Neutral Citation Number: [2022] EWHC 977 (QB)

Case No: QB-2020-000869

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2022

Before :

MRS JUSTICE ELLENBOGEN

- -

Between :

James Robert Longley	**Claimant**
- and -	
(1) PPB Entertainment Limited	
(2) PPB Counterparty Services Limited	
(3) PPB Games Limited	**Defendants**

- -
- -

Mark James (instructed by **Stewart-Moore Solicitors**) for the **Claimant**
Kajetan Wandowicz (instructed by **Paddy Power Legal Team**) for the **Defendants**

Hearing dates: 28, 29 & 30 June 2021

- -

APPROVED JUDGMENT

Mrs Justice Ellenbogen DBE:

Introduction

1. In these proceedings, the Claimant, Mr Longley, claims the sum of £257,400, plus statutory interest, arising from an alleged breach of contract by the Maltese-registered Defendant companies, which operate the business of a bookmaker and are licensed to take bets from customers in Great Britain by the Gambling Commission. They trade, collectively, under the name 'Paddy Power', which it is convenient to use throughout this judgment.

The undisputed facts

2. The majority of the facts giving rise to these proceedings are not in dispute and are summarised below.

3. Mr Longley has an account, 'jameslongley1', with Paddy Power, enabling him to place telephone bets and to receive any winnings. On Saturday, 21 September 2019, Mr Longley telephoned Paddy Power's telephone betting line, seeking to place an 'each way' bet of £1,300 on a horse named Redemptive, at 16/1, in the 19:20 race at Wolverhampton ('the Race'). In an each way bet, the total stake is double the notional value of the bet. Half of that total stake relates to a bet that the horse will win the race and half to a bet that it will place high in the race (usually, and in this case, within the first three places). If the horse wins, both halves of the bet succeed. If it places, only half of the bet is successful and half of the total stake is lost. The odds offered by bookmakers relate to a win. In this case, Paddy Power's odds for the placing part of the bet were 4/1.

4. The Dial-a-Bet operator to whom Mr Longley spoke was Ms Kendra Farrugia, who was based in Malta. The size of the stake was such that the computer system would not allow the bet to be placed without prior human approval. Ms Farrugia placed Mr Longley's call on hold whilst she contacted a trader in Ireland, Mr Sean Heffernan, whose role it was to decide whether to accept a bet which exceeded the system limit. Ms Farrugia informed Mr Heffernan that Mr Longley was seeking to place a bet of £13,000 each way. Mr Heffernan then sought authority to place such a bet from Mr Aidan McCarthy, Racing Risk Manager. Mr McCarthy granted authority, as requested by Mr Heffernan. Ms Farrugia then informed Mr Longley that she had cleared the bet with a trader. The two parts of their conversation ran as follows:

KF: *Paddy Power Kendra speaking. Can I have your account number or username please?*
JL: *Yeah it's Jameslongley1.*
KF: *Right, and your name please?*
JL: *James Robert Longley.*
KF: *How can I help you Mr Longley?*
JL: *Er… Can I have… Wolverhampton… 7.20…*
KF: *Wolverhampton 7.20, yep.*
JL: *Thirteen hundred pounds each way please.*
KF: *Thirteen hundred each way. On what please?*
JL: *Redemptive*
KF: *Number 6, Redemptive at 16/1. Is that the horse you are looking for, Sir?*
JL: *Yeah, yeah, yeah, yeah.*
KF: *Alright, so I'm getting max stake of 203, would you give me just a quick moment to call up a trader to see if I can get that cleared for you?*
JL: *Yeah, we need to up the stakes.*

KF: *Yeah I'm just going to have a look, OK?*
JL: *Yeah.*
KF: *Thank you. Please hold.*

[…..]

KF: *Hi, I got that cleared with a trader for you, if you like?*
JL: *Yeah, lovely.*
KF: *Alright, so that's going to be twenty-six thousand coming from Jameslongley1, is that correct?*
JL: *That's it, yeah*
KF: *Set for clearance*
JL: *Thank you*
KF: *And your bet is on fine Mr Longley*
JL: *Lovely*
KF: *Yeah that's on fine Sir*
JL: *Cheers, thank you.*

The telephone call then ended. The conversations between (1) Ms Farrugia and Mr Longley, and (2) Ms Farrugia and Mr Heffernan, were recorded and the transcripts have been produced in evidence. I have listened to the audio-recordings of those conversations.

5. Paddy Power's spreadsheet of all bets placed by Mr Longley that day records that an each way bet of £13,000 was placed, at 17:36. Mr McCarthy arranged for some of the liability on the Race to be hedged. Following his discussion with Ms Farrugia, and before the Race, the Claimant checked, via the Paddy Power app, that £26,000 had been deducted from his account. Paddy Power's log-in records show that he successfully logged-in to his account at 18:08 on that day. Redemptive won the Race and £286,000 was credited, automatically, to Mr Longley's account, calculated as follows: (£13,000 x 16 = £208,000) + the stake of £13,000 + (£208,000 x 0.25 = £52,000) + the stake of £13,000.

6. At 19:51 that same day, Mr McCarthy wrote to members of the Racing Leadership Team, under the subject 'Massive Overlay':

> *'I have been guilty of massively overlaying a horse this evening. A PP Customer James Longley…came on looking for a bet in the 7:20 Wolverhampton with Sean Heffernan £13k EW @ 16/1 Redemptive — Sean asked for my advice, I looked at the customers business for the day 16 bets & he seemed to be chasing for some reason the liability went out of my mind & I told Sean to accept the bet. The horse has won at a price of 12/1, I did put up some trades @ 19, 20 & 21 managing to get €1k matched @ 19.*
>
> *I can only apologise for this massive error on my part & I cant explain why the liability didn't register with me.'* (sic)

7. By e-mail sent at 07:31 on Monday, 23 September 2019, Mr McCarthy asked Customer Services to listen to the call between Ms Farrugia and Mr Longley, chasing for a reply 24 minutes later. At 08:47, Mr Martin Hynes, of Customer Services, replied:

- *Customer requests £1300 (**Thirteen Hundred**) E/W on Redemptive in the 19:20 at Wolverhampton. Operator calls this back when taking note of the bet, correctly saying £1300 (**Thirteen Hundred**) EW at this point.*

- *He got a max stake of 203 so operator advised she would call for clearance.*

- *The operator advised bet clearance the customer was looking for £13,000 (**Thirteen Thousand**) E/W (This was an error but never rectified by the operator), This was cleared by Sean Heffernan after he looked into it.*

- *Operator goes back to the customer advising "I got that cleared from a trader for you" and says that it will be £26,000 coming from the a/c and was that ok, the customer confirmed that was correct & bet was placed.*

- *If you can let me know if you want any action taken on the a/c* (sic)

8. At 08.50 that same day, Mr McCarthy asked the customer services team to amend the bet to £1,300 each way. The bet was subject to 'resettlement' at 09:15; the sum of £286,000 was removed from Mr Longley's account and replaced with a credit of £28,600. Mr Longley's claim is for the difference between those two sums, together with interest.
9. At around 15:44 on 23 September 2019, at his earlier request, Mr Longley had a telephone conversation with his Relationship Manager/VIP Relationship Executive, Mr Joseph Burns, whose note records:

> *'Spoke with James* [Longley]. *Confirmed that he wanted 1.3K EW on the horse but when he saw it said 13K he decided to let it ride as he was confident. offered him 2K cash as a GWG*[1] *due to the inconvenience caused. asked me to sent it in an email to him and he'll think about it.*' (sic)

That offer was confirmed by e-mail of the same date, sent at 16:50.

10. At 17:10 that day, Mr Longley sent an e-mail to Mr Burns, requesting a copy of the telephone betting call. He repeated that request by text message sent at 12:08 on 24 September. Mr Burns replied stating that he had already requested a copy and that he would let Mr Longley know as soon as he had received a response. At 15:03, Mr Burns informed Mr Longley that he had managed to get his boss to increase the proposed settlement offer to £3,500 in cash. In the meantime, Mr Burns had received a copy of the digital recording of the telephone call and been advised to play it to Mr Longley over the telephone, rather than provide him with a copy. It was played to Mr Longley, Mr Burns believes 'at least twice', by prior arrangement, at 09:30 on 25 September. On 26 September, at 13:20, Mr Longley sent a text message to Mr Burns, stating, *'The more I think about it the bet should be paid out but let me know what you come up with and we can discuss later.'* Shortly thereafter, Mr Burns telephoned Mr Longley to discuss Paddy Power's offer of settlement. Mr Longley told him that he had taken advice and was rejecting that offer. Mr Burns sent a summary of their discussion to certain individuals within Paddy Power at 13:34 that day:

[1] meaning goodwill gesture

'Just spoken with the client and he has rejected the initial offer. After listening to the call he believes that even though he initially asked for 1.3k EW he is also heard saying that he wants to increase the stake. He has then said that he clearly agrees with the operator when asked if the £26K stake is OK. He also was on the account during the day and has seen the £26k bet in his account and was happy with it.

…'

11. On 26 September 2019, Mr Burns telephoned Mr Longley and informed him that Paddy Power's handling of the error had been correct, that it had been right to resettle the bet at £1,300 each way and that it would not be increasing its settlement offer. On 1 October 2019, he received a copy of Mr Longley's solicitors' letter to Paddy Power, after which he had no further dealings with Mr Longley.

12. Meanwhile, Paddy Power's senior management had instigated a human resources investigation into Mr McCarthy's conduct. By e-mail from Mr Séamus Hazlett, Head of Racing Risk, to a Ms Michelle Keegan, sent at 11:09 on 24 September 2019, Mr Hazlett observed that Paddy Power's 'lay to lose' appetite was £3,250 per client and that, *'the problem here is that we have laid the client a bet 44*[2] *times the maximum the system would allow to ordinarily have on.'* Amongst other matters, Ms. Keegan was invited to investigate:

    - *What was Aidan thinking that led to him to make a decision to lay this bet? How can he justify this decision?*
    - ...
    - ...
    - *Why did Aidan not escalate the matter to a senior member of the racing team on Saturday evening before the race was run?*
    - *Having learned that the customer only wanted £1,300 each way on the horse on Monday morning, why did Aidan not seek direction on what to do next rather than unilaterally deciding to void the bet and restrike it with the correct amount?*
    - *Why did Aidan not think it appropriate that the customer be contacted about these large adjustments we were making to his account?*

13. The outcome of the investigation has not been disclosed by Paddy Power and specific disclosure was refused by Master Sullivan on 19 May 2021. Amongst the recitals to her order, dated 19 May 2021, was the following: *'AND UPON the Defendants confirming that Mr McCarthy's subjective intention on 21 September 2019 was to approve the stake of £13,000'.*

[2] The basis for this figure is unclear.

Summary of the parties' respective positions

14. Mr Longley's position is that, notwithstanding his original intention, the agreed bet which he placed was for £13,000 each way — by informing him that £26,000 was being taken from his account, Ms Farrugia made a counter-offer to enter into that bet, which Mr Longley accepted by confirming that that was the correct amount. Alternatively, so Mr Longley contends, his initial offer was to wager a stake of £1,300 each way, to which Paddy Power responded by indicating that it would accept a bet of £13,000 each way, whereupon he made an offer to place a bet in that latter sum, which Paddy Power accepted. In either event, it is said, Paddy Power is in breach of contract by failing to pay him the winnings which ought to have resulted from the larger bet.

15. Paddy Power's position is that there was no such contract, for the following reasons:

    15.1. The proper, objective construction of the second conversation between Ms Farrugia and Mr Longley is not as he would have it; alternatively

    15.2. Either there had been a contract for a bet of £1,300 each way, by reason of Paddy Power's unilateral mistake, or there had been no contract, by reason of the parties' mutual mistake; in the further alternative

    15.3. In the event that there had been a concluded contract for an each way bet of £13,000, by operation of clause 16 of its standard terms and conditions, under which Mr Longley held an account ('Clause 16') Paddy Power was not liable to pay any winnings awarded as a result of any human error or mistake and Mr Longley was liable to refund any such winnings.

16. Mr Longley disputes that there has been any material mistake and, hence, the application of Clause 16. In any event, he contends that, if the clause does apply, Paddy Power's exercise of its discretion thereunder was irrational, capricious or perverse. Alternatively, he says, the clause is unenforceable as being unfair, by operation of section 62 of the Consumer Rights Act 2015 ('the CRA').

Material standard terms and conditions

17. Clause 16 is set out, in full, below, in which the passages underlined are those upon which Paddy Power relies:

    *'**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.

16.3. In the event "each way" is offered in a market when the pricing of the market clearly indicates that it should not have been, Paddy Power reserves the right to settle this bet as "win only". Should the selection be part of an Each Way multiple, the entire multiple will be settled "win only".

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.

16.5. Should funds be credited to a customer's Account in error, it is the customer's responsibility to notify Paddy Power of the error without delay. Any winnings subsequent to the error and prior to the notification of Paddy Power, whether linked to the error or not, shall be deemed invalid and returned to, or otherwise be reclaimable by, Paddy Power.

16.6. Any monies which are credited to your Account, or paid to you as a result of an error shall be deemed, pending resolution under Clause 16.1.1 to be held by you on trust for us and shall be immediately repaid to us when a demand for payment is made by us to you. Where such circumstances exist, if you have monies in your Account we may reclaim these monies from your Account pursuant to Clause 18.2. We agree that we shall use reasonable endeavours to detect any errors and inform you of any such errors relating to you, your engagement with us, or your Account, as soon as reasonably practicable.

16.7. As soon as you suspect or become aware of an error you shall:
i. immediately cease play; and
ii. inform us as soon as reasonably practicable of any such error or suspected error.

16.8. Where you have used monies which have been credited to your Account or awarded to you as a result of an error to place subsequent bets or play games, we may cancel such bets and/or withhold any winnings which you may have won with such monies, and if we have paid out on any such bets or gaming activities, such amounts shall be deemed to be held by you on trust for us and shall be immediately repaid to us when a demand for payment is made by us to you.

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.

16.10. By using our Services, you understand that we reserve the right to change or remove any of these Services at any time.'

18. It is also convenient to set out here clauses 8.4 and 12.6:

'***8. Placing Bets***

…

8.4. Each Bet will be given an individual number as confirmation of the Bet. Bets will be valid (subject to meeting the criteria for placing a Bet laid down in the Terms of Use) if accepted by the Paddy Power Bet Server, whether or not the customer receives the Bet code. We are not liable for the settlement of any Bets where we have not issued a written confirmation of acceptance of the Bet or where we are unable to display that Bet in the 'My Account' pages of the Websites. It is the customer's responsibility to ensure that all of the details of their Bets are correct. Once a Bet has been confirmed by Paddy Power, that Bet cannot be cancelled by the customer. If you have any concern as to whether your Bet has been accepted, please log in and go to the 'My Account' pages of the Websites where details of all live Bets entered into by you will be displayed.

…';

*'**12. Dial-a-Bet***

…

12.6. Bet Confirmation

Minimum (currently €10 or £10) and maximum stakes apply, as will be indicated to you where relevant. It is your responsibility to ensure that our Dial-a-Bet agent has interpreted your instructions correctly. These will be repeated back to you during the call. At the end of the call you will be asked to confirm that the total stake is correct. All Bets will stand in accordance with our interpretation of your instructions. Should you wish to have your Bet(s) repeated to you in its (their) entirety this can be requested from the telephonist at the time of Bet placement. Currently our minimum stake per call is £10 or €10, maximum stakes may also apply and you will be informed of this where relevant.

…'

The CRA

19. It is common ground that Part 2 of the CRA applies to the contract between Paddy Power, as a trader, and Mr Longley, as a consumer, being a consumer contract within the meaning of section 61(3). The following are the material sections of the CRA:

> *'**Section 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) ….*
>
> *(3) This does not prevent the consumer from relying on the term … 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.*
>
> *…'*
>
> ***'Section 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.*
>
> *…'*
>
> *'**Section 68 Requirement for transparency***
>
> *(1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent.*
>
> *(2) A consumer notice is transparent for the purposes of subsection (1) if it is expressed in plain and intelligible language and it is legible.*
>
> *'**Section 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.

…'

'Section 70 Enforcement of the law on unfair contract terms

(1) Schedule 3 confers functions on the Competition and Markets Authority and other regulators in relation to the enforcement of this Part.

…'

'Section 73 Disapplication of rules to mandatory terms and notices

(1) This Part does not apply to a term of a contract, or to a notice, to the extent that it reflects—

(a) mandatory statutory or regulatory provisions, or

(b) ….

(2) In subsection (1) "mandatory statutory or regulatory provisions" includes rules which, according to law, apply between the parties on the basis that no other arrangements have been established.'

'Section 76 Interpretation of Part 2

(1) In this Part—

…

"transparent" is to be construed in accordance with sections 64(3) and 68(2).

…'

'SCHEDULE 2

CONSUMER CONTRACT TERMS WHICH MAY BE REGARDED AS UNFAIR

PART 1

LIST OF TERMS

…

3 A term which has the object or effect of making an agreement binding on the consumer in a case where the provision of services by the trader is subject to a condition whose realisation depends on the trader's will alone.

…

7 A term which has the object or effect of authorising the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the trader to retain the sums paid for services not yet supplied by the trader where it is the trader who dissolves the contract.

…

11 A term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.

…

13 A term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided.

…

16 A term which has the object or effect of giving the trader the right to determine whether the goods, digital content or services supplied are in conformity with the contract, or giving the trader the exclusive right to interpret any term of the contract.

17 A term which has the object or effect of limiting the trader's obligation to respect commitments undertaken by the trader's agents or making the trader's commitments subject to compliance with a particular formality.

…'

'SCHEDULE 3

ENFORCEMENT OF THE LAW ON UNFAIR CONTRACT TERMS AND NOTICES

…

Application for injunction or interdict

3(1) A regulator may apply for an injunction or (in Scotland) an interdict against a person if the regulator thinks that—

(a) the person is using, or proposing or recommending the use of, a term or notice to which this Schedule applies, and

(b) the term or notice falls within any one or more of sub-paragraphs (2), (3) or (5).

…

(3) A term or notice falls within this sub-paragraph if it is unfair to any extent.

…

(5) A term or notice falls within this sub-paragraph if it breaches section 68 (requirement for transparency).

(6) A regulator may apply for an injunction or interdict under this paragraph in relation to a term or notice whether or not it has received a relevant complaint about the term or notice.'

The witness evidence

20. I received live evidence from Mr Longley, and, on behalf of Paddy Power, from Mr Burns. I also considered the short witness statements of, respectively, Ms Farrugia and Mr McCarthy, each dated 26 March 2021. In a hearsay notice served by Paddy Power on the same date, it was said that it was not proposed to call either of them '*because it would be disproportionate and unnecessary to call them as witnesses in circumstances where their statements deal with matters which are not understood to be contentious between the parties'*. No application for permission to cross-examine either witness, under CPR 33.4, had been made on behalf of Mr Longley.

Mr Longley

21. Mr Longley is a wealthy man, having sold a business in 2018 for £10M, with a further £5M being contingent upon certain targets being met. At the date of trial, all targets had been hit and signed off, such that Mr Longley was to receive the full balance, within a few days. Since selling his business, Mr Longley has invested in a number of other business enterprises. To the best of his recollection, he has had an online account with Paddy Power for at least 10 years. In his own estimation, he is not a particularly successful gambler; he places relatively large bets, for fun, knowing that he need not worry about the effect of any losses on his personal finances. Since 2013, prior to which he had not placed many bets, his account is 'down' by £106,000, including £49,000 which he has withdrawn. Most of his betting is on horse-racing. So Mr Longley recalled, during the day prior to the Race he had won £60,000. His opening balance on 21 September 2019 had been £78,785.03. Having placed a number of unsuccessful bets that day, shortly before placing the bet the subject of this claim Mr Longley's account had stood at £59,335.

22. Mr Longley's evidence was that, initially, the operator to whom he had spoken had told him that the maximum stake which Paddy Power would accept was £200. He had had no interest in placing a bet at that level. He had told the operator that he wished to place a bet of £1,300 each way on Redemptive, in the Race, a stake which he had selected at random. Consistent with his experience, the operator had offered to speak to a trader, in order to circumvent the maximum stake; any such approval always being conveyed through the operator. So far as Mr Longley could recall, he had never spoken to a trader.

23. Mr Longley stated that he had been very confident that Redemptive would, at least, finish the Race in the first three places and that he had considered the odds of 4/1 to have been very generous. He had also considered Redemptive to have had a decent chance of winning the Race. If Redemptive were to place, but not win, on a £13,000 each way bet, he would receive £39,000 (being 4 x £13,000, less half of the stake which related to the bet to win). If it were to win, he would receive £260,000 (being £208,000, plus £52,000 for the place). Whilst a total bet of £26,000 was likely to have been the highest he had ever placed using his Paddy Power account, it had not represented a great deal of money relative to his personal wealth. After the call, but prior to the Race, he had checked the Paddy Power app to ensure that £26,000 had been taken from his account, which had been the case, in line with his expectations. He had assumed that Paddy Power had been happy to take such a large bet on the basis of his losses earlier that day. At paragraph 26 of his witness statement, Mr Longley stated,

> *'I understand that the defendants say that they should not have to pay out the major part of my winnings… because of a mistake. While I initially sought to place a bet at £1,300 each way I was happy to place a bet at £13,000 each way as soon as I was offered the opportunity of doing so and that is what I did. Had that not been the case, when the Operator asked me to confirm that £26,000 will be coming out of my Account for the stake for the bet, I would not have done so. However I clearly confirmed a bet with a stake for £26,000. Further, as explained above, I had another opportunity to correct the bet when I checked the balance of my Account on the App. I did not seek to make any correction then either.'*

24. Under cross-examination, Mr Longley stated that he had been listening to what the operator had been saying during their telephone call. He had understood that she would be calling the trader to see whether his requested bet of £1,300 each way could be authorised and that it had been that bet to which she had been referring when informing him, *'I got that cleared with a trader for you, if you like?'* Whilst Paddy Power had never before offered him ten times his suggested stake, he had placed more money on a bet, when his initial stake had been accepted. Mr Longley went on to state that he had placed a bet on many occasions and had known what was coming on the call. Whilst £26,000 had been confirmed as the sum which would be coming out of his account, his understanding had been that Paddy Power had been accepting a bet and that the operator had told him that it would be in the sum of £26,000. At that time, he had had no insight into, nor had he given any thought to, the conversation which had taken place between the operator and the trader. He had had no awareness of how or why they had got to that figure, nevertheless they had done so. His reaction had been one of excitement. Whilst it was possible that he had not known whether the sum of £26,000 had related to an each way bet, or a bet to win, he would always check the app to be sure and he had asked for an each way bet, acknowledging that he had also

asked for a stake of £1,300. Had Redemptive lost, he would not have expected to receive his money back. It was put to Mr Longley that, in that event, he could have called customer services to ask for his money. He said that he was unaware of that and thought that such a strategy would have been very dangerous. Mr Longley's evidence was that in the course of their first conversation on 23 September 2019, he had told Mr Burns that he had asked for a bet of £1,300 each way, but had not told him, as Mr Burns had stated in his witness statement, that it had not been until he had logged in to his online account and noticed that £13,000 each way had been bet that he had decided to let it ride.

Mr Burns

25. In addition to providing some of the material set out under the heading *'The undisputed facts'*, above, Mr Burns told me that he had had no dealings regarding the striking of the bet on 21 September 2019, nor had he listened to the recording of any telephone call before speaking to Mr Longley for the first time on 23 September 2019. Prior to that, he had understood simply that there had been a dispute over a bet. He had also been unaware of the trader's statement that he had 'massively overlayed' a horse; the first occasion on which he had seen Mr McCarthy's email to that effect had been during cross-examination. Mr Burns' evidence, at paragraph 6 of his witness statement, was as follows:

> *'...During this telephone call with Mr Longley, he confirmed to me that he only wanted £1,300 each way on Redemptive, but after checking his online Paddy Power account and seeing that £13,000 each way had been bet, he decided to "let it ride" as he was confident that the horse was going to win. I am very clear on this point as, immediately after the telephone call, I entered the following note of my conversation with Mr Longley in the 'Interaction Notes' which is an online records system:*
>
> *"Spoke with James. confirmed that he wanted 1.3k EW on the horse but when he saw it said 13k he decided to let it ride as he was confident. Offered him 2k cash as a GWG due to the inconvenience caused. asked me to sent it in an email to him and he'll think about it."'*

In cross-examination, he told me that Mr Longley had said that he had initially bet £1,300 each way on the horse and that the operator had later offered to accept £26,000.

Ms Farrugia

26. In her witness statement, Ms Farrugia stated that she is a native English speaker who had started working for Paddy Power in May 2019, as a dial-a-bet telephone agent. In that role, she would speak with customers on the telephone, typically handling around 200 calls per day, each of which lasting approximately two to three minutes. The balance of her statement essentially referred to the matters which are evident from the transcripts of her conversations.

Mr McCarthy

27. In his witness statement, Mr McCarthy stated that he had worked for Paddy Power since 1992. On 21 September 2019, Sean Heffernan had asked for his opinion as to whether they could accept a bet of £13,000 each way from Mr Longley: *'After a quick review of the race details, and Mr Longley's betting history for the day, I told Sean that we could accept the bet. Sean then relayed this message to Kendra. As my job involves the management of racing risk across all of* [Paddy Power's] *brands… I arranged for some of the liability on that race to be hedged. I believe that around €1,000 (Euro) was matched on Redemptive at odds of around 19.'* Mr McCarthy went on to state that, after the Race had taken place, he had noticed that Paddy Power had suffered a loss and had sent the e-mail headed 'Massive Overlay' to the Racing Leadership team. At paragraphs 7 to 10 of his witness statement, he said:

> '7. *Having thought about the bet over the weekend, and the fact that £13,000 each way seemed an unusually large bet for Mr Longley based on his betting history on the day, I wanted to double check that the dial-a-bet agent had taken the bet correctly.*
>
> *8. At 07:31 on Monday 23 September 2019, I emailed our Customer Services team to request that someone listen to the call made by Mr Longley. At 08:47 on 23 September 2019, I received an email from the Customer Services team informing me that there had been a mistake made by Kendra and that the customer had only requested £1,300 each way on Redemptive, rather than £13,000 each way…*
>
> *9. At 08:50 on 23 September 2019, I asked the Customer Services team to amend Mr Longley's bet to reflect the bet that he asked for, being £1,300 each way.*
>
> *10. At 09:45 on 23 September 2019, the Customer Services team informed me that the resettlement will take place, and that Mr Longley's bet would be resettled at the correct stake.'*

The above is the full extent of Mr McCarthy's evidence.

The parties' submissions
For Mr Longley

28. On behalf of Mr Longley, Mr James submitted that it was common ground that the words used in the telephone conversation between Mr Longley and Ms Farrugia were to be construed objectively. The precise order of offer and acceptance did not matter in a case in which both parties, subjectively and objectively, had agreed that a bet had been struck for £13,000 each way and a contract had been executed on those terms. Whilst it was accepted that, up to the point at which the alleged counter-offer/invitation to treat had been made, the exchange between Mr Longley and Ms Farrugia had related to a stake of £1,300, the position had changed from then onwards. The issue turned on the proper construction of Ms Farrugia's words, *'So that's going to be 26,000 coming from Jameslongley1, is that correct?*'

29. Clause 12.6 of Paddy Power's standard terms emphasised that it was for the betting party to confirm the bet and Mr Longley's confirmation of the sum to be taken from his account

had followed the procedure envisaged by that clause, a matter also relevant to Paddy Power's arguments regarding Clause 16. Mr Longley's evidence had been that Ms Farrugia's reference to a different stake had not surprised him; he had had experience of traders offering bets which differed from those which he had sought, albeit no examples of higher bets having been offered, and nothing as large as a tenfold increase. Whilst Paddy Power consistently had sought to avoid, or minimise the relevance of, the inconvenient figure mentioned by Ms Farrugia, all other terms of the bet had been communicated to her before she had contacted the trader. There had been five elements: the horse; the race; the odds; the type of bet (to win/each way); and the stake. The first four of those had already been communicated; the stake had been the only outstanding element. £26,000 had been the figure which Mr McCarthy had thought that he was authorising; there had been either a counter-offer of £13,000 each way, accepted with the words *'That's it, yeah',* or an invitation to treat, resulting in a revised offer by Mr Longley, by his use of the same words, which had been accepted with the words, '*Set for clearance… And your bet is on fine.'* The operator would not have deducted £26,000 from Mr Longley's account had she not confirmed that that had been the bet which he had struck. It was not necessary for the words used to have been intended as a counter-offer. The only alternative construction can be that there had been no contract at all. That would be a surprising conclusion, where there had been an executed contract, on terms which someone having authority had been prepared to accept on behalf of Paddy Power.

30. In short, Paddy Power's approach failed to see the wood for the trees and sought to divorce the relevant wording from its context, submitted Mr James. Should Mr Longley's evidence be accepted, the issue of unilateral mistake would not arise.

Unilateral mistake

31. Mr James submitted that a unilateral mistake (so far as relevant to this case) is one in which one party is mistaken as to the terms of the contract. The objective principle of interpretation means that a party is normally bound by what he says or writes, irrespective of whether he in fact intends to convey that which the other contracting party reasonably understands in the circumstances from the words used. Where, however, one party accepts a promise knowing that the terms stated by the other differ from that other's intention, the mistake may prevent effective acceptance of the words used, taken at face value; either the contract will be on the terms actually intended, or, possibly, the mistake will render the contract void. The interpretation to be applied is not that of an entirely detached observer, but that which would reasonably appear to the other party, in the circumstances.

32. Here, submitted Mr James, there had been no mistake; Ms Farrugia had not been the decision-maker and her original mistake had ceased to have effect by the time that the bet had been struck, because Mr McCarthy had intended to authorise a bet of £13,000 each way and Mr Longley had understood Paddy Power to have been willing to accept a significantly larger bet than, initially, he had requested and had authorised that bet, in accordance with clause 12.6. There was no question of Mr Longley having attempted to take unfair advantage of Paddy Power by seeking to buy something at a lower price than he knew to have been intended; the chances that Redemptive would win, or place, were unchanged by virtue of the higher bet. Mr Longley stood to win a significantly larger sum, but he also stood to lose a significantly larger sum. Mr McCarthy had been prepared to authorise a bet comprising all five of the elements previously outlined. In *Hartog v Colin & Shields* [1939] 3 All ER 566, in *OT Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep

700 (on each of which Paddy Power relied), and in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2006] 1 LRC 37, upon which Mr Longley relied, the price quoted had been significantly lower than the intended/ordinary retail price, subjectively not intended by the vendor. By contrast, in this case, the bet offered had been that which Paddy Power had intended to authorise. Whilst Paddy Power focused on the source of the information which led to the bargain struck, Mr Longley focused on the bargain itself. In order for Paddy Power to succeed in its defence of unilateral mistake, it would need to establish that Mr Longley had known that Paddy Power intended to offer a bet of £13,000 each way only if that were the stake previously sought by Mr Longley. Mr Longley had not been aware of the conversations which had been taking place behind the scenes, which was why the caselaw focused on the nature of the actual mistake, rather than on how it had come to be made, submitted Mr James. Paddy Power's primary case was that Mr Longley had not heard, or mentally processed, the figure of £26,000 and yet, in order to establish its defence, it needed to demonstrate his positive belief that a mistake had been made.

33. There was a conceptual distinction between actual and constructive knowledge of the other party's mistake, albeit often fine, and the two going hand in hand. Frequently, actual belief is tested by the belief which a reasonable man would hold in the same situation. Nevertheless, only actual knowledge suffices for unilateral mistake, submitted Mr James. That is because, on the face of it, there is a contract, but one in which one party has relied upon a known mistake by the other, such that it would be unjust to hold the latter party to the contract as apparently concluded. In *Smith v Hughes* (1871) LR 6 QB 597, at 608, Blackburn J had focused on the subjective intention of the purchaser, as had Hannen J, at 610. Neither judge had addressed the facts on the basis of constructive knowledge. Whilst Paddy Power relied on the dicta of Cockburn CJ, at 607, that passage related to the objective test for the existence of a contract. In other words, Paddy Power relied on the case for its consideration of whether there is a meeting of offer and acceptance, whilst Mr Longley relied upon it for the ingredients of a unilateral mistake.

34. The headnote in *Hartog* indicated that *Smith v Hughes* had been cited to the court. At 567C, the issue to be decided in *Hartog* was identified: whether the purchaser had known that a mistake existed and had sought to take advantage of it by 'snapping up the offer'. At 567H – 568A, reference was made to the position of reasonable person, as part of the judicial fact-finding process, leading to a conclusion that the purchaser *'must have realised, and did in fact know, that a mistake had occurred'*. It is clear, submitted Mr James, that the position of the reasonable person is considered simply as a route by which to reach the court's conclusion as to the purchaser's actual knowledge, being the issue before the court. Acknowledging that commentators differ on the relevance of constructive knowledge, Mr James submitted that, in any event, in this case, Mr Longley had in fact formed the view which the reasonable man would have formed in the same circumstances. The actions of the latter person could inform the court as to Mr Longley's actual belief.

35. In *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd*, unreported, 4 March 1983, CA, the plaintiff had proceeded in the way in which Paddy Power submitted that this court should proceed, by considering the issue of the defendant's constructive knowledge, but had then conceded that that issue could not be addressed on an application for summary judgment, and would need to be resolved at trial. The source of the asserted relevance of constructive knowledge was unclear and, seemingly, no authorities had been cited to the court, which had not considered it to be an appropriate occasion on which to embark upon a lengthy discussion of the law of mistake (per Slade LJ, page 6). Even if the premise that

constructive knowledge will suffice had been right, the court appeared to have adopted an estoppel argument, advanced by the plaintiff, in addressing whether a contract had failed for lack of consideration. The doctrine of unilateral mistake had not been an issue before the court; in such a case, there is consideration and the issue is whether a concluded contract can be set aside. The propositions in *Centrovincial Estates* were relevant to mutual, but not to unilateral, mistake, submitted Mr James. Whilst *OT Africa Line* had been a unilateral mistake case in which Mance J, citing *Centrovincial Estates*, had adopted constructive knowledge as an element of the test, his decision had been obiter, first instance and based upon the way in which the applicant had advanced its case (see page 110, second column). The authorities to which reference had been made had been limited and there had been no consideration of authority pointing in a different direction.

36. In Mr James' submission, the best summary of the law of unilateral mistake was to be found in *Digilandmall.com*, at [30] to [53], a case decided by the Singapore Court of Appeal. In that case, at [35], the court had concluded that phrases indicative of the relevance of constructive knowledge, *'...are really evidential factors or reasoning processes used by the court in finding that the non-mistaken party did, in fact, know of the error made by the mistaken* party', going on to hold, at [41] - [42] and [52] - [53], that:

> '41. *...in the absence of incontrovertible evidence, the fact of knowledge would invariably have to be inferred from all the surrounding circumstances, including the experiences and idiosyncrasies of the person and what a reasonable person would have known in a similar situation. If a court, upon weighing all the circumstances, thinks that the non-mistaken party is probably aware of the error made by the mistaken party, it is entitled to find, as a fact, that the former party has actual knowledge of the error…*
>
> *42. In order to enable the court to come to the conclusion that the non-mistaken party had actual knowledge of a mistake, the court would go through a process of reasoning where it may consider what a reasonable person, placed in the similar situation, would have known. In this connection, we would refer to what is called "Nelsonian knowledge", namely, wilful blindness or shutting one's eyes to the obvious. Clearly, if the court finds that the non-mistaken party is guilty of wilful blindness, it will be in line with logic and reason to hold that that party had actual knowledge.*
>
> *...*
>
> *52. As regards… OT Africa and …, we would say only this. Both cases did not really examine the doctrinal issue as to whether constructive knowledge by a non-mistaken party of the mistake would suffice to vitiate the contract ab initio. They assumed that to be the position. Moreover, in OT Africa, the court added that for constructive knowledge to avoid a contract, there had to be "some real reason to suppose the existence of a mistake", clearly a reasoning process to determine actual knowledge…*
>
> *53. In our opinion, it is only where the court finds that there is actual knowledge that the case comes within the ambit of the common law*

> *doctrine of unilateral mistake. There is no consensus ad idem. The concept of constructive notice is basically an equitable concept… In the absence of actual knowledge on the part of the non-mistaken party, a contract should not be declared void under the common law as there would then be no reason to displace the objective principle.…'*

Nothing in the English caselaw required a different conclusion, contended Mr James.

37. Mr James further submitted that the approach in *Digilandmall.com* was consistent with that adopted by Aikens J, in *Statoil ASA v Louis Dreyfus Energy Services* LP [2008] EWHC 2257 (Comm), who referred to the former case. In *Statoil* (see [84]), it had been common ground between the parties that, to the knowledge of the defendant at the material time, the relevant employee of the claimant had made a mistake when entering information into a software program in order to calculate the demurrage due from the defendant to the claimant under the terms of the contract. He had mistakenly believed that the vessel had completed its discharge on a date earlier than in fact had been the case. That, in turn, had affected the calculation of the demurrage due. Aikens J had held [93] that the mistake had not been as to a term of the contract and so did not affect the objective agreement between the parties. In setting out the effect at common law of a unilateral mistake, at [87] to [89], he had made reference only to the need for actual knowledge by the non-mistaken party. Having been referred to *Digilandmall.com*, he had considered [95] the decision in that case to have fallen *'...squarely within the classic rule. There was a unilateral mistake by the seller about the price …. The buyers knew that the mistake had been made, but went ahead and "snapped up the offer"... Plainly, when the subjective evidence was examined, the parties were not agreed as to the most fundamental term of the contract: the price.*' In *Merrill Lynch v Amorim Partners* [2014] EWHC 74 (QB), Hamblen J had stated [54] that a contract could be avoided on the grounds of unilateral mistake only where the other contracting party knew of the mistake which had been made. There had been no reference to constructive knowledge and he had then gone on to cite from paragraphs 87, 88 and 96 of *Statoil*, in support of the proposition that the mistake in question had to be as to the terms of the contract. In neither *Statoil* nor *Merrill Lynch*, had anyone contended for a test of constructive knowledge, nor had there been any detailed analysis of the issue by the English courts subsequent to *Digilandmall.com*.

38. In this case, submitted Mr James, the consequence in law of any unilateral mistake had been rendered moot by Paddy Power's acceptance that it should pay out on a £1,300 each way bet, the strategic reasons for which were obvious; it did not wish to be confronted with the legal consequences of its position. Were the court to be driven to an unattractive outcome, so be it, but such a conclusion would go against the grain of previous decisions, in which the court had striven to uphold the bargain struck, so Mr James submitted, such that few cases on mistake succeed.

Common or mutual mistake

39. The requisite elements of common mistake, if it is to avoid a contract, had been recited by Lord Phillips MR in *The Great Peace (Great Peace Shipping Ltd v Tsaviliris Salvage (International) Ltd)* [2002] EWCA Civ 1407 [76]:

'…(i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.'

40. Mr James submitted that any defence based upon common mistake must fail because the first and fifth such elements were not present. As to the latter, the bet was both capable of performance and (initially, at least) had been performed. Insofar as mutual mistake was said to differ from common mistake, the difference(s) had not been identified by Paddy Power, nor had the mistake under which each party was said to have been labouring. At all material times, Mr McCarthy had intended to authorise/accept a bet for £13,000 each way. Paddy Power's case appeared to be that, nevertheless, Mr Longley's intention at all times had been to place an each way bet of £1,300. That was incoherent and unreal, submitted Mr James; Paddy Power's pleaded case was that, by virtue of the parties' mutual mistake, the bet placed had been void and that Mr Longley had been able to retain £26,800 only through Paddy Power's 'honour and good customer service'. That was inconsistent with the full execution of the contract and subsequent adjustment made under Clause 16. Honour and good customer service might be expected to have led to Paddy Power's payment out of the winnings due on the bet which it had agreed to accept.

Clause 16

41. Clause 16 was relevant only if the court were to find that a bet for £13,000 each way had been struck. In that event, on its true construction, Clause 16 did not assist Paddy Power, submitted Mr James. At paragraph 21(e)(i) of its defence, Paddy Power had admitted Mr Longley's pleaded case that *'the only error made was when the operator sought the authority from the broker'*. The error made by Ms Farrugia, when seeking authority from the trader, had been neither material nor 'obvious' (the latter term to be objectively construed), within the meaning of Clause 16.1.1. To conclude otherwise would be to adopt an 'extraordinarily wide' meaning of Clause 16 and, further, to construe the word 'error' to apply only to the result of the error in question. It had been Mr McCarthy who had been the controlling mind of Paddy Power and he had made no error, such that no winnings had been awarded by virtue of any error; Mr Longley had won because he had placed a bet at the odds which had been offered and the horse had won the Race. Accordingly, Clause 16.6 was not engaged either, and it was to be noted that no demand for payment had been made by Paddy Power, prior to removal of the winnings which had been credited automatically. On the face of the standard terms and conditions, the only sub-clause potentially engaged was Clause 16.9 (the language of which did not require the error to have been 'obvious'), subject to the submissions outlined below. However, submitted Mr James, the court was obliged to adopt the construction most favourable to the consumer and clauses 16.1 and 16.9 were aimed at errors resulting from a mistake made by the trader.

42. Further, once a causative error has been made, Clause 16 expressly empowers Paddy Power to correct it, but creates no obligation for it to do so. A contractual power which is exercised in a manner which is irrational, capricious, or perverse will not have been exercised lawfully: *Braganza v BP Shipping Limited* [2015] WLR 1661, SC, submitted Mr James.

Albeit that he remained an employee, based in Dublin, and could have given evidence by video-link, Paddy Power had elected to call no evidence from Mr McCarthy, the decision-maker, notwithstanding Mr Longley's repeated requests that it do so. The plain inference to be drawn was that its intention had been to avoid exposing him to cross-examination. As a consequence, there had been no evidence as to his decision-making process. The court was invited to draw adverse inferences against the Defendant. In particular, based upon (1) the e-mail conveying an apology; (2) the e-mail notifying an investigation; and (3) the three-minute gap between Mr McCarthy's receipt of the email from Customer Services, dated 21 September 2019, and his actioning of the adjustment without having listened to a recording of the telephone call, the following inferences were invited:

42.1. a large bet of the relevant size having been taken, the procedure was to escalate it to a member of the senior racing team before the Race was run;

42.2. Mr McCarthy had not followed that procedure;

42.3. before adjusting any bet, under clause 16, the requisite procedure was to seek direction from a more senior manager;

42.4. Mr McCarthy had not followed that procedure;

42.5. Evidenced by the speed of resettlement, Mr McCarthy's reason for adjusting the bet had been to cover his own back, that is to protect his job; an irrational, capricious or perverse exercise of any power conferred by Clause 16.

Section 62 of the CRA

43. In any event, Mr James submitted that Clause 16 fell within section 62 of the CRA. Paddy Power's pleaded assertion to the contrary, upon the basis that the clause reflected mandatory statutory or regulatory conditions within section 73(1)(a) of the CRA, was misplaced; the provisions upon which reliance had been placed in the defence (see below) required only that the licensee have rules which cover the circumstances under which the operator will avoid a bet, or deal with errors; they did not require that the relevant provisions take any particular form. Sections 62 and 68 of the CRA require that a term be transparent and fair. Clause 16 is anything but transparent, submitted Mr James; buried, as it is, amongst 34 clauses, extending to 19 pages of text, within a total of 44 pages which, according to the index, apply to 'online gambling', rather than telephone betting, in language which is difficult to follow (even for a lawyer) and sub-clauses which are difficult to differentiate from one another.

44. Transparency is relevant to the issue of fairness, submitted Mr James. Inherent in fairness is the need for openness, requiring 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 customer.': Director General of Fair Trading v First National Bank Plc* [2002] 1 AC 481, HL, at 494 [17], in particular at letter F. Adopting the definition in section 68 of the CRA, transparency, thus, is a subset of fairness, Mr James submitted; he was not seeking to invoke the separate use of that term relevant to the functions of the Competition and Markets Authority.
45. Paragraph 17 of *Director General of Fair Trading v First National Bank Plc* continued:

'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 of 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.'

Acknowledging that there was no evidence to the effect that Mr Longley had been acting out of necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, or in a weak bargaining position, Mr James submitted that it was appropriate to have regard to the objects or effects listed, or analogous to those, at paragraphs 3, 7, 11, 13, 16 and 17 of Part 1 of Schedule 2 to the CRA, set out at paragraph 17 of the particulars of claim, creating an imbalance in the parties' respective rights and a lack of reciprocity. Clause 16, he submitted:

45.1. renders the provision of a service by Paddy Power subject to a condition dependent upon Paddy Power's decision alone (namely as to whether an error has been made);

45.2. authorises Paddy Power to dissolve the contract on a discretionary basis, conferring no corresponding right on the person placing the bet — clause 16.6 does not apply where an error to the benefit of Paddy Power has been made;

45.3. enables Paddy Power unilaterally to alter the terms of the contract by reducing the size of the stake (bet or accepted), and/or the winnings, without valid reason and after the relevant race has been run;

45.4. enables Paddy Power unilaterally to alter, without a valid reason, any characteristics of the services to be provided (that is, the stake accepted and/or the win);

45.5. gives Paddy Power the right to determine whether to supply services in conformity with the contract, or to interpret any term of the contract as it, exclusively, sees fit;

45.6. limits Paddy Power's obligation to pay out on a bet placed and freely accepted;

45.7. confers on Paddy Power the opportunity, on the one hand, to lay off the full amount of the bet accepted, and thereby share in the winnings, but, on the other hand, to reduce the amount paid out, thereby enabling it to accrue a large net gain. (In order to be fair, Clause 16 ought to have been drafted in terms which preclude Paddy Power from avoiding the contract, if it has already recouped losses by laying off bets.);

45.8. Had Redemptive not placed, there would have been no corresponding right for Mr Longley unilaterally to have reduced his lost stake from £26,000 to £2,600. Indeed, there is no clause enabling a betting party to correct an error, even before the relevant race has been run.

46. All such factors are referable to the characteristics of the particular contractual term, not of Mr Longley himself. The unfairness of Clause 16 must be judged by reference to all situations in which it might potentially be applicable, submitted Mr James. In summary, it allows Paddy Power unilaterally to take action to correct a mistake, whilst according no rights to the consumer if that mistake does not favour him or her, and after the outcome of the relevant race is known. Further, Paddy Power can lay off bets, to reduce its risk. It can make a profit on the transaction and still avoid the bet by reason of an error.

47. In addition, and on the question of transparency, Mr James referred me to:

    47.1. *Spreadex Limited v Cochrane* [2012] EWHC 1290 (Comm), as an example of a case in which the clause upon which a spread betting bookmaker had wished to rely had been held to be unfair, albeit under the Unfair Terms in Consumer Contracts Regulations 1999 ('the UTCCR'), which had contained a provision substantively identical to section 62(4) of the CRA. The clause in question had provided that, *'…You will be deemed to have authorised all trading under your account number…'* The claim had arisen in the context of the defendant's contention (on the claimant's application for summary judgment) that he was not liable for the trades which the claimant had sought to enforce because they had been carried out without his actual or ostensible authority and in his absence, by his girlfriend's young son. The High Court had held that, without at least some limitation, the clause fell foul of the relevant regulation. It went on to hold that its manner of incorporation was a compounding factor to be taken into account, itself rendering the clause unfair. In addition to the need to click on online links to four additional documents (which, the court considered, most potential customers would be unlikely to do), an exceptional customer who did so 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 relevant sentence]*, let alone appreciated its purport or implications, and it would have been quite irrational for the claimant to have assumed that he had. This was an entirely inadequate way to seek to make the customer liable for any potential trades which he did not authorise,…'*; and

    47.2. *Green v Petfre (Gibraltar) Ltd t/a Betfred* [2021] EWHC 842 (QB) in which the claimant had won an online Blackjack game in which, by operation of a computer glitch, the odds offered favoured those who had played over a long period. In that case, the parties had agreed that the CRA required that terms be transparent and, at paragraphs 174 to 177, the court had concluded that the contract did not conform with that requirement, finding that the language in question had been opaque, difficult and unclear to the average and informed consumer. At paragraph 183, Foster J had held, *'My findings hitherto inevitably mean that the clauses in question fell foul of the requirements of the statutory obligation of fairness. The obscurity of the language, the context of the contract, and the failure adequately to signpost the exclusion clauses and explain the consequences to the player are inconsistent with the fairness envisaged by the Act as indicated in the light of the previous relevant caselaw.'*

48. In Mr James' contention, whilst each case will turn on its own facts, the conclusions reached in *Spreadex* and in *Green* were invited and warranted in the instant case. In order

to be enforceable, Clause 16 ought to have been signposted appropriately, in a reasonably short document, using language understandable to a layperson. Instead, it had formed part of a lengthy, poorly drafted document, which had adopted misleading or confusing language. Perhaps a crib document could have been provided. The mere fact that a contract is lengthy will not render it unfair, but the consumer in a consumer contract is not a lawyer, nor, reasonably, can s/he be expected to wade through pages of documents expressed in legalese.

49. Whilst it was the proper construction of Clause 16 which mattered, the fact that, in practice, it had been exercised unfairly indicated that the latter was not simply a fanciful possibility, contended Mr James. Mr McCarthy had acted capriciously, out of concern for his own position, rather than to correct an obvious error. The relevant factor which he had omitted to consider was the fact that a bet had been offered and accepted at £13,000 each way, circumstantial evidence of which was to be found in his failure to have followed the correct procedure. The *Braganza* point had not been pleaded because of the timing of relevant disclosure and the implied joinder of issue with the defence. No application to amend the particulars of claim had been made subsequent to Master Sullivan's order out of a desire not to jeopardise the date of trial. Master Sullivan had refused the disclosure sought on the basis that Mr McCarthy's e-mail of 21 September 2019 (13:51), entitled 'Massive Overlay', sufficed; she had not concluded that no issue had arisen on Mr Longley's pleaded case. It would have been easy for Paddy Power to have called Mr McCarthy as a witness. It had not done so, resulting in a dearth of evidence as the factors which he had taken into, and left out of, account, when considering whether to invoke Clause 16.

50. Mr James concluded his submissions by observing that Paddy Power had accepted that damages in the sum claimed, together with statutory interest, would be payable in the event of adverse findings on liability.

For Paddy Power

51. Mr Wandowicz submitted that three issues arose for the court's determination, the second and third of which arising only in the event that the first were determined in Mr Longley's favour:

    51.1. the proper meaning of the words spoken during the telephone call between Ms Farrugia and Mr Longley and whether they had constituted a counter-offer to increase the stake to £13,000; if not, there had been no such offer and, hence, no contract for that sum, and the claim would fail;

    51.2. if the words spoken were determined to constitute an offer to increase the stake to £13,000, whether the defence of unilateral, or mutual, mistake succeeded;

    51.3. if not, whether, on a true construction of Clause 16, Paddy Power had been entitled to correct the stake to £1,300 and, if so, whether Clause 16 was unfair (in which event, it was accepted, it would be unenforceable against Mr Longley, as a consumer).

Interpretation

52. Mr Wandowicz submitted that the essential foundation of Mr Longley's case was that a counter-offer had been made; he acknowledged and had pleaded that his initial request had been to place an each way bet, with a stake of £1,300. The counter-offer, as pleaded, had come in the form of the operator's question, '*So that's going to be twenty-six thousand coming from Jameslongley1, is that correct?'*, said to have been accepted by use of the words, *'Yeah, that's it.'* Thus, the question for the court was whether a reasonable person in Mr Longley's position would have understood those words as constituting a counter-offer to place a bet at a stake of £13,000 each way, rather than at £1,300, as had been requested by Mr Longley. The answer, Mr Wandowicz submitted, was 'no'; objectively construed in their context, the words used by Ms Farrugia had made no reference to the size of the stake and had constituted simple administrative confirmation of the amount to be debited from Mr Longley's account, after the bet had been agreed. The parties' use of the word *'that'*, following Mr Longley's initial request to place a bet at a stake of £1,300, could only have referred to the request made. A counter-offer would have been structured differently. Whilst it could have taken many different forms, it could not have taken the form of the words used, which had not referred to the stake, or the nature of the bet (i.e. to win or each way); simply to the sum to be deducted from his account. Mr Longley's assumption was that the alleged counter-offer had referred to an each way bet, with a stake of £13,000, because he had previously sought an each way bet, but he had also sought a different stake, meaning that he wished to have his cake and eat it, too. The separate conversations which had taken place between the operator and the trader, and between the two traders, had taken place out of Mr Longley's earshot, such that the reasonable person in his position could only have understood that his request to place a bet at the lower stake had been approved. Mr Longley's error, it was submitted, lay in focusing on the figure, above all else. That was a distraction which ignored the inconvenient fact that Paddy Power had only ever intended to accept the bet which he had requested. In order for him to succeed on his pleaded case, the relevant words would need to mean, *'Scratch what you just said; let's up the stake by ten times'*; a construction which they would not bear.

53. On Mr Longley's alternative case, advanced in his skeleton argument but not pleaded, he had made a revised offer, following an invitation to treat made by Paddy Power, in the form of the words pleaded to have constituted a counter-offer. That case suffered from the same difficulties. Mr Longley's subsequent words, *'That's it, yeah'* had not come close to constituting a revised offer, followed by acceptance. The operator's words, *'Set for clearance'* meant nothing and her words '*And your bet is on fine, Mr Longley'* had come later.

54. Accordingly, and whether the words used by the parties were considered in isolation or in context, there had been no counter-offer, or revised offer, and no bet placed at the higher stake. The claim ought to be dismissed on that basis. Nevertheless, the court was invited to consider the second and third issues, in case the matter went to appeal.

Unilateral mistake

55. Mr Wandowicz submitted that, should Mr Longley succeed on the first issue, the Court should find, on the evidence, that he had known, or ought to have known, that Paddy Power's use of the words on which he relied had not signalled its subjective intention to make an offer for a stake of £13,000. In that event, the defence of unilateral mistake would succeed. Alternatively, were the Court to find that Mr Longley had not paid attention to the relevant words, it would follow that, at all material times, he had understood his stake to

have been £1,300. In that event, either there had been an each way bet for £1,300, or there had been no bet at all. Whilst there was no unanimous voice emergent from the authorities on the consequence of a unilateral mistake, that did not matter because no claim had been made by Paddy Power to recover the £28,600 resulting from the lower bet.

The law on unilateral mistake

56. Mr Wandowicz advanced, as the neatest formulation of the relevant principles, those set out in Lord Burrows' *Restatement of the English Law of Contract*, at section 35(4):

> *'(4) A mistake in entering the contract renders the contract void (or, to put it another way, there is no acceptance of an offer and hence no contract) if –*
>
> *(a) the parties are at cross-purposes such that there is a central objective ambiguity as to what has been agreed; or*
>
> *(b) one party is mistaken and –*
>
> *(i) the other party knows, or ought reasonably to know, of that mistake;*
>
> *(ii) the mistake is as to the terms of the contract or as to the identity of the other party; and*
>
> *(iii) it is the mistaken party who is alleging that the contract is void.'*

57. The proposition at (b)(i) was consistent with the following extract from *Cartwright on Misrepresentation, Mistake and Non-disclosure* [13-21 to 13-22]:

> *'**13-21 Mistake of one party known by the other** Under this test a party cannot enforce a contract on his own terms, even if it appears on the objective evidence to have been concluded, where he knows that the other party was mistaken about the terms. [...] This is the basis on which it is sometimes said that a party will not be allowed to "snap at" an offer: that is, if he receives an offer which he knows contains a mistake about a term – for example, the price stated in the offer is lower than the offeror intended the contract to prescribe – he cannot by accepting the offer before the offeror has discovered his mistake conclude a binding contract at a lower price. The fact that he knew that the offeror made a mistake in his letter of offer means that he cannot show that he in fact believed that it reflected the offeror's true intentions.*
>
> ***13-22 Mistake of one party that the other should have known about** Similarly, a party cannot enforce a contract on terms which he should have known did not reflect the other party's true intentions. In this case, [...] a reasonable person in his position would not have believed that the other party was agreeing to those terms. In practice, it may be easier to rely on this ground to avoid the contract, rather than proving that the party actually knew about the mistake, because it is easier to prove what a reasonable person would have understood than what the other party actually did understand.'*

58. Dealing, first, with unilateral mistake, Mr Wandowicz referred to the following passage from *Chitty on Contracts, 33rd Ed* [2-004][3]:

> *'**State of mind of alleged offeree***
>
> *Whether A is actually bound by an acceptance of his apparent offer depends on the state of mind of the alleged offeree (B); to this extent, the test of agreement can be said to be not "wholly objective". If B actually and reasonably believes that A has the requisite intention, the objective test is satisfied so that B can hold A to his apparent offer even though A did not, subjectively, have the requisite intention. However, if B knows that, in spite of the objective appearance, A does not have the requisite intention, A is not bound; the objective test does not apply in favour of B as he knows the truth about A's actual intention. There are other permutations. If B does not know, but ought to have known that A does not have the requisite intention, English law gives no clear answer. However, there are suggestions that B will not be able to hold A to his apparent offer.'*

59. As to actual knowledge, Paddy Power relied upon the well-known case of *Hartog*, in which the court had accepted that no contract had been formed for the sale and purchase of a quantity of hare skins, because, to the knowledge of the plaintiff, the apparent offer had contained a mistake as to terms (price per pound versus price per piece, the latter being three times higher).

60. As to constructive knowledge, *Chitty* put the matter too meekly, submitted Mr Wandowicz. In *Hartog* itself (at page 48F), the court had stated (with emphasis added), *'…the defendants…have satisfied me that the plaintiff* <u>*could not reasonably have supposed*</u> *that that offer contained the offerers' real intention.'* Furthermore, both the Court of Appeal (obiter) and the High Court (possibly obiter, but in the course of full and careful analysis) have said (not merely 'suggested'), that constructive knowledge of the mistake will suffice:

    60.1. In *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd*, unreported, CA, 4 March 1983, the landlords had written to their tenants inviting them to agree a figure of £65,000 per annum as the appropriate rental value of the property, at a rent review date. The tenants had written to the landlords on the following day accepting that figure. Five days later, the landlords had told the tenants that their offer was withdrawn because, owing to a mistake on their part, the figure ought to have been £126,000. The tenants had refused to accept the new figure, stating that they intended to hold the landlords to the original agreement, and the landlords had claimed a declaration that there had been no legally binding agreement, because there had been a mistake. They had applied for summary judgment, before conceding that that which the tenants knew or ought to have known constituted a substantial dispute of fact, inappropriate for summary determination. Having conceded that they could not obtain summary judgment on the issue of mistake, the landlords had pursued their application on a narrow point of construction of the relevant clause of the lease, but, since the clause referred to 'agreement', the issues engaged had been similar (save for an argument regarding consideration,

[3] now to be found, in substantively identical terms, at paragraph 4-004 of the 34th edition.

immaterial for present purposes). The landlords had succeeded before the judge, but the Court of Appeal (Slade and Robert Goff LJJ) had allowed the appeal and, in doing so, taken the opportunity to state the following general principle (with emphasis added):

> *'...In our opinion, subject to what is said below relating to consideration, it is contrary to the well established principles of contract law to suggest that the offeror under a bilateral contract can withdraw an unambiguous offer, after it has been accepted in the manner contemplated by the offer, merely because he has made a mistake* ***which the offeree neither knew nor could reasonably have known at the time when he accepted it****. And in this context, provided only that the offeree has given sufficient consideration for the offeror's promise, it is nothing to the point that the offeree may not have changed his position beyond giving the promise requested of him.'*

60.2. Accordingly, since, on an application for summary judgment, the landlords could not prove that the tenants had known, or ought reasonably to have known, of the landlords' error at the relevant time, the application had to fail and the tenants were given leave to defend the action. In the instant case, submitted Mr Wandowicz, the court is in a position, following a trial, to determine that which Mr Longley knew, or ought to have known.

60.3. Whilst obiter, the passage from *Centrovincial Estates* is said to be a sound statement of principle, made by a court which, expressly, was conscious that it did not need to discuss the law of mistake at all and yet decided that it would be helpful to express a general principle:

> *'...In all the circumstances this judgment on an Order XIV summons is not an appropriate occasion to embark on a lengthy discussion on the law relating to mistake in contract. Nevertheless, we should perhaps attempt to explain briefly (albeit obiter) why, quite apart from questions of consideration, we respectfully differ from the learned Judge on the question of mistake, as a matter of broad principle.'*

60.4. That statement of principle had been applied by the High Court, in *OT Africa Line*, in which an apparent offer of settlement for GBP150,000 had been made and accepted. It was alleged that there had been no binding agreement because of a unilateral mistake as to terms, since the intention had been to offer USD150,000, which the other party had known, or, at least, ought to have appreciated. Mance J (as he then was) had considered the applicable principles, holding that, objectively construed, there had been clear agreement for GBP150,000. Accordingly, he had moved to the second question; whether that 'apparent contract' had not been made because it had been displaced by a mistake which the other party knew, or ought to have known. On the facts, it was held not, because [703]:

> *'Here, there is objectively agreement on a particular sum. The question is what is capable of displacing that apparent agreement.*

> *The answer on the authorities is a mistake by one party of which the other knew or ought reasonably to have known….*
>
> *…*
>
> *…there was nothing in the letter to indicate that it was intended to repeat a previous position or to explain the position in any other way which would have made it clear that Vickers cannot – or even, so far as this may be material, may not – actually have been thinking in sterling terms.'*

60.5. In *Hartog* itself, at 568D-F, Singleton J had held (with emphasis added):

> *'I am satisfied that it was a mistake on the part of the defendants or their servants which caused the offer to go forward in that way, and I am satisfied that anyone with any knowledge of the trade must have realised that there was a mistake.… The offer was wrongly expressed and the defendants by their evidence, and by the correspondence, have satisfied me that the plaintiff could not reasonably have supposed that that offer contained the offerers' real intention…'*

That, too, indicated the relevance of constructive knowledge.

60.6. Mr Wandowicz submitted that the only basis for the suggestion by the authors of *Chitty* that there might be a lack of clarity as to constructive knowledge was a point made, in passing, by Hamblen J (as he then was) in *Merrill Lynch International v Amorim Partners Ltd* [2014] EWHC 74, QB. In that case, unilateral mistake had not been argued (because it had been accepted to stand or fall with the primary case on misrepresentation) and would have been hopeless, in any event, because the alleged mistakes had been as to facts, not terms, of the agreement. Recording that the case had failed because the case on misrepresentation had failed, the judge had added [54], *'Further, a contract can only be avoided on the grounds of unilateral mistake where the other contracting party – here MLI – knew of the mistake which was made. There is no evidence that MLI had any such knowledge.'* Mr Wandowicz submitted that, as the authors of *Chitty* point out [33rd Ed, 3- 023[4]],

> '*Hamblen J. said that a mistake will only give rise to relief if it was known to the other party, but the point does not appear to have been argued and the mistake was in any event not as to the terms of the contract.'*

Added to that was the fact that, unlike the full reasoning of Mance J, in *OT Africa Line*, Hamblen J's comment clearly had been made 'by the way'. In any event, it was not inconsistent with the proposition that mistake can give rise to relief if it ought to have been known to the other party; there is nothing in Hamblen J's comment which would suggest that his use of the word 'knowledge' excluded constructive knowledge, submitted Mr Wandowicz. In short, the weight of judicial

[4] See 5-023, in the 34th edition.

and academic analysis supported the proposition that constructive knowledge of a mistake will suffice.

61. Whilst Mr Longley placed reliance upon *Digilandmall.com*, in which constructive knowledge had been held not to suffice, that had been a decision of the Singapore Court of Appeal, as to the law in Singapore. Even then, paragraph 47 had imported concepts of constructive knowledge into actual knowledge.

62. Applying the relevant principles to the facts of this case (and assuming that Mr Longley made good his case that he had heard the words used by Ms Farrugia and that the objective interpretation of those words was that a counter-offer to enter into a bet at £13,000 each way had been made), Mr Wandowicz submitted that the questions for the court were whether:

    62.1. Paddy Power, when making that apparent offer, had made a mistake as to terms, in that it had thought that it was confirming the debit due, in the course of its acceptance of Mr Longley's requested bet, rather than offering a different bet of its own; and, if so,

    62.2. Mr Longley had known, or ought to have known, that that was the case.

    If the answer to both questions was 'yes', Paddy Power was not bound by the 'offer', submitted Mr Wandowicz.

63. On the evidence, Mr Wandowicz submitted, it should be uncontroversial that Paddy Power had thought that it had been accepting Mr Longley's requested bet; it was irrelevant which natural person's intention was attributed to it, because:

    63.1. the operator had made an error, when requesting authorisation for £13,000 rather than £1,300. By the time that she had been speaking to Mr Heffernan, she clearly had thought that that had been the bet which Mr Longley had requested. Accordingly, she had thought that she had been conveying a request for acceptance of his bet.

    63.2. both traders had been asked to approve the stake of £13,000. Neither trader had heard any other figure, hence had not been intending to make a counter-offer. Each had intended to authorise the bet which he had been informed that Mr Longley had requested. The qualified intention had been to accept a bet at £13,000, if that were the stake which the betting party had proposed. That much was clear from Ms Farrugia's discussion with Mr Heffernan:

        KF: *It's James Longley, he's looking at the 7.20 Wolverhampton, horse number 6, Redemptive at 16/1.*

        SH: *Yep*

        KF: *... and he's looking to get thirteen thousand each way, so a total of twenty-six thousand*

        SH: *Thirteen thousand each way?*

KF: *Yep*

SH: *And what's his max there please?*

KF: *203*

SH: *203?*

KF: *Yep*

SH: *Can you hold the line there for a minute please?*

KF: *Alright, thank you*

[Pause – 1 minute 13 seconds]

SH: *Hello*

KF: *Yep*

SH: *You can take that bet, …*

64. Assuming that Mr Longley had heard the relevant words and paid attention to them (and it was Paddy Power's case that he had not, given the 'split-second' timing), he must have realised that Paddy Power's only intention had been to accept and confirm the bet which he had requested; at the very least, he ought to have realised that, submitted Mr Wandowicz; bookmakers do not, typically, counter-offer a stake, as Mr Longley — a highly intelligent and sophisticated gambler — must have known. Whilst it was not submitted that he was lying, his recollection was unreliable; shaped by his sense of grievance, a phenomenon recognised in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) at [15] to [20], per Leggatt J (as he then was). At paragraph 16 of his witness statement, Mr Longley had stated, *'After a short period of time the Operator came back onto the line and said that the trader she had spoken to had confirmed the bet. She then asked me to confirm that there would be £26,000 coming out of the Account. This corresponded to a £13,000 each way bet rather than a £1,300 each way bet. This was obviously a significantly bigger bet than I had asked for but I was very confident that Redemptive would at least place in the Race and so struck the bet.'* That evidence, submitted Mr Wandowicz, did not fit Mr Longley's pleaded, or alternative, case: on that evidence, the bet had been confirmed prior to confirmation of the moneys to be deducted from Mr Longley's account, and so had preceded the alleged counter-offer/revised offer. Furthermore, whilst Mr Longley's past experience had included Paddy Power's refusal of the stake sought, he had never experienced an offer to increase the stake, and ten-fold at that.

65. On the same basis, any reasonable bettor in Mr Longley's position, would have known that no counter-proposal was being made, whether or not s/he had registered the figure to be deducted, but particularly if s/he had done so.

66. Any decision taken by Mr Longley after the call, having seen the deduction of £26,000 from his account via the app, had been post-contractual and could have had no effect on his

intention during the earlier call. That his decision had been taken at that stage, and not at the time of contracting, was consistent with Mr Burns' oral evidence and contemporaneous note of their first telephone call on 23 September 2019. Mr Burns was no longer employed by Paddy Power and, accordingly, had no 'skin in the game', submitted Mr Wandowicz. He had had no knowledge of the issue before he had spoken to Mr Longley and, thus, had been reliant upon Mr Longley's account as his source of information. By contrast, Mr Longley had an interest in arguing that the note had been inaccurate.

The law on mutual mistake

67. Here, in addition to Lord Burrows' proposition, Mr Wandowicz relied upon *Chitty* [33rd Ed, 3-019[5]], asserting that the defence would only arise in a discrete factual scenario:

> '***Parties at cross-purposes***
>
> *In most cases the application of the objective test will preclude a party who has entered into a contract under a mistake from setting up his mistake as a defence to an action against him for breach of contract. If a reasonable person in the defendant's position would have understood the contract in a certain sense but the defendant "mistakenly" understood it in another, then, despite his mistake, the court will hold that the defendant is bound by the meaning that the reasonable person would have understood. But where parties are genuinely at cross-purposes as to the subject matter of the contract, the result may be that there is no offer and acceptance of the same terms because neither party can show that the other party should reasonably have understood his version.'*

68. Mr Wandowicz submitted that the question of mutual mistake would arise only if the court were to find that:

    68.1. Mr Longley did not hear, or pay attention to, the words '*So that's going to be 26,000 coming from Jameslongley1, is that correct?*' (and so thought that he was offering to Paddy Power, and receiving acceptance of, an each way bet, at a stake of £1,300); and

    68.2. contrary to its case, Paddy Power subjectively intended to counter-offer a bet at a stake of £13,000, rather than accepting Mr Longley's requested bet.

    In that event, the parties had been at cross-purposes — at all times, Mr Longley had been offering a bet of £1,300 to Paddy Power, and Paddy Power had been offering a bet of £13,000 to him. There had never been any meeting of minds, or, hence, any contract at all.

Clause 16

69. Were the Court to find that a contract existed at the higher stake, the application or otherwise of Clause 16 would arise. Mr Wandowicz submitted that, on its plain wording, the clause had been engaged. Mr Longley's criticism of the wording used at best reflected poor draughtsmanship, but did not undermine its plain meaning; both parties acknowledge that an error had been made, leading to the bet placed (on this hypothesis) — the operator

[5] See, now, 5-019 of the 34th edition.

had added an extra zero to the stake, when requesting trader authorisation. Winnings are awarded automatically, by computer. Accordingly, any human error can only occur at an earlier stage. The real questions were whether Clause 16 fell within part 2 of the CRA and, if so, whether it constituted an unfair term.

70. As to the former question, in Mr Wandowicz's submission mandatory statutory or regulatory provisions relating to Paddy Power's standard terms and conditions included the Licence Conditions and Codes of Practice ('the LCCP'), issued by the Gambling Commission and statutorily forming a part of Paddy Power's gambling operator licences. Social responsibility code provisions 4.2.6(1)(a) and (b) of the LCCP provided that *'Licensees must set out within the full rules that they make available the core elements for the acceptance and settlement of bets. These rules must cover: a. the circumstances under which the operator will void a bet; b. treatment of errors, late bets and related contingencies'*, a provision which would be rendered meaningless if Paddy Power were not permitted to reverse a bet recorded in error. Clause 16 reflected the relevant provisions of the social responsibility code and, as such, was excluded from an assessment of fairness.

71. If that submission were rejected, the effect of Clause 16 was simply to correct human errors; it did not give Paddy Power any rights arbitrarily to escape inconvenient bets and a reasonable gambler would not see any difficulty in agreeing to such a term, submitted Mr Wandowicz. That being so, even if a bet had been struck at £13,000, Paddy Power had been entitled, contractually, to make the adjustment which it had made. Nothing in the CRA provided that any lack of transparency would affect the parties' contractual rights, though it could result in regulatory action by the Competition and Markets Authority; the only relevant issue affecting contractual rights was whether Clause 16 was unfair. Whilst Paddy Power did not seek to suggest that *Director General of Fair Trading v First National Bank* was bad law, it had been decided in 2001, long before *ParkingEye v Beavis* [2015] UKSC 67 (see below), which was now the leading case on the test of unfairness (at the time to be found, in like terms, in the UTCCR, which had also contained a provision substantially the same as s.62(5) CRA) and had not been cited to the court in *Green v Betfred*, submitted Mr Wandowicz.

72. In *ParkingEye*, Mr Beavis had been charged £85 for overstaying the permitted period of free parking in a shopping centre. He had contended (so far as material for current purposes) that the contractual provision imposing the charge was unfair. At [105], the Supreme Court applied binding CJEU authority, explaining the position as follows:

> *' ... the* [UTCCR] *give effect to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts…, and these rather opaque provisions are lifted word for word from articles 3 and 4 of the Directive. The effect of the* [UTCCR] *was considered by the House of Lords in Director-General of Fair Trading v First National Bank plc… But it is sufficient now to refer to Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) (Case C-415/11) [2013] All ER (EC) 770, which is the leading case on the topic in the Court of Justice of the European Union…The judgment of the Court of Justice is authority for the following propositions:*
>
> *(1) The test of "significant imbalance" and "good faith" in article 3 of the Directive (regulation 5(1) of the 1999 Regulations) "merely defines in*

a general way the factors that render unfair a contractual term that has not been individually negotiated": para 67. A significant element of judgment is left to the national court, to exercise in the light of the circumstances of each case.

(2) The question whether there is a "significant imbalance in the parties' rights" depends mainly on whether the consumer is being deprived of an advantage which he would enjoy under national law in the absence of the contractual provision: paras 68, 75. In other words, this element of the test is concerned with provisions derogating from the legal position of the consumer under national law.

(3) However, a provision derogating from the legal position of the consumer under national law will not necessarily be treated as unfair. The imbalance must arise "contrary to the requirement of good faith". That will depend on "whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations": para 69.

(4) The national court is required by article 4 of the Directive (regulation 6(1) of the 1999 Regulations) to take account of, among other things, the nature of the goods or services supplied under the contract. This includes the significance, purpose and practical effect of the term in question, and whether it is "appropriate for securing the attainment of the objectives pursued by it in the member state concerned and does not go beyond what is necessary to achieve them": paras 71-74.'

73. By a majority of six to one, the Supreme Court had upheld the £85 charge, holding that, even though it might well have fallen within a list of potentially unfair terms contained in the schedule to the UTCCR (and now in a schedule to CRA), it had not come within the statutory test for unfairness: any imbalance in the parties' rights had not arisen contrary to the requirements of good faith. At [107-108], the Court had stated:

'107. ...But it may fairly be said that in the absence of agreement on the charge, Mr Beavis would not have been liable to ParkingEye. He would have been liable to the landowner in tort for trespass, but that liability would have been limited to the occupation value of the parking space. To that extent there was an imbalance in the parties' rights. But it did not arise "contrary to the requirement of good faith", because ParkingEye and the landlord to whom ParkingEye was providing the service had a legitimate interest in imposing a liability on Mr Beavis in excess of the damages that would have been recoverable at common law. ParkingEye had an interest in inducing him to observe the two-hour limit in order to enable customers of the retail outlets and other members of the public to use the available parking space….

108. Could ParkingEye, "dealing fairly and equitably with the consumer, ... reasonably assume that the consumer would have agreed to such

> *a term in individual contract negotiations"? The concept of a negotiated agreement to enter a car park is somewhat artificial, but it is perfectly workable provided that one bears in mind that the test, as Advocate General Kokott pointed out in the Aziz case, at point AG75, is objective. The question is not whether Mr Beavis himself would in fact have agreed to the term imposing the £85 charge in a negotiation, but whether a reasonable motorist in his position would have done so. In our view a reasonable motorist would have agreed…'*

74. As was clear, from the wording of section 62 and the Supreme Court's dicta above, there were two elements to the test, submitted Mr Wandowicz: there must be (1) a 'significant imbalance in the parties' rights and obligations' which (2) is 'contrary to the requirement of good faith'. For a clause to be unfair, both elements must be satisfied.

75. As to that, Mr Wandowicz submitted that, adopting (for these purposes only) the hypothesis that a bet had been struck for £13,000 each way, Paddy Power was content to proceed on the basis that the clause created an imbalance, because the starting point was that Mr Longley could enforce an each way bet in that sum. However, in order to satisfy the first limb of the test, the imbalance must be 'significant' and was not, submitted Mr Wandowicz. First, the right to correct arises only in narrow, specified circumstances (where something has gone wrong), leaving everyday betting unaffected. Secondly, it is dependent upon the satisfaction of a specific factual test; whether a human error had occurred in the making of the bet. It would not suffice, for example, for Paddy Power reasonably but incorrectly to believe that a human error had occurred; the clause is drafted in objective terms. It is a safety net which does not affect the everyday operation of the contract. Even if that were not to be accepted, Clause 16 does not contravene the requirement of good faith, submitted Mr Wandowicz. Much like the overstaying fee in *ParkingEye v Beavis*, it fulfils a legitimate function in ensuring that erroneous bets are corrected. There is nothing punitive about it and, to the extent that it operates to Mr Longley's detriment, it only does so in the technical sense, in depriving him of a windfall which he would otherwise retain, but would give him exactly that which he had requested.

76. In Mr Wandowicz's submission, Clause 16 is also a provision which a reasonable, honest customer would not think twice about accepting in an individually-negotiated contract; no reasonable customer would object to bets being placed on the basis that an error would be corrected. Whilst Mr Longley himself might say that he would not have accepted it, that was nothing to the point — as the Supreme Court had made clear, at [108] of *ParkingEye* (set out above), the question is not whether Mr Longley himself would have agreed to Clause 16 in a negotiation, but whether a reasonable customer in his position would have done so.

77. In Mr Wandowicz's submission, the fact that only Paddy Power can invoke Clause 16 is a function of the way in which the relationship works; it is only the gambler who can win — if s/he loses, Paddy Power simply retains the stake. Thus, Clause 16 is designed to address a situation in which the customer has been paid, to which an error in Paddy Power's favour would have no relevance. The asserted lack of reciprocity and the scope for invoking Clause 16 after the race has been run were bad points, submitted Mr Wandowicz. Gambling operators' licences are subject to an obligation to have alternative dispute resolution in place, whereby, at the gambler's instigation, the dispute is referred to an adjudicator. In any

event, the clause under consideration in *ParkingEye* had operated at the instance of one party only; not every one-way clause is unfair.

78. In the above circumstances, so Mr Wandowicz submitted, Clause 16 was not unfair, such that Paddy Power had an entitlement to correct the bet as it did. Mr Longley's claim should be dismissed, whether on the basis of interpretation of the words used, by virtue of mistake, or by operation of Clause 16.

79. As to Mr Longley's *Braganza* submission, the relevant factual premise had not been pleaded, or established. Whilst the amenability of Clause 16 to irrational, capricious or perverse operation, as alleged though not accepted, was relevant to the question of fairness, the court could not make findings as to whether it had in fact been operated in such a way, because that had not been a pleaded issue. Accordingly, it was not open to Mr Longley to invite the adverse inferences sought. Nor could the decision-maker's motivation in looking into the matter be equated with his reasons for the decision then taken.

Analysis and conclusions
Findings of fact

80. It is first necessary to make findings on the material issues of disputed fact.

81. Mr Longley accepts that his original intention had been to place a bet of £1,300 each way and that, at all times until the point at which he had been informed that £26,000 would be coming out of his account, he had understood that to have been the bet which Paddy Power had been considering and willing to accept. I accept his evidence that he had registered that larger sum when speaking to Ms Farrugia, and had been excited and willing to strike the larger bet because he had been very confident that Redemptive would at least place and believed the odds offered for that event to be very generous. That evidence is consistent with his acknowledgement of the words spoken; the absence of any subsequent attempt to correct/reduce his stake before the Race started; the sums of money which he had gambled within, approximately, the 24 hours which had preceded the Race; the extent of his personal wealth and, in that context, his risk appetite. Whilst Mr Burns' note of their first telephone call on 23 September 2019 is said to record Mr Longley's account that he had made a decision to 'let it ride', having checked his app online, I am satisfied that, the two positions are not necessarily inconsistent; following his conversation with Ms Farrugia, Mr Longley had checked the app, seen that the larger sum had, indeed, been taken from his account and decided to let matters lie. That does not establish his understanding of Paddy Power's intention at the time of the call and it is inappropriate to seek to construe his words to Mr Burns as though they were a piece of legislation. Mr Burns' stated clarity about the content of their conversation appears to rely on the existence of his note, which does not go as far as his stated interpretation of it and is consistent with Mr Longley's position, as set out at paragraph 26 of his witness statement[6].

82. As to Paddy Power's intention, there being no dispute that Messrs Heffernan and McCarthy had been asked, and intended, to approve a bet of £13,000 each way, the question arises as to whether, as an issue of fact, that approval had been predicated upon the existence of a prior request by Mr Longley for a bet of that sum. I bear in mind that I have received no oral evidence from Mr McCarthy and that such evidence as he has provided has not been

[6]cited at paragraph 23 above.

the subject of cross-examination. Nevertheless, his witness statement is clear that Mr Heffernan and he had been considering whether to 'accept' a bet as requested by Mr Longley. That is consistent with the transcript of the conversation which took place between Ms Farrugia and Mr Heffernan; the way in which bookmakers typically operate; Mr Longley's stated personal experience of his past dealings with Paddy Power, over a substantial period; and Mr McCarthy's candid e-mail to the Racing Leadership team, sent shortly after the Race had concluded — *'A PP customer James Longley…came on looking for a bet in the 7.20 Wolverhampton with Sean Heffernan £13k EW @16/1 Redemptive…'* (emphasis added).

83. I accept Mr Wandowicz's analysis of the factual position as correct: there was a consistent, common intention on the part of Ms Farrugia, Mr Heffernan and Mr McCarthy to consider only the bet which each erroneously understood Mr Longley to have requested. Ms Farrugia's error in conveying to Mr Heffernan a request for an each way bet of £13,000 led to Messrs Heffernan and McCarthy approving that request. As is clear from the transcript of the conversation between Ms Farrugia and Mr Heffernan, following Ms Farrugia's statement, *'… and he's looking to get thirteen thousand each way, so a total of twenty-six thousand'*, the decision made was *'you can take that bet'*. Neither was intending to make a counter-offer. When Ms Farrugia returned to complete her conversation with Mr Longley, she, too, intended to relay the traders' acceptance of the bet which she and they had understood him to have requested. I am satisfied that, as a question of fact, the traders' intention, as communicated to and via Ms Farrugia, was that Paddy Power would accept Mr Longley's requested bet, which they erroneously understood to have been of £13,000 each way.

84. I am also satisfied that, when hearing Ms Farrugia's reference to the sum of £26,000, Mr Longley immediately appreciated that the larger stake did not reflect Paddy Power's true intention. First, as he acknowledged in cross-examination, in his approximately ten years as an account-holder Paddy Power had never offered him a bet at a stake higher than he had requested, let alone one at ten times the latter and, objectively, in such a substantial sum. Mr Longley is an experienced and sophisticated gambler who, I am satisfied, realised at the time, as would have anyone in that position, that a mistake had been made somewhere along the line, particularly as the higher sum in question had come with no discussion or explanation and would have resulted from the simple addition of a further zero to the stake which he had requested. I consider it to be likely that it was for that reason that he checked the amount which had been deducted from his account before the Race began. I reject Mr James' submission to the effect that, whatever the origins of Paddy Power's error, its consequential intention was to offer/accept an each way bet of £13,000; that is artificially to sever the figure from its proper and customary context, with which Mr Longley was very familiar.

85. Human nature being as it is, I am also satisfied that, when Mr McCarthy came to appreciate the extent of the loss which Paddy Power had sustained on the Race, he gave considerable thought to Mr Longley's bet and the options available at that stage. A person in his position cannot fail to have appreciated that it could only be improved by the resettlement of the sums originally paid out, but that is not necessarily synonymous with an irrational, perverse, or capricious exercise of any discretion for which Paddy Power's standard terms and conditions provide (assuming such considerations to be in issue at all — see below). His request that the bet be amended had followed confirmation by Paddy Power's Customer Services Team that the dial-a-bet operator had made a mistake and that the stake in fact

requested by the customer had been £1,300 each way. The amendment reflected the bet for which Mr Longley had asked, consistent with the intended basis upon which approval had been given.

Legal consequences

The proper construction of the words used by Mr Longley and Ms Farrugia

86. The starting point is the proper construction of the words said to constitute (counter-)offer and acceptance and, hence, to constitute the oral part of the contract between the parties. It is common ground that the words used are to be objectively assessed — see, for example, *Devani v Wells* [2020] AC 129, SC [17].

87. For ease of reference, I repeat below the two-part exchange which took place between Ms Farrugia and Ms Longley:

KF: *Paddy Power Kendra speaking. Can I have your account number or username please?*
JL: *Yeah it's Jameslongley1.*
KF: *Right, and your name please?*
JL: *James Robert Longley.*
KF: *How can I help you Mr Longley?*
JL: *Er… Can I have… Wolverhampton… 7.20…*
KF: *Wolverhampton 7.20, yep.*
JL: *Thirteen hundred pounds each way please.*
KF: *Thirteen hundred each way. On what please?*
JL: *Redemptive*
KF: *Number 6, Redemptive at 16/1. Is that the horse you are looking for, Sir?*
JL: *Yeah, yeah, yeah, yeah.*
KF: *Alright, so I'm getting max stake of 203, would you give me just a quick moment to call up a trader to see if I can get that cleared for you?*
JL: *Yeah, we need to up the stakes.*
KF: *Yeah I'm just going to have a look, OK?*
JL: *Yeah.*
KF: *Thank you. Please hold.*

[…..]

KF: *Hi, I got that cleared with a trader for you, if you like?*
JL: *Yeah, lovely.*
KF: *Alright, so that's going to be twenty-six thousand coming from Jameslongley1, is that correct?*
JL: *That's it, yeah*
KF: *Set for clearance*
JL: *Thank you*
KF: *And your bet is on fine Mr Longley*
JL: *Lovely*
KF: *Yeah that's on fine Sir*
JL: *Cheers, thank you.*

88. On behalf of Mr Longley, it is accepted, properly, that the opening line of the second part of that conversation could only have been and was understood to have referred to his earlier request for an each way bet of £1,300. I accept Mr Wandowicz's submission that Ms Farrugia's next words, *'...so that's going to be 26,000 coming from Jameslongley1, is that correct?'* cannot sensibly be construed, objectively and in context, as a counter-offer of a bet of that sum. First, they had followed the immediately prior confirmation that Mr Longley's requested bet had been cleared by a trader. Secondly, the language used made clear that the sum to be deducted from Mr Longley's account would be deducted in consequence of that bet: *'....so, that's going to be...'*. Thirdly, and even assuming that all other elements of the bet had, by that stage, no longer been under consideration, such that a £26,000 deduction from Mr Longley's account could reasonably have been interpreted to refer to a stake of £13,000 each way, the language used had not been structured as a counter-offer, particularly in circumstances in which the stake requested by Mr Longley had been a tenth of the size and the sum of money in question was so substantial. Relevant, as part of the context, is the generally appreciated fact that bookmakers do not typically counter-offer bets at substantially higher stakes, such that, absent clear language communicating an intention to depart from that position, the objective interpretation of the words used would not point in that direction. In my judgment, taken at their highest, Ms Farrugia's words constituted confirmation of the amount which would be debited from Mr Longley's account.

89. Insofar as it is said to constitute relevant context, clause 12.6 of Paddy Power's standard terms and conditions does not undermine that conclusion. In that clause, the words *'...At the end of the call you will be asked to confirm that the total stake is correct'* do not establish that Ms Farrugia conducted herself accordingly, or assist in the proper construction of the words which she in fact used, which made no reference to the stake. They cannot operate to distort the meaning of the words used by Ms Farrugia, in the context of her conversation with Mr Longley, considered as a whole.

90. Thus, Mr Longley's pleaded case fails. His alternative case, advanced in written and oral argument, and to which Mr Wandowicz, pragmatically, raised no objection, also fails. Here again, the language used by Ms Farrugia did not communicate an invitation to treat by Paddy Power; it sought Mr Longley's confirmation that the deduction to be made from his account, following the trader's clearance of his requested bet, was correct. Furthermore, his response, *'That's it, yeah'*, cannot properly be construed as a revised offer by him — those are words of confirmation, referable to the immediately prior question, hence Ms Farrugia's reply, *'Set for clearance.'* In any event, the words '*Set for clearance'* do not communicate Paddy Power's acceptance of a revised offer; they refer to the confirmation of the sum to be deducted from Mr Longley's account which had just been sought. Accordingly, the words *'And your bet is on fine, Mr Longley'* were themselves referable to the bet which (albeit erroneously) Ms Farrugia had recorded as having been requested by Mr Longley at the outset.
91. It follows that there had been no meeting of counter-offer/revised offer and acceptance and, hence, no contract for the placing of a bet of £13,000 each way by Mr Longley. The claim fails on that basis. Nevertheless, and as the parties invite me to do lest this matter go further, I consider, below, the various alternative positions which they advance.

Unilateral mistake

92. It follows from my findings of fact that, to the actual knowledge of Mr Longley at the relevant time, there had been no intention on the part of any relevant employee of Paddy Power to offer or accept a bet at a stake other than that which Mr Longley had requested. In the context of this case, the relevance of constructive knowledge (other than as a means by which to ascertain Mr Longley's actual knowledge) does not arise. At all times, Mr Longley had appreciated that the decision-maker was the trader, hence the need for Ms Farrugia to have obtained clearance of his desired stake. He had also appreciated that the trader was being asked to approve the stake which (so it was thought) he had requested. Both parties acknowledge that the stake is a fundamental term of the contract. If the alleged counter-offer is indeed to be construed as such, Mr Longley knew it to contain a mistake as to the relevant term and not to reflect Paddy Power's real intention, but, nevertheless, 'snapped it up'. Whilst it is right that, in so doing, he exposed himself to greater loss, should Redemptive fail to place, the fact remained that he also acquired the prospect of greater gain, thereby exposing Paddy Power to concomitantly greater loss.

93. Accordingly, in the event that there was an apparent contract for an each way bet of £13,000 (being the hypothesis to be adopted for these purposes), Mr Longley cannot enforce that contract. Whilst, in a different case, the question might then arise as to whether the apparent contract was void ab initio, or whether there was a contract on the terms intended by the mistaken party, in this case, it does not — whether or not on the cynical basis suggested by Mr James, Paddy Power has paid out on an each way bet of £1,300, and does not seek to recover the moneys paid.

Will constructive knowledge suffice to establish a unilateral mistake?

94. As in this case, the matters which a reasonable person would have known will tend to indicate that which the relevant party actually knew, itself likely to explain the dearth of authority in England and Wales, within the ratio of the decision, as to the relevance of constructive knowledge. In my judgment, the analysis in *Digilandmall.com* reflects the law of England and Wales — constructive knowledge does not suffice for the purposes of unilateral mistake, for the following reasons:

    94.1. I respectfully share the conclusion of the Singapore Court of Appeal [31] that *'Hartog represents a typical scenario where a party knowing of the mistake of the other party, sought to hold the latter to it. Phrases such as "must have known", "could not reasonably have supposed" are really evidential factors or reasoning processes used by the court in finding that the non-mistaken party did, in fact, know of the error made by the mistaken party'*.

    94.2. In *Hartog*, at 567D, Singleton J had observed, *'It is important, I think, to realise that in the verbal negotiations which took place in this country, and in all the discussions there had ever been, the prices of Argentine hare skins had been discussed per piece, and, later, when correspondence took place, the matter was always discussed at the price per piece, and never at a price per pound'*, going on to observe [567H – 568A], *'Even allowing that the market was bound to fall a little, I find it difficult to believe that anyone could receive an offer for a large quantity of Argentine hares at a price so low as … per piece without having the gravest of doubts of it… I am satisfied…that the plaintiff must have realised, and did in fact know that a mistake had occurred.'* In similar vein, he had found [568D], *'I am satisfied that it was a mistake on the part of the defendants or their servants which*

caused the offer to go forward in that way, and I am satisfied that anyone with any knowledge of the trade must have realised that there was a mistake.' All such conclusions, together with that at 568F on which Mr Wandowicz relies, supports the analysis in *Digilandmall.com*, rather than indicating that constructive knowledge, of itself, will suffice.

94.3. That is consistent with the position, as explained by Hannen J, in *Smith v Hughes*, at 610: *'And in considering the question, in what sense a promisee is entitled to enforce a promise, it matters not in what way the knowledge of the meaning in which the promiser made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promiser did not assent.'*

94.4. Whilst not mentioned in the judgment of Singleton J, it is clear from the headnote that *Smith v Hughes* was cited to the court in *Hartog*. The passage at page 610 of the former case neatly encapsulates the issue of principle which the common law doctrine of unilateral mistake is intended to address, being the situation in which the offeree, B, seeks to hold the offeror, A, to the objective meaning of A's apparent offer, notwithstanding that, to the actual knowledge of B, A lacked the relevant subjective intention. In such circumstances, the parties are not *ad idem*.

94.5. The above analysis is consistent with that of Aikens J, in *Statoil* [87], albeit that, in that case, the mistake on which reliance was placed had been known to the defendant:

> *'…The general rule at common law is that if one party has made a mistake as to the terms of the contract and that mistake is known to the other party, then the contract is not binding. The reasoning is that although the parties appear, objectively, to have agreed terms, it is clear that they are not in agreement. Therefore the normal rule of looking only at the objective agreement of the parties is displaced and the court admits evidence to show what each side subjectively intended to agree by way of terms. If it is clear from such evidence that there was not consensus, then there can be no contract, because the parties have not truly agreed on the terms. Some of the cases talk of such a contract being "void", but I think it is clearer to say that there was never a contract at all.'*

Aikens J's analysis of the decision in *Digilandmall.com* [95] is also instructive:

> *'To my mind this decision falls squarely within the classic rule. There was a unilateral mistake by the seller about the price of the printers. The buyers knew that the mistake had been made, but went ahead and "snapped up the offer" (**Tamplin v James (1880) 15 Ch D 215 at 221 per James LJ).** Plainly, when the subjective evidence was examined, the parties were not agreed as to the most fundamental term of the contract: the price.'*

94.6. By contrast, a mistake of which the offeree ought to have been, but was not in fact, aware does not lead to the conclusion that, subjectively, the parties were not *ad idem*; it points to the opposite conclusion. In my judgment, none of the caselaw on which Mr Wandowicz relied engages with that issue, or otherwise considers the matter doctrinally.

94.7. In *Centrovincial Estates*, decided in 1983, the Court's conclusions on constructive knowledge were not only obiter, but had followed a positive assertion by the plaintiff, the source of which was not identified, that constructive knowledge was a relevant consideration, in the alternative to actual knowledge. The Court of Appeal dealt with the matter in a brief paragraph, which adopted the language used by the plaintiff, seemingly without having been referred to any authority on the particular issue.

94.8. In *OT Africa Line*, Mance J (as he then was), held [page 703, first column]:

> *'Here, there is objectively agreement on a particular sum. The question is what is capable of displacing that apparent agreement. The answer on the authorities is a mistake by one party of which the other knew or ought reasonably to have known. I accept that this is capable of including circumstances in which a person refrains from or simply fails to make enquiries for which the situation reasonably calls and which would have led to discovery of the mistake. But there would have, at least, to be some real reason to suppose the existence of a mistake before it could be incumbent on one party or solicitor in the course of negotiations to question whether another party or solicitor meant what he or she said.'*

Consistent with the conclusion reached in *Digilandmall.com* [43], in my judgment that analysis principally was directed towards the question of so-called Nelsonian blindness. Mance J's reference to the need for the non-mistaken party to have some real reason to suppose the existence of a mistake points to that conclusion, in focusing the enquiry on the facts of which that party is aware, albeit to which he wilfully shuts his eyes. Furthermore, Mance J's analysis relied upon the position set out in *Centrovincial Estates* (adopted, also without analysis, by Nicholls LJ in *The Antclizo* [1987] 2 Lloyds Rep 130, at 146), in which, as I have previously noted, no authority had been cited for the plaintiff's, seemingly uncontested, proposition that constructive knowledge would suffice. If Mance J is to be taken to have concluded that constructive knowledge of the other party's mistake is of relevance other than as a means of ascertaining the non-mistaken party's actual knowledge, I respectfully dissent from that position.

94.9. Whilst apparently concluding that actual knowledge of the mistake is required, in my judgment *Merrill Lynch International* does not advance matters much further — in Hamblen J's consideration of an application for summary judgment, the nature of the knowledge required was addressed in the briefest of terms, given (1) the defendant's acceptance that its case on unilateral mistake stood or fell with its case in misrepresentation (which he had held to have had no real prospect of success); and (2) his conclusions that, in any event, the assertion of unilateral mistake had no real prospect of success because the alleged mistake had been post-

contractual and none of the mistakes on which reliance had been placed had been, or had been alleged to be, as to the terms of the contract. Whilst Hamblen J cited paragraph 87 (and others) of *Statoil*, he did so in support of that latter proposition. Again, no detailed analysis of the requisite knowledge, by reference to authority, was undertaken and the point does not seem to have been the subject of prior argument.

94.10. As to the practitioner texts on which Mr Wandowicz relies, Lord Burrows cites no authority for the proposition set out at section 35(4)(b)(i) and Professor Cartwright refers to the authorities which I have considered above. The editors of *Chitty*, rightly, observe that English law gives no clear answer on the point. I have been referred to no reasoned analysis of the issue (obiter or otherwise) by the courts of England and Wales, in particular post-dating *Digilandmall.com*. In my judgment, such an analysis leads to the conclusion that actual knowledge by B of A's relevant mistake is required and that a consideration of that which the reasonable person in B's position ought to have known is merely one means by which to ascertain, on the balance of probabilities, whether B in fact possessed the requisite actual knowledge.

Mutual or common mistake

95. Whilst, in the course of argument, these terms were used with some fluidity, the essence of Mr Wandowicz's submission was that, in the event that Paddy Power's case on interpretation and unilateral mistake were rejected, in the further alternative Mr Longley and Paddy Power had each been labouring under a different mistake. In this scenario, Mr Longley had not registered Ms Farrugia's reference to £26,000 and considered that he had both sought and received approval of an each way bet in the sum of £1,300; and Paddy Power subjectively intended to counter-offer an each way bet of £13,000, rather than to accept the bet requested by Mr Longley. Thus, the parties had been at cross-purposes as to the subject matter of the contract and neither can establish that the other party should reasonably have understood his/its position.

96. So described, the assertion is one of mutual mistake. On the facts as undisputed and found, that issue does not arise; at no point did Paddy Power intend to make any counter-offer, or to do other than accept a bet for the stake which Mr Longley had sought, a fact which Mr Longley understood. The parties were not at cross-purposes as to the subject matter of the contract. If engaged at all, this defence fails.

Clause 16

97. I turn to consider the rival submissions relating to Clause 16, advanced on the hypothesis, which I have rejected, that, notwithstanding the mistake made by Paddy Power, a contract had come into being for an each way bet of £13,000. Mr James acknowledges that sub-clause 16.9 is potentially engaged, but submits that, on their proper construction, sub-clauses 16.1 and 16.6 are not.

98. In my judgment, subject to the contention that it is an unfair term (considered below), sub-clause 16.9, at least, is engaged on the current hypothesis. I repeat that term below:

> *'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.'*

99. As Mr Wandowicz pointed out, winnings are paid automatically, by operation of Paddy Power's software. Thus, any human error can only occur at an earlier stage. I reject Mr James' construction of the clause, which focuses, to use the old-fashioned language, on the *causa causans*, rather than on the *causa sine qua non*. In my judgment, there is no justification for such a narrow construction. The meaning of the clause is clear and encompasses a situation in which human error by Paddy Power has led to the incorrect award of winnings, which the betting party agrees to refund. There being no ambiguity, the contra proferentem principle (embodied in section 69 of the CRA) is not engaged. In any event, (1) I do not accept that clauses 16.1 and/or 16.6 are aimed at errors resulting from a mistake made by the trader (albeit that they would attach to such an error); and (2) in this case, both traders acted in the mistaken belief that the bet requested had been £13,000 each way.

100. The *Braganza* point does not arise; it has not been pleaded, in which circumstances and, whatever the explanation for that position, Mr McCarthy is not to be criticised for failing to have addressed the considerations which it would have engaged, had it been in issue. The implied joinder of issue with the defence does not assist Mr Longley; the defence does not address the matters which had informed Mr McCarthy's exercise of any discretion. For the same reasons, it is inappropriate to draw adverse inferences from the limits of his evidence and Mr Wandowicz is right to submit that the factual premise of this unpleaded issue has not been established.

101. I note, in passing, however, the following two points:

    101.1. unlike sub-clauses 16.1.1; 16.3; 16.4; 16.6; and 16.8 (which, variously, speak of Paddy Power reserving the right to take the relevant action; state that it *'may'* do so; or specify that the betting party's obligation to repay arises when a (by implication, elective) demand for payment is made), sub-clause 16.9 is not expressed in such terms. The obligation on the betting party to refund any winnings paid is triggered if those winnings have been paid as a result of one of the specified errors. It follows that, on one view, this is not a clause in which a discretion arises, save in the broad sense that it is always open to a contracting party to decide that it will not enforce its contractual rights; in any event,

    101.2. unlike the clause within the contract of employment in *Braganza*, which had provided that the relevant benefits *'…shall not be payable if, in the opinion of the company or its insurers, the death…resulted from amongst other things, the officer's wilful act, default or misconduct…'*, sub-clause 16.9 (in common with sub-clauses 16.1.1 and 16.6); calls for an assessment by Paddy Power of a qualitatively different character; whether winnings have been awarded

incorrectly as a result of any human error. That is a relatively straightforward matter to resolve, once it is acknowledged that the enquiry is not restricted to the immediately proximate cause of the sums initially paid out, and bearing in mind that Paddy Power is in a position to review recordings of discussions between its agents and the consumer. In this case, Mr McCarthy established that there had been a human error, leading to the approval given by the traders, resulting in the initial payment to Mr Longley of a greater sum in winnings. In such circumstances, it is likely to be more difficult for a court to conclude that any discretion has been exercised contrary to the principles discussed in *Braganza*.

The CRA

102. Finally, I address Mr Longley's position that, pursuant to section 62(1) of the CRA, Clause 16 is, in any event, not binding upon him, as being an unfair term of a consumer contract. As to that:

Does Part 2 of the CRA apply to Clause 16?

102.1. I reject Mr Wandowicz's primary submission that Part 2 of the CRA does not apply to Clause 16, because the latter falls within section 73(1)(a). Mr James is right to contend that the provisions of the social responsibility code within the LCCP identify matters which licensees must set out within their rules; they do not mandate the form which such rules must take or, hence, exclude the form selected from section 62 of the CRA. Mr Wandowicz did not advance the contrary proposition with any vigour.

The relevance of transparency

102.2. Part 2 of the CRA is headed *'Unfair Terms'*. It includes section 76, which defines the word 'transparent' in accordance with sections 64(3) and 68(2). Whereas section 64 is headed *'Exclusion from assessment of fairness'*, and relates to terms to be excluded from section 62, section 68 is a freestanding term, headed *'Requirement for transparency'*. It is not expressly linked to the definition of unfairness for which section 62(4) provides, though it is not inconsistent with the latter. Schedule 3 to the CRA sets out the circumstances in which a regulator may apply for an injunction or interdict. Paragraphs 3(1) and 3(3) of that schedule entitle it to do so if it thinks that the term *'is unfair to any extent'*. By paragraphs 3(1) and 3(5) of schedule 3, it is entitled to do so if it thinks that the term *'breaches section 68 (requirement for transparency)'*. That provision would be otiose if transparency were an aspect of unfairness, which would be encompassed within paragraph 3(3). Thus, as a matter of construction, the statutory requirement of transparency is separate from the assessment of fairness under section 62 and a breach of the former requirement would not necessarily render the term in question unfair, and, thus, unenforceable against the consumer, though it might give rise to regulatory action. That is consistent with the Competition and Markets Authority's guidance on the CRA, dated 31 July 2015, which includes the following text:

'2. Part 2 of the Guidance: Fairness and transparency

…

2.2 Section 62 of the Act provides that 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'. The test for notices mirrors the test for terms, except that (in line with the intention to cover non-contractual notices) it does not make reference to 'the contract'.

2.3 Unfair terms and notices are liable to potential enforcement action by a 'regulator' such as the CMA…, and are not enforceable against the consumer. See part 6 of this guidance for more information on public enforcement. If consumers consider that wording on which a trader seeks to rely is unfair, they are entitled to challenge the trader and, if any dispute arises, to invoke the provisions of the Act more formally – taking legal advice as appropriate – for instance by bringing their own proceedings.

2.4 Transparency is fundamental to fairness and is also a requirement in its own right, breach of which can lead to enforcement action. The Act at section 68 requires that a written term of a consumer contract, or a consumer notice in writing, is transparent. This means that written terms and notices need to be expressed in plain and intelligible language and be legible. This specific transparency requirement sits alongside and reinforces, the more general obligation, embodied in the requirement of good faith, of fair and open dealing in the use of contract terms which is considered in detail below. To meet the section 68 requirement of transparency, also considered further below, obligations and rights should be set out fully, and in a way that is not only comprehensible but puts the consumer into a position where he or she can understand their practical significance.

2.5 This guidance refers at various points to the section 68 transparency requirement as a transparency test, when the context makes this appropriate, in the same way that it refers to the fairness test, and it treats the two tests as operating separately alongside one another. But the purpose of both is to achieve fairness, and (as underlined by the requirement of good faith) the fairness test is more likely to be met where there is transparency.

2.6 Failing this specific transparency test alone, independently of the fairness test, does not make a term unenforceable against an individual consumer in the same way as a finding of unfairness. But there is a requirement that, if a term or notice has more than one possible meaning, and so is ambiguous, it should be given the meaning that is most favourable to the consumer. This is designed particularly to assist consumers in their own disputes with traders. Further, if a regulator considers that a term or notice

> *breaches the section 68 transparency requirement, it can take enforcement action in the same way as when the requirement of fairness is considered to have been breached. Such action may be taken where a term or notice is ambiguous even if one of its potential meanings is not unfair.'*

102.3. Nevertheless, irrespective of whether the definition of transparency for which section 68 provides is imported into the definition of fairness in section 62(4) of the CRA, a lack of transparency in the broader sense could, for the purposes of the latter section, run contrary to the requirement of good faith, in this context being one of fair and open dealing, as explained by Lord Bingham in *Director General of Fair Trading v First National Bank Plc* [17F], on which Mr James relies and which Mr Wandowicz rightly accepts to remain good law.

Is Clause 16 transparent, in the sense explained by Lord Bingham?

102.4. I begin by considering the location of Clause 16 within Paddy Power's standard terms and conditions. At the beginning of the latter, there is an index and a table of contents. Whilst Clause 16 falls within Part A, entitled *'Online Gambling'*, a combined reading of clauses 1 and 2 makes clear that, by registering and/or using the dial-a-bet services, the consumer agrees to be bound by all terms and conditions in that part. Clause 8, entitled 'Placing Bets', also makes clear that it applies to dial-a-bet transactions. Clause 12, entitled 'Dial-a-Bet', imposes rules in that connection, expressly *'in addition to the rest of these Terms of Use'* (see clause 12.1). Parts B to G set out the terms and conditions applicable in specified circumstances only, to which a reasonable consumer would appreciate that s/he need not refer other than in such circumstances. Accordingly, in a document the relevant part of which runs to 19 pages, the content of each term is suitably identified and I do not accept either that the length of Part A itself serves to obscure its content, or that Clause 16 is 'buried' within that part. The provision of a crib sheet, as suggested by Mr James, would simply add further documentation and risk creating confusion between the summary provided (the suggested content of which was not identified) and the detail of the clause itself. It might also deter the consumer from reading the applicable contractual terms.

102.5. Nor do I consider the wording of Clause 16 itself to lack transparency, in the sense explained by Lord Bingham. Recognising that there are certain drafting infelicities which would benefit from tidying up, the clause is legible, its meaning is clear and it contains no concealed pitfall or trap. It is suitably signposted, both in the table of contents and within the body of the terms and conditions, under the heading *'Errors and Suspected Errors'*, and appears immediately below clause 15, headed *'Winnings & Payment'*, in which it might reasonably be expected that the consumer is likely to have a particular interest. Any reasonable user of Paddy Power's services would be aware of its existence and nature and would have a fair opportunity to read it, should s/he wish to do so. I consider it to be suitably prominent.

102.6. Accordingly I am satisfied that the need for openness, as part of the duty of good faith, is satisfied. For the sake of completeness, as Mr James acknowledged, questions of transparency are fact-sensitive. As such, there is a limit to the

assistance to be gained from conclusions reached in other cases, such as *Spreadex Limited* and *Green*.

Is there a significant imbalance in the parties rights and obligations, to the detriment of the consumer, which is contrary to the requirement of good faith?

102.7. I turn to consider whether there is a significant imbalance in the parties' rights and obligations which is contrary to the requirement of good faith, having regard to the principles set out in *First National Bank* and in *ParkingEye* [105] and recognising that there is a degree of overlap between the two limbs of the test.

Significant imbalance

102.8. Clause 16 has the potential to exclude the right of the consumer to hold the trader to a contract which had been entered into upon the basis of an error which would not, under the general law, render that contract void. Accordingly, there is an imbalance in the parties' rights, to the detriment of the consumer. The question is whether that imbalance is significant. In my judgment, it is not. On its proper construction, it applies only in limited, defined circumstances in which, objectively viewed, such an error has occurred. Mr Wandowicz's description of the clause as a safety-net, which does not affect the everyday operation of the contract, is apt. Lest I be wrong in that conclusion, I consider below whether any significant imbalance is contrary to the requirement of good faith.

The requirement of good faith

102.9. As noted above, the requirement of good faith is one of fair and open dealing. I have addressed the question of openness above, resolving that issue in Paddy Power's favour. I now consider the requirement of fair dealing, having regard to the numbered paragraphs within Part 1 of Schedule 2 to the CRA upon which Mr James relies (noting that such terms may, but will not necessarily, be regarded as unfair) and to the further matters pleaded at paragraph 17 of the particulars of claim:

102.9.1. Paragraph 3 of Part 1 is not applicable: Clause 16 does not render the provision of services by Paddy Power subject to a condition the realisation of which depends on its will alone (and I note that Mr Longley's pleaded case has replaced the word 'will' with the word 'decision'). As I have noted above, Clause 16 is triggered only in the event of a relevant error, objectively viewed. Either there is such an error or there is not; were the clause to be invoked in its absence, Paddy Power would be acting outside its ambit. That of itself acts as a significant limitation on the scope for the clause to be invoked capriciously, irrationally or in a perverse manner.

102.9.2. Paragraph 7 of Part 1 is not applicable and Mr James' criticism of sub-clause 16.6 is misplaced; the lack of reciprocity in that provision

arises from the fact that it is concerned with moneys paid to the consumer as a result of the relevant error. An error by the consumer would not result in the payment by Paddy Power of such moneys. In so far as reliance is placed upon a broader lack of reciprocity (echoed in clause 8.4) and the ability to invoke Clause 16 after the outcome of the race is known, clause 32 in Part A of Paddy Power's standard terms and conditions provides for a dispute resolution procedure (consistent with Paddy Power's obligations under its licences), enabling any unresolved dispute to be escalated, if not resolved to the consumer's satisfaction, to the Independent Betting Adjudication Service (which is an impartial adjudication service for disputes between licensed gambling businesses and their customers, approved by the Gambling Commission). A refusal to void an erroneous bet favourable to Paddy Power in its outcome, is unlikely to result in an adjudication in its favour, a fact of which it cannot but be aware.

102.9.3. Paragraph 11 of Part 1 is not applicable: Paddy Power cannot alter unilaterally the terms of the contract, nor, in any event, can it invoke Clause 16 'without a valid reason', such reason being the relevant error.

102.9.4. Similarly, paragraph 13 of Part 1 is not applicable: Paddy Power cannot alter unilaterally any characteristic of the service to be provided, nor, in any event, can it invoke Clause 16 'without a valid reason' (see above).

102.9.5. Paragraph 16 of Part 1 is not applicable: Clause 16 does not confer on Paddy Power the right to determine whether to supply services in conformity with the contract, or to interpret any term of the contract as it, exclusively, sees fit. Here again, either there is an error or there is not.

102.9.6. Paragraph 17 of Part 1 is potentially applicable: Clause 16 has the object or effect of limiting Paddy Power's obligation to respect commitments undertaken by its agents. Nevertheless, in all the circumstances discussed above, I do not consider such limitation to constitute unfair dealing.

102.10. Further, I accept Mr Wandowicz's submission that Paddy Power has a legitimate interest in correcting erroneous bets. Such detriment as the consumer experiences in those circumstances is the deprivation of a windfall arising from a bet made in error (recognising that the clause does not oblige Paddy Power to give credit for the winnings which the intended bet would have generated). The clause is not punitive. Mr James' submission that Paddy Power's ability to lay off the full extent of the bet whilst invoking Clause 16 itself renders the provision unfair is misplaced. The ability to lay off all or part of a bet outside the consumer contract (which may or may not be possible in any given circumstances) is a separate matter from any imbalance in the parties' rights and obligations under their own contract and does not operate to the detriment of the consumer under that contract, nor is it contrary to the

requirement of good faith. All such matters inform my conclusion that (1) Paddy Power, dealing fairly and equitably with the reasonable consumer in Mr Longley's position, could reasonably assume that such a consumer would have agreed to Clause 16 in individual contract negotiations, and (2) that a reasonable consumer would have agreed to that term.

103. It follows that I reject Mr Longley's contention that Clause 16 is unfair, within the meaning of section 62 of the CRA, and, hence, that, if engaged, it was not binding upon him.

Summary of conclusions

104. In summary, in my judgment:

104.1. on a proper construction of the words exchanged by Mr Longley and Ms Farrugia on 21 September 2019, there was no contract between the parties for an each way bet of £13,000. The claim is dismissed against all Defendants on that basis.

104.2. if, contrary to the above finding, there was an apparent contract for an each way bet of £13,000, Mr Longley cannot enforce that contract because, to his actual knowledge, Paddy Power had not intended to offer or accept a bet other than that which he had requested at the outset. The defence of unilateral mistake is, thus, established.

104.3. as a matter of law, constructive knowledge on the part of a non-mistaken party will not suffice to establish the defence of unilateral mistake. Consideration of that which a reasonable person in all the circumstances would have known constitutes the '*evidential factors or reasoning processes used by the court in finding that the non-mistaken party did, in fact, know of the error made by the mistaken party'*. The analysis by the Singapore Court of Appeal, in *Digilandmall.com*, also reflects the law of England and Wales.

104.4. were the defence of unilateral mistake not to have been established, on the facts as found and agreed the parties had not been at cross-purposes as to the subject matter of the contract and the defence of mutual mistake would have failed.

104.5. had there been a contract for an each way bet of £13,000 which the error made had not operated to vitiate, Clause 16 (in particular, sub-clause 16.9) would have applied; Paddy Power would not have been liable to pay the winnings resulting from the error made and Mr Longley would have been obliged to refund any such winnings. Clause 16 is not unfair, within the meaning of section 62 of the CRA. On the pleaded case, the *Braganza* point does not arise for determination and its factual premise has not been established.