighted the context of the clause in that case, including issues of prominence (a few words embedded in a lengthy clause) and the enhanced notice needed where the clause abrogates statutory rights.

Incorporation by reference or by notice

[135.] It is important to distinguish between conditions that may be incorporated by reference and particular and onerous terms which ought to be sufficiently highlighted so as to fairly and reasonably bring them to the attention of the other contracting party: **Blu-Sky Solutions Ltd v BE Caring Ltd [2021] EWHC 2619 (Comm); [2022] 2 All ER (Comm) 254** and **Andrew Green v Petfre (Gibraltar) Ltd. T/A Betfred [2021] EWHC 842 (QB).**

[136.] In **Blu-Sky Solutions Ltd v BE Caring Ltd**, Blu-Sky Solutions Ltd, the Claimant, a supplier of mobile phones and telecom services, offered BE Caring Ltd, the Defendant, a contract deal on mobile phones. The negotiation took place via email. The Claimant sent the Defendant an order form which referenced their standard terms and conditions said to be available on its website. An agent of the Defendant signed the order form without reading it. When the Defendant sought to cancel the order, they were informed of a clause with a cancellation fee.

[137.] The court had to determine whether the order form created a binding contract between Blu-Sky and BE Caring and whether the standard terms, and specifically the cancellation fee, were incorporated into the contract.

[138.] The court held that referencing terms on a website can be sufficient for incorporation if the reference is clear and the terms are accessible. In this case, the reference in the order form and the accessibility of the standard terms on the website were deemed sufficient to incorporate the general terms into the contract. However, Justice Davies found that the cancellation clause was onerous and was not fairly and reasonably brought to BE Caring's attention (paragraphs 108 – 111 of the court's judgment). In determining whether the clause was onerous, the court considered that the fee bore no relationship to any actual administration costs or reasonable estimate of loss, was disproportionate to any legitimate loss and was a penalty. That clause had been buried within dense terms and not highlighted.

[139.] The case of **Andrew Green v Petfre (Gibraltar) Ltd. T/A Betfred [2021] EWHC 842 (QB)** concerned a dispute between Andrew Green (the Claimant) and Petfre (Gibraltar) Ltd, trading as Betfred (the Defendant), over whether Betfred was liable to pay out online casino winnings after a software malfunction. When Green attempted to withdraw his winnings, Betfred initially congratulated him but later refused to pay, citing a software glitch that gave him much better odds than intended. Betfred argued that their contract terms excluded liability for paying out winnings in the event of a game defect or malfunction. The court considered the meaning of the exclusion clauses and whether they were incorporated into the contract.

[140.] In the premises, the court found that the exclusion clauses did not effectively exclude Betfred's liability to pay out Mr Green's winnings. The clauses were not clear or specific enough to exclude liability in the instant circumstances. Nor had the clauses been sufficiently notified to Mr. Green. They had been "buried" within lengthy, complex documents.

[141.] Trial judge, Mrs. Justice Foster, DBE, considered the relevant common law principles but found in that case that (1) the exclusion clauses did not obviously lend the meaning attributed to it by the Defendant; (2) the clauses were onerous and (3) the clauses had not been fairly brought to the attention of the Claimant. In that matter, Justice Foster, DBE opined at paragraphs 164 to 167:

> 164. It is well established at common law that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that the particular condition was fairly brought to the attention of the other party, see *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348 per Lord Dillon at page 339A. Mr Couser relies on the common law doctrine alongside the 2015 Act arguing this is a simple case that even the familiar common law principles support clearly his submission that exclusions here cannot be relied upon.
>
> 165. Questions of adequate notice are, of course, highly fact specific. As Lord Bingham said in the same case (at page 443):
>
> > **"what would be good notice of one condition would not be good notice of another" and involve the court's judgment on the basis of the particular facts of the case, bearing in mind what the clause relied on seeks to achieve.**
>
> [Emphasis supplied]

[142.] The learned judge concluded on the facts of the case that, at paragraph 189:

> …
> b. The wording of each of the clauses relied upon is inadequate as a matter of the natural meaning of the language in context to exclude liability to payout Mr Green's winnings in the events which happened.
> c. The manner in which the relevant clauses were presented and the failure adequately to draw them to his attention meant that the three purported exclusions, even had they been effective to exclude liability, were not incorporated in the contract between the parties.

[143.] The case of **Andrew Green v Petfre (Gibraltar) Ltd. T/A Betfred [2021] EWHC 842 (QB)** confirms that where clauses are not unusual or onerous, it is sufficient to give notice by reference. This is applicable to printed conditions. However, if one of those printed conditions is unusual or onerous, it must be highlighted to the contracting party and given special prominence. "The party seeking to enforce it must show that the particular condition was fairly brought to the attention of the other party."

Restrictive Conditions

[144.] A restrictive condition is not per se unusual or onerous. A court must have regard to all the circumstances of the case – including knowledge of the parties, context of the clause and its commercial setting. Support for this principle is found in **Goodlife Foods Ltd. v Hall Fire Protection Ltd. [2018] EWCA CIV 1371**

[145.] In **Goodlife Foods Ltd. v Hall Fire Protection Ltd.**, the Court of Appeal considered whether a limitation and exclusion clause in a commercial contract for the supply and installation of a fire suppression system was validly incorporated and enforceable. Goodlife Foods Ltd., the Claimant, sued Hall Fire Protection Ltd., the Defendant, for negligence after a fire caused significant losses at their factory, alleging defects in a fire suppression system installed by Hall Fire Protection Ltd. Hall Fire Protection Ltd. relied on a clause of its standard terms, which excluded liability for most losses except for replacement of faulty components. The clause in question limited the supplier's liability to the contract price and excluded liability for consequential loss, with an expectation that the customer would insure against the relevant risks. Among the issues that the court had to consider was whether that clause was incorporated into the contract (including if it was particularly onerous or unusual) and if it was fairly and reasonably brought to the attention of Goodlife Foods Ltd.

[146.] The court applied the principle that particularly onerous or unusual terms must be clearly brought to the other party's attention, relying on cases like **Thornton v Shoe Lane Parking Ltd** [1971] 2 QB 163 and **Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd** [1989] QB 433. However, the court found that the clause under review was not particularly onerous or unusual in the context of commercial contracts for fire protection systems, and that the supplier had taken reasonable steps to bring it to the purchaser's attention by including it in the standard terms sent with the quotation. The clause was therefore incorporated and enforceable.

[147.] In **Goodlife Foods Ltd. v Hall Fire Protection Ltd.**, Coulson LJ noted at paragraph 53:

> On the issue of notice, I consider that the judge was plainly right in his conclusions. Clause 11 was not buried away in the middle of a raft of small print, such as occurs in some of the older cases. Instead it was one of the standard conditions which were expressly referred to on the front of the quotation and which were printed in clear type….
> …A buyer who started reading these conditions would have seen by the very first words used that, at the very least, the conditions contained terms which were emphatically not in the buyer's interests. Obviously, the buyer should then have read on.

[148.] **Goodlife Foods Ltd. v Hall Fire Protection Ltd.** clarifies that a restrictive condition is not per se unusual or onerous. The case of **Super Chem Products Ltd v American Life and General Insurance Company Ltd and Others [2004] 2 All ER 358** is also authority for this principle. An analysis of **Super Chem Products Ltd v American Life and General Insurance Company Ltd and Others** confirms that a limitation clause (a time bar) is not *by its nature* unusual or onerous requiring special notice. A court must have regard to all the circumstances of the case – including knowledge of the parties, context of the clause and its commercial setting.

[149.] In **Super Chem Products Ltd v American Life and General Insurance Company Ltd and Others**, Super Chem Products Ltd, the Appellant, had a major fire at its premises. The company claimed for losses under two insurance policies: one for stock and one for consequential loss. The insurers, the Respondent, denied liability on several grounds including the ground that the claim had been time barred.

[150.] Among the issues to be determined was whether the limitation (time bar) clause had been validly incorporated and was enforceable. Dismissing Super Chem Products Ltd.'s appeal, the Privy Council found that the limitation clause was validly incorporated into the contracts. The judgment of the board was delivered by Lord Steyn. Holding that the issue of incorporation was to be objectively determined and that such an issue was a "pure question of law" (paragraph 10) the Lord Steyn concluded at paragraph 9:

> It is common ground that the consequential loss policy, which was in standard form, was prepared by the insured's brokers. A copy of that policy was placed before the Board. It contains the relevant limitation provision, and in particular Condition 4 which provided for 30 days' notice and Condition 5 which provided for a three-month limitation period running from the time of the rejection of a claim. It is common ground that a contract was concluded on the basis of the standard form. But at trial the judge was persuaded that Condition 4 and Condition 5 were not incorporated. Her reasoning was that in order to establish incorporation of the limitation provisions the insurers "must prove that the brokers knew about the condition upon which they [the insurers] now rely". She concluded:
>
> > "What the defendants have not shown in their attempt at agency, is that the conditions came to the knowledge of the brokers. Without that information, the knowledge cannot attach to the plaintiff at all. Insofar as [the consequential loss action] is concerned, the limitation point does not succeed."
>
> On this point the judge wrongly adopted a subjective approach to the formation of the contract. **The decisive fact is that the brokers, whatever they may have known, committed the insured to a contract on all the standard form terms of the consequential loss policy. They unquestionably had authority to do so. Conditions 4 and 5 were validly incorporated.** The judge erred.

[Emphasis supplied]

[151.] In summary, the limitation clauses were incorporated because the insurance contracts were based on standard forms prepared and agreed by authorized brokers, making all included terms validly incorporated.

Analysis And Determination of Issue B

[152.] I have taken the time to review various authorities relied on by the parties in this matter. Having reviewed same, the principle of law relevant for present purposes is that limitation and exclusion clauses must be incorporated through reasonable notice, with particularly onerous or unusual terms requiring special prominence. Merely referencing standard terms is insufficient for binding unusual or onerous clauses. In such cases, specific notice is required. Limitation clauses are not, for reason of the limitation alone, unusual or onerous. A court must enquire into the context. I note that the enforceability of such clauses is further subject to a fairness test under the Unfair Terms in Consumer Contracts Act, Chapter 337B.

[153.] To my mind, the question in this case, is not whether Clause G was restrictive. Plainly it was. The question is whether, in the context of this insurance placement, it was shown to be sufficiently out of the ordinary to require special treatment beyond a mere transmission of the policy to the insured with general words of reference to conditions and warranties. Was Clause G unusual or onerous such as to require special prominence and specific notice in order to effect incorporation?

[154.] The evidence is that the policy was sent to Mr. Jim Braniff on January 2, 2019 by email. The content of the email included the following:

> <u>Please read the following statements carefully.</u>
>
> <u>Duty to Disclose Material Facts</u>
> ….
>
> <u>Warranties</u>
> The Terms and Conditions of this Policy may contain certain warranties, conditions precedent and/or exclusions. It is important that you check the wording of the policy carefully to be satisfied that you understand their effect and they are complied with fully from inception and throughout the period of the policy. If you consider that any of the warranties or conditions precedent will not be able to be complied with you *must* contact us immediately. If you are any doubt as to any aspect of their meaning or effect and require an explanation please do not hesitate to contact us.

[155.] I accept that the evidence is that Clause G was not specifically identified in the transmittal email and did not have separate signposting in the policy wording. Mr. Hasler accepted as much. Mr. Sydow also said that the clause was not easy to find.

[156.] The current case is distinctly different from that in **Andrew Green v Petfre (Gibraltar) Ltd. T/A Betfred**, relied on by the Claimant. In that case, Justice Foster, DBE opined at paragraphs 166 to 167:

> 166. The observations made above when analysing the documents lead me inexorably to the conclusion that, *whatever their true meaning, none of the terms seeking to exclude liability was sufficiently brought to the attention of Mr Green so as to be incorporated in the gaming contracts he entered with Betfred*.
>
> 167. As explained, this is the result of the combination of inadequate signposting to these significant exclusions of liability, and the failure to highlight the meaning and effect intended. The unhelpful, often iterative presentation in closely typed lower-case or numerous paragraphs of capital letters meant that the relevant clauses were buried in other materials. **These features are exacerbated by the fact that the player must click through and scroll online, searching out what appears to be relevant to him. I do not go so far as to say that it was fanciful to expect that Mr Green would access the Terms and Conditions at all (as in the Spreadex case), but having accessed the Terms and Conditions and then the EULA, it is quite unreasonable to expect he would have found and noted the importance of the key clauses relied upon.** This is overwhelmingly obvious in the case of the Game rules where it is highly unlikely, in my view, he would have gone beyond the description in the earlier part of the document as to what to do to play the Game.

[Emphasis supplied]

[157.] I do not accept the Claimant's characterization that Clause G was deliberately or otherwise concealed in pages of documents. I do not think that it is an appropriate comparison to say that that it did not bear the highlights apparent for some Exclusions when the evidence is that the policy is made up of a number of different forms, prepared at different times by different actors in the market and that therefore there would be distinctions in font and appearance. On a perusal of the policy, it is apparent that it is comprised of a number of forms. This process was explained by Mr. Paul Hasler and explored at length on his cross-examination by Counsel for the Claimant. I think that his evidence credibly explains the difference in the fonts used and the font sizes reviewed and contrasted by the Claimant. I also note that Clause G forms part of the foundation documents. It is contained in what is called

"HOMEOWNERS 3 – SPECIAL FORM". It is not a stand-alone clause or an add-on clause. Each clause has a heading, and Clause G bears the individual heading "Suit Against Us" which is some indication of what the clause addresses. The font is small but not illegible.

[158.] Those facts, however, do not answer the legal question. The legal question is whether Clause G was sufficiently unusual or onerous, in the context of this insurance contract, to require extraordinary notice.

[159.] Clause G was a suit-limitation clause in a standard-form property insurance policy. There is no evidence before the Court that such a clause is extraordinary in that type of contract. Nor is there evidence that a two-year period is aberrant in the relevant market context. The Defendants' evidence was that the wording was standard in the London or Lloyd's market. There is no direct evidence of Bahamian market practice but I am satisfied that the evidence leads to the conclusion that the clause was not some unusual, surprising or bizarre insertion into the policy. "Surprising" in this context means whether such a clause would surprise insureds operating in the context of securing insurance coverage for their home. I think not.

[160.] Unlike the cases relied on by the Claimant, this was not an abrogation of rights exempting the Defendants from liability (**Thornton v Shoe Lane Parking Ltd)** or obligation, **(Andrew Green v Petfre (Gibraltar) Ltd. T/A Betfred)** or an imposition of exorbitant terms (**Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd**) such as a penalty (**Blu-Sky Solutions Ltd v BE Caring Ltd,)** for example.

[161.] I accept the Defendants' submission that the mere fact that a clause limits the period for suit does not automatically render it onerous. That conclusion is consistent with the authorities, including **Goodlife Foods Ltd v Hall Fire Protection Ltd** [2018] EWCA Civ 1371. The Claimant's reliance on **Thornton v Shoe Lane Parking Ltd** [1971] 2 QB 163 and **Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd** [1989] QB 433 does not alter that conclusion. Those are important authorities, but they arose in contexts where the impugned terms were exceptional or surprising in the relevant setting.

[162.] The present case concerns a standard-form insurance placement through intermediaries and is materially different. I find that Clause G was not shown to be sufficiently unusual or onerous, in the relevant legal sense, to require special notice or separate prominence.

[163.] I accept that the 2 January 2019 email did not specifically mention Clause G and that Clause G was not separately signposted. Nevertheless, because I have found that Clause G was not shown to be particularly unusual or onerous, I do not consider that the Defendants were required in law to do more than provide the policy with its usual terms to the Claimant's agent. The policy was so provided. Clause G appeared within it. That was sufficient to satisfy the applicable requirement of notice.

[164.] Additionally, I also find that the general notice under the heading "Warranties" as contained in the email of 2 January 2019 which transmitted the policy, was a sufficient reference to the standard terms and conditions, for purposes of incorporation. Clause G was one such condition, not being unusual or onerous.

[165.] I therefore conclude that Clause G was sufficiently brought to the attention of the Claimant's side for the purposes of incorporation.

Conclusion on Issue B

[166.] I find that:

1. Chandler and his agent were aware that there were printed terms.
2. Chandler and his agent were aware that there were conditions.
3. Chandler's agent bound him to the usual terms, including Clause G.
4. Clause G was not such a special condition – not so unusual or onerous – that it required special notice or prominence.

[167.] It was necessary to bring Clause G to the attention of the policy holder at or before the commencement of the effective period of the policy or immediately thereafter to give effect to Clause G.

[168.] An insured who obtains cover from a particular insurer through an intermediary will ordinarily be bound by that insurer's usual or standard terms. I find that Mr. Chandler acted through an agent who negotiated a policy on its usual terms, that such a policy was provided to Mr. Chandler's agent and that Mr. Chandler is bound by the terms of that policy.

[169.] I find that Clause G was not shown to be sufficiently unusual or onerous, in the relevant legal sense, to require special notice or separate prominence. Therefore, the Defendant was not required to take steps to give prominence to Clause G in order to give effect to or to enforce Clause G.

[170.] I therefore conclude that Clause G was sufficiently brought to the attention of the Claimant for the purposes of incorporation.

[171.] The enforceability of Clause G is further subject to a fairness test under the Unfair Terms in Consumer Contracts Act.

ISSUE C

Whether the following scenarios make Clause G ineffective i.e. render it unenforceable.

(i) Whether or not Clause G of "Section I-Conditions is a term that creates a significant imbalance between the parties' rights and obligations under General Policy B1230GP04015A19 to the detriment of a policyholder so as to render it ineffective and unenforceable.

(ii) Whether or not Clause G of "Section I-Conditions" which restricts the ability of a Plaintiff to commence legal proceedings within the period set out in section 5 of the Limitation Act is contrary to the provision of the Unfair Terms in Consumer Contracts Act so as to render it ineffective and unenforceable.

Claimant's submissions

[172.] The Claimant contends that Clause G is unfair or otherwise unenforceable. The Claimant submits that Clause G is unreasonable, unfair in operation and infringes The Unfair Terms in Consumer Contracts Act. The Claimant argues that the clause is not fairly and reasonably brought to the attention of the consumer where it is included in "a densely worded unsigned terms and conditions that gives no indication of its existence".

The Unfair Terms in Consumer Contracts Act

[173.] The Unfair Terms in Consumer Contracts Act ('UTCCA') establishes the legal framework for regulating unfair terms in consumer contracts. This Act aims to protect consumers from unfair contract terms and to ensure transparency and fairness in consumer contracts. It applies to any contract term between a seller/supplier and a consumer that has not been individually negotiated [Section 3(1)] save for those contracts excluded by the First Schedule to the Act. Section 3 (1) and (2) provide:

> 3. (1) Subject to the provisions of the First Schedule, this Act applies to any term in a contract concluded between a seller or supplier and a consumer where such term has not been individually negotiated.
>
> (2) In so far as it is in plain, intelligible language, no assessment shall be made of the fairness of any term which —
>
> a. defines the main subject matter of the contract; or
>
> b. concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied.

[174.] A term is considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer: Section 4(1). Section 4 provides:

> 4. (1) In this Act, subject to subsections (2) and (3), "unfair term" means any term which contrary to the requirement of good faith causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
>
> (2) An assessment of the unfair nature of a term shall be made taking into account the nature of the goods or services for which the contract was concluded and referring, as at the time of the conclusion of the contract, to all circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
>
> (3) In determining whether a term satisfies the requirement of good faith, regard shall be had in particular to the matters specified in the Second Schedule.
>
> (4) The Third Schedule contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

[175.] In an assessment of whether a term is unfair, a Court takes into account [Section 4(2)]:

i. The nature of goods/services;

ii. Circumstances at contract conclusion;

iii. All contract terms and related contracts and
iv. Good faith factors (Section 4(3)).

[176.] Good faith factors are provided in the Second Schedule and include bargaining strength, inducement, special orders, and fairness in dealings. The Second Schedule provides:

> SECOND SCHEDULE (Section 4 (3))
> Assessment of Good Faith
> In making an assessment of good faith, regard shall be had in particular to —
> (a) the strength of the bargaining positions of the parties;
> (b) whether the consumer had an inducement to agree to the term;
> (c) whether the goods or services were sold or supplied to the special order of the consumer; and
> (d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer.

[177.] The requirement of good faith is interpreted as fair and open dealing. Terms must not contain hidden traps or pitfalls, especially those that may operate to the consumer's disadvantage: **Andrew Green v Petfre (Gibraltar) Ltd t/a Betfred**. If a term is particularly unusual, it must be specifically brought to the consumer's attention to be enforceable.

[178.] The Act provides a non-exhaustive, indicative list of terms likely to be unfair. Those terms are found in the Third Schedule. For these purposes, the Claimant relies on the following provisions of the Third Schedule:

> THIRD SCHEDULE (Section 4 (4))
>
> Indicative and Illustrative List of Terms which may be Regarded as Unfair
>
> 1. Terms which have the object or effect of —
> (a) …
> (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
> …
> (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming

> acquainted before the conclusion of the contract;
> ….
> (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.
>
> …

[179.] In considering written terms of the contract, UTCCA provides that such terms must be in plain, intelligible language. Ambiguities are to be interpreted in favour of the consumer. Section 6 provides:

> 6. A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language, and if there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail.

[180.] Not only must written terms be expressed in plain and intelligible language, they must also be brought to the consumer's attention in such a way that the average consumer would be aware of them: **Andrew Green v Petfre (Gibraltar) Ltd t/a Betfred.**

[181.] Where a term is found to be unfair, it is not binding on the consumer although the rest of the contract remains valid if possible. Section 5 provides:

> 5. (1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.
> (2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

Analysis And Determination of Issue 3

[182.] The Claimant submits that Clause G "is an unfair, onerous and unusual term that was not brought to the attention of the Claimant at the time the Defendants placed insurance coverage over his residence and it has not been incorporated into the Policy. The term is heavily weighted against the Plaintiff and the interpretation of same is impractical."

[183.] The Claimant submits that Clause G falls under Categories (b), (i) and (q) of the Third Schedule. The Claimant argues that the Defendant concluded its investigation into the cause of the loss a week before the 2nd anniversary of the date of loss and that "to allow the Defendants to collect a premium and escape liability when it runs out the clock is to the detriment of the consumer."

Conclusion of contract

[184.] The Claimant's case is also that the present contract was "not made when THB sent an email to USI Inc on 2 January 2019 or when the premium was paid before April 2019. It was made when the Defendants and THB created the Quotation after obtaining information from Jim Braniff and they then agreed to same."

[185.] There is no evidence as to when such a quotation was created or that a quotation was sent. There is also nothing to suggest that there was a quotation with either no terms or with terms different from those found in the policy. The Claimant's submission would depend on whether the quotation had terms and whether they varied from those in the policy. The Claimant's submission, in essence, is that the terms of the policy were produced after a quotation and after the contract formation, and therefore Clause G was not incorporated and is unfair. Again, there is no evidence of a quotation which would inform what the Claimant submits is the contract formation date. For that reason, the Claimant's submission on this point is misconceived. This court, in the absence of positive evidence, will not speculate on the existence of a quotation and/or the terms of such a quotation. Nor will this Court presume to determine when the essential terms of the contract were agreed prior to the transmission of the policy.

[186.] In this case, the evidence is that the contract concluded on the transmission of the policy. Mr. Jim Braniff was a professional in the insurance industry that committed Mr. Chandler to the terms, that he went and sought out in the market – including the exclusion for Windstorm. Mr. Chandler entered the insurance market through an industry professional. This is not the case of a consumer merely met with a boiler plate document which the consumer signed "on the fly". This case is not analogous to a consumer being met with standard term documents online that the consumer had no opportunity to read before accepting same with a "click" (**Andrew Green v Petfre (Gibraltar) Ltd. T/A Betfred**). I consider that the windstorm exclusion was sought out by Mr. Braniff on behalf of Mr. Chandler. The premium was also negotiated. Those elements were reflected in the issued insurance policy. Mr. Braniff was an insurance agent ensuring that the terms of the policy met the request of Mr. Chandler. He agreed to the usual terms and bound Mr. Chandler to it.

[187.] In this case, I also consider "all circumstances attending the conclusion of the contract." It is the nature of an insurance contract, that contracting parties may assume contractual obligations prior to the payment of a premium (contractual consideration). I think that in such an instance as this, circumstances attending the conclusion of the contract includes conditions attendant on the conclusion of the contract. In this case, one of the essential terms of the insurance contract is the amount of the premium and the due date. **(McGillvray**). Neither party has produced evidence of any quotation that is said to have preceded the transmission of the policy. The submission of Counsel for the Claimant is that the effective period of the insurance policy was January 2, 2019. This is not in dispute by the Defendant and I accept this on the evidence. This much is borne out on the face of the policy document (from 2nd January 2019 to 2nd January 2020).

[188.] On January 2, 2019, the premium and its due date were communicated to Mr. Braniff. The evidence is that the premium was not due until April 2, 2019. Counsel for Claimant also submits that the premium was not paid until April 2019. I find that the policy was transmitted on January 2 2019 following the negotiations between Mr. Braniff, agent of the Claimant, and the Defendants. What were some of the circumstances attending that transmission? The text of the January 2, 2019 email from the Defendants to Braniff addresses the payment of the premium. It reads:

> Your attention is particularly drawn to the Premium Payment Terms which stipulates that the premium must be paid to Insurers by 2nd April 2019. In order for Thompson, Heath & Bond Limited to meet this deadline on your behalf, and to avoid cover being cancelled, we need to be in possession of identifiable cleared funds at least 10 working days prior to the due date."

[189.] The email refers to "premium payment terms" to be found in the policy, the premium amount due, when due and the effect of non-payment. Mr. Chandler was non-committal as to how he found out how much premium was to be paid – although, on his evidence, he negotiated the premium. The evidence is that Mr. Chandler paid the premium. Had Mr. Chandler not paid the premium, the represented consequence was that the insurance coverage would be cancelled. In this particular case, the terms of the policy were sent and available for 3 months before this consumer was obliged to pay the premium. Had Mr. Chandler refused to, or failed to, pay the premium, he would not have become "irrevocably bound" to Clause G.

[190.] By way of observation, accepting that the Defendant's communication on forwarding the policy was that it would be cancelled if the premium was not paid, it is a reasonable conclusion that, after receipt of the policy on January 2, 2019, Mr. Chandler was still at liberty to walk away from the contract and to refrain from doing business with this insurer. As a consumer, he also had an opportunity to read the terms. There is no evidence of inducement or duress and there is no suggestion that Mr. Chandler was forced to take insurance with this insurer or to be left without insurance because there was no other option for insurance.

Limitation Clause

[191.] Much of the Claimant's submissions rest on the absence of actual knowledge of Mr. Chandler, that the contract was a standard form contract and that it had a limitation clause. None of those factors, by themselves, automatically invite a pronouncement that Clause G is unfair. UTCCA specifically relates to contracts where the terms are not negotiated and so that the terms were consisted of "boiler plate forms" does not advance the Claimant's case any further save to bring it under the Act.

[192.] A limitation clause, by itself, is not onerous. Counsel's submission that "as a matter of policy, a party may not contract outside the Limitation Act unless statute provides that the periods set out therein may be abridged" was given without supporting authority and is, in my opinion without merit. The cases, as reviewed, demonstrate that contracting parties may very well incorporate limitation clauses in their contracts. There is nothing in the Limitation Act which constrains parties and the freedom to contract allows contracting parties to abridge time. I adopt the opinion of Adams J in **Smith v Motor Owners Mutual Insurance Association Ltd. (Bahamas) [1983] BHS J No. 31** at paragraph 15, where he considered that of the limitation clause there under consideration: "Nothing in the Statute of Limitations makes it nugatory and of no effect".

[193.] Counsel for the Claimant argues that Clause G is an abrogation of rights. The Claimant's case is that "Clause G is an exclusionary term that substantially reduces the time within which an aggrieved party to a contract may bring an action before the Court thereby derogating from the statutory right set out in s. 5 of the Limitation Act. After two years from the date of loss, Clause G attempts to oust this Court's subject matter jurisdiction."

[194.] The limitation clause in this case is not, to my mind, comparable with the abrogation of statutory rights as found in **Thornton v. Shoe Lane Parking** where Mr. Thornton would have lost the right to sue for personal injuries as provided by statute. In **Thornton v. Shoe Lane Parking**, the clause was designed to relieve the Defendant from liability. That is not so in the present case. In this case, the insured has not lost the right to sue or to sue for a particular loss. There has been no limitation on the nature of the suit. "Excluding and hindering the consumer's right to take legal action or exercise any other legal remedy" is explained, by examples, in the Third Schedule and, the shortening of the period to bring a law suit does not, in my opinion, amount to excluding, encumbering or thwarting a legal right or remedy under either (b) or (q).

[195.] The Claimant submits that the Clause G abridges the Limitation Act and "changes the law" by reference to date of loss and not date of breach which counsel submits should be a reference to the date when the Insurer "wrongly" denies the claim. The Claimant submits that an interpretation consistent with "date of loss" works to the detriment of the consumer. The Claimant also contends the clause "redefines the concept of the date of breach" in this jurisdiction.

[196.] The nature of this contract is that it is an insurance contract. It is a contract of indemnity i.e. under the contract, the insurer becomes liable to the insured on the occurrence of a loss covered under the terms of the insurance contract. I accept that the principle of law is as set out in the case of **Quorum A/S v Schramm (No. 2) [2002] 2 ALL ER (Comm)**. Therefore, the right of recovery against the insurer accrues on the happening of the loss rather than at a later stage such as when the insurers refuse to pay.

[197.] I have no reason to conclude that this contract is an attempt to change the law in this jurisdiction. The interpretation is clear and transparent and there is no reason why "date of the denial of the claim" is more practical or workable than "date of the loss". There is no suggestion that it would be less easy to ascertain "date of loss" than "date of denial of the claim". The only reason advanced is that the consumer is afforded less time under the current formulation of "date of loss". That there is a shorter window than would otherwise exist does not make it contrary to good faith or "cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer." The consumer can ascertain the date of loss and proceed to enforce their legal right.

[198.] The real complaint of the Claimant is that he will not have the period that he says would normally be available to him under the Limitation Act. For the reasons given earlier, an abridgement of that time period is not unusual or onerous. In this case, the Claimant must show why 2 years is unreasonable or onerous or is contrary to good faith. No such evidence is before me. By reference, the period under consideration in **Smith v Motor Owners Mutual Insurance Association Ltd.** (Bahamas) [1983] BHS J No.31 was 12 months. In a regional case (Trinidad and Tobago), **Super Chem Products Ltd v American Life and General Insurance Co Ltd**, the period was 3 months.

Imbalance of Rights

[199.] Counsel for the Claimant submits that Clause G "causes imbalance". Counsel submits that the Defendant could "run out the time" by causing an investigation into the cause of the loss and by not having a conclusion or not denying the claim before the expiration of the two years. The fallacy in this submission lies in a premise that an insured would not have a cause of action on non-payment of a claim until there has been a rejection of the claim despite the fact that the said claim remains unpaid. The fallacy is also demonstrated by the launch of a lawsuit in Texas within the two year period. That lawsuit was unsuccessful, not because of a lack of a cause of action but because the gamble on jurisdiction failed.

[200.] I do not treat the fact that the Texas action was filed within two years as establishing that the Claimant knew of Clause G at the time. Mr. Sydow's evidence was that he, as legal adviser, did not know of it, and I do not regard the filing of the Texas proceedings as conclusive proof of actual awareness. Even so, the Texas action is of real significance. The Claimant was in fact able to commence proceedings within the two-year period. That substantially weakens any argument that Clause G was unfair in operation, or was impossible to comply with, or productive of practical injustice. The Texas action dispels the proposition that the limitation period caused a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

[201.] By email dated June 12, 2020, Mr. Chandler wrote to Mr. Jim Braniff to say that he had received a copy of his policy in Miami, asked for the "pertinent" information "in the Lloyds file", expressed frustration that nothing had been accomplished, and advised that "I have two law firms on the go; Nassau and Houston". Proceedings were thereafter launched in Texas (in October 2020). The difficulty in the Texas proceedings was not the inability to comply with the time limit, but the fact that proceedings were commenced in the wrong forum.

[202.] In my judgment, the Texas action, launched within the 2-year window, materially supports the Defendants' submission that Clause G operated in a commercially workable manner and did not deprive the Claimant of a realistic opportunity to sue.

[203.] Counsel for the Claimant also submits that Clause G was concealed. I have already dealt with this submission at length. In this case, I also have found that Mr. Chandler, being represented by an insurance agent, was committed to the standard terms presented by the Defendant and that Clause G, being one of the standard terms, was not onerous or unfair.

[204.] The non-negotiable, standard-form character of an insurance contract does not render it unfair. Instead, UTCCA requires a substantive assessment of the content and effect of each term. The fairness test, as set out in Section 3 requires a court to consider whether the term causes a significant imbalance in the parties' rights and obligations, is contrary to good faith, and is to the consumer's detriment.

Conclusion on Issue C

[205.] I conclude that Clause G has not been shown to be unfair, nor does it create a significant imbalance between the parties' rights and obligations to the detriment of the policyholder.

[206.] I do not find Clause G which restricts the ability of a Plaintiff to commence legal proceedings within the period set out in section 5 of the Limitation Act, in this context, contrary to the provisions of the Unfair Terms in Consumer Contracts Act so as to render it ineffective or otherwise unenforceable.

[207.] For the foregoing reasons, it is my opinion that this is not a case that falls to be considered as "unfair" as against this particular consumer, in light of all the circumstances. I therefore conclude that Clause G has not been shown to be unfair or otherwise unenforceable.

ISSUE D:

The policy wording concerning fire or explosion resulting from windstorm or hail

A. Whether General policy B1230GP04015A 19 that has been underwritten by the Defendants in favour of the Plaintiff covers direct loss by fire or explosion resulting from windstorm or hail.

[208.] The natural meaning of the policy wording is that it preserves cover for direct loss by fire or explosion resulting from windstorm or hail. However, the parties are disagreed on the matter of causation. Further, what would constitute a "direct loss" would be a matter of law, industry practice and evidence.

[209.] The Claimant's case is damage by fire/explosion. The Defendants' case is that the residence was destroyed by windstorm rather than by a qualifying fire or explosion. The existence of that wording does not determine the factual issue of causation nor resolve the area of conflict between the parties.

[210.] Given my foregoing determinations, this issue is a moot point because regardless of the meaning of the wording, and despite the presence of the wording, Clause G has been incorporated, is enforceable and operates as a time bar.

OVERALL CONCLUSION

[211.] I make the following findings:

1. Mr. Jim Braniff/USI acted as the agent of the Claimant, Mr. Chandler, in obtaining the insurance contract on the Defendants' usual terms.

2. The insurance policy was transmitted to the Claimant's agent on 2 January 2019, containing the Defendants' usual terms.

3. Clause G formed part of the insurance policy.

4. Clause G is not sufficiently unusual or onerous to require special notice or separate prominence beyond the ordinary transmission of the policy through the Claimant's intermediary.

5. Clause G was sufficiently notified and incorporated.

6. The fact that the Claimant commenced the Texas action within two years materially weakens the contention that Clause G was unfair in operation.

7. Clause G is enforceable and bars the present proceedings.

8. The policy wording concerning direct loss by fire or explosion resulting from windstorm or hail remains subject to factual determination on causation and does not displace the Defendants' limitation defence.

[212.] In the premises, the preliminary issues are answered as follows:

A. Whether the Claimant is barred from commencing/continuing this action against the Defendants as a result of Clause G of "Section I – Conditions" in the Policy ("the Limitation Clause") which reads:

> "G. Suit Against Us
>
> No action can be brought against us unless there has been full compliance with all the terms under Section I of this policy and the action is started within two years after the date of loss."

DETERMINATION: The natural and clear meaning of the words is to be construed as effecting a time bar. It bars proceedings not commenced within two years after the date of loss and unless there has been full compliance with Section I. The present proceedings were not commenced within two years after the date of loss. The Claimant is barred by Clause G.

B. Whether the following pre-requisites are necessary to give Clause G effect i.e. make it enforceable.

(i) Whether it is necessary to bring Clause G to the attention of the policy holder at or before the commencement of the effective period of the General Policy or immediately thereafter in order to give effect or to enforce to Clause G

(ii) Whether the Defendant(s) must take steps in Homeowners 3-Special Form to give prominence to Clause G of "Section I-Conditions" in order to give effect or to enforce Clause G

DETERMINATION: (i) In this case, Clause G was incorporated on the conclusion of the contract and by transmission of the policy on standard form terms, at the commencement of the effective period of the General Policy, to the agent of Mr. Chandler. Further, and alternatively, the email notice was sufficient to draw it to the attention of the Claimant.

(ii) Clause G is not shown to be unusual or onerous. Clause G did not require special prominence on the facts of this case. The Defendants were not required to take additional steps, beyond transmission of the policy through the Claimant's intermediary, to bring the standard terms and conditions, including Clause G, to the Claimant's attention.

C. Whether the following scenarios make Clause G ineffective i.e. render it unenforceable.

(i) Whether or not Clause G of "Section I-Conditions is a term that creates a significant imbalance between the parties' rights and obligations under General Policy B1230GP04015A19 to the detriment of a policyholder so as to render it ineffective and unenforceable.

(ii) Whether or not Clause G of "Section I-Conditions" which restricts the ability of a Plaintiff to commence legal proceedings within the period set out in section 5 of the Limitation Act is contrary to the provision of the Unfair Terms in Consumer Contracts Act so as to render it ineffective and unenforceable.

DETERMINATION: (i) Clause G has not been shown in this case to be unfair, nor does it create a significant imbalance between the parties' rights.

(ii) Clause G is not contrary to the provision of the Unfair Terms in Consumer Contracts Act so as to render it ineffective or otherwise unenforceable.

D. Whether General policy B1230GP04015A 19 that has been underwritten by the Defendants in favour of the Plaintiff covers direct loss by fire or explosion resulting from windstorm or hail.

DETERMINATION: The policy wording preserving cover for direct loss by fire or explosion resulting from windstorm or hail does not displace the Defendants' limitation defence and remains subject to factual determination on causation, if necessary.

[213.] I conclude and determine that Clause G is enforceable and bars the present proceedings.

COSTS

[214.] The Preliminary Issues have been resolved in favour of the Defendants. The effect of such a resolution is that the Claimant is out of time and is barred from continuing with these proceedings. In the circumstances, the Defendants are entitled to costs of the action, taking into account the provisions of Part 71, CPR and in particular the provisions of Part 71, Rule 71.6.

[215.] Therefore, in this matter, the Claimant shall pay the Defendants' costs of the action, to be assessed by a Registrar, if not agreed.

ORDER

[216.] The ORDER and directions of this Court are as follows.

(i) Clause G is enforceable and bars the present proceedings.

(ii) The Claimant shall pay the Defendants' costs of the action, to be assessed by a Registrar, if not agreed.

Dated this 17th day of June 2026

Carla D. Card-Stubbs, J

Justice