OUTER HOUSE, COURT OF SESSION

[2020] CSOH 79

CA167/19

OPINION OF LORD CLARK

In the cause

PETER J STIRLING LIMITED

Pursuer

against

BRINKMAN (HORTICULTURAL SERVICE) UK LIMITED

Defender

Pursuer: Massaro; Allan McDougall
Defender: Smith QC, Murray; DAC Beachcroft Scotland LLP

13 August 2020

Introduction

[1] The pursuer operates a farming business, which includes growing a large amount of strawberries on several farms. The strawberries are planted through holes in polythene sheeting that is used as ground cover. For many years, the defender supplied the polythene sheeting. The pursuer claims that the sheeting supplied in August 2016 was not fit for purpose and as a result the strawberry crops were affected and losses incurred. The pursuer seeks an award of substantial damages for this alleged breach of contract. The defender claims that its terms and conditions were sent to the pursuer and incorporated into the contract and that these give exclusive jurisdiction to the courts in England and Wales. The

pursuer denies receipt of the terms and conditions. The case called before me for a proof before answer, restricted to the question of whether the defender's terms and conditions were incorporated into the contract and as a consequence whether this court has jurisdiction. This was the first Court of Session proof to be dealt with by way of video-conference, as a result of the Covid-19 pandemic. As a result, parties required to provide information to the court in advance of the proof about a number of technical and witness-management issues. At the commencement of their testimony, witnesses were required to confirm compliance with the directions they had been given by the court, including being alone in the room, having no access to means of communication with others and not having perused the productions sent to them.

Background

[2] For a number of years, the pursuer and its predecessor businesses have purchased polythene sheeting from the defender for use at the farms. The pursuer's business was formerly run by Peter Stirling as a sole trader. In December 2011, the business entity changed to a limited liability partnership named P J Stirling LLP. The present pursuer is a private limited company, incorporated on 18 June 2014. Mr Peter Stirling is the sole director and the majority shareholder. The business was transferred from the LLP to the pursuer in January 2016. Letters dated 12 January 2016, addressed to "Brinkman Agricultural Services" were sent by both the LLP and the pursuer to advise the defender of the change in the business entity. In around June or July 2016, the pursuer's soft fruit manager Mr Kenneth Shellard placed an order, in a telephone call with the defender's Chief Executive Officer Mr Glenn Notley, for blue polythene covers. Exchanges by email about the order then followed. Typically, orders were made and sales agreed informally in communications

between Glenn Notley and Kenneth Shellard, who were the respective principal points of contact for any sales by the defender to the pursuer. The pursuer purchased a quantity of blue polythene, which was delivered to the pursuer in August 2016. The defender subsequently sent an invoice dated 19 September 2016 to the pursuer, for payment of £21,488 plus VAT. The pursuer received the invoice on 26 September 2016 and on 14 November 2016 paid this sum to the defender. Thereafter, the dispute as to the alleged deficiencies in the polythene arose. The pursuer's farm office is at Seahills Farm. It also has an administration office at an industrial estate in Arbroath. The administration of the pursuer's business is shared between these two offices. Until mid-2019, Seahills Farm was known as Windyhills Farm. The farm is located near to Auchmithie, in Arbroath.

[3] In the course of discussions between them about the points in dispute, on behalf of the defender it was stated to the pursuer that the defender had sent a letter dated 30 July 2012 to P J Stirling LLP which was said to be in the following terms:

> "**Windy Hill Farm**,
> Authmithie,
> Arbroath,
> Angus,
> Scotland,
> [postcode]
>
> **NEW TERMS AND CONDITIONS OF SALE**
>
> As from 6th August 2012, Brinkman (Horticultural Service) UK Limited is introducing new terms and conditions of sale that will cover the transactions between our two organisations. A copy of these terms and conditions is enclosed.
>
> Any deviation to our standard terms and conditions, including customers referring to their own terms and conditions, must be agreed in writing between the parties. Should you have any questions about this please contact the undersigned in writing. We are also currently updating our customer account records. As such, please can you confirm an email address for the accounts department which we can use for future accounts correspondence if you could send a confirmation from that email address to [Elaine's email address] we will update our records accordingly.
> Yours faithfully

[signed]

Mr Stephen Mortimer
Managing Director
(On behalf of Brinkman (Horticultural Service) UK Limited)"

The defender's position was that the terms and conditions were enclosed with that letter. The pursuer stated that the LLP did not receive the letter or its alleged enclosure.

[4] The defender's terms and conditions were drafted by a firm of solicitors and sent by that firm to the defender in July 2012. A template letter dated 26 July 2012 was prepared by the defender to be sent to its customers, enclosing a copy of its terms and conditions. Clause 11.2 of the terms and conditions prorogates exclusive jurisdiction to the courts of England and Wales in respect of all disputes arising out of a contract governed by those conditions. Clause 7.4 of the terms and conditions seeks to limit the defender's liability for loss arising under or in connection with a contract governed by the terms and conditions. The defender did not receive an email from the pursuer in the terms requested in the letter. The parties are in dispute over whether the letter dated 30 July 2012 was sent by the defender or received by the pursuer.

The parties' averments

[5] The averments for the pursuer include the following:

> "The letter is not addressed to P J Stirling LLP nor to any equivalent or similar trading name or description. The postal address on the letter is incorrect if intended as the LLP's trading address. The office for the Pursuer's (and formerly the LLP's) business is only one of eight occupied properties at Windyhills Farm. The other seven are residential properties. On its business correspondence the Pursuer (and formerly the LLP) always used its name and never referred to itself as 'Windyhills Farm'. Three of those properties at the Farm are owned, and were then owned, by people unconnected with the business. Three are let out, and were let out at the time. The letter was not seen by Mr Peter Stirling. It would not have been seen by either of the other members for the reasons hereinbefore condescended upon. No

other employee had authority to accept any contractual terms on behalf of the LLP. Had such a letter been received by an employee of the LLP , it would have been passed to Mr Peter Stirling or the then office manager, Mr Tom Mann, for his consideration. The Pursuer has as a matter of course always retained important business correspondence received by it and the LLP. It does not have a copy of the letter, nor of the Defender's terms and conditions. The Pursuer has no record of it or the LLP ever having received the terms and conditions. Neither the Pursuer's director, nor the former LLP's members, had seen the terms and conditions now produced by the Defender and had no knowledge of their existence prior to the pre-action correspondence for this action. The previous course of dealing condescended upon by the Defender was not therefore conducted on the basis of the Defender's terms and conditions. The 'communications system' between the parties, and between the LLP and the Defender, was typically by email. When deliveries were made by third party couriers they only occasionally came with a delivery slip. Otherwise, invoices and monthly statements were usually emailed. The Pursuer's Susan Spink did contact the Defender's Elaine Thorely and others on various occasions to explain that invoices did not appear to have been received and asked for them to be emailed or posted. There does therefore appear to have been historic issues with the 'communications system' which were identified by the Pursuer and before it by the LLP to the Defender. *Esto* the terms and conditions document was incorporated into the parties' contract (which is denied), there was no specific consent on the part of the Pursuer (or the LLP) to the exclusive jurisdiction clause and thus it was not incorporated …"

[6] The averments for the defender include the following:

"In July 2016, the pursuer contacted the defender by telephone to ask for delivery of 136 rolls of polythene. An invoice was then issued by the defender to the pursuer, a copy of which is produced. The invoice stated on the front that "All business subject to our standard conditions of sale which include retention of title clause." Predecessor corporate entities of the pursuers commenced trading with the defenders in about the year 2000. All such entities traded from Windyhills Farm. The defenders' notepaper states the business address to be 'Windyhills Farm'. A lengthy and consistent course of dealing was established between those entities and the defenders. Correspondence was taken from details provided by the Pursuers in their prior iteration as the LLP, from a 'merge' database which was used for all correspondence including invoicing and receipts, and advice on credit facilities. The pursuers have never suggested prior to the averments in this action that the communication system to Windyhills Farm was in some way defective. Until January 2016, that business was carried on by Peter J Stirling LLP ('the LLP') from the said address. On 30th July 2012, the LLP was notified by letter that 'as from 6th August 2012 ... new terms and conditions of sale … will cover the transactions between our two organisations.' A copy of the terms and conditions was enclosed. Although the letter was addressed to 'Windy Hill Farm', no organisation other than the LLP traded with the defenders from those premises at that time. The address on the pursuers' headed notepaper is 'Windyhills Farm'. Trade continued between the LLP and the defenders as from that date and was thus under the terms and

> conditions enclosed. By letter dated 12th January 2016, the LLP wrote to the defenders advising that 'the business of PJ Stirling LLP is to be transferred to Peter J Stirling Ltd'. The letter was addressed to "Brinkman Agricultural Services". However, the LLP, and the pursuers, clearly intended that to be a reference to the defenders and continued to trade with the defenders. That letter stated that the 'existing contract or arrangements with the LLP (the 'contract') will be transferred to the Ltd Co.'. The terms and conditions referred to in the letter of 12th January 2016 [*sic*] were thus incorporated into any further trading as between the pursuers and defenders. Trade did, thereafter, continue between the parties as it had between the LLP and the defenders and did so under the terms and conditions referred to in the correspondence in 2012."

Evidence

Witnesses for the pursuer

[7] Peter Stirling explained how the farm business operated, including in relation to issuing orders for products, receiving invoices and making payments. He described the role of the various employees. He is involved in all strategic decision-making and was solely in charge of running the farming business during the lifetime of the LLP but left most of the day-to-day running of the business to the key staff. He was not aware that the business had entered into any general contractual arrangements with any of its suppliers and had no recollection of ever seeing any "standalone set of terms and conditions" sent from any supplier. He spoke to the letters sent out in January 2016 about the business changing hands from the LLP to the pursuer. At that time, the LLP did not, as far as he was aware, have any contracts with any suppliers, other than payment terms. The letter allegedly sent by the defender on 30 July 2012 was not addressed to the LLP and was addressed to "Windy Hill Farm", as opposed to Windyhills Farm. It also used the name "Authmithie" rather that Auchmithie, which is the village local to the farm. In its correspondence, the LLP had always identified itself by its name and given the address as "Windyhills Farm, Arbroath, Angus" with the postcode. There are (and were in 2012) seven residential buildings on the

farm and one farm office, which is a separate building from the farmhouse. There are three cottages that are owned by third parties, unconnected with the farm and three cottages owned by him but tenanted by other people involved in the farm business. The seventh residential building is the farmhouse in which he resides. The farm office is situated next to the farmhouse and the farm steading. Because of the number of properties on the farm, there had been a long history of postal mix-ups, with letters and parcels being delivered to the wrong addresses on the farm, even when the correct address has been on the envelopes. The farm office had received mail which should have been delivered to the three independent cottages, as had his farmhouse and the other three staff members' cottages. There had also been times when wrongly delivered mail had been handed into the office by farm residents, including farm manager Gary Bruce while he resided in his cottage known as "The Bothy". Even in the last month there had been problems with mail going astray. There had never been any indication made to him that the defender wished to formalise the relationship by the parties agreeing contractual terms. None of the staff, who were experienced, had any recollection of receiving the letter dated 30 July 2012. Searches had not revealed any copy of it. There was no trace of an email having been sent to the email address in the letter. The defender did not follow this up by either calling the pursuer or sending a copy of this letter by email to ensure the pursuer received it. He understood that there had been established e-mail communication between Susan Spink from the farm and Elaine Thorely of the defender prior to the date of this letter. While some invoices from the defender addressed to "Windy Hill Farm" had been received, the email correspondence showed, around 2012, invoices being re-sent by the defender due to the originals not having been received by the LLP. The invoices attached to these e-mails were addressed to "Windy Hill Farm" at the same address given in the letter dated 30 July 2012. The invoice for the

polythene ordered in mid-2016 stated "All business subject to our terms and conditions of sale which include retention of title clause". Mr Stirling had learned, during the course of this court action, that this was present at the bottom of all of the defender's invoices produced in the action. He did not generally have sight of invoices as these were simply received and processed by the administrative staff in the office.

[8] In cross-examination, Mr Stirling accepted that there was no other place called "Authmithie", nor was there any other farm with the name stated in the letter. The postcode in the letter was the postcode of the farm office and a few other premises. If the letter had been delivered to, for example, a cottage on the farm it would have been fairly easy to work out where it should go. But there had been another mistake just a few weeks ago. No issues had been raised by the pursuer about use of the wrong address. The preferred method for the pursuer to receive correspondence from the defender had moved from post to email and then Ms Spink had asked the defender to go back to post again. It was not impossible that the letter had been sent, but the staff were very methodical. The business had never been called Windy Hill Farm.

[9] Susan Spink is the office manager for the pursuer (as she was for the LLP) and she works from the farm office. Her role includes processing staff wages, organising and processing the paperwork for seasonal staff, matching invoices with purchase orders and delivery (or goods received) notes, and carrying out other administrative tasks such as opening up and passing round any mail that comes into the farm office. She opens the mail each morning and directs it to the most appropriate person. If she was on holiday, the mail would have been opened by a colleague. The person at the defender with whom she had most direct contact was Elaine Thorely. In 2012, the witness had requested that invoices be sent over as they were missing on the pursuer's system and the pursuer could not trace

having received the originals. She later asked if all invoices could be sent by post due to the volume of e-mail traffic she was receiving. She did not recall receiving a copy or having sight of a set of any of the defender's terms and conditions or any contract between the LLP or the pursuer and the defender. A thorough search had been carried out of the pursuer's cupboards, files and e-mails and a search of staff e-mails had also been done by the pursuer's IT company. No trace of any terms and conditions or a copy of the letter dated 30 July 2012 were found. To her recollection, she had not seen the letter before being shown it as a production in the case. If it had been delivered, then she expected that she would have opened it. Having checked her personal diary, on Thursday 2 August 2012 she left work an hour early to go away for the weekend. On Wednesday 8 August and Thursday 9 August she was on holiday. Even if she had not been at work on the morning the letter arrived, it was the sort of thing that would have been left for her to distribute following her return to work. Had she opened this letter up, she would have put it on Tom Mann's desk or may possibly have passed it to Peter Stirling. This would have been done because it was important to the company. Tom Mann's desk was just across from her desk. Sometimes there had been issues with external mail reaching the farm office. For example, the office would sometimes get mail in for other cottages on the farm. This had gone on since before 2012. There was no trace of any e-mail having been sent to the defender confirming an e-mail address for the pursuer's accounts department, in response to the request in the letter for that to be done. She was not aware of any follow-up e-mail or other correspondence chasing up a response to their letter. The defender would have been sent correspondence with the correct name and address of the LLP in early 2012. It was surprising that the defender's staff still addressed the letter dated 30 July 2012 as they did. The LLP would never identify itself as "Windy Hill Farm" or "Windyhills Farm". However,

she was aware that invoices were being sent by post and addressed in the same manner as the letter and that a number of these were received and paid by the pursuer. But some invoices addressed in this manner were never received and had to be requested by email as noted earlier. It was not part of her role to read the small print on invoices.

[10] She did not work on Fridays, including in 2012. 30 July 2012 was a Monday. She had no basis to think that the letter might have been received and then lost. Her primary responsibility was invoicing. It was correct that she had suggested that the defender should use the postal service. She "100%" trusted her colleague who, when she was on holiday, would open the mail and put it into two folders (invoices and then other items) and leave them for her to distribute. The postcode on the letter was correct. Even in the past week mail addressed to people in the farm cottages had arrived at the office. In carrying out her search, she hadn't searched boxes which were to deal with things other than items like the letter. Terms and conditions would not be put in these other boxes. She could not say that the letter had definitely not been received, but if it had been she would have been asked to reply to it and there was nothing to show that had occurred. It would be very hard for a document to be mislaid in such a small office. Only about ten items of mail would have come in each day during mid-2012.

[11] Kenneth Shellard is the pursuer's soft fruit manager. He lives in a cottage located on the farm formerly known as Windyhills Farm. He has his own desk and computer in the farm office, which he uses as a base, although he is out on the fields for most of the working day. The office manager, Ms Spink, worked in an adjoining room in the office. She was responsible for the clerical work and opens all mail that comes into the farm office and directs it to the relevant people. There are two postmen, one of whom is diligent and the other less so. When the latter is working, some of the neighbours' post will be delivered to

the farm office and items in the pursuer's post will go to the neighbours. There had been issues with his personal post being delivered to neighbours and to the office in the past. He kept files of the paperwork for each growing year and at the year-end these were placed into cardboard boxes for storage. Electronic files are stored on his computer. His principal involvement was in the practical aspects of the business. He would regularly speak on the phone with Glenn Notley about the pursuer's requirements, or communicate with him by email, but there was never any discussion about formalising the arrangements or agreeing a contract. Terms and conditions were never mentioned in any of the discussions and were never sent with any correspondence. He could not recall ever seeing the letter dated 30 July 2012 with the terms and conditions. If he had received it then he would have kept it; he would have remembered it as being quite unusual. He would have drawn it to the attention of someone more senior and he would then have put it in his general miscellaneous paperwork folder. He had searched his emails and had found no email sent to Elaine at the defender as requested in the letter. Even in the last two to three weeks there had been incidents of mail to other farm houses being passed into the office. If a document was "100% relevant" to him he would action it and return it to the administrative part of the office. Had he seen the letter, he would have had a verbal discussion with his senior colleagues about it. It would not have been his responsibility to respond to the letter. It was surprising that the letter said to have been sent had not been sent by recorded delivery. While previous invoices had been sent to "Windy Hill Farm", his focus would have been on the cost of supply. Issues about an incorrect name and terms and conditions were more of an "an office based/admin clerical thing". If Ms Spink had opened the letter and seen the terms and conditions, his view was that the document should have stayed within the administrative part of the office.

[12] Tom Mann is the pursuer's financial officer, as he was for the predecessor businesses, and has been in that position since 2000. Prior to 2016, he used to split his time between the pursuer's office in the industrial estate in Arbroath and the farm office. His role mainly involves the preparation and management of accounts. He is not involved with processing orders or payments and has very little, if any, contact with suppliers. The office managers would generally be the ones who had direct contact with suppliers about such things as invoices. The procedures for receiving and processing incoming documents, such as invoices, at the farm office were relatively straightforward and had been in place since he started work with the business. When mail arrived the same system was, and is, in place. Opening of any mail would be dealt with by the office manager. All mail would be opened by that person. Only items marked "private and confidential" or correspondence with Peter Stirling's name on it would not be opened. Paper records at the offices were kept in files. Purchase invoices, with purchase orders and delivery notes attached were filed in lever-arch folders and held in the administrative office until the relevant year-end audit had been completed, before being archived in a separate archive room. Files were retained in the archive room for the required statutory period set by HMRC and audit bodies, which is six years. The vast majority (99%) of incoming mail would be passed to the manager responsible. If the business had received any terms and conditions at the farm office, the standard systems would ensure that they would be directed to the manager who dealt with the supplier as it would only be that person who could determine that the terms were valid and met with their requirements. If the office managers were unsure of the correct distribution of a document then they would pass it to him for consideration. He would then redirect it to the person who could deal with it best. If it had come from a supplier of equipment relating to strawberry production then he would have passed it on to

Kenny Shellard. If a separate letter outlining terms and conditions had been received then because the purchase invoices in 2012 were filed alphabetically, by supplier, it would have been filed with the invoices, or retained for reference by the appropriate manager. He had no recollection of ever having seen a copy of any terms and conditions of the defender or any other contract from them. He had, supported by other members of the administrative team, trawled through the pursuer's physical archives and no trace of any copy of the letter dated 30 July 2012 or the terms and conditions had been found. While generally records are kept for six years before shredding them, when they went to check the archives for 2012, these had not yet been destroyed. Files of all supplier statements, sales invoices and delivery notes from 2012 were still there. Some records from that year, probably old timesheets, picking records and quality control files would have been destroyed but the primary financial records, sales and purchase invoices, year-end accounts and the like had been retained. The documents were kept in a shipping container. There were about 60 to 80 boxes. He had checked for the years outside 2012. The witness commented on the incorrect aspects of the address in the letter dated 30 July 2012. A letter that may have been sent addressed simply to the farm could have been delivered to any one of the other properties on the farm. His own home address has the same postcode as the pursuer's farm office. Quite often the office would receive mail for another property with the same postcode, to the extent that a box was kept in the office for returned mail. He had no doubt that poorly addressed mail for the LLP may well have been delivered to another location. Specific terms and conditions for a particular supplier was not something that he would keep in his own file. He had no recollection of passing this letter or any terms and conditions to any manager. If Kenny Shellard was not there it would have gone to Gary Bruce; there was a small chance of that having occurred. The file of invoices from 2012

had also been searched. In relation to the request for an email in the letter dated 30 July 2012, as the company's accountant he would have responded to that request. He accepted that there were various invoices stating that the all business with the defender is subject to standard conditions of sale and that several of these noted the customer as "Windy Hills Farm". He thought if this had come to his attention he would have asked Kenny Shellard or Susan Spink to have this corrected by the defender, but it may not have been something he focused upon. It was correct that there was only one Windyhills farm. But in the year from September 2011 to August 2012 six of the twenty-two invoices that had been posted to the pursuer by the defender had not been received.

[13] Gary Bruce is the pursuer's farm manager and has occupied that post for some 17 years. He has always been based in the farm office, spending about half his time in the office and the rest out on the fields. Any mail coming in to the farm office would be picked up and opened by Susan Spink. She would organise the mail depending upon the department it related to before normally passing it through to him and he would distribute it. Sometimes, if mail clearly related to a particular department (eg fruit) then Susan would put this straight onto the appropriate team manager's desk. Although he was not directly responsible for processing mail, he was aware of difficulties with mail being delivered to the wrong addresses in the past. It would largely depend on which postman was working. Sometimes the office would receive mail that was intended for one of the neighbouring cottages and *vice -versa*. He was in no doubt that on occasions mail meant for the office may have been received elsewhere. His own files were in the farm office but these relate solely to cereals, potatoes and vegetables. If anything related to the defender had landed on his desk, then he would have passed it straight to Kenny Shellard, as it would concern the fruit side of the business. He had never seen the letter dated 30 July 2012 or the terms and conditions.

Had Kenny Shellard come to him to ask what should be done in relation to the letter or terms and conditions then he would have considered these and would have spoken to Peter Stirling about them. That sort of thing occurred infrequently, and had it taken place he would have remembered any such discussion. He had no recollection of Kenny Shellard ever raising issues about written correspondence. Susan Spink did not work on a Friday. When she was not there, the mail was brought in by the postman and left on his desk and he would take it through and leave for her to open on her return. Another member of staff would deal with it if Susan Spink was on holiday, but would not distribute the mail. He had every confidence in the process and was unaware of any issues with letters going missing. It was a thorough and diligent procedure. Mail in the office was dealt with properly. He would get mail at his cottage which was intended for the farm, maybe three or four times a year. If he realised that it was intended for the farm, he would take it to the office and give it to Susan Spink. Residents in the other cottages would have brought up mail that was intended for the farm. If the letter and the terms and conditions had come in, these would not have been passed to him but would have gone to Kenny Shellard.

Witnesses for the defender

[14] Elaine Thorely has worked for the defender for some 30 years and is currently employed in accounts administration. She is responsible for sending out the invoices to all of the company's customers, including the pursuer. She was off work due to illness from the beginning of June 2012 to the end of October 2012, but apart from that period she would have sent out all invoices to the pursuer. The filing system for invoices goes back to 2002 and from then, until the defender was informed of the change of business from the LLP to the pursuer in 2016, all invoices were addressed to "Windy Hill Farm" at "Authmithie" in

Arbroath, that is, with the same address details and postcode as in the letter dated 30 July 2012. On her calculation, 117 invoices were sent to that address and postcode. She was not aware of having been told that there were problems with receipt of invoices by post, but on a couple of occasions the pursuer had asked the defender to provide copy invoices. On 9 February 2012 she sent an email to Susan Spink attaching six invoices dated from 26 September 2011 to 24 January 2012. Having searched her sent emails, this was the only one sending copy invoices. As far as she was aware, no complaints were made that the name or address on the invoices had caused any problems about them being received. The system showed that all of the invoices that had been posted had been paid. It was put to her that Susan Spink's evidence was that she had told the witness that the invoices requested had not arrived, but the witness maintained that while copies were asked for, no reason was given. It was possible that Ms Spink had said that they hadn't been sent but they had probably been asked for because the defender was chasing money.

[15] Glenn Notley has worked for the defender since February 2008 and is currently the managing director. He normally dealt with orders from the pursuer. He explained the exchanges between him and Kenny Shellard in mid-2016 regarding the order for polythene sheeting. In his time with the defender, it had supplied many products to the pursuer and subsequently sent many invoices. The defender's original terms and conditions were set up long before he joined the company. During Stephen Mortimer's time as managing director, a decision was made to re-send a copy of the terms and conditions to every customer on the database. Advice was obtained from the defender's solicitors and the terms and conditions were posted to every customer. As he understood it, this was done because there were several companies on the company's database who had not returned signed account forms and it was designed to make sure every customer had at least seen a copy of the terms and

conditions. Many new accounts had been established by this time. Every invoice sent by the defender to the pursuer made reference to the terms and conditions and stated that all orders are covered by them. Invoices addressed to Windy Hill Farm were paid by Peter J Stirling Limited or its predecessor. That was the only address the defender had for the pursuer until April 2016. From 15 April 2016, invoices were addressed to Peter J Stirling Limited. On the defender's system the pursuer is described as Windy Hill Farm and the customer number starts as "WH ". The pursuer's staff must have indicated the name. It had never been suggested by the pursuer that the name was incorrect. He was not aware that the terms and conditions referred to in July 2012 were new terms and conditions. The decision was to send them out to every customer on the list. There were just over 1000 customers, with the pursuer as number 972. He was not part of the process of issuing the terms and conditions at that time and it was people in the office who did the posting. The copy of the signed version of the letter dated 30 July 2012 that had been lodged as a production was electronically stored on the defender's server and bore to have been created at 1.35pm and saved on the server on that day. The witness was not aware whether Mr Mortimer had signed the letter or whether it was an electronic signature, but it was possible that he had physically signed all of the letters. The witness accepted that there was an email dated 1 August 2012 from the solicitor which referred to an amendment to the draft letter, suggesting that the letter might have gone out after that date. He was not aware of any issues with certain documents not making their way to the pursuer in 2012. Lots of customers asked for invoices and delivery notes and that was often just a way of delaying payment. The request by the pursuer for copy invoices was far more likely to be a delaying tactic, although there were many reasons why people might ask for copy invoices. The pursuer was not the best of payers. There was no reason for him to mention terms and

conditions to Mr Shellard; that was not his job and it had never crossed his mind to tell Mr Shellard. He did not think it possible that the letter dated 30 July 2012 was not issued, although it was possible that it didn't arrive. The letter had, based on what he had been told, definitely left the defender's office, as it did to all the other 1,002 customers. He was unaware of what was said on invoices issued before he joined the company. There was no reference to the terms and conditions in the emails he had sent after the problem with the polythene sheeting had arisen. That was not relevant at the time, as he had been asked by Peter Stirling to speak to the defender's insurers. He rejected the suggestion that one reason for not mentioning the terms and conditions was that he did not think the pursuer was subject to them. All of the letters sent to customers had been saved individually. He was 99.9% certain that the letter had been sent to the pursuer. After the problem arose, Mr Stirling had been told that the terms and conditions did not allow set-off in respect of other debts owed to the defender and a sum due (£30,000) which had been retained was then paid, said by Mr Stirling to be "as a gesture of goodwill". He was not aware of mail ever being returned to the defender as undelivered.

[16] Miki Foster works as an administrator for the defender, having started in 2011 as an office and warehouse assistant. Credit control was added to her role in the following year. A customer's credit account was set up by sending out an account form. Quite a few customers had never completed or signed an account application form. Following discussions involving the then managing director Stephen Mortimer and the company's accountant, the defender sent the terms and conditions out to every customer, so that no one could say that they hadn't received them. The letters were all produced by way of a mail merge of all the customer names and addresses from a spreadsheet, put into the letters as word documents. She had folded the letters up and franked them and sent them out, with

the terms and conditions attached. This was done over two or three days. All of the letters were sent out. If anyone was not at the address, the franking postmark had the defender's address on it, and the letter would have been returned. There were letters which came back and when that occurred the company would suspend the account and note that the customer had moved away. A letter to the pursuer dated 15 July 2016 reminded the customer of the terms of credit allowed by the defender's terms and conditions, although a copy of the terms and conditions was not sent with that letter. She was never asked by the pursuer or its predecessors to provide a copy of the terms and conditions. She had no particular recollection of sending the letter dated 30 July 2012 to the pursuer, but more than 1000 letters were sent. It was possible, but very unlikely, that the letter to the pursuer had not been in the bundle given to her, as the letters were produced for every customer. There was no reason for any particular letter to go missing over the two to three day period when they were being sent out. Other people had no reason to go into her room. The envelopes had a "window" and each letter was folded up so that the address on the letter was seen through the window. She checked every letter. To the best of her knowledge every single letter went out. She would have been aware of the letter being returned, had that happened. About ten to twenty of the letters came back. When Ms Spink contacted the defender to ask for invoices, that may or may not have been for invoices not received.

[17] The parties agreed that the witness statements of two solicitors, who in 2012 worked for a firm in Hull which advised the defender about the new terms and conditions, were to be treated as the evidence of these two witnesses in this proof. Their evidence concerned discussions with and advice given to the defender about changing its terms and conditions and notifying these to customers.

Assessment of the evidence

[18] Overall, the witnesses, some of who had much closer connection with the issues in dispute than the others, gave their evidence in an open and straightforward manner. I found their testimony to be credible and reliable and indeed no significant contentions in that regard were raised by the parties. By and large, with some minor exceptions, they each restricted their evidence to the limited range of matters to which they could properly speak. These were matters that occurred more than eight years prior to the proof and it was therefore not unusual that precise details of what occurred were, on occasion, not able to be fully explained.

Submissions

Submissions for the pursuer

[19] The submissions on behalf of the pursuer can be summarised as follows. The onus was on the defender to establish that its terms and conditions formed part of the contract: *Grayston Plant Ltd* v *Plean Precast Ltd* 1976 SC 206 (at 207). The terms of the contract were agreed in communications by the parties between 27 June 2016 and 13 July 2016. The terms were also supplemented by implied terms, as inserted into the contract by the Sale of Goods Act 1979. The defender agreed that the parties had a concluded contract in mid-2016 but argued that Mr Notley and Mr Shellard did not agree on "many of the aspects of the contract". The pursuer disputed that; what the parties agreed was clear from their correspondence, as that correspondence would be understood by the reasonable person with the knowledge of the parties. A mid-August delivery date from the defender to the pursuer was agreed. As confirmed by Mr Notley in his oral evidence, the defender knew where the pursuer traded from. There was no warrant for adding in other terms.

[20] The defender had not established that its terms and conditions were sent to the pursuer in or around late July 2012 or early August 2012. The defender had not been able to produce any evidence that a letter enclosing the terms and conditions was actually sent by it to the pursuer. No record had been produced recording when or to whom letters were sent. There was a clear possibility that it hadn't been sent. The provenance of the document was questionable. It had apparently been generated before the lawyers gave approval. The letters were left unattended over a three-day period in a room where anyone in the team could have had access to them. The defender required to establish that its processes were robust such that the court could infer that the letter to the pursuer was printed and was given to Ms Foster. No such evidence was led of that process.

[21] The pursuer objected to any evidence being led about the document described as the letter dated 30 July 2012. The basis of the objection was the best evidence rule. Reference was made to *Scottish & Universal Newspapers Ltd* v *Gherson's Trustees* 1987 SC 27 (at 46); *Japan Leasing (Europe) PLC* v *Weir's Trustee (No 2)* 1998 SC 543 (at 546H - 547B) and *Dowgray* v *Gilmour* 1907 SC 715 (at 719). The best evidence rule excluded secondary evidence if primary evidence was, or ought to be, available. An oral description of real evidence is inadmissible unless it is not practicable and convenient to produce the real evidence. It appeared from the evidence that the production is a copy taken from the defender's records. The nature of the document was not known (whether it was a hard copy, a copy of a copy, or a print of an electronic document such as a pdf, or of an electronic document that is not a pdf). It was also not known how and when the copy was made and whether the signature of Mr Mortimer is an actual signature or an electronic image. The defender had not established that the document produced is the best evidence available of what is in its records. If the document is an electronic document, the best evidence is the electronic

document which should have been lodged on a memory stick and this would therefore disclose when it was created and by whom and whether it had been edited. There was no reason why the principal (electronic) record Mr Notley says was retained by the defender could not have been produced, given the potential importance of this document. The electronic files were not produced and no good reason was given for not producing them. Testing the evidence had been denied to the pursuer. The electronic document's metadata might indicate whether it had been printed and, if so, when. The same kind of problems arose with the database referred to by Ms Foster. If a document is critical then a copy will not suffice; the onus is on a party to produce the document on which it relies.

[22] Further, it had not been established that the letters were sent to everyone else. It was important to note that there may be other customers who, like the pursuer, had no notice of the terms and conditions but did not have problems with any products purchased. As such, whether or not they had received the terms and conditions might not yet be apparent. The lack of records on this matter produced by the defender meant that there was really no way to know whether the problem the pursuer had with receipt was a problem other customers may also have had.

[23] The presumption of receipt of the letter relied upon by the defender is based upon *Stewart* v *Wright* (1821) 1 S 203 and *Chaplin* v *Caledonian Land Properties Ltd* 1997 SLT 384. In these cases there was direct evidence, which the court accepted, of the document in question having specifically been posted. In *Tullis Russell & Co* v *Eadie Industries Ltd* (unreported, 31 August 1999) Lord Macfadyen held that for posting to be established for the postal acceptance rule "clear and specific evidence that the particular document was posted" was necessary (para [57]). In *Robertson* v *Gamack* (1835) 14 S 139 the court effectively held that all the evidence that could have been led was led. That was not the case here. The defender

had not established that its terms and conditions were sent to the pursuer and so no presumption arose.

[24] If it was necessary to rebut that presumption, the evidence sufficed to do so. There was direct evidence that the relevant personnel at the pursuer did not see the letter and its alleged enclosure. Had these items been received, the pursuer's witnesses were clear that they would not have been disposed of but would have been retained. A thorough search had been carried out to locate the documents. Further, the letter was not responded to, despite it having requested a response. Also, there were other instances of mail not reaching the pursuer. This included the six invoices that Ms Spink asked to be sent to the LLP on 9 February 2012 because they had not been received. The problem of mail sometimes going missing was potentially compounded by the incorrect address. It could not be said on the balance of probabilities that the pursuer received the terms and conditions. Insofar as there is a presumption that the pursuer must rebut, the pursuer had rebutted it.

[25] In any event, if the terms and conditions did form part of the parties' contract, there was no specific consent to the jurisdiction clause. Reference was made to section 16 of the Civil Jurisdiction and Judgments Act 1982 and to paragraph 6 of Schedule 8. In interpreting the meaning of these provisions, EU law must be applied and it made clear that specific consent must be identified in order for jurisdiction to be prorogated. It was not enough that the clause forms part of the contract. Reference was made to *Bols Distilleries BV* v *Superior Yacht Services Ltd* [2007] 1 WLR 12 (paras [22] – [23) and *7E Communications Ltd* v *Vertex Antennentechnik GmbH* [2007] 1 WLR 2175 (paras [26] - [37)]. There was in this case no signed document at all and therefore nothing in writing. Separately, there was nothing in this case to demonstrate specific consent to a jurisdiction clause within the scope of the

parties' relationship that would bring the case within paragraph 6(2)(b). The jurisdiction clause was not therefore enforceable even if it formed part of the parties' contract.

[26] The pursuer also objected to reliance upon an alternative basis for incorporation of the terms and conditions, which the defender may seek to argue, namely incorporation in the course of business as a result of the pattern of invoices which referred to the terms and conditions. The grounds for this objection were a lack of pleadings on this alternative ground and a corresponding lack of fair notice to the pursuer, and separately, the best evidence rule. Reference was made to *Lothian Amusements Ltd* v *The Kiln's Development Ltd* [2019] CSOH 51 (paras [46] – [47]); *Grayston Plant Ltd* v *Plean Precast Ltd* 1976 SC 206 (at 217); *M'Crone* v *Boots Farm Sales Ltd* 1981 SC 68 (at 72 - 3). The invoices had not been produced, there was no good reason for that lack of production and their terms could not now be proved by parole evidence. The invoices were said to be critical documents to the argument the defender now wished to advance. While the pursuer may have stored the invoices, the defender did not timeously call on the pursuer to produce them. In the course of the proof, the pursuer also objected to a question asked on behalf of the defender to Mr Notley about Mr Stirling having authorised payment of withheld sums after being told that the terms and conditions did not allow such set-off and that objection was maintained in submissions.

Submissions for the defender

[27] The submissions for the defender can be summarised as follows. The contract for purchase of the polythene was formed by a combination of discussion between Mr Shellard and Mr Notley in person and by their email correspondence. Mr Shellard and Mr Notley did not attempt to reach any express agreement about many of the aspects of the contract, including the precise date of delivery, payment terms, warranties or retention of title. The

defender's terms and conditions were incorporated expressly into all future contracts of sale with the pursuer as a result of their intimation with the letter dated 30 July 2012. The majority of the pursuer's witnesses focused on matters that were really of no moment, for example on the incorrect identification of the name of the farm. This would not have caused any confusion or led to a failure to deliver. The pursuer at no time made an issue about the incorrect address. For years, trading took place, with invoices bearing this address being received and audited by Mr Mann for tax purposes without objection. It was clear that business correspondence received by other residents within the farm is likely to have ended up at the farm office, either because it was obvious that it was intended to go there from the address, or because upon opening the envelope, the contents were clearly for the farm business. The pursuer requested that invoices be sent by post and not email, thereby indicating that post was found to be more reliable than email. The simple explanation was that there was either an office error or a systems error by the pursuer which meant that the terms and conditions were not properly taken account of within the office, or perhaps were misfiled.

[28] There was a clear explanation by the defender's witnesses of the system employed in sending out the letters with terms and conditions. The probability of one letter dropping out of the system was fanciful. It was highly likely, and certainly the case on the balance of probability, that a letter with terms and conditions was put in the postal system addressed to the pursuer.

[29] The reliance in the written submissions on the alternative ground of incorporation of the terms and conditions as a result of a course of dealing was no longer founded upon. However, it was surprising that the repeated reference in the many invoices sent to and received by the pursuer to terms and conditions raised no query from the pursuer.

[30] The evidence supported the defender's position. The pursuer would not have been registered on the defender's system without having completed a customer account form. In 2011, the defender sought legal advice on its terms and conditions from a solicitor who sent a draft of the terms and conditions to the defender's accountant, Nigel Rock. The plan was to send out the new terms and conditions to all existing and new customers of the defender. The solicitor finalised the terms and conditions and then on or about 30 July 2012, Miki Foster, the defender's administrator, sent the letter to the pursuer enclosing the terms and conditions. Ms Foster described a system of producing letters to customers using a mail merge system and dispatching them. There was no evidence that she departed from that system in relation to the letter to the pursuer. The draft of the mail merge letter bears the date of 26 July 2012. The copy of the letter dated 30 July 2012 on the defender's server was last modified on that date. The franking stamp on the letter bore the name and address of the defender. Ms Foster sent out similar letters to all of the defender's existing customers. Some 1000 individual letters were stored. It was utter speculation to suggest that the letter to the pursuer did not go out. A small number of letters were returned as undelivered, upon which she suspended the defender's account with the customer to whom the letter had been addressed. She was not required to take any such steps for the pursuer.

[31] The evidence proved that the letter was dispatched by Ms Foster and the usual presumption of fact that the letter was delivered should apply: *Stewart* v *Wright*; *Chaplin* v *Caledonian Land Properties Ltd*. In light of that presumption, the onus was firmly upon the pursuer to establish that it did not receive the letter. The pursuer's evidence was really just that no-one could recall the letter coming in and no-one could now find it. None of these potential explanations carried any weight. The defender had traded with the pursuer's predecessor from around 2002, when the pursuer used the descriptive name "Windy Hill

Farm". After incorporation of the LLP, Susan Spink requested that certain invoices be re-sent by the defender. These were sent on 9 February 2012. They were addressed to "Windy Hill Farm" and post-dated incorporation. During the whole period of incorporation of the LLP, the defender sent its invoices to the LLP designed as "Windy Hill Farm", yet no attempt was made by the pursuer to have the defender correct its records. It was to be inferred that if there was any continuing difficulty with invoices not being delivered to the pursuer because they were incorrectly addressed, the pursuer would have raised the matter with the defender. The postal address of "Windyhills, Auchmithie" continues to be used by the pursuer's director, Peter Stirling, as his service address with Companies House. It was unlikely that he would use a description of an address that he had found unreliable. The difference between that address and "Windy Hill Farm, Authmithie" was not significant. The post is likely to have been directed to that area by the postcode. There was no evidence of another farm in the vicinity with a similar name. There was no evidence that mail addressed to "Windy Hill Farm, Authmithie" was likely to be delivered to somewhere else because of any such errors.

[32] Moreover, there was only evidence of mail wrongly delivered to other addresses within the farm's postcode; there was no evidence of mail being delivered to premises with a different postcode. On the evidence of Mr Bruce, it could be concluded that any items of mail for the pursuer incorrectly delivered to any of the other properties on the farm would have been handed into the farm office. There were many possible reasons why the pursuer might not have retained a copy of the letter. It might have been misplaced, misfiled or discarded. The pursuer did not have a system of recording all incoming mail. Susan Spink ordinarily opens the mail, but was not present in the office on several dates in early August 2012. If the letter was sent on 30 July 2012 from Yorkshire, it could have arrived on a

date when she was not there. The evidence of where the letter might have been directed after it was opened was confused. There was no evidence of where general correspondence and marketing materials, such as brochures, from suppliers were filed by the pursuer. Mr Mann said that some documents will have been destroyed. The invoices dated 2011 and 2012, addressed to "Windy Hill Farm, Authmithie" bear the same address as those sent to the pursuer in 2015. They both bear the same customer account number of WIN626. It can be inferred that the address held on the defender's customer database was not corrected over the course of four years. At best for the pursuer, it might be inferred that four invoices in late 2011 and early 2012 and one in 2015 were not delivered. The evidence did not suggest there was a continuing problem of mail failing to arrive. Other explanations were equally, if not more, probable: (i) that the invoices requested in 2012 had already been received, but copies were requested for some reason relating to payment; (ii) the invoice re-sent in 2015 was not in response to a request at all, but was a means of the defender chasing payment. Invoices addressed to "Windy Hill Farm, Authmithie" were paid by the pursuer. It could be concluded that they were received by P J Stirling LLP and, later, the pursuer. In the circumstances, the pursuer had failed to rebut the presumption that the letter, having been duly sent, was received by it in early August 2012.

[33] The objections made on behalf of the pursuer lacked substance. In this case it was impossible to produce the actual evidence. The defender had produced the best evidence it could. The actual letter was copied and stored. If the pursuer wished to have some form of electronic interrogation of the records kept, or wished to recover the metadata, that could have been requested. The best evidence rule is not a general exclusionary rule of evidence, but rather has its basis in the proposition that "a party must adduce the best attainable evidence of the facts he means to prove": *Dickson on Evidence,* paragraph 195. For the

reasons explained by Lord Macphail in *Haddow* v *Glasgow City Council* 2005 SLT 1219, it is no longer the law that the evidence tendered must be the best attainable. The governing principle is that the evidence must be sufficiently relevant to an issue and must not infringe any of the exclusionary rules. It was uncontroversial that the document is fundamental to the matters at issue in this proof. The rule against proving the content of a document by secondary evidence is a different exclusionary rule from the "best evidence rule". *Japan Leasing* and *Scottish & Universal Newspapers Ltd* are examples of aspects of that exclusionary rule, although neither were engaged in the circumstances of this case. The pursuer's objection raised an issue addressed in the recent case of *Promontoria (Henrico) Ltd* v *Friel* 2019 SLT 153. Similar points applied to the objection to Ms Foster's evidence about the mail merge.

[34] Condition 11.2 of the terms and conditions states that "all disputes arising out of this contract shall be subject to the exclusive jurisdiction of the courts of England and Wales." In terms of the Civil Jurisdiction and Judgments Act 1982, Schedule 4, Article 12(1), the parties prorogation of jurisdiction is binding and exclusive: *Cook* v *Virgin Media* [2016] 1 WLR 1672. There was no international element in this case and the authorities relied on by the pursuer were not applicable. It was incorrect as a matter of law to say that there needed to be specific acknowledgment regarding a clause dealing with jurisdiction: *Bols Distilleries BV* v *Superior Yacht Services Ltd*. Objectively the issue was whether the pursuer was aware of the provisions on jurisdiction. Positive acceptance was not required. It sufficed if there was agreement to any clause conferring jurisdiction.

Decision and reasons

Objections

[35] In relation to the copy of the letter dated 30 July 2012, the pursuer's objection was "to any evidence being led about production 7/7", including evidence as to the provenance of this production. The ground for objection was the best evidence rule. There is no suggestion on the part of the pursuer that the document is false or in some way fabricated. As it was put in the note of objections:

> "The best evidence rule is engaged because the Defender has not established that the document produced is the best evidence available of what is in its records. If the original copy was a hard copy, the best evidence would be the principal photocopy taken at the time (which would disclose whether the signature was on the copy document or the document of which it is a copy). If the document is an electronic document, the best evidence is the electronic document lodged on a memory stick (which would therefore disclose when it was created and by who and whether it had been edited). There is no reason why the principal record Mr Notley says was retained by the Defender could not have been produced, given the potential importance of this document."

[36] I have had some difficulty in understanding the intricacies of the second sentence of this ground of objection, but the general background is tolerably clear. The production itself is in paper form. On the evidence in the witness statement of Mr Notley, it was "a copy letter … taken from our records" and in the statement of Ms Foster all of the letters were "produced … by mail merge". As the pursuer noted, it is not plain from the production itself whether it is a copy of the original letter, or is a print of a scanned copy or electronically stored version of the original letter. It is also not clear whether the letter was signed by hand or signed electronically, although as it is a document said to be contained in records from some eight years ago, it is perhaps understandable that evidence could not be given on whether it was physically or electronically signed.

[37] Nonetheless, I reject the pursuer's objection insofar as it seeks to exclude any evidence concerning production 7/7. The scope and extent of the exclusionary rule as applied in the cases referred to by the pursuer is limited. In *Scottish & Universal Newspapers Ltd* v *Gherson's Trustees* the objection was to oral evidence about the content of missing records. Lord President Emslie stated (at 47):

> "secondary evidence of the contents of the missing records will be admitted only if it is shown that they have been destroyed or lost without fault on the part of the pursuers who had effective control of the records when the action began."

In *Japan Leasing (Europe) PLC* v *Weir's Trustee (No 2)*, a witness for the pursuer gave evidence that he believed that the principals of certain documents of which copies had been lodged were with the pursuer's solicitors in London. There was no question of the principals having been lost or destroyed or of that having occurred without fault on the part of the pursuer. The secondary evidence was therefore not allowed. I note, in passing, there is now some room for questioning the scope of the exclusionary rule (*Promontoria (Henrico)* v *Friel* [2020] CSIH 1 (at [44]). But in any event in the present case, understandably, the pursuer did not suggest any fault on the part of the defender in losing the actual document, as the original letter is said to have been sent. On the evidence the loss or absence of the original letter for the purposes of the proof occurred without such fault. It is clear from the authorities that the party seeking to rely on secondary evidence about the document must have averments as to its loss or absence. Those are made in the present case. Thus, the circumstances here allow the defender to seek to prove the terms of the document "incidentally", as it is put in some of the cases and textbooks. The defender was certainly entitled to lodge a copy of the production concerned and seek to use that as secondary evidence of the terms of the original document. It is correct that the production is not

certified as a true copy (as can be done under section 6 of the Civil Evidence (Scotland) Act 1988) but even taking the authorities as they stand that does not bar secondary evidence being admitted of this document, given that it was, on the evidence, lost or absent through no fault on the part of the defender. However, the best evidence rule also seems to be relied upon on by the pursuer on the basis that rather than, or in addition to, a hard copy of the production the version of it in electronic form exists. This, it is argued, could have been lodged by the defender thus allowing access to metadata, such as the properties of the document. But the practical reality is that the production before the court is said to be simply a copy of what was sent, to all intents and purposes of the same general nature as a photocopy. To require every document of materiality in a proof to be lodged in its actual original electronic version on, for example, a memory stick goes too far and is not required by the authorities. I accept that further oral evidence was led about the electronic creation of the document and I shall deal with that below. However, in this commercial action the issue of requiring the electronic version of the document to be lodged was not raised before the court in advance of the pre-proof by order. The Lord President explained in *Promontoria (Henrico)* v *Friel* ([36] and [37]), although in the different circumstances of a case involving proving the tenor and there being a certified copy of the document, that in a commercial action the court would expect a challenge to be clearly flagged as an issue at the stage of the preliminary and procedural hearings. Similar considerations apply in the present case. The document was lodged three months prior to the proof. If the pursuer wished to question or investigate the provenance of this production, it could have, in advance of the proof, moved for further specification (including in witness statements) of its provenance or sought recovery of further material such as metadata. The pursuer did not do so and indeed the note of objections was lodged very shortly before the commencement of the proof. It is not

appropriate in these circumstances to exclude all evidence about this crucial production and I therefore conclude that the objection is not well-founded.

[38] The next line of objection concerns oral evidence given, beyond what was said in the witness statements, as to the provenance of the document. Where the posting of a crucial letter is not admitted and therefore falls to be proved, and the sender wishes to lead evidence about the properties of the document which show the time and date of its creation, that evidence would ordinarily be expected to appear in a witness statement, rather than (as occurred here) being stated for the first time in oral testimony at the proof. The lack of fair notice on these important matters means that I shall sustain the objection to that limited extent. In relation to the objection to Ms Foster's evidence about the mail merge process, I do not regard that as well-founded. She simply explained in a little more detail a point already made in her witness statement.

[39] The next line of objection taken by the pursuer related to evidence supporting the apparently alternative ground of incorporation of the terms and conditions, foreshadowed in the note of argument for the defender lodged prior to the proof: incorporation as a result of a course of dealing rather than as a consequence of the letter dated 30 July 2012. In the event, senior counsel for the defender did not insist upon such an alternative line of argument. If it had been advanced, I would have been inclined to sustain the objection on the basis of a lack of fair notice in the pleadings of such an alternative proposition (which, as the pursuer submitted, is illustrated in the approach taken by Lord Doherty in *Lothian Amusements Ltd* v *The Kiln's Development Ltd* [2019] CSOH 51, at paras [46] – [47]).

[40] The pursuer also objected to a line of evidence that Mr Stirling released sums which had been retained because he received a copy of the terms and conditions from Mr Notley's solicitors (making the implicit assertion, argued the pursuer, that Mr Stirling had in that

regard acted in a way inconsistent with his company's position in this action). While I accept that the relevant correspondence on this point is not before the court and Mr Stirling's evidence on it was not heard, the evidence was really only about limited discussions after the dispute arose. Mr Notley said that the money was released by Mr Stirling "as a gesture of goodwill". This does not imply a different position in relation to the terms and conditions than that taken by the pursuer in the action and I did not understand the defender to suggest that it had that effect. I do not regard the evidence as objectionable but it is in any event of no significance in relation to the issues in dispute, to which I now turn.

Was the letter dated 30 July 2012 sent by the defender?

[41] The case law on the evidence required to activate the presumption of receipt of a posted item is clear. As Lord Rodger stated in *Chaplin* v *Caledonian Land Properties Ltd* (at 387B-D):

> "In my view once the petitioner has satisfied me that the letters of 14 August and 23 October 1992 were posted, then a presumption arises that they were duly addressed and delivered to the office of Bell Ingram. That presumption can be rebutted by evidence which satisfies the court that they were not so delivered. Counsel for the respondents argued, rightly in my view, that proof of a system operated in the office of Bell Ingram might be relevant in this regard."

[42] As counsel for the pursuer submitted, in *Tullis Russell & Co* v *Eadie Industries Ltd* Lord Macfadyen had to determine which party's terms and conditions were incorporated into a contract. One of the issues to be decided was whether an order acknowledgement, of which there was a copy on the defender's file, had been sent. This issue arose in relation to what is described as "the postal acceptance rule": that proof of postage of an acceptance constitutes an acceptance even if it is not received. As is noted at paragraph [38] in the

Opinion, evidence was led of the general practice of the defender that such documents would have been sent. Lord Macfadyen held that the "general evidence" as to practice was insufficient for a finding that the particular document had been posted and concluded that for posting to be established for the purposes of the postal acceptance rule "clear and specific evidence that the particular document was posted" was necessary (para [57]). On behalf of the pursuer, it was submitted that "Lord Macfadyen is right to insist on a high degree of evidence before one can conclude that a document concluding a contract has been posted". That submission reflects the point that the decision in *Tullis Russell & Co* was dealing with evidence of posting which would, if accepted by the court, result in a contract being entered into (rather than, as here, a presumption arising) and Lord Macfadyen's comments must be viewed in that context. In any event, I do not regard Lord Macfadyen's approach as putting some form of gloss, or higher test, on the requirement of proof of posting in a case such as the present, which is something that will fall to be determined on the balance of probabilities. Earlier in paragraph [57], prior to making the observations founded upon by the pursuer, Lord Macfadyen stated:

> "Before the rule can apply, however, there must in my view be a sufficient evidential basis for a finding in fact that the order acknowledgment was committed to the post by the defenders. The only evidence on which such a conclusion could be based was … that an order acknowledgment, once typed, would be posted to the customer. There was no specific evidence that the particular order acknowledgment was in fact posted to the pursuers. In my opinion, though I have no reason to doubt the general evidence given … as to practice, that evidence is an insufficient basis for a finding that the particular order acknowledgment was actually posted to the pursuers."

Lord Macfadyen's comments were therefore made in the context of an absence of evidence about actual posting of the particular item. In the present case, there was evidence about the actual posting of the items in the bundle of mail which was to be sent to all customers. That is evidence of actual events rather than general evidence as to practice. Counsel for the

pursuer accepted that in certain cases it might be possible to prove that a business had a sufficiently robust internal process, so that the court could determine that a document was posted without direct evidence to that effect (eg *Robertson* v *Gamack*). But counsel argued that in that case all the evidence that could have been led was led, whereas in the present case there were many things that could have been done, but about which there was no evidence, to provide a proper basis to conclude that a letter was sent to the LLP as the defender contends.

[43] In circumstances such as the present, I do not regard it as necessary to have direct evidence that the specific individual item, the letter dated 30 July 2012, was posted. The evidence of Ms Foster, which was credible and reliable, was that a bundle of letters to be sent to each individual customer was prepared, there being more than 1,000 customers. The letters were printed off and she folded each letter, placing it an envelope, and the envelopes were then franked and put in the post bag. Accordingly, as I have noted, this is not merely evidence of the general practice of the defender; rather, it is evidence of a materially important commercial exercise (the notification of terms and conditions to every customer), that took place over two or three days. It involved senior members of staff and was done on the basis of specific legal advice given by the company's solicitors about the need to send such letters to each customer.

[44] It is correct that no record was produced showing to whom letters were sent and when, but the evidence was that no such record was kept. Rather, copies of the letters sent were stored on a computer. It is also correct that that there was an email dated 1 August 2012 from the solicitor which referred to an amendment to the draft letter, after the letter to the pursuer had apparently been sent, but that does not demonstrate that a letter dated 30 July 2012 was not sent on that day or over the next couple of days. It is also true that no

evidence was led that the letters were received by all of the other customers and it was submitted that if other customers did not have problems with any products purchased, the issue of receipt of terms and conditions may well not have arisen or been considered in relation to those customers. But evidence of receipt by other customers (unless by virtually all) would be of little assistance in determining the issue in this case. Ms Foster's evidence was clear and there was nothing to show that she could have departed from her approach in relation to the letter to the pursuer. The franking stamp on the letter contained the defender's name and address and if it had not been received it would have been returned. A small number of letters were in fact returned, but the letter to defender was not. While I disregard the evidence as to the provenance of production 7/7 that was not covered in the witness statements, I accept and take into account the evidence that it was produced by mail-merge and contained within the records of the defender, along with some 1,000 other letters. The item produced is signed by Mr Mortimer (whether by hand or electronically) who was the Managing Director at the material time. The evidence of Ms Foster was that there was no basis for any particular letter to go missing and other people had no reason to go into the room in which the bundle of letters had been placed. I conclude that I have no grounds for finding that the letter was not printed-off and sent to the pursuer and on the contrary that there is clear evidence of that having occurred. I am therefore satisfied that there is a sufficient evidential basis for finding that the letter dated 30 July 2012 was posted. The defender has discharged the onus of proof on that matter.

Was the letter dated 30 July 2012 received by the pursuer?

[45] As a consequence, the presumption that the letter was delivered to the office of the pursuer arises, although it is capable of being rebutted by evidence which satisfies the court

that it was not received. The onus is on the pursuer to rebut that presumption. As Lord Rodger observed in *Chaplin* v *Caledonian Land Properties Ltd,* proof of a system operated in the defender's office might be relevant in this regard. While there was a slight inconsistency as to precisely to whom this letter would have been passed, the office system operated by the pursuer was, on the evidence, relatively simple and straightforward. In essence, Ms Spink received and opened the mail and if she happened to be on holiday or off then a colleague would receive the mail, open it, and place it into two folders on Ms Spink's desk, to await her return. Ms Spink would then identify the appropriate person to receive the mail and, in respect of a letter such as this, either place it on Mr Mann's desk or pass it to Mr Stirling. Mr Mann would have passed it to Mr Shellard. If it had been passed by Ms Spink to Mr Bruce, he too would have passed it to Mr Shellard. None of the relevant personnel saw the document. Had it been received, it would have been retained. The archived material included any important items from 2012. But the searches, which were thorough and comprehensive, did not locate the letter. Moreover, the evidence was also clear that the specific request made in the letter, for the email address of the pursuer's accounts department to be sent, would have been responded to, but again a thorough check of sent emails indicated that this had not occurred and there was no evidence from the defender's witnesses that any such response had been made. On the evidence, at the material time (July 2012) only a relatively small number of items of mail (about ten) were received each day at the farm office. There were also instances of items sent to the same address, broadly around the time when the letter was sent, which had not been received, in particular the six invoices. In that regard, I accept the evidence of Ms Spink that the invoices had not been received and I reject the alternative suggestion that they had already been received, but that copies were requested for some reason relating to payment.

[46] There were also many examples of items sent to the same address as that on the letter dated 30 July 2012 which were received. In my view, the incorrect address was of very little consequence. The slightly wrong version of the farm name and the local village name were of no moment, given that there was no other farm in the area with a similar name and no other relevant village name which might result in confusion, and that the correct postcode was used. The pursuer never raised any issue about the use of this address. There was some evidence of items of mail being delivered to the wrong address within the farm area, but the evidence was also that an item that was delivered to, say, a cottage, would be taken to the farm office by the recipient. I accept that the defender's name appeared on the envelope but while non-delivery by the postman might have resulted in the envelope being returned to the defender, which did not happen, mis-delivery or some other problem would not, or at least not necessarily, have that result. Lastly, I see no force in the submission for the defender that in making and accepting the order Mr Shellard and Mr Notley did not attempt to reach any express agreement about matters such as the precise date of delivery, payment terms, warranties or retention of title, implying that further terms and conditions were needed. Their agreement sufficed as contract.

[47] Taking the whole circumstances and submissions into account, I therefore conclude that the pursuer has discharged the onus of proof and rebutted the presumption that the letter was received.

If the letter was sent and received, has the jurisdiction of this court been excluded?

[48] In view of my decision that the letter was not received, this issue does not arise for consideration. However, having received submissions on the point, it is appropriate that I briefly express what my conclusions would have been in the scenario of it having been

received. The letter dated 30 July 2012 stated that the defender was introducing "new terms and conditions of sale that will cover the transactions between our two organisation." Numerous invoices were sent by the defender to the pursuer both before and after this date, and on the evidence they each stated "All business subject to our standard conditions of sale which include retention of title clause". The defender's position (which fits with that of the pursuer in this regard) was that the contract giving rise to the present action was entered into by the exchanges between Mr Shellard and Mr Notley in June and July 2016. The defender's contention was that terms and conditions were incorporated expressly into all future contracts for sale with the pursuer as a result of intimation of the Conditions of Sale to the pursuer with the letter dated 30 July 2012. At no time did the pursuer subsequently challenge or seek to vary those terms, argued the defender, and thus they were applicable to future transactions, including the clause concerning jurisdiction.

[49] In terms of section 20(1) of the Civil Jurisdiction and Judgments Act 1982, Schedule 8 of the Act has effect to determine in what circumstances a person may be sued in civil proceedings in the Court of Session or in a sheriff court. Paragraph 6 of Schedule 8 provides:

> "6. (1) If the parties have agreed that a court is to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court shall have jurisdiction.
>
> (2) Such an agreement conferring jurisdiction shall be either—
>
> (a) in writing or evidenced in writing; or
> (b) in a form which accords with practices which the parties have established between themselves …
>
> (3) Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'."

In determining any question as to the meaning or effect of these provisions, EU law concerning the relevant part of the Regulation (now Article 25 of Regulation 1215/2012) must be applied. There is a substantial body of case law on this issue and I was referred only to a few of the key decisions, principally *Bols Distilleries BV* v *Superior Yacht Services Ltd* and *7E Communications Ltd* v *Vertex Antennentechnik GmbH*. In considering the relevant principles, I have also had regard to the helpful observations of Waksman J in *R + V Versicherung* v *Robertson* [2016] EWHC 1243 (paras {7] and [8]) and Christopher Hancock QC sitting as a judge in *Pan Ocean* v *China-Base Group* [2019] EWHC 982 (para [32]), and to the cases to which they refer. As the legislation makes clear, an agreement conferring jurisdiction must be contained or evidenced in writing. The agreement, or consensus, in relation to exclusive jurisdiction must be "clearly and precisely" demonstrated. Whether such an agreement exists is a matter to be decided objectively, in accordance with the usual principles. The requirement of writing is not satisfied by the fact that the clause itself is in writing; the consent must be in writing or evidenced (or confirmed) in writing. The purpose of this formality is to establish consent to the necessary degree of certainty. If there is no written agreement, then the evidence of consent must be at least by written confirmation. There is no authority supporting the proposition that for this purpose consent can be implied solely from the conduct of the parties. Where a contract signed by both parties expressly refers to general conditions which include a clause conferring jurisdiction, the test is satisfied. An express reference to the general conditions in the contract is enough and there is no requirement for any express reference to the jurisdiction clause itself.

[50] Applying the relevant principles to the present case, it is quite clear that the exchanges between the parties in relation to this particular order (which each party refers to as the contract) made no express reference to the terms and conditions. In some cases, the

question which may arise is whether there was an overarching contractual agreement, within the terms of which certain orders were placed, which satisfies the test in the authorities. However, that was never put forward as the situation here. The defender's position is that having been sent the terms and conditions, and not demurred therefrom, the pursuer was bound by them in any later contract. While the defender no longer insisted upon an argument that there was incorporation of the terms and conditions by the course of dealing, the repeated reference in the invoices, when taken along with the letter dated 30 July 2012, was said to reinforce incorporation by that letter. As I understood the defender's position, it was that consent to the terms and conditions should be taken to arise from the making of a future order, by means of telephone calls and emails in June and July 2016. This, however, does not meet the test of agreement or consensus in relation to exclusive jurisdiction being clearly and precisely demonstrated and being agreed in writing or evidenced in writing. If, for example (on the hypothesis that the letter had been received) there had been express reference in the email correspondence, when entering into the contract, to the terms and conditions, that is likely to have sufficed, but there was no such reference. Accordingly, I conclude that even if the letter dated 30 July 2012 had been received, the jurisdiction of this court would not have been excluded.

Conclusion

[51] For the reasons given, I am persuaded that the letter dated 30 July 2012 was sent by the defender, but on the evidence the consequent presumption that it was received by the pursuer is rebutted. On that basis, the defender's case fails. Even if the letter had been received, the test for incorporation of the exclusive jurisdiction clause is not met.

Disposal

[52] As a result, I shall therefore repel the first and third pleas-in-law for the defender. I shall sustain the pursuer's third plea in law, and exclude the following averments from probation: (i) in Answer 1, the last two sentences; and (ii) in Answer 6, the fifth and sixth sentences, and the passage from and including "The invoice stated on the front …" to the end of Answer 6. I shall put the case out by-order to determine further procedure, reserving in the meantime all questions of expenses.