

IN THE LEICESTER COUNTY COURT

Date: 27/10/2016

Before :

H H JUDGE HAMPTON

Between :

Hobills Ltd
- and -
Mason Brothers Cold Storage and Grading Services
Ltd.

Claimants

Defendants

H H Judge Hampton :

JUDGMENT

(Unless otherwise stated, page numbers refer to the trial bundles).

Introduction

1. The Claimants are a company operating as livestock farmers based at Scalford in Leicestershire. Its directors are Frances and Malcolm Hobill, a husband and wife. The Defendants' business grades, stores and packs agricultural produce for its customers so that the produce is prepared for the retail trade. The grading process generates what has been described as "waste" vegetable products of varying quality made up of produce that is too small or misshapen for the human retail market or which has been damaged during handling. An additional

part of the business is that local farmers and stock feed merchants will purchase such waste produce either for onward sale as animal feed, or as feed for a farmer's own animals. Mr John Mason, for the Defendants describes the waste as a "by-product".

2. Prior to the matters giving rise to this litigation there had been a fairly long history of trading between the parties. The Claimants purchased and the Defendants sold the waste vegetable products as feed for the Claimants' stock. There were no written contracts between the parties and no express terms ever discussed. Documentation produced in the course of this trading e.g. weighbridge tickets and invoices do not incorporate any standard terms.
3. On 17th September 2013, by arrangement, a driver employed by the Claimants collected 21 tons of sweet potatoes which had been loaded onto a trailer supplied by the Claimants. The weighbridge ticket provided at the Defendants' premises described these sweet potatoes as "stock feed". Between 18th and 22nd September 2013 some of the sweet potatoes were mixed into a ration of potatoes which was fed to the Claimants' cattle in addition to their silage. By 26th September 2013, 76 cattle were dead. Thirteen more died between October and December. 45 died on the farm, 44 were slaughtered, 19 of those on the farm as they were not fit to travel.
4. The cause of the deaths was diagnosed by the Claimants' vet Mr Michael Thorne as interstitial pneumonia caused by sweet potato poisoning. Expert veterinary witnesses instructed by the parties agree the accuracy of Mr Thorne's diagnosis.
5. The Claimants blame the deaths and the consequential losses on the Defendants and bring this claim relying on a breach of an implied term in the contract to purchase the sweet potatoes. It is asserted that as they were sold as stock feed, there was an implied term that they were suitable for use as animal feed. Alternatively the claim is pleaded in negligence, asserting that the Defendants had a duty of care to supply produce fit for use as animal feed.

6. The Defendants deny liability asserting that there was no implied term as to the fitness of the produce. They plead that this was a sale by description and they do not hold themselves out as specialist stock feed suppliers. It is pleaded that the products purchased by the Claimants were waste and were described by Mr Simon Mason on behalf of the Defendants as having a lot of “wet and rot”. It is also pleaded that it was obvious and clear on visual observation when loading or unloading the produce that the sweet potatoes were wet and rotten. The Defendants also assert contributory negligence on the part of the Claimants in failing to consider whether the sweet potatoes were suitable for feeding to stock. They put the Claimants to proof of losses and the causation thereof.

The Issues

7. The principal factual issues are as follows
 - (a) What was said about the sweet potatoes when Mr Malcolm Hobill spoke to Mr Simon Mason on the telephone and agreed to purchase them.
 - (b) What in fact was the condition of the sweet potatoes when they were collected from the Defendants’ premises and unloaded at the Claimants’. The Defendants say that they were obviously wet, mouldy and rotting. It is the Claimants’ case that there was nothing obviously wrong with them, otherwise they would not have been fed to their cattle.
 - (c) How many of the Claimants’ cattle perished as a result of the sweet potato poisoning. Expert evidence has been given on this point as, as in even in the best run cattle business, there will be an element of underlying mortality.
8. The legal issues are
 - (a) Whether there was an implied term in the contract between the Claimants and the Defendants pursuant to Section 14 of the Sale of Goods Act 1979, that the sweet potatoes were of satisfactory quality and fit to be used as stock feed.
 - (b) Did the Defendants owe a duty of care in tort?

- (c) If there has been a breach of an implied term, or the duty of care, did the Claimants act reasonably in feeding the sweet potatoes to their cattle?
- (d) Are the Claimants' losses foreseeable?
- (e) Quantification of the Claimants' losses.

The Factual Evidence

9. I heard evidence from Mr and Mrs Hobill directors of the Claimants' company, their driver Mr Allen who collected the sweet potatoes on 17th September 2013 and their vet Mr Thorne who attended the Claimants' farm on 22nd September 2013. He diagnosed the cause of death as sweet potato poisoning. This is a condition Mr Thorne was aware of, through his training, but had never actually encountered before. The Claimants' directors themselves had not previously encountered, or indeed heard of the condition.
10. In addition I have a witness statement from a Miss Payne, another veterinary surgeon, and an advisor in Toxicology and Chemical Feed and Food Safety working for the Animal and Plant Health Agency. She carried out scientific analysis of the tissue samples taken and submitted to her by Mr Thorne. Her analysis confirmed Mr Thorne's diagnosis. She also examined an example of a sweet potato taken to her premises by Mr Thorne.
11. For the Defendants, I have heard from Mr John Mason a director of the Defendants and his nephew Mr Simon Mason who is a site manager for the Defendants at their premises near Boston. Mr Simon Mason dealt with the Claimants' directors' purchase of the sweet potatoes. He was also notified directly by the Claimants' directors of the problems which then followed.
12. The Defendant also called a Mr Bloor who has played a dual role. Initially he was involved in examining the Claimants' losses on the instruction of the NFU Mutual Insurers. Effectively he was fulfilling the role of a loss adjuster in his early involvement with this claim. Thereafter he was instructed by the Defendants to act as an expert witness to provide evidence to the court as to the quantification of the Claimants' losses.

Expert Evidence

13. As to the other expert evidence I have heard from two veterinary surgeons, Dr Andrews for the Claimant and Mr Blowey for the Defendants. They have agreed that the cattle deaths were caused by sweet potato poisoning. They have not been able to agree as to the number of cattle it can be proved died as a result.
14. In addition to Mr Bloor, I have heard from Mr Shelton an accountant who specialises in farming and related businesses who has quantified losses on behalf of the Claimants.
15. All the experts have the appropriate qualification and professional backgrounds to comment on the matters within their expertise. Nevertheless, the Claimants have challenged the admissibility of the evidence of Mr Bloor, or alternatively his ability to give objective evidence. There was an unsuccessful attempt at a hearing before Her Honour Judge George to exclude his evidence entirely. I have admitted that evidence, but will comment further as to the extent to which it may be relied upon below.
16. I have read all the witness statements and expert reports supplied to me. In setting out my decision below, the fact that I may not refer to any particular detail does not mean that I have not taken it into account. I seek to give an overall view of the reliability of the evidence, and my findings of fact relying on that evidence.

Analysis

17. The Claimants' evidence establishes that they run a large unit which finishes cattle for the retail market. They are clearly very experienced cattle farmers. Mr Hobill has worked with cattle for 30 years, Mrs Hobill has worked with cattle all her life.

18. Their unchallenged evidence was that they sell to major supermarkets. In order to maintain such supermarkets as customers, they are subject to routine unannounced inspections. In addition the Claimants' premises are an approved finishing unit for DEFRA and accordingly subject to inspections by that department. This accreditation requires them to keep their farm and stock to a high standard. It is part of the Claimants' business to take stock from other farms for welfare purposes, when the stock has been neglected or ill-treated in some way. The Claimants' unchallenged evidence was that in order to maintain this accreditation, their farm must be run and their stock kept to a high standard.
19. In addition, the Claimants' produce is labelled by its supermarket customers with the Red Tractor symbol. Again their unchallenged evidence was that the application of this symbol requires regular inspection of premises and cattle.
20. Both Mr and Mrs Hobill impressed me as straightforward and reliable witnesses. They clearly take a pride in what they do. Their documentation, made available for the expert witnesses, and for evidential purposes in the trial, demonstrates that they run an efficient unit. They are clearly concerned for the welfare of their cattle. When describing the condition and subsequent deaths of the cattle affected by the sweet potato poisoning, it was clear that they were affected, and upset by what had occurred.
21. It was suggested in the course of cross-examination that as a successful business, they were prepared to take risks. It was clearly inferred that they were prepared to feed low cost and obviously substandard produce to their cattle in order to boost profits. I consider that their indignation at such a suggestion was genuine. Their response, that they would not maintain their accreditations and approvals referred to above if they operated their business in such a way, reinforces the impression which they made in the witness box.
22. Mr Thorne gave evidence as to the condition of the sweet potatoes which he saw when he visited the Claimants' premises on 22nd September 2013. In order to seek scientific confirmation of his diagnosis, he sent a sample of the sweet

potatoes to Miss Payne. He also took a photograph of one example. He told me that the photograph was of a typical example from the pile stored in the Claimants' yard. He also told me that the pile of sweet potatoes that he observed after he asked to examine the affected cattle, did not appear to be obviously rotten, nor did they have a strong odour. It was suggested that as the Claimants were obviously valued clients of his veterinary practice, he might be less than objective, and inclined to support their account of the evidence. I found Mr Thorne to be a professional individual who gave his evidence in a genuine and truthful manner.

23. Mr Allen, is employed by the Claimants as a driver. Mr and Mrs Hobill also run a separate company providing transport for agricultural purposes. Mr Allen is employed by the Claimants in that business. He collected stock feed for the Claimants, who also supplied stock feed surplus to their requirements to other farming businesses. Frequently Mr Allen would collect vegetables for stock feed and take the produce straight from the supplier to one of the Claimants' feed customers. He told me that he had been involved in the business of transporting vegetables including root vegetables for 28 years. It was put to him in cross-examination that on collection, the relevant sweet potatoes were obviously rotting, producing an offensive smelling liquid and were mouldy. Mr Allen described climbing up to look at the produce he was collecting on the ladder attached to the trailer. He denied the description that was put to him in cross-examination. Furthermore, he said that this was a trailer which was not designed for carrying liquids. A rubber seal at the rear of the trailer, which was fairly old, was either missing or ineffective. If the sweet potatoes had been producing any liquid, this would have dripped on to him when he fixed the light unit to the trailer. He told me that rotting potatoes was one of the worst smells. If the sweet potatoes were in the condition the Defendants suggested, he would never have transported them. I found his evidence to be straightforward. He struck me as a plain speaking and honest man, genuinely offended by the suggestion that he was giving inaccurate evidence in order to support his employers.

24. Mr John Mason, one of the Defendants' directors could give little assistance as to the factual issues which arise in the case. He had no involvement in the discussions with Mr Hobill. His evidence principally concerned the background to the business. Notwithstanding the suggestion in the defence as pleaded, that the Claimants did not state that the sweet potatoes would be fed to cattle, Mr Mason conceded that it was obvious that they would be fed to cattle.
25. His attitude as to the Defendants' responsibility for the quality of the produce sold as stock feed is not supportable in law, in the absence of any clearly drawn written terms and conditions. He appeared to believe that vegetable produce sold as waste to a farmer, is sold for that farmer to do what he wants with it, and if there is a problem, then that is the problem for the farmer and not for his company as supplier. He consistently used the term 'waste' in the course of his evidence, but accepted that in reality vegetables described as waste were commonly sold as stock feed to farmers. They were waste because they were misshapen or the wrong size for the Defendants' customers who sold to the retail trade for human consumption.
26. The only direct factual evidence he could give was as to the condition of the sweet potatoes. He confirmed Mr Simon Mason's evidence that the quality of the sweet potatoes when they arrived were such that he wanted them off the Defendants' site. He described the liquid they were producing as "running all over the yard". He told me that it is also part of the Defendants' business, that vegetable produce which is not fit for feed, is sent for composting, with the Defendants' supplier being charged for the cost of disposal.
27. If the sweet potatoes were in the condition described by Mr John Mason, one is bound to wonder why he was prepared to tolerate them remaining on site between their delivery on 9th September, the agreed sale on to the Claimants on 13th September and their ultimate collection on 17th September, eight days later.
28. Mr John Mason's evidence, that Mr Hobill was a desperate man (i.e. that he was running short on food for his cattle) and 'we had to do what we could to help', is not based on any objective view formed himself, but entirely on what was reported to him by Mr Simon Mason.

29. The most important factual witness for the Defendants was Mr Simon Mason. He seemed to be quite unfamiliar with the concepts accepted initially by a Mr Ward of NFU Mutual (in an email dated 22nd October 2013 to Mr Bloor) that “unless they were bought as seen the insured would have the knowledge the potatoes would be consumed by cattle and they would be required to be fit for this purpose”. He gave evidence as to the condition of the sweet potatoes that was consistent with that given by his uncle.
30. I found Mr Simon Mason to be a most unimpressive witness. He was evasive and defensive more or less from the moment cross-examination started. I had to ask him to give straightforward answers to straightforward questions, something that he appeared to be reluctant to do more than once. When it was pointed out to him that the Defendants’ own invoices described vegetables sold to the Claimants as “stock feed” he responded “that’s what it says” and went on to say that the Defendants do not advertise as selling stock feed. He was eventually driven to concede that he knew that the vegetables sold to Mr Hobill would be fed to his cattle.
31. He maintained his account that when Mr Hobill rang him on 13th September 2013, he had told him that the Claimants were desperate for stock feed. Unchallenged documents disclosed by the Claimants show that during the relevant period, they were purchasing potatoes from other suppliers, some of which were delivered to their own premises and some of which were delivered to the Claimants’ own customers. Despite this, Mr Simon Mason maintained that Mr Hobill had told him he was desperate. It was common ground that there was a poor potato harvest in 2013.
32. Mr Simon Mason placed considerable reliance on photographs which were taken, he says, of the relevant sweet potatoes at the time of their delivery to the Defendants’ premises on 9th September 2013. These photographs, together with other documents relied upon by the Defendants were not disclosed until a few days before this case was originally listed for a trial, which could not proceed, in September last year. It has been suggested, with some vigour, on behalf of the Defendants that these documents establish an unassailable paper trail, which

shows that the sweet potatoes supplied to the Claimants were obviously in very poor condition and were rotting. The argument has been reinforced by reference to remarks made by Leggatt J in the report of **Gestmin v Credit Suisse (UK)** [2013] EWHC 3560 (Comm). In particular in paragraphs 15, 16 and 22. In that judgment the learned Judge gives guidance as to how to approach inconsistencies between documentary evidence and witnesses recollections. The arguments are superficially appealing. However further study of the relevant documents does not provide the overwhelming support to Mr Simon Mason's evidence that the Defendants contend for. These photographs have apparently always been available to the Defendants, notwithstanding that the first disclosure statements signed by Mr John Mason on the usual form, suggested that all reasonable searches had been undertaken. The documents apparently only came to light shortly before the trial was first listed, as a result of a casual remark made by Mr Simon Mason to office staff. There was no direct evidence from the staff concerned. The photographs were apparently taken by a Mr Frestle one of the Defendants' quality control inspectors. Mr Simon Mason's second witness statement states in paragraph 13 that the sweet potatoes were so bad that Mr Frestle did not bother to write the usual report. Mr Simon Mason inferred that the photographs were taken to show the general standard of the load. However we have not heard from Mr Frestle himself, as to whether the photographs were intended to be a representative sample of the load as a whole or what the purpose of the photographs was. The photographs apparently taken by Mr Frestle are in stark contrast to the example photographed by Mr Thorne on 22nd September 2013. We had Mr Thorne's direct evidence that the sample that he photographed, was indicative of the general condition of the sweet potatoes which he saw.

33. There is also evidence in the Defendants' documents as to the weight of the sweet potatoes when delivered to them. It is the Defendants' evidence that these sweet potatoes were directly sold on to the Claimants, after being removed from their cartons. The weights in the Defendants' documents of the potatoes as they arrived on the Defendants' site and as they were later despatched in the Claimants' trailer do not stand up to analysis. Both Dr Andrews, the Claimants'

veterinary expert and Mrs Hobill have analysed the figures and demonstrated the inconsistencies. I do not propose to repeat that analysis in this judgment. While the explanations given by the Masons may account for some of those inconsistencies, they do not account for all.

34. The observations of Leggatt J in paragraph 18 of his judgment that memories of past beliefs are revised to make them more consistent with our present beliefs and in paragraph 19, that the nature of litigation is such that witnesses often have a stake in a particular version of events, is borne out by the evidence given by Mr John Mason, whose belief that whatever description was attached to the produce he sold to the Claimants, the Defendants bore no responsibility for the quality of the product. I find that his description of the produce was influenced by Mr Simon Mason and the latter's defensiveness when he realised the gravity of the problem that the sweet potatoes had caused to the Claimants. It is also of note that Mr Simon Mason told me that Mr Bettinson, the supplier of the sweet potatoes, was a relatively new customer for the Defendants, of whom the Defendants had high hopes. He said that if there was any way in which they could salvage the load of sweet potatoes for Mr Bettinson, as they were a valuable crop, they would. Accordingly, I find that when Mr Hobill telephoned asking if there was stock feed available, Mr Simon Mason saw the opportunity to avoid sending them for composting, for which a charge would have been made to Mr Bettinson.
35. Accordingly where there are differences between the factual evidence given by the Masons and that given on behalf of the Claimants, I reject the Defendants' evidence and accept that which was given by the Claimants.

Factual Findings

36. As to the condition of the sweet potatoes, the Defendants' witness statements as originally served suggest that only Mr Simon Mason could give direct evidence of the condition of the sweet potatoes, although Mr John Mason purported to do so in cross-examination. Their evidence is to be contrasted with that of Mr and Mrs Hobill who saw them as they were delivered, and when they were still in the Claimants' yard where they were stored in a position where they would be

seen as everyone came and went about their business in the Claimants' premises. The Mason's evidence contrasts with that of Mr Allen, who had years of experience and who struck me as knowing a rotten load of vegetables if he saw one. It is also to be contrasted by what was seen and indeed not smelt by Mr Thorne, a professional man, whose initial impression was confirmed by the scientific evidence and who saw nothing like the amount of mould on the sample he sent to Miss Payne from that which can be seen in the Defendants' photographs. He was interested in the condition of the sweet potatoes, as sweet potato poisoning was a condition he had been aware of in the course of his training as a veterinary surgeon, but had never encountered in practice.

37. The Defendants have pointed to the fact that Miss Payne's analysis showed multiple irregular three millimetre to one centimetre wide raised plaques, typical of mould/fungus. This was on a sweet potato submitted on 22nd September, twelve days after the photographs apparently taken by Mr Frestle. One does not need specialist training in biochemistry, to know that once a vegetable has started to rot, it will continue to do so unless stored in very cold or frozen conditions. These sweet potatoes were simply stacked in an open yard.
38. Accordingly, I find on the balance of probabilities that the condition of the sweet potatoes collected by Mr Allen and delivered to the Claimants' yard, was not obviously mouldy and rotten and did not have an offensive smell.
39. As to what was said by Mr Hobill to Mr Simon Mason at the time he agreed to purchase the potatoes, I reject Mr Simon Mason's evidence that Mr Hobill told him he was desperate. I accept Mr Hobill's evidence, that given the nature of the unit which they run, they would not allow their stocks to run down. The distances between the two businesses are not that great. A text message sent by Mr Simon Mason to Mr Hobill on 14th September, indicates that the Claimants had not left a trailer in the Defendants' yard, as they often did. The trailer was not in fact loaded until 17th September. If the Claimants were desperate for feed, noting from their invoice on page 240, that between 13th September and 17th September they transported a number of loads of potatoes to themselves or to other customers, they would not have been supplying those other customers.

I accept Mr Hobill's remark that they would give preference to their own stock if they were short of feed. Further, in any event, the standards to which they run their farms with the ever present chance of inspections as discussed above, it would be foolish of them to run low on feed. I accept the Hobills' evidence that they do not allow this to happen.

40. Accordingly I find on the balance of probabilities that there was no suggestion by Mr Hobill to Mr Simon Mason that the Claimants were desperate for feed. I find that the only description given by Mr Simon Mason was that the sweet potatoes were a bit soft. I also accept the Hobill's evidence, that if the potatoes had been as soft and rotten as the Masons suggest, they could not properly be processed by a machine known as a truncher, which the Claimants used for chopping up vegetables to feed to their cattle as they would simply turn to mush. So far as the remark made in the course of a telephone conversation between Mrs Hobill and Mr Bloor is concerned, about "overcooked mash". I accept Mrs Hobill's account that she told Mr Bloor that they were not like that.
41. I note that Mr Simon Mason suggests that during discussions after the Claimant's cattle started to die, Mr Hobill told him that he was only seeking to claim against the Defendants' insurers because they were desperate and they had no insurance of their own. Mr Hobill denies he said any such thing. Moreover he has given evidence, not contradicted, that they are indeed insured in common with the Defendants, by the NFU. I find there was a conversation about insurance, although Mr Hobill did not recollect such a conversation. I find that the discussion was to the effect that the Hobills did not see why they should use their own insurance, when it was the Defendants' produce that was the cause of their loss. This attitude is borne out by the fact that Mrs Hobill, at Mr Simon Mason's invitation wrote a letter to a Miss Wright an employee of the Defendant on 10th October 2015, setting out information as to how she calculated the losses, by then, sustained by the Claimants' business.

The Number of Cattle Which Died

42. The particulars of the claim when first drafted relied on the factual evidence of Mrs Hobill. That evidence together with the detailed documents kept by the

Claimants has been analysed by the two veterinary experts, Dr Andrews for the Claimant and Mr Blowey for the Defendants. Each expert agreed that the other's method in reaching a conclusion as to the number of cattle deaths which could be attributed to the sweet potato poisoning was logical

43. Dr Andrews had the advantage of having visited the Claimants' farm, observed their practices and the general condition of their premises. He noted the fact that the Claimants operate sick pens for cattle that were unwell. They were able to isolate those which had been fed sweet potatoes, from others. Their cattle were, in accordance with relevant Regulations, ear tagged. Dr Andrews had considered an American academic article cited by Mr Blowey in reaching his conclusions. Dr Andrews did not find the article of assistance, as there are different methods of keeping cattle in America, animals are not ear tagged. In addition American animals are generally slaughtered before long term effects of sweet potato poisoning could be demonstrated. Dr Andrews had also considered the long term effect of such conditions as fog fever, which have some similarities with the symptoms shown in sweet potato poisoning.
44. Mr Blowey had not visited the Claimants' farm himself. He had prepared his report on a review of the documentary evidence. When determining the mortality caused by the sweet potato poisoning, he deducted an average mortality over the year. However the death chart kept by the Claimants which was considered by both experts demonstrates that the level of mortality varies over the year, and unsurprisingly is greater during the winter months. (D135). Death rates had reduced since the introduction of vaccination by the Claimants in 2010. In the two years prior to 2013, there had been no deaths in September only one death in October and two deaths in November.
45. Having considered the written reports of both these eminent experts, and their approach to the quantification of the number of cattle which died, I find that Dr Andrews' approach is more analytical and logical and I adopt it. He has taken into account seasonal variations in the death rate on the Claimants farm. He has taken into account and seen for himself the conditions in which the Claimants keep their cattle and their ability to isolate those animals which had been fed the

sweet potatoes. Accordingly I find that there were 49 attributable deaths on the Claimants' farm, and 45 were sent for slaughter. Accordingly I find that there were 89 additional cattle deaths attributable to the sweet potato poisoning.

Liability

46. In his helpful skeleton argument the Claimants' Counsel describes the claim as an uncomplicated claim in contract. The Defendants' position as pleaded in paragraph 17B(ii) of its defence demonstrated a lack of realism at an early stage of these proceedings. It is pleaded that "the Claimant requested stock feed, but did not state that the agricultural waste would be fed to his cattle". This is despite the fact that Mr John Mason remarked 'what else would the sweet potatoes be used for'. The Defendants accepted that all the vegetables which were not suitable because of their size or shape, for packaging for retail customers was described as waste, even though some might well be fit for human consumption. Accordingly I conclude that the description 'waste' was not a demonstration that the produce sold as such was potentially unfit. The Defendants plead that this was a sale of goods by description and that the description given by Mr Simon Mason was that the sweet potatoes were wet and rotten. I have rejected this description on the factual evidence.

47. It was tentatively suggested in argument by the Defendants' Counsel, that the Claimants could not rely on the provisions of the Sale of Goods Act 1979, as this had not been expressly pleaded. I observe that it is much too late to take a pleading point in final submissions. I accept that the Act is not expressly referred to in the Particulars of Claim, and that it would be good practice to do so. However the Defendants have referred to the Act in its defence and the Reply makes it clear that the Act is engaged. The Defendants cannot argue that they have been misled or embarrassed by any omission to refer expressly to the Act in the Particulars of Claim.

48. Insofar as this was a sale by description the relevant description is "stock feed". It defies logic to conclude that any material sold with that description would be

subject to anything other than an implied term that it was suitable for feed for stock.

49. With reference to Section 14(2A), the court must take into account the standard that a reasonable person would regard as satisfactory and the matters raised by the Section. The Defendants point to the price, arguing that this was cheap produce used by the Claimants to enhance their profits, whatever the risk. However it can be seen from the Defendants' invoice (D139) that all the vegetable waste sold by the Defendants to the Claimants over a considerable period was sold at a flat rate of £8 per ton. The sweet potatoes were sold at that rate, although the Defendants unsurprisingly did not pursue payment. The evidence was that it was convenient to both parties to agree such a cost, as this saved the expense and time of seeking to grade and individually price each load of vegetables.
50. It was suggested, on behalf of the Defendants, that with reference to Section 14(3) of the Act, as the Defendants did not hold themselves out as specialists in animal feed, it was unreasonable for the Claimants to rely on their skill and judgment. The burden of proving that a buyer does not rely on the seller's skill or judgment rests on the seller: **Ashington Piggeries Ltd v Christopher Hill Ltd [1972] AC 441**. The Defendants argued that the sale of stock feed was not their principle business, accordingly it was unreasonable for the Claimants to rely on any implied term as to quality. I find that it was clear from the evidence that I heard, that the sale of vegetables as stock feed was a routine part of the Defendants' activities. It is indeed an efficient and economical way of disposing of vegetable produce that is not of the size or perfection that supermarkets and other retailers perceive the human consumer to require. Mr Bloor the Defendants agricultural expert, who in addition to being a consultant, is also a dairy farmer, agreed that he fed such vegetable waste to his own stock. The Claimants made known the purpose of their purchase of vegetables, namely as stock feed, there was consequently an implied condition that the sweet potatoes would be reasonably fit for use as a feeding stuff for animals: **Ashington Piggeries v Christopher Hill** at 485C.

51. A duty to provide vegetables that were reasonably fit for purpose is not excused by an assertion that the Defendant did not know that mouldy sweet potatoes were toxic for cattle: **Hardwick Game Farm v SAPP** [1969] 2 AC 31 at 84E, in which it is observed that a customer buying from an apparently reputable shopkeeper or from a manufacturer will normally as a matter of fact be relying on the seller's skill and judgment unless there is something to exclude the inference. In the present case I find nothing to exclude such an inference.
52. There were no written contractual terms between the parties which might exclude any liability on the part of the Defendants. The Claimants intended to purchase the sweet potatoes to feed to their cattle. The Defendants knew this. The sweet potatoes were toxic to cattle and caused their death. Accordingly they were not of satisfactory quality or fit for purpose. It follows that liability is established against the Defendants.

Causation

53. The Defendants have asserted that there was a degree of contributory negligence on the part of the Claimants or alternatively that having knowingly fed mouldy rotten sweet potatoes to their cattle they took the risk of the losses which followed. I have found on the facts that the Claimants did not feed sweet potatoes that were obviously mouldy and rotten. Such mould as there was on the sweet potatoes when their condition was noticed by Mr Thorne, could only be seen on examination at close quarters. It is common ground that neither the Claimants nor the Defendants had encountered this problem before. There are no facts on which I find it is reasonable to make a finding of any contributory fault on the part of the Claimants.
54. As to remoteness, it is obvious that if you sell toxic stock feed it is likely that cattle will become ill and or die.

Duty of Care

55. The Claimants have pleaded the claim in tort as an alternative, principally so that they may advance a claim for distress. I have no doubt that seeing such a

number of cattle die in the distressing condition described by Mr and Mrs Hobill and Mr Thorne was traumatic and stressful. However the Claimants sue as a company and the distress was suffered by its directors. The company cannot of itself suffer emotional distress. I have considered, whether it is appropriate in these circumstances to make an award for distress relying on the principles used in holiday claims where, one individual contracts on behalf of a group of others. However in such claims the contract itself is for enjoyment and relaxation. Whilst I have considerable sympathy for the Claimants' directors' distress as a result of seeing their cattle die, I do not find it appropriate to make an award for distress and inconvenience in the present case. Accordingly it is not necessary to make any further observations about the duty of care.

Quantum

56. Quantification of the losses has been dealt with by Mr Shelton and Mr Bloor.

57. Mr Bloor is in the unusual position of having first become involved in this claim on behalf of the Defendants' insurers, as an agricultural consultant. In his factual witness statement he says that he has worked with NFU Mutual for a number of years and his role is usually to assist the company by carrying out an investigation. His usual role is to place the insurers in a position to either admit liability or instruct solicitors to defend the claim. It was suggested to him in cross-examination that his initial role was as a loss adjuster. He denied that he was a loss adjuster, but was driven to accept that he was fulfilling that role at the time of his first involvement. Despite having concluded, as he says in paragraph 10 of his witness statement, that this was a case where liability ought not to be admitted, he went on to discuss the Claimants' losses with Mrs Hobill in the course of a telephone conversation on 29th October.

58. The Claimants objected to the use of Mr Bloor as an expert witness. It is suggested that his evidence is contrary to the requirement of independence from the facts as embodied in the Practice Direction to Part 35 of the Civil Procedure Rules. Whilst I find Mr Bloor's evidence to be admissible, nevertheless he must establish his independence from the pressures of litigation. I found Mr Bloor's attempts to detach himself from his initial role to be unconvincing, he was

unduly defensive about that role. He was reluctant to accept the description of loss adjuster. This inevitably affects the weight of his opinion.

59. Mr Shelton, instructed by the Claimants is a qualified accountant with a great deal of experience in agricultural work. His reports demonstrates a methodical approach to assessing the losses taking into account costs of feed, additional costs, loss of profit and the other matters referred to in his report. Although he has considered it likely that other cattle were affected to a lesser extent by the poisoning, he has left that out of account in his opinion. He is of the opinion for the reasons given in paragraph 3.9 of the joint report, that Mr Bloor's allowance for mortality is too great. I find Mr Shelton's approach to calculations more scientific. His approach e.g. with regard to saved feed costs set out in paragraph 3 of the joint report is more logical. It is another demonstration of Mr Shelton's more methodical and evidence based approach to the quantification of loss. The same can be seen with regard to the calculation of additional wage costs on page 460.

60. Accordingly I accept Mr Shelton's figures as to the quantification of the Claimants' losses.

Conclusion

61. For the reasons given above, I find that there has been a breach of contract on the part of the Defendants and that the sweet potatoes that were sold to the Claimants were subject to an implied term as to fitness and quality. The feed was toxic and the Defendants were in breach of that implied term. I find on the balance of probabilities that 89 cattle died as a result and that the losses caused to the Claimants amount to £70,888.72. I make no award for distress and inconvenience.

Dated this 27th day of October 2016

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HER HONOUR JUDGE HAMPTON