Neutral Citation Number: [2025] EWHC 498 (KB)

Case Number: QB-2022-000760

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
THE ROYAL COURTS OF JUSTICE

Date: 5th March 2025

Before:
MR JUSTICE RITCHIE

- -

BETWEEN

CORRINE PEARL DURBER

Claimant

- and –

PPB ENTERTAINMENT LIMITED

Defendant

Mark Baldock of counsel (instructed by **Coyle White Devine** solicitors) for the **Claimant**
Philip Hinks of counsel (instructed by **Knights** solicitors) for the **Defendant**

Hearing date: 4.2.2025

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APPROVED JUDGMENT

This judgment was handed down remotely at 14.00pm on Wednesday 5th March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Ritchie:

1. The Claimant placed a bet on the Defendant's online gambling website called PaddyPower (the Site) on 18.10.2020 using her iPad computer in a game provided by the Defendant called the Wild Hatter (the Game). The rules of the Game (the Rules) provided that it had two stages based on a combination of the old fruit machine reels (stage 1) and the old spin the wheel of fortune game (stage 2). In stage one of the Game she was informed on her computer screen that she had won a jackpot prize and was moved to stage 2. She was asked to spin the jackpot wheel shown on her screen. This wheel is reproduced in colour below.

2. As can be seen, this circular wheel imitates the old fairground wheel of fortune game of chance. In the old days punters were invited to place their bets, then manually to spin a circular wooden wheel upon which were set out various pizza slices showing the prizes. A pointer was fixed in position to indicate which prize would be won when the wheel stopped turning. For the online Game, instead of manually spinning a wooden wheel, the Claimant clicked the spin button and this made the displayed wheel spin on screen. It stopped, as shown in the Defendant's reconstruction above, determining that the Claimant had won the Monster Jackpot. The Monster Jackpot segment of the digital wheel lit up. The Monster jackpot was stated on the left-hand side of screen as £1,097,132.71. This figure is visible on the reconstruction above, albeit darkened in the photo, so I have put a red arrow pointing at it. It was the Claimant's lucky day.

3. The Defendant did not pay her the Monster Jackpot, instead it only paid her £20,265.14, which was the sum due had the Claimant won the much smaller Daily Jackpot. Two pizza slices for the Daily Jackpot are shown in the photo above, one to the left of the Monster Jackpot and one further to the right. Neither was lit up. The pointer was not pointing to them. No explanation for the change of the sum which she had won was provided on screen. The Claimant's lucky day had turned sour. She clearly relied on what she was shown on screen when she won. She complained to the Defendant that

very evening. In correspondence, the Defendant explained that the computer system which ran the game on the Site had made an error over the display which she saw. It should have pointed to the Daily Jackpot but, because it had been mal-programmed, it did not. The Defendant relied on its written terms and conditions, which it published online and asserted that those entitled it to refuse to pay the Monster Jackpot. The Claimant sued for her Monster Jackpot winnings relying on what she was shown on her screen.

The applications

4. The parties pleaded out their cases and the pleadings closed after a part 18 request and answer in around March 2024. In June 2024 Master Gidden gave directions up to trial which was to be listed for 2 days in a window between 3rd February and 16th April 2025. Disclosure was to take place by 4.9.2024 and witness evidence was to be exchanged by 13.11.2024.

5. On 27.9.2024 the Claimant applied for the Court to strike out the defence or for summary judgment on the claim. A witness statement was served in support, not from the Claimant herself, but from her solicitor (David Sheahan). In response the Defendant served evidence from Richard Coleman, a lead product manager (statement dated 17.1.2025); Rhodri Smith, the head of legal (statement dated 17.1.2025) and Ashley Padgett, the director of compliance (two statements, dated 20.1.2025 and 21.1.2025). The Claimant served a further witness statement from Mr Sheahan in reply (dated 24.1.2025).

6. Thus, instead of having a trial on evidence between February and April 2025, the Claimant chose this course and the applications before me are for strike out and summary judgment. I raised with both counsel the question of whether I could decide all the issues raised in submissions in these applications without further evidence, for instance about what is and what is not "usual" in the online gambling field by way of terms and conditions and what players generally expect of such games. Both parties submitted that I should deal with the applications and that all the evidence which they wished to put before me was before me.

Terminology

7. I use the following terminology in this judgment:

"WYSIWYG": what you see (on screen) is what you get.
"WCT": written contract terms.
"The Rules": the rules of the Wild Hatter game.
"The Game": the Wild Hatter game.
"RNGS": random number generator software.
"Part A": Part A of the Terms of Use of the WCT.
"Part B: Part B of the Terms of Use of the WCT also called the "Conditions".
"The Preamble": the preamble to Part B.

The Issues

8. No agreed list of issues was put before me however, these are the issues which I consider I am asked to decide:
   (1) What is the proper construction of the Rules of the Game in relation to determining which Jackpot is won in the Game?
   (2) Was clause B1 of the Conditions consistent with or inconsistent with the Rules such that priority has to be determined? If so, did the Rules take priority over clause B1 or vice versa?
   (3) Were clauses B1 and B2 incorporated into the contract between the Claimant and the Defendant for her play of the Game or were they not incorporated because they were unusual and onerous and were not adequately brought to the Claimant's attention?
   (4) Did the scope of clause B2 cover human errors in programming the screen display of the Game and hence entitle the Defendant to make the Claimant's play void and/or exclude liability for the Claimant's win shown on her screen or any win?
   (5) If clauses B1 and B2 were incorporated, engaged and had priority, were they or were any parts of them unenforceable under the *Consumer Rights Act 2015*?

Pleadings and chronology of the action

9. The Claim Form was issued on 7th March 2022. The Claimant claimed monies due under the terms of a consumer contract between the parties and/or damages for breach of contract in excess of £1,000,000. In the Particulars of Claim the Claimant pleaded that she contracted with the Defendant as a consumer within the *Consumer Rights Act 2015* (CRA). She pleaded that she had played the Game and on 18th October 2020 and she had succeeded in winning the Monster Jackpot of £1,097,132.71. The Defendant had refused to pay that sum and had alleged she won the Daily Jackpot in the sum of £20,265.14. She claimed the difference.

10. The Defendant's defence, dated 8th December 2023, admitted that the Claimant contracted with the Defendant as a consumer under the CRA and admitted that the Claimant played the game on the site on the 18th of October 2020. The Defendant asserted that the Particulars of Claim disclosed no reasonable grounds for bringing the claim because they failed to comply with CPR part 16 and PD16. The Claimant had failed to state whether the contract was in writing, oral or by conduct, failed to attach a copy of the contract and failed to identify any terms or how such terms were incorporated. This latter part of the Defence was not pursued at the hearing.

11. As to the facts, the Defendant pleaded that the Claimant opened an account on the 15th of March 2011 and at that time, as part of the registration process, she confirmed that she agreed to be bound by the Defendant's terms and conditions. The terms were available to be viewed via hyperlinks during the registration process. As to the terms, the Defendant pleaded that the relevant version was effective from 24th August 2020

and appended those terms to the defence. Unfortunately, the Defendant did not append all of the relevant terms because the Defendant omitted the Rules. The Defendant relied on clauses 2.1, 2.2, 3.1 and 3.2 in Part A and clauses 1 and 2 in Part B. The Defendant asserted that, as set out in clause B1, the outcome of the Claimant's play was determined by the RNGS which determined that she had won only the Daily Jackpot. The Defendant went on to plead that the game was subject to a mapping error affecting the animations so the images which the Claimant saw when playing the game were in error, but asserted that the error did not affect the RNGS outcome. The Defendant accepted that during her play the Claimant's screen showed that she had won a Jackpot because three Jackpot symbols appeared on the slot reels. An animation was then presented to the Claimant with the Jackpot wheel. The Defendant asserted that, as a result of the mapping error, when the wheel spun the pointer came to rest on the Monster Jackpot segment but should instead have pointed to a Daily Jackpot segment. The Defendant asserted that clause B1 determined the outcome of the Claimant's play which was a win of the Daily Jackpot of £20,265.14. The Defendant pleaded that, under clause B1, where there was any discrepancy between that result and the results shown on the Claimant's screen, the records on the Defendant's server were definitive. Further or alternatively, the result displayed on the Claimant's screen was an error within the scope of clause B2 and, in the premises, the Defendant was not liable for any payout, the Defendant was entitled to avoid the play and avoided the play expressly in paragraph 19.2 of the defence.

12. In her Reply, dated 1st March 2024, the Claimant accepted that the contract between the parties included the Defendant's standard terms and conditions set out in paragraph 8 of the defence, subject to whether each of the terms was incorporated and subject to the CRA. The Claimant asserted that the terms ran to 44 pages of closely typed small print with numerous hyperlinks to other pages and that, given the draconian nature of the limitations which the terms unilaterally purported to place on the relationship, no reasonable consumer could be expected to read and understand the terms, especially the terms relied upon by the Defendant in the defence, without the same having been expressly highlighted to the Claimant both prior to opening the account and on each subsequent occasion that the Claimant utilised the Defendant's services. The Claimant pleaded that the contract was made partly in writing, incorporating the terms relied on by the Defendant, subject to express incorporation of relevant terms under contract law and enforceability under the CRA. The Claimant denied that any reasonable consumer would access the terms, much less understand them, or that the Defendant ever genuinely intended consumers to access and understand the terms. The Claimant put the Defendant to proof of the error.

13. In a Part 18 request made by the Claimant on the 26th of February 2024 various questions were asked of the Defendant, in relation to paragraph 4.2 of the Defence, including whether the Game was developed by a third party or licenced by a third party and enquired about ownership of the intellectual property of the software and whether the servers were owned or operated or hosted by a third party. The Claimant asked for

details of that third party. In relation to paragraph 14 of the Defence the Claimant asked when the Game was first available to play; whether the error arose at the start or later; when the error first arose; when the Defendant first became aware of the error; how the error is said to have occurred; when the error was resolved and how; for how long prior to the Claimant's play the error had persisted; whether the error was reported to licencing authorities and for copies of the report and the details of the report.

14. In answer, on the 12th of March, the Defendant refused to accept it was required to answer but provided the following information. Under paragraph 14: the error first arose on the 1st of September 2020 and the Defendant first became aware of it on the 23rd of October 2020.

15. At the hearing the Defendant abandoned the last 5 words of paragraph 19.2 in which they had purported to avoid the play altogether. The Defendant informed the Court that it had paid the Claimant over £20,000, being the appropriate sum for a Daily Jackpot and did not intend to recoup that sum.

16. As will become apparent below, in the Claimant's skeleton argument and submissions, she not only relied on the CRA but also up on the Rules of the Game and a particular paragraph in the preamble to Part B. The terms were not pleaded. Nor did the Claimant set out the facts and matters relied upon in support of a number of her submissions. Whilst complaining about the inadequacy of the Claimant's pleading the Defendant did not apply for an adjournment or assert that it was disadvantaged through any inability to rely on any further evidence which it might have wanted to call and submitted it that it was capable of dealing with all of the submissions raised in the Claimant's skeleton and verbal submissions. The Claimant accepted some inadequacy of the pleading but submitted that the Civil Procedure Rules do not require law to be pleaded, only facts and matters, and the inadequacies were a mere formality. I do not consider that the omissions from the pleadings are a mere formality and, at the end of the hearing, I directed that the Claimant should amend her pleadings properly to cover the facts and matters raised in her submissions, so that due procedural formality had been followed.

The post hearing amendments to pleadings with permission

17. The Claimant amended her Particulars of Claim after the hearing, as directed. She pleaded that the contract was governed by Chapters 3 and 4 of the CRA 2015 because the Defendant supplied digital content alongside and services. She pleaded the contract arose on the day when she accessed the Game; that it included the Rules and that her win was in accordance with the Rules which had priority over clause B1 of the Conditions. She pleaded that the Defendant was not entitled to rely on B1 and B2 because they were not incorporated and B1 breached S.s 47(2)(c) and (d) and S.s 57(4)(c) and (d) and S.62(1) of the CRA. She pleaded that B2 did not cover human errors and was unenforceable under S.62(1) of the CRA.

18. The Defendant amended its Defence in response. It deleted the pleading that the claim disclosed no reasonable grounds. The Defendant admitted that the contract was for the supply of services within Chapter 4 of the CRA 2015 but denied it was for the supply of digital content within Chapter 3. As to the Rules, the Defendant pleaded that they contained the following words: *"Malfunction voids all play and plays"*. The Defendant pleaded that the Rules were not inconsistent with clauses B1 and B2 of the "Terms". The Defendant asserted that the Rules explained how the entertainment features of the Game operate, but do not determine the outcome of plays which are determined under clauses B1 and 2 of the "Terms". The Defendant asserted that B1 and B2 were not onerous of unusual and pleaded that they were commonplace in the gaming industry. The Defendant pleaded that Ss. 47(2)(c) and (d) did not apply to the contract. And clause B1 did not fall within Ss. 57(4)(c) or (d) of the CRA 2015. The Defendant asserted that: "*no discrepancy can arise between (i) the outcome of plays determined by the random number generator software and (ii) the outcomes recorded on PPB's server,"* The Defendant denied that clause B1 caused a significant imbalance in the parties' rights and obligations to the consumer's detriment. The error fell within the scope of *"systems … error relating to the generation of any result, bet settlement or any other element of a Game"* and/or "*communications error"* in that it was an erroneous communication of the result. Further the error was a "*Malfunction"* under the Game Rules. Finally, clause B2 was neither onerous nor unusual and PPB asserted that they would rely on evidence at trial that similar provisions were commonplace in the industry; and was not contrary to the requirement of good faith and did not cause a significant imbalance in the parties' rights and obligations to the consumer's detriment.

Pleading amendment without permission

19. I directed the Claimant to amend her POC to reflect the arguments in the application. She has done so. The scope of my direction and permission to amend was only on the issues raised in the skeleton arguments and at the hearing and was set out properly at the top of the amended POC. The Defendant has not followed my direction. Two new issues have been raised by the Defendant which are as follows.

(1) The Defendant now relies upon these words: *"Malfunction voids all play and plays"* which were in the Rules provided in the hearing bundle (p168). They were not relied upon by the Defendant at the hearing and were not mentioned at the hearing or in the Defendant's skeleton argument for the hearing. I have therefore heard no submissions upon these words from either party. I do not know what "malfunction" the Defendant asserts arose. I do not know the Claimant's case on the correct interpretation of those words. In any event, the Defendant abandoned its formerly pleaded case that the play was void so this addition contradicts that abandonment. Furthermore, the Defendant made no assertion at the hearing that the system software or hardware was malfunctioning. The Defendant's evidence contained the admissions that a human mis-programmed part of it.

(2) The Defendant has pleaded that it intends to call, at trial, evidence to prove that clauses B1&B2 were commonplace and usual in the industry. However, this was not backed up by any evidence from the Defendant in any of the witness statements

provided at the hearing and was not mentioned in the Defendant's skeleton argument. Instead, the Defendant pursued its defence by reference to the terms in evidence in *Parker* and *Longley* (both cited below). If the Defendant had intended to rely on such evidence it should have served that evidence at least in summary for the hearing. There was and is no permission for the Defendant to plead new or different matters from those raised and relied upon at the hearing and in the skeleton arguments. So, the Defendant has gone beyond the permission granted. I did initially consider striking out those two amendments but on reflection have chosen to ignore those two parts of the Defendant's pleading because they were added outside the permission I granted. In any event, because neither was argued or pursued at the hearing, they are, in effect, a late attempt to re-argue the application on different grounds after the hearing thereby putting the Claimant at a disadvantage.

The lay witness evidence

20. The Claimant's evidence was contained in the two witness statements of David Sheahan, her solicitor. In his first witness statement he asserted that the contents of his witness statement derived from the documents in the case and instructions given to him by the Claimant. He asserted that having played the Game for a period of time the Claimant succeeded in winning a Jackpot prize because three Jackpot symbols appeared on the slot reels on screen. The screen then presented the Claimant with the Jackpot wheel. The Claimant was required to spin the Jackpot wheel. Having done so, it stopped with the arrow at the top of the Jackpot wheel pointed to the Monster Jackpot segment, showing that the Claimant had won the Monster Jackpot, being a sum of £1,097,132.71. Despite this, the Claimant was later presented with a message stating that her win was £20,265.14, being the Daily Jackpot and the Claimant's account was wrongly credited with the lower sum. Mr Sheahan asserted that there was no reasonable defence to the claim. He then made various submissions in law which should not generally be put in witness statements. Submissions should be in skeleton arguments. He asserted that clauses B1&2 were not incorporated and were not enforceable and do not cover the facts. He asserted that the Defendant's asserted error was not within the scope of clause B2 in any event. He complained that the WCT contained nothing that drew customers' attention to clauses B1&2, which were onerous and disadvantageous, in that they gave the Defendant the final say on outcomes from their server records regardless of what was shown on the consumer's computer. Furthermore, that right was granted regardless of whether the records were correct or not. Secondly, Mr Sheahan asserted that clause B2 gave a unilateral right to the Defendant to avoid the whole bet which created an imbalance of bargaining power and led to his assertion that there was inadequate signposting of these clauses. He also complained that the WCT were closely typed and these clauses were buried in other materials. Further, in relation to the CRA and the duty of fair and transparent dealing, he asserted that, if the terms were incorporated, they were unenforceable because they failed the significant imbalance test when considering the rights and obligations of the parties and were to the Claimant's detriment. The Defendant was the only one who could unilaterally determine the outcome of a win and avoid its own liability. The clause limited the Claimant's right to

challenge the result with what she had been shown on screen and there was no provision to determine whether the RNGS or the records on the server were right or wrong. He complained that this take it or leave it approach was unfair. He referred to the correspondence with the Gambling Commission and the letters from Red Tiger, who hosted the Game. They admitted that the pot ID's had been incorrectly mapped to the wrong Jackpot symbols on the 1st of September 2020 so that the Daily Jackpot and the Monster Jackpot were swapped. Mr Sheahan commented that other clauses in the WCT referred specifically to human errors distinguishing them from system errors and submitted that Red Tiger's error was a human programming error not a system error and therefore was not caught by the scope of clause B2 because it did not state expressly that it covered human errors. He asserted Red Tiger failed to do adequate testing. He referred to the Rules and specifically to the clause in the recital to Part B that said that if there was an inconsistency between the Rules and the terms and conditions the Rules prevail. Then referring to the Rules he relied upon the text under the heading Jackpot Game which stated: *"spin the jackpot wheel to determine which jackpot tier will be one"*. He asserted that, on its true construction, that Rule meant that the Jackpot wheel shown on screen determined the Jackpot win and that was undoubtedly the Monster Jackpot for this Claimant. Therefore, he sought summary determination and summary judgment.

21. The Defendant's evidence came first from Richard Coleman, their lead project manager, who had worked for them since 2014 but had no knowledge of the particular case. He gave evidence of the terms and conditions and the general registration process and provided screenshots of that process which were general and from around 2014. He assumed her registration process in 2011 was similar to the 2014 process that he produced in evidence and gave evidence that there were updated terms and conditions distributed to customers at various times including in 2016. He gave no evidence that any player was asked at any later stage to re-confirm agreement to the WCT.

22. The second witness relied upon by the Defendant was Rhodri Smith. He is the head of their legal team. He joined in 2015. The Defendant could not locate the 2011 terms and his explanation for this was that there had been a merger in 2016 and many documents had been lost. He asserted the terms and conditions in force at the time of the Claimant's play were dated the 24th of August 2020. He traced the history of the development of clauses B1&2 and he accepted these had changed since 2011. He pointed out that the RNGS determined the wins back in 2010 but by 2020 the terms had changed so that specific wording covered a discrepancy between what was shown on screen and what was recorded on the server and stated that the server records were definitive. He asserted that when changes to the terms and conditions were effected a consumer service announcement was usually sent out and he gave evidence of such announcements in 2014/2016 and 2018 but provided no evidence of any such announcement in 2020.

23. The third witness the Defendant relied on was Ashley Padgett who is the director of compliance at the Defendant's relevant group company. After her play the Claimant had complained (the same evening) and the Defendant investigated and asserted that there had been an incorrect screen symbol shown on her computer. He described how the error occurred. He asserted that the RNGS determined the win/lose and the result was pure chance. Red Tiger hosted the software on their server. The Game interface works with the Game engine which works with the RNGS and the Defendant kept copies of all of the product. He asserted that the screen animations do not affect the RNGS. He accepted that if a consumer like the Claimant got three Jackpot symbols the consumer would be taken to the Jackpot round and would spin a bonus wheel to determine which of the three Jackpots she would win. The three were: (1) a Cash Booster, (2) a Daily Jackpot and (3) a Monster Jackpot. He asserted that when the Claimant pressed the spin button the RNGS did its job and determined the Daily Jackpot. He asserted the Daily Jackpot was the smallest one. Stopping, there as we shall see, there were a number of errors in that evidence. Firstly, I notice the Daily Jackpot was the in fact the middle jackpot in terms of size, not the smallest one. Secondly, he later asserted in his second witness statement that the "click" which the Claimant effected to spin the wheel had no effect whatsoever in producing anything new from the RNGS and he had just been wrong about that. Thirdly, he tried to change the word "determine" in his first witness statement to the word "show". Continuing with the first witness statement, Mr Padgett accepted the Claimant's screen showed she had won the Monster Jackpot but said this was erroneous. He accepted the Claimant complained at 20.40 hours in the evening of the same day. Red Tiger had been asked to investigate and accepted they had made an error because they had made changes on the 1st of September 2020 to animations and the pot ID's had been incorrectly mapped in the software so that the Monster Jackpot and Daily Jackpots were swapped. He accepted the Monster Jackpot image appeared on the Claimant's screen. As for the testing, he informed the Court that in December 2019 testing was carried out by an independent agency showing that the system produced returns to players of over 92% but admitted that the testing would not pick out the animation errors and gave no evidence of any other testing at all. The Claimant's event was reported to the Gambling Commission but no response was received from them.

24. Mr Padgett then made the remarkable assertions that this was a "*fairly minor display issue"* and that the Claimant "*had not been negatively impacted and was in fact paid out the correct amount as determined by the RNG and in line with Paddy Power's terms and conditions."* Stopping here, despite the absence of a witness statement from the Claimant, I do not accept those assertions by Mr Padgett. £1 million is a life changing sum for the vast majority of people in England and Wales. It could abolish debts, feed families, buy houses, pay for private medical care and many other vital matters in life. I infer that, like the majority of the population, the Claimant hoped and maybe dreamed of winning over £1 million. So, when she did so, on 18.10.2020, and when that sum was then taken away from her, that cannot properly or fairly be characterised as a "fairly

minor display issue" and it is wrong to assert that the Claimant has "not been negatively impacted".

25. Mr Padgett admitted that 13 other consumers had been affected by the same mislabelling between the 1st of September and the 18th of October 2020 and he listed the dates upon which those events occurred. What he did not do was list the vice versa errors, namely where consumers were shown they had won the Daily Jackpot but in had in fact won the Monster Jackpot according to the RNGS and no evidence was provided at all about the vice versa errors, if any. Nor did he inform the Court about what the Defendant had done in relation to each of those consumers' wins.

26. In his second witness statement Mr Padgett sought to make the corrections that I have listed above thereby seeking to delete his statement that the spinning of the jackpot wheel "determined" the Jackpot. He also admitted that the RNGS software was only operated once during the whole of the Claimant's play, right at the start. He asserted that the result of the play was determined right at the start and that, by implication, the screens showing that customers should spin the Jackpot wheel were irrelevant, mere entertainment and with no effect whatsoever upon the result.

27. In a witness statement in reply, David Sheahan asserted that expert evidence was unlikely to assist. He stated that the Claimant accepted that she registered and ticked the box agreeing to the terms and conditions in 2011. He pointed out there was no requirement to scroll through the terms. He asserted that no consumer service announcement had highlighted the material changes in the terms in 2020 to the Claimant. He added to his list of submissions that the Defendant was seeking to bind customers to hidden jargon or hidden disadvantageous terms which permitted the seller to determine whether the seller was in breach and to decide what the terms meant. He asserted that clauses B1&2 are onerous and were not brought to the Claimant's attention and that clause B2 did not cover human error.

28. There was no expert evidence put before me of what the industry usually does in relation to standard terms and in relation to screen wins and RNGS software wins being in conflict.

The Parties' submissions

29. The main point made by the Claimant in her submissions was that the Rules stated, in relation to the Jackpot Game which she was playing: "*spin the jackpot wheel to determine which of the offered jackpot tiers will be won*". The Claimant spun the wheel and won the Monster Jackpot and there was nothing more to this case than that. As to the Defence and clauses B1&B2, the Claimant firstly submitted that these clauses were not incorporated into the WCT between the Claimant and the Defendant because they were onerous and unusual and they were not sufficiently brought to her attention. Secondly, the Claimant asserted the clauses were unfair under the CRA and so were unenforceable. Thirdly, the Claimant asserted that if they were incorporated, fair and

enforceable, they did not determine the issue because the Rules took priority over clauses B1&B2 did not cover human errors.

30. The Claimant accepted that by clicking the terms and conditions box on registration she incorporated the terms and conditions into her contract, subject to the common law need for signposting of onerous or unusual terms and subject to the provisions of the CRA. The Claimant submitted that the redrafted terms in August 2020 added a conclusive evidence clause in B1 but there was no evidence that the 2020 changes had been brought to the Claimant's attention. The Claimant submitted that B1 and B2 needed to be signposted because they contained particularly onerous and or unusual terms and relied on three cases: *O'Brien v MGN Limited* [2001] EWCA Civ 1279, para. [23] *per* Hale LJ as she then was; *Goodlife Foods v Hall Fire Protection Limited* [2018] EWCA Civ 1371, at para. 35 *per* Coulson LJ; and Foster J in *Green v Petfre (Gibraltar) Limited* [2021] EWHC 842 (QB), at paras 166 to 172. As to clause B1, its effect is to make the Defendant's server records (which the consumer was not shown) determinative, trumping what the consumer was shown on her screen. B1 ignores the degree of the discrepancy, the degree of fault for the discrepancy and applies even though the consumer has no knowledge of whether there was an error or discrepancy. As to clause B2 the Claimant submitted this clause covered errors caused by the Defendant's negligence or fraud or inefficiency and is very wide. It ignores the degree of error or fault or the method of error and entitles the Defendant to avoid the bet altogether even in cases where, like the Claimant, the consumer has won a Jackpot according to the RNGS, albeit different from the one shown on screen. The Claimant pointed out that the Defendant took no steps to bring these crucial clauses to the Claimant's attention, either for their predecessors, or for them after they were introduced in August 2020. Nor were they sufficiently signposted by positioning, by putting them in bold and in capitals or by giving proper headings on B1&B2. The Defendant did not highlight that the consumer's screen was irrelevant to the result or make clear that the consumer's bet could be avoided altogether if the Defendant had made an error. The Claimant asserted B1&B2 were buried on page 21 of 45 pages of closely typed text.

31. In relation to enforceability, the Claimant asserted that the CRA applied to this contract for services and that, under the test in S.62(4), clauses B1&B2 were unfair and contrary to the requirement of good faith because they caused a significant imbalance in the parties' rights and obligations to the Claimant's detriment. The Claimant relied on the factors in S.62(5) which include the nature of the subject matter and all the circumstances and terms. The Claimant submitted that clause B1 is blacklisted under the CRA because it is a conclusive evidence clause and hence unenforceable under S.47(2) and/or section 57(4). She relied on the subsection which black-lists clauses which exclude or restrict rules of evidence or procedure. In submissions this was expanded to state that under S.35, the fitness for purpose section, the Defendant was saying that if the results shown on screen do not match what was on their server then what is shown on screen is to be ignored, therefore the software is not fit for purpose and therefore clause B1 is caught because it excludes liability for a product which is

not fit for purpose. As to significant imbalance, the Claimant asserted that clause B1 unduly restricted the evidence available to the Claimant when making a claim for a win, therefore excluding or hindering the Claimant's right to take action. This was exemplified in Schedule 2, paragraph 20 of the CRA and the illustrations given in the Guidance about gas meters. A clause stating that a gas meter reading is conclusive breaches the CRA. Such would need to be changed to state that the gas meter reading was prima facie evidence, to be enforceable. The Claimant asserted that clauses B1& B2 limited or excluded the Claimant's rights in relation to non-performance or inadequate performance by the Defendant of its contractual obligations and created concealed traps which were not displayed and had no prominence.

32. In relation to construction, the Claimant asserted that the Rules took priority over Part B clauses 1 and 2 because the preamble to Part B stated: "*In the event of any inconsistency between these Conditions, the Terms and Conditions or the Rules, unless otherwise stated, to the extent of the inconsistency, the Rules shall prevail, followed by these Conditions and followed thereafter by the Terms and Conditions."* Clause B1 stated that the RNGS determined the outcome but the Rules stated that spinning the wheel on the screen determined the outcome. That was a clear inconsistency which led to the preamble giving priority to the Rules. Further, in relation to clause B2 the Claimant submitted that, on its true construction, the words "system or communication errors" did not cover the error in this case because it was a human error and pointed to other clauses which specifically separated human errors from system errors. Thus, it was submitted, because what occurred in the Claimant's Game was not a systems or communications error, clause B2 did not bite on the facts of the case.

33. In verbal submissions the Claimant accepted that the 2020 WCT were generally incorporated into the contract when she played on 18.10.2020 so there was no issue relating to general incorporation. However, she maintained her submission that clauses B1 and B2 were not incorporated because they were unusual and/or onerous and were not signposted or brought sufficiently to her attention. She submitted that the Rules governed the Jackpot Game and that the Jackpot Game spin of the wheel was determinative, as described. It was materially misleading to the Claimant for the Rules to state that she should *"spin the jackpot wheel to determine which of the offered jackpot tiers will be won"* in the light of the Defendant's admission in Mr Padgett's 2nd witness statement that in fact this did nothing of the sort and the result had already been predetermined by the RNGS when she had clicked at stage one of the Game. The Claimant submitted that clause B2, which entitled the Defendant to avoid liability, was unfair when she had already won a Jackpot. The entitlement to avoid liability only arose, on the facts admitted by the Defendant, because of their own error in coding in relation to the onscreen information. Clause B2, entitled the Defendant to avoid any payout in this case, even when they admitted that the Claimant had won (on their case) over £20,000. The Claimant relied on the fact that the Defendant had chosen not to include a verification clause in their terms and conditions. The root of the problem created by clause B1 was that the effect of the clause made the whole system not

"WYSIWYG": what you see is what you get. Consumers expect, when playing online, that what their screen tells them is correct, true and reliable. A parallel is to be drawn with a gambler at a casino playing roulette. If she bets on 13 and the ball rolls round and stops on 13, the player does not expect to be told: "ah, sorry, what you have just seen is not what you get, in fact the computer says that ball is on number 43". The Claimant submitted that clause B2 put all the risk for the Defendant's errors onto the Claimant's shoulders. The risk of software errors, of inadequate testing of what is shown on screen, the risk of any error by the Defendant, however gross, is all avoidable by the Defendant under clause B2, by allowing all such bets to be voided. No error by the Claimant permits the Claimant to avoid liability, so the clause is onerous and unfair. The Claimant submitted that the facts of *Parker* (I will come to that case below) are not similar to the facts of this case. In *Parker* the gambling company relied on its game procedures and the correct win which was shown on the consumer's screen: two flashing number "15"s circled in green (as distinct from the two not flashing, not circled, number: "1"s). The screen did not show a win of £1 million, it showed a £10 win. The game procedures were clear, they stated (see para. 10 of the judgment of Jay J.):

> "10. … If You match a number from the WINNING NUMBERS Section to a number in the YOUR NUMBERS Section, the two matching numbers will turn white and flash in a green circle indicating that you have won the Prize for the matched YOUR NUMBERS. When You have revealed all numbers and Prizes a message will appear at the top of the Game Play Window indicating the amount You have won, if any. The word 'FINISH' will appear underneath the message. You must select FINISH to complete the Game."

The Claimant in the case before me submitted that, in contradistinction to *Parker*, her screen showed the wheel spinning and then it stopped with the win arrow pointing to Monster Jackpot which lit up and showed over £1 million in winnings.

34. The Claimant also relied on the Defendant's more recent post event terms and conditions which had raised the prominence of clauses B1&B2 In addition, the Claimant asserted that the headings of clauses B1&B2 were misleading. The heading "random number generator" for clause B1 may not mean anything to a consumer and did not disclose that it was declaring that what the consumer saw on screen was not determinative of whether she won or lost. Furthermore, the other clauses on the same subject would be difficult for customers to understand and interpret alongside them. So, clause A16 and particularly 16.9 deals with errors and suspected errors as does clause B2. The Defendant did not rely on clause 16.9 but it is noteworthy that it does not have a conclusive evidence element to it based on the server records; it specifically covers human error and I also note that it covers a failure of "Games product" or "software" to operate in accordance with the Rules of the relevant game (it is set out

below in this judgment). The submission was made by the Claimant that it was difficult for a consumer to understand how that interacted with clause B2.

35. The Defendant submitted that the facts of this case were similar to *Parker-Grennan v Camelot UK Lotteries Ltd* [2023] EWHC 800 (KB) and the Court of Appeal's decision reported at [2024] EWCA Civ 185 (*Parker)*. The Defendant relied on the judgment of Andrews LJ in *Parker* to assert that the terms and conditions were incorporated in the WCT by clicking the tick box on registration and the forward amendment clause probably included in the original terms (which had been lost). As to the submission that clauses B1 and B2 were either onerous or unusual, the Defendant accepted the legal principle but rejected that it applied to these clauses. The Defendant denied that the clauses created an imbalance in rights. In the skeleton the Defendant complained that it was unclear how the Claimant put her case but stated that it would answer in verbal submissions. As to the CRA, the Defendant complained it was unclear how the Claimant put her case but relied on the guidance in *National Commercial Bank Jamaica Ltd v NCB Staff Association* [2024] UKPC 2 at para. 32 and *Lewison* on *Contractual Interpretation*. The Defendant submitted that its terms were transparently drafted and presented, were clear and not ambiguous. All the terms were incorporated, they were not onerous or unusual and that the Defendant had a legitimate interest in correcting erroneous bets. The Defendant asserted there was nothing unfair about a game of chance being determined by the RNGS. Indeed, the Court of Appeal in *Parker* confirmed the decision of the judge at first instance who accepted this. Nor is there anything unfair in clauses B1&B2 which ensure that only winning plays produce payouts rather than plays with errors. The Defendant relied on the judgment of Andrews LJ in *Parker* at para. 61 to the effect that the Defendant had a legitimate interest in ensuring that payment was only made on valid wins and that the wins were commensurate with the odds advertised on the face of the Game procedures. The Defendant asserted that the Claimant was not irrevocably bound by the WCT. She chose when to play and so chose when to be bound. She had opportunity to become acquainted with the terms whenever she wanted because they were online for nine years before her play. As to the Rules, the Defendant submitted that they were mere instructions how to play the game, mere entertainment guides and, relying on the failure of the Claimant in *Parker* who advanced a similar argument and the judgment of Mr Justice Jay, at para. 76 at first instance, asserted that no reasonable player could suppose that the game procedures defined the limits of the contractual documentation. The Defendant denied that the Rules were inconsistent with clauses B1 and B2. The Defendant submitted that the Rules were entertainment features whereas clauses B1 and B2 stipulated the outcomes, how they were determined and what occurs where there is a discrepancy between the RNGS outcome and animations on computer screens. The provisions work in harmony and the ordinary and natural construction is that the Rules tell customers how to play and how to win prizes by doing so, but in the event of any discrepancy between the result displayed and the Defendant's records, the latter will prevail and if there is a system or communication error relating to the displayed result, then the Defendant will not be liable for the error.

36. In verbal submissions the Defendant highlighted the common ground as follows: the Claimant opened an account and agreed to the terms; subject to sign posting, the 2020 terms apply; the outcome was determined by the RNGS and needed to be consistent with the return to player percentage and there was testing to ensure the payout percentage was correct. Although the RNGS needed testing and there was no evidence about how it worked the Claimant did not challenge that the RNGS produced a Daily Jackpot result on her play. Therefore, it was not disputed that there was an error affecting the Claimant's display on screen which did not affect the RNGS outcome. So, the Claimant does not challenge the decision of the RNGS. Therefore, it was common ground that the prize win was £20,000.

37. I do not accept the last point was common ground. The Claimant's case was that the Rules determined that she had won the Monster Jackpot whatever the RNGS stated.

38. The Defendant went on to submit that it had a legitimate interest in correcting erroneous plays and validating wins. The Defendant had sympathy with the Claimant in view of what she had seen on her screen but this was not a valid win. The Defendant was not taking away from the Claimant what she had genuinely won. It was an error because she was entitled to a win consistent with the RNGS product. As for incorporation the Defendant submitted that the terms were not difficult to follow. Click wrap had been decided in *Parker* to be a sufficient incorporation method. Clause B1 was not onerous to gamblers and the same approach was used in the terms in *Parker*. Neither at first instance nor in the Court of Appeal in *Parker* did the court consider the clauses stating that the result was determined by a RNGS were onerous or unusual. The Defendant relied on para. 35 of the judgment of Andrews LJ in *Parker* to the effect that games procedures which state that: the outcome of a play is predetermined by the computer system at the point of purchase; the player is not required to exercise any skill and the result is subject to a validation requirement, are explanatory in nature and do not impose any burden on the player or deprive them of a prize to which they would otherwise be entitled. The terms and conditions require and ensure that money is only paid out for a valid prize win and there is nothing onerous or unfair about that. As to clause B1, the second sentence related to discrepancies and merely stated that the records were definitive. This was not a conclusive evidence clause. The RNGS results prevailed over what shown on screen. The same occurred in the *Parker* case. As to clause B2 and errors, it merely provides a mechanism for dealing with errors ensuring that the Defendant does not pay prizes which have not been won. It is neither unusual nor onerous. The Defendant relied on the judgment of Andrews LJ in *Parker* at para. 36 to the effect that such rules safeguard the trader's payout against fraud and are designed to ensure that customers do not receive prizes they have not in fact won. The Defendant relied on para. 16 of the judgment of Ellenbogen J in *Longley* (see below) to submit that it was not unfair to include a clause which avoided paying out windfalls. Turning to enforceability, the Defendant complained that the specific provisions of the CRA were not set out in the Claimant's pleadings but accepted they were set out in the Claimant's skeleton and were relied on orally and the CRA required Courts to consider

the Act in any event. The Defendant stated that the Claimant was asking for summary judgment on the pleaded claim. When I raised in discussion that I had no expert or other evidence about what was and what was not usual or unusual, from any witness, the Defendant submitted that the previous decisions were sufficient to give guidance. (Defence counsel recalls asserting that the Defendant would rely on evidence at trial but I do not recall that assertion). The Defendant asserted that S.57(4)(d), the provision relating to unenforceability of clauses excluding rules of evidence or procedure, did not apply. Clause B1 sentence 2, relating to discrepancy, did not state the Claimant cannot check the result of the RNGS in the records. The records were not in dispute in any event. The clause merely stated that the records prevailed, not the screen display. If the Claimant had wanted to challenge the records on the server she could have done so. There was no equivalence to the Gas Meter example. Also, the Defendant asserted that if one part of clause B1 was unenforceable then the two sentences were severable and separate, the one relating to the determination of outcome by the RNGS and the other relating to the server records being decisive. The Defendant submitted that in previous cases the Courts had found a clause similar to B2 to be fair. It was not detrimental to the Claimant, nor contrary to good faith, for the Claimant not to be paid out winnings which she had not won. During submissions I asked defence counsel how it could be fair for the Defendant to be entitled to avoid a bet based on its own error in software programming where the consumer had in fact won the bet, if the Rules are correctly so construed. I asked whether the Defendant was in effect abandoning the pleading in paragraph 19.2 of the Defence that they had avoided the bet in this case. The Defendant then chose to abandon the last five words of that part of their pleading. In relation to paragraph 2 of schedule 2 of the CRA (clauses excluding non-performance or inadequate performance limitations) the Defendant submitted that it was not inappropriate to be able to avoid the bet under clause B2 for the Defendant's error because the Claimant did not have a right to the Monster Jackpot. In relation to the Rules, the Defendant submitted that they were not inconsistent with clauses B1 and B2. The Defendant relied on *Lewison* on *Interpretation of Contracts* in relation, generally, to how inconsistencies are resolved or identified. The Defendant submitted that only if there is an irreconcilable discrepancy does an inconsistency arise. The Defendant further submitted that the Rules set out how to play the Game, they were concerned with entertainment but the outcome was determined by clause B1. The Rules did not determine the outcome and that was the way that the interaction between these two provisions should be resolved. As for interpretation of clause B2 the Defendant submitted that the Claimant's argument that "system errors" did not include human error was far too narrow because all these matters were connected. There was a group of related hardware and programmes and these were adapted and maintained by human beings, therefore "system errors" covered any errors within the system whether created by humans or otherwise. An interpretation that human errors were not covered by the terminology "system errors" would give an unnatural meaning to the words. In relation to the contra proferentem rule, which is enshrined in the CRA, the Defendant submitted it was only triggered by ambiguity and that depended on the context, but that there was no genuine ambiguity in this case.

The Written Contract Terms (WCT)

39. The WCT were set out online. The parties agree these were generally incorporated into the contract between the Claimant and the Defendant, but some are subject to challenge as not incorporated and unfair under the CRA. The version I was given was on paper. The Rules were printed and exhibited to David Sheahan's witness statement dated 27.9.2024 and consisted of 3 pages. The full WCT were a combination of the Rules, the Terms of Use and multiple other separate documents.

The Rules

40. Because the Rules (of the relevant Game) took priority if there was any inconsistency (I shall come to the term covering this below) it makes sense to consider them first. The relevant parts are set out below.

> "HOW TO PLAY THE WILD HATTER
> …
> Gamble wheel
> The red section displays the exact chance of losing. If the player commits to pressing the Gamble button, the pointer within the wheel will spin. *If the pointer lands in the green area, the player wins the highlighted prize which they chose in advance.* If the pointer lands on the red area the Gamble is over and the player returns to the slot game
> …
> Spin the Reels
> Click the Spin button to spin the reels.
> …
> Jackpot Game
> *Win one of the offered jackpot tiers when three or more jackpot symbols appear on the reels* or the jackpot is triggered by a game feature. *Spin the jackpot wheel to determine which of the offered jackpot tiers will be won.* The size of the segments on the jackpot wheel do not correlate to the odds of winning each jackpot tier represented. The chances of winning a jackpot increase in correlation with the size of the stake played. The jackpot is triggered randomly and can be won by playing any of the linked jackpot games. *To win the jackpot, the player is not required to make any decision other than to spin the reels.* …" (My italics).

41. So, as shown in the evidence and stated in the Rules, stage one was to spin the reels. These "reels" were set out in a grid with 5 columns of boxes. I infer that the symbols in the boxes in the columns rolled up or down and then came to rest on screen imitating an old fashioned fruit machine. See the reconstruction provided by the Defendant below:

42. If 3 or more jackpot symbols "*appear*" in the reels then the consumer has won through to the Jackpot Game. The sizes of the Jackpots to be won are displayed on the screen, as shown above. The use of the word "*appear*" is important. It was confirming a consumer's expectation that what she sees is what she gets. It reflected the earlier words in the Rules about the Gamble Wheel which provided WYSIWYG, or screen determined success. The Jackpot Game Rules provided that the Claimant had to "*spin the jackpot wheel to determine which of the offered jackpot tiers will be won"*. The Rules explained that, on the wheel being spun, the size of the "segments", which I have called pizza slices, would be irrelevant to the chances of winning. So, this again related to what consumers would see and explained that size does not matter. This was a WYSIWYG caveat. I note that on the reconstruction of the Claimant's jackpot screen set out above, there were more Cash Booster and Daily Jackpot pizza slices than the sole visible Monster Jackpot slice. I have not been shown a whole circular wheel, so I do not know whether there is only one Monster Jackpot pizza slice on the wheel. In any event, the question I must decide below is how these Rules are to be construed. Do they provide expressly that once the Claimant has spun the Jackpot Wheel on her screen, it is that which she is watching which determines what she will win? If so, the determinant of the win is the Jackpot Wheel displayed in screen.

The Terms of use/Terms and Conditions

43. The layout I have seen does not represent the way that a player would have seen them on screen with hyperlinks. Doing the best I can to describe them, the first page is titled: "Terms and Conditions" and has an index which sets out each part: A to H and gives each a title. In printed form the Terms and Condition run to 45 pages, but that document does not include the Rules for each game, of which there were many. I infer that there were rules for all the other games which may have run to many more pages. Within the Terms and Conditions document, Part A was titled "Online Gambling Terms and Conditions". It had 34 clauses, each of which was given a title in the index but no titles were given in the Index to any of the terms in Part B where the key disputed clauses were situated. To that extent they were hidden.

Terms of Use – Part A

44. Clause 1 of Part A described who the Defendant was and the services it provided including "Additional Gaming Services" which, as defined in clause 2, included "Games and Vegas", which, had a player read all of the WCT, included the Game. Clause 2 stated that by visiting the website, registering and using the services the player agrees to be bound by: the Terms and Conditions; the Betting Rules (hyperlinked and not included in the evidence before me); the Regulatory information (hyperlinked and not included in the evidence before me); and "all such other of our terms and conditions, rules or policies as they relate to any applicable Services (e.g. rules for a particular game)…" Clause 2.2 goes on to state that when a player uses any "Additional Gaming Services", which I remind myself included the Game, the player agrees to be bound by the terms and conditions associated with each including the terms and conditions of third party service providers (which were not provided to me and could have been substantial), where indicated. The list included "Games and Vegas" (not hyperlinked) and other games (which were hyperlinked). If that was not complicated enough clause 2.3 stated that all of the terms and conditions (not capitalised), rules and policies referred to in clauses 2.1 and 2.2 were collectively called "Terms of Use" (capitalised first letters). Having read all that I doubt that any members of the public wishing to use the Site would understand the full scope of the terms which governed their game, let alone be able to find them all and read them, whether in a reasonable period of time or at all. This was a complicated web of multiple documents.

Amending the Terms of Use

45. Clause 3 provided that the Defendant was entitled to amend the Terms of Use at any time and clause 3.2 required the Defendant to give as much prior notice of such changes as was reasonably practicable and in any event consumer "*will be notified of material changes before they come into effect."* It also provided that material changes "*will be communicated"* to customers via pop up web messages at login and that customers would be asked to agree to them to continue using the website and that without agreeing customers would be unable to proceed. I note here that the Defendant produced no evidence that such occurred for the Claimant.

Winnings

46. The next potentially relevant clause in section A was 15 entitled "Winnings and Payment". It stated that, except for gaming jackpots, the maximum payout for any consumer in any 24 hour period was set by the Betting Rules (hyperlinked). It also dealt, at clause 15.5, with errors in the system leading to a breach of the Betting Rules maxima.

Errors

47. Clause A16 was entitled "Errors & Suspected Errors". This would appear relevant to the case before me but neither party relied upon it save by comparison. The first two clauses were as follows:

> "**16. Errors & Suspected Errors**
> 16.1. Paddy Power makes every effort to ensure that no errors are made in prices offered or Bets accepted. However, human and/or systems' error may occasionally result in errors.
> 16.1.1. Paddy Power reserves the right to correct any obvious errors and to void any Bets placed where such have occurred.
> 16.2. In the case of any blatant errors in prices transmitted (including for example where the price being displayed is materially different from those available in the general market and/or the price is clearly incorrect, depending on all of the circumstances), Bets will be settled at the correct price at the time of acceptance (or the Starting Price in the case of horse-racing, whichever is the greater). If a Bet is accepted by us on an event where offering a price on the event itself (rather than the price) was in error, the Bet will be void and your stake will be returned."

48. This relates to bets and prices offered. The relevance of the term was that the Claimant relied upon it to highlight the distinction between human errors and system errors. However, at clause 16.4 the following was written:

> "16.4. In the event of errors relating to the random number generators used in certain of the Services, Paddy Power reserves the right to void all Bets on the games affected and your stake will be returned."

The case before me does not involve any assertion of any error by the RNGS (remember that means random number generator software) but did the mapping error "relate to" the RNGS? The Defendant did not seek to rely on this term. It is instructive in that it involves the Defendant impliedly asserting that it can determine in some way when the RNGS makes errors. I have no explanation in the evidence before me of how that would be done. It is noteworthy that clauses B1 and B2 prevent consumers from challenging the outcome from the RNGS so the imbalance is apparent.

49. At clause 16.9 the term stated:

> "16.9. If you are incorrectly awarded any winnings as a result of (a) any human error; (b) any bug, defect or error in the Software; or (c) the failure of the relevant Games product or the Software to operate in accordance with the rules of the relevant game, then Paddy Power will not be liable to pay you any such winnings and you agree to refund any such winnings that may have been paid to you as a result of such error or mistake."

50. The Defendant did not rely on this paragraph in its defence. This may have been because, despite the Defendant's evidence proving that there was an error in the mapping of the Game which showed a Jackpot win on the Claimant's screen which was not the same as the Jackpot win determined by the RNGS, the win displayed on the

Claimant's screen was "in accordance with the rules of the relevant game". Therefore clause 16.9 may not have given the Defendant the right to avoid liability. Alternatively, the lack of reliance on clause A16 may be because these Terms and Conditions are subservient to the Conditions in Part B, if they are inconsistent (see below). I make no decision on that clause.

51. The only other potentially relevant clauses in part A were 27 and 28 which were all in BOLD TYPEFACE and covered liability exclusions for gambling and equipment errors preventing the consumer from gambling and other matters. The Claimant relied on these to show how clauses which adversely affected the Claimant were signposted, at least by capitalisation.

The Conditions in Part B

52. These Conditions were in a different document in a different place on the Site from the Rules. Part B of the Terms of Use starts on page 20. The title is "Games and Vegas" and the words expressly state that the terms and conditions set out in "this Part E" (which is probably a typing error, but is confusing for customers) as updated from time to time govern the relationship between the consumer and the Defendant when playing on the "Games tab" or the "Vegas tab" on the Site. Both parties agree that these terms were part of the WCT between the parties in this case, subject to whether clauses B1 and B2 were properly incorporated at all due to lack of signposting and whether they were unenforceable under the CRA. Both agree that the Game was played under one of these tabs. The preamble to Part B self describes as "these Conditions" (initial capital). The full wording of the preamble is as follows:

> **"Part B – Games and Vegas**
>
> The following terms and conditions made available in this Part E (as updated by us from time to time in our discretion) ("these Conditions") shall govern the relationship between you and us in relation to all play on the 'Games' tab (https://games.paddypower.com) and the 'Vegas' tab (https://vegas.paddypower.com) of the paddypower.com website (together "the Games Website") and any other Paddy Power websites where we refer to the applicability of these Conditions. Your use of the Games Website and/or your playing any game thereon or any game on any other Paddy Power website where we refer to the applicability of these Conditions ("Game") means that you accept these Conditions which are legally binding.
>
> Paddy Power reserves the right to amend these Conditions at any time, as may be required for a number of reasons including (without limitation) for commercial reasons, to comply with law or regulations, to comply with instructions, guidance or recommendations from a regulatory body, or for consumer service reasons. Where we wish to make material changes to

> these Conditions, we will give you as much prior notice of such changes as is reasonably practicable but in any event customers will be notified of material changes before they come into effect. Any such revision will be binding and effective from such date as is specified in such notice. Your continued use of the site will be deemed to be your acceptance of any changes we may make. The date on which the document comprising the then current Conditions came into (or will come into) force will be as stated in the date contained at the top of the Conditions page. Please check these Conditions frequently for updates.
>
> In addition to accepting these Conditions, you acknowledge and agree that the terms and conditions of www.paddypower.com ("the Website"), available at Part A above and as may be amended from time to time in our discretion ("Terms and Conditions"), apply to all eventualities relating to Games not covered by these Conditions. The Terms and Conditions contain important provisions applicable to your use of the Games Website including eligibility criteria requirements and limitations on our liability which apply to your use of the Website and the Games Website.
>
> Further, you acknowledge and agree to be bound by any additional rules which appear within a Game, including within a Game's "Game Info" or "Help" webpage ("Rules"), including rules relating to minimum/maximum bets, maximum payouts, disconnections and system malfunctions. The Rules may also contain instructions on how to play and the return-to-player ("RTP").
>
> Please familiarise yourself with these Conditions, the Terms and Conditions and the Rules before you use the Games Website or play a Game. These Conditions represent a legally binding agreement between you and us. In the event you do not agree or do not understand any of the terms within, please discontinue your use of the Games Website immediately. In these Conditions, "we", "us", or "our" refers to PPB Entertainment Limited if you are a UK consumer and PPB Counterparty Services Limited if you are a non-UK consumer.
>
> *In the event of any inconsistency between these Conditions, the Terms and Conditions or the Rules, unless otherwise stated, to the extent of the inconsistency, the Rules shall prevail, followed by these Conditions and followed thereafter by the Terms and Conditions."* (I have italicised the last paragraph).

53. Reading through these "Conditions", the first thing of note is that the unnumbered paragraphs of the preamble cover matters already covered in the clauses in Part A. So, for instance they seek to cover: amending and updating of terms; notice of amendment

of terms; incorporation of the terms in Part A; incorporation of the Rules of each game. However, unnumbered preamble 3 states that the terms and conditions in Part A (no initial capital, despite the Defendant defining the terms in Part A as "Terms and Conditions" with initial capitals in the preamble) relate to all eventualities "not covered by these conditions". Thus, I construe the words in Part B as the Conditions and work on the basis that the Conditions in Part B take priority over the Terms and Conditions in Part A. The latter filling in the gaps left over. The Part B preamble also states that the Claimant was bound by the rules of each game. The parties were not in dispute over the effect of these parts of the preamble. Thus, I consider that the WCT between the Claimant and the Defendant, when she played the Game, contained firstly, the Rules of the Game and then the "Conditions" in Part B, supplemented where those did not cover matters by the "Terms and Conditions" in Part A. For a consumer this is all exceedingly complicated. Moreover, what happens if the Rules and the Conditions are inconsistent? That question is addressed in the last paragraph in the preamble (in my italics above) which states that in the event of inconsistency, to the extent of the inconsistency, the Rules shall prevail followed by the Conditions (in Part B) followed by the Terms and Conditions (in Part A). The parties agreed both that this paragraph applied and that it governed the priority of the WCT provisions in the event of inconsistency.

54. Having completed the preamble Part B goes on to set out various numbered clauses. The relevant ones relied upon by the Defendant are as follows. I shall call them B1 and B2.

> **"RANDOM NUMBER GENERATOR**
> 1: You fully accept and agree that random number generator ("RNG") software will determine all outcomes of Games on the Games Website. In the event of a discrepancy between the results displayed on your computer and a Game's records on our server, our records shall be regarded as definitive.
> **ERRORS**
> 2: In the event of systems or communications errors relating to the generation of any result, bet settlement or any other element of a Game, we will not be liable to you as a result of any such errors and we reserve the right to void all related bets and plays on the Game in question."

B1: RNGS outcome determinator and definitive evidence of result

55. Clause B1 did not have the heading I have put above this paragraph. The heading it was given was far more obscure. It had two sentences containing two different but linked provisions. The first sentence is an outcome determinator provision. It states that the RNGS determines the outcome. The word "outcome" is not defined, it could mean "result" or win or lose or the size of the win or the size of the jackpot, but this is not made clear and there is no definitions clause in the WCT. The second sentence is an evidence provision. This provides that if the screen "result" which the consumer sees is different from either the Games' records or the Defendant's server's records, the latter

are *definitive*. It is not made clear why the word "result" has been used in the second sentence when the word "outcome" was used in the first sentence. This definitive evidence clause prevents consumers challenging to prove errors by the RNGS which I pointed out were the subject of a right to avoid reserved solely to the trader by clause A16.4.

B2: Exclusion of liability for systems or communications errors

56. Again, the title I have put above was not in the WCT. This is a liability exclusion clause and entitles the Defendant to avoid liability where there has been a systems or communications error relating to any "result" or "other element" of the Game and reserves to the Defendant the right to avoid the play (the gamble) completely.

Findings of fact

57. I make these findings on the balance of probabilities. There was no real dispute over the facts. In summary, the Claimant had registered on the Site in 2011 and when she played in October 2020 she was bound by the WCT (in so far as they were incorporated and enforceable in law). She placed her bet, she span the reels as directed and when they stopped spinning they displayed that she had three Jackpot symbols (these "appeared"). The screen showed that she had reached the Jackpot Game, she clicked the onscreen button to spin the jackpot wheel, which spun around showing her the various tiers of jackpot as it span. The wheel then stopped with the win arrow pointing to the Monster Jackpot. Her winnings were shown on screen as over £1 million. Soon thereafter the screen changed and she was only paid out just over £20,000. The Claimant complained asserting that what she saw determined what she had won. Later the Defendant discovered that the RNGS outcome (which was Daily Jackpot) was not properly mapped in the Defendant's supplier's software so as to display the correct pizza slice on the screen. It should have been mapped to Daily Jackpot but was mapped to Monster Jackpot instead. This had occurred during human software mapping works done by the supplier (or a sub-contractor) carried out on 1.9.2020 and had affected 14 plays over the subsequent 48 days. No evidence was provided to me about whether the reverse had also occurred: namely a player had won the Monster Jackpot but was shown only to have won the Daily Jackpot on screen.

58. I infer from the evidence, the Game, the way it was played online and the sums involved, that for the Claimant and the vast majority of players, the hope or dream of winning £1 million was exciting and important. As I stated above, for the majority of members of the public that would be a life changing sum. I also infer from the Claimant's timely complaint and all the circumstances surrounding online gambling and I find as a fact that when the Claimant entered the contract with the Defendant and when she played the Game she expected and understood that what she saw on screen would be what she would get: win or lose. I infer and find as a fact that the Claimant did not see clauses B1 or B2 when she made the relevant contract or at any time between 2011 and 18 October 2020. I also infer that at the time the contract was entered, it was the objective of the Defendant, as a large and reputable provider of online gambling, in

all the factual circumstances and from their WCT clauses relating to "errors", that the Defendant objectively intended to provide its customers primarily with: what you see is what you get games.

59. I have seen no evidence of the contractual relationship between the Defendant and its supplier, Red Tiger Gaming. I infer that if the Defendant makes a loss on a play due to negligence or breach of contract by the programmer or mapper, that a claim for breach of contract is possible to recover any loss caused.

The Law

Summary judgment and striking out

60. The Court may strike out a statement of case under CPR r.3.4(2)(a) if it appears to the Court that, even if the facts pleaded are assumed to be true, it "discloses no reasonable ground for bringing or defending the claim." The following examples of defences which may fall within CPR 3.4(2)(a) are given in para 1.4 of PD3A: (i) "where it consists of a bare denial or otherwise sets out no coherent statement of facts" and (ii) "where the facts it sets out, while coherent, would not amount in law to a defence to the claim if true."

61. CPR r. 24.3 provides that the Court may give summary judgment against a Defendant on a claim if it considers that the Defendant has "no real prospect" of succeeding on the defence and there is no other compelling reason why the case should be disposed of at trial. The test is materially the same as for striking out, save that the Court is not required to assume the truth of the pleaded facts: *Allsop v Banner Jones* [2021] EWCA Civ. 7 at para. 7. The principles applicable to summary judgment applications were set out in the well-known guidance in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) by Lewison J. at para. 15.

> "15. … the court must be careful before giving summary judgment on a claim. The correct approach on applications by Defendants is, in my judgment, as follows:
> i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [*2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ. 725."

62. Although the Court must not conduct a "mini-trial", that does not mean it cannot evaluate the strength of the evidence before it where there is a conflict of evidence. As Cockerill J. said in *King v Stiefe*l [2021] EWHC 1045 (Comm), at paras 21 to 22:

> "[21] The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other

> evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that - even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial. [22] So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up."

63. As to the burden of proof on an application for summary judgment, Chief Master Marsh said in *Punjab National Bank (International) Limited v Techtrek India Limited* [2020] EWHC 539 (Ch) at para. 11:

> "it is well-established that if the applicant adduces credible evidence in support of its case, the evidential burden shifts to the respondent and the respondent must prove some real prospect of success or some other reason for a trial."

Construction of the contract

64. There was agreement between the parties as to the correct approach this Court should take to the construction of the WCT. Lord Neuberger gave guidance in *Arnold v Britain* [2015] UKSC 36, between paras. 15 and 23, as follows:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn* at pp 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 995-997 per Lord Wilberforce, *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras 21-30.
> 16. For present purposes, I think it is important to emphasise seven factors.
> 17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16-26) should not

be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. 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. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

> 21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.
> 22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56, 2012 SCLR 114, where the court concluded that "any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract (see paras 17 and 22).
> 23. Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in *McHale v Earl Cadogan* [2010] EWCA Civ 14, [2010] 1 EGLR 51, para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". However, that does not help resolve the sort of issue of interpretation raised in this case."

65. Lord Hodge in the Privy Council summarised the principles more recently in *National Commercial Bank Jamaica Ltd v NCB Staff Association* [2024] UKPC 2, at para. 31 et seq:

> "31. The modern approach of the common law to the interpretation of contracts has been clear at least in its outline since the judgment of Lord Wilberforce in the House of Lords in *Prenn v Simmonds* [1971] 1 WLR 1381. In three recent cases – *Rainy Sky SA v Kookmin Bank* [2011] KSC 50; [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, and *Wood v Capita insurance Services Ltd* (above) - the United Kingdom Supreme Court has set out those principles and stated how the various principles may be applied in the unitary but iterative task of interpreting a contract. It is necessary therefore only to draw attention to certain principles of contractual interpretation which are germane to the construction of the scheme.

> 32. First, the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement, having regard to the contract as a whole. Secondly, in so doing the court has regard to the factual background known to the parties at or before the date of the contract, but excluding evidence of prior negotiations. Thirdly, where there are rival meanings of the relevant contractual provision considered in its context, the court can give weight to the implications of the rival meanings, by considering which construction is more consistent with business common sense. But, fourthly, the court does not depart from an interpretation of the natural language of words just because the contractual arrangement has proven to be a bad bargain for one of the parties. Fifthly, the weight to be attached to the precise words used in the contract will vary depending upon the sophistication of the contractual drafting and whether skilled professionals have been involved in creating the contract. But, sixthly, even where there has been a process of sophisticated professional drafting, the court must be alive to the possibility that the text of a provision, which has been accepted to conclude a contract, is a compromise between parties with conflicting aims or the result of a failure of communication between the parties. Where that is so, the court may give more weight to the factual matrix or the purpose of similar provisions in contracts of the same type. Finally, events and the actions of the parties after the conclusion of the contract are not relevant to its interpretation. The court has regard to the facts and circumstances which existed at the time the contract was made and which were known or reasonably available to both parties."

I will not rephrase any of the above, I simply will apply those principles.

Incorporation of terms into the contract

66. At common law, in order for a trader to incorporate a "particularly onerous or unusual" term into a contract with a consumer, there is a requirement to use reasonable efforts to bring it to the consumer's attention. The classic case, *Thornton v Shoe Lane Parking* [1971] 2 QB 163, is a good starting point. In that case, the ticket the consumer bought referred to the conditions, which could be found on a notice on a pillar opposite the ticket machine. In the middle of condition 2, there was a purported exclusion of liability, not only for damage to the consumer's car, but also for injury to the consumer "howsoever caused". The Court of Appeal decided that such a clause was unusual and onerous and the case was decided on the basis that it had not been fairly brought to the notice of the consumer.

67. Another guiding example was provided in *Interfoto Picture Library Limited v Stiletto Visual Programmes Limited* [1988] 1 All ER 348. SVP requested and was sent 47 stock photo transparencies, on loan, by a new supplier, IPL. SVP wanted to use them for a presentation and then return them. Written terms were enclosed with the photos in a jiffy bag which SCP probably did not read. Those terms included a charge of £5 per

day for photos not returned within 14 days. SVP put them aside and forgot about them. Calls were made but not acted upon. ILP sent an invoice for £3,784 when they were finally returned. SVP refused to pay because they asserted the charge was exorbitant. LIP sued and won at trial. On appeal the Court of Appeal held that the daily hold over charge was onerous and unusual and so had to be signposted in a way which reasonably would bring it to the consumer's attention. The case was decided on the basis that sufficient notice was not given. Dillon LJ ruled thus from p350J onwards:

> "The question is therefore whether condition 2 was sufficiently brought to the Defendants' attention to make it a term of the contract which was only concluded after the Defendants had received, and must have known that they had received the transparencies *and* the delivery note. This sort of question was posed, in relation to printed conditions, in the ticket cases, such *Parker* v *South Eastern Rly Co* (1877) 2 CPD 416, [187 4-80] All ER Rep 166, in the last century. At that stage the printed conditions were looked at as a whole and the question considered by the courts was whether the printed conditions as a whole had been sufficiently drawn to a consumer's attention to make the whole set of conditions part of the contract; if so the consumer was bound by the printed conditions even though he never read them. More recently the question has been discussed whether it is enough to look at a set of printed conditions as a whole. When for instance one condition in a set is particularly onerous does something special need to be done to draw customers' attention to that particular condition? In an obiter dictum in *J Spurling Ltd* v *Bradshaw* [1956] 2 All ER 121 at 125, [1956] 1 WLR 461 at 466 (cited in *Chitty on Contracts* (25th edn, 198 3) vol 1, para 742, p 408) Denning LJ stated:
>
> > 'Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.'
>
> Then in *Thornton* v *Shoe Lane Parking Ltd* [1971] 1 All ER 686, [1971] 2 QB 16 3 both Lord Denning MR and Megaw LJ held as one of their grounds of decision, as I read their judgments, that where a condition is particularly onerous or unusual the party seeking to enforce it must show that that condition, or an unusual condition of that particular nature, was fairly brought to the notice of the other party. Lord Denning restated and applied what he had said in the *Spurling* case, and held that the court should not hold any man bound by such a condition unless it was drawn to his attention in the most explicit way (see [1971] 1 All ER 686 at 689-690, [1971] 2 QB 163 at 169-170). Megaw LJ deals with the point where he says ([1971] 1 All ER 686 at 692, [1971] 2 QB 163 at 172-173):
>
> > 'I agree with Lord Denning MR that the question here is of the particular condition on which the Defendants seek to rely, and not of the conditions in general. When the conditions sought to be attached all constitute, in Lord Dunedin's words [in *Hood* v *Anchor Line (Henderson Bros) Ltd*

> [1918] AC 837 at 846-847, [1918] All ER Rep 98 at 103] "the sort of restriction ... that is usual", it may not be necessary for a Defendant to prove more than that the intention to attach *some* conditions has been fairly brought to the notice of the other party. But at least where the particular condition relied on involves a sort of restriction that is not shown to be usual in that class of contract, a Defendant must show that his intention to attach an unusual condition *of that particular nature* was fairly brought to the notice of the other party. How much is required as being, in the words of Mellish LJ [in *Parker* v *South Eastern Rly Co* (1877) 2 CPD 416 at 424, [1874-80] All ER Rep 166 at 170], "reasonably sufficient to give the plaintiff notice of the condition", depends on the nature of the restrictive condition. In the present case what has to be sought in answer to the third question is whether the Defendant company did what was reasonable fairly to bring to the notice of the plaintiff, at or before the time when the contract was made, the existence of this particular condition. This condition is that part of the clause - a few words embedded in a lengthy clause - which Lord Denning MR has read, by which, in the midst of provisions as to damage to property, the Defendants sought to exempt themselves from liability for any personal injury suffered by the consumer while he was on their premises. Be it noted that such a condition is one which involves the abrogation of the right given to a person such as the plaintiff by stature, the Occupiers' Liability Act 1957. True, it is open under that Act for the occupier of property by a contractual term to exclude that liability. In my view, however, before it can be said that a condition of that sort, restrictive of statutory rights, has been fairly brought to the notice of a party to a contract there must be some clear indication which would lead an ordinary sensible person to realise, at or before the time of making the contract, that a term of that sort, relating to personal injury, was sought to be included. I certainly would not accept that the position has been reached today in which it is to be assumed as a matter of general knowledge, custom, practice, or whatever is the phrase that is chosen to describe it, that when one is invited to go on the property of another for such purposes as garaging a car, a contractual term is normally included that if one suffers any injury on those premises as a result of negligence on the part of the occupiers of the premises they shall not be liable.' (My emphasis.)

Counsel for the plaintiffs submits that *Thornton* v *Shoe Lane Parking Ltd* was a case of an exemption clause and that what their Lordships said must be read as limited to exemption clauses and in particular exemption clauses which would deprive the party on whom they are imposed of statutory rights. But what their Lordships said was said by way of interpretation and application of the general statement of the law by Mellish LJ in *Parker* v *South Eastern Rly Co* and the logic of it is applicable to any particularly

> onerous clause in a printed set of conditions of the one contracting party which would not be generally known to the other party.
> Condition 2 of these plaintiffs' conditions is in my judgment a very onerous clause. The Defendants could not conceivably have known, if their attention was not drawn to the clause, that the plaintiffs were proposing to charge a 'holding fee' for the retention of the transparencies at such a very high and exorbitant rate."

Bingham LJ ruled thus, starting at page 353a:

> "English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways. The well-known cases on sufficiency of notice are in my view properly to be read in this context. At one level they are concerned with a question of pure contractual analysis, whether one party has done enough to give the other notice of the incorporation of a term in the contract. At another level they are concerned with a somewhat different question, whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions or by a particular condition of an unusual and stringent nature."

Further, having reviewed the authorities at p 355J Bingham LJ observed that:

> "The more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given."

Finally, Bingham LJ ruled at p 357e that:

> "The tendency of the English authorities has, I think, been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular condition said to bind him; and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question. This may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract is concerned."

68. Exemption clauses which exclude liability under the contract totally are less common nowadays, according the editors of *Chitty on Contracts 35th Ed* at para 18-001, because of the effects of the *Unfair Contract Terms Act 1977* and the CRA. The editors also explain that exclusion clauses in contracts negotiated between commercial parties of equal bargaining power do little more than allocate the risk between the parties. But they point out that where one is in an economically superior position and can dictate its own terms, the Courts have attempted to correct imbalances of power by principles of construction which require the party seeking to impose the terms excluding its own liability to do so in clear and unequivocal language. This control is also effected through the principles of incorporation.

69. The words "onerous or unusual" are not terms of art but "are a way of putting the general proposition that reasonable steps must be taken to draw the particular term in question to the notice of those who are to be bound by it and that more is required in relation to certain terms than to others depending on their effect", as Hale LJ ruled at para. 23 in *O'Brien v MGN Limited* [2001] EWCA Civ 1279. The terms have been described as imposing a high hurdle by Fraser J. in his long judgment in *Bates v Post Office* [2019] EWHC 606, at 979) but it all depends on the context, the facts and the nature of the contract. As Gross LJ stated in *Goodlife Foods v Hall Fire* [2018] EWCA Civ. 1371, at para 101, there is a sliding scale. Various terminology has been used for the scale. The more unusual, unreasonable, outrageous or onerous the clause is, the more necessary it is to bring it to the notice of the consumer.

Similar cases

70. I will take into account that the context is important in determining whether a clause is "onerous or unusual". Looking at previous online betting cases, I note that in *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm) Mr David Donaldson QC sitting as a Deputy High Court Judge considered similar provisions against the predecessor to the CRA, (the *Unfair Contract Terms Act 1977*). A spread betting bookmaker claimed summary judgment in respect of a consumer whose account was entered and played with by a child who, by playing on the computer, effected it a number of "trades" which caused tens of thousands of pounds worth of loss on the account. Spreadex sued on a clause that deemed the consumer to have authorised all Trading. The consumer was required to agree to a set of Terms and Conditions in a "click-wrap" process. Summary judgment was applied for by the company and refused. The deputy held that the term did not form part of the contract, but even if it did, the clause fell foul of the consumer protection provisions preventing reliance upon unfair terms. At para. 21 he ruled:

> "21. A further, and compounding, factor to be taken into account is the manner in which the clause was incorporated into any contract (if there was one). As I described earlier, the potential consumer was told that four documents, including the Customer Agreement, could be viewed elsewhere on- line by clicking "View". Many, one might suspect most, would have passed up on that invitation and proceeded directly to click on "Agree",

> even though it was suggested that they should do so only when they had read and understood the documents. Even if, exceptionally, the Defendant in fact chose to look at the documents, he would have been faced in the Customer Agreement alone with 49 pages containing the same number of closely printed and complex paragraphs. It would have come close to a miracle if he had read the second sentence of Cl 10(3), let alone appreciated its purport or implications, and it would have been quite irrational for the Claimant to assume that he had. (In most cases, the limited time spent on the on-line application would in any event probably preclude any serious perusal of the documents). This was an entirely inadequate way to seek to make the consumer liable for any potential trades which he did not authorise, and is a further factor rendering the second sentence of Cl 10(3) an unfair term."

71. The Claimant relied on the decision and the analysis of Foster J. in a more recent online Blackjack gaming case, involving allegedly defective software. In *Green v Petfre (Gibraltar) Limited* [2021] EWHC 842 (QB), Mr Green played for 5.5 hours and won over £1.7 million of chips which the supplier refused to honour. Mr Green applied for summary judgment and succeeded despite an exclusion of liability for errors clause and other clauses relied on by the gaming company. At paras. 166 to 172, Foster J. ruled as follows:

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

> 168. Betfred rely on acceptance of the EULA terms in 2013 some 4½ years before Mr Green actually played the Game (it had been in operation only for hours when the events in issue happened). I do not hold that it is, without more, impermissible to bind a regular player in this way. However, the commensurate burden upon the trader who wishes to exclude liability is all the greater. In all the circumstances it is almost impossible that Mr Green was reasonably aware, even in 2013, that the Terms and Conditions and the EULA contained clauses that purported to support a refusal to pay his winnings in these circumstances. In real terms it is fanciful to suggest that what he last saw in the EULA in 2013 was sufficiently brought to his attention for the purposes of the gaming session on the newly introduced Game in January 2018 absent a reminder, and the more ready availability of the EULA itself.
>
> 169. For reasons which have been given in relation to the context of the clauses in issue, I agree with the submission of Mr Couser that each of the clauses which purports to allocate the burden of the risk of an undetected and undetectable defect to Mr Green, are inadequately drawn to his attention in order to do so.
>
> 170. The mechanism by which acceptance of the Terms and Conditions is signalled is known as a "click wrap", and no issue arises but that Mr Green accepted by clicking on the relevant button. He sues on one of the clauses of the terms and conditions and has never sought to say that he is not bound by at least some of the Terms and Conditions set out.
>
> 171. It is important to say that I do not make any finding that acceptance of terms by means of a "click wrap" is inadequate to form a binding contract that contains limitations to or exclusions of liability. Nor, if adequately drafted and signposted, that, even in the context of an online betting facility, liability may be excluded for events such as occurred in this case."

72. *Green* has factual similarities with the case before me. The Defendant relied on the decision in *Longley v PPB* [2022] EWHC 977, Ellenbogen J. was dealing with a telephone gambling claim in which the consumer was suing for over £250,000. He had placed telephone bets on horse races. He placed a £1,300 each way bet over the phone. The bet needed human authorisation and during the internal phone calls the bet was misstated between staff as £13,000 each way. This was approved internally and a staff member, also in error, spoke to the consumer and recited authority for £13,000 each way and he agreed, understanding that the higher sum was in play. That bigger bet was recorded in the paperwork, £26,000 was debited from his account. His horse won. His account was credited with the winnings. The staff member who authorised it soon realised he had authorised over his authority and the winnings were deducted back from the consumer's account. PPB relied on their terms and conditions in particular clause 16 about errors which entitled them to correct obvious errors and void bets placed where such occurred. Ellenbogen J. found that there was no meeting of minds. Bookmakers do not make counter offers increasing customers' bets. When considering transparency

and significant imbalance under the CRA 2015 the judge did not consider that clause 16 correcting erroneous bets created an imbalance which was significant and so it was not unfair. Depriving the consumer of what was in effect a windfall from a bet made in error was not punitive.

73. In my judgment the factual matrix of *Longley* was substantially different from the present case and I gain little assistance from it. That was a telephone transaction. The case turned on mistake and mutual mistake. A mistake was made. Both parties were aware of it as the judge found and the ratio was that there was no meeting of minds. In addition, the judge ruled that the consumer knew that the company did not intend to counter-offer a different bet. There was no in depth analysis of whether the exclusion clause (clause 16) was not incorporated through lack of sufficient notice.

74. The Defendant relied heavily on *Parker-Grennan v Camelot UK Lotteries* [2023] EWHC 800 (*Parker)*. In that case Jay J. dismissed an application for summary judgment by a consumer who asserted that she had won £1 million on the national lottery because of seeing two matching number "1"s on her screen which were not lit up. The consumer relied on the words on the bottom of her screen which said "match any of the winning numbers to your numbers to win prize". As I explained at para. 31 above, the relevant games procedures stated that the winning numbers would be the numbers which matched and would be highlighted and circled in green. Her actual winning numbers ("15"s) were so highlighted and she was shown her £10 win, but she had spotted two other numbers ("1"s) which were not flashing or highlighted and asserted that because they matched she should have won £1 million. The errant number "1"s were a coding fault. Jay. J ignored various pleading points and concentrated on the parties' arguments (para. 29). As to incorporation of terms, at para.5 Jay J. noted that not only were they incorporated at the account opening but also: "The Defendant's contractual documentation is updated from time to time. Updates of any significance required acceptance by the Claimant by her ticking or clicking a button marked "Accept". At the relevant time, the Claimant was presented with a drop-down menu revealing a summary of the changes as well as complete versions of the new sets of provisions." Prize winning involved playing and then the consumer claiming the prize and validation of the claim. Clear headings in the rules of the game were given to the clauses for claiming and validation of the prizes. It was stipulated that players could only win one prize per play. It was stated that the result of instant win games was determined as the point the play was bought. A limitation of liability clause, with a clear heading, covering defects in the game was also prominent. There was a clause governing disputes and a definitions clause. The game procedures gave examples of screen shots and clearly described the way winning numbers would be displayed with green encirclement and flashing lights. The Judge dealt with the general incorporation of 3 sets of documents containing terms by the method of clicking an online screen box indicating agreement. He referred to *Chitty on Contracts* 34th edition para. 15-010 and ruled that the method of incorporation was valid. He then went on to consider the assertion that some terms were onerous or unusual and so needed signposting. He concluded that the game

procedures, the win determination clauses and the validation clauses were not onerous or unusual. In para. 64 he explained that, read together, they meant that what was shown on screen might be different from the predetermined result when the play was made and the games procedures and the rules made it clear that the outcome was determined by the computer system as it appeared on the official list of wins and nowhere else. What mattered was that the result was not rigged. In particular, he ruled that:

> "67. Furthermore, there can be nothing onerous or unusual about a game in which the definition of "Winning Play" is connected to what appears on the Defendant's official list and is "as predetermined by [the Defendant's] computer system". Clause 6.2(d) is unremarkable. *However, clause 6.3(e) is not quite so straightforward. A Play may be declared invalid if there were an inconsistency between the outcome as displayed on the screen and the result as predetermined by the computer system. Strictly speaking, this clause could be invoked by the Defendant in a case where all the correct lights were flashing and the message proclaimed that the player had won £1 million, even after the finish button had been pressed. That would, of course, presuppose a major computer error. Under the Game Procedures, a £1 million win would indeed have been the outcome even if it were not on the official list, and those take priority over the IWG Rules. Even if the Defendant were to surmount this first difficulty, would it be able to declare the Play invalid on this counterfactual? Clause 6.3(e) has the "feel" of being unusual if not onerous in these hypothetical circumstances.*
> 68. … On the facts of the present case, the final Game Play Window informed the Claimant that she had won £10 and that was also the result under the IWG Rules. The outcome "as displayed" (see clause 6.3(e)) was not that the Claimant had won £1 million. There was no conflict. The Defendant does not need clause 6.3(e) in order to win this application." (I have italicised one part).

75. The hypothetical facts which Jay J. identified and I have put in italics above, has pretty much occurred in the case before me. Jay J. was, in effect, concerned that overturning a *WYSIWYG* win had the feel of being unusual and onerous. The hypothetical shows that these cases are acutely fact sensitive. What the consumer saw on screen in *Parker* was what she had won under the games procedures: £10 due to the matching number "15"s and that is what the official list said. She claimed a purported right to win which was not highlighted or shown on her screen and not permitted under the game rules and procedures. In the case before me the Claimant claims a win which was shown on her screen and lit up and submits that the Rules support that win.

76. Turning to the UCTA and the relevant clauses Jay J. ruled thus:

> "89. I am prepared to accept that some of these clauses may have created an imbalance, but (putting clause 12 to one side for the time being) I cannot

> accept the argument that there was a significant imbalance. The Defendant was fully entitled to explain to players the basic philosophy of this game: namely, that it was a pure game of chance, and the outcome is determined as soon as the play button is pressed. Assuming that the animations are enabled, the outcome will also be "predetermined" inasmuch as whatever the player does thereafter cannot make a difference. Furthermore, I agree with Mr Hinks that it was not one-sided to set out a validation process which requires that the Defendant should only pay out on Winning Plays, thereby ensuring the integrity of the National Lottery and protecting the Defendant's odds and pricing structure. Clause 6.2(d), which in my judgment is the critical provision, ensures that unless the player's ticket number is on the Defendant's official list of Winning Plays, she has not won. As soon as one understands how Winning Plays are generated (i.e. randomly, and before the animations are selected), clause 6.2(d) cannot reasonably be considered as creating any unfairness."

As for the validation clauses Jay J. upheld them as enforceable with the following reasoning:

> "94. I consider that clause 12.1 did create a significant imbalance between the parties. Although the jurisdiction of this Court is retained (and Mr Hinks did not submit that clause 12.2 was an ouster of jurisdiction), it cannot be denied that the table is firmly tilted in the Defendant's favour, the Wednesbury test being a high burden for a player to discharge. Consideration must therefore be given to whether the Defendant has acted "in a manner or to an extent which is contrary to the requirement of good faith" in relation to this clause.
>
> 95. In my judgment, there was no want of fair and transparent dealing by the Defendant. Clause 12 was expressed fully, clearly and legibly, and there were no pitfalls and traps. As I have already said, the Defendant was fully entitled to have a validation process which it could control. Some of the matters under clause 6.2 raise issues of factual assessment and judgment, and I consider that it was fair and reasonable for the Defendant to accord to itself a considerable degree of leeway, if for no other reason than to avoid potentially expensive and time-consuming disputes. When it comes to the facts of the present case, or any other case with similar facts, one would have thought that the decision as to whether the player had either won or lost was both straightforward and binary, and the introduction of a Wednesbury filter makes little or no practical difference. What appears on the official list is the crucial question. In the event of computer errors, mistakes and glitches, how these arose can be explained by adducing relevant evidence from someone within the Defendant's IT department.
>
> 96. I would therefore uphold the final sentence of clause 6.1, and the whole of clause 12, on the basis that these provisions were not incorporated or

> applied by the Defendant in a manner or to an extent that was contrary to the requirement of good faith."

77. On appeal, reported at [2024] EWCA Civ. 185, Andrews LJ gave the judgment of the Court. The Court approved para. 15-101 of *Chitty* and upheld the ruling that the terms which the consumer accepted by click wrap were generally incorporated into the contract even though she did not read them. Under the game procedures she had only won £10. However, because the Court of Appeal had not considered online terms incorporation before the Court gave further guidance. On incorporation the Court agreed with Jay J. that the relevant terms were not onerous or unusual. They set out the game procedures and stated that the procedures prevailed unless otherwise stated. The definition of the computer-generated result, the winning procedure, the payout ratio and the validation requirements were considered at para. 35:

> " … These clauses are explanatory in nature; they merely set out what is required in order to achieve the entitlement to be paid the prize money. They do not impose any burden on the player, nor do they deprive them of a prize to which they would otherwise be entitled. They are rules which ensure that money is only paid out for valid prize wins. There is nothing onerous, let alone unfair, about that."

In two paragraphs, which were a warning to the industry about terms granting the trader the right to declare plays invalid in WYSIWYG circumstances, Andrews LJ stated:

> "36. If one looks more specifically at Clause 6 of the IWG Rules, it contains the sort of provisions that one would reasonably expect to be there to safeguard Camelot against fraud, and allows them to check for themselves that the player has indeed won a prize. These provisions are designed to ensure that someone does not succeed in making Camelot pay them a prize which they have not in fact won. The only provision which gave the Judge pause for thought about whether it was onerous was Clause 6.3(e), which would entitle Camelot to declare a Play invalid if the outcome as displayed on the screen did not match the result as predetermined by the computer system.
>
> 37. I agree with the Judge that in certain hypothetical circumstances, questions might arise as to whether Camelot would be entitled to rely on that Clause, e.g. if in consequence of a major software error the final screen had signified (with flashing lights) that the player had won £1 million and that result was confirmed when they clicked the "Finish" button. That would be much closer to the situation in *Green v Petfre (Gibraltar) t/a Betfred* [2021] EWHC 842 (QB), ("Green") where a betting company claimed to be entitled to rely on an exclusion clause so as to deprive the player of a sum he had won, even if he was otherwise contractually entitled to payment and the win was recorded on the company's own computer system."

The Court of Appeal did not accept the submission that to be properly incorporated it would have been necessary to make the consumer scroll through all the terms before being able to accept them and play. As to the issue of enforceability, Andrews LJ ruled thus:

> "52. None of these terms was individually negotiated and so the issue was whether, contrary to the requirement of good faith, any particular term caused "a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" (see Reg 5(1) of the UTCCR). If so, that term would be regarded as unfair, and unenforceable against the consumer by virtue of Reg 8(1). However, if the contract is capable of continuing in existence without that term, it will continue to bind the parties (Reg 8(2)).
> 53. In paragraph 79 of his judgment, the Judge correctly directed himself as to the general principles governing the application of the UTCCR and the meaning of "significant imbalance" by reference to the speech of Lord Bingham in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52; [2002] 1 AC 481 at [17]. In paragraph 88, he also correctly held that a step by step analysis is required to determine whether each clause under scrutiny survives the application of the UTCCR.
> 54. Schedule 2 to the UTCCR sets out a non-exhaustive list of the types of terms which may be regarded as unfair. By Reg 6(1) unfairness is to be assessed by taking into account the nature of the goods or services for which the contract is concluded and by referring, at the time of its conclusion, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
> 55. Reg 7(2) is a statutory enactment of the contra proferentem rule of construction. It provides that "if there is any doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail".
> …
> 58. … Reg 7(2) is concerned with the construction of individual clauses and not with the re-ordering or disapplication of contractual provisions. He relied on the approach to section 69 (1) of the Consumer Rights Act – the identical provision to Reg 7(2) UTCCR – which was taken by Bourne J in *R (Doneghan and others) v Financial Services Compensation Scheme Ltd* [2021] EWHC 760 (Admin) at [149] to [151]. In that case, Bourne J rejected a submission that section 69(1) could be used to resolve a conflict between two different contractual terms. It is simply a rule of interpretation which favours the consumer if a particular term could have different meanings.
> 59. I agree with that characterisation."

Enforceability of terms in the contract

78. The sections of the *Consumer Rights Act 2015* relied on by the Claimant are set out below.

> "**CHAPTER 3**
> DIGITAL CONTENT
> *What digital content contracts are covered?*
> **33 Contracts covered by this Chapter**
> (1) This Chapter applies to a contract for a trader to supply digital content to a consumer, if it is supplied or to be supplied for a price paid by the consumer.
> (2) This Chapter also applies to a contract for a trader to supply digital content to a consumer, if—
> (a) it is supplied free with goods or services or other digital content for which the consumer pays a price, and
> (b) it is not generally available to consumers unless they have paid a price for it or for goods or services or other digital content.
> (3) The references in subsections (1) and (2) to the consumer paying a price include references to the consumer using, by way of payment, any facility for which money has been paid.
> (4) A trader does not supply digital content to a consumer for the purposes of this Part merely because the trader supplies a service by which digital content reaches the consumer."
>
> *Can a trader contract out of statutory rights and remedies under a digital content contract?*
> **S. 47 Liability that cannot be excluded or restricted**
> (1) A term of a contract to supply digital content is not binding on the consumer to the extent that it would exclude or restrict the trader's liability arising under any of these provisions—
> (a) …
> (b) section 35 (digital content to be fit for particular purpose),
> (c) section 36 (digital content to be as described),
> (d) …, or
> (e) ….
> (2) That also means that a term of a contract to supply digital content is not binding on the consumer to the extent that it would—
> (a) exclude or restrict a right or remedy in respect of a liability under a provision listed in subsection (1),
> (b) make such a right or remedy or its enforcement subject to a restrictive or onerous condition,
> (c) allow a trader to put a person at a disadvantage as a result of pursuing such a right or remedy, or
> (d) exclude or restrict rules of evidence or procedure.

(3) The reference in subsection (1) to excluding or restricting a liability also includes preventing an obligation or duty arising or limiting its extent.
(4) …"

"Can a trader contract out of statutory rights and remedies under a services contract?"

S. 57 Liability that cannot be excluded or restricted

(1) A term of a contract to supply services is not binding on the consumer to the extent that it would exclude the trader's liability arising under section 49 (service to be performed with reasonable care and skill).
(2) …
(3) …
(4) That also means that a term of a contract to supply services is not binding on the consumer to the extent that it would —
(a) …,
(b) …,
(c) allow a trader to put a person at a disadvantage as a result of pursuing such a right or remedy, or
(d) exclude or restrict rules of evidence or procedure.
(5) …
(6) ….
(7) … "

"What are the general rules about fairness of contract terms and notices?

S. 62 Requirement for contract terms and notices to be fair

(1) An unfair term of a consumer contract is not binding on the consumer.
(2) An unfair consumer notice is not binding on the consumer.
(3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.
(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
(5) Whether a term is fair is to be determined—
(a) taking into account the nature of the subject matter of the contract, and
(b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.
(6) …."

"PART 2 UNFAIR TERMS

What are the general rules about fairness of contract terms and notices?

S. 63 Contract terms which may or must be regarded as unfair

(1) Part 1 of Schedule 2 contains an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair for the purposes of this Part.
(2) Part 1 of Schedule 2 is subject to Part 2 of that Schedule; but a term listed in Part 2 of that Schedule may nevertheless be assessed for fairness under section 62 unless section 64 or 73 applies to it."

"*What are the general rules about fairness of contract terms and notices?*
S. 69 Contract terms that may have different meanings
(1) If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail."

"SCHEDULE 2 Section 63
CONSUMER CONTRACT TERMS WHICH MAY BE REGARDED AS UNFAIR
PART 1 LIST OF TERMS
1 ….
2 A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.
…
20 A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by—
(a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,
(b) unduly restricting the evidence available to the consumer, or
(c) imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract."

79. In relation to what may or may not cause a significant imbalance and hence be unfair under S.62(4) in *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481, Lord Bingham gave guidance on an earlier, similar provision at para. 17:

> "17. A term falling within the scope of the Regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt

> the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the Regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the Regulations seek to address. The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the consumer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice. Regulation 4(1) lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the Regulations are designed to promote."

Applying the law to the facts

Summary judgment application

80. The Claimant's pleadings in this claim are scant and did not cover all of the facts and matters raised in the Claimant's skeleton argument or submissions. The evidence was not trial evidence it was served for the applications. However, both parties submitted that I should deal with the applications. A similar issue arose in *Green* (citation above) so I have carefully read paragraphs 27-38 of the judgment of Foster J. I adopt the same reasoning in this case. Whilst, in this case, neither party asked for an adjournment or for the Court to refuse to hear the applications and go to trial instead, I did have concerns that not all relevant evidence which could be put before me had been put before me about industry norms and usual terms. However, the responsibility for providing all the necessary evidence to assist with contractual construction, which falls four square on the parties and the timescale of the evidence for the application, which fitted closely to the direction to serve the evidence for trial, assist me in deciding to grapple with the issues in these applications because the parties ask me to do so. I also note that this approach has been taken in many of the case cited above.

Construction of the WCT

81. In the absence of any witness statement from the Claimant, and having read the Claimant's evidence from her solicitor, which was drafted on instructions, I infer that the Claimant probably did not read the Defendant's WCT. However, the parties agree that the August 2020 Terms of Use and Rules of the Game were part of the WCT subject to the issues over incorporation of clauses B1 and B2 and of enforceability under the CRA 2015. This agreement is consistent with the rulings of Andrew's LJ in *Parker*.

Construction of the Rules in the context of being part of the WCT

82. I start with construction of the Rules in the context of them being part of the WCT. I do so applying the principles set out above. I must discern what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood the words to mean, using the language in the contract. I must consider matters at the time the contract was made in the context of the type of transaction being carried out, namely online gaming where the only communication between the Defendant and the Claimant was going to be through her computer screen. The Rules were drafted by the Defendant and were not negotiated with the Claimant. There was an imbalance of bargaining power and of economic power.

83. I take into account that the factual background was that, at the time the contract was made, both parties knew that the Claimant's only method of communication with the Game would be via her computer screen. Unlike the facts in *Parker,* in which the player could choose to turn the screen animations off, here the Defendant constructed the screen visuals to be permanent and to match the Rules.

84. The Rules set out how the Claimant was required to play the online Game on her computer and how she would win (if she did). They created a two stage Game process. Firstly, she was required to click the "Spin" button on screen to spin the reels. The Rules stated that she would succeed in her first stage spin if *"three or more jackpot symbols appear on the reels"*. The Rules then stated that this "triggered" access to the Jackpot Game. In my judgment the words "*appear on the reels"* when interpreted in the context of an online game make the determination of the success at stage one clear, it is a "what you see is what you get" term, or as Mr Baldock put it: "WYSIWYG". Success was to be determined by what the Defendant's software displayed in her scene. In my judgment, objectively, the words would be understood at the time of entering the contract as meaning that the computer screen was showing the determination of the result of her spin at stage one. The Jackpot Game was described in the Rules as providing that players could *"win one of the offered jackpot tiers"*. The Claimant was instructed by the Rules to *"Spin the jackpot wheel to determine which of the offered jackpot tiers will be won."* I note the word "determine" and the connection between the spinning of the visual wheel and the visual determination of the result. In my judgment, objectively, there was no ambiguity in the words of the Rules about what was going to happen. There was no ambiguity on screen either, unlike the facts of

Parker. I consider that the words governing stage two, when read with the words in the Rules about stage one, clearly intended to bind the parties to the process which expressly stated that, by spinning the wheel shown on screen, the Claimant would have her Jackpot determined before her very eyes on the screen, understanding that the screen display was created by the Defendant's software. The process at stage two was stated and intended to be WYSIWYG: what she saw was what she would get.

85. Unlike the facts in *Parker*, the Rules did not set out any caveat for validation of her win after the spin was over nor did they tie winning to any unseen RNGS output, server records or official winnings list to be consulted or checked before her win was determined. The Rules were simple and clear.

86. In submissions the Defendant put forwards no rival meaning to this construction of the Rules, save to rely on the evidence in the second witness statement of Mr Padgett, correcting his first statement and asserting that there was in fact no real stage two, it was all "mere entertainment". He informed the Court that, in fact, behind the scenes, the RNGS had decided what the Claimant would win within a milli-second after she first pressed the spin button during the reel stage. I accept that was factually how the Defendant constructed the Game but that is not what the Rules stated. That was not known to the Claimant when she accepted the Rules and that was not explained in the Rules. Quite the opposite was explained in the Rules, which set out a two-stage process, with two clicks of the spin button and, by express words, two computer determinations displayed on screen, one for each of the two stages. The key stage in this case being the second spin, causing the wheel of jackpots to spin and come to rest on the Monster Jackpot.

87. Having considered the natural meaning of the words in the Rules in the context of online gaming, I must consider whether prospective commercial common sense affects the construction, which is relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. For an objectively reasonable player, whose only interaction with the game is only through a screen, the WYSIWYG approach would be the expected approach to the determination of any win. I do not believe that players willingly hope for or expect to have a secret determination, unshown on screen, which undermines or contradicts what will be shown on screen, as the normal or usual approach. The Rules match that expectation. On screen errors could objectively and prospectively be a matter of concern and could be raised in the Rules but the Defendant disclosed no concerns about errors in the Rules. So, I do not find much assistance when construing the words using prospective commercial common sense. The Defendant's post hearing reliance on the words "Malfunction voids all plays" is dealt with above in the paragraph relating to amended pleading and points not taken at the hearing. In any event, without hearing any submissions on the meaning of these words, the software and hardware did not malfunction, it was programmed wrongly by a human being.

Construction of B1

88. Part B clause 1 of the Defendant's Conditions provides that the RNGS will determine the "outcome" of Games. This of itself does not necessarily contradict the Rules. Firstly, the RNGS's outcome should be translated into the animations onscreen. The screen is intended to show what the software determined and it would not be inconsistent, so long as the consumer's screen showed the same outcome. In this case, that did not occur. The Claimant's screen showed a different outcome from that generated by the RNGS. I consider that the Jackpot which the Claimant won is properly to be considered as covered by the word "outcome" in clause B1 using its natural meaning and no party submitted otherwise. This discrepancy in outcome caused by the first sentence triggers the second sentence of B1. The latter makes the Defendant's Game's records on their server definitive of the "result", overriding what was shown on the Claimant's screen. Thus, it is plain to me from the natural meaning of the words in B1, that making the unshown RNGS outcome in the records the determinant of what the Claimant won would be inconsistent with what the Rules stated.

89. The Defendant sought to submit otherwise but was unable to explain how these two clauses could be reconciled, Firstly, the Defendant asserted that the Rules were merely, to use Mr Hinks' word, "wallpaper" and for "entertainment". Secondly, the Defendant asserted that clause B1 and the Rules were not inconsistent but did not explain how (in paras. 56-57 of the skeleton). The Defendant relied on *Lewison* on the *Interpretation of Contracts* 8th Ed, at paras. 9.103 – 9.113 to make good this assertion. Para. 9.103 sets out dicta about how contracts may come to contain inconsistencies. In the current case the evidence showed that, when some companies merged in 2016, there were various terms and conditions in various documents in addition to various game rules which were all amalgamated partly into one larger document, albeit it with other hyperlinked and non hyperlinked Rules and supplier documents as well. The redrafting at that time was clearly not complete or unitary. As I explained above when commenting generally on the "Terms of Use", the "Terms and Conditions", the "Conditions" and the Rules, the index does not cover any of the clauses in Part B and the headings in Part B are not of much, if any, assistance for a consumer seeking to read relevant clauses. Part B self describes as Part E and the clauses in Part B overlap with and clash with clauses in Part A. It is perhaps not so surprising then that inconsistencies between the Conditions in Part B and the Rules might have arisen. The Defendant also relied on para. 9.104 of *Lewison* in which a principle summarised by Lord Radcliffe is extracted from *Karachiwalla v Nanji* [1959] A.C. 581, to the effect that inconsistency is a desperate expedient. In two other cases, cited in footnotes 274 and 275, the author summarises that a clause should not be rejected unless manifestly inconsistent with or repugnant to the rest of the agreement. In essence what the Defendant relied on was the judgment of Akenhead J in *RWE Npower Renewables Ltd v JN Bentley Ltd* [2013] EWHC 978 (TCC) in which he ruled that (no page number provided):

> "If it is possible to identify a clear and sensible commercial interpretation from reviewing all the contract documents which does not produce an

> ambiguity, that interpretation is likely to be the right one; in those circumstances, one does not need the 'order of precedence' to resolve an ambiguity which does not actually on a proper construction arise at all"

This ruling was upheld by Moore-Bick LJ [2014] EWCA Civ. 150. Finally, the author suggested the approach was well summarised by Judge Stephen Davies in *GB Building Solutions Ltd v SFS Fire Services Ltd* [2017] EWHC 1289 (TCC); 172 Con. L.R. 18, thus:

> "In summary, the task for the court is to ascertain whether or not there is an inconsistency (meaning a contradiction or conflict, whether a case of literal inconsistency or a case where two clauses cannot fairly or sensibly be read together) without adopting any predisposition for or against inconsistency being present. If there is an inconsistency then the order of precedence clause provides the answer."

90. When considering the construction of the interaction between the Rules and Clause B1, and whether they can fairly be read together and made consistent, I must stand back and look at all of the WCT at the time the contract was made. I take into account the fact that the contract was to govern (at least in the relevant parts) online gaming executed on screen by customers. I take into account that such gaming was to be run and determined by computers and complicated software which had to be programmed not only to work and record, not only to govern small and large financial sums, but also to entertain and communicate with the consumer, who would no doubt wish, when using the service, to bet, to have fun and hopefully to win a large Jackpot, all using reliable software. I take into account that, objectively, customers would want and expect that what was to be shown to them on screen to be accurate and correct. The same expectation probably applies when customers go into a physical casino and play roulette. They expect the house to pay out on the roulette wheel if they bet on number 13 and the ball lands on number 13. I take into account that the Defendant drafted the Rules and terms and the consumer had no ability to change or negotiate the terms. I take into account the long-held understanding, ever since train tickets with terms on their rear, was that only a small percentage of customers will actually read the terms either in part or in full.

91. Applying the proper approach to construction set out above, I have tried to reconcile the Rules with the first sentence of B1 to achieve a clear and sensible commercial interpretation. Looking at relative length, the Rules were 1.5 pages long. I consider a consumer would be seen as more likely to read those before playing a game, than the Terms of Use or the Conditions (45 pages long with cross references to other documents). I note that the Rules do not state that they are subject to the Conditions. They do not even mention the Conditions. They do not mention errors in programming and they do not mention the RNGS. They do state that the Jackpot win would be determined by spinning the Jackpot Wheel and hence what *is* to be shown on screen.

However, B1 provides that the determinant of the outcome is *not* what is shown on screen. If I were to reconstrue the Rules to fit with B1, I would have to construe them to imply words to the effect that: what the consumer will see on screen when the Jackpot wheel stops spinning is *not* what the consumer will win, but instead the win will be determined by the non-visible outcome of the RNGS, which was first decided at the start of the play when the reels were first spun. That would contradict the actual wording of both stages of the Rules. There are three elements to this divergence: (1) the "what you see is what you get" approach, which is supported in the Rules and denied in B1; (2) consumer satisfaction which is provided by instant interaction in the Rules and overridden in B1; and (3) the commercial risk, which is on the Defendant's shoulders in the Rules and on the consumer's shoulders in B1. I consider that WYSIWYG is central to this Game. I consider that consumer satisfaction is commercially important to both contracting parties. I consider that allocation of risk is a matter of commercial choice and agreement but only when the parties have equal bargaining power. It could be allocated to one or the other party or split in some way related to the cause of the error creating the risk or the obviousness of it. So, a sensible commercial interpretation of where the risk should rest does not assist me in construction.

92. As for the second sentence of B1, it purports to make the first sentence prevail evidentially over the Rules. It states that if there is a discrepancy between the screen display and the RNGS result, the records of the RNGS will prevail. This is commercially good for the Defendant, but not at all so for the consumer. It runs contrary to the other two elements identified above. Moreover, it appears irreconcilable, with the Rules which do not mention the RNGS. It is also contrary to the words of the preamble to Part B, which provide that the Rules will prevail over Part B to the extent that they are inconsistent, not vice versa.

93. Stepping back and looking at the whole WCT and considering prospective commercial good sense, the Defendant could have made it clear to the consumer in the Rules at the date of the contract that, for instance, verification will determine the result (at least for big Jackpots) but chose not to do so.

94. I have looked at whether assistance in construction is gained by taking into account clause A16 in the Terms of Use. This deals with what happens when errors occur relating to prices offered and bets placed. It enables the company to correct obvious errors. It refers to "blatant errors" in pricing (for instance for horse racing offering odds of 10,000 to 1 on a favourite horse, I suppose). But those errors are self described as blatant or obvious. In the Claimant's type of case no error would be obvious to the Claimant and it appears it was not obvious to the Defendant for the 13 other consumers who suffered the same error. In addition, clause 16.9 related to errors causing failures to operate in accordance with the Rules, so does not apply to the Claimant's case which was not such an error.

95. The Defendant did not put forwards a way of reconciling the Rules and B1 other than asserting that the Rules upon which the Claimant relied described how the entertainment features (i.e., the animations) of the Game worked whereas B1 stipulated how the outcomes of all Games were determined which was in effect by ignoring the Rules. The Claimant submitted that they were irreconcilable and I agree. I conclude that both parts of clause B1 are inconsistent with the Rules.

The priority clause

96. Presciently, the Defendant put a priority clause into the preamble to Part B, indeed directly above clause B1. This gave priority to the Rules over Part B. I consider that the natural, objective construction of these provisions and the objective intention of the parties discernible from the wording, in the context of the whole WCT, at the time when the contract was made, was that the Rules prevailed over B1 where there was inconsistency. The Jackpot shown on the player's screen under the Rules was the determinant of the win not the outcome of the RNGS, recorded in the Defendant's records. This does not mean that B1 is wholly irrelevant for the WCT. It may still apply to the other games covered by the WCT which have different rules but I have not seen the other games and rules, so I do not know.

Construction of clause B2

97. B2 provides that "*In the event of a systems or communications error relating to the generation of any result … or any other element of a Game, we will not be liable to you as a result of such errors …"*. The clause transfers all of the risk for the Defendant's errors onto the consumer. It goes on to provide the Defendant with the right to avoid the bet or play altogether. It is a wide liability exclusion clause covering errors caused by the Defendant but also by their sub-contractors and perhaps others. The clause does not distinguish in relation to the degree of fault for the "error". The errors could be due to recklessness, gross negligence, lack of proper quality control, lack of testing or any manner of defaults. Ignoring the issue over the type of error, I look first at whether an error did cause a result? I find that the scope of the words is so wide that it covers the Claimant's correct and valid win "result" under the Rules (which was contrary to the RNGS "result"). The Defendant submitted that this clause excludes liability to pay out on the Claimant's wining result, whichever it was. It potentially allows the Defendant to avoid paying, not only the £1 million, but also the £20,000. Both related to the generation of "any result". Neither party sought to submit differently.

98. The Defendant has admitted that there was an error caused by a human whom the Defendant employed or sub-contracted via Red Tiger. This person mis-mapped the software which affected the "result" shown on screen. The issue between the parties was whether this human error was included in the scope of the words "systems or communications error" on the proper construction of the clause. In the context of Part B and online gaming, I consider that the natural interpretation of "systems and communications error" could cover errors in the systems caused by the humans who programme them or could be restricted to hardware and software errors more remote

from and not directly related to human errors. So, B2 could potentially have different meanings for the term "systems and communications errors", the one including human errors and the other not including them. All systems and software are created, maintained and updated by humans so all resulting errors in systems and communications could eventually be traced back to humans. But some are better described as equipment errors, for instance broken or worn out equipment. Others could be software clashes, or incompatibility which may be more remote from direct human errors. Others could be power outage errors. The list is endless.

99. The Claimant relied on other clauses in the Terms of Use referring separately to "human errors" as distinct from "systems errors" to submit that the latter did not cover the former. The words "human error" were used in the following clauses: A10.3; A16.9 and C8, which stated:

> "8. ERRORS
> In the event of systems, communications or human errors relating to the generation of any result, bet settlement or any other element of a game, we will not be liable to you as a result of any such errors and we reserve the right to withhold payment and to declare all bets or plays in question void. If we discover the error after payment has been made, you shall indemnify and shall be liable to pay us, on demand, the relevant amount paid by us to you as a result of the error (and any costs sustained or incurred by us in recovering the relevant amount from you."

This is a very similar exclusion of liability clause but included "human error" expressly and separately, whereas clause B2 did not.

100. Because there are two potential constructions, I have considered the application of the contra proferentem rule of construction at common law and as set out in S.69 of the CRA. The Defendant has shown that the RNGS worked properly, all the systems worked properly, all the hardware worked properly and it all produced a win result for the Claimant's play. The error was due to a human who mis-mapped the software. The construction most favourable for the Claimant would be to hold that human error was not included. I am persuaded that, because the Defendant separated out the term "human error" in other clauses in other parts of the WCT, it was objectively, mutually intended that those words should have a separate meaning. The contra proferentem rule requires me to construe this clause in the way most favourable to the consumer and I consider that it is reasonable to do so. If the Defendant wanted to include human errors it could have said so in B2 as it did in C8, but it did not. I take into account that the systems and equipment worked exactly as they were programmed to do from 1.9.2020 and onwards for 48 days. The communications to the consumers (and the Claimant) in those days were just as the software directed. When a human mapped, programmed or coded the system in error the system operated in accordance with the programming. So, I construe B2 as applying only to systems and communications errors, not to direct human errors and not to the relevant error in this case.

Conclusions on construction

101. I have decided that, on their proper construction, the Rules had priority over B1 and provided that the result or outcome shown on the Claimant's screen was contractually what the Claimant was entitled to.

102. The result from the RNGS was different from the result displayed on screen and the difference was caused by an error in the software mapping, a human error. Whilst clause B2 is an exclusion clause covering liability for results arising from errors, I have decided that, on its proper construction, the scope of the words "*systems or communications error"* in B2 did not cover the relevant human error. Thus, I hold that, even if clause B2 was incorporated into the WCT, and was enforceable, the Defendant was not entitled under B2 to avoid liability to the Claimant to pay out on her win or to avoid the play itself in this case.

103. These decisions determine the applications. However, if I am wrong, I should consider whether clauses B1&B2 were incorporated into the WCT and were enforceable under the CRA.

Incorporation of clauses B1 and B2

104. I apply the law summarised above on incorporation at common law. Where the particular condition relied on involves a sort of restriction that is not shown to be usual in that class of contract and is onerous a trader must show that his intention to attach the condition of that particular nature was fairly brought to the notice of the other party. I must consider whether clauses B1&B2 were particularly onerous or unusual for this online game. Whilst it does not set out the legal test, when deciding what is unusual, I take into account the Guidance in the *Unfair Contract Terms Guidance* dated July 2015 issued with the CRA, which says at paragraph 2.22:

> "***Openness***
> 2.22 In order to achieve the openness required by good faith, terms should be 'expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously' to the consumer. Consumers should not be assumed necessarily to be able themselves to identify (particularly in longer contracts) terms which are important, or which may operate to their disadvantage or which would be likely to surprise them, if drawn to their attention"

Further, at para. 2.25:

> "**Consumers' circumstances – how they behave in practice**
> 2.25 Economic research has drawn attention to a number of factors that the CMA considers are potentially relevant to the assessment of fairness. One

> of these is that most consumers do not read standard written contracts thoroughly before making a purchase This finding cannot be considered surprising, and it is not clear how it would be practical or economically efficient for consumers generally always to read all the terms of all contracts into which they enter, given the number of transactions in which they are involved and other claims on their time. It remains important that terms should be transparent, since those who do read them should be properly informed. But lack of time and ability to do so is an important source of consumer vulnerability that unfair terms legislation seeks to address.

105. Considering B2, it provided the Defendant with the power to avoid paying any Jackpot to consumers despite the fact that the consumer (the Claimant) had done nothing wrong, let alone dishonest and had validly won a Jackpot under the Rules (which took priority over B1) and as displayed on her screen. She had faithfully played the Game and spent her money. The clause purports to permit the Defendant to avoid liability to consumers because of errors in what was displayed onscreen caused by the Defendant's own recklessness, or negligence (or that of its sub-contractors), regardless of the seriousness of the errors or the default. Further, this clause purports to exclude liability for breach of the CRA S.35 duty to provide digital content which is fit for its purpose (that being: effective, instant win, online gambling shown on screen) or the S.36. duty to provide digital content which is as described (gambling under WYSIWYG Rules). In this case the seriousness of the default by the Defendant was high in my judgment. It related to huge Jackpots which were incorrectly mapped on a Jackpot wheel. The right to avoid was also given regardless of the duration of the Defendant's errors and regardless of their complete failure to test their screen graphics after remapping. In this case the failure to test lasted 48 days, which I consider to be a long time and was undetected over what were probably thousands of plays. The right is given regardless of the number of other customers disadvantaged by the default before the Claimant, in this case 13 others. I also take into account that the right to avoid was not a one off. It purported to apply to every play, every day of every year. If, contrary to my decision above, B2 covered human errors, the Defendant's sub-contractors' errors led to the right to exclude liability to the Claimant for over £1 million which she had properly won in accordance with the Rules. I consider that to be unusual.

106. I consider that the right to avoid liability adversely affected the Claimant seriously because she was deprived of what she was shown as a big win of over £1 million in her screen. Whilst B2 did not put any requirement to act on the Claimant's shoulders or any requirement to pay anything more, I consider that excluding liability for a screen displayed Monster Jackpot is onerous to the consumer in the context of (1) her reasonable expectation of WYSIWYG as set out in the Rules; (2) the emotional turmoil and perhaps trauma to her and (3) the financial loss of the money she was told she had won. Taking away a gambler's winnings, determined properly under the relevant game rules, undermines the whole purpose of the activity, undermines apparent fair dealing

and is properly to be described as onerous and unusual, in these circumstances where the Rules do not include any mention that this would or could happen.

107. I consider that "onerous" has a broad contextual meaning. I have ruled that, absent clause B2, the Defendant was liable to pay the Claimant. This is an exclusion of liability clause and such clauses are generally more likely to be onerous (see *Andrews* on *Exclusion Clauses*, 13th Ed. 2022 at para. 1.056). Here, the echos of the theoretical facts raised in para. 67 of the judgment of Jay J. which I italicised above in *Parker,* are audible. B2 is not a validation clause. Nor is it a "how you win this game" clause. It was not referred to in the Rules. It undermines what I have found was the common intention of both parties, that what the consumer sees is what she gets.

108. Further and importantly, when considering the effects of the clause, it governs which party bears the financial risk for the Defendant's errors, however gross, negligent or reckless they were. That risk could have been apportioned, allocated to either party or insured against. It could have been dependent on the blatancy, obviousness or seriousness of the default, but it was not so titrated. In B2 the risk is imposed wholly on the consumer. It was not, as occurred in *Interfoto*, due to the consumer's failure to act (to return photos), but due to the Defendant's failure properly to programme its software and its failure to test or quality control over 48 days. When a trader puts all the risk on a consumer for its own recklessness, negligence, errors, inadequate digital services and inadequate testing, that appears onerous to me. So, my initial view is to accept the submission of Mr Baldock that clause B2 was unusual and onerous, within the proper meaning of those words.

109. I must next consider whether the previous cases affect my initial view. Some show the efforts of various gaming companies to draft liability avoiding clauses for errors. In *Spreadex* a clause was held to be unusual and onerous, so not incorporated. Likewise in *Green.* In *Longley* the case turned on different issues. In *Parker,* the ratio related to the identified £10 win being shown clearly on screen and in compliance with the games rules and procedures. The validation of results term was also determined as incorporated, usual and not onerous. A liability exclusion was not the issue. It is clear that each case is fact specific.

110. The Defendant provided no evidence about whether clause B2 was usual despite being in the best position to do so having huge experience of the industry. The Claimant expected that what she saw would be what she would get. She, and I consider that most consumers, would be wholly unaware of any actual errors in gaming software at the time of making their contracts and I doubt they would be thinking about errors either. I consider that an objectively reasonable player would expect that a large organisation, like the Defendant, would ensure that their software was operating correctly. Likewise, I consider that the Defendant itself would expect its suppliers to get their programming and mapping right and in particular mapping about huge Jackpots and would test it after making alterations to mapping.

111. So, clause B2 is an exclusion clause for all liability for the Defendant's errors or any gravity and an unlimited right to void plays. Its effect is to deprive players, not only of their play, but also of any winnings, even those Jackpots to which they should have been entitled had the software been properly mapped. The Defendant accepts that the RNGS awarded the Claimant over £20,000, but clause B2 gave them the right to take that very substantial sum away. The fact that the Defendant has not chosen to reclaim the £20,000 odd they paid to the Claimant is nothing to the point. One can envisage many types of clauses to deal with software errors which are far less draconian. A clause which entitles the Defendant to avoid paying only the excess sum caused by the error, for instance. Before ever reaching the need for an exclusion clause the Defendant could have put a validation clause into the Rules for large Jackpots which would have avoided the mischief. See for instance the Camelot rules which made it clear that wins over a certain level needed validation, in *Parker*. The Defendant did not do that. In my judgment the man on the Clapham Omnibus or the woman on the Sheffield tram, if asked, would say that for online gambling, it would be unusual and onerous for the company to be able to avoid all liability for its own recklessness or negligence and long term lack of quality testing and for the consumer to bear all of the financial risk arising therefrom. So, taking all the circumstances into account, I consider that clause B2 was unusual and onerous.

112. **Clause B1**. I have ruled above that B1 does not apply to the Claimant's contract because it is inconsistent with the Rules and the latter take priority. So, incorporation does not need to be determined. If I am wrong about inconsistency and priority, then I should consider this and do so below. The following paragraph will, to an extent, be confusing because I will be working on the counter factual basis that B1 prevailed over the Rules and WYSIWYG was not the test for a win, instead the RNGS outcome was.

113. Is B1 unusual and onerous? Of itself there is nothing unusual in a clause saying the the computer decides the win. Both parties knew and expected that. However, unusualness depends on the circumstances. B1 seeks to substitute a different determinant for a player's Jackpot win to that which was set out in their own Rules. I have sought to explain above that objectively, I find that it is likely that players of online games expect that what they see is what they get and that the Rules enshrined that expectation. That transparency reflects what is required in S.68 of the CRA. If this expectation is enshrined expressly by the Rules then, it seems to me that, it would be unusual for it to be dashed by a standard term or condition so absolute as the terms of B1, saying the opposite. The second sentence of B1 makes the Defendant's internal records supreme, as evidence of whether there was a win whatever the size of the win. What the consumer sees on her screen is made irrelevant. I find that this clause is objectively unusual and unexpected for any consumer playing this game under these Rules who would expect the screen to provide both the determination of or at the least valid prima facie evidence of the win, but there was no such notice, rule or caveat in the Rules.

114. Next, is clause B1 onerous? Firstly, online gaming is determined by software. Both parties knew that. The software product for this Game was to be shown on screen, both parties knew that. The Defendant was under a duty arising from the CRA to provide digital content which was fit for purpose (see S.35) and was as described (see S.36). The losses and wins were to be shown on screen and in this case the Rules stated that the appearance of Jackpot symbols in the reels in stage one and the final stopping of the wheel of fortune in stage two, determined the Jackpot tier which was to be won. The Rules did not say that the display may be inaccurate and is only indicative. Nor did they say that the display is subservient to the computer records. This makes the first part of B1 unexpected and disadvantageous for the Claimant. If the result is not instant from the screen but overturnable later she would not know what she owned financially until later. Perhaps much later (although in this case the correction came quickly). Secondly, the second sentence makes an internal storage file *definitive* evidence of whether a player has won a Jackpot, not the player's display screen. This has many disadvantages for the player. Firstly, it is invisible, before, during or after the play. Secondly, it is unchallengeable, being definitive. Thirdly, it restricts the player's right or ability to rely on her own screen as evidence at all. Fourthly, it prevents a challenge to the correct functioning of the RNGS software itself or to the communication from the RNGS to the records or the accuracy of the recording process. All a player can do, to challenge the result, is to ask what was in the records. That may take days or weeks. This is similar to the gas meter example given in the 2015 *Guidance*. It would be less disadvantageous if it were only prima facie evidence. There may, for instance, be a fault in the RNGS processor, or software, or a miscommunication between the RNGS and the server or a server file storage error. The player is not entitled to prove those occurred. I can see that for small bets and wins, commercial good sense would support restrictions on the amount of investigation beyond records, but for wins of substance and especially £1 million pound wins, such a clause is onerous in my judgment because it restricts the player's power to challenge the accuracy of the records and the RNGS output or the functioning of the software between that and the storage files. For these reasons I accept Mr Baldock's submission that B1 by the combination of both of its sentences, is a conclusive evidence clause and is onerous.

115. Therefore, I consider that both the sentences in clause B2 were unusual and onerous, sufficient for the Defendant to be required to make reasonably sufficient efforts to bring them to the Claimant's attention, if it was to be incorporated into the contract.

Efforts to bring B1 and B2 to the Claimant's attention at the time the contract was made

116. Did the Defendant make reasonably sufficient efforts to bring clauses B1&B2 to the Claimant's attention before the contract was made? The relevant facts were as follows. The Defendant had long ago lost the 2011 contract; it produced no evidence that it sent out a customer notice to the Claimant when the terms changed in August 2020; the exclusion clause was not entitled "Exclusion of Liability for our mistakes"; it was not listed in the index to the Terms of Use; it was not mentioned or referred to in the Rules;

it was not in bold or capitals or highlighted; it was in the middle of 45 pages of small print; and it was not referred to on screen when the Claimant started playing on the day or at all. Furthermore, the WCT consisted of multiple differently located documents which made it difficult for consumers to see the whole contract in one place at one time. If I look at this in comparison to the facts of *Shoe Lane Parking*, the terms were not on the ticket machine. The Rules were on the pillar opposite and the Terms of Use were on another pillar in the car park altogether and were very long.

117. I also take into account that, internally, both Parts A and B expressly required the Defendant to give as much notice of the amendments as was reasonably practicable. I find that they breached their own terms by failing to provide the Claimant with a consumer service announcement of notice of the 2020 terms and failing to give as much notice as was reasonably practicable.

118. The Defendant did not, to use Lord Denning's classic example, print them in big red letters or put a big red hand or finger pointing towards them. They did not put a warning or notice on any pre-contract screens, or even in the Jackpot Game screen. They did not put the clauses in a bold box or put the text in capitals in the Conditions.

119. In my judgment the Defendant failed reasonably and sufficiently to bring clauses B1 and B2 to the Claimant's attention. Thus, at common law, clauses B1 and B2 were not incorporated into the WCT. So, if I am wrong about the analysis I set out above on construction, the Defence fails in any event on failure of incorporation.

Enforceability under the CRA

120. It is not necessary for me to consider the CRA in the light of the decisions made above. However, I do so in case I am wrong about both construction and incorporation. Bear in mind below that, contrary to my findings above, this section of the judgment assumes B1 and B2 are incorporated, prevail over the Rules and do seek to exclude liability for human errors.

Contract for the supply of digital content

121. The Claimant raised S.s 35 and 36 of the CRA in verbal submissions but not in her skeleton or pleadings. Whilst the Claimant asserted this was a contract for the supply of digital services and the Defendant denied this, no substantive submissions were made about this issue either in the skeleton arguments or at the hearing. The amended pleadings properly highlight that the issue relates to the interpretation of S.33(4) of the CRA but I heard no submissions on that section. No case law was provided to me to explain how that section operates. Because they were raised so late I do not consider it fair to the Defendant to determine this issue. So, I proceed on the agreed basis that this was a contract for the supply of services covered by the CRA.

Contract for the supply of services

122. A term in a trader's standard terms is unfair if, contrary to the requirement of good faith, it causes a *significant imbalance* in the parties' rights and obligations under the contract to the detriment of the consumer. Whether a term is fair is to be determined taking into account the nature of the subject matter of the contract, and by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract.

123. I have ruled that this Game was expected by the Claimant objectively, as a reasonable consumer, to be WYSIWYG. I have found that objectively the Defendant would have been thought also to have intended the Game to be WYSIWYG. I have ruled that the Rules enshrined this approach. Whilst in my judgment WYSIWYG is a main example of good faith between a trader and a consumer in online gambling, alongside adherence to return to player pay out ratios, errors can occur and game rules and procedures setting out clearly how an online game will only be won if no error has occurred and/or requiring verification of wins, in particular large jackpots, do not inherently cause an imbalance. For the reasons explained by Andrews LJ in *Parker*, they are necessary to make clear these crucial matters in online gaming contracts. So, no imbalance is caused merely by explaining clearly, in a set of game rules or procedures, or terms that the computer (or the RNGS) will determine the win, not the screen animations. Thus, I do not consider that the first sentence of clause B1, inherently created an imbalance of itself. But, in this Game it contradicted what was set out in the Rules and abolished the player's expectation, expressly confirmed by the Rules, that what the Defendant's computer displayed in digital form on her screen would determine her results. It is the contradiction between the Rules and the Conditions which creates the imbalance. Under the Rules the player knows what is being determined and sees the outcome. Under B1 the player does not know her result and, under the second sentence of B1, her screen provides no probative evidence of the result. This combination of secret determination off screen and abolishment of the evidential probative value of the player's screen display, put all the power into the Defendant's hands and disempowered the player. The equivalent in live roulette, would arise where the player who bet on number 13 and sees the ball stop on the roulette wheel on number 13, is not allowed to rely on what she sees. A term allowing the house to assert that the ball actually landed on another number (say zero) would be unusual and disempowering. It is equivalent to the gas meter reading being decisive in the examples in the *UCTA Guidance 2015.*

124. I consider that, taking into account what the Rules say, the nature of the services being provided and all the circumstances, the first sentence of clause B1, which combines with the second sentence, both create a serious imbalance in the parties' rights and obligations, so undermines good faith. It abolishes the Defendant's obligation to pay out for the on-screen win. It takes away the Claimant's right to claim her on screen win. As for the second sentence on its own, I consider that it is an conclusive evidence clause which puts the player at an unreasonable

disadvantage when seeking to prove that, in accordance with the Rules, the screen display accurately displayed a win and that there was no systems or communication error. It prevents the player from investigating malfunctions of (1) the Defendant's RNGS hardware and software or (2) the hardware or software communicating the outcome to the storage files or (3) the functioning of the storage system. Likewise for challenges to any sub-contractors' equipment or software. The Claimant's right to gain expert evidence and to litigate to prove such is abolished.

125. As for B2, in relation to the first part of B2, again there is nothing inherently unfair in a clause excluding liability for the excess sums caused by displayed wins which were actually losses under the Rules/WCT due to a specified no fault error (say a power outage). But this clause excludes liability for valid wins too. This clause creates a very wide exclusion. Even on the Defendant's own case the Claimant won over £20,000 but clause B2 would entitle the Defendant to avoid all liability. Furthermore, this clause entitles the Defendant to avoid liability for Defendant's own recklessness, gross negligence, negligence and long term failure properly to test. The breadth of the defaults covered is substantial. A more focussed clause would create less imbalance. For theses reasons, in my judgment, clause B2 created a significant imbalance between the parties which I consider breaches the requirement of good faith.

126. As for the right to treat the play as void in B2**,** the same reasoning applies. Therefore, I rule that clauses B1&B2 and each of the 4 sentences therein are unenforceable for being in breach of S.62 of the CRA.

Conclusions

127. For the reasons set out above I rule that:

(1) The Rules of the Game applied and determined that the jackpot wheel shown by the Defendant's software on the Claimant's digital screen determined that she had won the Monster Jackpot.

(2) If clause B1 was incorporated in the contract it was inconsistent with the Rules such that priority had to be determined. The Rules took priority over clause B1 by reason of the preamble to Part B. Thus, the Claimant won the Monster Jackpot under the contract.

(3) The scope of clause B2 did not cover human errors in programming the screen display of the Game and hence did not entitle the Defendant to make the Claimant's play void and/or to exclude liability for the Claimant's win shown on her screen.

(4) Clauses B1&B2 of the Conditions in Part B of the WCT were not incorporated into the contract between the Claimant and the Defendant because they were unusual and onerous and were not adequately brought to the Claimant's attention.

(5) If clauses B1&B2 were incorporated, they were unenforceable under the *Consumer Rights Act 2015*.

Therefore, summary judgment should be entered for the Claimant.

END