Neutral Citation Number: **[2023] EWHC 800 (KB)**

Case No: KB-2022-000731

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2023

Before:

MR JUSTICE JAY

- -

Between:

JOAN PARKER-GRENNAN **Claimant**

- and –

CAMELOT UK LOTTERIES LIMITED **Defendant**

- -
- -

James Couser (instructed by **Coyle White Devine Limited**) for the **Claimant**
Philip Hinks (instructed by **Browne Jacobson LLP**) for the **Defendant**

Hearing dates: 28th and 29th March 2023

- -

Approved Judgment

This judgment was handed down remotely at 2pm on 4th April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE JAY:

INTRODUCTION

1. Camelot UK Lotteries Limited ("the Defendant") is the licensed operator of the National Lottery. In that capacity it conducts a range of activities but the focus of this case is National Lottery Interactive Instant Win Games ("IWGs") which the Defendant promotes from time to time. These are games of chance played online on the National Lottery website.

2. On 25th August 2015 Ms Joan Parker-Grennan ("the Claimant") bought a £5 ticket for a particular IWG. Prizes ranged from £5 to £1M. In a nutshell, in order to win a player had to match a number in the "YOUR NUMBERS" section of the screen (assuming that the player had enabled the animations which are provided to make the game more fun) with a number in the "WINNING NUMBERS" section. After the Claimant had pressed the "play" button on her screen and then clicked on all five of the "Winning Numbers" and all 15 of the "Yours Numbers" (in whatever order she chose to do this), her screen changed and she was told that she had won £10. This was because the number "15" was matched and it was flashing white, and the prize for that combination was £10. However, on closer scrutiny the Claimant could see that she had also matched the number "1", the prize for which was £1 million. There was no corresponding message to the effect that she had won that amount, and no flashing lights. The Claimant says that she is entitled to this prize in addition to the £10 prize which the screen display had told her she had won. The Defendant has refused to pay out, saying that the Claimant did not win the £1 million and that a coding issue had generated an error in the Java software responsible for the animations. The £10 prize was the one the computer had "predetermined" would be won in conjunction with the ticket the Claimant purchased.

3. The Claimant now applies for summary judgment on her claim pursuant to CPR Part 24, alternatively that the Defence should be struck out pursuant to CPR Part 3.4. It is convenient to consider the Claimant's application within the scope of CPR Part 24, if for no other reasons than strike-out sets a higher bar and both parties have sought to adduce evidence. The principles governing applications under CPR Part 24 are sufficiently familiar that I do not propose to set them out.

4. The evidence before me comprises the witness statements of the Claimant's solicitor, David Sheahan, dated 27th May 2022 and of Neil Smith, an IT service delivery manager at the Defendant, dated 10th January 2023 and 21st March 2023. I will summarise the evidential position as briefly as I may because for the purposes of this application nothing is in dispute. It is the interpretation of some of the evidence that is in issue. Mr Smith raises some technical issues as to the internal workings of the Defendant's computer system and related Java software which the Claimant has not sought to contradict. It follows that his account must be accepted.

THE EVIDENCE

5. The Claimant first opened an online National Lottery Account on 27th February 2009. In order to do so, she was required to tick a box confirming that she had read and agreed to be bound *inter alia* by the Defendant's Interactive Account Terms and Conditions ("the Account Terms"), the Rules for IWGs ("the IWG Rules") and the Game Procedures for the specific games she wished to play. One way or another, these Account Terms, Rules and Game Procedures were accessible via a series of hyperlinks or drop-down menus. The Defendant's contractual documentation is updated from time to time. Updates of any significance required acceptance by the Claimant by her ticking or clicking a button marked "Accept". At the relevant time, the Claimant was presented with a drop-down menu revealing a summary of the changes as well as complete versions of the new sets of provisions.

6. The Claimant has advanced a number of submissions under the headings of non-incorporation and unenforceability. Without prejudice to those submissions, which I will be addressing below, it is convenient at this stage to set out the relevant provisions of the Account Terms, the IWG Rules and the Game Procedures for the particular IWG the Claimant played on this occasion.

7. The Account Terms provided in material part:

> "**Account Terms**
>
> **19th Edition effective 2nd July 2015**
>
> These Account Terms (the "Terms") set out the various rules and procedures that apply when You open an Account and use it to play National Lottery games online (including on mobile devices and by direct debit) or for any other reason.
>
> By accepting these Terms, You agree to be bound by the relevant documents below:
>
> (a) When playing Draw-Based Games online through Your Account: these Terms; the Rules for Draw-Based Games Played Online, the Game Procedures for each individual Draw-Based Game and the Game Specific Rules (if any) for a particular Draw-Based Game;
>
> (b) When playing Instant Win Games through Your Account: these Terms; the Rules for Interactive Instant Win Games; the Game Procedures for each individual Instant Win Game and the Game Specific Rules (if any) for a particular Instant Win Game.
>
> ...
>
> You can view copies of the documents mentioned above on the National Lottery website. You can also get copies of the documents by calling the Customer Care Team on 0845 278 8000 or by writing to The National Lottery, PO Box 251, Watford WD18 9BR. Please note that calls to the Customer Care

> Team cost 2p per minute plus your service provider's access charges."

(What is set out above is not exactly as appears in the original. There are certain font and formatting differences which cannot be ironed out.)

8. The IWG Rules provided in material part:

> "**Rules for Interactive Instant Win Games**
>
> **Edition 12.1 effective 10th August 2015**
>
> These Rules for Interactive Instant Win Games (the "Rules") apply when You play any National Lottery Interactive Instant Win Game. Each Instant Win Game also has its own Game Procedures that apply, and certain Instant Win Games may also have their own Game Specific Rules that apply from time to time.
>
> You can view all National Lottery Rules and Procedures, and the Account Terms and Privacy Policy, on the National Lottery website. You can also get copies of these documents by calling the Customer Care Team on 0845 278 8000 or by writing to The National Lottery at PO Box 251, Watford WD18 9BR. Please note that calls from a BT line are charged at your calling plan's standard network rate. Charges for mobile or other providers might vary.
>
> …
>
> **3. Games of Chance**
>
> You acknowledge that:
>
> 3.1 Instant Win Games are games of chance and the outcome of all Instant Win Games is predetermined at the point You buy a Play or start a Try Game. The outcome of an Instant Win Game is not affected by You exercising any skill or judgement.
>
> 3.2 The outcomes of Plays are based on probabilities within the Prize Structure and not from a limited pool or range of Plays. The chances of winning at each Prize level in an Instant Win Game are, therefore, exactly the same for each Play in that Instant Win Game and the chances are not affected by previous Plays or the number of Prizes already paid for that Instant Win Game.
>
> **4. Claiming a Prize**
>
> 4.1 Subject to Rule 5.4, You can only claim a Prize if You are the holder of an Account with the relevant Winning Play.

…

4.4 You can only claim the Prize that Your Winning Play is eligible for. You cannot claim any other Prize, or any otherwise unclaimed Prize in that particular Instant Win Game.

…

6. Validation Requirements

6.1 Before a Prize can be paid on a Play, it must be successfully validated in line with Camelot's reasonable validation procedures adopted from time to time. Camelot's decision about whether the Play is valid will be final and binding.

6.2 Without limiting the effect of Rule 6.1, Camelot will declare a Play invalid (and will not, therefore, pay any Prize) if:

(a) the Play is the result of an act by You or another person that was intended to increase the chances of You or that person winning a Prize in the relevant Pay to Play Game above the chances enjoyed by other Players of that Pay to Play Game, or to increase that Prize; or

(b) the Play is counterfeit, all or part of the Play has been forged, or the Play fails to pass Camelot's validation and security checks; or

(c) the Prize claim is not received within the relevant Claim Period; or

(d) the Play Number for the Play is not on Camelot's official list of Winning Plays, or the relevant Prize for the Winning Play with that Play Number has been paid previously; or

(e) the details associated with the Play Number of a Play do not match Camelot's official records of that Play Number; or

(f) Camelot reasonably believes that the Play was bought by or on behalf of a person falling in one of the categories in Rule 1.6.

6.3 Without limiting the effect of Rule 6.1, Camelot may declare a Play invalid (and will not be obliged to pay any Prize) if:

(a) Camelot reasonably believes that the person claiming the Prize is not the holder of the relevant Account or that person's duly authorised representative, or that the information provided by the person claiming the Prize is incomplete or has been altered or tampered with; or

(b) the Play has not been issued or sold by Camelot; or

(c) the Play Number, Play Symbols and Captions (or any other unique feature of the Play) don't match exactly those on Camelot's Computer System for the Instant Win Game that the Play relates to; or

(d) the Play is defective, in whole or in part; or

(e) the outcome of a Play as displayed on the Game Play Window is inconsistent with the result of that Play as predetermined by Camelot's Computer System; or

(f) the distribution, frequency or amounts of Prizes materially differ from that set out in the Prize Structure for a particular Instant Win Game.

…

11. Limitation of Liability

11.1 Where instructed by the Commission or in appropriate circumstances, Camelot will, or may (in its discretion provided it is acting reasonably), declare that a Play or an Instant Win Game is defective. In these circumstances, all relevant Plays of that Instant Win Game and all relevant Prizes won will be void and Camelot will either:

(a) give the affected Player an opportunity to play another Play of equivalent price; or

(b) refund to the affected Player the amount paid by that Player for the defective Play.

Camelot will decide which of (a) or (b) above shall apply.

You do not have the right to cancel a Play and except as set out in this Rule 11.1 and Rule 12.1, no refunds will be given in any circumstances. No interest will be payable in respect of any refunds made.

11.2 If Camelot is fully satisfied after proper and careful enquiries that a cancellation of a Play was wholly and directly the result of Camelot's fraud, negligence or error, and that Play would, but for that cancellation, have been a Winning Play, then Camelot will not refund the cost of the Play and Camelot's only liability will be to pay an amount equal to the Prize You would have been entitled to if the cancellation did not take place.

11.3 Camelot's only obligation is to pay the Prizes won in any Instant Win Game to the rightful owners of Winning Plays, or provide a refund in the circumstances set out in Rules 11.1

and 12.1. Without limiting the effect of Rules 11.1 and 11.5, Camelot will not be liable in any circumstances for any loss of whatever nature other than the non-payment of a Prize or the non-payment of a refund You are entitled to under these Rules. In particular but without limitation, Camelot will not be liable for any loss of profits, special, indirect or consequential loss, suffered or incurred by You (or any holder or owner of a Play, any person claiming a Prize during the Claim Period or any other person) that arises out of the withdrawal of any Instant Win Game or from the participation or non-participation of You or any person in any Instant Win Game. This includes the loss, for whatever reason, of the chance to participate in that Instant Win Game.

…

12. Disputes and Camelot's Decisions

12.1 Camelot's decision about whether or not a Play is a Winning Play, or in relation to any other matter or dispute arising from the payment or non-payment of Prizes, will be final and binding provided that it is a reasonable decision (and subject to Rule 12.4). Without limiting the effect of the previous sentence, Rule 11.1, Section 12.3 of the Account Terms, following any such decision made by Camelot, Camelot may (at its discretion) reimburse the cost of the Play or replace the disputed Play with a Play for any current Instant Win Game of the same price.

12.2 The remedy in Rule 12.1 will be the Player's sole and exclusive remedy, and any reimbursement or replacement will fully discharge Camelot from any liability in respect of such a dispute (subject to Rule 12.4). Camelot will not be liable to pay any interest in respect of any reimbursement made under this Rule 12.

12.3 Camelot may withhold payment of a Prize and/or make an equivalent payment into court until any dispute has been resolved.

12.4 Camelot operates a written procedure for handling Player complaints. Information about the complaints procedure will be accessible via the Site. Once You have completed the internal complaints process, and if Your complaint concerns a financial entitlement in relation to an Instant Win Game, You are entitled to refer Your dispute to alternative dispute resolution ("ADR"). The finding of the ADR provider will be binding on Camelot in respect of disputes up to and including £10,000.

13. General

13.1 Any person who buys a Play or submits a Play for validation or who claims a Prize in whatever capacity, agrees to be bound by the provisions of any applicable legislation, these Rules, the Privacy Policy, the Account Terms, the Game Procedures, any Game Specific Rules that apply (all as amended from time to time) and any other rules or procedures, statements or explanations Camelot may issue in respect of that Instant Win Game (including any statements or explanations set out on the Game Details Screen).

13.2 Camelot may change these Rules, the relevant Game Procedures and any Game Specific Rules applicable to the Instant Win Games, and the Account Terms (including the Privacy Policy) at any time. These changes will be effective from the date of their publication on the Site (or any earlier time Camelot states), or on notification to You that the changes have taken place (whichever takes place sooner) and will apply to Plays bought after the date on which the changes become effective, and/or Plays bought before that date if reasonable in the circumstances. Notification will be by email, Account notification, post or any other form of communication reasonably decided by Camelot. You agree that You will be bound by the changes when You next play an Instant Win Game, access Your Account or claim a Prize after the changes have become effective, or (where relevant) when You expressly accept the changes, whichever takes place first.

13.3 These Rules, the Account Terms, the Privacy Policy, the applicable Game Procedures and any applicable Game Specific Rules, and the statements and explanations set out on the Game Details Screen set out the full extent of Camelot's obligations and liabilities to You in relation to Instant Win Games and form the contract between Camelot and You for each Instant Win Game. If there is any conflict between these documents, they will apply in the following order (unless Camelot states otherwise): (a) the applicable Game Specific Rules (taking first priority); (b) the applicable Game Procedures; (c) these Rules; (d) the Account Terms (excluding, for this purpose, the Privacy Policy); (e) the statements and explanations appearing on the Game Details Screen; (f) the Privacy Policy.

If any provision (or part of a provision) in any of the documents mentioned in Rule 13.3 is decided by a court of competent jurisdiction to be void and/or unenforceable, that decision will only affect the particular provision (or part of the provision) and will not, in itself, make the other provisions void or unenforceable.

…

15. Definitions

The following words and terms will have the meanings given to them below when used in these Rules (unless the context clearly indicates otherwise).

…

Account Terms: The Account Terms available on the Site that apply to Accounts.

…

Camelot's Computer System: The computer systems used by or on behalf of Camelot from time to time to operate National Lottery games, administer Accounts, facilitate Plays and pay Prizes.

…

Game Details Screen: The screen on the Site that displays details of a particular Instant Win Game.

…

Game Procedures: A written document issued by Camelot for a particular Instant Win Game in addition to these Rules that includes the Instant Win Game name, the price per Play, how a Prize is won, the Prize Structure and Play Style, and any other relevant information for the Instant Win Game.

…

Game Specific Rules: Any rules or conditions issued by Camelot in addition to or in substitution for these Rules, which apply only to a particular Instant Win Game.

…

Instant Win Game: means a Pay to Play Game or a Try Game.

…

Pay to Play Game: A National Lottery instant win game which is available to play on the Site (following registration and provision of debit card details) and in which You have a chance to win a Prize. Pay to Play Games may not display correctly on, or be playable from, all devices used to access them.

Play: An entry into a Pay to Play Game in line with the Play Style for that Pay to Play Game.

> **Play Number**: The number which is unique to and which identifies a particular Play, and which is recorded on Camelot's Computer System.
>
> …
>
> **Play Symbol and Caption**: A symbol and (if appropriate) the caption that appears in the Game Play Window which is used to determine whether or not a Prize may have been won. Any Play Symbols and Captions will be specified in the relevant Game Procedures.
>
> …
>
> **Prize**: A prize won by a Player in a Pay to Play Game. Reference in these Rules to payment of a Prize includes the awarding of non-cash Prizes.
>
> **Prize Claim Form**: The form issued by Camelot which is required to be completed and submitted to be eligible to claim certain Prizes in line with these Rules.
>
> **Prize Structure**: The value of Prizes and odds of winning in an individual Instant Win Game as determined by Camelot and set out in the Game Procedures for the relevant Game.
>
> …
>
> **Validation Requirements**: Camelot's Play validation requirements referred to in Rule 6 or as otherwise determined by Camelot from time to time.
>
> **Winning Play**: A Play which entitles You to a Prize and which meets all the Validation Requirements."

9. It may be seen from clause 13.3 that, in the event of any conflict between documents, the contractual document having the highest priority is "the applicable Game Specific Rules" as defined in clause 15. In fact, there are no such rules applicable to the IWG the Claimant played on this occasion. It follows that the "first priority" document germane to the instant case was the Game Procedures, defined as may be seen in clause 15.

10. The Game Procedures relevant to this particular IWG provided, in material part:

"**£20 Million Cash Spectacular**

Win up to £1 Million

£5 per play. Odds: 1 in 2.86

”

“(The rubric under the second group of numbers reads, “Match any of the WINNING NUMBERS to any of YOUR NUMBERS to win PRIZE”. Additional prizes may be won if the symbol with the £ or the ££ in the middle appears. This wording is far clearer in any electronic copy of this judgment than in any printed copy.)

…

It’s quick and simple to play and so why not give it a go, and you could bag a spectacular cash win today.

Game Procedures including how to play ^

…

Introduction

These are the Game Procedures (“the Procedures”) for £20 million cash spectacular (“the Game”). When you play the Game, these Procedures, the Rules for Interactive Instant Win Games (“the Rules”) and the Account Terms apply. All these documents can be found on the National Lottery website.

Any word or term in these procedures that has a specific meaning will have the meaning given to it in these Procedures or the Rules (unless the context clearly indicates otherwise).

Game Details

…

There is a 1 in 2.86 overall chance of winning a Prize on each Play of the Game. The expected prize per payout percentage for this game is 74%.

This Game is a game of chance. The outcome of a Play in the Game is pre-determined by Camelot's Computer System at the point of purchase. You are not required to exercise any skill or judgement to win a Prize.

How to Play and Win

Each Play has its own Play Number – this can be found on the game outcome screen when the game has been finished, and in the "My games" section of Your account.

At the start of Play, You're presented with a Game Play Window displaying a PLAY button at the centre of the screen. Select the PLAY button to begin the Game.

On selecting the PLAY button, You're presented with a Game Play Window displaying two boxes labelled 'WINNING NUMBERS' (the 'WINNING NUMBERS Section') and 'YOUR NUMBERS' (the 'YOUR NUMBERS Section'). At the bottom of the Game Play Window are the instructions: 'Match any of the WINNING NUMBERS to any of YOUR NUMBERS to win PRIZE. Find a  symbol to win that PRIZE automatically. Find a  symbol to win DOUBLE the PRIZE shown.'

The WINNING NUMBERS Section consists of one row of five pound sign motifs. The YOUR NUMBERS Section consists of fifteen wads of cash motifs, each with a prize motif below it.

To start a Play, select one of the five pound sign motifs in the WINNING NUMBERS Section or one of the wads of cash or prize motifs in the YOUR NUMBERS Section. Selecting a pound sign motif will reveal a number between 1 and 30. Selecting a wad of cash motif will reveal a number between 1 and 30 and a monetary amount under the prize motif immediately below that wad of cash motif (the 'Prize') will also automatically be revealed. Selecting a prize motif will reveal the Prize and the number under the wad of cash motif immediately above that Prize will also automatically be revealed. You must reveal all numbers and Prizes to complete the Game.

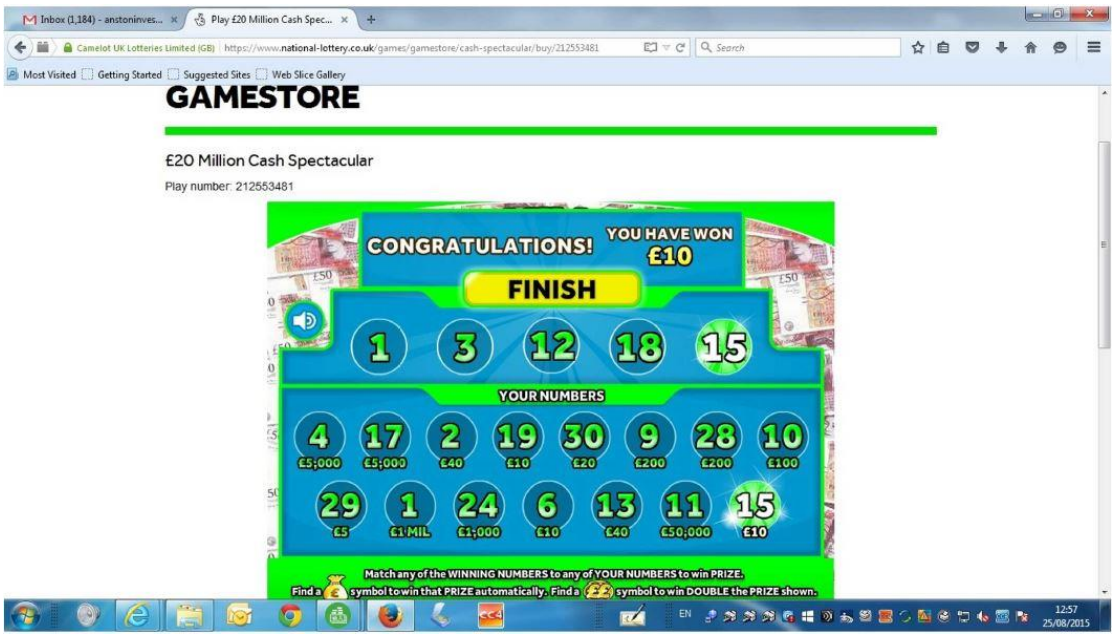
> If You match a number from the WINNING NUMBERS Section to a number in the YOUR NUMBERS Section, the two matching numbers will turn white and flash in a green circle indicating that you have won the Prize for the matched YOUR NUMBERS.
>
> When You have revealed all numbers and Prizes a message will appear at the top of the Game Play Window indicating the amount You have won, if any. The word 'FINISH' will appear underneath the message. You must select FINISH to complete the Game.
>
> **Prizes**
>
> The Prize amounts and odds of winning are set out in the table below:
>
> Prize Amount:
>
> £10 1 in 31
>
> …
>
> £1,000,000 1 in 4,990,000
>
> You can only win one Prize Amount per Play, as detailed in the Prize Amounts and Odds table above.
>
> **General**
>
> If there is any conflict or inconsistency between these Procedures – "£20 Million Cash Prize Spectacular and any other information issues by Camelot in respect of this Game, these Procedures will take priority (unless Camelot states otherwise)."

11. It should be explained that the blue typeface above (clearly visible in any electronic version of this judgment, but in hard copy discernible only by being in slightly paler type) designates either a hyperlink or, in the case of the "Game Procedures including how to play" rubric, a drop-down menu.

12. On 25th August 2015 the Claimant played the "£20 Million Cash Spectacular" on her laptop. She played this game with the animations enabled: in other words, she saw something similar to the coloured box we can see in the Game Procedures. It is unknown whether the Claimant clicked the drop-down menu to reveal the Game Procedures, or whether she used her intuition or past experience to guide her through the simple processes of this particular game, which I understand went "live" for the first time that day, although similar IWGs had been promoted by the Defendant in the past. On any view, the Claimant would have understood that the basic concept was to match any "WINNING NUMBER" with any of "YOUR NUMBERS" in order to secure "PRIZE".

13. When the Claimant pressed "Play" on the Game Play Window[1], she was then required to click several times to progress through the Game sequence and complete the Play. On my reckoning she would have needed to do 20 "clicks" to reach the end, but the precise number matters not. As the Game Procedures make clear, she did have to finish the game.

14. After the final number was clicked, the Claimant's screen came up with the following image, which is only available because the Claimant took a screenshot of it:



15. It may be seen that the Play Number was 2125533481. The Claimant was informed that she had won £10. This was presumably because she had matched the number "15" in "YOUR NUMBERS" with the same number in the line above (being one of the "WINNING NUMBERS" in the pictogram in the Game Procedures), and a "£10" is visible underneath.

16. But the Claimant was also astute enough to see that there was a second apparent match. The number "1" appears in both the top line and the bottom line, and the Prize for that was "£1 MIL". Yet, these numbers had not flashed, despite the description in the Game Procedures of what would happen if she had won, and the screen was telling her something different – that she had won £10.

17. Rather than click the "FINISH" button, perhaps fearing what would happen if she did, the Claimant spoke to the Defendant and was told that the game was not over until she did just that. The Claimant explained that it was her view that she had clearly won £1 million because, to use the expression I deployed during the hearing and not hers, she had done exactly what it says on the tin: she had matched the number "1", and that was enough to secure the Prize. Furthermore, the wording on the Game Details Screen – "Match any of the WINNING NUMBERS to any of YOUR NUMBERS to win PRIZE"

[1] The Game Procedures refer to a "Game Play Window" whereas the IWG Rules to a "Games Details Screen". Nothing turns on this difference in wording.

– does not exclude the possibility of winning twice. The Claimant's argument, therefore, is that the result of this Play was that she had won £1,000,010.

18. When the Claimant did click the FINISH button, her Prize – according to the Defendant's computer at least – was £10, and that was automatically credited to her account. The Claimant does not appear to have taken a second screenshot.

19. The Defendant's explanation for what happened – and for present purposes it must be treated as being true - is as follows. Essentially, as soon as the player presses the "PLAY" button on the Game Details Screen, the random number generator in the Defendant's interactive platform selects a number which corresponds with a specific prize tier. That number, which is automatically associated with the Play Number (here, 212553481), determines the outcome of the ticket. The random number in this case corresponded with a prize tier of 27, which meant that the Claimant had won £10.

20. This state of affairs is confirmed, says the Defendant, by examining the CIP[2] database (i.e. the Defendant's official list of Winning Plays for the purpose of the IWG Rules) recording a Prize of £10. That is in evidence in these proceedings. For this reason the Claimant's account was automatically credited with the sum of £10.

21. The reason for the screenshot at §14 above arguably showing something different is that there was a coding error which afflicted the Java software generating the pictorial display that makes this game more entertaining. After an extensive investigation at the instance of the Gambling Commission, it was ascertained that for a small number of plays this resulted in an erroneous "-1 value" being inserted into the xml code which generated the game animations.

22. Now, it is possible to play this game with the animations disabled. The Defendant has not assisted me with any details of how many players chose to play the game that way[3], although I would venture to suggest, very few. If the game had been played by the Claimant with animations disabled, the evidence is that she would have received a simple message saying that she had won £10, and would have been none the wiser about the matching number "1". I have been shown an illustration of this. Given that the Java software would in such circumstances either be disabled or not installed in the first place, its application would have no relevance.

23. However, this particular game was played with the animations enabled, and the counterfactual posited by the Defendant does not advance its case. Additionally, the Game Procedures I have been shown presuppose that the animations are enabled otherwise they would make no sense. The Defendant has not put in evidence any different Game Procedures for what might be described as the same game with animations disabled.

24. Nonetheless, the Defendant's submission on the facts has three limbs. The first is that the outcome – here, a £10 win – was determined the metaphorical nanosecond after the PLAY button was pressed (in real time, it may have been even quicker). This is what is meant by "pre-determined". The player needs to understand that in whatever order the various numbers on the screen are clicked thereafter will make no possible difference

[2] Camelot Interactive Platform
[3] Certain mobile devices possess limited or different functionality.

to the outcome. The die is cast. The second limb of the Defendant's submission is that the Java software is, as it were, an optional extra. That part of the computer system which generated the animations "understood", or was supposed to "understand", that the Claimant had won a £10 prize because that is what the random number generator had thrown up. The failure of the software to translate this state of affairs into all aspects of the pictorial display raises, argues the Defendant, a separate issue. The outcome of this play is unaffected. The third limb, which is very much connected to the second, is that on Mr Smith's evidence, the random number generator determines the outcome of the play *before* the animation files are selected by the computer. He means, of course, a nanosecond before.

25. The Claimant's argument on the facts is that all of this is a red herring. The Java software is part of the Defendant's computer system. The outcome, intended or otherwise, was a win of £1,000,010.

26. I will be addressing these evidential issues in due course.

27. No further recitation of the facts is required. It is unnecessary to comment on the Gambling Commission's investigation. Nor, on a related topic, do I place more than minimal weight on the consideration that the Defendant's contractual documentation has been given the seal of approval by the Gambling Commission. Whether some or all of these provisions survive the application of the Unfair Terms in Consumer Contracts Regulations 1999 (1999 S.I. No. 2083) ("the UTCCR"), which apply to the present case because its circumstances arose before the coming into effect of the Consumer Rights Act 2015, is an issue *par excellence* for the Court.

THE ISSUES

28. The parties decided to address the issues that arise in this case in their own order, each no doubt having their individual forensic reasons for doing so. In my opinion, the three key issues which arise in this case must be analysed in the following order:

    (1) What were the terms of the contract between the parties? ("the incorporation issue")?

    (2) Are all or any of the provisions that were incorporated rendered unenforceable by reason of the UTCCR? ("the enforceability issue")

    (3) Given (1) and (2) above, did the Claimant win the £1 million she is claiming? ("the construction issue")

29. A number of pleading points were raised by both Counsel during the hearing. With respect to Counsel, I have decided to ignore those and to concentrate instead on the parties' best arguments as advanced in writing and orally before me. Moreover, in order to clear the air I will grant permission for the Claimant's Amended Reply notwithstanding that it was filed eight days late.

30. Mr James Couser for the Claimant also sought to make something of the fact that the Defendant tested the software for this game only 1,900 times. These tests revealed no issues with the animations. Given that 99.76% of the games that were played after "£20 Million Cash Spectacular" was launched on 25th August 2015 were free of any

difficulty, a statistician would be in a position to calculate the odds of all 1,900 tests being incident-free. However, there is no evidence about that and also nothing to doubt the Defendant's evidence that this testing regime gave the new game a clean bill of health. Mr Couser's real point was that there ought to have been more tests, and that the Defendant's failings in this regard should not redound to his client's disadvantage. In my opinion, this submission is really no more than a jury point except perhaps in relation to the Limitation of Liability clause, namely clause 11 of the IWG Rules, in the context of the enforceability issue. As I will in due course be explaining, the Defendant does not need to rely on that clause to win this application.

THE CLAIMANT'S SUBMISSIONS

31. Mr Couser naturally focused on the Game Details Screen and the wording "Match any of the WINNING NUMBERS etc." A player sees this stipulation, described by Mr Couser as the "relevant contractual term", whether or not animations are enabled; but the fact remains that animations were enabled by the Claimant. On the natural and ordinary meaning of this term, it was submitted that a person could win more than once.

32. Mr Couser submitted, as I have already indicated, that the animations are a red herring. The Defendant may have intended to pay out only £10, but that is irrelevant. The outcome of this play was as dictated by the relevant contractual term and as shown by the screenshot that the Claimant took before she pressed the "FINISH" button. The screenshot showed that she had achieved two wins, including the win for the matching "1" – the £1 million.

33. The way in which the foregoing argument was advanced in writing was as follows:

> "The dispute between the parties is actually quite a narrow one. The Defendant says that the Terms mean that the Claimant is bound by what it intended the outcome of the Game to have been, despite the fact that was not what the Game was programmed to do, and despite the fact that what the Game **was** programmed to do accorded with what the Relevant Contractual Term said it could do."

34. Mr Couser further submitted that the Claimant had no means of detecting the coding error, which as it happens was not identified by the Defendant for 36 hours. This created a particular unfairness. The Defendant's remedy was not to deny this claim but to bring separate proceedings against its software supplier.

35. Mr Couser contended that those contractual terms which the Defendant said were incorporated by virtue of the hyperlinks were not so incorporated in all the circumstances of the present case. No reasonable consumer would read any of these terms, and the particular wording on which the Defendant relies should have been properly signposted in line with well-established principles. In relation to the contractual documentation, Mr Couser advanced three headline submissions. First, that the Defendant's contractual documentation is completely one-sided. The provisions at issue would, if upheld, place on the consumer the whole risk. Secondly, that the Defendant is seeking to exclude liability for an error which was detectable if proper testing had been carried out. Thirdly, that it is unfair to assume that consumers would

have any real understanding of the terms and conditions, and no consumer would in fact have read them.

36. Mr Couser submitted that this was a straightforward case which could properly be determined summarily. The relevant contractual term was "front and centre", and even on the Defendant's own case formed part of the contract between the parties. Contrary to what had been pleaded in the Defence, the relevant contractual term was not post-contractual. Moreover, the relevant contractual term clearly appears in the Game Procedures.

37. Mr Couser's submission on the UTCCR was, in summary, that the terms sought to be relied on by the Defendant were obviously onerous and unfair. He relied in particular on various dicta of Mr David Donaldson QC, sitting as a Deputy High Court Judge, in *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm) and of Foster J in *Green v Petre (Gibraltar) Limited t/a Betfred* [2021] EWHC 842 (QB).

38. I acknowledge, and am grateful for, the clear, attractive and helpful way in which Mr Couser's written and oral arguments were presented. He made some headway during the course of the hearing, but by the time I embarked on preparing this judgment I was entirely convinced that his case was unfounded.

THE DEFENDANT'S SUBMISSIONS

39. Mr Philip Hinks for the Defendant presented me with clear, comprehensive and able written and oral submissions. I appreciated the cool and understated way in which these were advanced. It is unnecessary for me to summarise them. Instead, I will indicate during the course of my analysis of the three issues I have identified where I disagree with him.

40. It is, though, right that I record Mr Hinks' disagreement with Mr Couser's characterisation of the dispute between the parties (see §33 above). Mr Hinks submitted, and I agree, that the Defendant's case is that the outcome of this game was that the Claimant had won £10.

THE FIRST ISSUE: INCORPORATION

41. It is clear that the Defendant sought to incorporate the three sets of terms on which it relies (viz. the Account Terms, the IWG Rules and the Game Procedures) by a series of hyperlinks and drop-down menus. The Game Procedures were visible by clicking on the drop-down menu on the Game Display Screen, and these in turn allowed further access to the IWG Rules by hyperlink.

42. I agree with Mr Hinks that there are two questions. Putting these in my language, the first is whether as a matter of general principle the terms at issue *could* be incorporated in this way. The second is whether there were or are any onerous or unusual clauses which required specific signposting. For clarity, I should say that the second question itself sub-divides into two. The first sub-question is whether there were any onerous or unusual clauses. The second sub-question is whether, if so, these were adequately brought to the attention of the Claimant.

43. In relation to this first main question, the general principles have been set out in *Chitty on Contracts*, 34th edition, para 15-010:

> "It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that they should have been made subjectively aware of their import or effect. The rules which have been laid down by the courts regarding notice in such circumstances are three in number:
>
> (1) If the person receiving the document did not know that there was writing or printing on it, they are not bound (although the likelihood that a person will not know of the existence of writing or printing is now probably very low);
>
> (2) If they knew that the writing or printing contained or referred to conditions, they are bound;
>
> (3) If the party tendering the document did what was reasonably sufficient to given the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them."

44. In the age of the internet, we all have experience of search engines or internet providers seeking to impose on the consumer the terms and conditions they have chosen. Whether these are read I would rather not have to say. There are at least two techniques. One company (to my knowledge) requires the consumer to scroll through the Terms and Conditions before clicking the relevant "accept" box; others adopt the same mechanism as this defendant, although there is considerable variation as to the steps a supplier may take to give appropriate prominence to all or any of these terms. We all have experience of being asked, or required, to "ACCEPT ALL COOKIES" without having a clear idea of what is happening. In the present case, it should be added that unless the Claimant did click the relevant box she would not have been able to play at all.

45. It is unnecessary to attempt to set out principles of universal application. I may confine myself to what happened in the present case. I agree with what Jacobs J said in *Ebury Partners Belgium SA v Technical Touch BV* [2022] EWHC 2927 (Comm), at para 8, that the application of general contractual principles (see §43 above) leads to the conclusion that terms are indeed incorporated by this technique. The hyperlinks and drop-down menus were sufficient to incorporate these terms, subject always to my second question.

46. The facts of the present case are stronger than those of *Ebury* to this extent. Mr Couser sought to make much of the fact that the Claimant ticked the relevant box six years previously. Given that the relevant terms were updated from time to time, I do not think that this was a good point; but, in any event, it would have been the easiest thing in the world, and indeed rather necessary if the Claimant did not know how to play this game, to click the drop-down menu revealing the Game Procedures. That document in turn contained hyperlinks to the other documents I have set out.

47. Another difficulty is that the Claimant has not filed a witness statement. Maybe those advising her were wary of generating triable issues. I am prepared to infer that the Claimant did know how to play this game without reading the Game Procedures, but why should I assume that she read none of the contractual documentation relied on by the Defendant? Mr Couser's submission that "no one reads these documents" puts the matter too high: some people do. The Claimant would of course be bound by any document she did in fact read.

48. Finally, the logic of Mr Couser's submission, and he did accept this at one stage of his oral argument, is that none of the documents relied on by the Defendant was incorporated. On that basis, the only way the Defendant could have incorporated them was by setting them out fully on webpage after webpage without creating a hyperlink. I simply cannot accept that argument.

49. For all these reasons, it follows that there can only be one answer to my first question as posed under §42 above.

50. Before I address the second question, I should touch on Mr Hinks' rather different argument that the relevant contractual term, as Mr Couser characterised it, was not a contractual term at all. He submitted that the objective reader would not understand it to have contractual effect, and that the print was in any case too small to be legible. I cannot accept that submission, but in truth the issue is somewhat academic. Other things being equal, this term has contractual effect because it appears on the Games Details Screen, falling as the latter does under item (e) of clause 13.3 of the IWG Rules. Judicial myopia or not, I *am* able to read the term as printed out in the bundle of documents, and someone playing this game on a small device could easily enlarge the screen if that were required (I am not overlooking the evidence that playing this game on an iPhone would generate different images). The better point is that the relevant contractual term gave no more than a very simple, abbreviated explanation of what the game was about. For an aficionado, that would be enough of an explanation for her to play the game, but even (or perhaps especially) such a person would know that there must be other relevant provisions. In my judgment, no reasonable consumer could believe that the relevant contractual term was the sole definer of the relationship between the parties. Its contractual status therefore means very little. It is unsurprising, in my view, that any contractual stipulation on the Games Details Screen comes low down the hierarchy set forth in clause 13.3.

51. The second question is whether the general rules of incorporation should be displaced in the light of some special or unusual feature.

52. In this connection I refer to four authorities.

53. First, in a celebrated passage in *J. Spurling Ltd v Bradshaw* [1956] 1 WLR 461, Denning LJ, as he then was, said this (at page 466):

> "This brings me to the question whether this clause was part of the contract. Mr Sofer urged us to hold that the warehousemen did not do what was reasonably sufficient to give notice of the conditions within *Parker v South Eastern Railway Co.* I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen

> need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."

54. Secondly, in *Bates v Post Office Ltd* [2019] EWHC 606 (QB), Fraser J analysed relevant authority and concluded that the test should be couched as follows (at para 980):

> "This judgment is unlikely to be improved by a linguistic analysis of whether there is a difference between harsh, onerous, unusual and/or extraordinary (or outlandish). I prefer onerous and unusual, because that is the phrase in the majority of cases, but the test may amount to the same whether one uses the phrase extortionate, extraordinarily harsh, or any permutation of those words …"

55. With some diffidence, I would modify the test modestly in the Claimant's favour. In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433, my third authority, Dillon LJ's formulation was "particularly onerous or unusual" (see 439A). Bingham LJ, as he then was, preferred to adopt a more flexible test – "the more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given" (at 443C/D). It seems to me that there must be an inherent element of flexibility to reflect the circumstances of the particular case, but (and subject to that) the test should be "onerous *or* unusual".

56. Fourthly, the authority closest to the present facts is *O'Brien v MGN Ltd* [2001] EWCA Civ 1279; [2002] C.L.C. 33. A scratch card game was organised by newspapers in the Mirror Group and the Claimant thought (with good reason) that he had won £50,000. The Defendant invoked clause 5 of the rules of the game, which were printed in its newspapers on a number of occasions. This provision stated that if more prizes were claimed than were available in any prize category for any reason, a draw would take place for the prize.

57. The Claimant did not seek to rely on the UTCCR. Hale LJ, as she then was, giving the judgment for the majority (Sir Anthony Evans decided the case on a very narrow basis), said this:

> "21. In my view, although Rule 5 does turn an apparent winner into a loser, it cannot by any normal use of language be called 'onerous' or 'outlandish'. It does not impose any extra burden upon the claimant, unlike the clause in *Interfoto*. It does not seek to absolve the defendant from liability for personal injuries negligently caused, unlike the clause in *Thornton v Shoe Lane Parking*. It merely deprives the claimant of a windfall for which he has done very little in return. He bought two newspapers, although in fact he could have acquired a card and discovered the hotline number without doing either. He made a call to a premium rate number, which will have cost him some money and gained the newspaper some, but only a matter of pennies, not pounds.

> 22. The more difficult question is whether the rule is 'unusual' in this context. The judge found that the claimant knew that there was a limit on the number of prizes and that there were relevant rules. Miss Platell's evidence was that these games and competitions always have rules. Indeed I would accept that this is common knowledge. This is not a situation in which players of the game would assume that the newspaper bore the risk of any mistake of any kind which might lead to more people making a claim than had been intended. Some people might assume that the 'get out' rule would provide for the prize to be shared amongst the claimants. Some might assume that it would provide for the drawing of lots. In the case of a single prize some might think drawing lots more appropriate; but it seems to me impossible to say that either solution would be 'unusual'. There is simply no evidence to that effect. Such evidence as there is was to the effect that such rules are not unusual.
>
> 23. In any event, the words 'onerous or unusual' are not terms of art. They are simply one way of putting the general proposition that reasonable steps must be taken to draw the particular term in question to the notice of those who are to be bound by it and that more is required in relation to certain terms than to others depending on their effect. In the particular context of this particular game, I consider that the defendants did just enough to bring the Rules to the claimant's attention. There was a clear reference to rules on the face of the card he used. There was a clear reference to rules in the paper containing the offer of a telephone prize. There was evidence that those rules could be discovered either from the newspaper offices or from back issues of the paper. The claimant had been able to discover them when the problem arose."

58. It might well be said that clause 5 is more unusual, and more tilted in the supplier's favour, than almost anything to be found in the Defendant's contractual documentation. How this case would have fared under the UTCCR raises an interesting issue.

59. Applying these principles, and putting aside two related issues for the time being, I have reached the conclusion that there was nothing either onerous or unusual about the various contractual provisions on which the Defendant seeks to rely. My reasons for that conclusion are as follows.

60. First, the provisions which explain how the game is to be played and be won (i.e. the Game Procedures) are entirely to be expected, indeed required. These procedures explained what would happen if the game were played with animations enabled. The player was informed that all the numbers had to be clicked before the game could be completed. The player was also informed that, if there were a match, the "two matching numbers will turn white and flash in a green circle indicating that you have won the Prize". Further, the player was also told that the game would only be completed when all the numbers have been revealed: at that point, a message would appear indicating the winning amount, and the FINISH button would have to be pressed to complete the game. The player was informed that she could only win one Prize and that, in the event

of conflict between the Game Procedures and any other contractual document, the former would prevail, unless the Defendant stated otherwise.

61. In my judgment, it cannot be said that these rules were either onerous or unusual. They were no more and no less than the rules for this particular game. Whether the Claimant was content to proceed on the basis of these rules was really a matter for her, but in my judgment there was nothing about them which could reasonably have caused her to hesitate. A stipulation to the effect that a player can win only one Prize per play is entirely reasonable and commonplace, particularly when it is understood that the odds are calculated on that basis and that the expected payout percentage for the game is 74%. To require that a player must finish the game, and that the outcome is as it appears on the screen immediately after the relevant button is pressed, is neither onerous nor unusual.

62. I have already made the point that no reasonable player would or could imagine that the relevant contractual term represents the four corners of the parties' relationship. This assumes, perhaps unrealistically, that the eye of that hypothetical individual had *not* alighted upon the highlighted "Game Procedures including how to play" wording and had not opened the drop-down menu. Had that person done so, she or he would immediately have understood that the relevant contractual term was part of an overall package. Even if the drop-down menu were not opened, the reasonable player would have understood that it contained relevant information.

63. Secondly, and turning now to the IWG Rules, I analyse these as follows.

64. Clause 3.1 provides that the outcome is predetermined at the point the player buys a Play and that this is not a game of skill or judgment. I can completely understand that without Mr Smith's explanation the use of the epithet "predetermined" is puzzling. The IWG Rules contain no information about the random number generator and any algorithms which govern this type of game so as to ensure that, taking a balance-sheet approach, the National Lottery wins more than it pays out. However, clause 3.1 has to be read in conjunction with the definition of "Winning Play" and the terms of clause 6. Here, the relevant provisions are 6.2(d) and 6.3(e). When understood against Mr Smith's evidence, it is clear from one or both of these provisions that there may be a difference between what appears on the Game Display Window and the result as predetermined by the Defendant's computer system. The IWG Rules also make it clear that the outcome is computer generated, and is as appears on the Defendant's official list of winning plays and nowhere else. Further, the player will understand that it does not matter in what sequence the numbers are clicked, and that this is what is meant by "predetermined".

65. In any case, there can be no requirement to explain to the player the internal workings of the Defendant's computer system. What matters here is that the result is not "rigged" and that the payouts over time do indeed correspond to the promised 74%. The Claimant has not advanced a positive case to the contrary.

66. In my judgment, there is nothing onerous or unusual about provisions of this sort. Clause 6 sets out the Defendant's validation procedure, and its existence could come as no surprise to anyone. All games of this type have to be validated by the supplier in order to double-check that the player has indeed secured a Winning Play, that there has been no fraud, and so forth. For wins under £500 it seems that the Defendant's computer

does the validating, but for higher amounts the Defendant needs to carry out further checks to protect itself. These provisions are unremarkable.

67. Furthermore, there can be nothing onerous or unusual about a game in which the definition of "Winning Play" is connected to what appears on the Defendant's official list and is "as predetermined by [the Defendant's] computer system". Clause 6.2(d) is unremarkable. However, clause 6.3(e) is not quite so straightforward. A Play may be declared invalid if there were an inconsistency between the outcome as displayed on the screen and the result as predetermined by the computer system. Strictly speaking, this clause could be invoked by the Defendant in a case where all the correct lights were flashing and the message proclaimed that the player had won £1 million, even after the finish button had been pressed. That would, of course, presuppose a major computer error. Under the Game Procedures, a £1 million win would indeed have been the outcome even if it were not on the official list, and those take priority over the IWG Rules. Even if the Defendant were to surmount this first difficulty, would it be able to declare the Play invalid on this counterfactual? Clause 6.3(e) has the "feel" of being unusual if not onerous in these hypothetical circumstances.

68. Happily, I do not think that it is necessary for me to answer hypothetical questions, however interesting and complex, particularly ones which raise multi-layered issues. Nor should I be answering questions which the Claimant did not raise. On the facts of the present case, the final Game Play Window informed the Claimant that she had won £10 and that was also the result under the IWG Rules. The outcome "as displayed" (see clause 6.3(e)) was not that the Claimant had won £1 million. There was no conflict. The Defendant does not need clause 6.3(e) in order to win this application.

69. Fourthly, my general comment about the IWG Rules is that they are clearly drafted, are set out in a logical order, and have reasonably prominent headings. They have obviously been drafted by a lawyer, and for me to say that I found them easy to follow may betray a lack of imagination on my part. However, I do think that they are clearly drafted.

70. Thus far, and reverting now to the two related issues I earlier put to one side (see §59 above), I have not addressed the Limitation of Liability Clause (clause 11), that part of the validation clause which holds that the Defendant's decision on validation is final and binding (clause 6.1), and the Dispute Clause (clause 12) which in any event governs clause 6.1.

71. In my view, it is unnecessary to say anything about the Limitation of Liability clause. The Defendant does not need to invoke it to win this application. Such clauses in contracts of this sort are not unusual, but whether this particular clause, or any sub-clauses, are onerous does not need to be examined.

72. As for the dispute resolution clause, a provision which enables one party to determine something in a final and binding way, subject to the relevant decision being reasonable, is not inherently objectionable: see *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 1 WLR 1661. In *Goodram and another v Camelot UK Lotteries Ltd* [2020] EWHC 2499 (QB) Senior Master Fountaine upheld clause 12.1 in these terms:

> "46. In my judgment, the fact that Clause 12.1 subjects Camelot's decision to a requirement of reasonableness, means that it could not be described as onerous. If Camelot's decision was

> unreasonable, in *Wednesbury* terms, then the Claimants could successfully challenge it, and would not be bound by it. Such clauses are not unusual and there is considerable jurisprudence in relation to how the reasonableness of any decision should be assessed. It does not abrogate any statutory rights. A consumer who disagreed with a decision taken by Camelot would still be able to pursue that dispute by the statutory ADR scheme, as well as by litigation, but would have to demonstrate that Camelot's decision was unreasonable to a *Wednesbury* standard. The evidence submitted on this application is that the Rules have been approved by the Gambling Commission, which would presumably not have done so if it considered that these were in any way inconsistent with the licensing objectives under the Gambling Act 2005. There could be no real prospect of success in challenging clause 12.1 on such ground, in my view."

73. Mr Couser submitted that the Senior Master came to the right conclusion overall but for the wrong reasons. My interpretation of his submission is that para 46 of *Goodram* is wrongly decided. Clearly, the Senior Master's decision is persuasive but I need to make up my own mind. In my judgment, there is nothing unusual about a clause such as this which states that the decision of an entity such as the Defendant is final and binding. That is and has been established practice for all sort of games and prizes available online and elsewhere. I may take judicial notice of that. Whether clause 12.1 is onerous is slightly less straightforward. Were it not for the proviso about decisions having to be reasonable, I would conclude that it was just that. However, as Senior Master Fontaine has very convincingly explained, there is nothing unfair or burdensome about a provision which gives more power to the supplier than it does to the consumer in these particular circumstances. The Defendant is required to act reasonably and in good faith, and as a last resort the Court can decide whether it has done so. I would therefore uphold clause 6.1 and clause 12.1 as being neither onerous nor unusual.

74. In any event, the Defendant does not need clause 12.1 to win this application. If the final sentence of clause 6.1 and the whole of clause 12 were notionally struck through, my conclusion is that its decision under the IWG Rules was right, not merely that it was reasonable. My reasons appear under the rubric of the third issue.

75. For all these reasons, I conclude that none of the provisions in the IWG which is essential for the Defendant's current purposes is either onerous or unusual. It follows that the second sub-question I have identified (see §42 above) does not strictly speaking arise.

76. Even so, I may add just this. No reasonable player could suppose that the Game Procedures defined the limits of the contractual documentation. These procedures tell a player nothing about how to make a claim (assuming that the winnings are not automatically credited to her account) and what would happen in the event of a dispute. So, the hypothetical individual I am referring to would understand that there must be other "small print" (as most consumers would describe it) which deals at the very least with these matters. That "small print" is to be found in the IWG Rules, which are – to be fair to the Defendant – clearly hyperlinked in the Game Procedures themselves. These observations are not designed, however, to provide a complete answer to my

second sub-question because the adequacy of the notice given by this technique would depend on how wrong I am about the clauses at issue not being either onerous or unusual.

77. Overall, I decide the incorporation issue in the Defendant's favour.

THE SECOND ISSUE: ENFORCEABILITY

78. The relevant provisions of the UTCCR are as follows:

> "**Unfair Terms**
>
> **5.**—(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
>
> (2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.
>
> (3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.
>
> (4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.
>
> (5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.
>
> **Assessment of unfair terms**
>
> **6.**—(1) Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
>
> (2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate–
>
> (a) to the definition of the main subject matter of the contract, or
>
> (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.

Written contracts

7.—(1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.

(2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12.

Effect of unfair term

8.—(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

SCHEDULE 2

INDICATIVE AND NON-EXHAUSTIVE LIST OF TERMS WHICH MAY BE REGARDED AS UNFAIR

1. Terms which have the object or effect of–

…

(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;

…

(f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

…

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

> …
>
> (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;"

79. The general principles governing the application of the UTCCR to any individual factual structure have been set out by the House of Lords in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52; [2002] 1 AC 481. At paragraph 17 of his Opinion, Lord Bingham of Cornhill said this:

> "A term falling within the scope of the regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the regulations seek to address. The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the 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 of the regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice. Regulation 4(1) lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the regulations are designed to promote."

80. Regulation 7 gives rise to no particular difficulty. On its natural and ordinary meaning, it does no more than crystallise the *contra proferentem* rule.

81. The parties drew my attention to three authorities where the UTCCR or similar provisions under the Consumer Rights Act 2015 have been considered.

82. In the *Spreadex* case, Mr David Donaldson QC held that a term that effectively bound the consumer to contracts which he had not authorised was unfair. At paragraph 19 of his judgment, the Deputy Judge said the following:

> "Importantly, the Regulations do not operate by precluding reliance on the contractual term in cases where it would be unfair to do so. Their prescription is absolute and binary: the term is either unfair, and hence unenforceable, or not. Its unfairness must therefore be judged by reference to all situations in which it might potentially be applicable."

This final sentence is particularly important.

83. In the *Green* case, Foster J found for the Claimant on every point: the term was poorly drafted and did not provide the exclusion from liability which the Defendant sought; the term was too onerous to be incorporated; the term was unfair. Mr Couser was fully entitled to draw this case to my attention but it does not help him particularly. To my mind, *Green* is an example of an egregious case of bad drafting and unfairness at all relevant stages. In addition, *Green* was a strong case on the facts: there could be no dispute that the Claimant had won; the issue was whether the Defendant could avoid having to pay.

84. Finally, I was taken by Mr Hinks to the decision of Ellenbogen J in *Longley v PPB Entertainment Limited and another ("Paddy Power")* [2022] EWHC 977 (QB). There, Ellenbogen J upheld a clause which permitted the bookmaker to correct any obvious errors. Mr Couser wondered whether this case was correctly decided on its facts. For reasons that have no consequence, I think that it was. The value of the case for present purposes inheres in Ellenbogen J's analysis of the related issues of significant imbalance and good faith:

> "102.8. Clause 16 has the potential to exclude the right of the consumer to hold the trader to a contract which had been entered into upon the basis of an error which would not, under the general law, render that contract void. Accordingly, there is an imbalance in the parties' rights, to the detriment of the consumer. The question is whether that imbalance is significant. In my judgment, it is not. On its proper construction, it applies only in limited, defined circumstances in which, objectively viewed, such an error has occurred. Mr Wandowicz's description of the clause as a safety-net, which does not affect the everyday operation of the contract, is apt. Lest I be wrong in that conclusion, I consider below whether any significant imbalance is contrary to the requirement of good faith.
>
> 102.10. Further, I accept Mr Wandowicz's submission that Paddy Power has a legitimate interest in correcting erroneous bets. Such detriment as the consumer experiences in those circumstances is the deprivation of a windfall arising from a bet

> made in error (recognising that the clause does not oblige Paddy Power to give credit for the winnings which the intended bet would have generated). The clause is not punitive. Mr James' submission that Paddy Power's ability to lay off the full extent of the bet whilst invoking Clause 16 itself renders the provision unfair is misplaced. The ability to lay off all or part of a bet outside the consumer contract (which may or may not be possible in any given circumstances) is a separate matter from any imbalance in the parties' rights and obligations under their own contract and does not operate to the detriment of the consumer under that contract, nor is it contrary to the requirement of good faith. All such matters inform my conclusion that (1) Paddy Power, dealing fairly and equitably with the reasonable consumer in Mr Longley's position, could reasonably assume that such a consumer would have agreed to Clause 16 in individual contract negotiations, and (2) that a reasonable consumer would have agreed to that term."

85. Taking the parties' submissions in what I think should be their logical order, I have reached the following conclusions.

86. First, I cannot accept Mr Couser's argument that regulation 7(2) of the UTCCR serves to elevate what he has called the relevant contractual term over the other contractual provisions on which the Defendant relies. That argument cuts across Mr Couser's primary case that these other contractual provisions were *not* incorporated. Be that as it may, regulation 7(2) cannot achieve the re-ordering of contractual provisions nor is it concerned with issues of contractual incorporation; it is concerned only with the interpretation of specific wording. No application of the *contra proferentem* principle can serve to re-write clause 13.3 of the IWG Rules, or to reorganise the contractual hierarchy, or (if this were Mr Couser's submission) to disapply certain provisions. In short, Mr Couser cannot recruit regulation 7(2) for the purpose of overriding or circumventing clause 13.3.

87. Secondly, I accept Mr Hinks' submission that the network of contractual provisions on which the Defendant relies were clearly drafted and well signposted through the various hyperlinks. In particular, the Game Procedures were very readily accessible, and these provided hyperlinks to other contractual provisions.

88. Thirdly, on Mr Couser's submission the contractual documentation read as a whole was so weighted in favour of the Defendant as to create a significant imbalance and be unfair. So, for Mr Couser this is all or nothing: these terms stand and fall together. In my judgment, the right approach is not to examine the entire contractual package on a compendious basis but rather each individual clause – in particular, the clauses on which the Defendant must rely to win this application – in order to determine whether the clause under scrutiny survives the application of the UTCCR. That was the approach adopted in the authorities I have examined, and it is also the one required by regulation 8 of the UTCCR and clause 13 of the IWG Rules. In short, if one term were void or unenforceable for any reason, the remaining unobjectionable clauses survive. The appropriate analysis has to be carried out step-by-step.

89. I am prepared to accept that some of these clauses may have created an imbalance, but (putting clause 12 to one side for the time being) I cannot accept the argument that there was a *significant* imbalance. The Defendant was fully entitled to explain to players the basic philosophy of this game: namely, that it was a pure game of chance, and the outcome is determined as soon as the play button is pressed. Assuming that the animations are enabled, the outcome will also be "predetermined" inasmuch as whatever the player does thereafter cannot make a difference. Furthermore, I agree with Mr Hinks that it was not one-sided to set out a validation process which requires that the Defendant should only pay out on Winning Plays, thereby ensuring the integrity of the National Lottery and protecting the Defendant's odds and pricing structure. Clause 6.2(d), which in my judgment is the critical provision, ensures that unless the player's ticket number is on the Defendant's official list of Winning Plays, she has not won. As soon as one understands how Winning Plays are generated (i.e. randomly, and before the animations are selected), clause 6.2(d) cannot reasonably be considered as creating any unfairness.

90. Other parts of clause 6 seek to go further than clause 6.2(d). I have already set out possible concerns about clause 6.3(e). However, I repeat what I have said about that provision in the context of the second issue: further examination of clause 6, beyond clause 6.2(d), is not required.

91. Mr Couser's attack on clause 13.3 appeared to have two prongs. I have already addressed the Claimant's case on regulation 7(2) of the UTCCR. I also understood Mr Couser further to submit that clause 13.3 was significantly imbalanced and unfair on the ground that it failed to accord appropriate prominence to the relevant contractual term, being the only provision that the consumer would in practice ever read. In my judgment, that submission is without merit. The Defendant's choice of contractual hierarchy does not in my view create an issue under the UTCCR. In any event, it was entirely balanced and fair to place the Game Procedures above the one-line provision.

92. Fourthly, I do not consider that the Claimant's case is advanced by reliance on any of the indicative considerations set out in Schedule 2 to the UTCCR. The only provision which comes close to availing the Claimant is paragraph 1(i). However, in my judgment it cannot be said that the Claimant was irrevocably bound to anything, still less to terms with which she had no real opportunity of being acquainted. There was every opportunity to click the drop-down menu and scroll down the Game Procedures, if the Claimant so wished.

93. Finally, a specific issue must be addressed of whether clause 12.1 can survive the application of the UTCCR. That was not in issue in the *Braganza* case itself, or indeed in *Goodram*.

94. I consider that clause 12.1 did create a significant imbalance between the parties. Although the jurisdiction of this Court is retained (and Mr Hinks did not submit that clause 12.2 was an ouster of jurisdiction), it cannot be denied that the table is firmly tilted in the Defendant's favour, the *Wednesbury* test being a high burden for a player to discharge. Consideration must therefore be given to whether the Defendant has acted "in a manner or to an extent which is contrary to the requirement of good faith" in relation to this clause.

95. In my judgment, there was no want of fair and transparent dealing by the Defendant. Clause 12 was expressed fully, clearly and legibly, and there were no pitfalls and traps. As I have already said, the Defendant was fully entitled to have a validation process which it could control. Some of the matters under clause 6.2 raise issues of factual assessment and judgment, and I consider that it was fair and reasonable for the Defendant to accord to itself a considerable degree of leeway, if for no other reason than to avoid potentially expensive and time-consuming disputes. When it comes to the facts of the present case, or any other case with similar facts, one would have thought that the decision as to whether the player had either won or lost was both straightforward and binary, and the introduction of a *Wednesbury* filter makes little or no practical difference. What appears on the official list is the crucial question. In the event of computer errors, mistakes and glitches, how these arose can be explained by adducing relevant evidence from someone within the Defendant's IT department.

96. I would therefore uphold the final sentence of clause 6.1, and the whole of clause 12, on the basis that these provisions were not incorporated or applied by the Defendant in a manner or to an extent that was contrary to the requirement of good faith.

97. For all these reasons, I have concluded that all the clauses on which the Defendant needs to rely in order to win this application are enforceable.

THE THIRD ISSUE: CONSTRUCTION OF THE CONTRACT

98. In my judgment, this process must begin by analysing the terms of the Game Procedures. These take priority over the IWG Rules and what the Claimant is calling the relevant contractual term, and for that reason must be the starting point.

99. The entire gravamen of Mr Couser's case is that the relevant contractual term has first priority. As soon as that case is demonstrated to be wrong, certain clear and obvious consequences flow.

100. The Game Procedures must be read of a piece. These include the instructions at the bottom of the Game Play Window – what the Claimant is calling the relevant contractual term – but the document does not stop there. The Game Procedures make it clear that a win is shown by flashing white matching numbers and a message stating what the win amount is, and that the player must then select FINISH to complete the game. They also make it clear that a player can only win once per play.

101. The screenshot taken by the Claimant does not represent the end-point or outcome of the game. When she pressed the FINISH button, it was confirmed that she had won £10. The Claimant's letter dated 8th October 2015 accepts as much.

102. In my judgment, interpreting the Games Procedures using ordinary contractual principles (see, for example, the judgment of Lord Hodge DPSC in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1197) sensed-checked against a modicum of flexibility and common sense, leads to the conclusion the Claimant did not win a second prize, namely £1 million.

103. Both parties accept, and I agree, that this is not the end of the matter. The IWG Rules take second place but they are not redundant. The Claimant made a claim for a £1 million prize under clause 4 of the IWG Rules and not under any provision in the Game

Procedures (there is none). The Defendant was therefore required to determine whether she was entitled to that prize. On my reading of the IWG Rules, in particular clause 6, the Defendant was required to do this not by applying the Game Procedures. This may well be because the Defendant's computer system does not retain a record of the Game Display Screen after the finish button is pressed. In my judgment, the first issue to be decided under the IWG Rules, and it is also almost always the last issue, is whether the player has achieved a Winning Play.

104. In the circumstances of this particular case, the Claimant in no way loses out by the bringing into consideration of the IWG Rules. Under the Game Procedures the outcome was a win of £10 and so she must look elsewhere.

105. The next step, therefore, is to examine the IWG Rules in order to ascertain whether the Claimant's win was limited to £10. The wording of clauses 3, 4 and 6 is clear enough, but without some further information, or some background knowledge of computer algorithms, the application of these clauses to these facts is not obvious. That further information has been provided by Mr Smith.

106. The random number generated by the computer and associated with the Claimant's play number, 212553481, had a numerical value which corresponded with a win of £10. For that reason, it was this result that was recorded on the Defendant's official list of Winning Plays (clause 6.2(d)).

107. It follows that applying clause 6.2(d) to the facts of this case achieves a result which is entirely in line with the Game Procedures. Fortunately, therefore, the instant case remains well away from the interesting counterfactual I posited under §67 above.

108. Earlier, I refrained from reaching a final conclusion about clause 6.3(e) in the context of the incorporation and enforceability issues. If a blue pencil should be put through it, the Claimant cannot rely on it. In any event, the sub-clause does not avail her. There was no inconsistency here because the outcome as shown on the Game Display Screen was that the Claimant had won £10; but, if there were an inconsistency, the result under clause 6.3(e) is a deemed win of £10. What the Claimant cannot properly argue with reference to clause 6.3(e) or any other provision in the IWG Rules is that, if there were an inconsistency between the Game Procedures and these rules, she had won £1 million.

109. Mr Hinks may have confused matters slightly by pleading clause 6.3(e) in his Defence. If by so doing he were intending to suggest that the outcome on the Game Display Screen may have differed from the result under clause 6.2(d) of the IWG Rules, his analysis would, with respect, be incorrect. The "outcome … as displayed on the Game Play Window" can only be a reference to the prize amount the player is told she has won at the conclusion of the game. What the Claimant saw beforehand is of no relevance, although the screenshot did not in fact inform her that she had won £1 million.

110. On this analysis, the Defendant could come to only one reasonable decision under clause 6.1 and/or clause 12, namely that the Claimant had not won £1 million. Clause 6.2(d) permits of only one answer; there is no room for any contrary evaluation or judgment-call. It makes no difference whether the issue is (a) *Wednesbury*, or (b) for the Court to determine for itself.

111. It is an interesting contractual question whether the reason why the Claimant won £10 and not £1 million is because (a) the Game Procedures so provided, (b) that was her Winning Play for the purpose of the IWG Rules, or (c) a combination of the two. In a case where there is no conflict between (a) and (b), I consider that the answer to my question must be (c). Under this contractual scheme, both the Game Procedures and the IWG Rules apply, in the absence of computer errors working in harmony with each other. How this contractual scheme might operate in the event of inconsistent outcomes falls to be decided on another occasion. The computer error in this case was not sufficiently serious to require an answer to that question.

112. The essential problem with Mr Couser's argument is that it does indeed place the relevant contractual term "front and centre". On his analysis, it overrides everything else; or, putting the same point in a different way, everything else has no contractual effect. For all the reasons I have given, the relevant contractual term is very far from having that status. Applying ordinary contractual principles to this provision in the light of clause 13.3 of the IWG Rules and the provision in the Game Procedures which accords the first priority to these procedures, the relevant contractual term carries no independent weight. It is part and parcel of a series of provisions, all set out in the Game Procedures, which explain how this game is played.

113. The relevant contractual term *does* have potential independent weight as one of the explanations on the Game Details Screen (see clause 13.3(e) of the IWG Rules). However, it cannot be applied in a manner inconsistent with earlier contractual provisions. If, according to earlier provisions, the Claimant has won £10, no reliance upon the relevant contractual term may serve to bring about a contrary result.

114. On the basis of Mr Smith's evidence, even if the Java software were part of the Defendant's computer system, what appeared on the screen was not the result predetermined by its computer system. The result of the play is the result generated by the random number generator in the Defendant's computer system, and that process has occurred the instant in time before the animations are flashed onto the screen. The random number generator in the Defendant's computer software was, it seems, working properly, which explains the record of a win of £10 in the Defendant's list of Winning Plays.

115. There is no escaping what I have just said, at least for the purposes of this application. Mr Couser's submission that the Defendant may have *intended* an outcome of £10 but the actual outcome *was* £1,000,010 cannot be accepted. It entirely ignores: (a) what the Claimant saw after she pressed the finish button, (b) the Game Procedures, (c) the relevant parts of clause 6, and (d) the Defendant's evidence about how its computer system worked. The outcome of £10 was both the intended and the actual result.

CONCLUSION

116. This application under CPR Part 24 must be dismissed.

117. Mr Couser conceded that if this case went to trial the Claimant would not seek to adduce expert evidence of her own. The logic of that concession is that Mr Smith's evidence should be regarded as being true not merely for the purposes of CPR Part 24 but for all purposes.

118. If, having considered this judgment, the Claimant adheres to her decision not to obtain expert evidence to address Mr Smith's evidence, she must notify the Defendant as soon as possible and, in the absence of a notice of discontinuance, her claim will in due course be dismissed by the Master. Unless Mr Couser submits in writing to the contrary, she should have 28 days in which to make a final decision.