Judgment Approved by the court for handing down.

Neutral Citation Number: [2025] EWCA Civ 70

Case No: CA-2023-002020

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
Mrs Justice Joanna Smith
Claim No. HT-2022-000253

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/02/2025

Before :

LORD JUSTICE COULSON
LORD JUSTICE PHILLIPS
and
LORD JUSTICE ZACAROLI

- -

Between :

EE LIMITED	**Appellant/ Claimant**
- and -	
VIRGIN MOBILE TELECOMS LIMITED	**Respondent /Defendant**

- -
- -

Conall Patton KC (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Appellant**
Adam Zellick KC and Gillian Hughes (instructed by **Baker & McKenzie LLP**) for the **Respondent**

Hearing date: 18 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 4 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

Lord Justice Zacaroli:

1. The question in this appeal is whether the claim brought by EE Limited ("EE") against Virgin Mobile Telecoms Limited ("VM") is excluded as being one "in respect of … anticipated profits", on the proper interpretation of that phrase in clause 34.5(a) of the contract between them.

2. On VM's application to strike out the claim, or for reverse summary judgment, Mrs Justice Joanna Smith held that the claim fell within the exclusion clause. EE appeals with the permission of Coulson LJ granted on 5 December 2023. For the reasons set out below, I consider the judge's conclusion was correct.

Background

3. EE's claim arises out of a Telecommunications Supply Agreement dated 28 August 2013 (the "TSA").

4. I take the following summary of the background from paragraphs 2 to 19 of the judge's careful and considered judgment.

5. EE is one of four Mobile Network Operators ("MNOs") in the UK. It owns and operates its own physical radio access network. VM, being a Mobile Virtual Network Operator, did not have its own radio access network so had to contract with one or more of the MNOs to make use of their networks.

6. Pursuant to the TSA, EE was required to provide VM with various services, essentially comprising access to its mobile network, to enable VM's customers to be provided with 2G, 3G and 4G mobile services.

7. Pursuant to clause 10 of the TSA, VM agreed that, for the duration of the "Exclusive Period" (which initially ran until 31 March 2018, but was later amended to run until 31 December 2021 or, in the event of an extension of the term of the TSA, until 31 December 2026), it would use EE's radio access network exclusively for the provision of such services to its customers. In consideration for the services provided by EE, VM agreed to pay the charges set out in schedule 3 to the TSA. These depended on the level of usage of the EE network by VM's customers. The TSA contained a Minimum Revenue Commitment (which VM had exceeded at all material times).

8. In its original form, the TSA did not make provision for 5G services. An amendment dated 9 December 2016 provided for potential agreement between EE and VM in relation to the provision of 5G services using EE's network. In the absence of agreement, VM would be entitled to provide 5G services to its customers from a network owned by another MNO. Clause 5B.2 provides that, where a customer of VM is provided with 5G services sourced from an alternative MNO, then "VM shall also be entitled to provide such customers of VM with 2G, 3G and 4G/LTE services sourced from such alternative supplier". At the same time, the exclusivity provision was varied, so that it became subject to the exception in clause 5B.2.

9. EE launched its 5G service in May 2019. In the absence of agreement with EE, VM subsequently entered into an agreement with Vodafone for the supply of 5G services

and, from around January 2021, began migrating customers from the EE network to the Vodafone network.

10. VM was entitled to do this, provided it acted in accordance with clause 5B.2. EE contends, however, that VM has acted in breach of the exclusivity obligation in clause 10, by migrating customers to Vodafone outside the parameters of clause 5B.2 and/or adding new non-5G customers to the Vodafone network, even though those customers were only provided with 2G-4G mobile services.

11. EE's claim for loss and damage, according to its particulars of claim, is represented by: "the revenue [EE] would have received from [VM] under the terms of the TSA for the 2G-4G services that each of [VM's] customers would have consumed had they remained or been added to the EE network rather than migrated or added to the Vodafone network or O2 or VOLT network". It estimates its loss in this respect at around £24,635,684.

12. VM denies that it acted in breach of the exclusivity obligation, but in any event contends that the loss and damage claimed is in truth a claim in respect of "anticipated profits", and as such falls within the exclusion contained in clause 34.5(a) of the TSA. The construction of this clause lies at the heart of the appeal, and it is helpful to set it out in the context of the rest of clause 34, which is headed "Limitations of Liability":

> "34.1 Except as set out in Clauses 34.2 or 34.6, the Parties agree and acknowledge that neither Party shall be liable to the other under this Agreement (including any liability of a Party arising out of any indemnification of the other Party specifically provided for under this Agreement) to the extent that the aggregate liability of that Party (for all claims made under this Agreement), in any Annual Period would exceed the lesser of:
>
> > (a) fifteen per cent (15%) of the total Customer Network Spend paid or payable by VM in the twelve month period preceding the event giving rise to liability (and in the first year of the Term, fifteen per cent (15%) of the total charges (excluding interconnect charges) paid under the Telecommunications Supply Agreement in the twelve (12) month period prior to the Effective Date); or
> >
> > (b) ten million pounds (£10 million).
>
> 34.2 In addition to any other exceptions or exclusions set out in this Clause 34, the Parties agree that the limitation of liability set out in Clause 34.1 shall not apply to:
>
> > (a) VM's liability to pay any Charges and any other sums payable under Clauses 17 and 39;
> >
> > (b) EE's liability to pay any revenue that EE is obliged to pass through to VM under this Agreement or other amounts which have been agreed to be payable by EE

> to VM from time to time pursuant to the Agreement Change Control Process and documented in accordance with that process; or
>
> (c) any liability for damage or loss arising from reckless or wilful misconduct or gross negligence of either Party, its employees, agents or permitted sub-contractors (or any other person for which it is responsible for performance or conduct).

34.3 For the purposes of Clause 34.2(c); and in the case of acts or omissions of EE, "wilful misconduct" will include any intentional act by EE resulting in any discontinuance, withdrawal or refusal to supply any Service to VM contrary to EE's obligations under this Agreement, subject to the following additional requirements:

> (a) VM promptly notifies EE in writing of the Service which it believes has been discontinued, withdrawn or not supplied, its reasons for its belief, its objection to the discontinuance, withdrawal or refusal to supply that Service and of VM's intention to pursue remedies pursuant to this Clause 34.3;
>
> (b) the discontinuance, withdrawal or refusal to supply relates to a Service that is used by VM to deliver services to Customers that result in Customer revenues in excess of seven and one half per cent (7.5%) of VM's total Customer Revenues…for the twelve (12) month period preceding the discontinuance, withdrawal or refusal to supply the Service in question…;
>
> (c) VM applies at the first practicable time for interim or other urgent equitable relief in response to the discontinuance, withdrawal or refusal to supply the Service in question, and provides notice of such application to EE without undue delay; and in any action claiming damages continues to claim equitable relief and the re-instatement of the affected Service as its primary remedy, with damages claimed only to the extent that equitable relief is not granted or only in respect of losses suffered by VM in the period from the initial discontinuance, withdrawal or refusal to supply the Service in question until re-instatement of the affected Service pursuant to the equitable relief actually obtained.

34.4 Neither Party shall be liable to the other for any loss which is not directly foreseeable or which does not arise directly from the performance of this Agreement and thus neither Party shall

> be liable for any indirect or consequential or special or incidental loss whatsoever.
>
> 34.5 Except for any damages claims by VM pursuant to Clause 34.2(c), to which Clause 34.3 applies (which EE acknowledges may include claims of damages for loss of profits), and for no other damage claims whatsoever, neither Party shall have liability to the other in respect of:
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> (a) anticipated profits; or
>
> (b) anticipated savings.
>
> 34.6 Neither Party excludes or limits liability:
>
> (a) to the extent that such liability arises from death or personal injury of any person…; or
>
> (b) for a fraudulent misrepresentation by a Party or its employees; or
>
> (c) for direct physical damage to or physical loss of the property of the other…
>
> 34.7 Except as expressly stipulated in this Agreement, any representations, warranties, terms and conditions (whether implied by law, custom or otherwise) are hereby expressly excluded to the extent permitted by law and the provisions of this Clause 34 specify the entire liability of either Party under or in connection with this Agreement whether arising in contract, tort (including negligence) or otherwise."

The judge's judgment

13. The judge first recited the test to be applied on a strike out/summary judgment application and the approach to be taken to construction, in particular the construction of exclusion clauses. No issue is taken with any of this on appeal, and I need do no more than quote or summarise the judge's judgment on these points.

14. At §20 to §22, the judge recited the well-known passage dealing with the approach to strike out or summary judgment applications from Lewison J's judgment in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at §15.

15. At §26, she set out the proper approach to the construction of contracts generally, citing, among others, Sir Geoffrey Vos C in *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821, at §18:

> "The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being

construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see *Arnold v Britton* [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 20;

iii) In arriving at the true meaning and effect of a contract or order, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract or consent order and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 17;

iv) Where the parties have used unambiguous language, the court must apply it – see *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] 1 All ER (Comm) 1, [2012] 1 Lloyd's Rep 34 per Lord Clarke JSC at paragraph 23;

v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 18;

vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see *Rainy Sky SA v. Kookmin Bank* (ibid.) per Lord Clarke JSC at paragraph 2 – but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 19;

vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see *Wood v Capita Insurance Services Ltd* [2017]

> UKSC 24, [2018] 1 All ER (Comm) 51, [2017] AC 1173 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent– see *Wood v Capita Insurance Services Ltd* (ibid.) per Lord Hodge JSC at paragraph 13; and
>
> viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 20 and *Wood v. Capita Insurance Services Limited* (ibid.) per Lord Hodge JSC at paragraph 11".

16. At §27, the judge summarised the approach to be taken specifically in relation to the interpretation of exclusion clauses, as follows:

> "27. As for the approach to be taken to the interpretation of exclusion clauses:
>
> a. The exercise of construing an exclusion clause must be undertaken in accordance with the ordinary methods of contractual interpretation. Commercial parties are free to make their own bargains and to allocate risks as they think fit; exclusion and limitation clauses are an integral part of pricing and risk allocation. The principle of freedom of contract requires the court to respect and give effect to the parties' agreement (see *Interactive E-Solutions JLT v O3b Africa Ltd* [2018] EWCA Civ 62 at [14] per Lewison LJ and *Triple Point Technology Inc v PTT Public Co Ltd* [2021] AC 1148 at [108] per Lord Leggatt with whom Lord Burrows agreed).
>
> b. However, a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law. In construing an exclusion clause, the court will start from the assumption that in the absence of clear words the parties did not intend to derogate from those normal rights and obligations. (*Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) Ltd* [1974] AC 689 per Viscount Diplock at page 717H; *Triple Point* at [108]-[110]; *Soteria v IBM* at [34] and *Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] 1 WLR 575 per Lord Hamblen at [48]).
>
> c. The more valuable the right, the clearer the language of the exclusion clause will need to be if it is to be given effect (*Stocznia Gdynia v Gearbulk Holdings* [2009] EWCA Civ 75, per Moore-Bick LJ at [23]; *Triple Point* at [110] and *Soteria v IBM* at [35], [37] and [60]).

d. Unclear words will not suffice; if linguistic, contextual and purposive analysis do not disclose an answer to the question with sufficient clarity, any ambiguity or lack of clarity must be resolved against the party seeking to exclude liability (*Dairy Containers Ltd v Tasman Orient Line CV (The Tasman Discoverer)* [2004] UKPC 22 at [12], per Lord Bingham of Cornhill and *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128 at [16]-[19] and [21] per Briggs LJ).

e. However, "[i]n commercial contracts negotiated between business-men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne…it is…wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only…" (*Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 per Lord Diplock at page 851 and *Fujitsu* at [49]).

f. Notwithstanding (a)-(e) above, an exemption clause will not normally be interpreted as extending to a situation which would defeat the main object of the contract or create a commercial absurdity, notwithstanding the literal meaning of the words used. This is a context in which it is open to the court to strain to avoid a particular construction, rather than one which requires ambiguity on a fair reading before the principle comes into play, because it is inherently unlikely that the parties intended that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force such that the contract becomes 'a mere declaration of intent' (*Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38, per Tomlinson LJ at [19] citing from the speech of Lord Wilberforce in Suisse Atlantique *Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at pages 431-432; *CNM Estates (Tolworth Tower) Ltd v VeCREF I Sarl* [2020] 2 CLC 243, per Foxton J at [33]).

g. However, even in this context, where language is fairly susceptible of one meaning only, that meaning must be attributed to it unless "the meaning is repugnant to the contract" (see *Kudos* at [20]). It is a principle which "should be seen as one of last resort and there is authority that it applies only in cases where the effect of the clause is to relieve one party from all liability for breach of any of the obligations which he has purported to undertake: see *Great North Eastern Rly Ltd v Avon Insurance plc* [2001] EWCA Civ 780, [2001] 2 ALL ER (Comm) 526…Only in such a case could it be said that the contract amounted to nothing more than a mere declaration of intent" (*Transocean Drilling UK Ltd v Providence Resources plc (The GSF Arctic III)* [2016] EWCA Civ 372, per Moore-Bick LJ at [27]).

17. The judge then dealt with the two principal issues presented to her. First, whether the court should "grasp the nettle" and determine the true construction of clause 34.5(a) at this stage, or should delay doing so until trial. Second, whether on the true construction of clause 34.5(a), it excluded EE's claim.

18. On the first question, the judge concluded that: (1) the true nature of EE's claim was either a question of law or a mixed question of fact and law, in circumstances where all the necessary facts were before the court; (2) it was fanciful to suggest that EE's claim was anything other than a claim for loss of profit; (3) the question of the true construction of clause 34.5(a) is a short point of construction, largely dependent on an analysis of the terms of the TSA; (4) the court had before it all the evidence necessary for the proper determination of that question of construction; (5) there was no obvious conflict of fact on any issue and no reason to believe that a fuller investigation into the facts of the case would materially add to, or alter, the evidence available to the trial judge; and (6) there was no other reason why the court should decline to decide the point.

19. On the second question, the judge concluded that on the true construction of clause 34.5(a), any liability of VM for damages for the unlawful diversion of its customers to alternative networks fell within the exclusion. The phrase "anticipated profits" was susceptible of one meaning only; it sought to exclude damages claims for loss of profits of any kind which it was foreseeable would be made by either party.

20. For this purpose, there was no difference between "anticipated profits" and "lost profits". That was reinforced by the fact that clause 34.5 used the phrases interchangeably, in carving out claims by VM brought under clause 34.2(c), "which EE acknowledges may include claims for loss of profits".

21. The judge found that her conclusion as to the natural meaning of the words was supported by the surrounding circumstances, including the fact that: the TSA is a bespoke, lengthy and detailed contract; detailed consideration had gone into the risks and rewards of each party; clause 34 itself was a detailed regime including a liability cap and various exclusions of liability, clearly intended to form part of the risk allocation exercise between the parties; and the clause applied equally to both parties, save for the specific carve-out in relation to the specific claims by VM identified in clause 34.2(c) and 34.3.

22. While the judge had regard to the point that clear words are needed to rebut the starting presumption that parties do not intend to abandon remedies arising by operation of law, the language of clause 34.5 is clear and unequivocal.

23. EE relied on certain previous cases in which an exclusion of claims for loss of profits had been construed as not extending to claims for diminution in price, or as limited to claims for loss of profits outside of the contract. I deal with these cases in more detail below. The judge found them to be of no assistance, as they showed no more than that those words may be differently construed depending on their contractual context.

24. Before the judge it was contended by EE that, on VM's construction, the exclusivity clause would be deprived of all contractual force and would be reduced to a mere statement of intent. Reliance was placed on *Kudos Catering (UK) Ltd v Manchester Central Convention Complex* [2013] EWCA Civ 38; [2013] Lloyd's Rep 270. In that

case, the claimant was appointed exclusive provider of catering services at the defendant's venue for a period of five years. The claimant contended that the defendant had repudiated the agreement and claimed damages for the lost profits that it would have earned during the remaining 20 months of the five-year term. The defendant contended that this claim was barred by a clause which excluded liability of the defendant to the claimant (but not the other way round):

> "…in contract, tort (including negligence) or otherwise for any loss of goodwill, business, revenue or profits, anticipated savings or wasted expenditure (whether reasonably foreseeable or not) or indirect or consequential loss suffered by the Contractor or any third party in relation to this Agreement…"

25. The Court of Appeal rejected that contention, holding that the defendant's construction of the clause would reduce the contract to a mere "declaration of intent". In order to avoid that uncommercial result, Tomlinson LJ (with whom Laws LJ and McCombe LJ agreed) construed the clause as relating "…to defective performance of the agreement, not to a refusal or to a disabling inability to perform it". Had the parties intended to provide an exclusion of all financial loss in favour of the company, but not the contractor, in the event of a refusal or inability of the company to perform, that would have been spelt out clearly.

26. The judge distinguished *Kudos,* first because the so-called "statement of intent rule" was of little assistance where the wording of the contract was plain (citing *Fujitsu Services v IBM United Kingdom* [2014] EWHC 752 (TCC) and *Transocean Drilling UK Ltd v Providence Resources plc (The GSF Arctic III)* [2016] EWCA Civ 372), second, because VM's construction would not exclude claims in wasted expenditure or for injunctive relief and, third, because EE remained contractually entitled to the payment of the Minimum Revenue Commitment.

Grounds of appeal

27. EE's first ground of appeal relates to the judge's conclusion that its claim is to be characterised as one for lost profits. It asserts that "the judge was wrong to hold that EE had not provided the Services, insofar as [VM] had migrated its customers to another network" and that the judge should have held, or proceeded on the assumption, that EE provided the services. Had she done so, then she should have held that the claim is one for the diminution in the price payable under the TSA, and not for lost profits.

28. The second ground of appeal is simply that the judge was wrong to construe clause 34.5 as barring the damages pleaded by EE.

Ground 1: the characterisation of EE's claim

29. Mr Zellick KC, who appeared with Ms Hughes for VM, characterised EE's claim in this case as "an expectation loss claim for loss of profits".

30. Mr Patton KC, who appeared for EE, accepted that EE's claim in this case is based on the expectation measure of loss, the classic formulation of which is to be found in *Robinson v Harman* (1848) 1 Exch 850; [1843-60] All ER Rep 383, per Parke B at p.855:

> "the rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

31. Had VM not, in breach of the exclusivity obligation, diverted customers to the networks of other MNOs, then EE would have received charges under the contract, measured by reference to the use those customers made of EE's services. Mr Patton disputed, however, that it is a claim for loss of profits. He contended that it is to be characterised as a claim for diminution in price, and that it is well established that such a claim is not to be regarded as a claim for lost profits.

32. That submission was primarily based on two earlier cases involving salvage.

33. The first is an unreported decision of Clarke J in *Alexander C Tsavliris & Sons Maritime Company v OSA Marine Limited*, 19th January 1996 ("*The Herdentor*"). In that case OSA, the owner of the tug 'Herdentor', provided it to Tsavliris to enable Tsavliris to perform a contract of salvage entered into with the owners of the *Atlas Pride* on the terms of a Lloyds Open Form Salvage Agreement 1990 ("LOF 1990"). Tsavliris claimed that OSA withdrew Herdentor before the salvage services had been completed. The essence of its claim was that, but for OSA's breach, (1) the total sum awarded under the LOF 1990 would have been greater and (2) Tsavliris' share of that award would have been greater, because Herdentor would have contributed more to the overall salvage operation, whereas in the event Tsavliris' sub-contractor, Pentow, had carried out a greater share of the work and thus received an increased share of the award.

34. OSA contended that the claim fell within an exclusion clause in its contract with Tsavliris, which read:

> "Save for the provisions of Clauses 11, 12, 13 and 16 neither the Tugowner nor the Hirer shall be liable to the other party for loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever."

35. Counsel for Tsavliris submitted that the true position was that "Tsavliris have received less money as payment for their services then they would have done. It has therefore in effect cost them more. It is as if they have suffered a diminution in price which they were to receive for the salvage services." Clarke J accepted that submission, noting that whether the reduction in the amount of the award involved less profit than would otherwise have been made depends on whether the services were in fact profitable: "It may be that they were, but it seems to me that it is somewhat artificial to treat Tsavliris' claim as a claim for loss of profit." He added that counsel for OSA had conceded that if Tsavliris had chartered another tug at a higher cost, a claim in respect of that higher cost would not be a claim for loss of profit. He considered that concession was rightly made because otherwise the effect of the exclusion clause would be that the hirer was entitled to no damages at all where the tugowner withdrew the tug in repudiatory breach of the agreement. Clarke J thought it most unlikely that the draftsman intended to permit that measure of loss but to exclude the loss which Tsavliris had in fact incurred.

36. Although he considered it was unnecessary to do so, Clarke J addressed – and accepted – a further submission by counsel for Tsavliris to the effect that, because the phrase

"loss of profits" was followed by the phrase "or other indirect or consequential damage", it followed that it was only *indirect* loss of profit that was excluded.

37. The second case relied on by Mr Patton is *Ease Faith Ltd v Leonis Marine Management Ltd* [2006] EWHC 232 (Comm); [2006] 1 Lloyds Rep 673 ("*Ease Faith*"). Ease Faith entered into a contract to sell the vessel *Kent Reliant* to Chinese purchasers for scrap. Ease Faith then contracted with a tugowner, Leonis, to have the *Kent Reliant* towed to Zhanjiagang. A dispute arose between Ease Faith and Leonis, resulting in the late delivery of the *Kent Reliant*. Ease Faith sued Leonis for damages, including (1) additional pilot and escort charges arising from the delay; (2) the reduction in the purchase price of the *Kent Reliant* and (3) loss of interest arising from the delay in receipt of the purchase price.

38. Leonis contended that the claim was excluded by clause 18.3 of the contract which was in the same terms as the relevant clause in *The Herdentor*. Andrew Smith J, at §143-144, however, held that the claim fell outside the exclusion clause, which he considered was "directed at protecting the tug owner from a claim for loss of productive use of the tow and the hirer from a claim of loss of productive use of the tug." He was encouraged in that view by the decision of Clarke J in *The Herdentor*. He also considered, separately, that because of the inclusion of the word "other" before the phrase "indirect or consequential loss", loss of profits was intended to mean only indirect loss of profits, although he noted (at §149) that he did not need to put his decision on that basis.

39. Neither of these cases establishes any principle of wider application than the construction of the particular contract in issue. The relevant clauses were materially different to the clause in issue here, and appeared in different contexts. The judge in each case reached his conclusion applying normal principles of construction. Neither judge purported to identify any established meaning of "loss of profits", or determine that an exclusion of "loss of profits" cannot cover a claim for "diminution in price". These are in any event not terms of art, but must take their meaning from the context in which they are used.

40. This serves to demonstrate that the debate underlying the first ground of appeal – whether EE's claim is for "loss of profits" or "diminution in price" – is an arid one. The only question is whether EE's claim is one "in respect of anticipated profits" within the meaning of clause 34.5(a).

41. I nevertheless deal briefly with the premise of the first ground, because I consider its criticism of the judge's reasoning is misplaced. EE contends that the judge, in distinguishing this case from the salvage cases, based herself on the flawed conclusion that EE had suffered the diversion of customers "to whom it would otherwise have been providing a service". That is wrong, says EE, because its services were provided to, and only to, VM. I reject that contention. I have little doubt, reading the judgment as a whole, that the judge understood well how the agreement worked, i.e. that in contractual terms EE provided its services to VM, but that in practical terms its services were made available for the benefit of VM's customers. As Mr Zellick pointed out, the detailed services set out in Schedule 2 to the TSA are there described in terms of enabling customers (of VM) to initiate or receive calls, texts and voicemails.

Ground 2: the true construction of clause 34.5(a)

42. The core issue between the parties is whether a claim in respect of anticipated profits means, on the true construction of clause 34.5(a), a claim for loss of profit other than expectation loss. Put another way, whether it is something other than the loss that consists in the value to EE of the contractual performance which would have been provided by VM but for the breach of contract.

43. Mr Zellick submitted that the judge was right for the reasons she gave. EE's claim for expectation loss is a claim in respect of the additional profit which EE anticipated making from the contract, measured as the additional charges that VM would have paid but for its breach of the exclusivity obligation, to the extent that such charges would have exceeded the cost to EE in providing the services in respect of the diverted customers. (EE contends, in fact, that it would not have incurred any additional cost in the event that its services had been used by the diverted customers. That, however, is not relevant to the analysis. If true, it would simply mean that EE's lost profit was the same as its lost revenue.)

44. EE disputes that. Its contentions can be distilled into three over-arching points.

45. First, on the judge's construction, exclusion of liability for loss of profits is capable of obliterating virtually every claim by the victim of a breach of contract to recover their expectation loss, and the courts have repeatedly held that not every claim for expectation losses falls within such a clause (citing *The Herdentor* and *Ease Faith*). That view is said to be supported by the decision of Cooke J in *Glencore Energy v Cirrus Oil* [2014] 1 All ER (Comm) 513, and by that of HHJ Keyser QC in *University of Wales v London College of Business* [2015] EWHC 1280 (QB).

46. Second, the wording of the clause, and of other aspects of the TSA, favours the narrower construction that "anticipated profits" means profits that were anticipated to be earned outside of the contract.

47. Third, the commercial consequences of the judge's construction – in particular that EE is left without a meaningful remedy for breach of the exclusivity obligation – should lead the court to give a narrower construction to the clause (citing *Kudos Catering (UK) v Manchester Central Convention Complex* [2013] 2 Lloyd's Rep 270).

48. Before turning to the arguments in detail, I make the following preliminary points.

49. First, as Andrew Smith J pointed out in *Ease Faith* (above), at §144, there are few, if any, losses suffered by a commercial concern that could not be described as amounting to or producing a reduction in the profits of the company generally or of the particular venture in which the company was engaged, but it does not necessarily follow that – where it can be shown that a reduction in profits is caused by the defendant's breach – that will fall within an exclusion of "loss of profits" in the particular contract between them.

50. The salvage cases, and other cases on which EE relies as discussed below, demonstrate that depending on the context, an exclusion of liability for loss of profits can be intended to refer to something other than the loss of profit inherent in the failure to perform the primary obligations under the contract.

51. Second, on the other hand, a claim for expectation loss is undoubtedly capable of being described as one for lost profits: see, for example, *Omak Maritime v Mamola Challenger Shipping* [2010] EWHC 2026 (Comm); [2011] 2 All ER (Comm) 155, at §34, citing the judgment of the High Court of Australia in *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, per Mason CJ and Dawson J at pp.80-82:

> "In the ordinary course of commercial dealings, a party supplying goods or rendering services will enter into a contract with a view to securing a profit, that is to say, that party will expect a certain margin of gain to be achieved in addition to the recouping of any expenses reasonably incurred by it in the discharge of its contractual obligations. It is for this reason that expectation damages are often described as damages for loss of profits. Damages recoverable as lost profits are constituted by the combination of expenses justifiably incurred by a plaintiff in the discharge of contractual obligations and any amount by which gross receipts would have exceeded those expenses. This second amount is the net profit."

52. Third, it is important in construing the TSA not to focus too narrowly on the particular breach that is alleged to have occurred in this case. Breach of the exclusivity obligation is just one way among many in which a breach of the TSA might have occurred. The exclusion of liability in respect of anticipated profits applies to all of them, and it must have the same meaning whichever breach gives rise to a claim in damages.

(1) The case law relied on by EE

53. I have already explained why little assistance is gained from the two salvage cases. The same applies to the other cases relied on by EE, none of which purports to lay down any legal principle.

54. *Glencore Energy* involved a claim under ss.50(2) and (3) of the Sale of Goods Act 1979 for damages for non-acceptance in relation to a contract for the sale of crude oil. The contract contained an exclusion of liability for, among other things, loss of anticipated profits.

55. It was contended by the buyer that, pursuant to the prima facie rule applicable to claims under ss.50(2) and (3), the seller's loss was to be ascertained as the difference between the contract price and the market price at the time when the goods ought to have been accepted, and that is properly construed as a claim for loss of profits (to be contrasted with a claim for out of pocket expenditure, or physical damage caused by a quality problem with the cargo).

56. Cooke J rejected that argument, at §98, on the basis that the "contract/market price differential is not a computation of lost profit", but was designed to compensate the seller for the loss of the bargain with the buyer. He commented that "no one who understands the way in which the 1979 Act works, would refer to this measure of loss as "lost profits" or "loss of anticipated profits"".

57. Outside the sale of goods context, however, as the passage cited above from *Omak Maritime* demonstrates, expectation loss *is* often referred to as damages for loss of profits.

58. Cooke J went on to contrast what he *did* regard as "lost profit", namely:

> "the difference between the total net cost to the seller of acquiring the goods and bringing them to market on the one hand and the net sale price that would have been achieved on the other."

59. In fact, that is not a description of lost profits, but of the way in which the seller's loss or profit overall from the transaction would be calculated. Such anticipated profit (or loss) in that wider sense would not be relevant in calculating damages against the buyer (save to the extent that the cost to the seller of acquiring the goods and bringing them to market might be recoverable as wasted expenditure, subject to a cap equal to the amount of the expectation loss, as explained in *Omak Maritime* (above) at §45). However much the seller paid in order to acquire the goods and bring them to market, the amount arrived at in respect of its overall *loss* of profit, i.e. the change to its profit arising from the buyer's breach, would always be the same as the difference between the contract price and the market price at the time of repudiation by the buyer, as shown by the following example:

(1) If S sourced the goods for £40, sold them to B for £100, and re-sold them in the market on B's breach for £80, its overall loss of profit is the difference between the anticipated profit (£60) and the actual profit (£40), i.e. £20. That, being the difference between contract/market price, is its expectation loss.

(2) If on the other hand, S sourced the goods for £90, sold them to B for £100, and re-sold them on B's breach for £80, its overall loss of profit is the difference between its anticipated profit (£10) and the loss that it made (-£10), i.e. £20, which is, again, its expectation loss, being the difference between the contract/market price.

60. The decision of Adrian Beltrami QC, sitting as a deputy High Court judge in *Galtrade Ltd v BP Oil International Ltd (The "Pioneer")* [2021] EWHC 1796 (Comm); [1022] 1 Lloyds Rep 129, does not take matters any further. It was another sale of goods case. The clause in question excluded liability "in respect of any indirect or consequential losses or expenses including if and to the extent that they might not otherwise constitute indirect or consequential losses or expenses, loss of anticipated profits, plant shut-down or reduced production, loss of power generation, blackouts or electrical shut-down or reduction, goodwill, use, market reputation, business receipts or contracts of commercial opportunities, whether or not foreseeable." The claimant's claim was for wasted expenditure. The defendant contended that this was nevertheless in substance a claim for "anticipated profits". The judge unsurprisingly rejected that argument. One reason for doing so was that he considered the clause was limited to what he called "conventional claims for loss of profit", noting that the analysis was consistent with the passages from Cooke J's decision in *Glencore* to which I have referred above.

61. The other case relied on by EE is *University of Wales v London College of Business* [2015] EWHC 1280 (QB), in which HHJ Keyser QC concluded that an exclusion clause of liability for "loss of any anticipated or future business, revenue, goodwill or profit"

applied only to losses of profit outside the agreement. That was mainly because the clause would otherwise have the "remarkable effect" of negating the primary commercial benefit for each party. The case involved the construction of a different clause, in a different contractual context, and laid down no principle of wider application.

62. Accordingly, I do not accept, on the basis of the cases cited by EE, that the courts have "repeatedly held" that not every claim for expectation loss would fall within such a clause, or that these cases established, let alone clearly established, that loss based on diminution of price is not a loss of profits.

63. For what it might be worth, VM pointed to authorities the other way, in particular the decision of Carr J (as she then was) in *Fujitsu* (above). In that case, IBM was obliged, by its contract with Fujitsu, to sub-contract to Fujitsu the performance of certain services IBM was obliged to perform under its main contract with the DVLA, and to pay Fujitsu for those services. Fujitsu claimed that IBM had breached that obligation, and claimed damages in the net amount it would have received from IBM if it had not been deprived of the services IBM would otherwise have provided.

64. The contract contained an exclusion clause to the effect that, with certain exceptions, "Neither party shall be liable to the other under this Sub-Contract for loss of profits, revenue, business, goodwill, indirect or consequential loss or damage…".

65. Carr J held, having regard in particular to the clear and unambiguous wording, the detailed provisions of the contract, prepared with the benefit of experienced commercial solicitors, and the fact that the exclusion clause was for the benefit of both parties, that Fujitsu's claim was excluded by that clause. She also observed (at §77) that – given the obviousness of the point – one would expect it to be made clear if the intention was to exclude only indirect loss of profit, given it was well-known that loss of profit could be both direct or indirect.

66. In response to an argument that the agreement was reduced to a mere statement of intent (see *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] AC 361, per Lord Wilberforce at p.432), at §49-§62, Carr J (while deprecating the reference to a statement of intent rule, as such) found that it had no application where the wording was clear, and where various substantive rights and remedies existed other than a claim for loss of profits, including the right to payment under the contract and the availability of equitable remedies such as specific performance, injunction and declaration. Carr J also considered, at §75, that she did not gain any real assistance from *Ease Faith*, given the material difference in wording. At §81, she noted that the exclusion clause before her "conspicuously" did not contain the word "other" before "indirect or consequential losses".

67. While the nature of the claim in *Fujitsu* (loss of payments which would have been due, but for the breach of contract) is similar to that here, little assistance is to be gained from the decision, for the same reasons Carr J found little assistance in other authorities which were merely examples of judges adopting a different interpretation on different wording.

(2) The contractual language

68. The first linguistic point that EE makes is that it would not be an ordinary or natural use of language to describe EE's claim as one for lost profits or anticipated profits. Mr Patton submitted that the reasonable reader of the TSA would not describe it in that way. He referred to the comments of Coulson LJ in *Soteria Insurance v IBM United Kingdom* [2022] 2 All ER (Comm) 108, at §65-70, where he observed that claims for lost profits often depend on hypotheticals, involve an element of speculation, are difficult for the contract-breaker to estimate in advance and can be notoriously open-ended. Mr Patton contrasted the position in this case, where the TSA legislates in detail as to how charges are calculated, and where the usage that diverted customers would have made of the EE network is discernible from their actual usage on a rival network during the relevant period.

69. That, however, is to focus too narrowly on the particular breach in issue in this case. In the case of other breaches, as Mr Patton accepted, for example the failure by EE to provide the service at all, or in the case of VM's repudiatory breach of the contract, the calculation of the sum due either way as compensation for the loss of bargain would be subject to similar difficulties to those referred to in *Soteria*.

70. EE places particular reliance on the use of the word "anticipated" in clause 34.5(a). In the context of the breach of the exclusivity clause, there is something to be said for the proposition that – even if the loss of revenue is to be regarded as lost profit – the claim is for the profits that have already been lost as a result of the diversion of customers to other networks, as opposed to a loss of profits that are still anticipated to be made in the future.

71. I do not, however, accept this argument. The meaning of a claim in respect of anticipated profits cannot vary depending on the time when the claim is brought. A claim for damages following a repudiatory breach by either party would be in respect of profits that would have been made (i.e. anticipated) during the remainder of the term of the contract. Even in respect of the breach of the exclusivity obligation, the claim is for profits which it was anticipated, at the time of breach, would have been made in the future during the period the customers were diverted.

72. In my view the phrase "liability … in respect of anticipated profits" merely refers to liability in respect of profits that it was anticipated would be, or would have been, made, but which will not be, or were not, made because of the breach of contract. In other words, it has the same meaning as the phrase "claims for lost profits".

73. I am reinforced in that view, as was the judge, by the fact that clause 34.5 carves out claims which "may include claims of damages for loss of profits". Those words imply that what is being excepted from the exclusion would otherwise be within it, and thus suggests that the phrase "claims of damages for lost profits" is used interchangeably with the phrase "liability in respect of anticipated profits". For that reason, I reject the submission that the use of the different phrase "damages for loss of profits" in the carve-out from clause 34.5 demonstrates that the parties deliberately confined the substantive exclusion to liability for "anticipated" profits.

74. Mr Patton submitted that the language of anticipated profits "simply makes it all the clearer that a claim for charges foregone by reason of VM's breach falls outside the scope of the exclusion".

75. This is a stark example of a broader failure to distinguish between the way in which a claim can be described and the legal basis underpinning that claim.

76. Thus, while it might be possible to *describe* the claim as one for "charges foregone", that is an inaccurate formulation of the legal basis of the claim. It is common ground that EE has no claim for "Charges" (which would sound in debt), but only a claim for damages because of VM's alleged breach of the exclusivity obligation. Those damages are calculated (on the expectation loss basis) by reference to the excess of the charges to which it would have been entitled, over the cost of providing the additional services, but for the breach. Describing it as a claim for charges foregone distances it from the appearance of a claim for lost profits, in a way that describing its essential legal basis does not.

77. As I have noted, there is a dispute as to whether EE would have incurred any additional expenses on the facts as they occurred here, but (1) if it did not, that just means that in the circumstances of this case the additional income would have been pure profit, and (2) in other circumstances, viewed at the time of contracting, it would have been reasonable to expect that additional expenses would have been foregone if the service did not need to be provided.

78. In fact, the carve-out from clause 34.5 has, in my judgment, wider significance. It carves out any damages claimed by VM pursuant to clause 34.2(c) to which clause 34.3 applies. EE acknowledges in clause 34.5 that such carved-out claims may include damages for loss of profits.

79. I have set out these clauses above. Clause 34.2(c) relates to any liability for damage or loss resulting from reckless or wilful misconduct or gross negligence, and clause 34.3 provides that wilful misconduct on the part of EE will include any intentional act by EE resulting in any discontinuance, withdrawal or refusal to supply any service to VM. The additional requirements to which that is subject include that VM must apply promptly for interim or other urgent equitable relief, and that any action claiming damages must continue to claim equitable relief and the reinstatement of the service as it primary remedy. It continues:

> "with damages claimed only to the extent that equitable relief is not granted or only in respect of losses suffered by VM in the period from the initial discontinuance, withdrawal or refusal to supply the Service in question until re-instatement of the affected service pursuant to the equitable relief actually obtained."

80. In circumstances where VM claims damages for the failure by EE to provide the service, it is difficult to see what losses – limited to those suffered in the period between discontinuance and reinstatement – could have been incurred other than lost revenue from its own customers because of their inability to access the EE network during that period. That loss is measured as the difference between the revenue it would have received from its own customers, and the amount it would have had to pay in charges to EE had the service not been discontinued or withdrawn. That is the amount required to put it in the position it would have been in if the contract had been performed, i.e. its expectation loss.

81. Mr Patton suggested that VM may also have a claim for loss of longer term profits, if customers chose to leave VM for good as a result of the temporary discontinuance of EE's services. Any longer term loss of profits would appear to me, however, to fall outside the parameters of "losses suffered by VM in the period … until re-instatement of the affected service".

82. In any event, that still leaves the fact that the paradigm claim that is permitted by the carve-out from the exclusion of claims in respect of anticipated profits in clause 34.5 is a claim for loss which, though calculated by reference to the profit VM would have made from its own customers using the services (i.e. the income it would have received from them less the charges due to EE), is properly characterised as VM's expectation loss arising from the wilful discontinuance of EE's service.

83. The inference, in my judgment, is that such a claim would otherwise be caught by the exclusion.

84. Mr Patton also criticised the judge for relying on the fact that if "anticipated profits" are limited to losses apart from expectation loss, then clause 34.4 (which excluded indirect losses) would be rendered otiose. He contended that clause 34.4 only barred claims for losses within the second limb of *Hadley v Baxendale*, whereas claims for loss of profits might fall within either the first or second limb of *Hadley v Baxendale*.

85. It is true that, as Mr Patton also submitted, the court should guard against giving the presumption against surplusage too much prominence because, as Coulson LJ commented in *Mutual Energy v Starr Underwriting Agents* [2016] EWHC 590 (TCC) at §35, "as we all know, some tautology, some overlapping terms, some surplusage, will often be found in commercial contracts." There is, however, force in the view that clauses 34.4 and 34.5 are aimed at different things, and are intended to operate cumulatively. As in *Fujitsu* (and unlike the two salvage cases) the reference to profits is not immediately followed by wording such as "or other" indirect or consequential loss.

86. I accept that the exclusion of claims in respect of anticipated profits – even if meant to add to the exclusion of indirect or consequential losses – could be intended to capture just those loss of profits claims which, while still characterised as direct loss, fall outside the concept of expectation loss. The limited category of lost profits claims that would remain is emphasised by the fact that the first example Mr Patton gives of such a claim is actually expectation loss: namely the loss VM suffers by losing out on charges under its contracts with customers consequent upon EE causing a network outage (as I have sought to explain above, in the context of the claim preserved by the carve-out in clause 34.3).

87. More importantly, I consider that, if the parties had in mind such detailed distinctions between the types of loss of profit claims, the exclusion clause would have been drafted with greater specificity. Accordingly, I consider that the two clauses taken together point more persuasively to the conclusion that the broad and unqualified reference to "liability in respect of anticipated profits" applies to claims based on loss of profits, whether those fall under the heading of expectation loss, or whether they fall under the first or second limb of the rule in *Hadley v Baxendale*.

88. Mr Patton relied also on the fact that, pursuant to the amendment agreed in 2016, VM was entitled to terminate the TSA without notice in certain circumstances (which essentially involved it being taken over by, or it taking over, another UK MNO), but was then required to pay EE a substantial amount (ranging from £315 million to £193 million, depending on the date of termination). Against that background, he submitted that it was unlikely that the parties intended VM to be able to breach its exclusivity obligations and invoke clause 34.5 to insulate itself from the duty to pay compensation.

89. There are two points in answer to this. First, there was no such provision in the TSA as drafted, and it has not been suggested that the meaning of clause 34.5 changed upon the introduction of the amendment. The contents of the amendment agreement are therefore of limited if any relevance to the construction of clause 34.5. Second, while the contract was on foot, irrespective of how many customers VM migrated away from EE's network, VM remained obliged to pay the Minimum Revenue Commitment, which by 2019 was £132 million per year. The suggested incentive to VM to insulate itself from any duty to pay compensation is therefore illusory.

(3) The commercial consequences

90. EE's over-arching point under this heading is that if the judge's construction of the exclusion clause is correct, then EE is left without any effective remedy for VM's alleged breach of the exclusivity obligation. That is because, in the circumstances which have in fact happened, first, EE suffered no wasted expenditure and so would have no damages claim at all and, second, there was serious doubt as to whether it could have obtained an injunction, even if it could overcome the difficulty that it had insufficient information to apply for one in the first place. In this latter respect, therefore, the judge's conclusion was based on the flawed reasoning that EE would likely have had a "strong claim" for injunctive relief.

91. Mr Patton submitted that, as the judge rightly recognised, an exemption clause will not normally be interpreted as extending to a situation which would defeat the main object of the contract or create a commercial absurdity, citing Coulson LJ in *Soteria* (above) at §60: "the more extreme the consequences, the more stringent the court must be before construing the clause in a way which allows the contract-breaker to avoid liability for what may be his catastrophic non-performance".

92. EE also relies on the decision of the Court of Appeal in *Kudos Catering* (above). The rejection in that case of the broader interpretation of a claim for loss of profits was motivated by the fact that it left the agreement "effectively devoid of contractual content since there is no sanction for non-performance by the respondent. It is inherently unlikely that the parties intended the clause to have this effect." The contention that the claimant contractor could have obtained an order for specific performance or a negative injunction to restrain the defendant from excluding it from the venue was rejected. Tomlinson LJ, at §16, considered it "very optimistic" to think that the claimant could have obtained such relief. Having regard to the specific provisions of the contract, which involved many continuing and interrelated obligations on both sides, he characterised (at §18) the suggestion that the claimant could have performed the contract without the full-hearted cooperation of the defendant as "wholly unstainable".

93. It is here, again, important to have regard to the fact that the commercial reasonableness of the judge's interpretation must be judged at the time of entry into the TSA and by

reference to the range of likely circumstances in which clause 34.5 might apply. EE's argument focuses too narrowly on the breach which it is alleged has in fact occurred.

94. Taking a wider view, there are likely to be many other circumstances in which the innocent party would have a claim for wasted expenditure in the event of breach by the other, for example in cases of repudiatory breach.

95. Even if, therefore, EE does not have a damages claim that escapes the exclusion clause in the circumstances of this case, while that is a relevant consideration, it loses much of its force when set against the range of possible claims that would have been in the contemplation of the parties at the time the agreement was made.

96. The same is true as regards the availability of injunctive relief. The particular difficulties EE might have had in connection with a claim for an injunction in the circumstances of this case do not undermine the utility of injunctive relief in the case of other breaches that would have been in the contemplation of the parties when the agreement was made, for example in the case of the failure by EE to provide the services, or of VM to accept them. In the case of wilful breach by EE, the contract goes further, mandating that injunctive relief is the primary remedy VM must seek (see clause 34.3(c), discussed above). More generally, the fact that the parties agreed that neither would argue that damages was an adequate remedy points towards their contemplation that injunctive relief was a real and valuable remedy.

97. The continuing obligations of the parties to each other under the TSA are very different in nature from those in the contract in issue in *Kudos Catering*, and the problems which led Tomlinson LJ to conclude that there was no realistic possibility of an order for specific performance are not replicated here. I observe that even in the extreme commercial consequences of *Kudos Catering*, the solution adopted by the Court of Appeal was to read down the ambit of the exclusion clause, not by concluding that the loss claimed fell outside the scope of "loss of profits" on the true meaning of the exclusion clause, but by limiting the type of breach to which the clause applied (i.e. limiting its application to cases of defective performance).

98. It is also of note, as Mr Zellick pointed out, that the particular difficulties EE would have had in the circumstances of a breach of the exclusivity obligation *as amended* could not have been in the contemplation of the parties at the time the agreement was made. The difficulty for EE, in knowing whether any breach was occurring, was exacerbated by the amendments made in 2016 because after that point the mere fact that a customer of VM is placed with another MNO is not itself indicative of a breach of the exclusivity obligation; it is also necessary to show that the customer is one to whom 5G services are offered.

99. Looking more broadly at clause 34.5(a) in the context of the TSA as a whole, and against the range of possible claims which may give rise to a claim for loss of anticipated profits, I do not think that the judge's construction is to be rejected on the basis that it is uncommercial. As she noted, and as Mr Zellick submitted to us, it is part of a carefully drafted agreement which allocates risk between the parties. On the judge's construction, exclusion of claims for loss of expectation leaves the parties with valuable contractual rights, readily enforceable in a range of circumstances by specific performance or injunction, or by awards of damages based on wasted expenditure.

100. From EE's perspective, an important part of the overall allocation of risk is the Minimum Revenue Commitment, which entitles it to payment from VM ranging from £120 million to £132 million per year. I accept that this does not meet the concern as to the lack of remedy in relation to a breach of the exclusivity obligation, because that obligation has any commercial relevance only where the Minimum Revenue Commitment is already exceeded. It is relevant, however, in considering the overall commercial sense of the allocation of risk in the TSA as a whole, for example in considering the commerciality of the exclusion of liability in respect of anticipated profits in the context of other breaches by VM.

Conclusion

101. Taking into account the points made above in relation to the language of the TSA and the commercial consequences, and notwithstanding the cogent and attractive arguments presented by Mr Patton, I consider that the judge came to the right answer on the interpretation of clause 34.5(a).

102. To summarise: (1) there is no overarching principle of law that limits an exclusion of liability for loss of anticipated profits to losses other than expectation loss or diminution in price; (2) in some cases similar wording has been found to be so limited, but in other cases it has not; (3) the wording of the exclusion in this case is clear and unequivocal; (4) the better view is that clauses 34.4 and 34.5 are intended to be read cumulatively, so that liability for anticipated profits is intended to indicate something additional to loss which does not arise directly from the performance of the TSA, and if the parties had intended clause 34.5(a) to cover only direct loss of profit claims that do not fall within the ambit of expectation loss, they would have done so specifically; (5) the better view is that "anticipated profits" is used within clause 34.5 interchangeably with "loss of profits"; (6) the fact that at least the paradigm case that falls within clause 34.3(c), and is thus carved out from the exclusion in 34.5(a), is a claim for expectation loss points towards such a claim otherwise being covered by clause 34.5(a); (7) the clause is part of a lengthy contract drafted with the assistance of legal advice on both sides, involving a careful allocation of risk for both parties; and (8) the consequences of this reading of clause 34.5(a), in the context of the range of its possible applications at the time of entry into the TSA, are commercially reasonable, and no less so than the alternative reading, particularly in view of the substantive remedies that remain across those applications (whether by way of damages or equitable relief).

103. Accordingly, I conclude that EE's claim is excluded by clause 34.5(a), and I would dismiss this appeal.

Lord Justice Phillips

104. The commercial bargain embodied in the TSA was that VM would use EE's telecommunications services and would pay Charges (as defined) for so doing. There was, however, no positive obligation on VM to use EE's services. Instead, the key contractual obligation of VM, giving effect to that bargain, was the exclusivity provision in clause 10, supported by the Minimum Revenue Commitment in clause 17. The centrality of the exclusivity provision is perhaps demonstrated by the fact that the exclusion of 5G services from its scope resulted in VM utilising the 5G services of other MNOs and migrating linked 2G-4G services from EE to those MNOs, resulting in the present dispute as to when the latter was permitted by the clause.

105. In my judgment it would be surprising if the parties intended that VM could breach the key exclusivity provision, unlawfully diverting its customers to a third party supplier, without incurring liability to pay EE damages reflecting the loss of revenue resulting from that breach. A right to claim for the amount of lost charges (less costs savings, in the unlikely event that there were any) by reason of such diversion would be conventional, straightforward and would simply reflect the commercial bargain made. To exclude that right would undermine the bargain and it is unclear why the parties would have so provided consistently with business common sense. I do not consider that the theoretical availability of injunctive relief to prevent VM's alleged breach is a real answer to that conundrum, not least given the likely delay in EE discovering that VM was engaged in significant diversion. Further, where the parties envisaged that the primary remedy for breach would be to obtain an injunction, they expressly so provided: see clause 34.3(c) of the TSA in relation to the far more immediate and discernible wrongful discontinuation of its service by EE. Neither is the theoretical availability of a claim for wasted expenditure a sensible substitute for a straightforward claim for lost revenue, particularly as the parties would have known when entering the TSA that the addition of customers to EE's network required no additional expenditure by EE.

106. Zacaroli LJ emphasises more than once in his judgment that it is important not to focus too narrowly on the particular breach in issue when considering the meaning of the exclusion of liability. While I agree with that as a general proposition, its application depends on the nature of the particular breach. Where, as in this case, it is a breach of the central obligation of one of the parties, it is right to focus intently on whether the parties really intended that the enforceability of that obligation would be significantly undermined by the exclusion clause in question.

107. In my judgment, adopting the words used by Tomlinson LJ in *Kudos Catering* at [20], it would require language "fairly susceptible of one meaning only" to exclude EE's right to claim damages for breach of the key exclusivity provision. In this regard two well-known principles of contractual interpretation coincide. First, as Lord Clarke of Ston-cum-Ebony pointed out in *Rainy Sky* at [21]:

> "If there are two possible contractions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

Second, as Tomlinson LJ summarised at [21] of *Kudos Catering*:

> "There also comes into play the presumption that neither party to a contract intends to abandon any remedies for its breach arising by operation of law – see per Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at page 717. Lord Diplock went on to say that clear words must be used to rebut this presumption and the judge plainly thought that the words here used were sufficiently clear for that purpose."

108. In my judgment, however, it is far from clear that the exclusion of damages claims for "anticipated profits" encompasses a claim for loss of revenue by reason of a breach of the exclusivity provision. It is correct that EE's damages claim is, strictly speaking, for

profit it would have made from VM's lost custom (albeit that would simply be the revenue), but in my judgment the loss is properly to be regarded as a readily ascertainable sum that would have been payable to EE by way of the contractual price for the use of its services had VM not diverted its business elsewhere. In my view, in contrast, the term "anticipated profits" indicates hoped for but uncertain profits which would arise as a consequence of, but outside, performance of the contract, not sums directly payable under the contract. That reading is reinforced by the commercial rationale referred to above that the parties would not have excluded a remedy for the key obligation of VM under the TSA, applying the approach taken in *Kudos Catering* and *University of Wales v London College of Business*.

109. I do not consider that the carve-out from clause 34.5 requires that that clause be read as excluding EE's claim for breach of the exclusivity provision. The carve-out permits VM to claim loss of profits, but these will be profits it would have made from its own customers (the paradigm case being a wrongful withdrawal of service by EE) and so will be a loss of profits from dealings with third parties outside the contract, not the loss of sums which would have been payable by EE under the contract had it been performed.

110. I also do not consider that reading clause 34.5 as excluding only indirect or consequential losses of profit outside the contract gives rise to a problem of redundancy in relation to clause 34.4, which expressly excludes indirect, consequential or incidental loss. In my judgment the sequential exclusion of such losses, and then loss of profits, reflects a standard and well-recognised formulation, such as the clause in *The Herdentor* and *Ease Faith*. In the TSA the exclusion of indirect or consequential losses and loss of profits has been split into two clauses, but that appears to be in order to permit the carve-out in relation to loss of profits. I do not see it as effecting a reversal of the conventional approach to excluding loss of profits, giving rise as it would to the commercially surprising result described above.

111. For the above reasons I would allow the appeal.

Lord Justice Coulson

112. I have not found the central issue in this case easy to decide. Like Phillips LJ, my original instinct was that the claim for sums that would otherwise have been due under the TSA was not caught by the exclusion clause, because that would strike at the heart of the bargain between the parties. However, I have concluded that the analysis of Zacaroli LJ is to be preferred. Since my Lords disagree, I should set out briefly why I have come to the conclusion that the appeal should be dismissed.

113. The issue is whether the provision that "neither Party shall have liability to the other in respect of…anticipated profits" excludes this claim. In my view, Zacaroli LJ is right to say that there can be no magic in the words "anticipated profits" since the expression "loss of profits" is used interchangeably in clause 34.5.

114. For EE's claim to fall outside the exclusion clause, EE have to say, as a matter of construction, that "anticipated profits" refers to profits anticipated to be earned outside the TSA. That was Mr Patton's argument before us, summarised by Zacaroli LJ at [46] above.

115. But why should those words be given that very specific and qualified meaning? There is nothing whatsoever in the words themselves to indicate that they are referring only to anticipated profits to be earned outside the TSA, not profits under the TSA. On the face of it, such a construction requires the insertion of words that are just not there.

116. Furthermore, the provisions as a whole point the other way. In my view, clause 34.4 already excludes any claims for profits lost outside the TSA, because that clause is expressly designed to exclude indirect or consequential losses. That would plainly cover profits anticipated to be earned outside the TSA. If that is right, then to import the same qualification into clause 34.5 not only does unnecessary violence to the words of clause 34.5, but would also have the effect of duplicating an exclusion that already existed.

117. I am not persuaded by Phillips LJ's suggestion, at [110] above, that this was a standard formulation which had been amended simply to permit the carve-out in favour of VM. But even if it was, that works against EE, because it means that VM saw that their claims under clause 34.3 – which might include claims for loss of profit under the TSA, not outside the TSA - would be excluded by clause 34.5, and so obtained the required carve-out. EE did not, so there is no similar carve-out in their favour of the kind that they now contend for.

118. In my view, a consideration of the applicable law and the commercial consequences of this construction do not alter this conclusion: in fact, they confirm it.

119. As to the law, it is not unfair to describe the cases relied on by EE and analysed by Zacaroli LJ in his judgment at [33] – [39] and [54] – [62] as something of a ragbag of particular results in particular types of cases (the salvage cases of Herdentor and Ease Faith, and the sale of goods cases, such as Glencore and Galtrade). The judgments in those cases cannot be woven together to comprise any sort of principle. On the other hand, the decision that, at least in some ways, is closest to this case, both in its words and its context, is Fujitsu. There, Carr J (as she then was) roundly rejected arguments that were very similar to those put forward by Mr Patton in this case. In the end, of course, these decisions almost always come down to the words used and the commercial background against which the words must be construed, so other cases are always of limited utility.

120. As to the commercial consequences of the judge's construction, I was originally struck by the fact that the claim here, albeit a claim for damages, was in essence a claim for the Charges that would have been otherwise recoverable under the TSA. It therefore seemed to me to be potentially artificial to label that as a claim for lost profit.

121. However, I think that, on analysis, that is precisely what it is. As a result of VM's alleged breaches of the exclusivity agreement, EE would in principle have had two different types of claim. First, they would have had a claim for any expenditure that they had wasted because they had anticipated X number of customers, and had spent money on providing the necessary infrastructure for X number of customers, only to find that – due to VM's breaches – some of that money had been wasted because they only had X less Y customers. The claim for wasted expenditure would not be caught by the loss of profits exclusion clause (see Soteria) and would be recoverable against VM.

122. Secondly they would have a claim for loss of profits. It would only be that second claim which would be irrecoverable as a result of clause 34.5.

123. That there could have been a claim for wasted expenditure in the present case seems to me to be confirmed by EE's own evidence, and in particular paragraphs 27 and 28 of the witness statement of Mr Harrap dated 17 March 2023. He refers to the "billions of pounds that EE had incurred in building and maintaining the network." He refers to the "very significant operational costs in providing network services to users". He concludes: "I believe that EE would have incurred costs and overheads which were specific driven by the additional capacity (such as backhaul capacity) built into the network to cater for VM customers (and the demand that VM forecast they would use").

124. In the light of that specific evidence, I do not agree with Phillips LJ's view at [105] that a wasted expenditure claim in these circumstances was a theoretical claim. It seems to me that such a claim could have been separately identified if EE had wished: the "specific" costs and overheads "driven by the additional capacity" as described by Mr Harrap. The problem is that EE has chosen to claim the charges that they would otherwise have recovered under the TSA, without reduction or qualification, and without any attempt to differentiate between wasted expenditure and loss of profit. Moreover the charges claimed could never have been recoverable as damages for breach: even if a very large element of the charges could have been shown to be pure profit, EE would always have had to have given credit for the costs that they would have incurred in providing the service to the customers who were migrated away.

125. I suspect that I have reached my conclusion with a little more reluctance than Zacaroli LJ. But in the end, for the reasons I have briefly stated, I have concluded that both his analysis – and more importantly, the judge's careful judgment - are correct, and that this appeal should be dismissed.