Neutral Citation Number: [2021] EWHC 842 (QB)

Case No: QB/2019/001489

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07 April 2021

Before:

Mrs Justice Foster DBE

- -

Between:

Andrew Green — **Claimant**

- and -

Petfre (Gibraltar) Limited t/a Betfred — **Defendant**

- -
- -

Mr Couser and Mr Smith (instructed by Coyle White Devine Limited) for the Claimant
Mr Osborne (instructed by Blue Sky Law Limited) for the Defendant

Hearing date: 15 October 2020

- -

Approved Judgment

Mrs Justice Foster DBE:

Introduction and the Parties

1. On 26 January 2018, just after midnight Mr Green began playing a game online called 'Frankie Dettori's Magic Seven Blackjack' ("the Game") via an online platform hosted by the Defendant (whom I shall refer to here as "Betfred"). In particular he played for about 5½ hours on a side bet feature within the Game. At the point when he finally stopped playing the Game, having left, and played elsewhere on the site for a short time, betting chips to the value of £1,722,500.24 were recorded on screen as his winnings. When he attempted to withdraw the winning chips into his cash account with Betfred he was unable to do so.

2. He contacted customer services at Betfred about his win, they congratulated him and asked him to ring back after 9:30 AM later that day to make arrangements for his chips to be cashed. The evidence differs as to what was said, but it is agreed that, subject to checks which they said had to be carried out, Betfred did not seek at this point to suggest other than that he was a big winner. Mr Green went out that night and celebrated with his family and friends spending some £2,500 in the process, expecting, as he says, to be credited with £1,722,500.24 in his account. When he was in touch with Betfred's VIP team on the Monday he was told the win was so big it would have to be sent off to the Game provider, Playtech, to be double-checked, and that this was standard procedure. Two days later on Wednesday, 31 January 2018 a Mr Russell Young for Betfred informed Mr Green that Playtech had informed him there had been a glitch in the Game and he could not be paid out.

3. For the purposes of this application, the Claimant agrees, as is pleaded in Betfred's defence, that, unknown to Betfred and to Mr Green, what appears to be a fault in the development of the Game meant that where play continued without a break, it gave much better odds of a player winning than Betfred intended. Betfred say that eventually at some point over time if play did not cease, the player would have held only winning cards.

4. Betfred said they were not obliged to pay Mr Green his winnings in the circumstances, and the terms of the contract between them excluded liability to him. Mr Green issued a claim for his winnings relying upon certain clauses in a Terms and Conditions document he had clicked to accept when he first accessed the site some years previously. The Game itself was first made available to players at 10:19 AM the day before it was played by Mr Green.

Issues

5. By the application before the court Mr Green seeks summary judgment alternatively to strike out Betfred's defence and recover what he says are the winnings to which he is entitled.

6. Put shortly, Betfred say they are not obliged to pay Mr Green his winnings because three terms in three documents of contractual effect excluded any liability to payout in these circumstances. Betfred also rely upon the doctrine of common mistake and say they are entitled to limit their obligations to a return of the stake invested by Mr Green.

The Claim

7. Mr Green accepts that he agreed to certain written Terms and Conditions and made his pleaded claim on the basis that there has been a breach of clause 2.4 of the written Terms and Conditions which he says appear to govern payment out of monies to a player. The screenshot of what he saw on his mobile phone after playing was as follows:

> "Withdraw
>
> In order to change your chips into cash you can withdraw, visit Balance
> Transfer your balance
> Cash £0.15 p
> Chips 1,722,500.24
> Enter amount to withdraw with Visa debit…"
>
> [Last four digits of Card number given.]

8. In seeking to operate this function he was refused any withdrawal. He sues claiming a breach of a promise contained in the clause stating that customers may withdraw funds from their account at any time provided all payments had been confirmed.

The Defence

9. Betfred express their defence as follows:

    a. the clause upon which Mr Green relies cannot found a claim as it refers to rights to withdrawal from a customer account of monies placed there by the customer, not payment out of "chip balances" in the Casino area of their website;

    b. because there was a defect in the Game, clause 4.4 of the Terms and Conditions to which Mr Green agreed means that Betfred is not liable to pay his claim;

    c. because there was a defect in the Game, clause 5 of the End-User Licence Agreement ("the EULA"), to which he also agreed, also entitles Betfred not to payout;

    d. the rules of the Game ("the Game rules") which were incorporated by reference in the gaming contract by means of clause 2 of the EULA and/or by necessary implication also exclude liability as they provide that bets and payments in the Game will be void as a result of "malfunction" and this was a malfunction; alternatively,

e. the parties were operating under a mutual mistake at the time when Mr Green played and that voids the contract between them.

10. Mr Green argues that the clauses which purport to limit Betfred's liability:

a. do not cover the events which happened: in particular there was no malfunction of "Software" as that term is defined which entitled Betfred to avoid liability to pay winnings: the term "Software" in the contract refers to software downloaded in order to access and play the Game, not the Game itself;

b. were not sufficiently notified to him so were not incorporated into the contract he had with Betfred and do not bind him;

c. even if incorporated, pursuant to the Consumer Rights Act 2015, and at common law, clauses of this nature were required to be clear, fair, and transparent and these clauses were none of those things, and so may not be relied upon.

11. Mr Green argues the doctrine of mistake has no application in the current circumstances.

12. For the purposes of this application Betfred accept that Part 2 of the Consumer Rights Act 2015 ("the Act") may have application to a contract made on or after 1 October 2015, but reject the analysis based upon it. Even if the Act applied as alleged, Betfred's case is that the terms upon which they rely are consistent with it.

Applicable Law
Part 24

13. There was no dispute as to the principles applicable in respect of summary judgment and, as set out by Lewison J in *Easyair Limited (Trading as Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch), I accept I must be careful before giving summary judgment on a claim. As he set out in paragraph 15 of that case:

a. I must consider whether the party against whom the remedy is sought has a "realistic" as opposed to a fanciful prospect of success

b. "realistic" means a case that carries some degree of conviction and is more than merely arguable (*ED and F Man Liquid Products v Patel* [2003] EWCA Civ 472 [8])

c. the court must not conduct a mini-trial when reaching its conclusion but that does not mean that the court is obliged to take at face value and without analysis anything said in statement before the court (*ED and F Man Liquid Products v Patel* [2003] EWCA Civ 472)

d. in reaching its conclusion the court must take into account the evidence before it on the application and also evidence that can reasonably be expected to be available at trial (*Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550)

e. a court should hesitate about making a final decision without a trial even where there is no obvious conflict of fact where reasonable grounds exist for believing that a full investigation into the facts of the case would add to or alter the evidence available to the trial judge and so affect the outcome of the case (*Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63)

f. on the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

14. As it was encapsulated recently by Warby LJ in *HRH The Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch):

> "14. Easyair principles (vi) and (vii) contain echoes of the law's traditional disapproval of "a desire to investigate alleged obscurities and a hope that something will turn up…" as a basis for defending a summary judgment application; a case that is "all surmise and Micawberism" will not do: see *The Lady Anne Tennant v Associated Newspapers Ltd* [1979] FSR 298, 303 (Sir Robert Megarry V-C). The focus is not just on whether something more might emerge, but also – and crucially – on whether, if so, it might "affect the outcome of the case"; and the court's task is to assess whether there are "reasonable grounds" for believing that both these things would occur: see *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661 [2007] FSR 63, [18] (Mummery LJ).
>
> 15. As Mummery LJ warned in the *Doncaster* case at [10], on applications for summary judgment the court must be alert to "the defendant, who seeks to avoid summary judgment by making a case look more complicated and difficult than it really is". But as he also said at [11], the court should beware "the cocky claimant who…confidently presents the factual and legal issues as simpler and easier than they really are and urges the court to be efficient…". Efficiency is not a ground for entering summary judgment. Judgment without a trial may sometimes result in huge savings of time and costs; that would have been so in the hugely

> expensive litigation in *Three Rivers District Council v Bank of England.* But neither Part 24, nor the overriding objective, permits the court to enter judgment on the basis that the claimant has a strong case, the defence is not likely to succeed, and the time and costs involved in a trial are disproportionate to the potential gains.
>
> 16. The overriding objective of "deciding cases justly and at proportionate cost" does have a role to play if the court concludes there is no realistic prospect of a successful defence, and the question arises whether there is "some other compelling reason" for a trial. At that point, the court would be bound to have regard to considerations such as saving expense, proportionality, and the competing demands on the scarce resources (CPR 1.1(2)(b), (c) and (e)). It is rare for the court to find a compelling reason for a trial, when it has concluded there is only one realistic outcome. The defendant has not suggested that this is such a case. My focus must be on whether it is realistic or fanciful to suppose the claims might fail at trial."

General Principles of Construction

15. There is also no disagreement on the applicable principles of construction in this case. There was no particular nuance to the submissions that requires any extensive citation of authority. It suffices to say that the purpose of interpretation is to ascertain the objective meaning of the language in its documentary, factual and commercial context and I adopt the approach set out by Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] AC 1173:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of a particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

16. The text must be assessed in the light of the natural and ordinary meaning of the words, but also in the context of any other relevant contractual provisions, and the overall purpose of the clause and the contract.

17. In the words of Lord Neuburger in *Arnold v Britain* [2015] UKSC 36:

> "When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic arrangement involving both parties, it cannot be right, when interpreting a contractual provision,

> to take into account a fact or circumstance known only to one of the parties."

18. The essence is that the process of construction is unitary and iterative. The text of the contract must be assessed in the light of the natural and ordinary meaning of the words of any other relevant provisions of the contract, the facts and circumstances known or assumed by the parties at the time the contract was executed. The surrounding facts may be of more importance where the drafting is not particularly sophisticated.

The Consumer Rights Act 2015

19. The Claimant relies on Part 2 of the Consumer Rights Act 2015 and the provisions that prohibit reliance on unfair terms by a trader as against a consumer.

20. In the pleadings the Claimant characterised the relationship between the parties as a contract for the supply of an online gambling platform, and/or services arguing that Part 3 of the Consumer Rights Act 2015 governing contracts for the supply of digital content also applied. Before me he did not advance any argument to the effect that these were other than contracts for the supply of services, consistent with his acceptance that, as the Defendant argues, each bet was an individual gaming contract. Since the Act has effect only in respect of contracts formed on or after 1 October 2015, on this analysis the individual contract, formed in respect of the winning bet is subject to the 2015 Act. It was not in dispute that Mr Green was a consumer and Betfred a trader (Consumer Rights Act 2015 section 2). Mr Osborne accepts that the 2015 Act would apply to a contract entered on or after 1 October 2015 but contends that to the extent the agreement between Mr Green and Betfred is subject to its provisions, its terms comply with the statutory requirements.

21. The Claimant relies particularly on the following sections:

> **"62 Requirement for contract terms and notices to be fair**
>
> (1) An unfair term of a consumer contract is not binding on the consumer.
>
> (2) An unfair consumer notice is not binding on the consumer.
>
> (3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.
>
> (4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
>
> (5) Whether a term is fair is to be determined -
>
> (a) taking into account the nature of the subject matter of the contract, and

(b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.

64 Exclusion from assessment of fairness

(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—

(a) it specifies the main subject matter of the contract, or

(b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.

(2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.

(3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.

(4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.

(5) In subsection (4) "average consumer" means a consumer who is reasonably well-informed, observant, and circumspect.

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.

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."

22. Mr Couser also referred the court to the judgment of Mr David Donaldson QC sitting as a Deputy Judge of the High Court in *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm) considering similar provisions in the predecessor to the Consumer Rights Act 2015, (the Unfair Contract Terms Act 1977).

23. In that case the spread betting bookmaker claimed summary judgment in respect of a consumer, Mr Cochrane, who had made certain initial personal trades with significant

profitability. In his absence, without his knowledge and authorisation, his account was tinkered with by a child who, by playing on the computer, effected through it a number of "trades" which caused tens of thousands of pounds worth of loss on the account. The Claimants sued on a clause that deemed the Defendant to have authorised all trading under his account number.

24. In *Spreadex*, the spread bet player was required to agree to a set of Terms and Conditions and to a EULA in a "click-wrap" agreement similar to that in operation here. The Terms and Conditions in this case were some 32 pages long, the EULA was nine pages, and the Game's rules, six pages.

25. In refusing summary judgment, the Deputy Judge held that the Claimant's analysis was wrong: the terms did not form part of any contract, but even if they did, the clause in question fell foul of the consumer protection provisions proscribing reliance upon unfair terms. The Deputy Judge also said:

> "21. A further, and compounding, factor to be taken into account is the manner in which the clause was incorporated into any contract (if there was one). As I described earlier, the potential customer was told that four documents, including the Customer Agreement, could be viewed elsewhere on-line by clicking "View". Many, one might suspect most, would have passed up on that invitation and proceeded directly to click on "Agree", even though it was suggested that they should do so only when they had read and understood the documents. Even if, exceptionally, the Defendant in fact chose to look at the documents, he would have been faced in the Customer Agreement alone with 49 pages containing the same number of closely printed and complex paragraphs. It would have come close to a miracle if he had read the second sentence of Cl 10(3), let alone appreciated its purport or implications, and it would have been quite irrational for the Claimant to assume that he had. (In most cases, the limited time spent on the on-line application would in any event probably preclude any serious perusal of the documents). This was an entirely inadequate way to seek to make the customer liable for any potential trades which he did not authorise, and is a further factor rendering the second sentence of Cl 10(3) an unfair term."

26. Mr Osborne for Betfred argued in answer that the nature and consequences of liability for the unauthorised making of spread bets were far more serious than non-payment of winnings, and no analogy could be drawn with the present case.

Decision on the Preliminary Points

Suitability for Summary Judgment or Strike Out

27. Before turning to the materials which contain the contentious clauses, I deal with two preliminary matters. In addition to their main argument that they have realistic

defences to the claim, Betfred submitted the case was unsuitable for summary judgment because it concerns standard Terms and Conditions in the industry and has wider implications requiring a full trial of the issues. It also requires further evidence, including from experts, in order to determine the issues arising, in particular the allegation that the terms said to bind Mr Green are unfair.

28. Mr Green argues that there is no further admissible evidence which could assist the court in the task of construing the exclusion clauses in issue. There is sufficient material on which this court can come to a conclusion, in particular in the detailed evidence of Mr Gaunt on behalf of the Defendant concerning the operation of the betting site. This is a red herring on the part of Betfred, he submits, and should not dissuade the court from determining the issue under CPR 24.

29. Secondly, Mr Osborne raises a procedural issue. He says the Claimant's pleadings, indeed the contents of the application pursuant to CPR 24, are inadequate to make Mr Green's case. The provisions of clause 2 of the Terms and Conditions relate not to the withdrawal of winnings but to deposit of his own monies. Betfred, with some justification, also criticise the fact that the gist of the legal case on behalf of Mr Green is to be gathered from its Reply (rather than its claim) and from statements made by Mr Green's solicitor. The case made by Reply now relies upon the Consumer Rights Act 2015 and the claim would require amendment properly to express even the case they now make.

30. Mr Osborne submitted that the true contract was one of gaming. His analysis is that the player offers and Betfred accepts a bet on the terms contained in the three documents. On Betfred's analysis each bet constitutes a separate contract, and each is covered by the terms as set out. They do not point to any clause other than that relied upon by Mr Green, relating to a claim for winnings.

31. Mr Couser was minded to accept before me that the true analysis may well be as a gaming contract. Nonetheless, he argues, in the events which happened, Mr Green is entitled, whether under clause 2 of the Terms and Conditions, or under an implied term, to a sum representing his winnings under his contract with Betfred.

32. I have a little sympathy with the mispleading of the case. Nowhere is it made clear in my judgement what the full nature or extent of the contract between the parties is, and various descriptions of important purportedly binding clauses such as "terms", "conditions" and "rules" does not lead to clarity, neither does the layout of the contractual documentation about which I will say more below. Mr Couser contends that, even if the Defendant is correct that the Particulars of Claim require amendment, the essence of his case was always clear and was repeatedly made in correspondence, and latterly in the Reply. It is the case that Mr Green's solicitor did raise the Consumer Rights Act 2015 in a letter in December 2018. It has also been explained in the statement from him; it is simply that Mr Green clearly won at an online game and is entitled to his winnings which Betfred have wrongly withheld; the defence relies upon contractual exclusions and that is the case he meets. It is that central issue the court must decide, it is a short one of construction on which accordingly, summary judgment

pursuant to CPR 24 or the strike out of the defence are appropriate remedies where the central issue may be resolved as a matter of construction.

33. I have pondered carefully in light of the multiple changes to the Claimant's case since the matter was first pleaded whether this precluded me, without more, from exercising the jurisdiction under CPR 24. I have come to the clear conclusion it does not. There is no disagreement that the nub of the issue between the parties is the effect of the exclusion clauses. The matter, inevitably, would require permission to amend the claim and the court has elsewhere deprecated the pleading of the main case only by way of Reply. However, I have addressed my mind to CPR 1.1 and what was said about it by Lord Hope in *Three Rivers District Council v Governor and Company of the Bank of England* [2001] UKHL 16. In my judgement in pursuit of the overriding objective, and in the light of the fact that before me the issues had crystallised to a much narrower contest of which the Defendant had had fair warning in writing, I should go on to consider the substantive arguments in the case.

34. The clear central issue of this case is whether the Defendant has successfully excluded liability to pay Mr Green his winnings. The Defendant relies four-square on three terms which they say were of contractual effect. It is, as Mr Green says, a point of contractual construction.

35. In my judgement there is no impediment to considering the issues as they are presented here because of the possible wider potential scope of the decision within the industry. I am also not persuaded there is a body of further evidence that would put the material documents in a different light. Since these events and the terms in issue were used, the Defendant has significantly amended its Terms and Conditions, which illustrates that there is continuing development and fluidity in the industry. The relatively regular changes notified in respect of online terms by Betfred in the course of Mr Green's own relationship with them also bears this out. Given the parameters of my consideration of this consumer contract, I am not hampered by an absence of expert evidence particularly in the light of the detailed materials before the court.

36. Betfred's very helpful detailed evidence as to the process of engaging with their website is a sufficient foundation for understanding the way in which Mr Green accessed and played the Game, and in reaching conclusions on the scope of the clauses in issue. Mr Green is happy, indeed obliged, to accept it for the purposes of this application. I am satisfied that there is no particular expert or other admissible evidence which would assist me further in understanding what I need to understand about the process so as to come to the relevant conclusions about it in the present case. It is not to be forgotten, as Moore-Bick LJ said in *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725:

> "[13] It is the responsibility of the Respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case. Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said

> to point to a construction which is not that which the document would naturally bear, the Respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome.
>
> [14] Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

37. In summary, it is my judgement this is an issue the court should tackle. However the case should be framed, the central issue is whether these clauses do what the Defendant says they do.

38. By reference to the defences raised I have determined that notwithstanding the infelicities of pleadings, and the late articulation of the basis of the application under CPR 24, I should "grapple with" the substance. If Mr Green is correct that there is no realistic prospect of defending this case it serves nothing to adjourn to amend when the central issue will remain the same.

39. I turn to the background to the case.

Factual Background

Mr Green's interaction with Betfred and the contract

40. In response to Mr Green's argument that the term "Software" is not apt to encompass the programs and facilities which make up the Game, a detailed description of engagement with the Betfred Online Casino facility was provided by Betfred from which the following explanation comes.

41. The Defendant, Petfre (Gibraltar) Limited, under the name "Betfred", owns and operates an online gambling business including the website www.betfred.com ("the Website"). One area of the Website is designated the Betfred Online Casino ("the Casino") offering gambling games provided by and licensed from a third party known as Playtech Software Limited ("Playtech"). At the time of these events, Mr Green had been a customer of Betfred for some years. He recalls that he first opened an account with the Defendant in or around 2006 to 2007. The Defendant accepts that Mr Green certainly registered for an online account on 28 August 2012. When doing so he would have seen a box on screen headed "Terms and Conditions" under which was a checkbox with text next to it stating, "I accept Betfred's Terms and Conditions, Rules

and Privacy Policy". The site required that a player register in order to participate in the games offered.

42. Within the Betfred Casino a "chips" balance is shown on screen rather than a balance in cash. This appears in the general area of the Website. The information about the balance was apparently stored in a Playtech Information Management System ("IMS") and retrieved for display from there. Players do not use balances from their cash account directly, rather they use "chips" purchased when they make a transfer from their "Optima Wallet" to their Betfred Casino balance. As the screenshot showed, Mr Green's winnings were shown on screen as a sum of money, following a "£", but designated "chips", not "cash".

43. The evidence of the Defendant was to the effect that software comprising the "lobby", the IMS and the Game were all hosted on a server owned by the Defendant but managed by Playtech in Gibraltar. The software comprising the games within the Betfred Casino was provided by, and was the intellectual property of, Playtech.

44. End-user software comprising picture and sound files such as are displayed to a customer, are downloaded onto a customer's mobile device as they play. They speed up the functioning of the Game, are owned by Playtech and licensed to the Defendant. Game server software which remains on the game server and is accessed, rather than downloaded, as the Game is played, is also owned by Playtech, and licensed to the Defendant. The game server software interacts and continuously communicates with the end-user software as a game is played, controlling what is displayed to the user. Each is required for a player to participate in a game. They cannot be utilised independently.

Playing the Game and the Problem

45. The Game is played using a deck comprised of six packs of cards. Both Mr Green and the (virtual) dealer were dealt two cards per hand at the start of each round of play. When a card was dealt it could be designated as a trophy card meaning it had a blue and gold "trophy" picture in the top right-hand corner. If he chose to engage in the side bet, one or more of the cards dealt during the initial deal in the Game were trophy cards. The total number of trophy cards dealt was carried forward, being recorded in the play's total. If in the next initial deal in the next round of the Game, a further trophy card was dealt then the total increased. Play stopped when no more trophy cards appeared in the initial deal to either the player or the virtual dealer. At that point the accumulated total "crystallised" and the player was awarded a prize determined by his stake on the side bet, and the number of trophy cards, (between two and seven), he had accumulated. It was possible for a player to play up to three different hands, independent of each other, in any round.

46. If the player acquired a total of seven or more trophy cards in three or more consecutive rounds of play in the same hand, he won 70 times the side bet stake. If he accumulated a total of seven or more trophy cards in two consecutive rounds in the same hand, he won a prize of 7777 times the side bet stake.

47. The Game was designed to designate a proportion of cards as trophy cards at random during the initial deal.

48. Mr Green began the gaming session in issue here at about 4:20 AM on 26 January 2018, ending at 5:58 AM. In that time, he played 221 rounds of the Blackjack and side bet games. He played 44 rounds and achieved nine trophy card side bet prizes, Mr Green then played two hands and two side bets simultaneously, for a further five rounds, and accumulated two trophy card side bet prizes. From round 50 onwards Mr Green played three hands and three side bets, the most the Game allowed, and achieved a further 128 side bet prizes.

49. Neither Betfred nor Mr Green detected (nor, it is accepted, could they have done) that anything was amiss.

50. Mr Osborne accepted in argument that what happened was in fact possible within the Game, operating as Betfred intended it to operate, however the chances of it happening were very, very small indeed. To illustrate, the figures proffered by the Defendant suggest that the intention of the Game was that the chance of a player achieving the jackpot of 7777 times the side bet stake just once, should be 0.00018361%. Mr Green in fact won the jackpot three times just before he stopped betting: £497,792 at 5:55 AM, £606,684 at 5:56 AM and £497,792 at 5:57 AM. He ended his session of play at 5:58 AM.

51. As to the provision of the Game, the Defendant explains that Playtech develops and then operates games licenced to the Defendant on a server owned by the Defendant. Playtech enters into licensing arrangements for licensed operators such as Betfred, to allow their customers to play the games. Betfred provides a platform from which players who register may access and play the games offered. When the customer chooses, by clicking on an icon on screen, that action triggers a request to be sent from the Betfred platform to the Playtech server to launch the Game. Playtech then provides ("serves") the customer directly with the Game, which opens up on the customer's computer or device.

52. The application which opens to enable the Game to be played is managed by Playtech, not Betfred. All the computer programming and code governing how the Game operates, including logic tables, and including all the programming and code governing how and in what circumstances the player wins (or loses) a hand and how much the player wins (or loses) are contained within the application.

53. Game logs are held by Playtech, not Betfred. Certain things are made available to Betfred, such as the starting balance and the end balance in respect of the customer, the amount bet, and the win. These and some other details are transferred by Playtech into an IMS which Betfred may access but, Betfred explain, they have no access to or control over any of the programming or code used to create the application.

54. Further, Betfred do not have access to anything that would explain or quantify or confirm whether and if so, what might have gone wrong within the software.

55. Mr Young for Betfred says that Playtech informed them that the Game was not resetting properly, due to a fault, and Mr Green had many more trophy cards available to him than should have been the case, and that was the reason for his "apparent winnings". The explanation given by Playtech to Betfred is that trophy cards were not being reset after each hand, with the effect that cards with a trophy remained marked as trophy cards when reinserted into the deck, and new ones were allocated also. In this way the number of trophy cards increased the longer Mr Green played the Game, until he stopped, when it would reset. Mr Gaunt describes in his statement the fault as the Game not functioning "in accordance with its published rules". By this he means the published "return to player" or "RTP" was not reflected in the actual odds enjoyed by Mr Green. The RTP is an indication of risk and return, expressed as a ratio figure and which appears right at the bottom of the third document relied upon containing the Game rules. It is a requirement of the Gambling Commission so that a would-be player may gauge whether he wishes to engage. The relevant phrase is as follows:

> "The theoretical percentage return to player (RTP) is 98.31%."

The Terms and Conditions

56. Mr Green sues on clause 2 of the Terms and Conditions and does not dispute here that when he checked the "accept box" in the click-wrap, he was binding himself to at least some of the terms contained in that document. What he argues is that the clauses upon which the Defendant relies were inaccessible and unclear, even if they did cover the circumstances, which he denies. He relies upon the findings in *Spreadex* saying it was irrational for Betfred to have believed he had accessed, read, and understood them, and accordingly they were not incorporated into the contract between the parties.

57. The Terms and Conditions document was closely typed, of about 24 pages when printed, the contents of which were updated from time to time. The clauses deal with each of the areas in which Betfred operates online, including the Casino. The heading of the written part, below a series of hotlinks to the various areas of activity, says:

> **"Terms and Conditions**
>
> **These Rules and Terms and Conditions will be amended on 15 December 2017**
>
> These rules and Terms and Conditions will apply as from 28 October 2015. All casino, sports book, poker, games, bingo and mobile bets accepted by us are subject to these Terms and Conditions. It is a condition of having a Betfred account that you must accept all Betfred rules, Terms and Conditions."

[No hot links are given here.]

> …

> "We reserve the right to make changes to these rules, Terms and Conditions. Notification of any change to these Terms and Conditions will be made in advance of any changes coming into effect. Any such notification will be made in these Terms and Conditions."

[The emboldened text is as the original. In the version before the court the typeface appears to be sized at 8 or 10 point for the general text.]

58. In order to give the contractual context to the clauses in issue, the broad shape and description of the documents is set out below.

59. It appears to start with terms of general application (indeed the first paragraph suggests all activities are covered) thereafter, in an iterative fashion, under subheadings, presents sets of clauses relating to named activities available to the player on the Betfred website. For a player to find wording that might involve his planned activity, he is required to scroll on-screen through the repetitive sections until the wording for his individual activity appears.

60. After the initial section set out above, the document begins "1. Opening and Maintaining of Accounts". Clause 1 has eight numbered subclauses. They refer to requirements as to age, confirmation of the authenticity of the account, stipulations as to the participant's residence, activation of a single account and minimum account deposit of £5 or equivalent and so forth.

61. Clause 1(8) provides that:

> "By registering a customer is deemed to have fully accepted and understood all rules, Terms and Conditions published via this website."

[No links accompany this clause.]

62. Clause 2 is headed "Deposits Payments and Withdrawals". It has 12 subclauses. Provision is made in clause 2.1 for the deposit of monies according to Betfred's accepted deposit methods, and (at clause 2.2) stipulations as to the name on accounts.

63. By clause 2.4:

> "Customers may withdraw funds from their account at any time providing all payments have been confirmed."

It is this clause on which the Claimant sued in his application for judgment claiming that he was entitled to withdraw funds from his account because he won on the morning of 26 January 2018.

64. The rest of clause 2 provides for charges to be made for depositing funds and for recouping mistaken credits. It sets out the conditions of acceptance of bets by Betfred, for example that the player does not know the outcome of the event on which the bet is placed.

65. After subclause (12) there is an unnumbered heading "Sports Governing Bodies". The numbering continues, (13) etc, under it. It deals with representations made by the player including as to the lawfulness of their play, and that they do not know the outcome when they place a bet.

66. Subclause (16) makes express provision for the forfeiting of any stake and the non-payment of winnings in the event that any of the representations prove false.

67. Provision is made in clause 3 for the protection of customer funds and in clause 4, as to complaints. The paragraphs under each are un-numbered.

68. A new, un-numbered, heading "Sports" then appears. It also makes express provision for voiding a bet in certain circumstances (see 1.2), and what happens if there is, for example, an internet failure (see 1.8) referring to "computer malfunctions and failure of telecommunication services or Internet connections". It provides in full thus:

> "1. Placing Bets
>
> 1 When a bet is placed and accepted, the corresponding amount is charged against the customers deposit account.
>
> 2 Bets placed do not become valid until the company has received payment. In the event that such payment is not forthcoming before the event that the bet is on commences, then that bet is automatically void.
>
> 3 All casino, sports book, poker, games, bingo and mobile bets must be placed using the legitimate Betfred bet slip or game software.
>
> 4 The customer is obliged to check that the bet instruction submitted is correct before confirming the bet.
>
> 5 We reserve the right to propose a different stake size or price for the selection on any bet, before the bet has been confirmed.
>
> 6 We do not accept bets by post or email. Betfred staff cannot place online bets on behalf of customers.
>
> 8 [*sic*] We cannot be held responsible for a bet not being placed for any reason, including but not limited to; computer malfunctions and failure of telecommunication services or Internet connections. We will not honour "bets" that have been submitted to us, but not confirmed in the manner described above.

> 9 Returns due on bets placed online will be added to your deposit balance once the bet has been settled. This balance will remain in your account unless you submit a request to withdraw part or all of the outstanding balance. Once you have submitted your withdrawal request, you will receive a confirmation message the transfer has been completed, and your balance will then display the new amount. If you have cleared your balance to 0, in order to place any further bets, you'll be required to transfer the minimum deposit into your account."

69. Then, after a second unnumbered heading "Sports" the numbering begins again at numeral one: "1. Acceptance of Internet Bets", and provision is made for betting online on races. As well as causes of prior knowledge/unfair advantage and fraud, the terms also say:

> "Should there be an obvious pricing error or system failure which leads to incorrect prices, lines, or handicaps being displayed…"

they will void the bets.

70. Under the next heading "2. Betting In Play" there are express rules as to price and handicap and as to the right to limit maximum payouts, for example under "3.1 Horse Racing" maximum payouts are designated, as they are for a number of other sports.

71. It is accepted that there was no clause limiting maximum payouts in respect of the Game.

72. At "3.6 Lotto Betting" various other types of betting are dealt with, running to 13 further paragraphs.

73. There is then an unnumbered heading:

> "Betfred Casino and Games"

which begins towards the bottom of page 8 of the 24 pages (when printed) of Terms and Conditions. This section contains the terms upon which the Defendant relies.

74. The section begins and is laid out as follows:

> "PLEASE READ CAREFULLY THE FOLLOWING LEGALLY BINDING AGREEMENT BETWEEN PETFRE (GIBRALTAR) LTD, UNDER THE BRAND NAME OF BETFRED CASINO, AND YOU. BY CHECKING "I ACCEPT" YOU ACKNOWLEDGE THAT YOU HAVE READ AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS AGREEMENT, THE HOUSE RULES AND OUR PRIVACY POLICY. IF YOU DO NOT AGREE WITH ANY OF THE TERMS OF THIS AGREEMENT, DO NOT CHECK "I ACCEPT"

> AND DO NOT DOWNLOAD, INSTALL OR OTHERWISE USE THE SOFTWARE.
>
> PLEASE READ THE AGREEMENT CAREFULLY AND MAKE SURE YOU FULLY UNDERSTAND ITS CONTENTS. IF YOU HAVE ANY DOUBTS ABOUT YOUR RIGHTS AND OBLIGATIONS RESULTING FROM THE ACCEPTANCE OF THIS AGREEMENT, PLEASE CONSULT A LEGAL ATTORNEY IN YOUR JURISDICTION."

75. The numbering begins again after the portion in capital letters thus:

> "1. Definitions
>
> > The following words and terms, when used with this agreement, shall have the following meanings, unless the context clearly indicates otherwise.
> >
> > *Online Casino*
> > Petfre (Gibraltar) Ltd's Internet gaming system on the Website and related services and gaming activities as offered and listed at www.betfred-casino.com including but not limited to, online Casino and/or online bingo and/or any other games, where applicable;
> >
> > …
> >
> > *Software*
> > The software licensed to us including any program or data file or any other content derived there from, that have to be downloaded, accessed or otherwise utilised by you from the Website to enable you to participate in the Online Casino;
> >
> > *Website*
> > www.betfred-casino.com and any related sites accessible via links or any other access way."

76. Aside from definitions of player account, username, and password, this is the totality of the definition section.

77. The agreement continues:

> "2. Subject Matter of Agreement
>
> > This agreement covers the arrangements between you and us in relation to your use of the Online Casino either for playing play-for-real or play-for-fun games."

78. Then, relevantly:

> "4. Licence to Use Software
>
> We hereby grant to you a personal non-exclusive, non-transferable right to use the Software, for playing the Online Casino, in accordance with the following provisions.
>
> 4.1 You are not permitted to:
>
> 4.1.1 Install or load the Software onto a server of other networked device or take other steps to make the Software available via any form of "bulletin board", online service or remote dial-in, or network to any other person;"

There follow in the remainder of clause 4.1 various prohibitions on sub licensing, reverse engineering and so forth.

79. The Terms and Conditions continue:

> "4.2 You do not own the Software. The Software is owned and is the exclusive property of the licensor, a third party software provider company, (the "Software Provider"). The Software and accompanying documentation which have been licensed to us are proprietary products of the Software Provider and protected throughout the world by copyright law. Your use of the Software does not give you ownership of any intellectual property rights in the Software. This agreement applies only to the grant of the licence to use the Software.
>
> 4.3 THE SOFTWARE IS PROVIDED "AS IS" WITHOUT ANY WARRANTIES, CONDITIONS, UNDERTAKINGS OR REPRESENTATIONS, EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE. WE HEREBY EXCLUDE ALL IMPLIED TERMS, CONDITIONS AND WARRANTIES (INCLUDING ANY OF MERCHANTABILITY, SATISFACTORY QUALITY AND FITNESS FOR ANY PARTICULAR PURPOSE). WE DO NOT WARRANT THAT THE SOFTWARE WILL MEET YOUR REQUIREMENTS.
>
> 4.4 WE DO NOT WARRANT THAT THE SOFTWARE WILL BE NON-INFRINGING OR THAT THE OPERATION OF THE SOFTWARE WILL BE ERROR FREE OR UNINTERRUPTED OR THAT ANY DEFECTS IN THE SOFTWARE WILL BE CORRECTED, OR THAT THE SOFTWARE OR THE SERVERS ARE VIRUS-FREE. IN THE EVENT OF COMMUNICATIONS OR SYSTEM ERRORS OCCURRING IN CONNECTION WITH

> THE SETTELMENT [*sic*] OF ACCOUNTS OR OTHER FEATURES OR COMPONENTS OF THE SOFTWARE NEITHER US [*sic*] NOR OUR SOFTWARE PROVIDER WILL BE LIABLE TO YOU OR TO ANY THIRD PARTY FOR ANY COSTS, EXPENSES, LOSSES OR CLAIMS ARISING RESULTING [*sic*] FROM SUCH ERRORS. WE FURTHER RESERVE THE RIGHT IN THE EVENT OF SUCH ERRORS TO REMOVE ALL RELEVANT GAMES FROM THE SOFTWARE AND THE WEBSITE AND TAKE ANY OTHER ACTION TO CORRECT SUCH ERRORS."

[The capital letters are in the original.]

> "4.5 You hereby acknowledge that it is not in our control how the Software is used by you. You load and use the Software at your own risk and in no event shall we be liable to you for any direct, consequential, incidental or special damage or loss of any kind (except personal injury or death resulting from our negligence).
>
> 4.6 The Software may include confidential information which is secret and valuable to the Software Provider and/or us. You are not entitled to use or disclose that confidential information other than strictly in accordance with the terms of this agreement."

80. Clause 5 is headed "Security" and deals with non-commercial use, not using the account of another and representations about encryption. It refers (with a hot link provided in the text) to the Privacy Policy, stating that Betfred will only use personal information in accordance with that Privacy Policy. It continues:

> "6. Your Responsibilities
>
> 6.1 We make no representation or warranty with respect to the legality or otherwise of the accessing and use of the Online Casino in your country of residence…"

81. Provision follows on non-transferability of rights, responsibility for taxes and fees. It continues with the right to withhold payments and to cancel bets.

> "6.5 Payments
>
> 6.5.1 You agree that we or a payment processing company on our behalf will handle all financial account transactions ("Payment Processor"). You hereby agree that the Payment Processor reserves the right to withhold any payments should the Payment Processor have reason to believe or have any suspicion that you may be engaging in or have engaged in collusion or fraudulent, unlawful or improper activity.

> 6.5.2 You agree to fully pay any and all payments due to us or any third party in connection with your use of the Online Casino. You further agree not to make any chargebacks and/or renounce or cancel or otherwise reverse any of your due payments and in any such event you will refund and compensate us for such unpaid payments including any expenses incurred by us in the process of collecting your payment. In any event where a chargeback, pronouncement, cancellation, reversal or otherwise has occurred or been made by you, then we may cancel all bets made in respect of such unpaid payments."

82. Then follows:

> "6.7 You acknowledge that our random number generator will determine the outcome of the game as played on the Online Casino and you accept the outcomes of all such games. You further agree that in the unlikely event of a disagreement between the result that appears on the Software and the game server, the result that appears on the game server will prevail and you acknowledge and agree that our records will be the final authority in determining the terms and circumstances of your participation in the Online Casino gaming activity."

83. Mr Green points out that all Betfred's records in his case showed a win. He relies on the fact that clause 6.7 deals with contentious results and that they are to be taken to be as shown on Betfred's server – the server showed that he had won. Betfred's pleaded answer is that this clause is irrelevant to the facts in issue here.

84. There follows a list of warranties and representations that are made by the player in similar form: acting on his own behalf and not being restricted as to legal capacity. Clause 8 explains how changes will be notified. Clause 9 reserves the right to refuse to register an applicant or accept any bet on the Online Casino, or to make enquiries about the player.

85. Clause 9.3 provides:

> "In the event of any dispute regarding a bet or winnings, our decision will be final and binding. We reserve the right to reasonably withhold any payout or winning amount until the identity of the winning person is verified to our satisfaction in order to ensure that payment of the winning amount is being made to the correct person."

86. Other subparagraphs contain reservations of other rights and provisions as to transfer of the sublicense and similar matters.

> "10. Term
>
> This agreement is effective from the moment of acceptance, by checking the "I accept" box, and shall remain in force indefinitely unless terminated in accordance with clause 9.6. For the avoidance of doubt it is agreed that you are bound by this agreement if you use the online casino, website or software in any way, including but not limited to, initiating or making a deposit through your Account or submitting your deposit details to us."

87. Thereafter there follow some provisions on "mega jackpot games" and following (this is now page 14 of the 24 pages (when printed)) under a heading "Betfred Poker" is set out (again, beginning at numeral one) an agreement in similar terms relating to that game.

88. The following pages relate to Betfred Bingo, (the numbering starts, again, at numeral one: "1. Definitions" and is in similar format with similar content). At the very end of the agreement are provisions under the heading "Betfred CashOut Terms and Conditions", a facility available on certain betting activities but not that in question here.

89. I turn to the next stage in the "journey" as it was phrased by Betfred's solicitor, describing the manner in which the Game would have been accessed and played by Mr Green.

The EULA

90. Mr Green played on his mobile device. He could have either accessed the Website through his internet browser, navigating to the "Betfred Casino" area, alternatively he could have downloaded a dedicated Betfred Casino Application operational from 2012/2013. The application took customers directly to what is referred to as the Betfred Casino "lobby" area of the Website; it was also possible to download a program allowing direct access to the Casino area to a computer.

91. The "lobby" was a screen displaying a number of icons or tiles each representing a game which a customer could tap on to play. When a player tapped on an icon to play a game in the Casino for the first time, and before a game launched, he was asked to accept a set of Terms and Conditions of an End-User License Agreement (referred to here as "the EULA") by tapping an "accept" button. A player did not need to accept the Terms and Conditions on each occasion of play, but Betfred say that a new acceptance was required on occasions when the terms of the EULA changed. No issue arises concerning changes to terms.

92. When a game is selected, a loading page is presented which carries a Betfred logo and, in the bottom right-hand corner, the wording "a game by Playtech" appears.

93. Whilst interacting with the Website Mr Green would be downloading HTML (a text-based language that tells the browser what text and images to display and how to lay them out) and also images, that is to say files which contain icons, drawings photos or other graphical data, which together display the relevant pages of the Website on the mobile device.

94. If Mr Green used the specialised application (of a type known as a "wrapper app") to access the site, it would take him straight into the "lobby" – that is, the page would take him to the Casino area direct. If he accessed through the Webpage, he would be welcomed to the Betfred site and shown the different areas he might choose to access, including the Casino area. When he tapped to access the Betfred Casino this way, his login information was automatically used to log him into Betfred Casino's software (written by and licensed from Playtech).

95. At the Betfred Casino "lobby", with the icons including the Game, Mr Green would be viewing material within the Betfred Content Management System ("CMS"). This was a piece of software licensed to Betfred from a third party company called Sitecore and configured by Betfred. This is software of the sort licensed to and used by many different betting companies; Betfred explain that it had been tailored in terms of branding and presentation for Betfred.

96. Mr Green clicked the EULA terms "accept" button as described on a total of three occasions, long before the events in issue. The first time was when he accessed a game on his desktop internet browser. He also accepted an updated version on his desktop browser and when he sought to access a game on his mobile phone. There was no material difference in their terms. It is not disputed that Mr Green last accepted the EULA on 13 August 2013, almost five years before the Game was introduced and played by Mr Green.

97. The document is nine pages of closely typed material when printed, it begins as follows

> "Terms and Conditions-View
> Casino
> Betfred
> Client Type
> Casino
> Client Platform
> Mobile"

98. Various other details such as the version number appear with the creation date of 19 August 2013. The words "Terms and Conditions" appears again, and below that is over half a page, (approximately 6 inches (15 cm) on A4) of wholly capitalised, single-spaced text, unnumbered and without guidance headings or paragraph breaks. It begins with words upon which Betfred rely:

> "END-USER LICENCE AGREEMENT
> IMPORTANT

> THIS WEBSITE IS OPERATING THE GAMING SOFTWARE PLATFORM OF PLAYTECH SOFTWARE LIMITED AND ITS GROUP COMPANIES (THE "VENDORS") UNDER A LICENCE FROM VENDOR [*sic*]. A CONDITION TO YOUR DOWNLOADING OR OTHERWISE USING THE SOFTWARE (AS DEFINED BELOW) IS THAT YOU ENTER INTO THE FOLLOWING LEGALLY BINDING SUB-LICENCE AGREEMENT WITH US WHICH GOVERNS YOUR USE OF THE SOFTWARE."

99. Thereafter in the capitalised section is a similar phrase regarding the obligation to read carefully and cautioning to consult an attorney or other legal adviser in the jurisdiction if in doubt. The rest of the section contains a series of warnings and prohibitions relating to jurisdictions and improper use of the software, stating the player will be liable to "us" for any damage or loss resulting therefrom.

100. Further in capitals, it states that a player agrees to the use of electronic communications to enter into contracts, by clicking "I agree". After further provision the capitalised section concludes, after a paragraph break:

> "IF YOU DO NOT AGREE WITH ANY OF THE TERMS OF THIS AGREEMENT, DO NOT ACCEPT TERMS AND CONDITIONS AND DO NOT CONTINUE TO DOWNLOAD, INSTALL OR OTHERWISE USE THE SOFTWARE."

101. The definition section follows in lower case and with numbering, provided materially:

> …
>
> "1.4 "Player Account" means a personal account opened by an individual and maintained with Us to enable that person to play the Online Games;
>
> 1.5 "Poker Room" means the poker room and/or any other poker gaming activities offered by Us on our Website and/or on Our downloadable poker client;
>
> 1.6 "Software" means the software required to be downloaded, accessed or otherwise utilised by You from the Website for the purpose of participating in the Online Games, including the related documentation and including any enhancements, modifications, additions, translations or updates to such software."

102. In light of one of the arguments raised by the Claimant as to the meaning of "Software" it is necessary to set out one or two of the other provisions.

103. Betfred rely particularly on the next clause of the agreement which they argue incorporates by reference the Game rules which refer to "malfunction":

> "2. Subject Matter of Agreement
>
> The rules of the Online Games are placed in www.betfred-casino.com as well as other sections of the Software and the Website, including but not limited to rules describing how to play the Online Games, tournaments, and any other rules governing particular game, event and tournament. All such rules are incorporated and included under the Terms and Conditions set out herein.
>
> 3. Licence to Use the Software; Restrictions
>
> 3.1 We hereby grant to You a limited, personal, non-transferable, non-exclusive, worldwide (except as noted below) licence to download, access and otherwise utilise the Software on Your device in order to play the Online Games, in accordance with this agreement.
>
> 3.2 This license applies only to the object code of the Software (i.e. the compiled, assembled, or machine executable version of the Software) and does not grant you any rights whatsoever with respect to the source code of the Software.
>
> 3.3 Notwithstanding anything to the contrary herein, persons located in the Prohibited Jurisdictions are not permitted to use the Software in any way or manner in connection with any real-money play."

104. Clause 3.3 continues concerning prohibited jurisdictions, restrictions and prohibited actions such as reverse engineering, removal of copyright, et cetera.

105. Clause 3.4 contains further prohibited actions to do with the rights in the Software including reverse engineering, removal of copyright, et cetera. There follows a section upon which the Defendant relies containing wording similar to but not exactly the same as that relied on in the Terms and Conditions.

106. "5. Disclaimer Of Warranties

> THE SOFTWARE IS MADE AVAILABLE TO YOU HEREUNDER ON AN "AS IS" BASIS, WITHOUT ANY UNDERTAKINGS, WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE.
>
> WE AND THE VENDOR AND ALL OF THEIR AFFILIATES AND RELATED PARTIES, HEREBY EXCLUDE AND DISCLAIM ANY AND ALL IMPLIED TERMS, CONDITIONS AND WARRANTIES (INCLUDING ANY WARRNATY [*sic*] OF MERCHANTABILITY, SATISFACTORY QUALITY AND FITNESS FOR ANY PARTICULAR PURPOSE), AND, WITHOUT LIMITING THE GENERALITY OF THE

> AFORESAID, WE AND THE VENDOR DO NOT WARRANT, AMONG OTHER THINGS, THAT (A) THE SOFTWARE WILL BE NON-INFRINGING, (B) OR THAT ANY DEFECTS IN THE SOFTWARE WILL BE CORRECTED, OR THAT THE SOFTWARE IS VIRUS-FREE; (C) THE SOFTWARE IS OF SATISFACTORY QUALITY OR FIT FOR ANY PARTICULAR PURPOSE; OR (D) USE BY YOU OF THE SOFTWARE WITH ANY OTHER SOFTWARE, OR WITH INAPPROPRIATE HARDWARE, WILL NOT CAUSE ANY DISTURBANCE TO THE SOFTWARE OR TO SUCH OTHER SOFTWARE.
>
> IN THE EVENT OF COMMUNICATIONS OR SYSTEM ERRORS OCCURRING IN CONNECTION WITH THE SOFTWARE, NEITHER WE NOR THE VENDOR NOR THEIR AFFILIATES AND RELATED PARTIES WILL BE LIABLE TO YOU OR TO ANY THIRD PARTY FOR ANY COSTS, EXPENSES, LOSSES OR CLAIMS ARISING OR RESULTING FROM SUCH ERRORS.
>
> NEITHER WE NOR OUR AFFILIATES AND RELATED PARTIES WILL BE LIABLE TO YOU OR TO ANY THIRD PARTY FOR PAYMENTS MADE TO YOU AS A RESULT OF A DEFECT OR ERROR IN THE SOFTWARE, OR IN CONNECTION WITH ANY CLAIM OR DEMAND MADE BY THE VENDOR OR ANY THIRD PARTY FOR THE RETURN OF SUCH PAYMENTS OR OTHERWISE IN CONNECTION WITH SUCH PAYMENTS.
>
> You hereby acknowledge that it is not in Our control how the Software is used by You. You load and use the Software at Your own risk and in no event shall We be liable to you for any direct, consequential, incidental or special damage or loss of any kind (except personal injury or death resulting from Our negligence)."

[Capitalisation as in the original.]

107. This contract wording is similar to but not exactly the same as the Terms and Conditions.

108. It continues with "6. Confidentiality" covering the obligation of the user to keep confidential information confidential. Clause 7 covers prohibited jurisdictions; clause 8, changes to the agreement, clause 9 Term and Termination. Clause 10 is as follows:

> "10. No Claims Against Vendor or; Limitation of Liability
>
> 10.1 You understand and agree that We will be solely responsible to You under this agreement, and Your commitments under this agreement are also for the benefit of the Vendor, its affiliates and related parties (and can therefore be enforced by them too).

> Vendors, its affiliate and related parties are not parties to this agreement and will not be liable for any damages of any kind whatsoever caused to You or any third party, regardless of the form of action, whether in contract, tort (negative including negligence), strict liability or otherwise.
>
> 10.2 You are free to choose whether to download and use the Software. If You do so, You acknowledge that You do it with the full understanding of this agreement, including the provisions of this section 10, and at Your own risk. IN NO EVENT SHALL WE (AND FOR THE AVOIDANCE OF DOUBT, ALSO VENDOR) [*sic*] OR ANY OF THEIR AFFILIATES AND RELATED PARTIES, IN AGGREGATE:
>
> 10.2.1 BE LIABLE TO YOU FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL OR SPECIAL DAMAGE OR LOSS OF ANY KIND WHATSOEVER; OR LOSS OF BUSINESS, PROFITS, REVENUE, CONTRACTS OR ANTICIPATED SAVINGS; OR LOSS OR DAMAGE ARISING FROM LOSS, DAMAGE OR CORRUPTION OF ANY DATA; or
>
> 10.2.2 BE LIABLE TO YOU WITH RESPECT TO ANY AND ALL CLAIMS AT ANY AND ALL TIMES ARISING FROM OR RELATING TO THIS AGREEMENT, HOWSOEVER ARISING UNDER CONTRACT OR ANY THEORY OF LAW, FOR DAMAGES EXCEEDING THE LOWER OF (A) THE AMOUNTS DEPOSITED BY YOU WITH US AND USED BY YOU FOR GAMING PURPOSES, OR (B) AT €1000 (ONE THOUSAND EUROS)."

[Capitalisation as in the original.]

109. The use of capital letters is adverted to by Betfred as enhancing fairness in particularly highlighting important clauses.

110. The contract then makes separate provision under various headings: "11. Shared Poker Room Network", "12. Security" and reservations of rights, et cetera, and declares that English law governs the contract.

The Game Rules

111. Betfred rely upon clause 2 of the EULA (set out above) which refers to "the rules of the Online Games" as incorporating these terms by reference into the individual gaming contract and binding Mr Green. It was not necessary they argue, for the Game to exist at the time that Mr Green accepted clause 2, as it applied to the rules of such games as may be introduced over time if Mr Green chose to play them.

112. Both the EULA and the Game rules they argue were clear and transparent, and the rules of the Game "were available to Mr Green before he placed any bet within it". It is reasonably to be inferred that Mr Green did review them, and he is bound. Obviously, say Betfred, any game will operate on the basis of a set of rules (including as to what will constitute a win within that game and the prizes); Mr Green is bound by them because he ought to have read them – he was warned in the Terms and Conditions by clause 5.6 to do so.

113. If Mr Green did choose to click on the button connecting to the Game rules (it was not obligatory in order to play the Game), a scroll down document was then accessible. It was materially as follows:

> **"Frankie Dettori™ Magic Seven Blackjack"**
> "Frankie Dettori™ Magic Seven Blackjack is a variant of standard Blackjack that features the **Magic Seven Side Bet**. For information on the rules and differences to the standard game, proceed straight to the "Rules" section.
>
> TO PLAY THE GAME
>
> - Choose your limits by tapping on the entry screen and then tap **Join**
> - On the entry screen tap on the **Payout** button to view the payable or tap on the **OK** button to enter the main game. Stop tap **Do not show this message again** to prevent this pop-up screen from appearing in future.
> - This game can be played with up to three hands. To play you must place a bet on at least one of your hands. Every hand may have a different bet amount.
> - To place a bet, tap on a chip in the bottom left of the screen to select your chip value. Tap on one of the available betting areas (the three larger circles) to place the bet. Every tap increases a bet by the value of the selected chip.
> - **The Magic Seven Side Bet** is placed on the betting area under each hand
> - You can tap CLEAR BETS to remove all bets from the table..."

114. Further instructions as to how to play the Game are set out and follow this format. They all explain how it operates. A section entitled:

> "BUTTONS"

in larger bold type, indicates the function of certain buttons, and each of the terms used is explained, for example "DEAL – Deal the cards". Thereafter is another section with a large bold heading:

> "RULES
>
> The object of Frankie Dettori™ Magic 7 Blackjack is to get a hand that totals 21 or is closer to 21 than the dealer's hand without exceeding 21.
>
> The value of a hand is the sum of the individual card values. Blackjack is the highest hand and consists of two cards: an ace and any 10–point card. Blackjack beats a score of 21."

115. The scroll down rules are in bullet format as before. It states that the Game is a variant of Blackjack with the following rules and a further page includes headings such as "SPLIT" and "DOUBLE" including one dealing with the variant played by Mr Green. It said:

> "SIDE BETS
>
> A side bet is a wager you can make beyond the regular game bet to get an extra win even if your regular game hand does not win.
>
> MAGIC SEVEN SIDE BET
>
> The goal of the game is to collect trophies. Trophies are collected from random trophy cards that are dealt to you and the dealer during the initial deal.
>
> You must collect two or more trophies in a single round or multiple consecutive rounds to win a payout.
>
> If you collect at least one trophy your current **Magic Seven Bet** will be played in the next round automatically: no extra bet is required.
>
> Trophy cards appear only during the initial deal.
>
> When the dealer receives a trophy card, a trophy is allocated to every hand with a **Magic Seven Bet.**
>
> If you collect seven trophies or more in two consecutive rounds you win the jackpot: 7777 times your bet."

116. The last bold capital heading is "PAYTABLE". It is followed by numbers in table form as a list of winnings or "pays" and a short explanation. Then follows "**Note on**

disconnections" explaining that if there is a disconnection from the Internet you must log in again and instructions as to how to check the results of the old games.

117. Below that, at the end of the scroll-down document in lowercase are lines upon which the Defendant relies:

> **"Note on malfunctions:** a malfunction voids all pays and plays.
>
> **Note on unresolved bets**: unresolved bets placed become void after 90 days.
>
> The theoretical percentage return to player (RTP) is 98.31%."

118. There is no definition of the term "malfunctions".

119. The Defendant says this excludes liability for what happened here, whether or not Mr Green in fact read it. It was, the Defendant argues, transparent and accessible and the term "malfunction" covered the fault in the Game in this case.

Consideration

The Relevant Questions

120. There seem to me to be three essential questions:

    a. Question 1. Meaning

    b. Question 2. Incorporation

    c. Question 3. Reliance on the exclusions of liability

121. First, what did the clauses mean? As a matter of interpretation is any one of the terms relied upon apt to exclude liability to Mr Green? The second question is whether or not any of the clauses were part of the contract between Betfred and Mr Green? Third, as a matter of common law or statute, were Betfred able to rely on the clauses or any of them to exclude liability?

122. The further question of mistake arises separately and is dealt with later.

The Contract

123. Before answering the three questions I deal for completeness with an issue that does not strictly require resolution but was a matter of contention: namely the form of the contractual relationship. Since the pleadings, which now extend to a Rejoinder for which I gave permission for service at the hearing, the issues have narrowed and did so further before me.

124. I am grateful to Mr Osborne for Betfred for his careful analysis both on paper and orally of what his clients say in answer to Mr Green's reliance on clause 2, and Mr

Green's initial framing of the case as a supply of software. In my judgement Mr Osborne is correct that the contract upon which Mr Green must sue is a gaming contract. That fact is, however, obscure on the materials before me. As a gaming contract it is of course (following the Gaming Act 2005), possible for Mr Green to sue upon it for his winnings.

125. In my judgement it is likely although I emphasise, I heard no developed argument on it, that the true analysis includes that there is a gaming contract made on each occasion that a player bets upon a game. It seems to me likeliest the contract is formed when the player accepts, by placing his bet, the continuing offer made by the Defendant to play on Betfred's terms, such as they may be (and subject to other arguments about incorporation and enforceability), at the time of the transaction/s in question. Betfred presents the website and requires a player's acceptance of the Terms and Conditions at a prior stage, and of the EULA, as a necessary preliminary, and in so doing the Defendant makes an offer to the Claimant to bet or gamble upon its proffered terms. It would be a necessarily implied term of that contract that if the player wins a game or games, his winnings will be credited to his account and paid out from it by Betfred, absent a valid contractual reason for not doing so – such as, for example, in the Terms and Conditions, that the player had cheated.

126. The requirement to agree to the Terms and Conditions when initial involvement begins, and to the EULA, suggests an offer from Betfred which is accepted by a player by placing the bet. Betfred is at liberty to withdraw or modify the offer at any time up to its acceptance in the usual way, changing the terms on which it offers to accept a wager from time to time, as the evidence shows it did.

127. As I understand it, Betfred prefer the analysis that there is an offer made by the player to Betfred, accepted by them when the bet or stake is received. There may be other enforceable relationships such as that pertaining to a player's account, of course, and I make no findings.

128. The Claimant was minded to accept the Defendant's analysis that the contracts in question would be gaming contracts, and put his case firmly on the basis the exclusion clauses were not clear or transparent and could not be relied upon.

Question 1: Meaning

Context

129. In light of the obligation to discover the meaning of terms in their context, I make the following observations on the contractual context of the material clauses which will also inform consideration of the further issues of incorporation and the Defendant's ability to rely on the exclusions.

130. The Terms and Conditions document has a number of infelicities of presentation. It is iterative and repetitive; in places the numbering is absent or inconsistent; it contains typographical mistakes. The beginning of the document appears to contain general clauses applying – but not very obviously – to all players before requiring a scroll down

to find the heading relevant to the game the player seeks, which requires, for games at the end of the list, trawling through pages of other like material reciting similar issues for each activity.

131. The layout and the terminology used in the Terms and Conditions does not make clear in my judgement exactly what a player is obliged to agree to, nor where to find it, if it is additional to or differs from this document. The introductory words say for example: "These rules and Terms and Conditions will apply as from 28 October 2015." That phraseology is repeated in the subsequent paragraphs. The document, however, is called only "Terms and Conditions". The phrase "All casino, sports book, poker, games, bingo and mobile bets accepted by us are subject to these Terms and Conditions" is immediately followed by "It is a condition of having a Betfred account that you must accept all Betfred rules, Terms and Conditions."

132. None of these features is necessarily fatal to reliance upon an exclusion clause seeking to doff liability for a hidden defect, but they are not at first blush features of an open and fair consumer contract that is easy to access and understand.

133. The Terms and Conditions document is capable of dealing expressly and clearly when it chooses to with the effect of supervening events that might arise. Clauses in the section dealing with "Sports" deal expressly with problems and interruptions in placing a bet and voiding a bet in consequence.

134. Similarly, in other circumstances where the contractual intention appears to be the right to void a bet, the contractual materials also appear capable of clear words. Under "Sports 1. Acceptance of Internet Bets" at page 4 of the 24 pages (when printed) of the Terms and Conditions it is provided:

> "11. Betfred.com reserves the right to void any, or all bets made by any person or group of persons acting in an attempt to defraud the company where there is evidence of price, race, match or event rigging…"

and under "2. Betting In Play":

> "3. Betfred.com reserves the right to void any bets struck after the outcome of an event is known. Should a bet be placed at an incorrect price…where a team has gained a significant advantage…bets will be voided, win or lose."

135. Looking elsewhere in the contractual material, and in light of the Defendant's reliance on the bare word "malfunction" in the Game rules, it is not insignificant that, when the word occurs in the Terms and Conditions, it is coupled with obvious connection and communication difficulties:

> "We cannot be held responsible for a bet not being placed for any reason, including but not limited to; computer malfunctions and failure of telecommunication services or Internet connections."

The phraseology suggests that the word "malfunction" is likely connected to the hardware itself or relates to the operation of a visible mechanism or a supervening or obvious failure such as a "communications failure" or an "internet failure".

136. The Defendant states that it is entitled to assume that the Claimant read and understood the terms in the Terms and Conditions and point to clause 5.6 which says:

> "It is your responsibility to ensure that you understand the rules and procedures of the games in the Online Casino and your use of online gaming in general before you play any such games."

Such words do not of course relieve the party relying on them from the obligation to be transparent and fair, but in any event in my judgement, here, the natural reading of these words and clauses relating to "rules of the games" in context, suggests that the "rules and procedures" are referring to the mechanics of play – the "how to" and the set-up of the various games. The use of the phrase "and your use of online gaming" is too general and vague. This applies also to the slightly different phraseology of the EULA in clause 2:

> "2. Subject Matter of Agreement
>
> The rules of the Online Games are placed in the www.betfred-casino.com as well as other sections of the Software and the Website, including but not limited to rules describing how to play the Online Games…"

137. This wording suggests the rules referred to are the instructions as to how to play the various games. The lawyerly phrase "including but not limited to" is unlikely to mean much to the layman consumer in my view, absent a clearer indication. Certainly nothing in this phraseology suggests that the player is being directed to a term that purports to allow Betfred to sweep away the whole of his winnings after a significantly extended period of apparently unimpeachable play where neither he nor they have, or could have, any idea there is anything amiss.

138. The "Betfred Casino and Games" section begins with a capitalised warning about the "following legally binding agreement" with Betfred Casino. It then states that by checking "I accept" the player has agreed to be bound by the Terms and Conditions of "this agreement", and the "HOUSE RULES AND OUR PRIVACY POLICY". There is no link here to further documents or indication of what is comprised in the "HOUSE RULES". A link to the privacy policy occurs later under the heading "Security" in clause 5.8 elsewhere in the Casino section. "HOUSE RULES" is not defined or linked.

139. The wording of the clauses relied upon by Betfred is strikingly different from the wording used when Betfred intends elsewhere to reserve the right to void bets. In my

judgement the clauses have the appearance, rather, of purported attempts to exclude the generally implied terms of merchantability or fitness for purpose. It also deals with copyright breaches. The clauses appear to seek to exclude liability for reliance costs, consequential damages, and other costs following contractual breach, not avoiding the contract itself.

140. In my judgement, to the extent the exclusions purport to go beyond this, the language used in the Terms and Conditions is obscure and unclear. The use of capital letters (liberally employed through the Terms and Conditions) do little to remedy the obscurity about the purported scope of the exclusion of responsibility for the hidden defect. The stated obligation on the player of online gaming to consult an attorney if in any doubt over meaning is, in the context of a contract for an online consumer betting facility, in my view, a singularly ineffective attempt to shift the burden of providing clear language and proper warning where liability is sought to be excluded.

141. The EULA has the appearance of a standard form of software licence agreement. It is long and complex, repetitive, both internally, and in terms of areas of its content has similarity with the Terms and Conditions, and it is in parts, obscure.

142. The prolific use of capitalisation at the start of the EULA is striking and rather diminishes its power elsewhere in the document as a signpost of importance. Similar observations are applicable to this document as to the Terms and Conditions in respect of the clauses. Again, on the natural meaning of the words of the relevant clauses they seek to exclude liability for obvious failures of connection or computer equipment or signal. They refer again to losses akin to consequential and other losses. They do not make any attempt at reference to voiding a bet or avoiding a contract with consequences such that an apparently unimpeachable win, where hours of play is not interrupted nor visibly corrupted in any way, will not be paid out.

143. The wording of the exclusion clause in the EULA, clause 5, is similar to the purported exclusion in the Terms and Conditions. The second part of the clause also seeks to exclude liability for "PAYMENTS MADE TO YOU AS A RESULT OF A DEFECT OR ERROR IN THE SOFTWARE". The intended meaning is argued to be an exclusion that allows the voiding of the bet and the non-payment of winnings – it is an onerous clause, but these words are never used. Elsewhere, as noted, it is clear when the right to void a bet is in issue. "PAYMENTS MADE TO YOU" is conspicuously obscure when the intended meaning is that the player's bet is voided so the obligation to pay never arises.

144. I observe, although the observation is no more than that, and does not form part of my reasoning as to the failure of the clauses to be transparent, that the terms seem to me rather to be dealing, if in a confusing manner, with matters of functionality such as exclusion of liability for damaging the materials owned by the consumer and technical protection measures, or the compatibility of supplied digital content with the hardware and software already owned by the consumer.

145. Turning to the Game rules, a number of points emerge from these provisions, particularly, that failure to click on the box under which the Rules were contained did not prohibit entry to the Game. The Terms and Conditions and the EULA by contrast did not allow registration or use of the Website without signalling agreement, even if only on one occasion, and years before the Game in question was developed and offered by Betfred. In fairness, the Defendant describes the Game rules as only "available" to Mr Green.

146. Nothing on the Game site suggests that important exclusions of liability are contained in the clauses which appear only in the antepenultimate and penultimate lines, and to deal only with the "how to" of the Game. Even then the purported exclusion is described as a "**Note**", and the last heading before it is "PAYTABLE" – above the table. Further, although referred to as "the Game rules", in fact in the document, the first bold capitalised heading after the Game's name is "TO PLAY THE GAME". The heading "RULES" appears a third of the way down page 3 of six pages and does indeed deal with the object of the Game and how to achieve it. Nothing suggests at the top of the Game rules that it is essential that you must read right to the end of the scroll down, once you have learnt how to play the Game.

147. As already noted, the term "malfunction" is not attached to any other. There is no mention of "software" – nor indeed "computer" – which is the context in which it appeared when used elsewhere in other of the Defendant's documentation. The term "malfunction" is nowhere defined in the Rules – or indeed elsewhere.

148. Betfred suggested that Mr Green could confirm how or whether the Game was working by reference to the latter part of the Game rules which were available to him and suggested that the Game was not "played by the rules" on the winning occasion.

149. In my judgement it is unreal to suggest that a player will either realise the import of the bare figures given as the RTP, or recognise they may not have been reflected in what has happened. Nor would a player know that there has been an occurrence inconsistent with Betfred's intended operation of the Game. One of the difficulties with this submission is Mr Osborne's answer to me that, even if operating properly, the result obtained by Mr Green when he had finished playing, was technically possible. The fact that there may be a "pop up" stating trophy cards appear "randomly" during the initial two card deal is nothing to the point. It cannot be determined that the cards are appearing more frequently than (it may later be shown) was truly, randomly, or more frequently expected or desired by Betfred. It was indeed true that the trophy cards appeared "randomly" during the initial deal.

Conclusions on the Question of the Meaning of the Clauses

150. In my judgement clause 4.4 of the Terms and Conditions on its face (even without recourse to the 2015 Act) is just not apt to cover the circumstances of this case. It is not dealing with the failure to payout winnings at all. Nor is it dealing with a fault or glitch or programming mistake that is undetectable to either party.

151. The prior clause, 4.3, looks like a comprehensive attempt to exclude liability for any warranties of merchantability or fitness for purpose (such as might find a place in a contract for the supply of goods, or, by extension, for digital content or a programme). In clause 4.4, on a natural reading of the words in context this appears to relate first to questions of copyright then to the operation of the software which is not warranted as being without error or without interruptions – these latter suggest a termination or interruption of the service. There is no warranty that problems will be corrected. There is then a disclaimer about viruses.

152. It is not explained what is comprehended by "error free". "Communications or systems errors" are not defined, but on a natural reading of the words they suggest in my judgement, firstly an error relating to one computer or system, communicating with another, and, for example, delaying a transfer of funds, and by "system error" is likely meant a (serious) and obvious error that causes an operating system not to work anymore. At best the meaning is unclear.

153. The syntax is also not clear: does the clause purport to exclude communications errors and systems errors, either of which occur (i) in connection with settlement of accounts, and (ii) in connection with "other features" of the software, and (iii) in connection with "other components" of the software? Again, the language is at best unclear. All of the defects in respect of which Betfred seek to exclude liability thus far in my view comprehend hindrances to the user – whether by reason of one system failing to communicate with another or by stoppages to the digital provision, that are patent or detectable. These are obvious faults that cause the programme or feature to stop working or to become corrupted and/or obviously inoperable. They are not apt to cover the hidden defect upon which Betfred rely.

154. I am of the clear view that these clauses in the Terms and Conditions are inadequate to exempt Betfred from the obligation to payout on an ostensibly winning bet or series of bets. If it were to seek to exclude liability to pay on an ostensibly clear win, that is if it comprehended the obligation of Betfred to payout a winning player it would have to be much clearer in what it says on the page.

155. The EULA clause 5 suffers from the same vices – it does not cover these circumstances – and in my judgement is not on its face capable of extending to the present set of circumstances.

156. The wording is slightly different in that it also provides for liability for PAYMENTS MADE TO YOU AS A RESULT OF A DEFECT OR ERROR IN THE SOFTWARE. I have dealt with this issue above: it is in my judgement conspicuously obscure when the intended meaning is that the player's bet is voided so the obligation to pay never arises. Again, there is no mention of voiding bets, no explanation as to who the third parties might be, and it appears to deal with payments already made – which would not cover anyone in the position of Mr Green.

157. Aside from arguments as to incorporation of these terms, they do not bind him as a matter of language.

158. There is no definition of the meaning and extent of the word "malfunction" and absent a clear definition the natural meaning of the word in my judgement does not connote the circumstances here. It naturally means, without further words of explanation, something in the nature of a detectable breakdown or interruption in service. It is associated elsewhere in documentation available to Mr Green, with a "computer malfunction" in company with communication interruptions. Here, the Game functioned apparently flawlessly, but produced a set of odds that were not what one party intended. What happened to Mr Green was, as Betfred admitted, in fact possible absent the "glitch", just extremely unlikely.

159. Accordingly, I conclude that to achieve the meaning sought by Betfred for the exclusion clauses in the Terms and Conditions, the EULA or the Game rules requires a strained and unnatural meaning to be given to the terms.

The Meaning of "Software"

160. Mr Couser had a distinct argument that the word "Software" as it appeared in both clause 4.4 of the Terms and Conditions and clause 5 of the EULA did not extend to the software that operated the Game, in which the Defendant said the error had occurred. "Software" was not apt to cover that part of the computer programme that comprehends the Game itself. Accordingly, he says, even if the Defendant is correct about the incorporation of the terms, any exclusion relating to "Software" as defined cannot exclude liability for a fault in the Game that produced the win for Mr Green.

161. Having read the detailed evidence on behalf of Betfred, I reject the analysis of Mr Couser on this issue. In my judgement the term "Software" is clearly broad enough to encompass the whole of the operational system from the entry into the "lobby" area of the website to the engagement with the Game at which Mr Green won. It refers to the whole of the computer software including the Game. The definition section describes software as:

> "Software licensed to us including any program or data file or any other content derived there from, that have to be downloaded, accessed or otherwise utilised by you from the Website to enable you to participate in the Online Casino."

162. Mr Gaunt explained, and it is set out in detail above, how end-user software licensed to Betfred is downloaded onto a customer's mobile device and game server software, also licensed to them, which remains on the game server, is accessed. Once the operation of the system is understood, the term "Software" is in my judgement clearly apt to include the bundle of programmes and data files and instructions/programmes that are required to participate in and comprise the Game itself. It was pleaded by Mr Osborne that every time Mr Green launched the Game by tapping the relevant icon, he triggered a download of the software comprising a front-end component of the Game in HTML5 format, which was executed in his browser. I accept that this, and the other technical detail pleaded, is borne out by the evidence and is inconsistent with Mr Couser's case that the term "Software" does not include the Game.

163. Betfred, rightly in my judgement, do not seek to say that the contracts they entered with Mr Green were not "consumer contracts" properly understood under the Consumer Rights Act 2015 where made after 1 October 2015.

Question 2: Incorporation of Terms

164. It is well established at common law that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that the particular condition was fairly brought to the attention of the other party, see *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348 per Lord Dillon at page 339A. Mr Couser relies on the common law doctrine alongside the 2015 Act arguing this is a simple case that even the familiar common law principles support clearly his submission that exclusions here cannot be relied upon.

165. Questions of adequate notice are, of course, highly fact specific. As Lord Bingham said in the same case (at page 443):

> "what would be good notice of one condition would not be good notice of another"

and involve the court's judgment on the basis of the particular facts of the case, bearing in mind what the clause relied on seeks to achieve.

Conclusions on the Question of Incorporation

166. The observations made above when analysing the documents lead me inexorably to the conclusion that, whatever their true meaning, none of the terms seeking to exclude liability was sufficiently brought to the attention of Mr Green so as to be incorporated in the gaming contracts he entered with Betfred.

167. As explained, this is the result of the combination of inadequate signposting to these significant exclusions of liability, and the failure to highlight the meaning and effect intended. The unhelpful, often iterative presentation in closely typed lower-case or numerous paragraphs of capital letters meant that the relevant clauses were buried in other materials. These features are exacerbated by the fact that the player must click through and scroll online, searching out what appears to be relevant to him. I do not go so far as to say that it was fanciful to expect that Mr Green would access the Terms and Conditions at all (as in the *Spreadex* case), but having accessed the Terms and Conditions and then the EULA, it is quite unreasonable to expect he would have found and noted the importance of the key clauses relied upon. This is overwhelmingly obvious in the case of the Game rules where it is highly unlikely, in my view, he would have gone beyond the description in the earlier part of the document as to what to do to play the Game.

168. Betfred rely on acceptance of the EULA terms in 2013 some 4½ years before Mr Green actually played the Game (it had been in operation only for hours when the events in issue happened). I do not hold that it is, without more, impermissible to bind a regular

player in this way. However, the commensurate burden upon the trader who wishes to exclude liability is all the greater. In all the circumstances it is almost impossible that Mr Green was reasonably aware, even in 2013, that the Terms and Conditions and the EULA contained clauses that purported to support a refusal to pay his winnings in these circumstances. In real terms it is fanciful to suggest that what he last saw in the EULA in 2013 was sufficiently brought to his attention for the purposes of the gaming session on the newly introduced Game in January 2018 absent a reminder, and the more ready availability of the EULA itself.

169. For reasons which have been given in relation to the context of the clauses in issue, I agree with the submission of Mr Couser that each of the clauses which purports to allocate the burden of the risk of an undetected and undetectable defect to Mr Green, are inadequately drawn to his attention in order to do so.

170. The mechanism by which acceptance of the Terms and Conditions is signalled is known as a "click wrap", and no issue arises but that Mr Green accepted by clicking on the relevant button. He sues on one of the clauses of the terms and conditions and has never sought to say that he is not bound by at least some of the Terms and Conditions set out.

171. It is important to say that I do not make any finding that acceptance of terms by means of a "click wrap" is inadequate to form a binding contract that contains limitations to or exclusions of liability. Nor, if adequately drafted and signposted, that, even in the context of an online betting facility, liability may be excluded for events such as occurred in this case.

172. In my judgement the particular context of an online betting contract must however be borne in mind. A player is most unlikely to spend significant time trawling through documentation, particularly if it is repetitive and not clearly relevant to him. The exclusion of or limitation to liability to pay in circumstances where play has continued over a number of hours and is ostensibly wholly valid, is something that would need to be achieved with great care and particularity.

Incorporation by Reference

173. It follows from the above that clause 2 of the EULA is inadequate to bind Mr Green with the terms of the Game rules. The relevant phrase is:

> "The rules of the Online Games are placed in www.betfred-casino.com as well as other sections of the Software and the Website, including but not limited to rules describing how to play the Online Games, tournaments, and any other rules governing particular game, event and tournament. All such rules are incorporated and included under the Terms and Conditions set out herein."

I have said that it is in my judgement obscure. It is not adequate to describe a powerful exclusion clause within the phrase "including but not limited to rules describing how to play…and any other rules governing particular game, event and tournament" and

cannot bear the weight the Defendant wishes to place upon it. Further, the "Rules" as such are but a part of the Game rules document.

Question 3: Reliance on the Terms

Consumer Rights Act 2015

174. There was no dispute that, aside from some immaterial exemptions, the Consumer Rights Act 2015 requires that as between a trader such as Betfred and a consumer such as Mr Green, terms and notices must be transparent and must be fair. A term that is unfair will not bind the consumer, although the contract will continue in existence, unless that is impossible. The court has an element of judgment to exercise in the light of the circumstances of each case.

175. A term is 'transparent' if it is expressed in plain and intelligible language and, where written, is legible (s64(3)). A term is 'prominent' if brought to the consumer's attention in such a way that the average consumer would be aware of it (s64(4)), that is to say someone who is reasonably well-informed, observant, and circumspect (s64(5)).

176. The findings made elsewhere about the drafting of the clauses means, inevitably that I am not satisfied that the three clauses relied upon to exclude liability in this case, conform to the requirements of the 2015 Act. The language is not, for the reasons already given, in my judgement to be described as "transparent". Even if I am wrong and the clauses properly construed were apt to cover the liability in issue, and were in fact incorporated, the drafting was nonetheless opaque and difficult, and the meaning was not in my judgement clear to an average and informed consumer.

177. I am prepared to accept, as Betfred argued, that Mr Green was an experienced and competent player of internet gaming. Nonetheless, the nature of the liability sought to be excluded required clear explanation and "signposting" which would have involved a full and clear description of the possibility of a hidden technical defect, and its potential consequences for the gaming contract. Unambiguous language that made it clear Betfred intended to void a payout in such circumstances was necessary.

178. Even if, at best, an ambiguity could be spelt out, then statute requires it must be construed against Betfred. I have been unable to find any such ambiguity.

179. Section 62 was also relied upon by Mr Couser who submitted that under s62(1) an unfair term of a consumer contract is not binding on the consumer 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, and that the requirement of good faith in this context is one of fair and open dealing. This means, among other things, that the terms must be expressed fully and clearly and contain no hidden traps or pitfalls, especially clauses that may operate to the customer's disadvantage.

180. In *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 AC 481, Lord Bingham at [17] dealing with predecessor provisions stated:

> "A term…is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith.
>
> …
>
> The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice."

181. By Section 62(5), reflecting this approach, fairness is to be judged taking into account the nature of the subject matter of the contract, and by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends. The court will have regard to the knowledge and experience of the consumer and the identity of the party who has put forward the term alleged to be unfair. Necessarily there is relevance here in the previous observations made about the position of the online gamer, even where it is accepted that the participant has experience and familiarity. There is an obvious read-across here from the context of the three agreements relied upon, and the lack of accessibility and clarity which I have found to exist.

182. Betfred submitted that the exclusionary terms in the Game rules were not subject to the restrictions of the 2015 Act because they were to be read as dealing with the subject matter of the contract. I reject that submission. As a matter of language that is not the case. These clauses purport to deal with a contingency: namely with the risk that there is an undetectable flaw in the design or realisation of the Game that shortens the odds in the player's favour. The court will not be astute to bring terms within this description. As Lord Steyn expressed it in *First National Bank* (above) at para 34 (dealing with predecessor provisions):

> "In any event, regulation 3(2) must be given a restrictive interpretation. Unless that is done regulation 3(2)(a) will enable the main purpose of the scheme to be frustrated by endless formalistic arguments as to whether a provision is a definitional or an exclusionary provision."

Conclusion on the Question of Reliance

183. 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 their consequences to the player are inconsistent with the fairness envisaged by the Act as indicated in the light of the previous relevant case law.

The Doctrine of Mistake

184. Mr Osborne argued that both Mr Green and Betfred proceeded on a shared but mistaken belief that the Game was functioning properly according to its intended design and the rules. He argues that the rules dictated "Trophies are collected from random trophy cards that are dealt to you and the dealer during the initial deal", whereas, in fact, they were also allocated because they had been previously designated.

185. Mr Couser submitted this is not a case of a mistake that avoids the contract, that the mistake did not render contractual performance impossible, the Game patently was able to continue and did continue until Mr Green stopped and he does not accept it was not played according to the rules.

186. *The Great Peace (Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd)* [2002] EWCA Civ 1407 [2003] QB 679 provides assistance in the application of the doctrine of common mistake. It was set out by Phillips MR at paragraph 76 as follows:

> "The following elements must be present if common mistake is to avoid a contract: (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."

187. Mr Couser submits that in the current case it just cannot be said that the performance of the contract was rendered impossible by the alleged mistake. I agree. The contracts of gaming were performed, albeit not as profitably to Betfred as they believed they would be. Further, it cannot properly be said in my view that the state of affairs was not the fault of the provider of the gaming services, Betfred, to Mr Green. In my judgement the doctrine of mistake has no role to play in this case. As in *The Great Peace*, the mistake did not render the contract incapable of performance, just less advantageous to one party.

188. I do not accept that the phrase in the Game rules highlighted by Mr Osborne to the effect "Trophies are collected from random trophy cards that are dealt to you and the dealer during the initial deal" was rendered wrong or misleading by the fault relied upon. It still remained a true statement although, the defect caused other cards to be retained. This argument, in common with the others advanced in support of a mutual mistake avoiding the contract must fail.

Summary of My Conclusions

189. I have concluded that the Claimant succeeds in his application for summary judgment under a number of heads of argument. In summary:

a. This case involves the resolution of a number of relatively short points of contractual construction and there are sufficient materials before the court for it to decide the issues, and there is no other good reason as to why the court should not do so.

b. The wording of each of the clauses relied upon is inadequate as a matter of the natural meaning of the language in context to exclude liability to payout Mr Green's winnings in the events which happened.

c. The manner in which the relevant clauses were presented and the failure adequately to draw them to his attention meant that the three purported exclusions, even had they been effective to exclude liability, were not incorporated in the contract between the parties.

d. Even if the words of the clauses relied upon by Betfred were adequate to encompass the fault in the Game and adequately brought to Mr Green's attention so as to be incorporated in the contracts of gaming, they were not transparent or fair and Betfred were not entitled to rely upon them.

e. The doctrine of mistake is inapplicable to these facts.