Neutral Citation Number: [2019] EWHC 507 (Ch)

Case No: HC-2017-001572

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building, 7 Rolls Buildings,
Fetter Lane, London, EC4A 1NL

Date: 6 March 2019

Before :

HIS HONOUR JUDGE KEYSER Q.C.
sitting as a Judge of the High Court

- -

Between :

GREEN DEAL MARKETING SOUTHERN LIMITED	**Claimant**
- and -	
(1) ECONOMY ENERGY TRADING LIMITED **(2) E (GAS AND ELECTRICITY) LIMITED** **(3) LUBNA KHILJI** **(4) PAUL COOKE**	**Defendants**
-and-	
TOBIAS JUNG	**Third Party**
RICHARD TURNER	**Fourth Party**
ASHLEY ALLEN	**Fifth Party**

- -
- -

Jeffrey Chapman QC and Rory Brown (instructed by **Brandsmiths**) for the **Claimant, Third Party, Fourth Party and Fifth Party**
Andrew Green QC and Dominic Howells (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Defendants**

Hearing dates: 13, 14, 15, 16, 19, 20, 21 November and 18 December 2018
Written submissions: 7 December 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HIS HONOUR JUDGE KEYSER Q.C.

H.H. Judge Keyser Q.C. :

Introduction

1. The first defendant, Economy Energy Trading Limited ("EE"), and the second defendant, E (Gas and Electricity) Limited ("EGEL"), are companies in the business of selling gas and electricity to domestic customers. On 14 January 2019, after the conclusion of the trial in these proceedings, EE entered administration. The third defendant, Lubna Khilji, is a director and the Chief Executive Officer of EE. The fourth defendant, Paul Cooke, is a director, now indeed the sole director, of EGEL. Ms Khilji and Mr Cooke live together in a personal relationship, are the principal beneficiaries of each other's wills, and together share ultimate beneficial ownership of the holding companies that own EE and EGEL.

2. Until the matters giving rise to these proceedings, the claimant, Green Deal Marketing Southern Limited ("GDM"), carried on the business of an energy mediator, connecting energy providers with gas and electricity consumers. More particularly, it had a team of door-to-door salesmen (sometimes referred to as "field sales agents"), numbering more than 200, who would visit the homes of customers of the larger energy suppliers and try to persuade those customers to transfer their custom to GDM's principal. From May 2015 until January 2017 GDM provided these services exclusively to EE. Initially it did so under a written contract ("the Partnering Agreement") dated 18 May 2015 and signed on 20 July 2015. However, it contends that from 29 June 2016 its relationship with EE was governed by a new written contract signed on that date ("the Heads of Terms"). EE contends that the Heads of Terms had no legal effect and that the relationship remained subject to the Partnering Agreement.

3. On 31 January 2017 the commercial relationship between EE and GDM was summarily terminated by EE. The correct analysis of the termination is an issue between the parties.

4. GDM contends that in ending the commercial relationship EE was acting wrongfully and in repudiatory breach of contract. In these proceedings, GDM claims against EE damages at common law for breach of contract and compensation pursuant to regulation 17 of the Commercial Agents (Council Directive) Regulations 1993 ("the Regulations").

5. EE denies the claim in its entirety. Its principal contention is that it was entitled to bring the relationship to an end on account of serious breaches of contract by GDM involving mis-selling on a large scale by GDM's field sales agents. EE counterclaims against GDM damages for loss of profits said to have resulted from GDM's breaches of contract. By reason of an order made at the pre-trial review, the quantum of the damages payable to EE, if liability on the counterclaim is established, do not fall to be assessed at this trial.

6. GDM makes a further claim against EE, EGEL, Ms Khilji and Mr Cooke for breach of confidentiality. The claim in summary is that, immediately after EE terminated its relationship with GDM, EGEL or its agent contacted over 200 of GDM's sales agents with an offer of work, using for that purpose a database that was confidential to GDM and had been obtained by EGEL from EE in breach of EE's duty of confidentiality to GDM.

7. EE also brought Part 20 claims against three directors of GDM, Tobias Jung, Richard Turner and Ashley Allen, alleging that they induced GDM's breaches of contract and that they conspired to injure EE by means of those breaches. Those Part 20 claims were discontinued very shortly before trial.

8. During the trial, reference was made to a significant amount of documentation generated by investigations into the operations of EE by the Office of Gas and Electricity Markets ("Ofgem"). That documentation was subject of a confidentiality order made at an earlier stage of the proceedings and extended by me at the trial. For the periods when that documentation was being referred to, the court sat in private; the trial was held in public at all other times. Some of that confidential documentation is relevant to the findings and conclusions expressed in this judgment. When reference to properly confidential material has been necessary, the text of this judgment is limited to what I consider to be an appropriate summary and the detailed references have been included in a confidential annex, available only to those permitted to have access to the documentation. I have tried to ensure that the amount of material so omitted from the public judgment is kept to the necessary minimum.

9. In the course of this judgment I shall make findings on some disputed issues of fact. In doing so, I have regard to all of the voluminous evidence that was adduced at trial, both documentary and from witnesses. The judgment is long enough as it is, perhaps too long. I shall not make it longer by a preamble giving my impressions of the various people who gave evidence. Suffice it to say at this stage that the principal actors, whom I have already named, all seemed to me to be highly motivated individuals who were willing to be less than frank or entirely truthful if they considered it to be in their financial interests. Ms Khilji and Mr Cooke were, perhaps, especially unimpressive; however, that was in part due to their unfortunate manner in the witness box—hers, sullen; his, blustering, combative and dismissive—and I have not assumed that their evidence was shown to be more unreliable than that of other witnesses on that account. One particular matter calls for brief comment at the outset. Both sides conducted the case by seeking to impeach the personal character of their opponents. (The attacks on Ms Khilji seemed to me to be particularly distasteful in tone.) More specifically, each side tried to persuade me that the other had no interest in fostering good selling practices and was happy to tolerate or even encourage mis-selling in the single-minded pursuit of profit. In respect of both sides of the case, I reject that picture. There is no doubt that GDM and EE and their respective directors were strongly driven by money and commercial growth. It is likely that this attitude contributed to pressures that led to or exacerbated the problems that came to a head in late 2016 and in 2017. I also think that EE was overly reliant on GDM to ensure good sales practices and that its lack of internal expertise was highlighted by its unimaginative and unconstructive response to Ofgem's concerns, dealt with in some detail below. However, I formed the clear view that the senior management of both companies, including the directors, were genuinely concerned to avoid mis-selling. Each side claims that much for itself. I find it to be true of both. Financial self-interest is a sufficient, albeit not necessarily exclusive, explanation of that concern. The fact that mis-selling was not avoided does not mean that the concern was not real.

10. The rest of this judgment will be structured as follows. In paragraphs 12 to 92 I shall set out the main factual narrative, referring only to such matters as seem to be relevant to the issues or helpful for explaining the context in which those issues have arisen.

This part of the judgment will also set out the most relevant provisions of the Partnering Agreement and of the Heads of Terms. In paragraphs 93 to 98 I shall address the question concerning which contract governed the relationship between GDM and EE. In paragraphs 99 to 138 I shall consider the allegations of breach of contract and the correct analysis of the termination of the relationship between GDM and EE. In paragraphs 139 to 152 I shall consider GDM's claim to be entitled to compensation under the Regulations. In paragraphs 153 to 196 I shall consider issues of quantification. In paragraphs 197 to 202 I shall consider the claim for misuse of confidential information. The result is summarised at paragraph 203.

11. I am grateful to Mr Chapman QC and Mr Brown, counsel for GDM, and to Mr Green QC and Mr Howells, counsel for EE and EGEL, for their helpful written and oral submissions.

The Facts

12. In October 2012 EE began to carry on the business of the supply of low-cost gas and electricity to existing customers of the UK's major energy suppliers. Ms Khilji has at all times been the driving force behind EE, as well as the person with effective control of it, and has ensured that its vision for growth is ambitious. That ambitious vision was shared by others, notably the Chief Operations Officer Angela Beardsmore, who left the company in mid-2016, and the Head of Sales, Lynne Curtis-Blackwell. By February 2014 EE had approximately 70,000 customers, most of whom it had acquired in the last three months of 2013. Growth continued, and EE had approximately 94,000 customers by January 2016 and approximately 206,000 customers by January 2017. In the financial year ending on 31 March 2017, EE had a turnover of £133,685,000 and an operating profit of £2,785,000.

13. As a supplier of energy to consumers, EE is subject to regulation by Ofgem. Ofgem has particular concern with the market to vulnerable consumers, that is, consumers who lack full ability to conduct their own affairs. Most of EE's customers use prepayment meters ("PPMs"), though since 2016 it has also supplied energy to customers who pay by direct debit after the supply has been made. A high proportion of PPM customers are regarded as vulnerable consumers; therefore EE's business is the kind with which Ofgem has a particular concern.

14. One means by which Ofgem exercises regulation is by the inclusion of Standard Licence Conditions (SLCs) in licences to supply energy. There are separate sets of SLCs for the supply of gas and the supply of electricity; however, for the purposes of this case there is no difference between them and I shall refer to them as though they were a single set. SLC 25 is one of a number of conditions dealing with consumer protection. At the material time, this very lengthy condition included the following particularly material provisions:

> "25.1 The objective of this licence condition ('the Objective') is to ensure that:
>
> (a) all information which the licensee or any Representative provides (whether in Writing, by

electronic display or orally) to Domestic Customers in the course of the licensee's Marketing Activities and/or its Telesales Activities is complete and accurate, is capable of being easily understood by Domestic Customers, does not relate to products which are inappropriate to the Domestic Customer to whom it is directed, does not mislead the Domestic Customer to whom it is directed and is otherwise fair both in terms of its content and in terms of how it is presented (with more important information being given appropriate prominence); and

(b) the licensee's Marketing Activities and Telesales Activities and all contact by the licensee or a Representative with, and the behaviour of the licensee and any Representative towards, a Domestic Customer in the course of the licensee's Marketing Activities and/or Telesales Activities are conducted in a fair, transparent, appropriate and professional manner.

25.2 The licensee shall take all reasonable steps:

(a) to secure the achievement of the Objective; and

(b) to avoid doing anything which jeopardises its ability to achieve the Objective.

25.3 The steps which the licensee shall take to secure the achievement of the Objective in respect of its Marketing Activities shall include, without limitation, the steps which are detailed at paragraphs 25.5 to 25.16 of this licence condition.

…

25.5 The licensee shall:

(a) put in place and follow procedures which are appropriate for the selection of staff or other Representatives who are employed or engaged in roles which involve, might involve or will involve communication with Domestic Customers for the purpose of its Marketing Activities;

(b) provide or procure appropriate training for all staff or other Representatives who communicate with Domestic Customers for the purposes of the licensee's Marketing Activities, which training should include, but not be limited to, training about the licensee's obligations insofar as they affect

Domestic Customers, including its obligations under the licence condition;

(c) take all reasonable steps to ensure that: (i) a Domestic Customer may readily identify the licenses whenever that Domestic Customer is contacted by the licensee or a Representative; (ii) if the Domestic Customer enters into a Domestic Supply Contract with the licenses, that Domestic Customer will readily understand that they have done so; and (iii) any unsolicited contact made by the licenses or a Representative with any Domestic Customer takes place at a reasonable time.

25.6 Where the licensee or any Representative offers to enter into a Domestic Supply Contract with a Domestic Customer in the course of its Marketing Activities, the licensee or Representative must at the time it makes the offer and before entering into a Domestic Supply Contract with that Domestic Customer:

(a) provide to that Domestic Customer, in Writing or by means of electronic display, an estimate of the total annual Charges … [The detailed provisions require that, where the Domestic Consumer is a PPM customer, he must be provided with a comparison between the charges of the current supplier and the charges under the tariff being offered by the licensee.]

…

25.11 Where the licensee enters into a Domestic Supply Contract with a Domestic Customer, the licensee or Representative shall, either at the time that the Domestic Supply Contract is entered into or as soon as reasonably practicable thereafter, provide to that Domestic Customer all the information which the licensee or Representative reasonably considers the Domestic Customer would need having regard to the Objective and the licensee's obligation to secure compliance with the same.

…

25.16 The licensee must take all reasonable steps to establish management arrangements that facilitate the licensee's compliance with its obligations under this condition, including, as appropriate, steps to ensure that any agents and subcontractors of the licensee establish equivalent arrangements."

The definition of "Marketing Activities" covered door-to-door sales such as were carried on for EE by GDM's field sales agents between May 2015 and January 2017. And each of those field sales agents came within the definition of "Representative".

15. When the commercial relationship between EE and GDM commenced in May 2015, EE was subject to an ongoing Ofgem investigation in respect of the period October 2012 to December 2013 concerning *inter alia* its compliance with SLC 25 in gas and electricity supply licences. The main trigger for the investigation was concern about high levels of consumer complaints about EE in October 2013, the beginning of the period of its initial expansion. In due course, Ofgem found and EE admitted that there had been various breaches of SLC 25 by the provision of misleading information to consumers by EE's field sales agents in the course of face-to-face marketing activities, and in respect of EE's selection and training of its sales staff. By a decision dated 17 December 2015, Ofgem imposed a financial penalty of £1 on EE, on the basis that EE had paid a consumer redress package of £249,999 in respect of the admitted breaches. The Notice of Decision stated that, if that payment had not been made, Ofgem would have considered it appropriate to impose "a much larger penalty" on EE.

16. GDM was incorporated in 2012, and until 2015 it carried on the business of an energy comparison website and the supply of eco-installations. For present purposes, however, its story begins in early 2015, when its director, Andrew Denning, began to forge business links with a company called Digital Wave Solutions Limited ("DWS"). DWS had been incorporated by Mr Turner in October 2014, primarily as a means of carrying out IT consultancy services. In January 2015 Mr Jung and Mr Allen became directors and shareholders of DWS with Mr Turner, with a view to exploiting the commercial potential of software developed by Mr Turner and, in particular, an application called Open Door, which collected and maintained data about field sales agents in a confidential database and provided the agents' instructions and recorded a log of their door-to-door activities. At the same time, Mr Jung and Mr Allen had begun to provide services to GDM on an occasional or consultancy basis.

17. In April 2015 Mr Jung on behalf of DWS sent an introductory email to EE in response to an advertisement for field sales advisers who could promote EE's energy packages by way of door-to-door sales. As a result of that initial contact, on 8 May 2015 a meeting took place between representatives of EE and DWS; the discussion focused both on the use of the Open Door application and on the provision of a team of field sales advisers to assist in the expansion of EE's customer base. This in turn led to discussions among the personnel at DWS and GDM with a view to combining their resources—DWS's software applications and GDM's salesforce—to provide the services sought by EE. In the event, it was decided that the two companies would remain separate but that Mr Jung, Mr Turner and Mr Allen would be appointed directors of GDM in addition to Mr Denning and would become equal shareholders with him. Mr Allen was Head of Operations and Finance. Mr Jung was Head of Sales and Marketing. Mr Turner was Head of Technology and Software Development. Mr Denning was Sales Director and, for a brief period in late 2015, Head of Compliance.

18. Further discussions between EE and GDM resulted in the making of the Partnering Agreement; it was not signed until 20 July 2015 but had a stated "Commencement Date" of 18 May 2015 and was treated as applying to the relationship from that date. The Partnering Agreement referred to EE as "Economy Energy" and to GDM, though not consistently, as "the Partner"; here and elsewhere in this judgment I shall substitute

EE and GDM in direct quotation. At the start of the document was a "Statement of Ambition":

> "The parties' ambition is to work together to offer EE's customers savings on household bills by offering energy saving and switching, with the aim to grow to 1,000+ products per week within 3 months. GDM agrees to have a minimum of 10 field agents and the required support staff required during the duration of this agreement for successful running of the campaign."

19. Table 1 set out the Commission that was payable by EE to GDM. For single fuel switches (i.e. either gas or electricity) the payment was £25 per customer for the first thousand switches in a calendar week, £26 per customer for the next thousand and £27 per customer thereafter. For dual fuel switches (i.e. both gas and electricity) the corresponding figures were £50, £52 and £54.

20. Under the heading "Minimum Service Agreement" it was provided:

> "Subject to the Terms and Conditions attached, GDM shall adhere to the following service levels, a constant breach of these levels may be subject to the conditions specified in 12.3a".

There then followed Table 3, which set out certain "Conditions" for specified "Subjects":

Subject	Condition
Minimum Sales - Month 1 & 2	400 fuels per week
Minimum Sales - Month 3	1000 fuels per week
Cancellations	<15% (not including objections)
Complaints	<2%
Compliance	>85%
Sales Agent Rating	>8 out of 10

In the Terms and Conditions that followed, "Customer" was defined as "the individual person who makes a Switch as a result of a Referral". "Switch" was defined as "a sales transaction entered into by a Customer with EE". "Customer Complaint" was defined as "an expression of dissatisfaction or a grievance on a customer's (consumer's) behalf to EE or GDM. An Upheld Complaint is the Customer Complaint that is found to be legitimate after investigation, at the sole discretion of EE." ("Objections", undefined, relate to the case where the existing energy supplier objects to the transfer, for example because there is an unpaid balance on the customer's account.)

21. Among the other provisions of the Terms and Conditions were the following:

> "2.5 EE has the right to change the value of the Commissions for Switches by giving not less than 30 days' notice to GDM, which would not be applied on retrospectively to previous Calendar months' Commissions."

"2.6 GDM shall ensure that the Minimum Service Levels are met at all times."

"5.1 The parties shall comply with all applicable laws, statutes, rules, regulations, directives or requirements of all relevant governmental agencies and regulatory bodies including, but not limited to, those relating to data protection."

"9 Limitation of Liability

9.1 Subject to clauses 9.2, 9.3 and 9.4, the total liability of either party under or arising out of this Agreement (whether in contract, tort (including negligence) or otherwise) shall not exceed £50,000 in respect of any one incident or series of connected incidents, or £250,000 in respect of all claims (connected or unconnected) in any consecutive period of twelve (12) months.

…

9.3 EE shall not be liable for any loss of profit or any indirect, special or consequential loss."

"12 Term and Termination

12.1 The initial period of this Agreement shall, subject to earlier termination in accordance with this clause 12, be twelve (3) months from the Commencement Date (the 'Initial Period'). On completion of the Initial Period the Agreement shall continue unless terminated by either party by giving the other not less than one (1) months' (sic) notice or otherwise in accordance with this clause 12.

12.2 Either party may terminate this Agreement at any time by giving written notice, effective immediately, to the other if:

a) The other is in material breach of this Agreement (including any material breach of warranty) and either the material breach is not capable of remedy, or, if capable of remedy, the breaching party fails to remedy such material breach within thirty days of receipt of a notice specifying such material breach and requiring such material breach to be remedied ...

…

12.3 EE reserve the right to terminate this Agreement at any time by giving written notice , effective immediately, if:

a) GDM does not meet the minimum service agreement for 6 weeks in a 12 months period as specified in Table 3."

22. There is an obvious mistake in clause 12.1, where there is a discrepancy between the period of months expressed in words ("twelve") and the period expressed in figures ("3"). This discrepancy arose because of inconsistent incorporation of amendments in the drafting process. On the basis of the evidence adduced at trial, it is quite clear, in my judgment, that the parties' intention and understanding was that the Initial Period of the agreement should be three months. This revision originated with Ms Khilji, who marked the alteration to a three-month trial period on a draft of the document, and that was the trial period resolved on by EE's board. Accordingly, I regard the averment in the particulars of claim that the Initial Period was twelve months as incorrect. For EE, Mr Green submitted that the reference to 12 months in clause 12.3(a) showed that the discrepancy between "3" and "twelve" ought to be resolved in favour of the latter. I disagree: first, it is clear that there was a deliberate decision to substitute "3" and that the problem lies in a failure to adjust the rest of the document coherently; second, clause 12.3(a) could not anyway take effect before the end of the first twelve months; third, the effect of clause 12.1 is that the agreement would, unless terminated upon the expiry of the primary term, continue indefinitely until one month's notice were given, so clause 12.3(a) would still have meaningful operation if the primary term were only three months.

23. The people at EE with primary responsibility for the day-to-day relationship with GDM were two Managers, Vijay Gagan (from May to July 2015, and again from early July 2016) and Vanessa Blandy (from June 2015 to early July 2016). Mr Gagan and Ms Blandy were directly answerable to the Head of Sales, Ms Curtis-Blackwell. She in turn was answerable to Kris Jakobsen, the Sales Director. When Mr Jakobsen left the company in early June 2016, Ms Curtis-Blackwell took over his role. Ms Beardsmore was a director and Chief Operations Officer until 31 August 2016. John McKenzie was and is the Chief Financial Officer; he is now the only director apart from Ms Khilji. Trevor Foster was a director throughout the period of the relationship between GDM and EE but had limited involvement in matters affecting GDM.

24. At the commencement of the relationship, in May 2015, EE provided to GDM, for the use of its field sales agents, a Welcome Pack, which contained among other things EE's own Code of Conduct and a Code of Practice produced by the Association of Energy Suppliers. Those documents set out information regarding compliance with SLC 25 and the avoidance of mis-selling. EE also had a series of protocols, dealing with a range of matters such as training, complaints handling, verification procedures, and recruitment. The protocol on training contained a section on "Compliance and Mis-selling", with reference to SLC 25. Although the evidence on the point is not entirely clear, it is likely that the protocols, which were subject to periodic revision, were provided to GDM. More certainly, EE provided GDM with training materials including PowerPoint slides, a compliance training exercise and a Field Sales Assessment Questionnaire. Although it may be arguable that the training materials were rather indigestible, they evidence an intention to ensure that field sales agents were fully aware of their compliance obligations. The responsibility for recruitment and training of agents rested with GDM.

25. GDM quickly recruited more field sales agents and began to generate a large amount of business for EE. These efforts were appreciated by EE. In an email to the senior members of EE's Sales Team on 14 July 2015, Ms Beardsmore noted that GDM were "doing a great job" and that EE "would be a lot worse off without them"; she expressed

some concern, however, that more would be required of GDM if EE were to meet its sales targets. In fact, sales continued to increase. An internal email from EE's Verifications Manager on 10 August 2015 noted: "[GDM] are growing at a rapid speed and already have over 100 agents." That month, in recognition of GDM's success, EE expanded the territories in which its sales agents were permitted to operate.

26. Along with the increased sales there came incidences of complaints concerning the poor selling practices of some field agents. On 6 August 2015 Mr Allen sent a bulletin to the sales team, identifying some non-compliant behaviours that had been subject of complaint and warning that any further occasions of such conduct would be treated as gross misconduct. On 19 August 2015 Ms Blandy sent to Mr Jung and Mr Allen a draft complaints policy, setting out the way in which breaches of the field sales code of conduct would be dealt with, and asked for their feedback. Mr Jung responded on 23 August 2015 with comments on both the complaints policy and the code of conduct. Regarding the complaints policy, he emphasised the need for a proper investigation to take place before disciplinary sanctions were applied. Regarding the code of conduct, he made practical suggestions with a view to reducing the number of complaints; these included restricting the hours during which agents could call on customers and a prohibition on calls at sheltered housing.

27. The overall position remained positive, however. EE's figures for August and September 2015 show that GDM was already responsible for achieving more than half of the sales made by EE and that in percentage terms it generated a lower level of complaints of mis-selling than did EE's own field sales team or the other external agents it engaged. In an email to Mr Jakobsen and Ms Curtis-Blackwell on 2 October 2015 Ms Blandy identified the quality of GDM's training as the main difference "between GDM and others for compliance that makes them that much better." Ms Curtis-Blackwell observed in reply, "GDM pull someone off the road as soon as there's an issue."

28. It is a mark of the success of the commercial relationship between EE and GDM in its early months that by autumn 2015 they were turning their thoughts to a new agreement to carry the relationship forward. The communications in that regard are relevant, if at all, only to the status of the Heads of Terms that was eventually signed. On 9 October 2015 Ms Blandy sent an email to Mr Jung, Mr Turner and Mr Allen:

> "Please find attach[ed] Heads of Terms, this sets out the general outline of what we would like to put in place. It is fairly similar to what is in place currently with some minor amendments, particularly in relation to term. Sorry for the delay in these being forwarded.
>
> We have been really pleased with the outcome of our partnership to date and want to thank you for your contribution to our growth.
>
> If you could consider the document attached and collate your thoughts and feedback to be forward to me. We will then put in place a review meeting/conference call in order to finalise information to be entered into the final contract."

29. The draft document sent by Ms Blandy was in many respects similar to the Heads of Terms subsequently signed and it contained the same preamble that was included in the signed document and in all intermediate drafts:

> "This document sets out the heads of terms that will form the basis of agreement between EE and GDM and that both parties will work together to agree a formal contract within 90 days of commencement."

(The draft document and all subsequent drafts identified the "Commencement date" as 1 October 2015.) The proposed arrangement was for a fixed three-year term, during which GDM would provide its services exclusively to EE for remuneration at the rate of £25 per fuel. (By the time of the penultimate draft of the Heads of Terms, remuneration had been amended to a scale rising to £27 per fuel.) The security of a fixed term was obviously advantageous to GDM. EE's interest in exclusivity was stated clearly by Mr McKenzie in an email to Mr Turner on 14 October 2015:

> "We are very keen that GDM continue to sell exclusively for Economy Energy in the agreed areas and we had hoped that the substantial business already generated and the prospect of a long and growing partnership might have persuaded you not to sell to another party."

30. GDM forwarded the draft Heads of Terms to Graeme Parry, an acquaintance person with long experience in the energy industry and whose expertise they respected, and asked for his recommendations. On 30 October 2015 Mr Parry provided a detailed response, which made some points concerning provision for termination and for performance targets. The first paragraph of the response said:

> "It is probably worth stating at the outset that signing this or any subsequent version does not constitute a contract, it merely sets out a framework subsequent to which the parties are committed to continue to develop the provisions and mechanisms covering their commercial relationship. All of which will be enshrined in the final legally binding contract covered by an 'entire agreement clause', which effectively means that any agreement, arrangement or practice operated prior to the contract would be void. In essence I am sure we all understand that agreeing heads doesn't mean that either party is bound to abide by the terms and can renegotiate all aspects in the subsequent discussions. I should also point out that my comments should not be construed as a legal opinion and that I would strongly advise that legal advice is sort (sic) in the preparation of the final document."

31. On 2 November 2015 Mr Allen sent a response to Ms Blandy and Mr Jakobsen. The email confirmed that GDM shared EE's enthusiasm for extending and developing the relationship between the companies. It stated: "we feel strongly that the final agreement should include provisions covering the following areas"; those areas were set out in a number of bullet points. The email concluded: "I hope you agree that these aspects of our relationship are sufficiently important to be clarified in the Heads of Terms rather

than brought into the more detailed clause drafting which follows our initial agreement."

32. On 18 November 2015 Mr Jakobsen responded with a revised draft. It incorporated some of GDM's proposals but not others; Mr Jakobsen identified a couple of "deal breakers" on which no negotiation was possible. His email ended: "If you can feed back any comments, I will aim to get this over to the lawyers on Friday to sense check. Once agreed I shall get them to draft the full agreement."

33. GDM again provided the latest draft to Mr Parry, who commented at some length on 19 November. One passage in the email concerned the implications of certain Key Performance Indicators ("KPIs") in the draft:

> "I guess you would acknowledge that you are already in breach on some of the performance criteria so there needs to be a side agreement that you work towards achieving those before they become live and actionable under the final legal document."

34. Meanwhile, of course, other matters had continued to be discussed between the parties. One such matter concerned a tariff that EE offered to customers on the basis of No Standing Charge; that is, that the customers would pay only for the fuel actually used and would not pay a standing flat-rate charge in addition. On 5 November 2015 Mr Jung sent an email to Ms Blandy, Mr Jakobsen and Mrs Curtis-Blackwell, in which he recommended scrapping the No Standing Charge tariff: it often made no material difference to the customers' bills; it involved complications that increased the risk of mis-selling; and it gave to rivals' win-back campaigns an easy opportunity to encourage complaints against GDM's field sales agents. EE did not respond to that email, but Mr Jung was told that scrapping the No Standing Charge tariff was not an option.

35. A second matter, which was being actively discussed within EE, concerned the perceived need to slow down the rate of sales on account of concerns regarding the levels of cancellations and complaints. On 3 November 2015 Ms Khilji told Mr Jakobsen of some of her concerns, including a report that field sales agents who had been dismissed by EGEL for mis-selling were being taken on by GDM. She asked Mr Jakobsen to check that agents who had previously been dismissed for mis-selling were not engaged, and continued:

> "If we have to formalise a process to make it work its definetly (sic) worth doing. I do honestly believe direct sales can work and I don't want us to quit the channel but I do definetly (sic) need absolute certainty the team are doing EVERYTHING to avoid it. …
>
> We can tolerate the 1% complaints. And so can Ofgem.
>
> But when it's housing associations, trading standards, bg [i.e. British Gas], eco and epower I'm starting to think if we're doing it right. I agree with the long term goals around telesales, partners etc. But we need something in the interim. I just don't know what."

36. Internal emails on 12 and 13 November 2015 show that Mr McKenzie proposed reducing the weekly sales target to 6,500, of which 4,000 would be for GDM and the rest would be achieved by EE's own field sales and telesales teams; the relationship with the other sales agent, ESNF, would be terminated. Even with this reduction, he thought, it would be possible to achieve a total of over 100,000 customers by April 2016. Ms Khilji approved that proposal and explained it to a reluctant Mr Jakobsen:

> "I started with axe GDM and ESNF, John convinced me to keep GDM.
>
> I know you won't be happy but it's out of control and with additional interest from EON regulations team it has to be something dramatic for a dramatic improvement. We'll still be on target but with the added protections outlined by John [McKenzie]. …
>
> Trust me. This needs to happen or we'll be subject to another investigation."

37. Mr Jakobsen remained unhappy. He replied to Ms Khilji: "the info I have seen from the recent complaints would seem to show that GDM rather than ESNF are generating more of the issues. … I'd encourage you to look at asking both agencies to reduce volume significantly rather than removing either one." For the time being, that advice prevailed; the decision was taken to reduce ESNF's weekly fuel sales to 1,000 and GDM's to 3,000. That represented a significant reduction of sales for GDM, which by November 2015 was achieving about 5,000 sales a week.

38. Mr Jakobsen identified two further steps that he wished to take in respect of GDM: to work through a list of its agents, ranked by quality, and remove the poorest performers; and to stop GDM from engaging sub-agents to provide field sales teams. On 17 November he recommended to Mr Turner that GDM dismiss 66 field sales agents whose performance had been identified as "outwith acceptable levels". Sixty-one of those agents were dismissed immediately. Mr Turner asked for the remaining five agents to be given a further chance, on condition that they be monitored strictly and would be dismissed if their performance did not improve. Mr Jakobsen considered the request but rejected it: "Ultimately, whilst I understand it is extremely difficult to dismiss your biggest earners, I'm afraid we are not in a position to take risks with our reputation." The agents were duly dismissed by GDM, which explained developments to its field sales agents in a November Newsletter:

> "As most of you will know we have decided to consolidate our sales operation and focus on quality to ensure longevity for us all. This has resulted in GDM removing contractors from the campaign with a high cancellation percentage or high levels of complaints.
>
> EE has re-introduced calling all customers within 1 hour of sign-up to ensure the correct process was followed at point of sale. …

> All of these changes are already having a significant impact on the cancellation percentage which is coming down dramatically which is very positive."

39. The mention of the telephone calls to customers within one hour of them signing up with EE was to what has been called Live Verification. This was a third matter of discussion in late 2015. An important part of compliance with SLC 25 was that each field sale be verified prior to registration, in order to ensure that the customer had given free and informed consent to the sale, understood its principal terms and remained content to proceed. Two methods of verification were employed: the Verification Letter, sent to the customer's home, confirming the main details of the contract and providing information about cancellation rights; and the Verification Call, which involved going over matters that had or ought to have been dealt with by the field sales agent. In November 2015 a new system (Live Verification) was introduced, whereby the Verification Call would be made within one hour of the point of sale. Initially all Live Verification was carried out by EE's own staff. By March 2016 the level of sales had rendered this impractical; from that point the Live Verification was carried out by the company whose field sales agent had made the relevant sale. In May 2016 Live Verification became the responsibility of the entity (for example, GDM) that had made the sale. EE's Sales and Quality Team listened to a random sample of the Live Verification calls to monitor quality and compliance.

40. Discussion between EE and GDM about the draft Heads of Terms continued. On 20 January 2016 Mr Jakobsen sent an email to Mr Turner, Mr Jung and Mr Allen:

> "At long last, I'm pleased to attach the final version of our heads of terms. These have now been through our lawyers so have changed a bit.
>
> Once you've had a chance to review, let me know and I'll send over a signed copy. We can then get DWF [solicitors] to put into a full contract."

41. There does not appear to have been a written response by GDM to that email. In his written evidence Mr Jung said that discussions about the Heads of Terms stalled because Mr Jakobsen was dismissed by EE. That is incorrect: Mr Jakobsen did not leave EE until June 2016. In his oral evidence Mr Jung suggested that the reason for the lack of any progress in early 2016 was that GDM was unhappy with the rates of payment in the draft Heads of Terms; however, he said, there would have been some discussion about the matter with EE. It is likely that there was some kind of conversation on the matter between GDM and Ms Blandy, as there was nearly daily contact at the time and emails in April 2016 indicate that the terms of any future agreement remained under discussion. I consider it unlikely that there was anything in the nature of an agreement that the draft terms or any of them should be operative before they were signed.

42. On 12 April 2016 GDM sent EE its weekly invoice. The charges for fuel sales were made at the rates set out in the Partnering Agreement (see paragraph 19 above), which were also those set out in the various drafts of the Heads of Terms. However, an additional item on the invoice related to "Verifications" at a unit price of £2.20. That charge, which is for Live Verifications, was not in the Partnering Agreement and was

introduced into the draft Heads of Terms in the version sent by Mr Jakobsen on 20 January 2016. In an email to Mr Allen on 12 April, Ms Blandy picked up on this component of the invoice (a subsequent email made clear that she was referring to the £2.20 charge):

> "[W]e are currently being billed on the new pricing structure as per the recent Heads of Terms. In order to continue payment on this basis we will require the Heads returned signed."

43. In the course of an exchange of emails on 15 April Ms Blandy asked GDM either to confirm that it would sign the Heads of Terms or to submit a new invoice. Mr Turner said that he had understood some weeks previously that EE was amending a section of the Heads of Terms but that nothing further had been heard. By 18 April Mr Turner was able to confirm to Mr Jakobsen that GDM was happy to sign the latest version of the Heads of Terms, subject to certain minor details including the updating of the postcodes for the areas where GDM was to have exclusive sales rights. On 28 April Mr Jakobsen sent an email to Mr Turner:

> "Please find attached updated heads:
>
> - Postcodes should now be correct
> - I believe we are now agreed re data for invoicing
> - I have removed the cancellation clause as it seemed unnecessary given the heads have a termination provision anyway and we'll look to expand on this within a full contract.
>
> Let me know if you guys are comfortable with that and I'll send over a clean copy."

44. Having received no response, Mr Jakobsen re-sent that email on 18 May. Mr Turner replied that he, Mr Allen and Mr Jung had spoken and were waiting to hear back from GDM's solicitor; Mr Jung, he said, was "chasing now". That was not entirely true. The likelihood, in my judgment, is that Mr Turner had previously left a telephone message with a solicitor, with a view to asking for advice on the draft Heads of Terms, but when the solicitor did not respond to the message the directors of GDM forgot about the matter. When Mr Jakobsen chased for a response, Mr Turner asked Mr Jung to get in touch with a solicitor. Mr Jung told his fellow directors that he was going to instruct a solicitor; he asked them to inform him of any specific questions they had, and Mr Denning sent him a list of questions. But in the event, for reasons that remain unclear, no advice was taken.

45. The evidence of Ms Blandy, which I accept on this point, is that despite the continued failure of the parties to sign the Heads of Terms the unit charge of £2.20 for Verification Calls continued to be invoiced by GDM and was paid by EE.

46. In May 2016 the invoicing system was modified by mutual agreement. Thenceforth, GDM would invoice for the amount of its sales less a deduction of 27.5%, which would act as a retention against future loss rates (that is, switches that for one reason or another

did not proceed). Each quarter, when EE knew accurately the number of new customers that it had lost and in respect of whom no commission was payable to GDM, it would produce a reconciliation report and make any necessary balancing payment form the retention.

47. Still the Heads of Terms were not signed. A meeting to discuss them was arranged for 13 June 2016. In the week before the meeting Mr Jung sent to Ms Blandy an email setting out GDM's position on the draft:

> "The partnership between GDM and EE has been a successful one and we are looking forward to continuing to grow our operation. There have however been some significant changes in both market price which we have to pay to our advisors and operational demand to support EE's new sales process. We have asked for our commercials [i.e. charging rates] to grow in line with these changes but this has not happened yet.
>
> GDM has stayed exclusive to EE and not worked with any other companies even in postcode areas in which we are not currently contracted. For GDM to stay exclusive to EE nationwide for the proposed 3 years and grow to support the growth aspirations new commercials of £30 a fuel will need to be agreed.
>
> GDM will also require additional areas to grow and [as?] discussed in our meetings in the past. [A suggested list of thirteen postcodes followed.]
>
> In return for the above we will give you our full exclusive commitment and aim to grow to 5000+ fuel sales a week."

48. On 22 June, after the meeting had taken place, Ms Blandy sent to GDM updated Heads of Terms for review and signature; these included a new payment rate of £30 per fuel, "which we have agreed will come into effect from time of signing", as well as new postcodes.

49. At long last, the Heads of Terms were signed at a meeting on 29 June 2016. The negotiation of the document had taken many months, and its signing was clearly seen by each party as representing a major commitment by both to their future relationship and a significant step forward in achieving their shared ambition for substantial growth in the years ahead. The mood at the meeting was celebratory. Some take-away food from Wagamama's was laid on; this extravagance seems to have been in part a way of celebrating but no doubt also because the signing took place at a working meeting extending to lunchtime.

50. The Heads of Terms is a four-page document and must be considered in its entirety. Here I set out only its most relevant provisions. It begins with a preamble (already mentioned in the context of the draft but here repeated) followed by a paragraph defining the scope of the subject matter of the document:

> "This document sets out the heads of terms that will form the basis of agreement between EE and GDM and that both parties

will work together to agree a formal contract within 90 days of commencement.

"Scope: GDM agrees to supply to EE and EE agrees to purchase and pay for the 'field agent' service described in this document."

51. The sections headed "Terms" and "Exclusivity" are important in their entirety.

"Terms

Commencement date: [this was left blank]

This agreement covers a fixed period of 3 years, after which time a review meeting will be held to renegotiate or fix the terms of this agreement. The agreement will include standard termination rights, including rights to allow EE to terminate on material breach by GDM which is irremediable or, if remediable, the breach is not remedies within 10 days.

Throughout the fixed period 6 monthly reviews will be held internally and give EE the provision to terminate the contract in the event of a breach that cannot be remedied by GDM (to the sole satisfaction of EE) having been given 14 days' notice of any such breach. Notice of this must be provided in writing stating clear reasons for the termination.

It is intended that any/all valid termination reasons will be full (scil. fully) outlined in the formal contract."

"Exclusivity

GDM agrees to provide direct sales to EE on an exclusive basis.

EE will not allow access to any other field sales team to the postcodes listed below provided sales are at an acceptable and prior agreed level: [then follows a list of 53 postcode areas].

Commissions shall not be payable for any sales made outside the agreed postcode areas.

Areas will be allocated for a fixed term of 3 months as to their exclusivity, should there be non-performance against set targets to be agreed in the final contract after this fixed term EE reserves the right to re-allocate postcodes."

52. The following provision appeared under the heading "Confidentiality":

"Each of the parties undertakes to keep confidential, both during this Agreement and after its expiry or termination all information

both written and oral concerning the business and affairs that has been received as a result of this agreement."

53. Under the heading "Financials", provision was made for payments to GDM for sales:

> "£30 per live (net) fuels per week
>
> For customer sales completed via the 'telesales model' an additional payment of £2.20 per live customer shall be payable."

54. Provision for KPIs was made under the heading "Targets":

> "GDM agrees to adhere to the below minimum targets:
>
> Volume of cancellations and % against sales – Target <15%
>
> Volume of objections/rejections and % against sales <5%
>
> Volume of complaints and % against sales – Target <1%
>
> Call quality to remain over 85%
>
> Successful contact rate on telesales model >80% per agent per week
>
> All targets will be reviewed and communicated on a weekly basis.
>
> EE shall be entitled to amend the KPIs from time to time (acting reasonably) so as to ensure compliance with any legal and/or regulatory obligations.
>
> If GDM fails to achieve the KPIs and does not remedy such failure within a reasonable period of time, EE shall be entitled to terminate the agreement."

55. At the end of the Heads of Terms, specific obligations of each party were set out. GDM agreed to:

> "1. Provide full names of all field sales agents to EE for agreement prior to sales. No field sales agents shall be provided with badge IDs unless previously approved by EE.
>
> 2. All agents to have DBS checks completed and approved by EE.
>
> 3. Adhere to EE's policies, including code of conduct, complaints and training.
>
> …

5. Hold weekly compliance meeting, provide weekly reports and immediately highlight to EE any risks or non-compliance with SLC25.

…

7. Comply with all relevant legal and regulatory requirements and ensure it (sic) acts and omissions do not result in EE being in breach of its legal and regulatory requirements."

56. Agreement of the Heads of Terms brought new impetus to the relationship between EE and GDM. The signing of the Heads of Terms took place at the conclusion of a "Kick-off Meeting", called by Ms Beardsmore "to talk through the sales ramp up and how Economy can help support." Thereafter, EE did indeed provide practical support: it paid the salaries of three of the Regional Sales Managers that GDM engaged and the rent for three of GDM's regional offices. GDM, for its part, recruited Regional Sales Managers, who had responsibility for enforcing its compliance procedures among the field sales team, and in August 2016 GDM engaged Kelly Owens as its Head of Learning and Development. Ms Owens, who was highly experienced, revised and re-wrote the training materials that had been provided to GDM by EE for the purpose of instituting a training programme for field sales agents. As she explained in her evidence at trial, the training made some use of PowerPoint but aimed to be "experiential" so that field sales agents would "internalise" the matters in which they were instructed. The PowerPoint slides and text show that the training covered both the principles and the details of compliance with SLC 25, and Ms Owens, who was an impressive witness, confirmed that these matters were a major part of the training. I am sure that Ms Owens was personally a very effective trainer and I consider the printed materials produced by her to have been an improvement on those that had been produced by EE and used previously. However, EE's earlier materials did address compliance matters in detail and do not give rise to any inference or suspicion that compliance was not a concern at EE. Ms Owens demonstrated the revised training materials in a meeting with Ms Curtis-Blackwell and Mr Gagan on 18 October 2016 and the new materials were used for training from early November 2016.

57. In the period from late summer until autumn 2016, various aspects of the field sales procedure were modified in the interests of improving compliance and reducing complaints. (These are conveniently summarised in responses subsequently given by EE to enquiries by Ofgem.) In August, all field sales agents were required to sign a Representation Agreement, which was intended to ensure that they understood the importance of good sales conduct as regards both the customers and EE. In the same month, distinctive clothing and photographic identification were introduced for field sales agents, with a view to ensuring that customers understood which company the agents were representing. From mid-September, EE stopped registering new sales unless the customer had been spoken to in a Verification Call; the former practice of relying on a Verification Letter if no answer had been obtained on the telephone was stopped. In November, all Verification Calls were made the responsibility of GDM, though the monitoring of quality and compliance remained in-house with EE. (Before the agency was terminated, responsibility for Live Verification was moved to a different company called Phonetics.)

58. On 21 September 2016 Ofgem opened a formal investigation ("the SLC 25 Investigation") into alleged non-compliance by EE with SLC 25 in respect of mis-selling to consumers. The matters giving rise to the SLC 25 Investigation were, first, that between February 2016 and May 2016 Ofgem received information from two "whistleblowers", each a former GDM sales agent, making allegations of mis-selling by EE and, second, that analysis of complaints records showed an increasing number of complaints in respect of EE's sales agents, such that EE was regarded as a clear outlier in relation to complaints of mis-selling when compared to other energy suppliers. At the same time, Ofgem launched a separate investigation into a suspected infringement of Chapter 1 of the Competition Act 1998 by reason of an anti-competitive agreement between EE and EGEL. (In June 2016 Ms Khilji had asked Ms Curtis-Blackwell to send an email to Mr Turner, asking him to "hide the properties belonging to"—that is, the customers of—EGEL "so the agents can't sell to them please.")

59. On 29 September 2016 there was a meeting of representatives of Ofgem and EE to discuss the SLC 25 Investigation. Ofgem indicated that, as a result of complaints received from multiple sources, it had three areas of concern: first, customers being misled into switching to EE, in particular (a) switches happening without the customer's express permission, (b) requests for cancellation by customers not being acted upon, and (c) customers being switched despite stating expressly that they did not want to switch; second, field sales agents failing to identify themselves correctly (for example, saying that they had come to read the meter); third, customers believing that they had signed for something other than a switch. In a letter dated 7 October 2016 Ms Khilji, who had not yet received particulars of the allegations, offered a general rebuttal. She said that EE had made great efforts to ensure proper sales practice and that mis-selling was not in the interests either of the sales agents or of EE. She invited Ofgem to consider the extent to which the allegations were being deliberately generated by other suppliers as part of their retention activities.

60. On 19 October 2016 GDM's senior management sent a message to all of its sales agents via Open Door, emphasising the company's commitment to compliant sales and fair treatment of customers and warning that a complaint of any of a number of non-compliant practices would result in immediate suspension of the agent pending investigation. Mr Allen forwarded that message to Ms Curtis-Blackwell and Ms Khilji, with "apologies for the non-compliant behaviour of some of our field agents of late." Ms Khilji replied, "Thanks for that, so reassuring to know we're all in the same page. Let's keep it going though, regular reminders/prompts so we don't end up here again." Later that afternoon, Mr Allen sent to Ms Khilji a detailed report compiled on the basis of feedback from regional sales managers. He wrote:

> "Today has really highlighted to us that it was only a small percentage of our team using immoral sales techniques sub 10%. I hope this gives you great confidence that the vast majority of our sales are compliant and we will not tolerate anything less moving forward."

Ms Khilji forwarded the report to Ms Curtis-Blackwell and Mr McKenzie and commented, "Everyone has a good understanding, that's encouraging. I'll press home the point of managing people who don't comply"; and again, "I do think it's a relatively new problem and we just need to stamp it out." In a response to Mr Allen that evening she explained her perception of the position:

> "Great to see the feedback from managers, it's clear they understand what's expected. I think the missing link has been sending unsuccessful sales details to them and asking chronic recidivists to leave the campaign.
>
> This brings me to the attached calls [i.e. those attached to the email], they are the reason I panicked in the first instance. Where a sale is completed, it's of very good quality[;] however where they are unsuccessful it's really incredibly bad. This is the stuff we need to act on.
>
> The trend growing in complaints is from people who are not customers but who have had an extremely bad experience, so much so they contact us to complain and go to the consumer regularly CAB—the agency who referred us to Ofgem. I think this is indicative of the trend of agent behaviour.
>
> Until recently things have been going really well and I just want to be able to go back to that. Part of that process is change for you but also a lot of changes for us. I'll keep you in loop when we do make the changes.
>
> Thanks again for your support and please don't let up the focus. If we can make field sales work to a high quality, it's a positive move giving longevity to us all."

61. On 22 December 2016 Ofgem wrote again to EE in respect of the SLC 25 Investigation. The letter expressed concern that Ofgem was continuing to receive serious allegations of poor behaviours on the part of EE's field sales agents and specified categories into which the complaints fell, including those identified in the meeting on 29 September 2016 (above). Ofgem asked EE to address the concerns with a plan of action by 10 January 2017. Further particulars of the letter are set out in the Confidential Annex.

62. On Friday 6 January 2017 a meeting took place between Mr Jung and Mr Allen for GDM and Ms Khilji, Mr McKenzie, Ms Curtis-Blackwell and Mr Gagan for EE. The purpose of the meeting was to discuss matters raised by Ofgem's letter of 22 December 2016. Nine actions were agreed by EE and GDM in respect of training, investigation, remuneration and incentives and related matters. Evidence was given for EE that at that meeting Ms Khilji and Mr McKenzie made it clear that, unless the conduct of GDM's sales agents changed, EE would terminate door-to-door sales. That evidence was disputed by GDM. In circumstances where memories are likely to be diminished by passage of time and where evidence is naturally liable to be self-serving, the most reliable evidence as to what transpired is, in my judgment, the contemporaneous note made by Mr Gagan and typed up later. The existence of this note was only revealed during the course of the trial and a copy of the typed note was then produced. (I find it hard to understand how EE's solicitors can ever possibly have thought that the note was privileged.) The note does not record any warning, threat or ultimatum to that effect. Any such comment would surely have been recorded. Therefore I find that none was expressed. I accept, however, that at the meeting general mention is likely to have been made of the risk that the continued existence of the door-to-door sales business would be jeopardised if Ofgem could not be satisfied.

63. On Monday 9 January 2017, pursuant to what had been discussed at the meeting, Mr Jung sent to Ms Curtis-Blackwell an email, headed "I hope this is what your (sic) looking for", in which he set out details of GDM's management structure, use of software, and learning and development programme.

64. On Tuesday 10 January 2017 Ms Khilji wrote a long letter to Ofgem in response to its letter of 22 December 2016. The letter made use of the information contained in Mr Jung's email of the previous day. After setting out details of the steps EE was taking, Ms Khilji addressed the question of compliance with SLC 25. She said that EE took seriously both Ofgem's concerns and the complaints, and continued:

> "It acknowledges that the volume of interactions currently taking place across the county is significant and is resulting in increased numbers of complaint to both CA [Citizens Advice] and Ofgem. Although the level of complaint compared to the number of interactions is low, Economy Energy does not seek to cause any individual any trouble and fully understands the need to reduce the number of complaints.
>
> We consider that the number of complaints received relating to sales activity is low as a percentage of the number of sales interactions conducted and that this has been achieved through the monitoring processes and training we have in place. In order to make a significant reduction in the physical number of complaints received it is possible that we would need to reduce the number of customer interactions."

65. On 13 January 2017 Mr Gagan provided GDM with EE's Representation Agreement, "to be signed by all advisors ONCE they have sat the Customer Service presentation and they have successfully passed the assessment." The Representation Agreement amounted to an undertaking to act in a manner compliant with SLC 25 and spelled out in some detail what that entailed.

66. On 19 January 2017 Mr Gagan asked GDM to provide him with up-to-date mobile telephone numbers for all its field sales agents. I am satisfied and find that there was nothing sinister about this: as the email said and as Mr Gagan repeated in his evidence, he had reason to believe that the contact details he had were not entirely accurate; the information was not being sought in order that it could be misused. However, later events have added significance to the request. The information requested was promptly provided.

67. On 25 January 2017 there was a meeting of EE's board of directors (Mr Foster, Ms Khilji and Mr McKenzie). The following passages in the minutes are relevant:

> "*1. Spotlight*
>
> LK expressed her concerns that the pace of growth in customer numbers has become very high potentially leading to a loss of control. Unlike the previous year sales have not slowed following the Christmas break and the costs of making these sales are increasing. The options available are to either accept a

> heavy cost of growing or to slow the growth rate and focus on improving systems and profitability. There was much discussion over the current strategy and the numerous outside factors including the price cap that will impact the business in the next financial year."
>
> "*4. Sales Report*
>
> Following on from the earlier discussions about the pace of growth it was agreed by all that the level of sales needed to be reduced. In broad terms it was agreed that the field sales would need to be reduced by about fifty percent at the net gain level. Options for this might include requiring one or more of the third party field agencies to stop altogether. Any further feedback from Ofgem might also influence this decision. JM and LK agreed that action would be taken within the next week and it was agreed that TF, LK and JM would meet again on 2 February to assess actions being taken."
>
> "*5. Operations Report*
>
> … IT problems have become more and more frequent with increased amounts of system downtime. Cyan Solutions are no longer able to cope with the size and scale of the business and a new IT partner is being sought."

68. On the late afternoon of 30 January 2017 Mr Allen attempted to speak by telephone to Ms Khilji after learning that a number of GDM's field sales agents had received a text message from EGEL with a view to recruiting them. Ms Khilji did not speak by telephone but sent a text saying that she had been in an all-day meeting with lawyers (which was untrue) and was stressed. The text continued: "Had a call with VJ [Gagan]. Spoke to EPower [i.e. EGEL]. They said they had 5 guys they were after. Said they won't persist." Mr Allen responded with two text messages: "I am extremely worried about what I have been told"; "5 people … they have called around 30 members of our field today." (The following day, at around lunchtime, Mr Allen sent another text message: "Lubna, they are offering our staff £19 a fuel and still calling them today. What's going on?")

69. On the late afternoon of 30 January, EE received Ofgem's letter in response to EE's letter of 10 January 2017. The response expressed concern at continuing complaints and at what was seen as the inadequacy of EE's response to Ofgem's earlier communications. It asked EE to provide a clear plan of action by 6 February 2017. Further particulars of the response are set out in the Confidential Annex.

70. There were two important telephone conversations on 31 January 2017. The first, short conversation took place at about 4 p.m., when Ms Curtis-Blackwell and Mr McKenzie called GDM and informed them that all field sales would be suspended as from 8 p.m. that day.

71. The second, much longer conversation took place in the evening and all but the beginning was recorded. The participants were Mr Gagan, Mr McKenzie and Mrs

Curtis-Blackwell for EE and Mr Jung and Mr Allen for GDM. It is clear from the transcript that, despite the difficult circumstances, the conversation was cordial and each side had an understanding of the other's difficulties. I shall mention some of the main points that were discussed.

72. First, the decision to stop field sales was not a total surprise, though its timing was. Mr McKenzie said: "While we have all thought this might happen one day, I don't think we thought it would be today." Mr Allen replied: "No. Yes, I think we all knew it was on the table."

73. Second, Mr Jung and Mr Allen did not make any objection to the decision to suspend field sales but they did raise the question of a notice period before the suspension took effect. Mr Allen said that there was a big difference between telling the field sales agents that they had no work tomorrow and telling them that there was a fortnight's notice period during which efforts would be made to resolve the position. He said: "I think within our heads of terms there is a 14-day notice period that we need to be served, so I just don't understand." Later he asked why the suspension could not be deferred until the end of the week. Mr Jung also raised the question of a 14-day notice period; he said that he had previously been assured that a notice period would apply in such circumstances and continued: "It is also in the heads [presumably the Heads of Terms]." The response to this from EE was to the effect that the receipt of the letter from Ofgem the previous day had made it necessary to make and implement a decision without delay.

74. Third, the conversation touched on the question of what was meant by a "suspension" of field sales. Mr McKenzie certainly appears to have thought of the matter in terms of a suspension, inasmuch as he envisaged field sales recommencing at some point. He said: "If we don't do it today, the chances are I'm getting another letter within a day or two, potentially forcing me into suspension for a potentially much longer period of time." However, he envisaged that the suspension, though not permanent, would be indefinite; later, he said: "We have told them [Ofgem] we are going to suspend field sales for a period. I guess, you know, I can't tell you exactly how long that is going to be, though, and I am sure it is not simple for you guys to turn round to your sales people and say, you know, 'Don't worry guys, it will all be back on at some point in the future.' I don't imagine that is going to cut it with many of them. I don't know the answer at the moment." Indeed, the resumption at any time of field sales was, though an aspiration, entirely uncertain, as is clear from this significant exchange between Mr Jung (TJ) and Mr McKenzie (JM):

> "TJ So that actually really means that you are saying that the relationship between us at this point is – that you are essentially giving us notice and saying, 'We don't know if it is going to get back'. So essentially you are terminating the agreement.
>
> JM I just don't know. I really don't know. We have done what we kind of had to do today. If we were to start again – I mean, already they have been pressing us on what is our plan for improving things. We have gone back with all the things, and we have talked about plenty of them with you— how we could police non-sale interactions, and all that kind

> of stuff—and they have basically said, 'That is not a big enough plan. We don't believe you have the right plan.' So we would have to go back with something pretty substantial to get going again. Given that I think all of us think we are doing quite a substantial amount already, to keep getting hit back with 'You are not doing enough' – I am not sure what more we can go back with that says, 'Now we are doing this, so that will be ok.'"

75. Fourth, Mr Allen expressed frustration at the fact (as he saw it) that a very high proportion of the complaints concerning GDM's field sales agents had been incited by a rival energy company as part of its win-back campaign. Ms Curtis-Blackwell expressed sympathy with Mr Allen's position but said that Ofgem's approach was that "a complaint is a complaint". She also observed that there were complaints that did not arise out of any win-back campaign but were rather the result of unjustifiable behaviour by field sales agents. Mr Allen accepted that; there were, he said, behaviours that were "uncontrollable".

76. Fifth, there was some discussion of recent approaches to GDM's agents by EGEL (which in the conversation was referred to as "EPower", one of its trading names). Mr Jung began to speak of the risk of other energy companies attempting to entice away GDM's agents, and Mr Allen (AA) interrupted:

> "AA Well, EPower have already started, which obviously has put our backs up, because they were getting calls yesterday, so they knew something was …
>
> TJ They knew yesterday, yes.
>
> AA I had an argument with their recruiter on the phone, saying, 'Who are you? Why are you doing this?' And she's telling me she's worked there for 16 months and they can do what they want, there is no link between the two businesses—there never has been—and she's been recruiting people for the last 16 months. And I was, like, … That's why I thought something's going on.
>
> JM I am surprised at that, because I didn't even know we were going to do this till this morning.
>
> AA I don't know how they, why, she took … yes. Apparently, she got given a database over the weekend, John.
>
> TJ She said she has been given a database of all the phone numbers of our guys."

77. Sixth, Mr Allen said that, in anticipation of something like a suspension of field sales, there had been internal discussions at GDM: "So we have obviously been thinking for a long time about setting up a comparison. We are actually thinking about buying a comparison service and then we are going to sell for multiple providers." Mr Allen and Mr Jung encouraged Mr McKenzie to involve EE as one of the providers.

78. After the second telephone conversation had ended, Mr Allen, Mr Jung, Mr Denning and a couple of employees created a Presentation for distribution on the following day by the regional sales managers to the field sales agents. The purpose of the Presentation was to try to reassure the field sales agents that they still had a future with GDM despite the end of the relationship with EE. Only the first page of the Presentation referred to EE: it mentioned that EE had been under "intense scrutiny" from Ofgem; it said that GDM had always "maintained [its] side of the partnership"; and it put what may euphemistically be termed a "spin" on the turn that events had taken:

> "However this partnership had started to become very one sided and we felt we were no longer able to secure the future of our business working alongside EE and so, as of yesterday at 20:00, that partnership ceased, with immediate effect.
>
> This is something we have planned for, and the knowledge that this partnership was going to come to an end has been in the pipeline for us for some time."

The remainder of the Presentation outlined long-term plans for a Whole of Market Comparison, which was to develop over time.

79. At some time on 1 February 2017 field sales agents engaged by GDM began receiving text messages from Energy Watch, a trading name of Amblin Limited, which sought to recruit them to work for EGEL:

> "E (Gas & Electricity) are recruiting. We pay £13.50 per fuel up to 49, £17.50 for 50-59, £18.50 60-69, 70+ £20 per fuel. Paid weekly, only 1 week in arrears. No Bond! Course next week. Call [contact details]."

80. On the evening of 1 February 2017 Mr Turner sent an email to Ms Khilji and Mr McKenzie. The email referred to GDM's disappointment at EE's decision "to suspend field sales with immediate effect" and set out GDM's understanding of the position:

> "• The suspension of sales activity is for an indeterminate period which if (scil. in) any event will be in excess of 6 weeks.
>
> • At this stage you are unable to indicate whether you would wish to resume sales activity at some point in the future or at what volume.
>
> • In light of this uncertainty and your resistance to fund the maintenance cost of the sales teams during the suspensions, it is assumed that it is your intention to terminate your agreement with GDM as of 8pm on Tuesday 31st January 2017 (immediate effect).
>
> I would be grateful if you could confirm the points made above, and where this is not the case please can you clarify what your position is …"

81. There does not appear to have been a direct response to that email, but it seems likely that Mr Allen attempted to obtain one, because on the following morning Ms Khilji sent him a text message:

> "Hi Ashley
>
> I don't think we've ever had a conversation that isn't civil?! I hope you agree.
>
> Tried to call. We've had a run at sales, all the rubbish that's happened since to one side, we've both benefited. Let's just move on. I don't want more crap on my door, I'm busy trying to fix my wrecked reputation with consumer regulators and ofgem. I don't want to get involved with turf wars, postcodes, agents etc. We're not selling door to door. The market is yours, not mine."

Mr Allen replied by text message on the same day:

> "Hi Lubna
>
> Your (sic) correct[,] me and you have always remained civil through the relationship. And I want that to continue.
>
> I just wanted to have a conversation with you direct and a clear understanding of what is expected of both parties throughout this period as it was very ambiguous on the phone with Lynne and Vijay and we still don't really know what's happening as no clear answers were offered."

Ms Khilji replied: "Thanks for the message, in a meeting. Will get some time to call." It does not appear that there were any further direct communications between the parties.

82. On 7 February 2017 GDM submitted to EE an invoice for all outstanding moneys. On 9 February Mr Gagan responded, asking for an update concerning the return of the EE uniforms that had been supplied to GDM's field sales agents; he said that payment of the invoice (which he described as the "final" invoice) would not be authorised until all the uniforms had been returned. I assume that the uniforms were returned; at all events, the payment was made.

83. Correspondence between the parties' respective solicitors commenced on 13 February 2017, when GDM's solicitors threatened an application for an interim injunction unless EE gave certain undertakings. A file note by GDM's solicitors refers to a conversation on 20 February with EE's solicitor, who is recorded to have said that EE had not terminated its contract with GDM and that the parties were rather "on a break"; a proposition with which GDM's solicitor is recorded as expressly disagreeing.

84. On 27 February 2017 GDM's solicitors wrote to EE's solicitors in relation to "the Agreement dated 29 June 2016 [that is, the Heads of Terms] and your client's

termination of the Agreement." After setting out a summary of facts surrounding the ending of the relationship, the letter continued:

> "5. The termination of the Agreement without giving any notice and without giving any clear reasons to GDM is a clear breach of contract ('Breach 1').
>
> 6. As set out in our letter of 13 February 2017, it is now clear that during the period 19 January 2017 EE unlawfull passed the GDM Agent Database to third parties, including EGEL. Such unlawful acts amount to a breach of confidence and database right infringement ('Breach 2').
>
> 7. It is clear that the Agreement is now terminated following our client's acceptance of your client's repudiatory breaches of contract: Breach 1 and Breach 2. These repudiatory breaches of contract were accepted by our client by its email dated 1 February 2017. Alternatively, for the avoidance of doubt, in the event that the 1 February 2017 email is not considered an acceptance of the repudiation, our client hereby accepts the repudiation by this letter. On any view the Agreement has been terminated.
>
> 8. Yet in the further alternative: if a Court determines that your client's actions do not amount to a repudiation, the telephone call of 31 January 2017 was a renunciation of the Agreement, which entitled our client to treat the Agreement as discharged and at an end."

85. On 16 October 2017 Ofgem produced its Summary Statement of Initial Findings ("SSIF") in the SLC 25 Investigation. The SSIF set out Ofgem's initial findings, the grounds on which the findings were made, and a summary of the nature of the investigation. Paragraph 1.8 made clear that "decisions on everything in this document, including whether a breach has occurred" rested solely with independent decision-makers under the auspices of the Gas and Electricity Markets Authority, which "may take a different view to that of the case team." Further: "The case team may also revise its assessment following EE's response to this document and/or in light of further information." EE was invited to respond to the SSIF by 13 November 2017 (time was subsequently extended).

86. The short summary of SSIF's initial findings was set out in section 1. It expressed the view that EE had failed to take all reasonable steps to secure the achievement of the Objective in SLC 25.1 and had failed to take specified steps which a supplier intent on complying with its obligations under SLC 25.2 would have taken in similar circumstances. Further particulars are set out in the Confidential Annex.

87. Section 2 of the SSIF, paras 2.1 to 2.79, set out the analysis of doorstep sales that was considered to support the conclusion in section 1. (A footnote to para 2.56 recorded that between January and October 2016 GDM was responsible for 70% of all EE's doorstep sales.) The analysis related both to the volume of complaints and to the behaviours that generated them. The geographical spread of complaints led Ofgem to

consider that the problem was "systemic" rather than being confined to a few "rogue agents". Detailed particulars are set out in the Confidential Annex.

88. On 28 November 2017 Ms Khilji submitted EE's response ("the EE SSIF Response") to the SSIF. It amounted to a detailed rebuttal of the SSIF. It complained that there were "innumerable inaccuracies" and "misrepresentations" in the SSIF and that Ofgem's analysis was flawed in that it focused on the dates when complaints were made rather than the dates when the behaviours complained of were said to have occurred. It said that complaints represented a tiny proportion of the total interactions with the public and that Ofgem had taken insufficient account of the investigations into those complaints and the results of those complaints. Details of the EE SSIF Response are set out in the Confidential Annex.

89. On 3 August 2018 Ofgem produced its Statement of Case ("SOC") against EE for consideration of the Enforcement Decision Panel ("EDP") of the Gas and Electricity Markets Authority. The SOC, which runs to 112 pages, sets out the regulatory framework, details of the SLC 25 Investigation, the allegations of breach of SLC 25 by EE, and particulars of the penalties sought by Ofgem. The general matters set out in the parties' statements of case appear to me to be appropriate to refer to in this judgment. I refer to the following significant matters in the SOC.

- Para 21 observed correctly: "It should be noted that it is the obligation in SLC 25.2 of which there can be a breach, and that the content of the SLC 25.2 obligation is defined by reference to SLC 25.1."

- Para 31 contended that: "an obligation to take all reasonable steps cannot be delegated contractually to a third party such as a service provider. It is Ofgem's position that the obligation to take all reasonable steps in the SLCs also rests with the licensee. Of course, the licensee may contract with third parties with a view to the fulfilment of the obligation, but cannot discharge its responsibility for taking 'all reasonable steps' on to any of those third parties." Para 35 contended that: "A breach [of SLC 25.2] may therefore occur in the case of a single failure on the part of someone for whom the licensee is responsible to not do something specific and thus not take all reasonable steps to secure the achievement of the Objective (or to not take all reasonable steps to avoid doing something which jeopardises a licensee's ability to achieve the Objective) and/or a breach may occur in the case of a systemic failure on the part of the licensee to take all such reasonable steps."

- Much of the factual content regarding mis-selling corresponds to the contents of the SSIF.

- Similarly, the specific allegations against EE of breach of SLC 25.2 are similar to those in the SSIF. In particular, the following allegations were made: (1) Failure to monitor trends in cancellations which took place during welcome calls and in complaints about mis-selling behaviour—(a) failure sufficiently to monitor complaints and cancellations made during welcome calls; (b) requiring complaints to be proved beyond a reasonable doubt; (c) overlooking or inadequately investigating potentially credible complaints. (2) Failure to implement appropriate risk management controls. (3) Failure to control and review incentive schemes. (4) Failure to implement a policy to address agents'

inappropriate conduct. (5) Failure adequately to select, train and audit representatives. Accordingly the alleged breaches did not lie in the mis-selling of field sales agents *per se*; rather it lay in EE's failure to take all reasonable steps to address a problem, namely mis-selling, that jeopardised achievement of the Objective in SLC 25.1.

- The remedy sought by Ofgem was (1) a penalty of at least £2.08m and (2) a Final Order requiring EE to "implement robust processes and procedures to secure achievement of the objective of the licence condition and commission an independent audit of its doorstep sales processes and procedures before recommencing sales." Para 280 spelled out the purpose of the Final Order sought:

  "The Final Order proposed by Ofgem will require EE not to undertake doorstep sales until it has significantly improved its processes and procedures, such that, if it were to recommence sales, it is not likely to contravene SLC 25. The terms of the proposed Final Order will require EE to address the reasonable steps set out in the Statement of Case and more generally satisfy both itself and an independent auditor that it has appropriate systems and processes in place, if it wishes to conduct doorstep selling in the future."

The proposed Final Order was materially the same as that which was proposed by Ofgem to EE as part of the terms on which it would agree to conclude the SLC 25 Investigation.

90. EE put in its Response to the SOC ("the EE SOC Response") on 21 September 2018. Again, much of the material is similar to that in the EE SSIF Response. Here I confine my reference to the sections dealing with what was said to be the declining rate of complaints (I omit the Figures and the footnotes):

> "3.10 The SOC fails to acknowledge or address the fact that the rate of complaints to EE was in decline over the relevant period. The SOC instead refers to a 'continuing number of complaints' and a 'persistently high number complaints'.
>
> 3.11 The rate of decline of the number of complaints as a proportion of the sales made <u>in the month to which the complaint relates</u> is clearly demonstrated by the trendline in Figure 1 below. The decline in the rate of complaints received by EE is even clearer when figures for 2015 are included (see Figure 2 below).
>
> 3.12 The steps that would be reasonable for a supplier to take in the face of a 'continuing' rate of complaints would clearly differ from those that would be reasonable in circumstances where the rate of complaints was actually decreasing. However, Ofgem has failed to take into account the declining rate of complaints in its assessment

of whether EE has contravened SLC 25. This is, again, a fundamental flaw in the facts as found in the SOC and renders the conclusions of breach unsound.

3.13 The SOC finds that the introduction by GDM of a five-week incentive scheme for sales agents in October 2016 'corresponded to a very significant spike in sales complaints in November and December 2016.' The SOC states that 'mis-selling complaints to EE increased from 45 in October 2016 to 103 in November 2016. Whilst the volume of sales slightly increased over this period, the number of complaints per volume of registered sales increased considerably more, increasing from 0.19% in October to 0.4% in November and a spike of 0.51% in December.'

3.14 In fact, this 'spike' is overstated. When the number of complaints as a proportion of the sales made in the month to which the complaint relates is examined, it is clear that the rate of complaints as a function of the level of sales activity is lower. In relative terms, there is no 'significant spike', and as shown in Figure 1 above, and the rate of complaints is trending down. Complaints reflected only 0.12, 0.21 and 0.26 per cent of sales in the months of October, November and December. Figure 1 shows that in each of the first seven months of 2016 (except March) the rate of complaints was equivalent or higher to (sic) that in November and December 2016. Again, unless Ofgem wishes to ban doorstep sales *per se*¸ there is no evidential or policy basis for identifying this 'spike' as the basis for a compliance breach or indicative of anything other than an increase in sales activity."

91. Ofgem submitted its Reply on 1 November 2018. In paragraphs 10 to 14 it largely disputed EE's case that the trend of complaints was downwards. At paragraph 15 it averred:

> "In any event and notwithstanding the above, EE has not demonstrated why its observations on the trend of complaints (even if correct) would indicate that the reasonable steps set out in the Statement of Case were not in fact reasonably required. As the EDP has made clear, as a matter of general principle the reasonableness of any particular measure at any particular time will depend upon the circumstances. The circumstances in this case was (sic) of an increasing number of complaints over the Breach Period arising out of doorstep sales and a large number of complaints in total across the Breach Period. The fact that complaint levels (as a percentage of successful sales alone) decreased very slightly in percentage terms over the Breach Period [footnote: From around 0.35% to around 0.3%] is not a material circumstance which means that lesser steps were

> reasonable in the circumstances or that steps which were reasonable at the start of the Breach Period became unnecessary or unreasonable. If anything, the increasing number of complaints and broadly consistent percentage of complaints received during the Breach Period demonstrates that a given problem was *not* being resolved within a reasonable time and that further and more effective measures were required to be taken."

92. In the context of the facts as summarised above, I turn to consider the issues that fall for determination.

Which contract governed the relationship between GDM and EE?

93. GDM's case is that the Heads of Terms constituted a concluded contract with effect from 29 June 2016 and governed the relationship between the parties from that date until 31 January 2017. EE's case is that the parties intended the matters contained in the Heads of Terms to have contractual effect only when a formal contract was executed and that, as no such formal contract was ever executed, the Partnering Agreement continued to be the governing contract.

94. The issue raises two distinct though related questions: first, whether the parties intended that the Heads of Terms should create legal relations; second, whether the Heads of Terms were sufficiently certain or complete to have contractual force. The second question is related to the first, because uncertainty, vagueness or incompleteness in a document may, though it need not, be an indication that the parties did not intend it to be legally binding. EE's argument is that the absence of intention to create legal relations is shown by, first, the negativing of intention by the provisions of the Heads of Terms and the conduct of the parties, second, the prior existence of legal relations between the parties under the Partnering Agreement, and third, the incompleteness of the Heads of Terms, both when viewed alone and when compared with the Partnering Agreement.

95. The usual test for contract formation, as for construction of legal documents, is an objective one. In the normal case, the outward appearance of agreement, whether by offer and acceptance or by signature on a document (cf. *L'Estrange v F. Graucob Ltd* [1934] 2 K.B. 394) will be sufficient, regardless of the parties' subjective states. "Whether there is a binding contract … depends not upon [the parties'] subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations": *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14, [2010] 1 W.L.R. 753, *per* Lord Clarke JSC at [45]. Within the commercial context, where there is objective agreement supported by consideration, the intention to create legal relations will generally be presumed. "[I]n a case of this nature [i.e. where the subject-matter of the agreement is business relations, not social or domestic matters] the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one": *Edwards v Skyways Ltd* [1964] 1 W.L.R. 349, 355, *per* Megaw J. It is a question of fact in each case whether there was the necessary intention.

96. It is well established that a written agreement may by clear words negative any intention to create legal relations. The most common form of words with this effect is probably "subject to contract" or a variation of it. The best-known case where express words were used to rebut the presumption of contractual intention is *Rose & Frank Co v J R Crompton & Bros Ltd* [1923] 2 K.B. 261, affirmed on this point only at [1925] A.C. 445. That case, like this, involved termination of an agency agreement. Comparison of the facts of cases is not, I think, profitable; however, it is of interest to note the provision in that case:

"This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the … parties concerned to which they honourably pledge themselves with the fullest of confidence, based on past business with each other, that it will be carried through by each of the … parties with mutual loyalty and friendly cooperation."

Scrutton LJ, with whose reasoning the House of Lords particularly concurred, considered that the provision showed a clear intention that the arrangement between the parties should not affect their legal relations or be enforceable in court; the clarity of the provision thus made good sense in what was otherwise a "vague and loosely worded agreement or arrangement". An important point emphasised by Scrutton LJ at 287 was the need to consider the wording of the entire document, not only part of it.

97. A distinct ground on which an agreement may lack contractual effect is that important points remain to be agreed and the agreement is insufficiently complete. Incomplete agreement or vagueness in expression may itself be a reason for inferring that the parties did not intend to create legal relations; in such a case the agreement will lack contractual effect for that reason. Even if the parties did intend to create legal relations, however, their failure to agree important terms may frustrate their intention because the agreement may be held void for uncertainty. The courts are reluctant to reach this latter conclusion, particularly if the parties have acted upon the agreement. In *Pagnan S.p.A. v Feed Products Ltd* [1987] 2 Lloyd's Rep. 601, which concerned the question whether a prolonged exchange of telexes had resulted in the formation of a contract, Bingham J said at 611 (citations omitted):

"Where the parties have not reached agreement on terms which they regard as essential to a binding agreement, it naturally follows that there can be no binding agreement until they do agree on those terms … But just as it is open to parties by their words and conduct to make clear that they do not intend to be bound until certain terms are agreed, even if those terms (objectively viewed) are of relatively minor significance, the converse is also true. The parties may by their words and conduct make it clear that they do intend to be bound, even though there are other terms yet to be agreed, even terms which may often or usually be agreed before a binding contract is made …

The parties are to be regarded as masters of their contractual fate. It is their intentions which matter and to which the Court must strive to give effect."

(See also *per* Lloyd LJ in the Court of Appeal, at [1987] 2 Lloyd's Rep 619, especially propositions (4), (5) and (6).)

98. In my judgment, the Heads of Terms took effect as a valid contract when it was signed on 29 June 2016. The matters that lead me to this conclusion are as follows.

1) The Heads of Terms was formally executed by signing by directors of both parties at a meeting after a lengthy period of negotiation. This is by no means conclusive but it is strongly suggestive of an intention that the document should have legal effect. While it is true that the Heads of Terms was intended to be superseded by a formal and more complete contract, the formality of the document itself tends to indicate that it was seen as being more than merely a guide for the lawyers who would draw up the formal contract and was itself an effective agreement. I agree with the similar point made by Mr Chapman and Mr Brown in respect of the element of celebration that attended the meeting on 29 June 2016: the parties were not celebrating the need, or opportunity, to instruct lawyers to draft a formal contract that the parties would, all being well, execute; they were celebrating finalising, at long last, the agreement that would take their relationship to a new stage.

2) The Partnering Agreement was itself intended only as the contract to govern the initial three-month trial period. This does not of itself demonstrate an intention that the Heads of Terms should have legal effect. But it is a relevant matter to have regard to when considering the proper conclusions to be drawn and the relevance of the existing legal relationship.

3) The opening words of the Heads of Terms ("This document sets out … 90 days of commencement") make clear, as do several other provisions, that a formal contract was contemplated. However, they fall far short of expressly negativing an intention that the document should have legal effect until the formal contract was executed, and much of the content of the document reads as a present agreement. It makes perfect sense to reach a binding agreement in the expectation that it will hold the ring until a more comprehensive agreement is put in place.

4) Indeed, the provision that the parties will work together to agree a formal contract "within 90 days of commencement" tends to argue in favour of the Heads of Terms having contractual effect. It makes sense only if a particular day can be identified as "commencement". The further provision for a "Commencement date" was left incomplete; the date of 1 October 2015, which had been present in all drafts including the first sent on 9 October 2015, was removed. One may speculate that the printed date was removed in order that the correct date could be inserted in manuscript when the document was signed. It is unlikely that the "Commencement date" was to be the date of the formal agreement, because (a) there would be no point in including a blank date in this manner as a point to be agreed later, (b) that was clearly not the function of the date inserted into the drafts, and (c) the "Commencement date" probably is meant to correspond to the words "within 90 days of commencement" in the opening paragraph. But whatever one makes of "Commencement date", there was necessarily a day of "commencement" for the purpose of the opening paragraph. The obvious question is: commencement of what? The word is hardly apt to refer merely to signature on a non-contractual document. It cannot refer to the commencement of the commercial relationship between the parties, because that had been ongoing for more than a year. It could possibly refer to

the commencement of an arrangement that was not contractual but was expected in due course to result in a contract on similar, though expanded, terms. But such a construction would make little sense, where there was a pre-existing contract, and would anyway depend on the presence of clear words excluding an intention to create legal relations. For reasons already given, I do not find such clear words. Therefore the significance of the words "both parties … within 90 days of commencement" is most naturally taken to be that a new contractual relationship commences with the execution of the Heads of Terms and that the parties will seek to execute a formal contract within ninety days thereafter.

5) An intention to create legal relations is not negatived by the mere fact that the Heads of Terms makes clear at various points that matters remain to be agreed; by way of example, I mention the provisions under the heading "Terms": "The agreement will include standard termination rights …"; "It is intended that any/all valid termination reasons will be full (sic) outlined in the formal contract." The Heads of Terms makes expressly clear that a formal contract was contemplated; there is no reason why it should not contain indications of what would go in the formal contract but had not yet been agreed. That does not mean that the matters which had been agreed were not to have immediate contractual effect.

6) In my judgment, sufficient matters had been agreed to be capable of constituting a contract. In particular, there was agreement as to the term of the contract, the services to be provided and the remuneration for those services. If the parties had not already been in a contractual relationship under the Partnering Agreement, no court would hesitate to hold the Heads of Terms sufficient to constitute a binding contract if the parties had commenced trading with each other. Of course, the circumstances surrounding the Heads of Terms, including the prior existence of the Partnering Agreement, are relevant to the question of intention to create legal relations. But it is implausible to rely on supposed incompleteness to defeat the contractual effect of the Heads of Terms. That the Heads of Terms refers to various matters that had not yet been agreed merely shows that the formal contract would have contained additional terms, not that the provisions in the Heads of Terms are not contractual.

7) For EE, Mr Green and Mr Chambers refer to a number of points of drafting that they say tend to show that the Heads of Terms was not itself a contractual document. I do not find these matters persuasive.

    a) As for termination rights, the Heads of Terms makes clear that the formal contract will make detailed provision. However, the Heads of Terms itself identifies three circumstances in which EE can terminate the agreement within the three-year period: first, if a material remediable breach by GDM is not remedied within ten days; second, in the event of a material irremediable breach by GDM; third, if GDM "fails to achieve the KPIs" and does not remedy such failure within a reasonable period of time. The concept of a "material" breach of contract may not be very precise, but it is found also in the Partnering Agreement. The concept of reasonableness may be similarly imprecise, but it is common enough in contracts and the courts have never been reluctant to apply it to the

facts before them. Mr Jakobsen himself appreciated that the Heads of Terms contained provision in respect of termination; see his email of 28 April 2016 (paragraph 43 above).

b) The Heads of Terms envisaged further agreement as to the performance targets for GDM in respect of the postcode areas for which it had exclusive rights; see the "Exclusivity" section, set out in paragraph 51 above. This is not a matter that could properly lead the court to refuse to enforce what would otherwise be a contract on which the parties were acting, and I do not see it as any genuine indication that the parties lacked an intention to create legal relations. It is important not to lose sight of the fact that the parties had an existing commercial relationship and that sales targets were in place. The proper legal inference is that they would abide by the existing sales targets until they agreed others.

c) The Heads of Terms does not contain any provision limiting liability. Such a provision was contained in the Partnering Agreement. I cannot see why the omission from the Heads of Terms should be any indication that the document was not intended to have legal effect. It was certainly intended to set out the basis for the formal contract, so one would expect it would be included if it were considered to be of major importance.

8) EE also relies on the fact that the Heads of Terms contains no express provision for termination of the Partnering Agreement and that no notice of termination was ever served under clause 12 of the Partnering Agreement. I do not regard this as a point of substance. If a new contract were made, covering the same ground as the Partnering Agreement, the latter would be impliedly determined. It would make no commercial sense to suppose that the parties were operating under two separate contracts in respect of the same subject matter. Moreover, the Partnering Agreement and the Heads of Terms contained numerous conflicting provisions, as pointed out by Mr Chapman and Mr Brown: the Heads of Terms contained exclusivity provisions, whereas the Partnering Agreement did not; the Heads of Terms provided that GDM should not receive remuneration for sales outside the exclusivity areas, whereas the Partnering Agreement did not; the Heads of Terms introduced a target in respect of objections and rejections, whereas there was no such target in the Partnering Agreement; the Heads of Terms contained a more demanding target for complaints than did the Partnering Agreement (1% compared to 2%); and the remuneration rates were different.

9) The parties acted on the basis that the Heads of Terms were the governing contract: first, they took no steps to procure a formal contract; second, they acted on the basis of the provisions of the Heads of Terms; third, they both understood that the Heads of Terms applied.

10) The first point gains its significance from the second: obviously, if the provisions in the Heads of Terms were ignored and the parties just carried on as though it had never been signed, it might hardly be surprising that they did not bother formalising them. But the provisions were not ignored. It is remarkable, therefore, that there is no evidence that any step was ever taken to procure the formal contract envisaged in the first sentence of the Heads of Terms. (In fact,

Ms Khilji did say in cross-examination that EE had instructed solicitors, but there is no documentation or other evidence to support what she said and I reject it.) The simple explanation is that the parties felt no need to seek a further agreement; what they had signed on 29 June 2016 was sufficient for their purposes. (Although the point is not important, the likelihood in my view is that once Mr Jakobsen, who had been the driving force at EE in respect of the Heads of Terms, had left the company, no one else had much concern with bothering with lawyers.)

11) The second point is that the Heads of Terms were implemented. From the date when the Heads of Terms was signed, remuneration was paid at the rate in that document and the parties acted on the basis of the new KPIs.

12) The third point is that both parties clearly believed and understood that their relationship was henceforth on the basis of the Heads of Terms. It follows that, when they implemented the provisions of the Heads of Terms, they did so knowingly (that is, they did not act merely on the basis that what they were doing was required by something other than the Heads of Terms).

a) In the course of negotiation of the Heads of Terms, Ms Blandy appears to have worked on the basis that charges at the rates in the Heads of Terms were levied if at all on the basis of the pricing structure "as per" the Heads of Terms and that signing of the Heads of Terms was therefore a precondition to payment at the new rates; see her email of 12 April 2016 (paragraph 42 above). For EE, Mr Green makes the point that the charge of £2.20 for each Live Verification Call was in fact paid from April 2016, before the Heads of Terms was signed. That is true, but it seems to me to show no more than that EE back-pedalled on the particular charge, which related to a feature that had materially altered since the Partnering Agreement was made. Mr Green is therefore correct to say that new terms could be agreed without the Heads of Terms being signed. The point remains, however, that Ms Blandy is reasonably to be taken to have proceeded on the basis that the Heads of Terms was intended to be a contractual document.

b) Mr Gagan confirmed that after the Heads of Terms was signed he expected GDM to keep within the complaints KPI of 1% rather than the less strict figure of 2% in the Partnering Agreement.

c) A series of emails between 4 and 6 November 2016 shows that the exclusivity provisions in the Heads of Terms were regarded as contractual: Mr Allen complained to Ms Curtis-Blackwell of infringing sales by others in postcode areas "that are exclusive to GDM as per our heads" and sought payment for those sales; Ms Khilji, to whom the email was forwarded, observed, "there's no allowance for that in the contract"; and Ms Curtis-Blackwell replied to her, "The contract that GDM has says we will not pay agents operating in an area where they shouldn't be … says nothing about giving that money to anyone else". It is a reasonable inference that Ms Curtis-Blackwell used this contractual argument to refuse payment when she met Mr Allen the following week, and he confirmed in evidence that she did so. Both parties were clearly

proceeding on the basis that the relevant terms for exclusivity and payment were those in the Heads of Terms.

d) In the longer telephone conversation on 31 January 2017, GDM's references to a 14-day notice period were clearly to the provisions of the Heads of Terms. EE's representatives did not seek to deny the relevance of the notice period by reference to the Partnering Agreement.

e) Again, in its response dated 21 September 2018 to Ofgem's statement of case in the SLC 25 Investigation, EE relied on "quality minimums" on GDM, including "objections and rejections of less than 5%"; this can only refer to the provision in the Heads of Terms.

13) For EE, Mr Green and Mr Chambers submitted that new terms operating after 29 June 2016 should be understood as having effect by way of variation of the Partnering Agreement. That seems a very implausible and unnecessary analysis. There is no evidence that anyone considered that the Partnering Agreement or a variation of it was anything to do with the matter. The parties were negotiating Heads of Terms, which contained new provisions not previously included in their relationship. They gave effect to the new terms upon execution of the Heads of Terms. The obvious analysis is that the agreement of the Heads of Terms constituted a new contract. It is no doubt true that the same result in respect of remuneration rates and postcodes could have been achieved by emails operating by variation of the Partnering Agreement. But it was not achieved in that way and I see no reason to understand the new terms as taking effect by way of variation of the Partnering Agreement.

Breach and Termination of the Contract

99. By its re-re-amended defence, EE avers that, if (as I have held) the Heads of Terms was the applicable contract, it was entitled both at common law and under the express terms of the contract to terminate the contract on 31 January 2017. It relies principally on GDM's failure to achieve compliance with the KPI for cancellation as amounting to a repudiatory breach of contract or giving EE a right to cancel pursuant to the express terms of the contract. It relies further on what are said to be other repudiatory breaches of contract in respect of mis-selling. It further contends that it exercised its entitlement to terminate by doing so either in the longer telephone conversation on 31 January 2017 or by Ms Khilji's text message to Mr Allen on 2 February 2017.

100. I mention, so as to dispose of it now, a further argument advanced by EE. It submits that the express wording of the Heads of Terms ("The agreement will include standard termination rights …"; "It is intended that any/all valid termination reasons will be fully outlined in the formal contract": see paragraph 51 above) were sufficient to imply into the Heads of Terms a cancellation provision corresponding to that contained in clause 12.1 of the Partnering Agreement (see paragraph 21 above); though EE accepts that, by reason of regulation 15 of the Regulations, the minimum notice period would in fact be two months. There is in my judgment no basis either for implying such a term into the Heads of Terms or for construing the contract in such a manner as to incorporate such a term on the basis of the existing provisions of the Partnering Agreement. A one-

month notice period is hardly a "standard termination right", especially if the effect of legislation is to override such a provision. Neither is it necessary to imply such a provision in order to give business efficacy to the agreement, nor is the inclusion of such a provision so obvious that it goes without saying. The fact is that the parties did not include such a provision in the Heads of Terms and may well have had their own reasons for not doing so.

101. Accordingly, the questions that need to be addressed are: whether GDM was in breach of contract; whether any such breach of contract gave EE a right to terminate the contract; whether any such right to terminate was lost; and whether any such right was exercised.

Breach of contract: the KPIs

102. Compliance with the KPIs, or "Targets", was a contractual obligation upon GDM: "The Supplier agrees to adhere to the below minimum targets". Therefore, failure to comply with the KPIs was a breach of contract.

103. The relevant KPIs are those for "cancellations" and for "objections/rejections": see paragraph 54 above. (It is accepted that GDM achieved the KPI for "complaints".) A cancellation occurs where a sale that has been processed is subsequently cancelled by the customer indicating that he does not wish to change suppliers. This could result from the wrong details being registered for the customer, so that the transfer was processed for the wrong customer. More commonly, it would result from a change of mind on the part of the customer. The former situation would tend to indicate carelessness on the part of the field sales agent. The latter situation might be indicative of a deficiency in the sales procedure adopted by the agent, but it might simply indicate a change of mind for any other reason. An objection occurs where the previous energy supplier objects to the transfer on valid grounds, such as an outstanding debt owed by the customer to that supplier. (A rejection appears to be materially the same as an objection. It may be, as Mr Turner suggested, that "objection" is used in the case of electricity sales and "rejection" is used in the case of gas sales. Some of the papers in the case used the expression Lost Transfers, or LTs, as an apparent synonym for objections/rejections.)

104. Mr Chapman and Mr Brown made the tentative suggestion that the KPI for cancellations should be taken to have been amended by the parties to 27.5%, which was the amount of the monthly retention made by EE on GDM's invoices in respect of all pre-acquisition losses, that is, all sales that might later prove to be abortive. I reject that suggestion. First, the point was not pleaded. Second, more importantly, Ms Blandy's evidence, which I accept on this point, was that the retention was in operation from early May 2016, which was before the Heads of Terms was signed. Third, there is no necessary reason why the retention had to be at the same level as the sum of the KPI percentages for cancellations and objections/rejections. It was not axiomatic that GDM would achieve the targets or that EE would choose to terminate the contract if it failed to do so.

105. EE's primary pleaded case on the KPIs is that GDM failed to meet the cancellations target of <15% in each and every month from the outset of the relationship, whether under the Partnering Agreement or the Heads of Terms, right up until 31 January 2017.

106. In its pleaded response to that case, GDM denied that it had not met the cancellations KPI for the final two weeks of the operation of the contract (the weeks commencing 16 January and 23 January 2016) and made no admission as to the failure to achieve the target during the remainder of the contract period. As the response comprised part of a defence to counterclaim, as well as a reply, the non-admission was justified only if the truth or falsity of EE's pleaded case was neither within its actual knowledge nor capable of rapid ascertainment from documents or other sources of information at its rapid disposal: cf. *SPI North Ltd v Swiss Post International (UK) Ltd* [2019] EWCA Civ 7, at [49]. One would have thought that GDM should have been able to state a positive case, because throughout the contract period it had received daily and weekly reports that showed the cancellation rates and quarterly reconciliation reports that set out more accurate adjusted figures. Further, the positive case advanced in respect of the last two weeks of January 2017 was derived from figures in a table that GDM itself produced, which showed cancellation rates in excess of 15% for every preceding month.

107. For EE, Mr Gagan adduced in evidence figures that supported the pleaded case as to GDM's failure to meet the cancellations KPI, indicating that in every month from May 2015 onwards the rate of cancellations had exceeded 17% and that in all but three months (those three all preceding the signing of the Heads of Terms) it had exceeded 20%. In a second witness statement, produced in the week before the commencement of the trial, he gave further information as to the cancellations and explained that the figures for the final two weeks of January 2017, when corrected to take into account cancellations not shown in the daily and weekly reports but shown in the quarterly reconciliation, also showed cancellations in excess of the 15% target.

108. During the trial, GDM put in a further witness statement from Mr Turner. It was purportedly in response to Mr Gagan's second statement, though in fact it went significantly further and purported to show that the figures in GDM's own table, if properly analysed, established the positive case that the rate of cancellations during the term of the Heads of Agreement was less than 12%. Mr Turner's evidence was that, although the total cancellation rates were shown as exceeding 15%, the figures in fact included sales that were lost for other reasons, notably objections; when adjusted to leave in only true cancellations, the figure was well within the contractual target.

109. That further witness statement and Mr Turner's oral evidence prompted a third witness statement from Mr Gagan, who said that he had again checked the underlying data and confirmed that the cancellations figures he had produced did not include sales that had been lost for reasons other than cancellation. He modified his figures slightly, for reasons explained in his statement, but the adjustments are not significant.

110. I have no hesitation in preferring Mr Gagan's evidence concerning breach of the cancellations KPI to Mr Turner's evidence. First, at the times when the amended reply and defence to counterclaim was pleaded and when Mr Turner made his first and second witness statements, GDM and Mr Turner respectively both knew that the cancellation rates were in issue and had access to and purported to have collated all of the information on which they have latterly relied; yet they did not make a positive case, save as to the final fortnight of the contract, until trial. This itself gives rise to a degree of suspicion about the reliability of that case. Second, Mr Turner's evidence that he had not appreciated the relevance of the breakdown of the cancellation figures before hearing Mr Jung's cross-examination is inherently incredible and is belied both by the contents of his first witness statement, which show that he was aware of the issue

concerning the cancellation KPI, and by the remarkable non-admission made in GDM's pleadings. Third, Mr Turner's evidence posited that both EE and GDM had been producing figures on the basis of a misapprehension, namely the failure to understand that their figures for cancellations actually included sales lost for reasons other than cancellation. But it is inherently improbable that either party should have made that mistake and it is particularly improbable that GDM, whose very compliance with KPIs under the Heads of Terms was open to question, should have made that mistake or, having once made it, should have persisted in it once the matter had become an issue in the litigation. Fourth, neither the evidence of Mr Gagan or of Mr Turner nor any other evidence adduced at trial gave substantial reason to think that the figures produced by EE were wrong. Mr Turner accepted that those figures ostensibly differentiated between cancellations on the one hand and objections/rejections on the other hand. He mooted the possibility that some objections/rejections might nevertheless have found their way into the cancellations figure, but he was unable to give any reason to suppose that this had happened or that, if it had happened at all, it was of more than *de minimis* impact. Similarly, although Mr Turner raised the possibility that other causes of lost sales might exist, which would not properly be included within the cancellations figures, his evidence did not suggest that these would be statistically material. Fifth, the comparison between EE's data and GDM's data, digested onto a sheet produced to Mr Turner in the course of his cross-examination and explored with him in evidence, strongly suggests that both sets of data have been produced on the same basis, purporting to show as cancellations only what are properly so designated. Differences are plausibly to be explained by the greater accuracy of the figures based on quarterly reconciliations and by a margin of error, but not by reference to different methods of compilation. Therefore, as EE's figures clearly exclude objections/rejections, the figures relied on by GDM in its pleadings and written evidence may also reasonably be supposed to do so.

111. Accordingly, I find that GDM was persistently in breach of the KPI for cancellations. (Incidentally, if Mr Turner's evidence on this point were to be preferred to Mr Gagan's evidence, it would mean that GDM, though compliant with the cancellations KPI, was persistently in breach of the KPI for objections/rejections.)

112. EE contends that it had two distinct rights to terminate the Heads of Terms for breach of the KPIs: first, an express contractual right ("If the Supplier fails to achieve the KPIs and does not remedy such failure within a reasonable period of time, the Customer shall be entitled to terminate the agreement."); second, a right at common law to terminate for breach of condition.

113. Mr Green and Mr Howells submitted that any failure by GDM to meet the KPIs gave rise to the right to terminate, on the basis that no past failure to achieve the KPIs could possibly be remedied. I reject that submission. The contractual provision clearly envisages that a failure to achieve the KPIs is remediable; the words "and does not remedy such failure within a reasonable period of time" can have no other application. The submission involves treating those words as included by mistake. That is unnecessary. Good sense can be given to the provision by taking it to mean that, if GDM were to fall short of the targets, EE would be able to terminate the contract if GDM failed to improve performance and attain compliance with the targets within a reasonable time. Accordingly, I reject the submission for EE that strict and absolute compliance with the performance targets was a condition of the contract, breach of

which gave an immediate right to terminate. Both the express opportunity to remedy the failure to achieve the KPIs and the nature of those performance indicators as targets, not all of which had a necessary correlation with good selling practices, make EE's proposed construction implausible.

114. Therefore, whether the right to terminate be analysed in terms of a response to breach of condition or a contractual right—and, in the circumstances, I see no material difference between the two analyses, the latter simply involving a contractual definition of the relevant "condition"—, it arises when GDM (a) fails to achieve the KPIs and (b) does not remedy such failure within a reasonable time.

115. Mr Chapman submitted that any commercial construction of the termination provision in respect of KPIs must require EE to inform GDM of its failure to achieve the KPIs and to require GDM to remedy that failure within a reasonable time. For EE, Mr Green submitted that there was no requirement in the provision of any such information or notice. Mr Green's submission was, of course, made in the context of a wider submission that *any* failure to comply with a KPI constituted a breach of condition. I have rejected the wider submission. The argument remains, however, that the termination provision makes no mention of notice or information and that it suffices that GDM was, for an unreasonably long period (that is, always) in breach of the KPIs. However, I agree with Mr Chapman's submission. In my judgment, the commercial construction of the termination provision is that, when GDM failed to comply with a KPI, EE would become entitled to terminate if it required GDM to achieve compliance within such-and-such a time (being a reasonable time) or, possibly, simply within a reasonable time, and GDM failed to do so. I reach this conclusion, first, because of the wording of the provisions under "Targets" (see above). Targets were to be reviewed, as well as communicated, on a weekly basis and were subject to reasonable amendment. This does not itself indicate the need for notice of breach, but it does show a context of mutual communications going beyond merely provision of past performance data. The termination provision itself is framed in two parts rather than one: that is, it does not provide that the right to terminate will arise if GDM's failure to achieve the targets continues for a given period, or for an unreasonably long period of time; rather the right arises if GDM fails to achieve the targets "and does not remedy such failure within a reasonable period of time". This is suggestive of communication of a requirement to remedy, as distinct merely from prolongation of breach. A second reason for adopting this construction, necessarily intertwined with the first reason, arises from a consideration of how the termination provision might operate in practice. Let us assume (as is in fact the case; see below) that no requirement to remedy breach of the KPIs was ever communicated and, as EE contends, that there is nothing that amounts to a waiver. GDM was at all material times, both before and after the signing of the Heads of Terms, in breach of the cancellations KPI. If EE's construction of the termination right is correct, it was able summarily and without warning to terminate the contract for a failure to remedy a state of affairs that it had been content to tolerate throughout the parties' relationship. I do not consider that such a conclusion makes good sense of the intended operation of the termination provision.

116. There is no doubt that GDM at all times knew how it was performing in respect of the KPIs. However, I find that EE did not notify it of a requirement to achieve compliance with the KPIs within a reasonable time before terminating the contract. EE placed some reliance on the meeting that took place on 6 January 2017: see paragraph 62 above. I

have rejected the evidence that Ms Khilji and Mr McKenzie made it clear that, unless the conduct of GDM's sales agents changed, EE would terminate door-to-door sales. Further, so far as concerns GDM's performance, the focus of the meeting was on customer complaints and agents' misconduct, not on the KPIs and certainly not on the KPI for cancellations. (GDM was not, of course, in breach of the KPI for complaints.) Mr Gagan's note of the meeting contains no record of a requirement to bring performance into line with the KPIs.

117. It follows that, in my judgment, the right to terminate the contract for failure to achieve the KPIs had not arisen as at 31 January 2017. I deal below with the question whether, if (contrary to my view) the right to terminate had arisen, it was validly exercised.

118. The question whether the right to terminate the contract for failure to achieve the KPIs had been waived by EE does not arise for determination. However, I would have held that the right, if it had arisen, had not been waived. If (contrary to my view) it were not a precondition to termination for failure to achieve the KPIs that EE issue GDM with a requirement to achieve them within a particular time, it would follow that the right to terminate would arise when GDM remained in breach of the KPIs having been in breach of them for an unreasonably long period of time. Payment of an invoice would not be a waiver of the breach and it would not be an affirmation of the contract in any sense other than that EE had not then elected to terminate the contract. As GDM's persisting failure thereafter to remedy the breach by achieving the KPIs was a continuing breach, EE would remain entitled to terminate if it chose to do so. That right would, however, be lost if, before it were exercised, GDM achieved compliance with the relevant KPI of which it had been in breach.

Breach of contract: other obligations

119. EE also claims to have been entitled to terminate the contract on account of repudiatory breaches by GDM of innominate, or intermediate, terms of the contract relating, in particular, to mis-selling by GDM's field sales agents. EE relies on the provisions numbered 5 and 7 in paragraph 55 above and contends that wrongful conduct by the agents and a failure by GDM's management to control it placed EE in breach of SLC 25 or at least at risk of being in breach of it, resulted in the SLC 25 Investigation, and not only entitled EE to terminate the contract with GDM but left it with little option but to do so.

120. EE's case on these matters is set out in paragraphs 49.1 to 49.6 of the re-re-amended defence. These paragraphs (which were not the work of Mr Green or Mr Howells but have not been amended) are regrettably vague and general.

> "49.1 GDM failed to comply with the SLC 25 requirements throughout the [term of the contract], resulting in over 1000 complaints, 848 Erroneous Transfers and 1601 cancellations at the point of verification.
>
> 49.2 GDM failed to follow the recruitment and training procedures EE provided concerning SLC 25 compliance and mis-selling.

> 49.3 GDM did not adequately respond to the numerous warnings by EE concerning mis-selling.
>
> 49.4 GDM failed to put in any or any adequate measures to prevent its agents from mis-selling.
>
> 49.5 GDM's conduct throughout the [term of the contract] put EE at risk of being in breach of its regulatory requirements.
>
> 49.6 GDM caused Ofgem to investigate EE for breaches of SLC 25."

Despite the clearly unsatisfactory nature of these particulars, EE's case was developed and explored in evidence and dealt with by both sides in submissions. That case has two broad parts: the first relates directly to mis-selling by the field sales agents; the second relates to the conduct of GDM's management relating to the prevention of mis-selling.

121. There is no doubt that some of GDM's field sales agents engaged in mis-selling. Both the evidence taken as a whole and common sense indicate that, when a large number of agents are making large numbers of sales on a door-to-door basis, it will be very likely that some mis-selling will occur. GDM has never disputed this. In an email to Ms Khilji on 19 October 2016 (paragraph 62 above), Mr Allen wrote: "Today has really highlighted to us that it was only a small percentage of our team using immoral sales techniques sub 10%, I hope this gives you great confidence that the vast majority of our sales are compliant and we will not tolerate anything less moving forward." The number and nature of consumer complaints recorded in EE figures and in Ofgem's SSIF indicate the occurrence of at least a significant number of incidents of mis-selling. As already mentioned, substantially the greater part of EE's doorstep sales was conducted by GDM. When he was cross-examined, Mr Jung very realistically accepted that some of the doorstep mis-selling of which Ofgem was complaining in the SLC 25 Investigation must have been committed by GDM's field sales agents.

122. For EE, Mr Green seeks to rely on the findings in the SSIF as reflected in the SOC; I shall not repeat these here. He also relies on the numerous documents recording serious mis-selling complaints prior to the commencement of the SLC 25 Investigation; I refer in particular to paragraph 123 of the defendants' written closing submissions. The latest instance referred to in the submissions—the defence, of course, is entirely unparticularised—is from mid-September 2016, that a field sales agent had been physically aggressive towards a support worker for vulnerable people who had asked him to leave.

123. The question of the admissibility and status of SSIF was dealt with very briefly in submissions and was not subject of oral submissions at all. My conclusion, in summary, is that the findings in SSIF are inadmissible as evidence of the facts found; but that the factual material contained in SSIF is admissible as hearsay evidence on normal principles, subject of course to the fact that the weight to be placed on any of that material is a matter for the court.

1) Mr Chapman relied on the decision of the Court of Appeal in *Hollington v F. Hewthorn & Co. Ltd* [1943] K.B. 587, where a conviction for driving without

due care and attention was held to be inadmissible in civil proceedings as evidence of the negligent driving of the convicted motorist. (The actual decision in the case has been reversed by statute. Mr Chapman relied on the common-law principle underlying the decision.) The principal reason given for the decision was that the conviction was irrelevant, because it was evidence only of the conclusion of another court (see 594-5). The Court also considered that, where the parties to the earlier finding were different from the parties to the later proceedings, there would be an additional reason for holding the evidence inadmissible on the ground of *res inter alios acta* (see 596). I need not mention some other points it mentioned.

2) The decision in the *Hollington* case has come in for much criticism. However, I regard the reasoning of the Court of Appeal as both sound and applicable. The basic point made by the Court, namely that the opinion of a previous tribunal as to a matter of fact is irrelevant to the fact-finding exercise of a later tribunal in respect of the same matter of fact, seems to me (with respect) to be correct. This also appears to be the view of the editors of *Phipson on Evidence* (19th edition); see para 43-79. The initial opinion of Ofgem's investigation team regarding the conduct of GDM's field sales agents is not itself relevant in this case. Further, although GDM was invited to and did submit information to Ofgem, it was not privy to the SLC 25 Investigation, which was not into GDM but into EE. This is relevant in at least two related respects. First, any finding or expression of opinion has not been made in a process to which EE is privy; this is the second point made in the *Hollington* case. Second, Ofgem was not concerned with GDM's field sales agents in particular but with EE's door-to-door selling in general; therefore it has not been required to distinguish clearly between the conduct of different agents.

3) There is an exception to the general exclusionary rule in the case of public inquisitions, surveys, assessments and reports made by public officers under a judicial or quasi-judicial authority in relation to matters of public interest or concern. See *Phipson on Evidence* at paras 32-90 to 32-92. Such public documents are said to resemble judgments *in rem* as being admissible against strangers but to differ from them as being only prima facie evidence. Mr Green referred me to the decision of the Court of Appeal in *Hill v Clifford* [1907] 2 Ch. 236 (affirmed on other grounds [1908] A.C. 12), which may be seen as an example of this exception within a particular legislative framework. He did not develop any submission as to why Ofgem ought to be viewed as occupying a position analogous to that which the General Medical Council occupied in *Hill v Clifford.* It seems to me that in the circumstances of the present case it cannot possibly do so, for at least two reasons. First, the documents relied on by EE in the present case are subject to confidentiality and neither constitute nor have resulted in nor as yet even led to any public finding. That is why, at every reference to them, the court sat in private. The test of publicity cannot be satisfied; cf. *Sturla v Freccia* (1880) 5 App. Cas. 623; *Mercer v Denne* [1905] 2 Ch. 538. Second, Mr Green greatly overplays the status of the SSIF. It is simply a record of the initial conclusions of Ofgem's investigatory team; as the SSIF itself makes explicitly clear, in a passage set out in the original in bold print, "decisions on everything in [the SSIF], including whether a breach has

occurred, rest solely with the Gas and Electricity Markets Authority … [which] may take a different view to that of the case team."

4) It is an entirely different question whether the factual material on which Ofgem relied and which it summarised in the SSIF is admissible. Such evidence would generally be admissible as hearsay evidence in the usual way, and it would be for this court to give it such weight as it thought appropriate. Indeed, much of the raw data is not seriously controversial, having been provided to Ofgem by EE, though the veracity of the complaints reported to EE or recorded by Ofgem as having been reported to it by Citizens Advice is controversial, as are some of the conclusions to be drawn from the data.

124. Although I accept, as I have said, that there was some mis-selling by GDM's field sales agents and also accept that this constituted a breach of contract by GDM, I reject the contention that the mis-selling was repudiatory or that it entitled EE to terminate the contract as at 31 January 2017.

125. The law as to the circumstances in which breach of an innominate, or intermediate, term of a contract will be repudiatory, in the sense of entitling the innocent party to elect to terminate the contract, has been considered in many cases, beginning with the decision of the Court of Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 and including an illuminating analysis by Lewison LJ in *Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577, [2013] 4 All E.R. 377. I have regard to the judgments in those cases but need not refer to them in detail here. The test most commonly used was adopted in *Valilas v Januzaj* [2014] EWCA Civ 436, [2015] 1 All ER 1047, at [59] by Arden LJ, who succinctly explained its use:

> "The common law adopts open-textured expressions for the principle used to identify the cases in which one contracting party ('the victim') can claim that the actions of the other contracting party justify the termination of the contract. I will use the formulation that asks whether the victim has been deprived of substantially the whole of the benefit of the contract. The expression 'going to the root of the contract' conveys the same point: the failure must be compared with the whole of the consideration of the contract and not just a part of it. There are other similar expressions. I do not myself criticise the vagueness of these expressions of the principle since I do not consider that any satisfactory fixed rule could be formulated in this field."

In the same case, Floyd LJ, with whose judgment Arden LJ expressed agreement, said at [54]:

> "Whether a breach or threatened breach does give rise to a right to terminate involves a multi-factorial assessment involving the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach and the consequences of the breach for the injured party: see the passage from the majority decision of the High Court of Australia in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*

[2007] HCA 61 (2007) 82 AJLR 345 at [54] cited by Lewison LJ in *Telford Homes (Creekside) Ltd v Ampurius Nu Holdings* [2013] EWCA Civ 577 at [50]."

126. Turning to the circumstances of the present case, I set out below my reasons for concluding that GDM was in breach of contract in respect of mis-selling but that the breach did not entitle EE to terminate the contract.

1) The argument that mis-selling was not a breach of contract is twofold. First, GDM's conduct regarding sales is governed by the KPIs: if complaints were within the 1% limit, that is an end of the matter. Second, point 5 in the Heads of Terms does no more than require GDM to bring to EE's attention "any risks or non-compliance with SLC 25"; the first part of point 7 has no application, because GDM was not itself privy to the licence and had no independent obligations under it; and the second part does not apply, because (as Ofgem rightly observed in the SOC) a failure to attain the Objective is not itself a breach of licence by EE: the breach is of the obligation under SLC 25.2 to take all reasonable steps.

2) I reject that argument. The second limb of the argument relies on an overly technical and unrealistic construction of point 7. It seems to me that the obligations relating to sales in SLC 25.6 and 25.11 would be breached by EE if agents failed to act in accordance with those provisions; and on that basis the second part of point 7 would be directly engaged. Further, the sensible way of reading the first part of point 7 is that it requires GDM to comply with the parts of SLC 25 that relate to its activities, including in particular SLC 25.6 and 25.11. A contrary construction would prove too much, because it would tend to indicate that even a policy of deliberate mis-selling on GDM's part would not be or result in a breach of contract provided only that the KPIs were achieved. Accordingly, Mr Jung was right to accept in cross-examination that GDM was itself bound by contract with EE, though not under the licence from Ofgem, to act in accordance with SLC 25. The second limb of the argument contains a point of much force, as I mention below; nevertheless, the contract contained independent obligations. The obligations in respect of KPIs relate to performance targets that, though closely related to questions of mis-selling and misconduct, are strictly distinct from them. Compliance with the KPIs would mean that EE was not permitted to terminate the contract by reason only of the level of complaints etc, but it would not follow that misconduct by GDM or its field sales agents in respect of doorstep sales could never amount to a repudiation of the contract.

3) Nevertheless, in my view EE have failed to show that mis-selling by GDM's agents amounted to a repudiation of the contract in the sense of a sufficiently serious breach of its innominate terms to justify termination. The complaints recorded by Ofgem in the SSIF are contained in the figures used to measure compliance with the KPIs. (It is possible that the complaints in the SSIF include some additional matters notified by Citizens Advice and not included within EE's figures. However, the extent of any additional matters is unclear; EE has not developed its case in reliance on any such addition.) The rate of complaints was within the relevant KPI. One cannot, in my judgment, conjure a repudiation out of the figures simply by breaking down the figures and arguing that each

complaint represents a breach of contract and that by adding them all together one has lots of breaches of contract such as to amount to a repudiation. Although compliance with the KPIs is, as I have said, not the final word, it does restrict EE's ability simply to rely on the existence of complaints as constituting a repudiatory breach of contract by GDM.

4) The KPIs are premised on the existence of some correlation between complaints, cancellations and objections/rejections on the one hand and mis-selling on the other; if they were not, they would lose their rationale. But, as I have said, not even a complaint is proof of misconduct. Findings by SSIF, involving acceptance of the veracity of complaints, are inadmissible. Some complaints were justified, as GDM accepted by taking disciplinary measures. However, it is instructive to consider EE's own analysis of complaints from January to September 2016, which shows that for GDM's agents the rate of complaints as against fuels (not necessarily customers: a customer might have switched in respect of both gas and electricity) was 0.95% and the rate of complaints upheld was 0.18%. A criticism made by Ofgem against EE, and not accepted by EE, was that it required too high a standard of proof before upholding a complaint. The proportion of justified complaints was very probably higher than EE's figures show. But it is impossible to say how much higher it was. Again, on 3 February 2017—three days after EE suspended field sales—EE's Sales Administrator sent to Ms Curtis-Blackwell an analysis of all complaints received since 1 August 2016. This showed that the rate of complaints against GDM agents, as compared with the agents of other companies engaged by EE, was low, having regard to the much higher number of sales achieved by GDM. Further, of 454 complaints received against GDM agents in the relevant period, 322 (70.9%) had not been upheld, 61 (13.4%) had been upheld, and about 15% remained to be adjudicated on. (By way of comparison: of the complaints against the sales team responsible for most sales next to GDM, 57% were not upheld, 20% were upheld, and 20% remained to be adjudicated upon.) The matters set out in these documents are consistent with EE's case to Ofgem and EE has never sought to resile from them, though Ms Khilji did suggest that she had been trying to put the best possible spin on the data when she responded to Ofgem.

5) Mr Green submits that the instances of mis-selling were nevertheless constitutive of a repudiation of the contract, because they led Ofgem to commence the SLC 25 Investigation and, in practical terms, necessitated the cessation of EE's field sales business, and therefore deprived EE of "substantially the whole benefit" of the contract. I do not accept that submission. The starting point has to be the contract itself, with regard in particular to the nature of the business to be conducted under it and the realism built into it by way of the KPIs. As a matter of contract, neither the rate of complaints nor the rate of upheld complaints would justify viewing GDM's conduct as a repudiation. It does not seem to me that Ofgem's intervention, be it on good or bad grounds, can make it so. Both Ms Khilji and Ms Blandy emphasised that Ofgem had less interest in performance measured by the relationship of complaints to sales than in the absolute level of complaints. However, if that were accepted as the touchstone of repudiatory breach it would mean that a better-performing agent responsible for more sales would be more

readily found in repudiatory breach of contract than a worse-performing agent responsible for fewer sales. The two major defects in EE's case on this point are, first, that it underplays the importance of its own contract with GDM and, second, that it sidesteps the fact that Ofgem's complaint in the SLC 25 Investigation was that EE was itself failing to take steps that (in Ofgem's opinion) it ought to take: the breaches of SLC 25.2 alleged by Ofgem relate to EE's behaviour, not that of other persons. Further, EE's case concerning the cessation of doorstep selling seems to me to be confused. First, Ofgem has not sought cessation of doorstep sales but proper control of them by EE, and the decision to stop doorstep selling was made by EE, not by Ofgem. Second, if (as EE has consistently maintained) Ofgem's concern is with the overall level of complaints, the obvious responses (apart from accepting Ofgem's suggested reforms) are either to vary the KPI for complaints under the contract or to seek to reduce the level of new complaints by reducing the amount of doorstep selling. If (as I am satisfied was not the case) the decision to stop doorstep selling entirely was taken because it was impossible to achieve satisfactory levels of performance in doorstop selling, then even if the sales teams might perhaps *ipso facto* be guilty of repudiatory breach no possible loss to EE could result. On the other hand, if (as I am satisfied was the case) the decision was taken as an expedient by EE to try to get Ofgem "off its back" in circumstances where EE failed to make constructive proposals to Ofgem, there is nothing in that to indicate that GDM had repudiated the contract.

6) Finally, any argument that EE terminated the contract on account of GDM's repudiatory breach in respect of mis-selling must fail on the ground of affirmation. EE has relied on nothing in this regard that was not known to it at all relevant times and when it made its quarterly reconciliations. It was content to continue with the contract. It changed its mind not because of learning of new breaches of contract by GDM but because it concluded that Ofgem would pursue it vigorously and decided to take drastic steps in order to persuade it to desist.

127. Mr Green and Mr Howells relied on a number of specific matters in support of the more general complaints under paragraphs 49.2ff of the re-re-amended defence.

1) In GDM's submission to Ofgem in March 2017, it was stated: "GDM did not have any internal policies to handle complaints"; and again: "There was no disciplinary procedure …" Mr Green submitted that a failure to have an internal complaints procedure or a disciplinary procedure was an obvious breach of the contractual obligation not to place EE at risk of being in breach of SLC 25. I reject that submission. It involves taking both quotes out of context. Regarding the complaints policy, the text read: "GDM did not have any internal policies to handle complaints. GDM followed whatever instructions were given by EE." That text followed an explanation that complaints were never received directly by GDM; rather they were received by EE. And it was followed by an explanation that, when EE informed GDM of a complaint, it would also tell GDM how it would like the complaint dealt with. Regarding disciplinary procedure, the text read: "There was no disciplinary procedure as the advisers are all self-employed contractors. There were either one of 3 outcomes when a complaint was received: (i) retraining; (ii) no further action required; (iii) taken

of (scil. off) the campaign." I am satisfied that both pieces of text were essentially accurate. The lack of any formal internal complaints policy is not in my view a breach of contract at all. It is certainly not a repudiatory breach. The same is true of the lack of a formal disciplinary procedure: the practice described in the text was proper, and absent any systemic failure to exercise sanctions nothing remotely like a repudiatory breach has been established on the evidence.

2) One particular matter relied on in evidence was an email sent by Mr Jung to GDM's regional sales managers on 26 July 2016, in which he gave them guidance for the enforcement of "our [i.e. GDM's] compliance procedure". In respect of complaints, part of the text read:

"Check how serious the complaint is—

- Forgery / abusive or threatening behavior (sic) (SUSPEND)".

It was pointed out that this was apparently contradictory of the evidence of one of the regional sales managers, who said that dishonesty would result in summary dismissal, and it was suggested that it showed that GDM's management was tolerant of serious misconduct. Mr Jung was not himself questioned about this email. However, his evidence on the third day of the trial was clear that a field sales agent might be suspended pending investigation and, if found responsible for gross misconduct, would face dismissal. This too is reflected in EE's draft policy for field sales complaints and the comments that GDM made on it in August 2015 (see paragraph 26 above), which envisaged immediate suspension pending investigation of a serious complaint and possible dismissal thereafter. I reject the suggestion that GDM was tolerant of serious misconduct.

3) Mr Green submitted that GDM failed to have adequate management structures in place to deal with compliance. He referred to the appointment in November 2015 of Mr James Eggleton as GDM's Compliance Manager. Mr Eggleton left GDM in December 2015 and was not replaced. His evidence was that during his employment with GDM he did not encounter examples of mis-selling and was not given or made aware of the content of SLC 25. Mr Green submitted that Mr Eggleton was not a properly qualified person to be Compliance Manager and that "GDM's subsequent failure to replace him was an aspect of GDM's wider failure to take proper steps to control mis-selling among its agents" and was a breach of contract (written closing submissions, para 123). However, Mr Eggleton's appointment and employment both preceded the contract made by the Heads of Terms. The evidence of Mr Allen and of Emma Selman, GDM's Office Manager, which I accept on this point, was to the effect that it had been felt that the level of complaints being received in late 2015 did not justify taking on a member of staff to replace Mr Eggleton and that the introduction soon afterwards of live verification confirmed them in that decision. Failure to give Mr Eggleton a copy of SLC 25 or to refer to it by name seems to me to be irrelevant. What is important is that the persons with responsibility for compliance should know what conduct was acceptable and what was not. I am satisfied that Mr Eggleton knew that. More generally, the failure to appoint a new head of compliance could not itself be a repudiatory breach of contract. If

the complaint is actually that the failure is indicative of a general disregard for compliance, I reject it. It is quite clear on the evidence as a whole that the management of both companies, GDM as well as EE, were concerned to avoid non-compliant selling, though neither can be regarded as conspicuously successful in that regard.

4) Similarly, I reject the complaint that GDM's regional sales managers were insufficiently trained or competent to communicate the importance of compliance to field sales agents. Three of the managers gave evidence at the trial: Mike Shipp, Scott Gilkerson, and Lukas Kocfelda. So far as concerns their communication of relevant standards and requirements to field sales agents, I found their evidence generally persuasive on the main points. I do not accept that the managers mentioned SLC 25 expressly to the sales agents, and I think it improbable that either the managers or the agents ever read SLC 25. However, I find that the managers were sufficiently apprised by Mr Jung in particular of the substance of the requirements of SLC 25 and that they understood those requirements and communicated them to the sales agents.

5) There was a complaint that GDM failed to follow the recruitment procedures provided by EE. Save for one particular instance, which I discuss in the next main paragraph below, this complaint was wholly unparticularised. I received evidence from Emma Selman, who as GDM's Office Manager had responsibility for the procedure relating to the addition of field sales agents to GDM's workforce. She said that each new agent was subject of a Criminal Records Bureau check and was also required to complete training (discussed below).

6) Again, EE complains, without giving particulars, that GDM failed to follow prescribed training procedures. Ms Selman's evidence, which was not subjected to any material challenge on this point, was that before any agent was permitted to engage in field sales he was required both to attend a training session, designed by EE and delivered by GDM's regional sales managers or by Mr Jung, and to achieve a mark of at least 80% in a test provided by EE. I find as a fact that the training programme used by GDM until autumn 2016 was that provided by EE. The evidence does not permit any detailed findings as to the skill with which training in that period was delivered. It suffices to say that EE has not proved that there was any breach of contract on the part of GDM, far less that there was anything amounting to a repudiation of the contract. From about early November 2016 the training was provided by Ms Owens, in accordance with the revised materials that she had prepared, and the length of the training was increased from one or two days to a course lasting between three and five days. I am satisfied that the materials were compliant with EE's requirements and that training delivered by Ms Owens was delivered to a high standard.

128. In addition to these general matters, in evidence and submissions EE relied on a particular allegation that GDM had deliberately deceived it by re-hiring, under a different name, a field sales agent who previously been dismissed for misconduct. The main evidence on this point was given by Mr Jung; there was also some from Ms Selman. The agent was called Johnny Powell. He was dismissed for misconduct in 2015. In July 2016 he was re-appointed as a field sales agent but in the name Johnny

Spade. In late 2016 he was, as I find, suspended again after a complaint. In December 2016 he was reinstated with Mr Gagan's permission. The evidence shows that EE was not told and did not know that Johnny Spade was the same person as Johnny Powell. Mr Jung's evidence was that GDM was permitted to re-appoint Mr Powell because, after the introduction of live verification in early 2016, he was told by either Ms Blandy or Ms Curtis-Blackwell that agents who had been dismissed could now be re-appointed in view of the greater protection afforded by live verification; though he said that Mr Powell was the only agent to be re-appointed. Mr Jung said that Johnny Spade was a name that Mr Powell used socially, for example on Facebook, and was not really a false name. Ms Selman said that the reason for using the name Spade rather than Powell in 2016 was in order clearly to distinguish sales recorded on Open Door.

129. I do not accept Mr Jung's evidence that Mr Powell was re-appointed by virtue of a general amnesty granted by Ms Blandy or Ms Curtis-Blackwell. There is no documentary record of such an amnesty and no other evidence to support its existence. If EE had told GDM that it was free to reinstate agents who had previously been dismissed, the matter would probably have been mentioned in an internal note or an email between the parties, especially as different considerations might apply to agents whose misconduct had been of varying grades of seriousness. Further, it is likely that mention of the amnesty would have been made to the regional sales managers and that some record of the matter would exist. Again, it is relatively unlikely that a general amnesty should result in the reappointment of only one agent. I accept that Ms Selman believed the reappointment to have been authorised and was told to use the name Spade for convenience on the Open Door system. However, I find that Mr Powell's reappointment was not authorised by EE and that the use of the name Spade was designed to conceal it from EE.

130. I accept that the reappointment of Mr Powell in these circumstances would amount to a breach of point 5 in the Heads of Terms. However, I do not consider that it was a repudiatory breach, such as would entitle EE to terminate the contract. First, it is not relied on as such in the statements of case; rather, EE refers to it in evidence as being a particular of one or more of the vague and general allegations in paragraph 49 of the re-re-amended defence. This is in part a pleading point: I should be unwilling to permit reliance on a specific act of misfeasance as itself constituting a repudiatory breach of contract in the absence of a clear pleading to that effect. In the present case, although Mr Green referred to the Spade/Powell matter in two passages of cross-examination, in one brief section of his written and oral submissions and briefly in his oral response, Mr Chapman made no reference to it, no doubt because it was not a pleaded allegation. The absence of the matter from the pleadings also tends to indicate that EE does not view the reappointment of Mr Powell as by itself constituting a repudiation of the contract. Second, I have regard to the law relating to entitlement to terminate a contract for breach of an innominate, or intermediate, term, as mentioned above. It seems to me that the single instance of reappointing an agent who had previously been dismissed has not been shown to be sufficiently serious to justify termination of the contract. I accept that it involved efforts to mislead EE by concealing the agent's true identity. However, it was a single incident. EE has not sought to prove the circumstances of the termination of Mr Powell's previous engagement or the nature or seriousness of the conduct he had engaged in or was complained of as having engaged in. Mr Jung gave evidence (day 3, pp. 113-114) to the effect that the circumstances were less than clear-cut and that he was satisfied that the introduction of live verification would obviate

future similar problems. I accept that part of Mr Jung's evidence. EE has also not alleged or proved that Mr Powell engaged in mis-selling after being reappointed.

How did the contract come to an end?

131. I hold that GDM lawfully terminated the contract by its acceptance of EE's own repudiatory breach consisting of a renunciation of the contract on 31 January 2017 and on 2 February 2017. However, if I had been of the opinion that EE was entitled to terminate the contract by acceptance of a repudiatory breach by GDM, I would have held that EE had so terminated it by Ms Khilji's text message to Mr Allen on 2 February 2017, though not by the telephone conversations on 31 January 2017.

132. Acceptance of a repudiatory breach of contract must be clear and unequivocal, though no particular form of acceptance is required and in appropriate circumstances acceptance can be inferred from conduct: *Vitol SA v Norelf Ltd* [1996] A.C. 800 at 811-812; *BskyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC) at [1373].

133. The conversations on 31 January 2017 could not have constituted acceptance by EE of a repudiation by GDM, for two reasons: first, there was no such repudiation; second, the conversations did not contain a clear and unequivocal purported termination of the contract by EE. EE said that it was suspending doorstep sales and could not tell GDM when they would resume. Mr McKenzie was expressly given the opportunity to confirm that EE was terminating the agreement, but he did not take it.

134. The conversations did, however, amount to a renunciation of the contract by EE. "A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect": *Chitty on Contracts,* 33rd edition, para 24-018. The renunciation amounted to a repudiatory breach on the part of EE, that is, one that entitled GDM to terminate the contract.

135. Ms Khilji's text message to Mr Allen on 2 January 2017 (see paragraph 81 above) was unequivocal and unambiguous in indicating that the relationship, though it had been mutually beneficial, had come to an end, so that the parties would go their separate ways. The message was not written in the style of a contract law textbook, but in the context of the conversation on 31 January and of Mr Turner's email of 1 February 2017 it could have left no reasonable doubt that EE was purporting to terminate the contract. If EE had been entitled to terminate the contract on account of repudiatory breach by GDM, the text message would have been sufficient to effect termination. It is immaterial that a party gives no reason or a poor reason for terminating a contract, if indeed the facts were such that a good reason could have been relied on: *Boston Deep Sea Fishing and Ice Co. v Ansell* (1888) 39 Ch. D. 339. However, as EE was not entitled to elect to terminate the contract, the text message constituted a very clear confirmation of renunciation of the contract. Therefore GDM had a choice whether to affirm or to terminate the contract.

136. The statement by EE's solicitor on 20 February 2017 that EE had not terminated the contract and that the parties were merely "on a break" made no difference to this analysis. EE remained in repudiatory breach of contract, because it was confirming, albeit in different terms, its unwillingness to perform the contract. (If, however, as Mr Green submits, EE had already validly terminated the contract, the solicitor's statement

would have made no difference. Once a repudiation has been accepted, the acceptance cannot be withdrawn: *Scarf v Jardine* (1882) 7 App. Cas. 345.)

137. GDM validly terminated the contract on 27 February 2017.

138. It follows that, in principle, GDM is entitled to damages for breach of contract. I shall consider the question of the amount of such damages after I have considered the principle of the claim under the Regulations. It also follows from my earlier findings that EE has, in principle, a right to damages for breach of contract on its counterclaim. It seems to me to be very doubtful whether those damages would be more than nominal. However, the quantum of the counterclaim is not an issue before me.

The claim under the Regulations

139. The Regulations govern the relations between commercial agents and their principals in relation to the activities of commercial agents in Great Britain: regulation 1(2). The first question is whether the Regulations apply to GDM. If the Regulations do apply, the second question will be whether GDM is entitled to compensation on account of the termination of the agency.

Do the Regulations apply to GDM?

140. Subject to certain exclusions, which do not apply in the present case, "'commercial agent' means a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the 'principal'), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal": regulation 2(1). However, the Regulations do not apply to "persons whose activities as commercial agents are to be considered secondary": regulation 2(3), (4). The Schedule to the Regulations has effect for the purpose of identifying the persons whose activities as commercial agents are to be considered secondary. Paragraphs 1, 2 and 3 of the Schedule are relevant to the issues in the present case.

> "1. The activities of a person as a commercial agent are to be considered secondary where it may reasonably be taken that the primary purpose of the arrangement with his principal is other than as set out in paragraph 2 below.
>
> 2. An arrangement falls within this paragraph if—
>
> (a) the business of the principal is the sale, or as the case may be purchase, of goods of a particular kind; and
>
> (b) the goods concerned are such that—
>
> (i) transactions are normally individually negotiated and concluded on a commercial basis, and
>
> (ii) procuring a transaction on one occasion is likely to lead to further transactions in those goods

> with that customer on future occasions, or to transactions in those goods with other customers in the same geographical area or among the same group of customers, and
>
> that accordingly it is in the commercial interests of the principal in developing the market in those goods to appoint a representative to such customers with a view to the representative devoting effort, skill and expenditure from his own resources to that end.
>
> 3. The following are indications that an arrangement falls within paragraph 2 above, and the absence of any of them is an indication to the contrary—
>
> (a) the principal is the manufacturer, importer or distributor of the goods;
>
> (b) the goods are specifically identified with the principal in the market in question rather than, or to a greater extent than, with any other person;
>
> (c) the agent devotes substantially the whole of his time to representative activities (whether for one principal or for a number of principals whose interests are not conflicting);
>
> (d) the goods are not normally available in the market in question other than by means of the agent;
>
> (e) the arrangement is described as one of commercial agency."

141. Mr Green submitted, first, that GDM was not within the definition in regulation 2(1) and, second, that if it was within the definition its activities as a commercial agent were to be considered secondary. There is a degree of interrelationship among the various arguments.

a) Mr Green's argument that GDM was not within the definition in regulation 2(1) was that GDM did not have authority to negotiate, and did not negotiate, the sale of power to customers; its role was limited to soliciting customers to switch their supplier to EE, so that the customers could thereafter buy power from EE, but it had no part in any consequent sale of gas or electricity.

b) Mr Green's first argument under the Schedule was that EE's business was not the sale of goods, for the following reasons: EE's main business was the sale of electricity (sales of electricity and of gas were very approximately in the proportion 3:2); electricity is not "goods" within the meaning of the Regulations; therefore paragraph 2(a) of the Schedule was not satisfied, the primary purpose of the arrangement between EE and GDM was other than as

set out in paragraph 2, and any activities of GDM as commercial agent were secondary.

c) Mr Green's second argument under the Schedule was that the arrangement between EE and GDM fell outside paragraph 2 because the goods concerned were not such that transactions were "normally individually negotiated". The argument is directed to both stages of the transaction: the switch of suppliers is not individually negotiated, because the agent is simply offering terms on a "take it or leave it" basis; and the subsequent sales of gas and electricity are not individually negotiated, because they are simply according to tariffs.

d) Mr Green's third argument under the Schedule relied on several matters referred to in paragraph 3 of the Schedule as showing that the arrangement between GDM and EE did not fall within paragraph 2. First, the gas and electricity were no different from those obtainable from any other supplier and were not "specifically identified with [EE] in the market": paragraph 3(b). Second, the goods, namely gas and electricity, were normally available in the market other than by means of GDM; customers did not need to switch to EE via GDM or any other agent and no agent was involved at all in the actual sales of gas or electricity: paragraph 3(d). Third, the contract between EE and GDM made no mention of commercial agency: paragraph 3(e).

142. In my judgment, the Regulations do apply to GDM.

143. EE accepts that gas constitutes "goods" for the purposes of the Regulations. It follows that the question whether electricity also constitutes "goods" is not relevant to deciding whether GDM satisfied the definition of "commercial agent" in regulation 2(1). However, it is said to be relevant to deciding whether the primary purpose of the arrangement between EE and GDM was other than as set out in paragraph 2 of the Schedule and whether, therefore, the Regulations do not apply to GDM. I accept Mr Chapman's submission that electricity is to be regarded as goods within the meaning of the Regulations.

1) That was the decision of H.H. Judge Langan Q.C., sitting as a Judge of the High Court, in *Devers v Electricity Direct (UK) Ltd* (unreported, 7 November 2008); see paras 36-38 of the judgment. I take this to be part of the ratio of his judgment: the claim failed because of failure to give the requisite notice under the Regulations, and it was therefore necessary to the decision that the Judge held the Regulations to apply.

2) That electricity constitutes goods for the purposes of the Regulations was assumed by Morison J in *Tamarind International Ltd v Eastern Natural Gas (Retail) Ltd* [2000] Eur.L.R. 708, at [41]. In the *Devers* case, Judge Langan Q.C. referred to the concluding words of that paragraph—"Electricity is not gas."—and, apparently taking them to express a reservation as to the status of electricity, remarked that they were obiter. In fact, although the words are obiter, their logic assumes that electricity is goods: Morison J was making the point that, for the purposes of paragraph 2(b)(ii) of the Schedule, the goods in question had to be the same; electricity is one good, gas is another.

3) The Regulations derive from the Directive, not from the domestic English law of personal property. Saintier & Scholes, *Commercial Agents and the Law* (2005), at p. 42, state: "According to the DTI guidance notes of 1994, 'goods' clearly has to be interpreted in accordance with the EC Treaty, which explains why the Agency Regulations do not define the word." It is settled law that electricity is goods within the EC Treaty. *Commission v Italy* C-158/94 (23 October 1997) was an action under article 179 of the EC Treaty in respect of monopolies in the electricity industry. Italy contended that electricity was not "goods" within the meaning of the Treaty and that it corresponded more closely to services than to goods. In terms not dissimilar to Mr Green's submissions on behalf of EE, it argued "that that electricity is an incorporeal substance which cannot be stored and has no economic existence as such, in that it is never useful in itself but only by reason of its possible applications. In particular, imports and exports of electricity are merely aspects of the management of the electricity network which, by their nature, fall within the category of 'services'." In rejecting that argument at [17], the Court "noted that it is accepted in Community law, and indeed in the national laws of the Member States, that electricity constitutes a good within the meaning of Article 30 of the Treaty. It noted in particular that electricity is regarded as a good under the Community's tariff nomenclature (Code CN 27.16)".

4) There could be no purposive argument for distinguishing between agents who procure switches of gas supplier and agents who procure switches of electricity supplier. The distinction could only be driven by the constraints of a legal analysis imposed on the Directive by factors having no bearing on any discernible purpose. The courts should not be energetic to be so driven. Just how unattractive EE's proposed analysis is appears by considering the fact, already mentioned, that it applies not to GDM's status as commercial agent but to the question whether its activities as such were secondary. According to Mr Green's argument, if EE's sales had been 51% gas and 49% electricity, its primary business would have been the sale of goods and the Regulations would have applied to GDM, whereas because EE sold more electricity than gas the Regulations did not apply. This is not to say that the courts should distort the meaning of legislation on policy grounds, something against which the Court of Appeal has warned in the next case mentioned below. It is rather to say that the purposes of legislative provisions may inform the sensible construction of those provisions.

5) In *Computer Associates Ltd v The Software Incubator Ltd* [2018] EWCA Civ 518, [2018] 1 Lloyd's Rep 613, the Court of Appeal proceeded on the basis that both gas and electricity were "goods" for the purposes of the Directive. (The remarks about the *Tamarind* case at [53] do not seem to be entirely accurate, but Gloster LJ was correct in thinking that Morison J clearly accepted that electricity was "goods".)

6) No doubt because its only mention of electricity supports GDM's case and not EE's case, Mr Green did not seek to rely on the *Computer Associates* case in support of his argument. I have, however, considered it carefully, because it contains the most recent authoritative judgment on the meaning

of "goods" within the Regulations. The case concerned electronically supplied software with no physical form. H.H. Judge Waksman Q.C. held that the software constituted goods. Gloster LJ, with whom Irwin and Henderson LJJ agreed, disagreed with Judge Waksman on the point and held that the software did not constitute goods within the meaning of regulation 2(1). She saw the critical distinction as being between tangible and intangible property. The actual decision relates to facts quite different from those of the present case. Gloster LJ had some difficulty in explaining how gas and electricity were any more tangible property than the software in the case before her: see [53]; though the physical presences demonstrated by the ignition of gas or the touching of a live wire do suggest a difference. With great respect, I am not entirely sure why Gloster LJ appeared to find a survey of the meaning of "goods" in sales of goods legislation in common-law jurisdictions to be of assistance. In *Devers,* Judge Langan Q.C. observed that there was "a problem about using a definition which has its origin in 19th century domestic legislation for the purpose of construing an expression in regulations which derive from late 20th century European legislation." I respectfully agree with that remark. At all events, Gloster LJ recognised the relevance of the meaning of "goods" in European law (which, as I have said, clearly includes electricity) and did not cast doubt on the inclusion of gas and electricity within the definition in the Regulations.

144. I accept that GDM had authority to, and did, negotiate the sale of goods on behalf of EE. It is correct, as Mr Green points out, that GDM did not directly negotiate sales of energy but rather acted in respect of signing the customers up to a switch of energy providers, who then made the sales themselves. However, the courts have construed the Regulations broadly so as to bring work such as that done by GDM within the scope of the definition. In *PJ Pipe Valve Co. Ltd. v Audio India Limited* [2005] EWHC 1904 (QB), Fulford J treated "negotiate" as meaning "to deal with, manage or conduct", a construction he derived from the judgment of Morritt LJ in *Parks v Esso Petroleum Company Limited* [2000] E.C.C. 45: see [30]-[32] in Morritt LJ's judgment. In *Nigel Fryer Joinery Services Ltd v Ian Firth Hardware Ltd* [2008] EWHC 767 (Ch), Patten J said the meaning attributed to "negotiate" by Fulford J was "obviously a much wider meaning of the word than to negotiate a sale in the sense of engaging in the bargaining process or haggling over terms or price", and at [20] he approved that construction of the Regulations:

> "I prefer the approach of Fulford J. It seems to me that the inclusion in reg. 2(1) of two definitions of commercial agent (negotiate the sale or negotiate and conclude the sale) indicates that the first of these alternatives can include the wider meaning which he gave to the word 'negotiate' in the first of the two definitions. This can, I think, include an agent whose role (like that of Mr Fryer) is to get the client interested in the product; suggest possible prices subject to confirmation by the principal; and to encourage the customer to place an order at those prices. This seems to me to come well within the ordinary meaning of 'negotiate'."

145. Consistently with this approach, both in *Tamarind International* and in the *Devers* case, where the facts were, in the relevant respect, materially identical to those of the present case, the court accepted that the definition of commercial agent in regulation 2(1) was satisfied, notwithstanding the fact that the agents in those cases had no ability to alter the offered terms and were not involved in the actual sales of energy. In *Tamarind International,* the defendant did not dispute that the claimant fell within the definition: see [22]. Relevantly, Morison J found at [31]: "The claimants were chosen and appointed expressly for their expertise in direct selling, marketing and promotion … and in overcoming what is the customer's clear resistance to change." In *Devers,* Judge Langan Q.C. at [34] expressly approved and followed the approach of Fulford J and Patten J.

146. Once the breadth of the concept of negotiation in the Regulations is understood, the main objection to finding that "the goods concerned were such that … transactions [were] normally individually negotiated" (Schedule, paragraph 2(b)(i)) falls away. Of course, the field sales agents did not negotiate "in the sense of engaging in the bargaining process or haggling over terms or price", but they did so in the relevant wider sense explained in the cases. Mr Green relied on *Parks v Esso Petroleum*, where it was held that the proprietor of a petrol station did not negotiate with those who filled up their cars with fuel on the forecourt. That case does not assist EE; indeed, the reasoning, as mentioned above, directly supports GDM's case. The following paragraphs from Morritt LJ's judgment make this clear and show just how far removed the *Parks* case is from the present case:

> "31. So I return to the one short point which arises on the appeal. Did Mr Parks negotiate and conclude the sale of the petrol owned by Esso to those who attended his forecourt? I take the normal meaning of the word from the Oxford English Dictionary definition relied on by Mr Parks. This definition does not require a process of bargaining in the sense of invitation to treat, offer, counter-offer and finally acceptance, more colloquially known as a haggle. But equally it does require more than the self-service by the customer followed by payment in the shop of the price shown on the pump, which is how the system operates nowadays.
>
> 32. In my view the motorist would be astonished to be told when he inserted the nozzle of the pipe into the top of his petrol tank that he was 'negotiating' with the site operator. In my view it is quite plain that there is no process of negotiation involved. To revert to the Oxford English Dictionary definition Mr Parks relied on, Mr Parks did not 'deal with, manage or conduct' the sale of petrol to his customers, for he took no part in the customer's choice and self-service. In so far as the definition indicates the need for skill or consideration Mr Parks provided none.
>
> 33. Further, the provisions of the Schedule, in particular those which distinguish between sales individually negotiated and those which depend on the customer's self-selection, show

beyond doubt that the regulations are not intended to apply to one in the position of Mr Parks."

147. Paragraph 3 of the Schedule does not set out an independent test for the applicability of the Regulations. Rather it assists in assessing whether the arrangement between the parties falls within or without paragraph 2, by listing indicative factors that, as they are present or absent, are indications that the arrangement does or does not fall within paragraph 2. As to those indicative factors, I comment as follows.

a) EE rightly accepts that it was the distributor of the gas and electricity. This is an indication that the arrangement fell within paragraph 2.

b) The gas and electricity were specifically identified with EE in the market. It is true that the energy was no different from that supplied by the other energy companies. That does not matter; what matters is the way in which the goods were perceived in the market. In *Tamarind International* at [33]-[37] Morison J specifically noted that the gas was the very same gas as that which was supplied by the previous monopoly supplier but nevertheless held that the relevant indicative factor was present: "Gas was identified with Eastern in the market place, since that was the sales strategy dictated by Eastern and accepted by the agents." (See also at [40], where Morison J gave the example of petroleum products being sold under different names.) The matter is essentially one of branding. Where the customers were being persuaded to switch supplier from their existing supplier to EE, the case seems to me to be a paradigm of paragraph 3(b), especially as EE's own evidence was that the terms on which it offered to supply customers were significantly different from those on offer from other suppliers. Accordingly, this is an indication that the arrangement fell within paragraph 2.

c) EE does not dispute that the indicative factor in paragraph 3(c) was present. This supports the contention that the arrangement fell within paragraph 2.

d) In my judgment, paragraph 3(d) ("the goods are not normally available in the market in question other than by means of the agent") is an indicative factor in favour of the arrangement falling within paragraph 2. The word "normally" imports a degree of vagueness, into the factor. It is appropriate to apply it by reference to the wording of paragraph 2 itself ("and that accordingly … to that end"), which shows clearly what is for present purposes the relevant objective of the Regulations, namely to provide protection to a class of commercial agents whose sales activities and efforts are of primary importance to the development of the principal's goodwill in the market within which the agents operate. The evidence indicates that EE's business was conducted mainly if not entirely by direct sales, of which some were tele-sales but most were doorstep sales. EE had progressively limited its own direct sales capacity and chosen to rely on agents. GDM conducted 70% of all of EE's doorstep sales and, importantly, had sole rights for such sales within the areas of its operations. In these circumstances, I regard the indicative factor in paragraph 3(d) as being present. Even if I were wrong about that, I should not regard the availability of EE's goods through other channels as being a significant contra-indication, in the circumstances outlined above.

e) The Heads of Terms do not describe the arrangement as one of commercial agency and do not refer to the Regulations. This is an indication that the arrangement between the parties was not within paragraph 2.

Weighing up these various factors, I am clearly of the view that the overall indication is that the arrangement between the parties was within paragraph 2 and that accordingly the Regulations apply to GDM.

Is GDM entitled to compensation under the Regulations?

148. The entitlement to compensation is provided in regulation 17, which so far as material provides as follows:

> "(1) This regulation has effect for the purpose of ensuring that the commercial agent is, after termination of the agency contract, … compensated for damage in accordance with paragraphs (6) and (7) below.
>
> …
>
> (6) Subject to paragraph (9) [which has no bearing on this case] and to regulation 18 below, the commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal.
>
> (7) For the purpose of these Regulations such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely circumstances which—
>
> (a) deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or
>
> (b) have not enabled the commercial agent to amortize the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal."

149. Regulation 18 provides for limited exclusions from the right to compensation. So far as material to the present case, it provides as follows:

> "The compensation referred to in regulation 17 above shall not be payable to the commercial agent where—
>
> (a) the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of

the agency contract pursuant to regulation 16 above; or

(b) the commercial agent has himself terminated the agency contract, unless such termination is justified—(i) by circumstances attributable to the principal, …"

150. Regulation 16 provides in part:

> "These Regulations shall not affect the application of any enactment or rule of law which provides for the immediate termination of the agency contract—
>
> (a) because of the failure of one party to carry out all or part of his obligations under that contract; or …"

151. On the facts as I have found them to be, GDM is entitled to compensation pursuant to regulation 17(6). The right to compensation is not excluded by regulation 18, because the termination of the contract by GDM was justified by circumstances attributable to EE, namely EE's renunciation of its obligations under the contract.

152. If I had reached a different conclusion as to EE's entitlement to terminate the contract by acceptance of a repudiatory breach by GDM, the question would have arisen whether the combined effect of regulation 18(a) and regulation 16(a) excluded the right to compensation. As to this, I comment as follows.

1) In *Rossetti Marketing Ltd v* [2012] EWCA Civ 1021, [2013] Bus LR 543, the Court of Appeal left open the question whether the right to compensation was excluded when the ground on which the principal could lawfully have terminated the contract was not known to it at the time of termination: see [58]-[60].

2) As the Court of Appeal has recently reminded us in *W Nagel (a firm) v Pluczenik Diamond Company NV* [2018] EWCA Civ 2640, a case concerning the Regulations: "It is a principle of EU law that exceptions from the general scope of a Directive should be interpreted strictly, although not in such a way as to deprive the exceptions of their intended effect: see *Belgium v Temco Europe SA* (Case C-284/03) [2004] ECR I-11237, para 17; and (with specific reference to this Directive) *Volvo Car Germany GmbH v Autohof Weidensdorf GmbH* (Case C-203/09) [2012] Bus LR D13, para 42."

3) In *Volvo Car Germany GmbH v Autohof Weidensdorf GmbH* itself, the ECJ decided that an agent was not deprived of the right to an indemnity under the Directive "where the principal establishes a default by that agent which occurred after notice of termination of the contract was given but before the contract period expired and which was such as to justify immediate termination of the contract in question": see [45]. That point does not arise in the present case. The Court was asked to answer the question whether Article 18(a) of the Directive, the source of regulation 18(a) of the Regulations, ought to be interpreted "as precluding national legislation under which a commercial agent

is not entitled to an indemnity in the event of contractual termination of the contract by the principal if a serious ground for immediate termination of the contract because of the agent's default existed at the date of contractual termination but was not the cause of the termination?" However, it declined to answer that question on the ground that it was hypothetical on the facts of the case.

4) However, the Court's reasoning in the *Volvo* case does have a bearing on the present case. First, the Court relied on the principle, mentioned above, that the exception was to be interpreted strictly. Second, it relied on the words "because of" in Article 18(a) of the Directive, which are repeated in regulation 18(a) of the Regulations, as an indication that "the legislature intended to require that there be a direct causal link between the default attributable to the commercial agent and the principal's decision to terminate the contract in order to deprive the commercial agent of the indemnity provided for in article 17 of the Directive": see [38]-[39].

5) That reasoning is consistent with the reasoning of Briggs J in *Crane v Sky In-Home Service Ltd* [2007] EWHC 66 (Ch). In his discussion of regulation 18(a) at [82]-[92] he accepted the need for a causal link; see in particular [89]-[91]. For that reason, he did not consider that the right to compensation would be excluded where the principal did not know of the breach at the time of termination: see [90]. However, he did not consider that, for the right to be excluded, it was necessary that the principal should have purported to terminate on account of breach of contract or should even have terminated the contract summarily: see [85].

6) I respectfully agree with the reasoning of Briggs J in *Crane*. The entitlement to compensation will be excluded only if (a) the principal terminates "because of" default attributable to the agent and (b) that default would justify immediate termination of the agency. A default of which the principal is unaware is unlikely to satisfy the causal requirement of the words "because of". Thus, for example, if the reappointment of Johnny Powell were a repudiatory breach of contract, EE could not be said to have terminated the contract "because of" that default, of which it knew nothing. It may perhaps be that circumstances could exist in which, even if a principal did not know of the breach of contract by the agent, its reasons for terminating the agency contract were such that the termination could nevertheless be said to be "because of" the default for the purposes of regulation 18. It is unnecessary for the purposes of this judgment to decide whether such circumstances could exist.

7) The argument for EE is that it terminated the contract because of GDM's mis-selling and that the mis-selling justified immediate termination of the contract. As I have said, I accept that the mis-selling was a breach of contract but not that it justified immediate termination of the contract. If I considered that the mis-selling was repudiatory, I would have concluded that EE terminated the contract "because of" that default by GDM and that compensation was excluded by regulation 18(a). That is because the termination was a direct response to Ofgem's attentions, which were themselves the consequence of GDM's mis-selling. In other words, EE terminated the contract because of mis-selling.

Quantum: compensation under the Regulations

The law

153. The method of compensation in the provisions of the Directive and the Regulations is derived from French law. It is not directly concerned with compensation for the results of wrongdoing; compensation is payable even on the expiry of a fixed-term contract: *Light v Ty Europe Ltd* [2003] EWCA Civ 1238. "The commercial agency is regarded as a matter of common interest of which the agent is (in cases where he does not assign it) deprived: his claim is quasi-proprietary. … The loss is the loss of an asset, his interest in the common enterprise of himself and the principal": *Bowstead & Reynolds on Agency,* para 11-050. This is all quite different from the way the common law would traditionally deal with such matters, although the valuation exercise required is by no means an unfamiliar one.

154. The correct approach to the quantification of compensation under the Regulations was established by the House of Lords in *Lonsdale v Howard & Hallam Ltd* [2007 UKHL 32, [2007] 1 W.L.R. 2055. The main points in the speech of Lord Hoffmann are these. The underlying theory is that the agent is regarded as having a share in the goodwill in the principal's business which he helped to create. The agent is entitled to compensation for the loss of his interest in the goodwill, which the principal retains after termination of the agency: [8]-[9]. The right for which the Directive requires the agent to be compensated is the right to be an agent. "The value of the agency relationship lies in the prospect of earning commission, the agent's expectation that 'proper performance of the agency contract' will provide him with a future income stream. It is this which must be valued": [11]. Lord Hoffmann continued:

> "12. Like any other exercise in valuation, this requires one to say what could reasonably have been obtained, at the date of termination, for the rights which the agent had been enjoying. For this purpose it is obviously necessary to assume that the agency would have continued and the hypothetical purchaser would have been able properly to perform the agency contract. He must be assumed to have been able to take over the agency and (if I may be allowed the metaphor) stand in the shoes of the agent, even if, as a matter of contract, the agency was not assignable or there were in practice no dealings in such agencies: compare *Inland Revenue Comrs v Crossman* [1937] AC 26. What has to be valued is the income stream which the agency would have generated.
>
> 13. On the other hand, as at present advised, I see no reason to make any other assumptions contrary to what was the position in the real world at the date of termination. As one is placing a present value upon future income, one must discount future earnings by an appropriate rate of interest. If the agency was by its terms or in fact unassignable, it must be assumed, as I have said, that the hypothetical purchaser would have been entitled to take it over. But there is no basis for assuming that he would then

> have obtained an assignable asset: compare the *Crossman* case. Likewise, if the market for the products in which the agent dealt was rising or declining, this would have affected what a hypothetical purchaser would have been willing to give. He would have paid fewer years' purchase for a declining agency than for one in an expanding market. If the agent would have had to incur expense or do work in earning his commission, it cannot be assumed that the hypothetical purchaser would have earned it gross or without having to do anything."

At [28] Lord Hoffmann again emphasised that the only counter-factual assumption to be made was that the agency was available to be bought and sold at the relevant date. "What it would fetch depends upon circumstances as they existed in the real world at the time: what the earnings prospects of the agency were and what people would have been willing to pay for similar businesses at the time."

155. Mr Green submitted that GDM had not suffered any relevant damage for the purpose of the Regulations, having particular regard to regulation 17(7)(a): GDM was entitled to receive only one commission for each customer who switched to EE; it had received all of the commissions to which it was entitled; any benefits retained by EE by virtue of the performance by GDM of its agency functions were benefits for which GDM had already been fully paid and which EE would have retained irrespective of termination of the agency agreement. That submission has immediate attraction, at least to a common lawyer. However, in agreement with the submissions of Mr Chapman for GDM, I reject it. Regulation 17(6) is the basic provision for compensation. Both the method and the purpose of compensation have been explained by the House of Lords in the *Lonsdale* case. After termination, EE retains the goodwill of the business that GDM helped to create; the rationale of the Directive and the Regulations is that after termination the agent should share in that goodwill; it does so by being compensated for the loss of the income stream it would have received by way of commission if the agency had continued. GDM's claim falls squarely within that rationale and the scope of regulation 17.

156. Lord Hoffman's mention of counter-factual assumptions raises the question of the relevance of the principal's ability to terminate the agency in accordance with the terms of the contract. In this regard I comment as follows.

1) The Heads of Terms fixed a three-year term, subject to prior termination for serious breach. "An agency contract for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency contract for an indefinite period": regulation 14. In such a case, either party would be entitled to terminate the agency contract by three months' notice expiring at the end of a calendar month: regulation 15 (1), (2), (4), (5).

2) Subject to regulation 18, the agent's entitlement to compensation arises regardless of the reason for the termination and even if the agreement determined by reason of the expiration of its fixed term: *Light v Ty Europe Ltd, supra.*

3) In *Page v Combined Shipping and Trading Co Ltd* [1997] 3 All ER 656, the Court of Appeal decided, on an interlocutory appeal, that there was a good arguable case that for the purposes of compensation under the Regulations the common-law rule that a party to a contract could perform it in the manner most advantageous to himself did not apply; therefore, on the facts of that case, there was a serious question to be tried whether the principal could resist a claim for substantial compensation by relying on its ability to reduce its trading to nil or nearly nil.

4) In *Alan Ramsay Sales & Marketing Ltd v Typhoo Tea Ltd* [2016] EWHC 486 (Comm), [2016] 4 W.L.R. 59, Flaux J referred to some expert evidence before him to the effect that "any valuation should take account of the 12-month notice period in the agency agreement" and said:

   "100. In his submissions, Mr Thomas QC [for the defendant] placed great emphasis on this point, saying that, in the real world, any valuation would take account of the fact that the agency was terminable after twelve months. However, I agree with Mr Segal QC that this is a heterodox approach. As is clear from [12] of Lord Hoffmann's judgment in *Lonsdale* quoted above: 'it is obviously necessary to assume that the agency would have continued and the hypothetical purchaser would have been able properly to perform the agency contract', in other words the valuation for the purpose of the Regulation is on the basis that the agency continues, with the purchaser performing the agency agreement in accordance with its terms, and the principal not invoking any termination or notice provision. Even if this point were not absolutely clear from *Lonsdale*, what is essentially the same argument was rejected by the Court of Appeal in an earlier case on the Regulations, *Page v Combined Shipping & Trading* [1997] 3 All ER 656: see per Staughton LJ at 660d-h. Accordingly, in my judgment, the notice period is to be disregarded in valuing the agency and the assumption should be made that, in the absence of external evidence of matters, such as financial difficulty or a trade in terminal decline, the agency would have continued."

   For GDM, Mr Chapman submitted that accordingly compensation was to be assessed on the basis that the principal would not invoke any termination or notice provision and that the agency would continue.

5) However, in *The Software Incubator Ltd v Computer Associates UK Ltd* [2016] EWHC 1587 (QB), His Honour Judge Waksman Q.C. considered the matter in the following terms:

   "165. [A]s a matter of law, it is said that no account can be taken of the fact that at some point in the future, the Agreement might be terminated either by CA or indeed by the agent—in the latter case, of course, no right to a Regulation 17 award would arise. I accept that one cannot say that any valuer must proceed on the basis that the principal for example will take immediate steps

itself to terminate at the first available opportunity here on 3 months' notice. But nor do I accept the converse which is that the valuer cannot take into account the prospect of a lawful termination on notice at some point in the future. Otherwise, subject only to any shelf-life of the product any notional valuation would have to assume that the agency would last forever. I do not believe that this is realistic.

…

167. In *Ramsay v Typhoo Tea* [2016] EWHC 486, however, Flaux J had to deal with a similar submission that a 'real world' valuer would have to take into account the fact that the agency was determinable after 12 months. He rejected this. First he referred to the dicta of Lord Hoffmann's judgment in *Londsale* at paragraph 12 set out above. As to that it is not in fact clear to me that Lord Hoffmann was dealing with a notice point. In context it seems to me that he was making the more basic point which was that although the agency had in fact terminated (otherwise there would be no Regulation 17 claim) in fact it must be assumed to continue and be properly performed. Second, Flaux J relied upon the decision of the Court of Appeal in *Page v Combined Shipping* [1997] 3 All ER 656. This was a case involving an injunction and so all the Court of Appeal had to do was to find there was a good arguable case on the merits in favour of the agent claimant. One submission was that the agent could not show that he would suffer any substantial loss because, even if the agency was not terminated, it would in fact have been open to the principal not to give the agent any work over the next 3 ½ years (that is the period until the primary period of the agency expired). So the agent would earn nothing. Staughton LJ did not accept this argument at least to the extent of saying that there was a good arguable case that he would earn a substantial sum because the language of Regulation 17 refers to the commission which 'proper performance' of the agency would have earned, noting that the French, German and Italian versions used words equal to 'normal performance'. It was then said that this assumption would arguably exclude the possibility of the principal providing no work at all. I see that but the Court of Appeal there was (on a provisional basis only) dealing with a different scenario going forward and one which might be said to be unexpected i.e. the principal exercising its right to provide no work at all. Just as in the real world that might be unrealistic, so it seems to me that in the real world some account has to be taken of the prospect of the agency terminating especially where it is not a fixed term agreement.

168. And in practice, a standard net earnings valuation must in effect assume that the agency would not last forever. Hence, for example, in *Ramsay* itself Flaux J adopted a multiplier of 4. For

those reasons, I would respectfully differ from his observations, if by them, he was intending to lay down a hard and fast rule that no account whatsoever can be taken of the prospect of a termination in the future.

169. I add two footnotes to this: First, I accept as a matter of logic that the agency deemed to be available for sale if later terminated, would itself contain a right to compensation under Regulation 17 (again) once bought by the notional purchaser. But again, one has to be realistic. I do not accept that that notional right in the future means that the notional valuation would have to regard the agency, again, as being of infinite duration or with equivalent compensation.

170. Second, Mr Dhillon QC submitted that the reasoning in *Page* would now be regarded as wrong anyway because, as Lord Hoffmann made clear in *Lonsdale* at paragraph 17, it is for Member States in their discretion to decide what method to use when assuming the value of the indemnity (and by inference also the compensatory award) in relation to which they enjoy a wide margin of appreciation. On that footing, he says that today, *Page* would be decided the other way because the Court should make the common law assumption (as per a damages claim) that the party in breach must be assumed now to have exercised his contractual rights to the greatest advantage to him. I do not go so far, not because I do not follow paragraph 17 of Lord Hoffmann's judgment but rather because it is plain that a valuation exercise is not the same as a pure damages claim at common law anyway and that difference has to be respected. The better way, therefore, to consider rights of termination is, in my view, to say that they can be factored into account in a valuation which has to be conducted on a 'real-world' basis."

Judge Waksman's decision was overturned on a different ground in the Court of Appeal. However, Mr Green relies on these passages as showing that the court assessing compensation is not required to make a counter-factual assumption that the agency would have endured forever.

6) I respectfully agree with Judge Waksman's remarks concerning the scope and relevance of the decisions and dicta in *Lonsdale* and *Page*. However, the difficulty, as it seems to me, lies not so much in any constraints supposedly imposed by case-law as in the fact, adverted to by Judge Waksman at [169], that the compensation provisions apply upon any termination of the agency contract (subject only to regulation 18) and that the agency in the hands of any notional purchaser would itself attract compensation rights in the event of termination. It is hard to see how the existence of a contractual termination right (including non-continuance after expiry of a fixed term) can be invoked to limit compensation when it is the fact of termination that gives rise to the entitlement to compensation. This leads me to the conclusion that, although the court is not obliged to make unrealistic assumptions about the continuation of an agency in perpetuity, the relevance of termination rights is limited. It is, however, real. A

factor of obvious relevance to valuations of businesses is the uncertainty concerning future performance. The fact that an agency contract is not perpetual but can be lawfully terminated by the principal must be relevant to a realistic valuation of the agency, because it means that the principal will have a legitimate opportunity to avail himself of a get-out in the event of adverse trading conditions without the need to pay damages for breach of contract. Additionally, where compensation is not excluded by regulation 18, I see no proper reason for ignoring the fact, if it be such, that if the business were to have continued it might become liable to be terminated lawfully by the principal on account of continuing breaches of contract (see further below).

Summary of the expert evidence

157. Each side adduced evidence from a valuation expert: for GDM, Mr Paul Waite, of Aspen Waite Ltd; for EE, Mrs Kate Hart, of Roffe Swayne. The experts were in agreement that an assets-based valuation of GDM's agency would be inappropriate and that an earnings-based valuation should be adopted. Accordingly, each of them provided a valuation by applying a multiplier, or multiple, for years of purchase to a multiplicand representing a sustainable annual profit. The experts agreed (joint statement, page 2) that it was appropriate to discount multiples taken from listed companies in order to reflect GDM's smaller size, lack of diversity, increased risk, and the lack of marketability of its shares. However, despite this degree of similarity, they adopted different valuation methodologies and reached very different views as to the sustainable profit. As a result, they arrived at very different conclusions. Mr Waite valued the business as at 31 January 2017 at £8,011,800. Mrs Hart valued it at £1,049,600 on a best-case scenario.

158. Mr Waite adopted the Price/Earnings Ratio ("P/E Ratio") method, which values a business by applying a multiple, based on a benchmark but subject to adjustments reflecting the relative risks and prospects of the subject company relative to the companies from which the benchmark is derived, to the company's actual or forecasted profit after tax and seeks thereby to determine the price that represents an acceptable return for the subject company's income stream. Mr Waite's opinion was that the P/E Ratio for an unquoted company would normally be in the range 2 to 10 and, in the case of a company generating earnings of over £500,000 p.a., in the range 3 to 10. This accorded with the result that his chosen methodology produced. He took as his benchmark a multiple of 15.41, being the median multiple obtaining in the case of a list of selected listed companies. He then discounted that multiple to take account of the fact that "transaction pricing multiples of public companies were typically greater than the transactions pricing multiples of private companies" and on the basis of a consideration of factors more or less particular to GDM. He identified eight "positive valuation indicators" ("PVIs") and four "negative valuation indicators" ("NVIs"). The PVIs were: strong sales growth; strong profitability and profit growth; no restriction on ability to grow further; quality management team with relevant experience (he also mentioned the "strength of the workforce"); requirement of only low levels of investment; high return on capital; industry-leading cutting-edge software and systems; and the positive state of the local and national economy. The NVIs were: relative immaturity (i.e. short life) of the business; restriction of the maximum applicable P/E Ratio to 10, on account of the absence of a free market in the shares and the nature of the business; the fact that the business had only a single customer; and the 3-year

contract. Although Mr Waite considered that a discount of about 34% could be argued to be appropriate for a company whose business was the provision of services, he thought it more appropriate to apply a discount of 55% "to take into account the difficulty in establishing direct comparators within the specific market sector of the claimant." This resulted in a pricing multiple of 6.93.

159. In assessing GDM's maintainable earnings, to which the multiple should be applied, Mr Waite acknowledged the importance of adjusting GDM's recorded profits, to take account of the fact that the remuneration of its senior management had been taken as dividends rather than as salaries. He considered that a figure of £300,000, to include employer's National Insurance contributions, would suffice to cover the functions of two high-level sales executives, an operations director and an IT/systems director. (It is right to record that Mr Waite and Mrs Hart acknowledged that the identification of market-rate remuneration was not within the scope of their expertise; they relied on their experience and the information available to them to arrive at plausible figures.) This produced a calculation of a normalised profit after tax of £1,156,116 and a value for the business of £8,011,800.

160. When he wrote his report for this case, Mr Waite mistakenly applied his chosen multiplier to a figure for *pre-tax* profits and arrived at a valuation of £7,933,700. Correction of that mistake would by itself have reduced the valuation by 19% to £6,426,297. However, when he corrected the mistake in the experts' joint memorandum Mr Waite actually increased the valuation to £8,011,800 by basing it not, as previously, on what he said was a conservative estimate of earnings but on a weighted average of a conservative estimate and a best-case estimate. He said in his evidence that, revisiting the figures for the purpose of the joint statement, he was satisfied that the new approach to calculating profit was reasonable and reflected a more realistic assessment, particularly in the light of further, unspecified information.

161. Mrs Hart, by contrast, adopted the EV/EBITDA method of valuation (where "EBITDA" stands for earnings before interest, tax, depreciation and amortisation, and "EV" stands for enterprise value). Mrs Hart explained that EBITDA was considered to be a proxy for cash flow, so that the EV/EBITDA method of valuation attempted to value the future cash flows expected to be achieved by the company. The method involved two stages: first, calculation of the level of maintainable EBITDA which could reasonably be expected to be achieved during the average year; second, application of a suitable multiple (the "EV/EBITDA multiple") so as to calculate capitalised earnings, giving the "enterprise value" of the business. (A third step, deduction of net debt from the enterprise value, was not required in the present case.) The first stage requires reference to the historic performance of the company and to available forecasts. In order to arrive at a maintainable EBITDA, it is necessary to modify the historic results if, as here, they do not include normal business expenses such as the market-rate salary for the role performed by the directors. The second stage involves consideration of publicly available multiples that might be relevant to the company to be valued, as well as of key strengths, weaknesses, risks and opportunities facing the company.

162. Mrs Hart considered that the state of the economy and the market prospects as at 1 February 2017 were relevant as affecting the value of GDM's business. Her assessment was that the UK economy was growing but remained uncertain. As regards the prepayment sector of the retail energy market, on the basis of instructions from Mr McKenzie Mrs Hart expected that the introduction of price-capping, as mentioned in

the minutes of the EE board meeting on 25 January 2017, would have an adverse effect on the business because of the reduction in savings that could be offered and the consequent increase in competition. If the doorstep sales business ceased to be viable after 31 January 2017, the value of GDM's agency would be nil. However, if the business remained viable, then on the basis of historic results she assessed GDM's maintainable EBITDA at £656,000. The detailed calculations, which are set out in appendices 18a, 18b, 18c and 18d to her report and in Appendix B to the experts' joint statement, are based on a weighted average of adjusted EBITDA for the years to 30 April 2016 and 2017, weighting it 2:1 in favour of more recent results to reflect the growth of the business.

163. In assessing the appropriate EV/EBITDA multiple, Mrs Hart opined that multiples in the sectors in which GDM worked were generally lower (at, on average, 7.4 for the power sector and 6 for the utility sector) than for the market as a whole (on average, 12.7). Like Mr Waite, she identified specific positive and negative valuation indicators for GDM. The positive factors were: a history of profitable trading; use of sub-contracted field sales agents, which reduced the company's fixed cost base and improved its ability to deal with fluctuations in demand; and the company's healthy financial condition and non-reliance on debt finance. The negative factors were: reliance on a single source of income, namely EE; the relatively short fixed term and inclusion of termination provisions in the contract; increased regulatory scrutiny of the sector and upcoming regulatory change, in particular the forthcoming price cap; and damage to the reputation of the doorstep sales market by the Ofgem SLC 25 Investigation. She stated at para 7.32 of her report: "The most significant issue affecting GDM's business at 31 January 2017 was the regulatory pressures and scrutiny facing the prepay marketplace. This had the potential to significantly curtail GDM's trading." However, she also expressed the opinion that the single-customer issue was the most important consideration affecting the choice of multiple: it would have been difficult to find a commercial buyer for GDM because of its reliance on a single customer and the lack of opportunity to diversify the customer base, and "[i]n practice a deal to acquire a business like GDM's would likely be structured with a significant proportion of deferred consideration contingent on the duration of the agency relationship and EBITDA generated in the post-acquisition period."

164. Mrs Hart's conclusion was that a multiple between 3.5 and 4.5 would normally be applied to a fully diversified, non-agency, owner-managed business of a similar size to GDM operating in the gas and electricity industry, on the assumption that the agency would continue indefinitely. To these figures she applied a discount comprising three elements: 50% for the risks associated with operating under an exclusive agency agreement with a single customer (including the risks that EE might terminate the agency relationship, that EE's business might fail, and that EE might impose a sales-volume cap); 20% to reflect the regulatory pressures and scrutiny facing the market; and 10% to reflect the assumption that the agency business could not be assigned once sold to a hypothetical purchaser (an assumption apparently taken from a reading of paragraph 13 of Lord Hoffmann's speech in *Lonsdale*). Accordingly, on the assumption of indefinite continuation of the agency, the appropriate EV/EBITDA was between 1.25 (3.5 x 50% x 80% x 90%) and 1.6 (4.5 x 50% x 80% x 90%). However, if the agency were time-limited to twenty-nine months, the starting-point would be a multiple of 2.42 (29 months / 12 months = 2.42) and the three elements of the discount would be applied rather differently: the single-customer element would reduce the

multiple to 2; and the other percentage discounts would be applied to that figure (2 x 80% x 90%), giving an EV/EBITDA multiple of 1.44.

165. Mrs Hart's resulting valuation of the compensation claim was accordingly:

- On the basis of a term limited to twenty-nine months: (£656,000 x 1.44) £944,640
- On the basis of no restriction of the duration of the agency: minimum (£656,000 x 1.25) £820,000; maximum (£656,000 x 1.6) £1,049,600.

Discussion

166. I shall deal in turn with a number of issues that arise for consideration. However, I take my bearings for what follows from Mrs Hart, whom I regarded as the preferable expert. First, I found her to be the more rigorous analyst of the two experts, who proceeded less on the basis of a method of work learned many years ago and applied, invariably, on the basis of convention and "feel" (or experience) and more on the basis of modern practices in common use among practitioners responsive to changes in method. Second, her evidence was entirely clear as to the assumptions or understandings on which it rested and on their sources. As her reasoning was also set out clearly and in detail, points at which her conclusions are open to doubt are easily identified. Third, I formed the clear view that Mrs Hart was less liable than Mr Waite to have an eye on the advantage to the client in carrying out her valuation. On more than one occasion Mr Waite took no account of a factor on the simple grounds that he had been instructed to disregard it. More importantly, my confidence in Mr Waite as an expert was diminished by the way in which he altered his analysis for the purpose, as it seems to me, of avoiding the consequences of the mistake he had made as to the incidence of tax. The fact that he made that important and, as it seems to me, elementary mistake in the first place also counts against his reliability as an expert.

167. Before turning to detailed matters affecting the valuation of compensation, I shall deal with some underlying factual premises. The value of the income stream at the notional date of sale (here, 31 January 2017) depends on the risks faced by that income stream. There were three existential risks in the present case: first, the state of the doorstep market for sales; second, the relationship between Ofgem and EE; third, the position of GDM under the contract with EE.

168. First, I do not consider that it can properly be said that the state of the market for doorstep sales was such that GDM's business had no continued viability after January 2017. As at that month it was continuing to trade profitably and showing no sign of ceasing to do so. There is some evidence that the market contracted thereafter. Of course, EE withdrew from the market. I was shown no evidence that other participants in the market increased their activities as a result of EE's withdrawal. Mr Jung gave evidence of a number of companies continuing to carry on doorstep sales and I accept that most of those mentioned by him do so. However, there was no reliable evidence as to the scale of their activities. On the other hand, there is documentary evidence tending to indicate that EGEL's doorstep sales have reduced significantly since 2016. There is also evidence that the new venture of Mr Jung, Mr Turner and Mr Allen, which is said to carry out a business similar to that of GDM, has achieved very modest sales compared with those formerly achieved by GDM. Mr Jung explained this last point in

terms of reputational damage among field sales agents on account of the termination of the EE contract. That seems to me to be implausible as a primary explanation: first, such evidence as I have suggests that Mr Jung in particular is respected among those working in field sales; second, it is unclear to me why EE's withdrawal from doorstep selling should have caused significant reputational damage to GDM and there is no independent evidence, as distinct from assertion, that it has done so; third, the reason given for carrying on the new venture other than through GDM was to avoid reputational damage: there is at least a degree of tension in the way GDM advances its case. On the other hand, it would be to great a leap to infer that the modest sales achieved by the new venture are indicative of a significant change in the market.

169. This much can, I think, be said regarding the relevant market. In January 2017 there was reason to believe that the introduction of a price-cap would have an adverse effect on the business of companies offering cheap energy and therefore on the doorstep selling businesses of those companies. There was also reason to think that Ofgem's close attention to EE's business (see below), which itself may have been set in motion in part by concern on the part of the larger energy companies, presaged closer attention from the regulator and additional pressures on the market. There is some evidence from subsequent developments to suggest that such concerns about the future of the market may have been justified, although Mr Jung's evidence was that the price-cap had not had the expected adverse effect. At all events, these concerns would have had relevance to the price that could be obtained for the business on the notional sale. But it has not been shown that the state of the market was such that the business ceased to be viable.

170. Second, as for the relationship between Ofgem and EE, there was, as it seems to me, only limited evidence from which I could gain a clear view as to how Ofgem would have conducted itself vis-à-vis EE if EE had not suddenly terminated its doorstep selling activities. (The evidence of Ms Khilji and Mr McKenzie, to the effect that Ofgem would have intervened to stop such activities, seemed to me to rest at the level of assertion.) I do not accept that the evidence establishes that there would have been no viable business after January 2017. Having regard to such evidence as there is, I think it probable that a viable business would have continued. Again, however, Ofgem's investigation did present a risk to the continuation of the business. I mention the following specific points.

1) The communications between EE and Ofgem in the period before 31 January 2017 do not establish that the requirement for cessation of doorstep selling either was made or was likely to be made in the near future. Ofgem's letter of 30 January 2017 (paragraph 69 above) showed that it was looking for constructive proposals for improving the quality of doorstep sales. It did not threaten a ban on such sales. The final paragraph refers to "Enforcement action" as a course generally available, but neither it nor the evidence explains what would have been envisaged on the facts of the case. (I was not addressed on the powers to make provisional orders under section 28(2) of the Gas Act 1986 or section 25 of the Electricity Act 1989, and there was no evidence as to Ofgem's policies and practices with respect to such powers.) Further, there is no indication in the letter that Ofgem thought that a proper response by EE either was impossible or would result in cessation of doorstep sales. Reference to the draft Order sought by Ofgem in the SOC (paragraph 89 above) is of relatively limited assistance: the draft Order was proposed in an offer of settlement of the

SLC 25 Investigation and advanced in a statement of case, it preceded any findings adverse to EE, it came in a context where EE was not engaged in doorstep selling, and it did not propose to prohibit doorstep sales by EE provided that certain steps were taken.

2) Nevertheless, I regard it as unrealistic to think that Ofgem's interest in and investigation into EE would have had no effect, and would have been perceived by a prospective purchaser as having no effect, on GDM's doorstep sales business. By 31 January 2017 EE had failed to persuade Ofgem that there was no requirement to take enforcement action. Whatever the rights and wrongs of the stance Ofgem was adopting, the indications are that the SLC 25 Investigation would be pursued. It seems to me to be likely that it would have been pursued with greater urgency if EE had continued to engage in doorstep selling, unless provisional enforcement measures had been taken. Neither GDM nor EE would be served by a failure to respond to Ofgem's concerns. Indeed, it would be unreasonable to suppose that either company would wish to fail to respond to them. Although I do not know how the companies would have responded, it is likely that greater controls would have been introduced on the recruitment of agents and, in particular, the supervision of agents in the field, which was a matter specifically identified by Ofgem as a potential area for improvement. Further, EE had previously introduced sales-capping as a method of reducing complaints. Mrs Hart raised the question whether a cap was capable of being imposed unilaterally under the Heads of Terms. However, at least as important is the question of commercial reality: I think it likely that, if EE had decided to continue doorstep selling, it would have looked to introduce a sales cap in order to reduce the total number of complaints; and in those circumstances I think it most unlikely that GDM would have objected to a sales cap that was designed to protect, not to harm, the business. That the pressures facing EE and the potential consequences of those pressures were well understood by GDM, and therefore would have been well understood by a prospective purchaser, is clearly illustrated by Mr Allen's remark, in the conversation on 31 January 2017, that GDM knew that cessation of doorstep sales was "on the table".

171. Third, there is GDM's position under the contract with EE, specifically as regards termination. For reasons already explained, the prospective termination of an agency by reason of notice or expiry of a fixed term is not itself a limiting factor on compensation. However, I see no reason why a valuation of the business should ignore the fact that GDM had never achieved the KPI for cancellations and that the Heads of Terms gave to EE a right to terminate the contract on account of such failure unless it were remedied within a reasonable time. The notional purchaser of the business on 31 January 2017 would know that the agency contract would be liable to termination for default if he failed to achieve the relevant KPI within a reasonable time of being required to do so. Termination in such circumstances would not give an entitlement to compensation. The purchaser would doubtless have regard to the fact that compliance with the KPI had never been required. But the fact that it could be required and that remedy of the default, if possible, might nevertheless be onerous would be relevant in law as well as in fact to the valuation of the business. Mr Waite acknowledged that it would be relevant to the valuation of the business that GDM was in breach of the KPIs, particularly if such breach gave EE a right to terminate the contract.

172. Turning to the quantification of compensation, I accept the evidence of Mrs Hart and find that it is appropriate to adopt the EV/EBITDA method of valuation. Mr Waite considered that the P/E Ratio method of valuation was more appropriate in the present case, as being the method most commonly used in market-based valuation and being especially used for smaller private companies. He said that in thirty-one years of preparing valuations of businesses he had never used the EV/EBITDA method. However, Mrs Hart did not accept that the P/E Ratio method was appropriate in the present case, because it tended to produce distorted results. Specifically, she relied on the fact that the EV/EBITDA method is independent of the capital structure of the companies under consideration. This means that it is capable of making proper use of comparable companies that have different levels of gearing (ratios of debt to equity) from that of the company being valued and that pay tax at different rates. By contrast, the P/E Ratio method assumes that the levels of gearing and applicable tax rates are the same for the comparables as for the company being valued. The potentially significant difference that the choice of method makes was illustrated by Mrs Hart by reference to the comparables selected by Mr Waite; I shall not repeat the illustration here. Although I do not go so far as to say that the P/E Ratio method is positively inappropriate as a valuation method in the present case, I prefer the EV/EBITDA method adopted by Mrs Hart. First, for the reasons I have given, I considered her to be the more reliable expert. With specific regard to methodology, I think it reasonable to conclude that she is more attuned to up-to-date approaches to business valuation and less reliant on the fact of having learned a method many years ago and never departed from it. Second, while GDM is much smaller than listed companies, it was a significant business, for which reference to multiples used for listed companies was a relevant exercise, if one to be performed with considerable care. The fact that the EV/EBITDA method does not lead to distortions resulting from different gearing and tax rates is an advantage.

173. In selecting a multiplier, Mrs Hart's starting-point was 3.5 to 4.5. Mr Waite's own multiplier was 6.93; that, however, was for application to post-tax profits in accordance with the P/E Ratio method, whereas Mrs Hart's multiplier is to be applied to pre-tax earnings. Mr Waite did not dissent from Mrs Hart's starting-point under the EV/EBITDA method and I see no good reason to depart from it. As to where within the range the figure should lie, I have considered whether it would be appropriate to select the bottom of the range in order to take into account the vulnerability of the business to termination for breach of requirements never previously complied with. However, the discount applied by Mrs Hart on the basis that GDM was a single-customer business is said to take account of the risk of termination by EE as well as other risks relating to the sole customer. The application of a double discount must be avoided. Even so, I see no good reason to take the top of the range of the starting-point. It seems to me to be sensible to start from a multiple of 4.

174. As to the three discounts applied by Mrs Hart to her starting-point:

1) In one sense, the fact that GDM had only a single customer is neither a positive nor a negative valuation factor: it simply identifies the object being valued. For the purpose of assessing compensation under the Regulations, one has to value the agency that has been terminated, not other business. If GDM had been agent for other companies in addition to EE, nevertheless one would not have been concerned to value those other agencies. However, I accept Mrs Hart's evidence that the fact of being a single-customer agency is obviously highly

material to the choice of multiplier and the valuation of a business in a market. Mrs Hart's starting-point was for a fully diversified business; that starting-point cannot be the end-point for a single-customer business. Where the business has only one customer, the purchaser's eggs will all (so to speak) be in one basket. That affects risk. It therefore affects market value. Mr Waite identified the single-customer nature of the business as an NVI but was unwilling to accept that it ought to be reflected in the multiplier. I did not find his evidence on the point at all persuasive. The logic of a discount from the starting-point is compelling. I also accept that a 50% discount is reasonable to take account of the risks attendant on GDM as reliant solely on EE. Mr Chapman's submission that it is wrong "as a matter of law" to take account of the risk of working for only one principal is either a truism of no relevance to Mrs Hart's evidence (for reasons explained at the start of this sub-paragraph) or an incorrect attempt to make a valuation in accordance with *Lonsdale* counter-factual.

2) For reasons indicated above, I accept Mrs Hart's evidence that regulatory pressures would be highly relevant to a real-world valuation of GDM's business. I accept her opinion that a 20% discount would apply on this ground. (Mr Waite did not deal with this issue. When he prepared his report, he did not know of the SLC 25 Investigation. When he learned of it from Mrs Hart, he was instructed not to take it into account.)

3) I do not accept that a further discount ought to be made for non-assignability of the agency. The discount seems to have been suggested on the basis of a misreading of Lord Hoffmann's speech in *Lonsdale*. Lord Hoffmann's point was simply that a non-assignable agency will be valued on the counter-factual assumption that it could have been sold at the date of termination, but that the business notionally bought at that date will not itself be treated as assignable. He said nothing to imply that an assignable business must, counter-factually, be treated as non-assignable.

175. Accordingly, the appropriate multiplier is 1.6 (being 4 x 50% x 80%).

176. As for the multiplicand, several issues arise.

177. First, Mrs Hart and Mr Waite disagreed as to whether earnings were seasonal to any material degree. She said that they were, but he strongly denied it. This is a relatively minor issue; it has some bearing on the decision of how the earnings for the part-year to 31 January 2017 are to be reflected in a figure for annual maintainable earnings. I prefer Mrs Hart's view on this issue. She set out clearly her analysis of how the sales data showed a seasonal element, with customer transfers being higher in autumn and winter when energy bills are naturally of greater concern to consumers. The data are limited, but they provide support for Mrs Hart's conclusion and are supported by published observations of Ofgem to the effect that switches of customers generally follow a seasonal pattern. Mr Waite referred to Ofgem's comment but was adamant that he saw no evidence of a seasonal pattern. I did not think that he convincingly addressed Mrs Hart's analysis.

178. Second, Mr Waite based his assessment of future earnings on the management accounts for the period May 2016 to January 2017 inclusive; he divided the earnings by 9 and multiplied by 12 to arrive at an annual figure. In his report, he did not increase the

resulting figure to take account of prospects of future growth. As I have already mentioned, when the experts' joint statement was prepared he realised that he had failed to deduct tax from his multiplicand; however, he managed nevertheless to increase the multiplicand by projecting future growth: section 7 of the joint statement. I have already expressed a view concerning this revision of Mr Waite's evidence, which I view with scepticism. Mr Chapman objected that Mrs Hart's approach of taking a weighted average was unreasonable because it resulted in a profit figure that was lower than was being achieved in the second year of trading and because it involved double-counting of the effect of regulatory pressures. I do not agree. The first objection only amounts to saying that the result is irrational. It is not. The question is what would be the approach of the purchaser of a young business with only a single set of audited financial statements and only unaudited management accounts thereafter. GDM's growth, which though quick was over a limited period of time, had been fuelled largely by expansion of the territories (postcodes) in which it operated; there was limited reason to suppose that such expansion would continue and good reason to doubt that it would. If territorial expansion did not continue, there was an obvious risk that diminishing returns within the allocated postcode areas would result in contraction. I accept Mrs Hart's opinion, that a purchaser would place reliance on the audited accounts as having been subjected to greater scrutiny. She nevertheless weighted her calculations 2:1 in favour of the more recent figures. Mr Chapman's second objection, though it is able to gain some support from certain answers in cross-examination, does not, I think, fairly reflect Mrs Hart's reasoning when viewed as a whole, which was that regulatory factors were addressed through the multiple but that the factors specific to the business of GDM and EE were addressed primarily through the assessment of the maintainable earnings. Although there is a clear connection between these two factors, in my judgment Mrs Hart's analysis did ultimately keep them distinct.

179. Third, the experts agreed that, for the purpose of a business valuation, it was necessary to disregard the actual remuneration taken by the directors and substitute a market remuneration. They acknowledged that the level of adjustment was strictly outside the scope of their expertise, though they offered opinions based on their experience. Mr Waite allowed £300,000 (inclusive of employer's NIC) for two high-level sales executives, an Operations Director and an IT/Systems Director. Mrs Hart considered that these figures were below plausible market rates, having regard to figures published in *Croner's Directors Rewards* and in *Payscale* and also the fact that Mr Waite's figures included employer's NIC and pension contributions. She proposed to allow £420,000 (inclusive of bonus, pensions and benefits but exclusive of employer's NIC) for a managing director (£120,000) and three other directors (£100,000 each). I think that Mrs Hart's figures are credible and rest on careful thought and analysis and I accept them.

180. Fourth, the experts disagreed whether the multiplicand should be reduced by deducting revenues on the ground that, though they had been received in the past, they would not be expected to be received in the future. Mrs Hart proposed reductions in respect of three items: (1) verification calls, for which revenues of £38,000 were received in the year to 30 April 2016 and £125,000 in the period to 31 January 2017 but which were no longer being carried out by GDM; (2) income received by GDM from third parties, not under the agency contract with EE, in the sums of £35,000 and £15,000 for the same periods; (3) reimbursement from EE for expenses incurred in the sums of £10,000 and £116,000 for the same periods. Mrs Hart proceeded on the assumption that items (1)

and (2) would have generated profit at the same margin as the rest of the business but that item (3), being a subsidy for expenses, was pure profit. Accordingly, when calculating the multiplier, she deducted item (3) in its entirety and stripped out the profit element of items (1) and (2).

181. Mr Waite's position in the experts' joint statement regarding non-recurring income was: "I do not believe there was any profit element in the non-recurring income as EE simply made contributions to the overheads of GDM. There would be no reason for there to be a profit element." His position in cross-examination was that he had no information as to whether there was any profit element in items (1) and (2) and therefore thought it reasonable to assume that there was no profit element, particularly as EE was making a contribution to GDM's overheads. As regards item (3), he did not see any good reason to suppose that EE would have made a contribution to GDM's profits rather than merely to its overheads. I did not find these positions persuasive and prefer Mrs Hart's evidence. As to items (1) and (2), in the absence of particular evidence to the contrary it seems to me to be a reasonable assumption for the purposes of a business valuation that the particular income streams generated the same profit-margins as the business generally. As to item (3), the simple point is that if, as appears, the overheads were required for the purposes of the business and were defrayed by EE, GDM has been saved the expense of them and its profits have been boosted accordingly.

182. Finally, in their written submissions Mr Chapman and Mr Brown argued, on the basis of dicta of Moore-Bick LJ in the Court of Appeal in *Lonsdale,* [2006] 1 W.L.R. 1281 at [29], that unamortised expenses should be recoverable as part of the compensation award under the Regulations. However, Moore-Bick LJ's remarks were directed to the situation where the value of the business was too low to provide sufficient compensation to cover the unamortised expenses. That is not this case.

Conclusion

183. For the reasons set out above I assess compensation under the Regulations as being £1,049,600 (namely, £656,000 x 1.6).

Quantum: damages for breach of contract

184. Three preliminary legal issues arise for determination.

185. First, Mr Green submitted that the Heads of Terms must be construed so as to permit either party to terminate the contract on notice for convenience, not merely for cause. He pointed to the risk that Ofgem might shut down EE's doorstep selling business for reasons other than fault on GDM's part and submitted that it was commercially unreal to suppose that EE would in such circumstances be unable to terminate the agency agreement but would be obliged to pay damages based on the remaining term of the contract. I reject that submission. The scenario invoked by Mr Green might be commercially disadvantageous, or even unpalatable, for EE, but that does not mean that a construction of the contract that leads to that result is wrong. *Arnold v Britton* [2015] UKSC is an example of a contract that produced what, at least from a certain point of view, might be considered a highly undesirable result. But as Lord Neuberger PSC observed, commercial common sense is to be applied prospectively not retrospectively

and even then is not to be used to rewrite what the parties have agreed: "The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice": see [20]; I have regard generally to the principles set out at [17]-[23]. The Heads of Terms provided for a three-year fixed term, with specified termination rights in case of breach. It could have provided for termination on notice for convenience but it did not do so. Such a provision might have been advantageous for either party, but it would also have brought disadvantages; it would, for example, have tended to undermine the guarantee of a fixed period. There is no need at all to read into the contract any such provision; indeed, I find it impossible to do so. It is unnecessary for me to consider here whether the most unpalatable consequences envisaged by Mr Green might in some circumstances be addressed and obviated by the doctrine of frustration.

186. Second, Mr Green submitted that the Heads of Terms ought to be construed as either leaving unaffected the limitation of liability provisions in the Partnering Agreement (which excluded any claim for loss of profits and limited recovery for other heads of damage to £50,000) or containing an implied term that EE's liability was subject to the same limitations of liability as those in the Partnering Agreement. Again, I reject that submission. The Heads of Terms superseded the Partnering Agreement. Provisions from the earlier agreement could have been taken over into the later agreement, but the provisions limiting liability were not reproduced. Once it has been found that the Heads of Terms constituted a binding and effective contract to regulate the parties' relationship over the ensuing three years, there is no reason to read into it provisions in the previous but now superseded contract.

187. Third, there is an issue concerning the relationship between compensation under the Regulations and damages at common law. GDM's damages claim is for the loss of the profits it says it would have made during the remaining twenty-nine months of the agency contract. Mr Chapman submits that damages for the loss of profits are recoverable in addition to compensation under the Regulations. Mr Green submits to the contrary that to award damages for loss of profits and compensation under the Regulations would be to give double recovery and that a claim for damages ought to be disallowed. On this issue I comment as follows.

1) I accept Mr Chapman's submission that compensation is a different remedy from common-law damages, that compensation is available even where there has been no breach of contract, and that the Directive and the Regulations do not purport to exclude a common-law right to damages.

2) However, it does not follow from those propositions that damages for loss of profit are to be awarded in addition to compensation under the Regulations. The fact that compensation might be awarded in the absence of breach does not mean that the victim of a breach ought to receive, in addition to compensation, damages for that breach; it depends, surely, on whether the loss resulting from the breach has been compensated by the award under the Regulations; if it has, an additional award of damages would result in double recovery.

3) Thus para 11-053 of *Bowstead & Reynolds on Agency,* which Mr Chapman relies on as pointing out that the Regulations do not appear to displace common-law remedies, states (emphasis added):

   "It remains to ask whether an action in damages for breach of contract might also be available for loss suffered (*assuming that double recovery could be avoided*) in appropriate circumstances. It would of course not normally apply where the agency determined by death, retirement or expiry of a fixed term; though it might sometimes if appropriate notice is not given. The fact that such an action is expressly preserved by reg.17(5) in respect of the indemnity is some indication that it is not available where the remedy is compensation. It is also possible that in French law some such elements could be taken in under the compensation award, though it would seem likely that a remedy for termination in bad faith might be separate. But there is no indication that the Directive supersedes other remedies, let alone of which remedies would be superseded, and as a matter of principle other remedies for breach of contract should survive if relevant, and if the elements of loss could be separated out. In particular, it is clear that sums due as commission, but payable at a later date, under reg.8(a) would be a separate matter. …"

4) In *Vick v Vogles-Gapes Ltd* [2006] EWHC 1665 (TCC), H.H. Judge Richard Seymour Q.C. dismissed all of the claimant's claims, including the claim for compensation. However, at [130] he considered the claimant's claim for damages for wrongful termination of the agency contract without notice:

   "How the claim was put was that the Company could lawfully have determined the Agency Agreement by giving three months' notice and, as it had not given that notice, Mr Vick was entitled to be compensated for the earnings which he would have made in the notice period, in addition to the claim for compensation for loss of the agency altogether. This claim strikes me as misconceived. The error underlying it seems to originate in the fact that in a case in which an agency agreement was terminated by notice, but the provisions of Regulation 18 of the Commercial Agents Regulations did not apply, the agent would still be entitled to the compensation for which Regulation 17(6) provided. That analysis, which is correct, seems to have been misapplied to result in the conclusion that if no notice were given, and there was a claim for compensation under Regulation 17(6), there was in addition a claim for loss of earnings in the notice period which should have been allowed. The true position, as it seems to me, in a case in which an agency agreement has been wrongfully terminated without notice, is that the valuation of the amount of the goodwill payable as compensation under Regulation 17(6) includes, so far as appropriate (and it may well be that it is not appropriate to adjust the calculation in any way), the period which would otherwise have been covered by a notice."

5) However, in *Alan Ramsay Sales & Marketing Ltd v Typhoo Tea Ltd, supra,* Flaux J gave compensation under regulation 17 and also awarded damages for the loss of profits that would have been earned during the contractual notice period: see [120]. There does not appear to have been any argument as to the relationship between compensation and damages.

6) In *The Software Incubator Ltd v Computer Associates UK Ltd*, at [188] Judge Waksman Q.C. agreed with the approach of Flaux J rather than that of Judge Richard Seymour Q.C.:

> "[The defendant] says that there can be no separate claim [scil. for damages] here because of the successful claim for compensation under Regulation 17 (2). But in my view, one cannot make a direct comparison between the contractual claim here and the valuation-based award under Regulation 17 (2) for the same kind of reason which I gave in paragraph 180 above. The most that one might do would be to see if the valuation overall was affected by the fact that CA, the notional seller was paying out a separate damages claim. But even if so, then, as with the Regulation 8 award, it would depend on the relative size of the awards (see paragraph 181 above) and here, again I think it would be *de minimis* as against the Regulation 17 award. In addition in *Ramsay*, Flaux J made a contractual award on this basis in addition to the Regulation 17 award without deduction. I accept that in *Vick v Vogle-Gapes* [2006] EWHC 1665, Sir Richard Seymour refused to allow the additional claim for damages for lack of notice on the basis that the valuation would have included this but I respectfully consider that the approach taken by Flaux J was the right one".

7) On the facts of the present case, I respectfully agree with the view of Judge Richard Seymour Q.C. It is not in point that the same compensation might be payable even where there was no breach of contract. According to *Lonsdale*, the loss for which compensation under the Regulations is awarded is the loss of the future income stream that proper performance of the agency contract would have provided. This includes the loss for which compensation is provided by common-law damages for premature termination. The value of the income stream is capitalised by a business valuation taken at the date of the termination of the agency, not at a later date such as the date of trial. This indicates that an award of compensation and an award of damages for loss of profit will tend to result in two awards of compensation for the same loss. It is true that a capitalised business value is not usually acceptable in the courts as a method of quantifying loss of profits; however, not only is it a method of quantifying loss of profits but it is acceptable where, as here, the breach for which damages are to be awarded has destroyed the business that would have generated the profits: see *MMP GmbH v Antal International Network Ltd* [2011] EWHC 1120 (Comm). (In the present case, GMD has actually carried on some business since January 2017. However, the business for which compensation has been awarded was entirely destroyed.) Further, no method has been identified by

which to avoid double recovery in the present case if damages were to be awarded in addition to compensation.

188. Accordingly, I refuse the claim for damages on the basis that it would result in double recovery. However, if I had taken a different view on this issue I would have made an award of damages as set out below.

189. The purpose of damages for breach of contract is, as nearly as may be achieved by an award of money, to put GDM into the position it would have been in if the contract had been performed according to its terms. Prima facie that means that an award of damages will equal the profits that GDM would have earned during the final twenty-nine months of the agency that remained when EE repudiated the contract. That is how the case is advanced in the re-amended particulars of claim.

190. Mrs Hart addressed the claim for damages for loss of profits in considerable detail. Mr Waite did not deal specifically with the damages claim in his report, although some of its contents are directly relevant to the calculation of damages. He addressed the claim in the experts' joint statement, though he declined to consider certain alternative scenarios considered by Mrs Hart. In the light of what I have already said concerning the expert evidence, it is convenient to begin with Mrs Hart's analysis.

191. Mrs Hart dealt with the damages claim on the basis of three scenarios: (1) that regulatory interference would have made GDM's business unviable after January 2017; (2) that regulatory interference would have had a significant adverse impact on the business but would not have made it unviable; (3) that regulatory interference would not have had a significant adverse impact on the business. Her assessment of loss of profits was nil on scenario (1) and in the range £178,814 to £248,223 on scenario (3). (The range for scenario (3) was given as £446,330 to £502,012 in the report but was reduced in the experts' joint statement.) On scenario (2), the range would fall between nil and £178,814, depending on the extent of the adverse impact of regulatory interference. The detailed analysis may be very shortly summarised as follows.

- First, for the purpose of scenario (3), Mrs Hart assessed the likely revenues that GDM would have generated on the basis of the contractual commission rates. Having regard to past performance, she prepared figures on three alternative bases to take account of different possibilities for further growth: (i) moderate decline in the business; (ii) stable levels of business; (iii) moderate growth in the year after termination. (She did not consider that there was an evidential basis for positing growth thereafter.) The projected figures assumed that GDM's business was seasonal; see above.

- Second, on the basis primarily of GDM's audited financial statements and subsequent management accounts, Ms Hart assessed GDM's likely gross profit margin on revenues at 31.2% (revised down from the figure of 31.8% shown in the report).

- Third, she calculated the likely overheads that GDM would have incurred to earn its gross profit on the three alternative bases.

- These stages of the exercise produced figures for loss of profits on the three alternative bases respectively of: (i) £209,857; (ii) £242,245; (iii) £289,777.

(These figures were an increase on the figures of £108,409, £128,514 and £164,091 in the report.)

- Fourth, she applied a discount rate of 14% to the lost profits during the remaining term of the contract, in order to calculate the value of the profits as at 1 February 2017. This resulted in adjusted loss of profit on the three alternative bases respectively of: (i) £178,814; (ii) £206,875; (iii) £248,223.

- In her report, Mrs Hart calculated that GDM incurred wasted costs of £356,741 (comprising £98,719 for direct costs and £258,022 for overheads) as a direct result of EE's unlawful termination of the agency contract. However, in the joint statement she explained that she had assessed wasted costs on the false assumption that GDM had entirely ceased to trade after 31 January 2017; as it was, she no longer had any information that would enable her to identify and value wasted costs.

192. The matters in dispute between the experts that were relevant to the assessment of loss of profits included some issues that I have already addressed, in particular whether the business was seasonal, whether it was reasonable to expect continued growth of the business, and the relevance of non-recurring income. Two further points of disagreement fall to be considered here.

193. First, the experts disagreed as to the proper way to deal with directors' fees and management remuneration when calculating loss of profit. The issue here is different from that in respect of compensation under the Regulations. Mr Waite's position was the same for both claims, namely that the actual costs of the directors' remuneration ought to be replaced by lower, market-rate costs (cf. transcript, day 7, pp. 811-812, 838-840). Mrs Hart's argument, however, was that GDM had in fact been paying its directors consultancy fees at above the market rate, that its profits had thereby been reduced, and that to assess damages on the basis of directors' remuneration at a market rate would therefore result in an award exceeding the loss of profits (transcript, pp. 905-907). The objection to Mrs Hart's position, as put to her in cross-examination, is that it does not take account of the reality of the situation, namely that directors' remuneration was simply a way of allocating profits. There is obvious force in that objection. However, GDM was a limited company with separate identity from its director/shareholders and in my opinion the correct approach is to consider the profits actually made and likely to be made by the company rather than what those profits might have been if it had arranged its affairs differently. Accordingly I accept Mrs Hart's position on this issue.

194. Second, Mr Waite disagreed with Mrs Hart's application of a discount. She justified the discount on the ground that it was necessary in order to value the lost profits over the remaining term of the contract at the valuation date, namely the wrongful termination of the contract. I regard that approach as correct in principle. Mr Waite rejected it on the ground that the envisaged profits, though future as at the date of termination, were calculated on the basis of the prices obtaining as at that date and therefore took no account of price increases during the remaining term of the contract. In my judgment, that argument fails for the simple reason that the contract did not provide for price increases and it is to be supposed that GDM would have carried on the business on the basis of the existing prices.

195. For these reasons, I accept Mrs Hart's calculations.

196. The next question is which of Mrs Hart's various alternatives would be the appropriate one to take for the purposes of the calculation. There is necessarily a great deal of speculation involved in answering this question. On the basis of the evidence and of the various factors I have mentioned, I consider it probable that GDM's business would have suffered some minor decline but would have continued as a viable business. I would therefore have assessed the damages as being in Mrs Hart's scenario (3), alternative (i), namely at £178,814.

GDM's database claim

197. In paragraphs 37 to 47 of the particulars of claim, GDM advances a distinct claim against all four defendants for releasing the database of GDM's agents to EGEL. The claim may be summarised as follows. GDM's database, containing details of all of its field sales agents (names, addresses, telephone numbers, email addresses and National Insurance numbers), was confidential and belonged to GDM. On a date unknown, and without authority from GDM, an agent or employee of EE passed GDM's database directly or indirectly to EGEL. EE was thereby in breach of its confidentiality obligations under the agency agreement (see paragraph 52 above), in breach of confidence, and liable for infringement of GDM's database rights under the Copyright and Rights in Databases Regulations 1997 ("the Database Regulations"). Further, Ms Khilji and Mr Cooke, as the controlling minds of EE and EGEL respectively, procured and induced and acted so as to cause the companies to effect the disclosure of the database and are jointly liable with EE and EGEL. On 1 February 2017 EGEL, using the database, sent the text message referred to in paragraph 79 above "to over 200 of GDM's sales agents", of whom "over 140 sales agents" consequently left their roles with GDM (particulars of claim, paragraphs 40 and 45). By reason of the misuse of its database, GDM has suffered loss, comprising lost profits from those field sales agents and/or unrecouped expenditure on the training and development of those agents, and is entitled to an account of the profits made by EGEL or EE from the use of the agents. An award of additional damages is also sought under section 97(2) of the Copyright, Designs and Patents Act 1988. The claim for breach of contract lies against EE alone on the basis of the confidentiality provision in the Heads of Terms.

198. The defence denies that EE or Ms Khilji supplied GDM's database to EGEL or Mr Cooke and avers that Amblin Ltd, which traded as Energy Watch and was responsible for the recruitment of sales agents for EGEL, received a list of names and contact details from one of its sales agents and sent text messages to a number of sales agents, some of whom were GDM's agents. The number of GDM's agents so contacted was not admitted; GDM was put to proof in that regard. Mr Cooke and Ms Khilji gave evidence in support of the defence, though no one from Amblin Ltd was called to give evidence.

199. In *Attorney General v Observer Ltd* [1990] 1 A.C. 109, Lord Goff of Chievely expressed the general principle underlying a claim for breach of confidence as follows at 281: "a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to

others." There are three requirements for an action for breach of confidence: (1) the information in respect of which relief is sought must have the necessary quality of confidence about it; (2) the information must have been imparted in circumstances importing an obligation of confidence; though it is not necessary that there should have been an initial confidential relationship; (3) there must be an unauthorised use or disclosure of that information: see *Clerk & Lindsell on Torts* (22nd edition), para 27-06.

200. As for the claim under the Database Regulations, by regulations 12 and 6 of the Database Regulations and section 3A(1) of the Copyright, Designs and Patents Act 1988, "database" means "a collection of independent works, data or other materials which (a) are arranged in a systematic or methodical way, and (b) are individually accessible by electronic or other means." Regulation 13(1) provides that a property right called "database right" "subsists, in accordance with this Part, in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database." Regulation 16 provides in part:

> "(1) Subject to the provisions of this Part, a person infringes database right in a database if, without the consent of the owner of the right, he extracts or re-utilises all or a substantial part of the contents of the database."

In relation to any contents of a database, "extraction" means "the permanent or temporary transfer of those contents to another medium by any means or in any form", and "re-utilisation" means "making those contents available to the public by any means": regulation 12(1). "[T]he repeated and systematic extraction or re-utilisation of insubstantial parts of the contents of a database may amount to the extraction or re-utilisation of a substantial part of those contents": regulation 16(2). Regulation 15 provides that the maker of a database is the first owner of database right in it. Regulation 14 explains who will be "the maker" of a database:

> "(1) Subject to paragraphs (2) to (4), the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation shall be regarded as the maker of, and has having made, the database.
>
> (2) Where a database is made by an employee in the course of his employment, his employer shall be regarded as the maker of the database, subject to any agreement to the contrary."

201. However the database claim is framed in law, I find it unproven on the evidence. GDM's case rests on inferences to be drawn from a number of circumstances: EE's possession of agents' contact details, both on Open Door (which EE had been licensed to use in January 2016) and through the information sought and obtained by Mr Gagan; the close relationship between Ms Khilji and Mr Cooke, which included anti-competitive arrangements intended to ensure that EE and EGEL did not harm each other's businesses and shared interests by each in both companies; the decision by Ms Khilji to end doorstep selling; the fact that Ms Khilji told Mr Cooke of her decision; the timing of the text messages on 30 January and 1 February 2017 and the number of agents to whom they were sent; the vagueness of Mr Cooke's evidence concerning the source of the information received by Amblin Ltd; and the lack of any evidence from

that company. Mr Chapman also drew attention to a considerable number of points that he relied on as showing Mr Khilji and Mr Cooke to be unreliable witnesses who were prepared to be economical with the truth or even deliberately untruthful when it was in their interests to be so. I have considered those points carefully. However, it remains the case both that there is no direct evidence that any of the defendants made use of confidential information or databases belonging to GDM and that the evidence adduced by GDM of the numbers of agents contacted by Amblin Ltd (not, as was formerly alleged, by EGEL) is threadbare. The case for GDM rests on the assertion that the numbers and geographical range of the agents who were contacted compel the inference that contact was made possible only by the illicit use of the database. But this relies on what I regard as unverified assertions as to the premises, which have not been substantiated by any proper evidence. I am unpersuaded by the contention that only use of confidential information can explain such texts—and there were certainly some—as were sent. I should anyway not be prepared to draw the inference that, if data available on Open Door were misused, this was the result of any act of EE's management or, as is really GDM's case, the result of any collusion between Ms Khilji and Mr Cooke.

202. In these circumstances, the question of remedy does not arise. However, I should note that GDM has not established that, if its database was misused, it has suffered any identifiable loss as a consequence. No loss of profits is capable of being identified as a result of loss of agents, as distinct from termination of the agency agreement with EE. It is said that there was wasted expenditure in respect of the recruitment and training of the agents, but I see no basis for supposing that any wasted expenditure resulted from the loss of agents by reason of the breach of confidence rather than from the quite separate loss of GDM's underlying business. (I note that GDM's efforts to retain its agents involved misleading them: see paragraph 78 above.) There is a claim for an account of profits under the Database Regulations for infringement of database right. That claim would have failed in any event. First, no evidence was adduced to establish that the requirements for the existence of database right, as stipulated in regulation 13, were satisfied. GDM's case proceeded on the basis that the recording of agents' contact details on Open Door sufficed to create database right. In the absence of evidence as to what was involved in making that record, I do not accept that. Second, although Mr Chapman asserted that GDM was obviously the owner of the database, I do not consider that that has been established. The owner of database right is *prima facie* the maker, though that is subject to assignment and to the provisions of regulation 14(2). The re-amended particulars of claim did not deal with the statutory components of a claim for infringement of database right and this aspect of the claim was not explored in evidence. Third, although there is evidence that some of GDM's have subsequently gone to work for EGEL, there is no evidence that any of them did so by reason of the text messages that are said to have been, or resulted from, infringement of database right. Therefore the factual basis for ordering an account of profits would be lacking.

<u>Conclusion</u>

203. For the reasons set out above, the result is this:

1) There will be judgment for GDM against EE for £1,049,600 for compensation under the Regulations;

2) GDM's claim against EE for damages for breach of contract will be dismissed;

3) There will be judgment for EE against GDM on the counterclaim for damages for breach of contract in an amount to be assessed. I do not at present see what damages EE would have suffered by reason of GDM's breaches of contract, but that question is not before me;

4) GDM's claim against all four defendants for misuse of confidential information will be dismissed.

204. I shall make an order giving effect to the conclusions set out above and shall adjourn consideration of consequential matters, including questions of interest and costs and of directions on the counterclaim, to give the parties an opportunity to consider how matters might conveniently proceed.