IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV-2014-463-209
[2016] NZHC 490

BETWEEN	JARDBORANIR HF TRADING AS ICELAND DRILLING Plaintiff
AND	SUMMIT HYDRAULIC SOLUTIONS LTD Defendant

Hearing: 7 and 8 March 2016

Counsel: J P Temm and D Prasad for Plaintiff
P Hunt and M Cavanaugh for Defendant

Judgment: 22 March 2016

Reissued: 23 March 2016

JUDGMENT OF BREWER J

This judgment was delivered by me on 22 March 2016 at 3:00 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Solicitors: Ken Patterson (Tauranga) for Plaintiff
McElroys (Auckland) for Defendant

Introduction

[1] The plaintiff (Iceland Drilling) suffered losses pleaded to be about $1.3 million as the result of the breakdown of one of its geothermal drilling rigs (Tyr).[1] Its case is that the defendant (Summit) caused the losses by performing substandard work on Tyr's main mast cylinder.

[2] Summit pleads that it cannot be sued for more than the price it charged for the work ($46,444). This is because its terms and conditions of trade provide:[2]

> 10.3 AT NO TIME shall the liability of the Company exceed the purchase price of the goods or services in question;

[3] Iceland Drilling contends that Summit's terms and conditions of trade do not apply. It says it had an oral contract with Summit for the work, and the terms and conditions were not part of it.[3]

[4] At the parties' request, a separate trial was ordered to determine the agreement between them and its terms.[4] This judgment provides the outcome of the separate trial.

Issues

[5] There are, perhaps, two issues I have to decide:

(a) Do Summit's terms and conditions of trade apply to the work done on Tyr's main mast cylinder?

(b) If so, does clause 10.3 limit Summit's liability to the price of the work?

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1 Iceland Drilling named its rigs for the old Norse Gods. Tyr was a god of war, but was also involved in matters of law and justice.

2 There are other relevant clauses in the terms and conditions, which I will discuss later, but this is the main one.

3 There is a fallback argument that if the terms and conditions do apply then they do not wholly limit its ability to sue Summit; but this is the main contention.

4 There are some related issues, but this is the main one.

Do the terms and conditions of work apply?

Factual background

[6] Iceland Drilling and Summit came into contact in November 2012 when Summit's sales engineer, Mr Simmonds, visited Tyr. He spoke with the rig engineer on duty that day and with Mr Holmgeirson, the project manager. He gave them a brochure advertising Summit's capabilities. There was a further visit, probably in early January 2013.

[7] These contacts bore fruit for Summit. Iceland Drilling's rigs had hydraulic cylinders which needed periodic maintenance. On 7 February 2013, someone from Iceland Drilling (probably Mr Atli) telephoned and spoke to Mr Simmonds indicating that Iceland Drilling required some service and repair work. The components were being delivered to Summit.

[8] Mr Simmonds, I find, replied that in order for Summit to do the work, Iceland Drilling would need to sign and return Summit's terms of trade as soon as possible. He asked to whom he should send the terms of trade and was given a name and an email address. I accept that it was the practice at Summit to require a new customer to complete a standard engagement document. The document is a single page document. It is headed "Application for Credit Account", and on the reverse of that page are Summit's terms and conditions of trade.

[9] In cross-examination, Mr Simmonds accepted that he did not refer specifically to the terms and conditions of trade. His practice was to refer to the need to complete the application for a credit account.

[10] At 11:31 am on 7 February 2013, Mr Simmonds sent a copy of what he referred to as "our credit application form" to the email address he had been given for that purpose by the person who had telephoned him on behalf of Iceland Drilling. The email address was that of Ms Gisladottir. She was known as Thury. I infer from the evidence of Mr Gudmundsson, then a director of Iceland Drilling and the senior representative in New Zealand, that Thury was one of his administration staff.

[11] The document headed "Application for Credit Account", and containing the terms and conditions of trade, was sent by Mr Simmonds in two parts. That is to say, the page headed "Application for Credit Account" was one part and the reverse of that page headed "Terms and Conditions of Trade" was the other part. So, when the attachment to the email was printed out at Iceland Drilling's office, there were two pages.

[12] According to Mr Gudmundsson, the details under the heading "Application for Credit Account" were completed by the administration staff. The details relate to the identity of Iceland Drilling, contact means, the names of its bank, accountants and solicitors, and also trade references. Beneath these details is the following:

> **DECLARATION:**
>
> I the undersigned, referred to herein this Application for Credit Account as 'the Customer', have read the Terms and Conditions of Trade set out over page and agree that those terms and conditions form an Agreement between the Customer and Summit Hydraulic Solutions Ltd, herein this Agreement referred to as 'the Company' and 'Summit'.

[13] Mr Gudmundsson printed his name and signed it in the signature block directly beneath this passage. His signature is not witnessed but the date is given as 7 February 2013.

[14] In his evidence, Mr Gudmundsson said that he cannot remember seeing the terms and conditions of trade and he thought it possible that the administration staff might have given him only the page that he signed. Certainly, the signature block on the page headed "Terms and Conditions of Trade" was not signed or dated, even though at the foot of the page there is the admonition:

> *NB: APPLICATION MUST BE SIGNED AS REQUESTED ON P1 & P2*

[15] On Friday, 8 February 2013 at 9:58 am, Thury returned the document (both pages) to Mr Simmonds by email, referring to it as "a credit application". Mr Simmonds in turn gave it to either Mr Chris Joseph, the Managing Director of Summit, or to his immediate superior, Mr Dane Joseph. Either way, the document was signed by Mr Chris Joseph on 8 February 2013. The signature is at the foot of the page headed "Application for Credit Account". Somebody, and I infer it was

somebody at Summit, has crossed out the portion on that page which provides for a personal guarantee where the applicant for a credit account is a company. Mr Gudmundsson did not complete that portion. However, it comes after his declaration and signature.

[16] Two cylinders from Iceland Drilling (from its Odin rig) arrived at Summit's workshop shortly before Mr Simmonds emailed the document to Thury. I find that Summit did some preparatory work on them (cleaning, disassembly and inspecting) before Thury returned the document to Mr Simmonds.

[17] On 18 February 2013, Mr Holmgeirson and Mr Hafsteinsson (Tyr's rig mechanic) visited Summit's workshop. They were shown around by Mr Dane Joseph. Mr Holmgeirson says that the purpose of the visit was to discuss whether summit was able to undertake the servicing of Tyr's main mast cylinder. He gave evidence that there was "extensive discussion" on the work that would be required. Mr Holmgeirson said that he agreed to give Summit the job and that "at the conclusion of the meeting" it was agreed that the cylinder would be delivered the next day.

[18] Mr Hafsteinsson gave evidence also that the purpose of the visit to Summit was to discuss whether Summit had the capacity to service the main mast cylinder. He corroborates Mr Holmgeirson's evidence that it was agreed to send the cylinder to Summit. I note that in cross-examination Mr Hafsteinsson was not as clear on this point as in his evidence-in-chief.

[19] Mr Dane Joseph has a different view of the meeting. He says that the purpose of the visit was to decide what work should be done on the cylinders already at the workshop. His evidence is that this is what happened. He showed Mr Holmgeirson and Mr Hafsteinsson the dismantled cylinders and, sometimes including the technician responsible for the work, discussed what needed to be done.

[20] Mr Joseph was adamant that there was no discussion of the main mast cylinder on this occasion. He acknowledges that the next day it was delivered to the workshop He says that was a surprise. The cylinder was far too heavy and far too

long for the workshop to handle. He had to make immediate arrangements for it to be taken to another company's premises that were available for hire.

[21] For reasons I will come to, I do not think it is necessary for me to decide whether or not the main mast cylinder was discussed at the meeting on 18 February. However, I think it unlikely that it was more than mentioned. The obvious point is that the most basic description of its weight and length would have led to Mr Joseph pointing out that it could not be accommodated in the workshop. Some other arrangement would be needed. Indeed, Mr Holmgeirson's and Mr Hafsteinsson's evidence was to the effect that they were surprised when they learned that the cylinder had been redirected to alternative premises.

[22] I was also given a diary note of Mr Hafsteinsson for 18 February 2013 (it was not shown to Mr Hafsteinsson but no objection was taken to it and it is a business record). His description of the meeting is general and does not mention discussing the mast cylinder. However, after the paragraph describing the visit there is a final paragraph which reads:

> Decided to send them the big mast cylinder and it will be loaded onto a truck tomorrow along with the mast lifting cylinder and parts for the weight indicator. This will be the last items sent to their workshop hopefully.

[23] This is consistent with a decision being taken after the visit. It is significant that it relates to items other than the cylinder which no-one says were discussed during the visit. It is consistent also with the evidence that Iceland Drilling would send items to Summit without notice and without any job specification. Summit would receive and inspect them and then (mostly) telephone Iceland Drilling to discuss what work should be done.

Discussion

Is the exclusion clause valid?

[24] The law has long recognised the validity of exclusion clauses.[5] In *DHL International (NZ) Ltd v Richmond Ltd*, the Court of Appeal provided the conceptual basis for upholding these clauses in the commercial sphere. In that case, Richmond had signed a contract containing a clause stating that DHL was not to be liable "in any event" for any consequential or special damages or other indirect loss "however arising". The Court said:[6]

> In international commercial arrangements of this kind involving major commercial organisations, it would be unsafe to approach the interpretation of their contract on the footing that it was the product of unequal economic power or to regard standard terms and limitation provisions as somehow suspect and so give them a strained construction to protect the shipper. Such provisions are to be given their natural plain meaning read in the light of the contract as a whole. Only in that way will the reasonable expectations of the parties as expressed in their contract be fulfilled.

[25] Thus, as the Court of Appeal confirmed in *i-Health Ltd v iSoft NZ Ltd*, the general approach to the interpretation of exclusion clauses should be the same as that applying to the interpretation of contracts generally.[7] The task for the Court is to give effect to the mutual intentions of the parties as they objectively appear. It is clear, therefore, that clause 10.3 is not invalidated by virtue of its nature as an exclusion clause. Rather, the question is whether it formed part of the contract between Iceland Drilling and Summit.

Did the terms of trade form part of the contract?

[26] Mr Temm, counsel for Iceland Drilling, submitted that Summit's terms and conditions do not form part of its contract with Iceland Drilling. Mr Temm advanced two lines of argument in support of this submission.

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5 Exclusion clauses have been upheld as far back as *Parker v South Eastern Rly Co* (1877) 2 CPD 416 where the Court articulated the requirement that a party seeking to rely on an exclusion clause must give the other party reasonable notice of that clause.

6 *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA) at 17.

7 *i-Health Ltd v iSoft NZ Ltd* [2011] NZCA 575, [2012] 1 NZLR 379 at [43]. The Court cited *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 and *Vector Gas v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 in reference to the "interpretation of contracts generally".

[27] His primary argument was that the signed return of the credit application form should be seen, in terms of contractual formation, as an offer rather than as an acceptance. This is because Mr Gudmundsson only partially completed the credit application form. The application form requires an applicant to "sign both sides of the document". Mr Gudmundsson did not sign the second page. Further, Mr Gudmundsson did not agree to provide a personal guarantee as the form requested. These omissions, Mr Temm argued, gave Summit the option to accept the partially completed application or reject the application and require the documentation to be completed more fully. He submitted further that a credit application ascertains credit worthiness and inquires as to business partners and trade references. It does not form part of an agreement for the maintenance and service of hydraulic cylinders. For these reasons, Mr Temm submitted that the signed return of the credit application form was a contractual offer on the following terms:

(a) That it was a document limited to the credit application details;

(b) That no personal guarantee would be provided for a company debt; and

(c) That the express terms and conditions set out on the second page of the application are not acknowledged or accepted.

[28] Mr Temm's subsidiary argument is that Summit's terms and conditions of trade were never drawn to Iceland Drilling's attention. In particular, Summit did not notify Iceland Drilling of the limitation clause. As a result, Summit's terms of trade were not validly incorporated into any contract that may have existed between Iceland Drilling and Summit.

[29] The major obstacle facing Iceland Drilling is that Mr Gudmundsson signed a declaration confirming he had "read the Terms and Conditions of Trade set out over the page and [agreed] that those terms and conditions form an Agreement between the Customer and Summit Hydraulic Solutions Ltd". It is now well established, both overseas and in New Zealand, that a person who signs a document which is known

by that person to contain contractual terms, and to affect legal relations, is bound by those terms.

[30] This general rule can be traced back to the case of *L'Estrange v Graucob* where the English Court of Appeal held:[8]

> When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

The Court in *L'Estrange* acknowledged that where a contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms or conditions. The Court held, however, that this rule has "no application when the document has been signed".[9]

[31] In *Toll (FGCT) Pty Limited v Alphapharm Pty Ltd*,[10] the High Court of Australia affirmed *L'Estrange* for the purpose of Australian law. It rejected any importation of the notice requirements that apply to unsigned contracts to signed contracts.[11] The Australian High Court stated the general rule in very similar terms to *L'Estrange*:[12]

> The general rule, which applies in the present case, is that where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document.

[32] The New Zealand Court of Appeal affirmed in *BBX Financial Solutions Pty Ltd v Wallace* that the general rule articulated in *L'Estrange* and *Toll* applied in New Zealand.[13] In *Ravensdown Fertilizer Co-op Ltd v Eveleigh*,[14] Ronald Young J applied this same rule. He said:[15]

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8 *L'Estrange v Graucob* [1934] KB 394 (CA) at 403. See also at 406 per Maugham LJ.
9 At 403.
10 *Toll (FGCT) Pty Limited v Alphapharm Pty Ltd* [2004] HCA 52, (2004) 219 CLR 165.
11 At 184–186.
12 At 185.
13 *BBX Financial Solutions Pty Ltd v Wallace* [2011] NZCA 667 at [48]–[49].
14 *Ravensdown Fertilizer Co-op Ltd v Eveleigh* [2012] NZHC 660 (HC).
15 At [38].

> Here, the fact there was a guarantee sought was expressly brought to the defendants' notice by referring them to the term and conditions on the reverse. Further, the defendants signed the contract which directed them to the conditions on the reverse. This can be contrasted with the "ticket" cases. There, no signature on the ticket was required acknowledging its contents. Nor could it be said the defendants were in any way misled. They were told to refer to the terms and conditions on the reverse. The fact they chose not to do so is hardly the plaintiff's responsibility.

[33] The legal position is therefore clear. Iceland Drilling bound itself to Summit's terms and conditions as soon as Mr Gudmundsson signed a declaration stating that he had read the terms of trade and agreed that those terms formed an agreement between the parties. I am unable to accept Mr Temm's submission that the partially completed credit application form amounted to a contractual offer on different terms than those stipulated in the application form. That submission is completely inconsistent with Mr Gudmundsson signing the declaration. By signing the declaration, Mr Gudmundsson clearly communicated to Summit the following statement: "I have read the terms and conditions of trade and agree that those terms and conditions form an agreement between Iceland Drilling and Summit." That is a perspicuous statement of contractual intention. There would need to be strong evidence of a contrary intention to displace the declaration's plain meaning. In my view, Iceland Drilling has not adduced such evidence.

[34] The failure to sign the second page of the application is not cogent when considered against the declaration. A reasonable and fully informed person standing in Summit's position would not take the lack of a signature on the second page as negativing the declaration. I agree with Mr Hunt that to hold otherwise would be counter to commercial commonsense.

[35] I find the refusal or failure by Mr Gudmundsson to provide a personal guarantee to be immaterial. The provision of a guarantee stood separately from Iceland Drilling's acceptance of the terms of trade.

[36] Finally, the fact that Summit's terms of trade were annexed to a credit application does not alter the legal position. A broadly similar issue arose in *Toll*. In

that case, the High Court of Australia took no issue with general terms of contract being incorporated into an application for credit:[16]

> The Application for Credit was in substance an application by Richard Thomson to become an account customer, and it was to cover all future dealings with Finemores. The Application for Credit had been referred to in the first written communication from Finemores to Richard Thomson. The evidence was against any conclusion that the conditions were abnormal. There was no evidence to support a finding that applications for credit in the transport industry do not normally contain general terms of contract.

[37] In the present case, the return of the application for credit was a specific requirement of Summit for it to begin work on Iceland Drilling's behalf. That was made clear by Mr Simmonds on 7 February 2013 when he told a representative from Iceland Drilling via telephone that for Summit to do the work, Iceland Drilling would need to sign and return Summit's terms of trade as soon as possible. I do not consider that the preparatory assessment work done while waiting for the return of the terms of trade has any contractual significance. Further, there is no evidence that in any of the discussions about work on the main mast cylinder there was any reference to the terms of trade.

[38] Originally, Mr Temm sought to argue that even if the terms of trade formed part of the contract, these terms were varied by an oral agreement purported to have been made on 18 February 2013. At the hearing, however, Mr Temm conceded that there was insufficient evidence to support that proposition. This was a proper concession to make because there is no evidence that the discussion on 18 February went to the terms of trade. There needed to be specific discussion on that point to oust the terms of trade because those terms clearly attach themselves to jobs commenced after they are signed:

> 2.1 Any instructions received by Summit from the Customer for the supply of Goods and Services shall constitute a binding contract and acceptance of the Terms and Conditions contained herein. Summit rejects all additional or different terms in any of the Customer's purchase order or documents.
>
> …
>
> 10.3 AT NO TIME shall the liability of the Company exceed the purchase price of the goods and services in question.
>
> (Original capitalisation)

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[16] At 187–188.

[39] Thus, the terms of trade clearly covered agreements made after the credit application form was signed and returned. As a result, it is irrelevant whether Mr Holmgeirson is correct when he says Mr Dane Joseph agreed at the meeting to work on Tyr's main mast cylinder. There had to be specific discussion as to the terms of trade before any agreement made on 18 February would fall outside the ambit of those terms. There is no evidence of this having occurred. As a result, I am unable to find that the standard terms of trade do not apply.

[40] I turn now to Mr Temm's secondary argument that the nature of the exclusion clause was such that Iceland Drilling's attention had to be expressly drawn to it. There is authority to suggest that in exceptional cases, where the contractual term in issue is unusually onerous, a higher degree of notice may be required. In *Spurling Ltd v Bradshaw*, Denning LJ said of some clauses he had seen that they "would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient".[17] I am not aware, however, of any case where this rule has been applied in favour of a commercially astute plaintiff who has signed a document and thereby agreed to its terms.

[41] In any event, clauses 10.3 through 10.5 are not exceptionally onerous clauses. The courts routinely uphold contractual terms limiting and excluding liability. This is particularly true of the commercial context where the parties are capable of looking after their own interests, and the need for certainty assumes a greater significance. In the present case, Iceland Drilling and Summit are commercial parties capable of looking after their own interests.[18] Any requirement of notice was easily satisfied when Summit provided its terms of trade on the reverse of its credit application form and required Iceland Drilling to sign a declaration saying it had read those terms.

Does clause 10.3 limit Summit's liability to the price of the work?

[42] Mr Temm submitted that Summit's terms of trade should be construed *contra proferentem*. He sought to establish two ambiguities in Summit's terms of trade that are sufficient to invoke this rule of strict construction. Mr Temm first points to the

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17 *Spurling Ltd v Bradshaw* [1956] 2 All ER 121 at 125.

18 Above n 6.

use of the word "Company" in clause 10. He notes that the word "company" is not included within the definition of Summit in clause 1.1 He also notes that the word "company" is not defined anywhere in Summit's terms of trade. Mr Temm submitted that this creates an ambiguity because clauses 10 and 11 are the only clauses in Summit's terms of trade that refer to the "company" rather than to "Summit".

[43] The declaration signed by Mr Gudmundsson, however, removes any ambiguity that may have arisen from the use of the word "company. The declaration relevantly provides:

> … [I] agree that those terms and conditions form an Agreement between the Customer and Summit Hydraulic Solutions Ltd, herein this Agreement referred to as 'the Company' and 'Summit'.

It is clear, therefore, that the reference to "the Company" in clause 10 is a reference to Summit. No ambiguity arises.

[44] Mr Temm then points to the fact that clause 10.3 refers to "goods or service" rather than "goods and services", which is defined in clause 1.4.[19] Accordingly, the phrase in clause 10.3 is disjunctive whereas the one in clause 1.4 is conjunctive. Mr Temm notes that Summit provided both goods and services to Iceland Drilling. He argues that the disjunctive phrase in clause 10.3 contemplates the provision of *either* goods *or* services rather than both. That, he submits, is sufficient to give rise to an ambiguity invoking the *contra proferentem* rule.

[45] I am unable to accept this submission. Clause 10.3 refers to the "goods or service in question". "Goods" has its own definition in clause 1.3 while the definition of a "service" is clearly subsumed within the definition of "goods and services" in clause 1.4. The use of the disjunctive "or" in clause 10.3 makes no difference to its interpretation in the context of the document.

[46] As I have said, the general approach to the interpretation of exclusion and limitation clauses should be the same as that applying to the interpretation of

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[19] "Goods" is also defined in clause 1.3 without any reference to "services".

contracts generally.[20] The Court in *i-Health Ltd v iSoft NZ Ltd* noted, however, that in the context of exclusion clauses, the Court will ordinarily look for clear language or necessary implication before enforcing the clause in issue. That is because any reasonable person, interpreting a contract objectively, cannot expect that the other party would lightly limit its common law right to sue for damages.[21] Having said that, the *contra proferentem* rule of construction only applies if there are genuine ambiguities. Strained or tortured constructions upon which to base ambiguities are not appropriate.[22]

[47] In applying these principles, I am unable to see any ambiguity sufficient to invoke the rule of strict construction. When the document is construed as a whole and in its commercial context, no ambiguity arises. It is clear that the reference to "goods or service" in clause 10.3 is covered by the definitions of both "goods" in clause 1.3 and "goods and services" in clause 1.4. It is also clear by way of the declaration that references to "the Company" in clause 10 are references to Summit. Mr Temm has endeavoured, somewhat desperately, to create ambiguities by straining the plain meaning of Summit's terms of trade.

Decision

[48] It follows that I find against the plaintiff and rule:

(a) Summit's terms and conditions of trade apply to the work done by it on Tyr's main mast cylinder; and

(b) Summit's liability to Iceland Drilling (if any) is limited by cl 10.3 to the price of the work.

Addendum

[49] The foregoing is the Judgment as I delivered it initially. As I noted at [4], there were related issues. I did not address them because, in the context of the trial,

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20 At [25].

21 *i-Health Ltd v iSoft NZ Ltd* HC Auckland CIV-2006-404-007881, 8 September 2010, Asher J at [20].

22 *Victor Hydraulics Ltd v Engineering Dynamics Ltd* (1996) 2 NZLR 235 (HC) at 241 citing *SGS (NZ) Ltd v Quirke Export Ltd* [1988] 1 NZLR 52 (CA).

my decision on the issues I addressed overtook them. However, at the joint request of counsel, I have recalled the Judgment to answer them explicitly. They are:

(a) *Whether a duty of care was owed by Summit to Iceland Drilling?* At the hearing, Iceland Drilling conceded that should I find that Summit's terms and conditions apply then no duty of care in tort was owed by Summit to Iceland Drilling. I made that finding and it follows that Iceland Drilling's cause of action in negligence cannot succeed and is dismissed.

(b) *Whether the Sale of Goods Act applies?* At the hearing, Iceland Drilling conceded that should I find that Summit's terms and conditions apply then the Sale of Goods Act does not apply. I made that finding and it follows that Iceland Drilling's cause of action under the Sale of Goods Act cannot succeed and is dismissed.

Costs

[50] I am minded to award costs on a 2B basis. However, in case there are matters I am not aware of, or in the event of disagreement as to quantum, Summit may file a memorandum within 20 working days of the date of this Judgment. Iceland Drilling may file its memorandum in reply within a further 20 working days.

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Brewer J