Neutral Citation Number: [2022] EWHC 2692 (Comm)

Case No: CC-2020-LDS-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS AT LEEDS
CIRCUIT COMMERCIAL COURT (KBD)

Leeds Combined Court Centre
(Sitting at the Leeds Nightingale Court)
1 Oxford Row, Leeds, LS1 3BG

Date: 9 November 2022

Before:

Her Honour Judge Claire Jackson
Sitting as a Judge of the High Court

- -

Between:

Mr Mohammed Gulzar	**Claimant**
- and -	
HPAS Limited trading as Safestyle UK	**Defendant**

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- -

The Claimant appeared in person
Mr Mark Baldock (instructed by Devonshires Solicitors) for the **Defendant**

Hearing dates: 4-7 October 2022

- -

JUDGMENT

This judgment was handed down remotely

on 9 November 2022 at 9.30am.

Her Honour Judge Claire Jackson :

1. Mr Mohammed Gulzar, the Claimant, was engaged as a self-employed sales agent by HPAS Limited trading as Safestyle UK, the Defendant, which carries on a business supplying double-glazed windows and doors. The relevant engagements for this case took place between July 2013 and February 2019

pursuant to a number of written contracts on terms which in all material respects were identical (the "Sales Agent Contracts").

2. Pursuant to the terms of the Sales Agent Contracts, the Claimant would offer the Defendant's products to customers for sale at appointments provided by the Defendant. The Claimant would attend the appointment and calculate the price of the products ordered by a customer by reference to the prices provided to the Claimant by the Defendant. A document headed "purchase contract" would be signed by the customer.

3. A surveyor appointed by the Defendant would then attend the customer's property. Items were sometimes added to customer orders submitted by the Claimant.

4. The Claimant was entitled to be paid commission for each contract which the Defendant concluded with a customer that had been introduced by the Claimant. Clause 2.1 of the Sales Agent Contracts provided that commission was to be paid to the Claimant by the Defendant "*in accordance with the commission structure in force at the time*."

5. At all material times, the Defendant's commission structure provided for commission to be calculated on the basis of the difference between the so-called "*list price*" of the items which the Claimant offered for sale to the customer and the actual price which the customer paid for the items (the agent having a discretion to offer items for sale at a discount). The percentage difference between the list price and the actual price corresponded to a commission percentage. The commission percentage was inversely proportional to the

percentage difference and therefore the greater the percentage difference the lower the commission percentage.

6. From time to time, there was the possibility that the Claimant would be entitled to an additional bonus based on the sales achieved within a given period and the average percentage difference between list price and actual price paid that the Claimant achieved.

7. The Claimant disputes the commission paid to him on in excess of 800 orders between 2013 and 2018. The Defendant does not accept the disputes raised by the Claimant. The main point of contention between the parties is a dispute as to the construction of the commission structure. This judgment which considers the question of construction, and a bonus scheme operated by the Defendant, follows the preliminary issue trial of eight test cases. If judgment is given in favour of the Claimant directions will need to be given to allow any disputes on the remaining cases to be resolved.

8. One point of importance at trial was that an allegation raised by the Claimant that the Defendant had tampered with evidence in this case was withdrawn by the Claimant during the course of the trial. The Court notes that no evidence capable of sustaining an allegation of evidence tampering was in any event placed before the Court.

The Sales Agent Contracts

9. During the course of his sales agency for the Defendant the Claimant entered into a number of Sales Agent Contracts. The terms of those contracts remained the same throughout the period 2013 to 2019.

10. The terms of the contracts so far as relevant to the case provided that:

1 Agreement

1.1 Safestyle UK has offered and you have agreed on the terms set out in this Agreement, to sell window and door frames for Safestyle as a Self Employed Sales Agent.

1.2 Under this Agreement, you represent Safestyle UK. However, you do not have authority to incur liability on behalf of Safestyle UK or accept any order or make any contract binding on Safestyle UK in respect of the sale and purchase of windows and door frames, or negotiate the sale and purchase of doors and windows outside the standard price list of Safestyle UK.

2 Commission

2.1 Subject to Clause 5 (Deductions), Safestyle UK will pay you in accordance with the commission structure in force at the time. Safestyle UK reserves the right to amend the commission structure at its discretion with reasonable notice. The present fee structure can be obtained at the Sales Branch.

[…]

5 Deductions

5.1 You agree that Safestyle UK may deduct such sums or other amounts from the commission to form a Retention Fund, the current rate of which can be obtained from the Sales Branch. Deductions from Commission and the Retention Fund may be made in respect of:

- *Commission and Retention Clawbacks.*
- *The cost incurred by Safestyle UK in respect of any mistake made by you or a substitute.*
- *Any loss or theft of a deposit or a survey fee prior to their receipt by Safestyle UK*
- *Sales Kit (see Clause 6)*
- *Transport Deductions*
- *Compensation paid to a customer as a result of your representations.*

[…]

7 Customer Documentation

7.1 You shall obtain from the customer upon signing a Purchase contract:

The Survey Fee

Any signed Finance Documentation (if applicable) and supporting information

A signed and completed Purchase Contract

A signed and completed Building Work contract (if applicable)

A signed copy the Treating Customers Fairly Checklist

[…]

9 Regulation and Statutory Requirements

9.1 The Industry in which Safestyle UK operates, namely replacement windows and doors, is subject to a number of regulatory and statutory requirements. In order to meet such requirements, Safestyle UK has put in place procedures, codes of conduct and guidelines.

9.2 You agree that when you are representing Safestyle UK you will at your own cost comply with any current procedures, codes of conduct and guidelines which have been issued to you by Safestyle UK.

[…]

11 Entire Agreement

11.1 This Agreement shall comprise the entire agreement between the parties and cancels and replaces any former agreements between you and Safestyle UK whether oral or in writing. This Agreement may not be changed by oral agreement but only in writing signed by both parties."

The Claimant's case

11. The Claimant appeared in person at the trial. He had previously been supported and assisted by a McKenzie Friend, Ms Ellen Walker, a freelance paralegal, with the permission of His Honour Judge Klein. Ms Walker was unable to attend the trial due to illness. The Claimant was able to obtain assistance from Support

Through Court for the first morning of the trial only. The Claimant therefore had no assistance for the remainder of the trial. However he confirmed that he wished for the trial to proceed.

12. The Claimant claims that the Defendant has used the wrong "*list price*" for the purposes of calculating the "*percentage out*" for his standard commission, and accordingly has made errors in the payment of his commission. The Claimant says that "*list price*" means the listed price of those items which he offered for sale to the customer. In his skeleton argument the Claimant contended that this was because anything further provided to the customers by the Defendant were gifts to customers.

13. The Claimant claims that applying his construction of "*list price*" to the eight Test Cases that he has been underpaid "*not less than £1,119*" as the purchase orders completed by the Claimant, being the contract of sale between the Defendant and the customer, was the document from which the list price was to be calculated, save for deductions due to mistakes by him in accordance with Clause 5 of the Sales Agents Contracts. Changes made by the Defendant to orders after completion of the purchase order in the test cases were not due to mistakes by him, as he did not make mistakes.

14. In that regard the Claimant asserts that, at all times, he offered for sale to householders those goods that he was required to offer according to the training provided to him by the Defendant and the applicable legislation. In this regard the Claimant asserted in his skeleton argument that

"*[the defendant] provided training to [the claimant] consisting of an induction course in 2003, details of which are shown at tab 66, when [the claimant] commenced his first*

engagement for [the defendant] but that is all the training that [the claimant] received from or was offered by [the defendant].

… The only training [the claimant] was provided with in 2013 was an update to literature and the sales pitch."

15. Therefore the Claimant claims that his commission should have been calculated on the listed price of the items noted in the purchase contract. The Claimant further asserts that if there is any doubt about the construction of the standard commission structure, as operated under the Sales Agents Contracts, then, given this was the Defendant's document, it should be construed against the Defendant under the *contra proforentum* rule.

16. Further the Claimant asserts that the Defendant has failed to pay him a £4,000 bonus in accordance with the *"£100k Bonus Club*" structure that was in force in 2018.

The Defendant's case

17. The Defendant denies the claim in its entirety. The Defendant avers that first, and as a matter of construction of the relevant commission structures the "*list price*" to be used for the calculation of commission was the listed price of those items actually sold to a customer by the Defendant, i.e. the price of the items ordered and installed by the Defendant. Alternatively, the Defendant could pay commission on either party's definition of "*list price*" such that, in the absence of any irrationality in its chosen method of performance, it discharged its obligation to pay commission. If either of those submissions succeeds, the Defendant asserts that is the end of the Claimant's claim.

18. Second, and if that is wrong, the Defendant says "*list price*" must mean the listed price of those items which the Claimant was obliged to offer for sale in accordance with the training he received. If that is right, then the Defendant has underpaid the Claimant by a total of £269, being an increase as a result of concessions made during the evidence by the Defendant's witnesses from the pleaded figure of £97.00.

19. In relation to the *£100k Bonus Club* the Defendant denies the claim asserting that in order to succeed, the Claimant must show that the aggregate list price of the items he sold within a particular month was £115,000, with an average discount on the said business of between 42% and 48%. The Re-Amended Particulars of Claim fails to plead those facts.

The Issues

20. The parties agreed that the issues for the trial were:

    i) As a matter of construction, what is the meaning of "*list price*":

        a) Does "*list price*" mean the list price of the products which the Claimant offered for sale to a customer of the Defendant?

        b) Alternatively, does "*list price*" mean the list price of the products which the Claimant was obliged to offer for sale to a customer of the Defendant in accordance with his training?

        c) Alternatively, does "*list price*" mean the list price of products sold to a customer of Defendant by the Defendant?

ii) If "*list price*" has the meaning in either paragraph a or b, in what respects (and if so in what amounts) did the Defendant underpay or overpay the Claimant in respect of any commission to which he was entitled to in relation to the eight test cases pleaded in the Particulars of Claim?

iii) Is the Claimant entitled to £4,000 in respect of the *"£100k Bonus Club*" for the month of October 2018?

21. On reading the papers I was concerned about issue 3, as the Re-Amended Particulars of Claim, so far as they address the bonus issue, refer to eight relevant cases, only one of which, Taberner, was a test case. The other seven cases were not test cases. Further the *£100k Bonus Club* was not listed as a preliminary issue in prior court orders. However having read the parties skeleton arguments I noted first that both parties had prepared for the issue to be dealt with at trial and wanted the issue dealing with at the trial and second that it was the Claimant's case that: *"due to the aforementioned breaches by [the Defendant] in relation to the test cases [the Defendant] wrongfully failed to award [the Claimant] a performance bonus of £4,000 which he would have qualified for*". I confirmed to the parties at the outset of the trial that given that the Claimant was now asserting that it was the eight test cases (which were the preliminary issue test cases) which were relevant to this issue, that the issue would be considered at the trial.

The Law

22. The Court notes that the claim advanced is a civil claim. It is therefore a claim in which the burden of proof rests on the Claimant to prove his claim to the relevant standard, being the balance of probabilities. I have applied this burden

and standard of proof throughout this judgment. This is of particular importance in relation to the third issue.

23. As noted, the Claimant relies in his claim on the *contra proferentum* rule. He also relied on some statutory provisions. First the Claimant relies on the Commercial Agents (Council Directive) Regulations 1993 ("Regulations"). Insofar as relevant these provide:

4(1) In his relations with his commercial agent a principal must act dutifully and in good faith.

4(2) In particular, a principal must -

...

(b) obtain for his commercial agent the information necessary for the performance of the agency contract, and in particular notify the commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agency could normally have expected.

4(3)A principal shall, in addition, inform his commercial agent within a reasonable period of his acceptance or refusal of, and of any non-execution by him of, a commercial transaction which the agent has procured for him.

…

6(1) In the absence of any agreement as to remuneration between the parties, a commercial agent shall be entitled to the remuneration that commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carried on his activities, and if there is no such customary practice, a commercial agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction.

7(1) A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract-

(a) where the transaction has been concluded as a result of his action;…

12(1): The principal shall supply his commercial agent with a statement of the commission due, not later than the last day of the month following the quarter in which the commission has become due, and such statement shall set out the main components used in calculating the amount of the commission.

24. In his skeleton argument at paragraph 48 the Claimant asserted that the Defendant had, in breach of regulation 4(1), failed to fulfil its duty of good faith. I addressed this with the Claimant in opening submissions as there is no pleaded case from the Claimant of a breach of duty of good faith or of a claim in that regard. The Claimant confirmed to me that he was raising this matter as a background issue, and he was not asserting a claim for damages on that basis as a standalone claim.

25. Second the Claimant relied on The Sale of Goods Act 1979 and more particularly section 2 thereof:

(1) *A contract of sale of goods is a contract by which the seller transfers or agrees transfer the property and goods to the buyer for a money consideration, called the price.*

(2) There may be a contract of sale between one part owner and another.

(3) A contract of sale may be absolute or conditional.

(4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.

(5) Where under a contract of sale the transferred property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.

(6) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

26. Neither party raised at trial whether this was the correct statute for the Court to consider given the Defendant not only supplies replacement doors and windows but fits them. The Court could therefore have also been referred to the Supply of Goods and Services Act 1982 or the Consumer Rights Act 2015. Given the Claimant appeared in person in this case I have in preparing this judgment had regard to those statutes. I am satisfied having considered their provisions that if the Claimant had relied on them at trial, it would not have affected the outcome of this case.

27. The Defendant relied on the following legal propositions, producing in each case the authority for the Court and the Claimant to consider:

    i) *Declarations of subjective intent are not relevant when it comes to questions of construction*: Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 WLR 896, 913A per Lord Hoffmann

    ii) The approach a court should take on interpretation of a contract is as summarised by Lord Hodge JSC in Wood v Capita Insurance Services Limited [2017] UKSC 24:

"11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the Rainy Sky case [2011] 1 WLR 2900, para 21f. In the Arnold case [2015] AC 1619 all of the judgments confirmed the approach in the Rainy Sky case: Lord Neuberger of Abbotsbury PSC, paras 13–14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the Rainy Sky case, para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 , paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close

examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in Sigma Finance Corpn [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

iii) *"[T]he interpretation of a written contract involves the ascertainment of the words used by the parties and the*

determination, subject to any rule of law, of the legal effect of those words". Lewison (ed.), The Interpretation of Contracts (7th ed., 2020), [2.01].

iv) "*In construing any written agreement the court is entitled to look at evidence of the objective factual background known to the parties or reasonably available to them at or before the date of the contract. This principle applies even if the contract appears to be unambiguous. There is no conceptual limit to background. It can include anything relevant which would have affected the way in which the document would have been understood by a reasonable person. However, this does not entitle the court to look at evidence of the parties' subjective intentions; nor to ascribe to the words of the contract a meaning that they cannot legitimately bear.*" Lewison (ed.) The Interpretation of Contracts (7th ed., 2020), [3.143]

v) The following cases were referred to on whether a term should be inferred into a contract: Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, [21] per Lord Hoffmann, BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, 283 per Lord Simon of Glaisdale; approved in Marks & Spencer Ltd v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [21] per Lord Neuberger.

vi) Where on the true construction of an agreement an obligation can be performed in different ways:

a) "*It is generally for the party obliged to perform the obligation to choose the method of performance*": The Interpretation of Contracts, [8.57]; see Pease v Henderson Administration Limited [2019] EWCA Civ 158, [69] per Nugee J.

b) *"[t]he existence of such a choice is akin to a contractual discretion and, like a contractual discretion, will normally be governed by the concept of rationality*": The Interpretation of Contracts, [8.60].

28. The Claimant told the Court during closing submissions that he had not read the authorities relied upon by the Defendant and was therefore unable to comment on the authorities.

The Witnesses

29. Given that the Claimant attended the trial in person and without the support of his litigation friend during the housekeeping phase of the trial on the first morning I discussed CPR 3.1A with the Claimant. I noted for the Claimant that given the trial would be taking evidence from witnesses that the Court could provide some assistance. I agreed with the Claimant that:

i) In so far as a witness was tendered by the Claimant that the Claimant would prior to the witness giving evidence inform me of the issue/s that witness would address;

ii) In so far as a witness was tendered by the Defendant the Claimant would produce a short bullet point summary for the Court, not to be shared with

the Defendant, as to the areas of evidence he wished to cover with the witness referring to the issues and the witness statement.

30. The Claimant did not prepare the summary for the Defendant's witnesses. He was fully entitled not to do so and the Court does not hold this choice against him in the proceedings. Instead, it was agreed at the start of the Defendant's case that for every witness who gave evidence for the Defendant the Claimant would prior to their evidence commencing tell the Court which paragraphs of their statement he would like to cross examine the witness in relation to so that the Court could ensure that the Claimant questioned the witness on all the areas he wished. This process was followed throughout the trial.

31. The Claimant is by profession a salesman. This is a respectable profession and not something for a which a witness will be condemned. However, the role of a witness at a trial is to give evidence of fact through witness statements and oral testimony. The role of a witness is not to sell a case. Unfortunately, in this case the Claimant did not fulfil the role of a witness rather when giving his evidence, and despite warnings from the Court not to do so, the Claimant sought to sell his case to the Court. The Claimant in the witness box assumed his professional role and not the role he was there to fulfil.

32. This led to the Claimant being a particularly evasive witness who only answered questions when they suited him: When they did not suit him or when he thought a line of questioning did not suit him the Claimant answered what he wanted or engaged in obfuscation and obstruction. Again, the Court warned the Claimant against this, telling him repeatedly to answer the question he was asked. The Claimant continued not to do so, and frequently cut across Counsel not even

waiting for the full question to be asked before starting his answer showing clearly he was not listening to nor was he interested in what he was being asked.

33. The Claimant, if faced with documentary evidence that proved his testimony to be incorrect, was willing to make concessions, however in the absence of conflicting documentation he frequently did not make sensible concessions.

34. One of the concessions made by the Claimant was that his commission was not based on his measurements. This was a concession made after an intervention by the Court to seek to ensure that the Claimant had the best opportunity to answer Counsel's questions. The Court ensured at that time that the Claimant was able to understand the questions being asked of him by the use of non-technical, single questions. The concession having been made the evidence was checked by the Court to ensure that the Claimant understood what he had said and that it was his evidence. The Claimant confirmed this to be the case. The Court did not perceive that the Claimant was in any difficulties at this time, and the Court therefore made a contemporaneous verbatim note of the evidence ensuring the Claimant and Counsel for the Defendant were aware that was taking place.

35. The Court also made both the Claimant and Counsel for the Defendant aware it was taking a contemporaneous verbatim note when the Claimant put questions relying on this concession to the Defendant's witness, Mr Thompson.

36. This was potentially an important concession in the case as the list price derived from a purchase contract was a list price derived solely using the Claimant's measurements. If therefore the Claimant's case was that his commission was not based on his measurements, then the interpretation contended for by the

Claimant was understood to be wrong by him on his own evidence. It was therefore of concern that when this was explained to the Claimant during closing submissions the Claimant sought to resile from his evidence saying that, whilst he had not lied to the Court, he had got his evidence wrong and his commission was based on his list price, so on his measurements, but if the surveyor differed in his measurements from the Claimant then the Claimant must have made a mistake and the list price would be affected accordingly.

37. This was not however an avenue of explanation open to the Claimant as he had also confirmed in his sworn evidence that whilst he was aware that any mistakes he made would affect his commission, mismeasures of windows would not be a mistake. The Claimant explained that this was because windows are not made based on his measurements as he was not qualified. His measurements were a rough guide for pricing not fitting (see also paragraph 10 of the Claimant's skeleton argument). I can only presume when seeking to change his case during submissions that the Claimant forgot that he had given this evidence.

38. A Court must be careful when dealing with litigants in person and some allowance must be given for a failure to understand the difference between evidence and submissions. However where a party seeks to rewrite their sworn evidence in submissions this necessarily raises credibility concerns for the Court. This is particularly so when the rewriting seeks to ignore very clear answers given by a party. It is of even greater concern when the new explanation provided by the party does not fit with other evidence given by them under oath.

39. The Claimant therefore in his closing submissions sought to recuse himself from a straightforward admission made in circumstances where the Court is satisfied that the Claimant understood the questions, had time to properly understand and answer the question and where the Claimant continued to assert the same case through the next day. This change of position by the Claimant, which only occurred when the Court had explained to the Claimant the position, raised grave concerns for the Court over the credibility of the Claimant.

40. Taken together with his attitude, demeanour and behaviour as a witness the Court must treat the Claimant's evidence with care. The Court therefore accepts the Claimant's evidence where it represented a concession from his pleaded case (e.g. that he had received training beyond that in his pleaded case) or where supported by either the Defendant's witnesses or by contemporaneous documentation not solely produced by the Claimant. The Court must otherwise treat the evidence of the Claimant with care as it was evidence given with a purpose and not simply as a witness. Where in those circumstances there is a conflict in the evidence and there is no underlying contemporaneous documentation, the Court will prefer the evidence of a witness found to be honest and credible.

41. Mr Marquis, a witness for the Claimant, was a straightforward witness. He answered questions having listened to Counsel in a clear and direct manner. I am satisfied that he was an honest and credible witness. Given that the subjective intentions of parties and the conduct of the parties following the contract being concluded is not admissible in court it was not entirely clear to the Court to what end Mr Marquis was tendered as a witness. To the extent his

evidence is admissible to this Court however it is evidence that supported the Defendant's case as Mr Marquis confirmed to the Court that his understanding was that a sales agent's commission was calculated by the Defendant based on the "*rep pricing summary*" and not the list price of the purchase order.

42. Ms Whitfield was an impressive witness for the Defendant. She sought to ensure that the Court and the Claimant knew that she was only giving evidence of what she knew. She did not engage in speculation even when invited to do so. Her evidence was clear, consistent and answered the questions asked. She was also candid admitting when there were mistakes in her witness statement. Ms Whitfield was an honest and credible witness.

43. Mr Thompson was an attentive witness who was honest and credible. He listened to questions with care whether asked by Counsel for the Defendant, the Claimant or the Court. He then answered questions as clearly and directly as he was able to do so. He was not distracted from his role despite the need for the Court to intervene in his cross examination on numerous occasions. He was frank in his answers, made sensible concessions and accepted that he made mistakes. When mistakes were shown to him he accepted them in an open and honest way even when those mistakes may have cost his employer money.

44. Mr Donoghue was an ebullient witness, who seemed to enjoy his time in the witness box. This is not to say that he played to the crowd or behaved in an inappropriate manner but rather that he was ready and prepared to answer questions, was focused on his evidence and did not seem to suffer any nerves at all. His evidence was of little direct importance to the Court but to the extent it is needed the Court accepts it as true and honest.

45. The Claimant produced witness statements from a number of individuals who he did not then call as a witness at trial. One of the witness statements, said to be from David Bush, was unsigned and I did not therefore read it. The other statements were signed, and save for the statement from Mr Nagley, were served under a DIY Civil Evidence Act Notice. I have therefore read the remaining statements.

46. Neither party made any submissions on the statements in their submissions. I have concerns over Mr Nagley's statement which was close to a mirror image of Mr Marquis' statement. How this happened remains unexplained. In any event however the statements have been of limited assistance to the Court in preparing its judgment, especially as Mr Nagley's statement focuses on how the parties acted following the Sales Agents Contracts and a subjective understanding of the relevant clause whilst the customers' statements focus on the second issue in the case. To the extent it is however necessary to comment on the statements I accept them as written, save where an honest and credible witness gave evidence to the Court to the contrary. In those circumstances I prefer the tested evidence from the witness who appeared before the Court to the untested witness statement.

The Process surrounding a Sale

47. When seeking to interpret a contract the Court must consider the matrix of facts. This includes the factual situation in which the contract operates and the commercial realities of the interpretations contended for by the parties. In this case the key factual matrix is that the Claimant was a sales agent who

represented the Defendant in sales pitches to consumers but who could not bind the Defendant in relation to contracts. It is therefore necessary to understand the ordering process for customer orders.

48. Having heard the evidence of the parties I accept the evidence of Mr Thompson in this regard. The paragraphs below are extracted from the witness statement of Mr Thompson and sets out what the Court accepts is the process surrounding a sale of the Defendant's products by a Sales Agent (referred to by Mr Thompson as a Rep):

"*Reps are given their leads by their branch, and they would attend prospective customers' homes. Reps now have tablets, but the process used to work with a paper contract with 5 or 6 carbon copies that could be pulled off. There would be a pink sheet for the sales branch, blue for head office, green for the customer and white and yellow for the surveyor to pick up. If the customer decided they wanted to place an order with Safestyle, the rep would fill out the order form (that we refer to as a "contract") with details of what the customer wanted, including design and measurements of doors and windows, as well as details of any discount offered by the rep. When it was paper contracts, they had a list price book and would look in the book to determine the list price of the window based on its width and height and the specification. They would then manually add this up using a working out sheet, and at the end of it would come up with a total list price. The reps had a discretion to offer items at less than list price, and we called the discount they offered the "percentage out" from list price. The reps would work out the "percentage out" they offered the job at. Now that tablets are used, reps no longer have a pricing book and the tablet works the list price and percentage out for you. It does not give a commission but gives the total list price, total building work price (which is not included in the commission calculation) and, based on what the rep said they offered the job to the customer for, the percentage out. Reps would then check the commission structure to work out for themselves the commission they thought they would get. The customer would then need to pay a survey fee to move*

on to the next stage of the order, which was for a surveyor to come visit. The survey fee works as a sort of deposit because it will come off the total that the customer agreed to pay. The rep would then hand the blue sheet with the fee to head office. Now that Safestyle uses tablets, whatever data the rep has inputted is saved on a software called Polaris. The rep would leave two sheets of the order form with the customer: one for the customer and one for the surveyor. The surveyor would do the survey report, which included measuring window and doors and checking whether the order was safe to install. For example, the surveyor might add toughened glass to the order, or fire hinges, or scaffolding where necessary to install a window safely. That is how discrepancies would occur between the percentage out as at the point of order and the percentage out after the survey.

The surveyor's white and yellow copy was then sent to head office to process. Even though Safestyle now uses tablets, the surveyor still does his survey report as he would before, on paper, and hands it in to head office. The next step is for the order to go through the Survey QC department, which does quality control. They check surveyors' measurements to make sure everything adds up and makes sense, that all the paperwork is filled out, as well as whether the surveyor missed anything such as scaffolding. It is part of the surveyor's role to flag up possible issues with the building, and give a view as to how to deal with these, for example, if a particular window has a crack above it, the surveyor might recommend not to install in that location. The Survey QC department will then make the decision at that stage (although this could then be reviewed later, for example if the installation team has a different view). Once all the quality checks are done, the order paperwork goes to the Direct Input team who input all the final data for the order onto a software called ProfitMaker. The order then goes to either the Order Clearing team or what we now call the Retentions department. If there are no issues with the order, it goes to Order Clearing who would call the customer to confirm an installation date. If something was changed during the survey or quality control stages, then the order would instead go to Retentions, who would discuss the changes or charges with the customer. Sometimes this might be because the customer, after placing their initial order with the rep, wanted to

change the style or design of a window so charges would need to be agreed. The customer would be asked to pay for the change or item at the same percentage out as at the point of order, so for example if the rep offered the job at 40% out and the customer wanted to add a window that had a £1,000 list price, the customer would be asked to pay £600. Sometimes, and this is where my role would come in, a change was made because a rep made a mistake, for example forgetting to charge for scaffolding when they should have said it was required. In that case, the Retentions team might see if the customer is willing to pay extra but very often they say no because they said they agreed a price for the job, and if there is a risk that the customer will cancel their order, the team usually do what is necessary to save an order. If the customer cancelled the order, both Safestyle and the rep would lose out.

In this situation, if something needs to be added to an order, there are basically three outcomes. If the customer agrees to pay for the addition at the same percentage out as at the point of order, then the order stays at the same percentage out, but the commission percentage is calculated on a higher order price so the rep would receive a higher commission. If the customer refuses to pay anything extra for the change, then the total list price of the order would increase but the final sale price would not, so the "percentage out" would be higher and the rep would get paid at a lower rate than they thought. Safestyle would also lose out because it would have to supply something for free. There is then the middle way, if the customer agrees to pay a contribution for the item, and we agree to accept that contribution to stop a cancellation. In that case, the impact on the rep's commission would depend on the level of contribution. I do not think there were set rules about whether to call up the customer to ask for more money. In the course of business, I think sometimes the decision is made not to ask the customer for more money if there was a clear mistake from a rep, for example if they forgot to charge for something that they should clearly have charged for and the customer might question that. For example if a bay window has four sides to it and the rep only noted it down as three sides, the customer might say the rep clearly should have costed for four sides as they were ordering a like-

for-like replacement. A factor for this decision might be whether there is already a lot of profit on the job or if it had been very underpriced. Another factor might be if for example the job is sold on finance and the paperwork has already been prepared and executed, if making a change would mean the job had to be refinanced and the second proposal would result in a decline, we might not go back to the customer for more money. Managers will make the call on this and have to judge on a case-by-case basis.

…

Once Retentions agreed the changes or charges with the customer, the order would then go to Order Clearing to confirm the installation date with the customer. From there, the order details are sent for manufacture. The Order Clearing record the installation date or any changes to that on a software called CRM. On a weekly basis reps can ask for a "fit date bonus sheet" which is basically a tracker, a sheet designed to see the progress of customers' orders that gives the percentage out as it came back after the job was surveyed and went through the other stages. I am sure we used to send fit date bonus sheets to branches every Monday for managers to hand them out to reps, but I was not directly involved in this process. If reps did not receive a fit date bonus sheet, they could always ring sales support to ask for it to be sent via email or to their branch. The fit date bonus sheet shows orders at any stage in the ordering process, for example it might have gone through Order Clearing who agreed an installation date weeks away. Reps only get paid commission on a job once it is installed. They get paid a week on the Monday after the installation date. Every Monday, reps receive a commission sheet breaking down how much they are getting paid, including the commission for jobs installed the previous week and the percentage out this was based on. Reps could choose to wait until they receive their commission sheets to see what percentage out they are paid on, but the majority of reps would ask for their fit date bonus sheet to find out the percentage out before the job is installed. Reps would then check the percentage out for their jobs to see if it matched the percentage out at the point of order. If it did not, then they could investigate why themselves by ringing the Sales Support team and ask for the pricing summary sheet that

would be produced from the surveyor's data and see if they can see any difference from the data they had put in to Polaris (or on the paper forms before Polaris was introduced). Sometimes they might see that they failed to offer toughened glass where they should have done so in some cases they would never come to me. Otherwise they would give me a call and we would discuss and at the end of the call we would either agree whether the percentage out would be amended or not. My decision was purely based on what I would be told by the training department, for example, if they said that the reps were trained in something and should have known about the error they made. If there is something I am not sure about, I will go to my manager to say the rep is saying he did not know and training are saying that he should have known. Usually my manager and the rep's manager would then discuss and make the decision. Similarly, if for example a customer had agreed to pay a small contribution to something added to the order and we had accepted that, I would explain that to the rep and we might agree that this was necessary to save the job. If we could not come to an agreement then the query would have to be dealt with by my manager and the rep's manager.

…

In order to look into a query, I would look at Polaris to see what the rep inputted, as well as the surveyor's reports and the pricing summary sheet to see where the difference in percentage out arose. Once I have come to a decision about whether to adjust the percentage out on a particular order, and provided there is no need for managers to be involved, I fill out a "wage add-on" spreadsheet every Wednesday. I enter details about the adjusted percentage out I have agreed, the total commission that should be paid based on this adjusted percentage, and the difference between that and the commission I believe they received for the job. I then send this spreadsheet to Kayleigh Whitfield in the Wages team who will arrange for payment of the extra commission to the reps."

49. Having accepted Mr Thompson's evidence as to the process and considered the commission statements provided to sales agents when their commission was

paid there is no evidence before me that either the process or the statement provided breached Regulations 4(1), 4(3) or 12(1). Further having considered the evidence of Mr Marquis and Mr Thompson I am satisfied that an agent could obtain the necessary information if they wished to query a commission paid to them.

The Claimant's Training

50. Before turning to the issues in the case there is one factual matter which the Court must address, given the parties' cases and its potential relevance in relation to issue 2, and that is the training the Claimant received from the Defendant.

51. The Claimant's pleaded case was that the Defendant provided training (paragraph 4 of the Re-Amended Particulars of Claim). The Claimant did not expressly set out the training he had received but paragraph 19 of the Re-Amended Particulars of Claim suggested that this took place when his self-employment commenced. As noted in his skeleton argument the Claimant clarified his position such that he had received training in both 2003 and 2013 but that this was the only training he had received.

52. Having heard the evidence of the parties and read the documentation I am satisfied that the Claimant received:

i) Induction training in 2003 (as admitted by the Claimant);

ii) Updated training in 2013 (as admitted by the Claimant);

iii) Consumer Protection training in January 2018 (as shown by the documents before the Court);

iv) GDPR training in October 2018 (as shown by the documents before the Court), and;

v) Training on the Polaris system in 2018 from Mr Donoghue (as per Mr Donoghue's evidence).

Findings on the Issues

Issue 1

53. It was evident during the trial that there was an inherent tension between the Claimant's pleaded case and the Claimant's evidence to the Court. The Claimant's pleaded case is that his commission was based on the list price as calculated from the purchase contract signed by the customer (so using the Claimant's measurements), however in evidence the Claimant agreed that his commission was not based on his measurements. Therefore on his evidence his commission could not be calculated as per his pleaded case. Mr Baldock in closing submissions submitted there was at least an inference to be drawn from this that the Claimant agreed with the Defendant's case, at least on measurements, and this was fatal to his case on issue 1.

54. I have already noted that the Claimant sought to change his evidence in this regard during closing submissions and that this has affected my assessment of the credibility of the Claimant. I have determined however that in relation to issue 1 it would not be appropriate for the Court to base its decision, either in whole or in part, on that evidential concession of the Claimant or to draw the inference suggested by Mr Baldock. The primary issue in this case is one of construction of the relevant commission structure. This is a question which the Court must determine by ascertaining the meaning of the words used by the

parties thereby determining the legal effect of the words. The Court is not therefore looking for the parties' intentions when agreeing to the commission structure or how the commission structure in fact operated. Much of the evidence tendered by the Claimant was evidence of subjective intention, subjective understanding or post contract behaviour and is therefore not admissible on this issue. In my judgment this included the evidence of the Claimant in relation to measurements. I have therefore not taken into the disputed concession of the Claimant when determining this issue. I have approached the issue applying the rules of construction.

55. In seeking to establish the meaning of the words a Court can look, for example, at the quality of drafting of the commission structure, the Sales Agent Contracts as a whole, the factual background and business common sense. The Court must then balance these in its judgment.

56. Looking first at the drafting of the commission structure in this case it is, in contrast with the Sale Agents Contracts and the purchase contracts with customers, an informal document. It does not appear to be a document which has been drafted by a lawyer but rather looks like a document produced internally by the Defendant. It is rough and ready and therefore is a document which, in my judgment, requires interpretation using the contextual model rather than textualism. It is the Defendant's document produced without negotiation with the Claimant and therefore if the Court needs to rely on the *contra proferentem* rule the Court may do so.

57. If the Court does look simply at the words used in the commission structure alone the words are not clear. Whilst the word *"Your*" is used in relation to

selling price in the 2013 and the 2014 structure this could mean either the selling price in the purchase contract or the selling price of the goods actually sold. There is no definition in any of the commission structures of "*sale price*" or "*list price*", nor any cross references to any other documentation to provide guidance in this regard.

58. The Claimant placed emphasis on the words "*sold at*" in the 2017 structure. However the phrase used in the 2017 commission structure is "*Job sold at*". This is again ambiguous when only the words are looked at as the purchase contract was offered by the customer at a price but the job actually done may have differed both in terms of work done and price. Working out what the "*job sold at*" or what the "*list price*" was, in my judgment, therefore requires the Court to look beyond the pure words used in the contract

59. The commission structure is of course part of the Sales Agent Contracts remuneration. In interpreting the commission structure the Court should therefore do so in the light of the whole of the Sales Agents Contracts. As a result the interpretation of the commission structure must take into account clauses 1 and 5 of the Sales Agent Contracts. Therefore the Court must interpret the commission structure on the grounds that the purchase contract as signed by the customer in the presence of the Claimant did not bind the Defendant until it accepted the contract and deductions could be made from commission for a number of matters including costs incurred by the Defendant in respect of any mistake made by an agent.

60. As to this later point it is noteworthy that clause 5 does not state that commission may be reduced or recalculated by the Defendant based on a mistake by the

Claimant as the Claimant sought to assert throughout his evidence. It provides (inter alia) that the Defendant was entitled to make deductions from the commission payable to sales agents in respect of costs incurred by the Defendant in respect of mistakes. In other words the Defendant having calculated the commission payable in accordance with the commission structure could reduce this if the Claimant had made a mistake which had led to a cost to the Defendant. So, for example, if an agent had failed to quote for a traditional scaffold which was necessary on a job and which the Defendant then had to provide at its own cost the Defendant having calculated the commission payable had a discretion as to whether to deduct the cost of the scaffold from the commission as calculated. The ability of the Defendant to make deductions by way of recovery of costs it had incurred due to a sales agent's mistake was confirmed by the Claimant and Mr Thompson during Mr Thompson's cross examination.

61. As for the factual background, the process and procedures of the Defendant in relation to orders was either reasonably available to the parties (e.g. by the Claimant asking about the process and procedures during his initial application to the Defendant) or known to the parties (as it was the Defendant's procedure and the Claimant had previously worked for the Defendant) at or before the date of the Sales Agents Contracts with which this case is concerned. If the structures were changed during the period of a Sales Agents Contract then the process and procedure of the Defendant was known to the parties due to their ongoing contractual relationship. Therefore the factual matrix set out at paragraph 48 above can be looked at by the Court in interpreting the commission structure

and, in particular, in looking at the business sense of the interpretation contended for by the parties.

62. Further the process and procedure of dealing with customers was known to the Defendant and should have been available to the Claimant. Therefore the parties should at the time the Sales Agents Contracts were entered into/the commission structures changed have understood how this worked.

63. It is common ground that pursuant to clause 1.2 of the Sales Agent Contracts the Claimant did not have authority to contractually bind the Defendant. As a result, and taking into account, the process surrounding a sale of the Defendant's products, in my judgment, the proper contractual analysis is as follows:

i) Following a lead the Claimant would attend the customer's house and provide a 12 month no obligation quotation for the supply of windows and doors. This was an invitation to treat by the Defendant;

ii) The customer would then choose whether to accept the quotation or not. If the customer accepted the quotation the Claimant would then produce a "purchase contract" which the customer would sign as would the Claimant. Using the Holmes contract as an example the purchase contract described itself as a "*legally binding contract for the purchase of made to measure goods and associated installation services*." Further the purchase contract states that "*I have agreed to the sale price as below, however I understand that all orders remain subject to a technical survey in accordance with the terms and conditions of sale"*. That the purchase contract was subject to a technical survey was also noted within the body of the purchase contract "*Please be aware all*

orders are subject to a technical survey report being completed prior to installation. In the unforeseen event that further work is identified such as the presence of suspect material, hidden obstructions, structural issues, etc. further costs may be applicable subject to mutual agreement." Customers were also warned in the body of the purchase contract that "*Please be advised that any material changes to your order could affect the purchase contract price."* The Claimant accepted during his evidence that purchase contracts were subject to survey.

iii) The clauses in the Yousufi and Bush purchase contracts were different to the above. However the customer still signed to accept the terms and conditions of the Defendant. The terms and conditions are set out below. From these it was again clear that this purchase contract was subject to survey, as the Claimant accepted in evidence.

iv) The terms and conditions of sale were part of all the purchase contracts and when signing the purchase contract a consumer confirmed that "*I have read, understood and agree to the terms and conditions of sale, as set out in this document and that I am entering into a contract for goods made to measure and to my specific requirements*." The terms and conditions of sale provided that

1 We will only have a contract with you when you sign a purchase contact, which we accept.

2 We have clearly written all products, services and special terms of this agreement on the front page of the purchase contract so that we both know that it is included as part of the contract.

3 If you or we want to make changes to the terms of the contract after it has been signed, including associated changes to price (a variation), we will agree the changes with you and set them out in writing so that we both know what we are under a legal duty to supply. This will not be binding until we and you have confirmed agreement in writing (including e-mail).

4 The price of the products (including the VAT) is the price set out on the purchase contract over the page.

5 Before we install the products, our technical surveyor will survey the installation address

…

7 We will contact you after the survey if we believe that we cannot install the products properly and we will cancel the contract.

v) Taking all of this into account the "purchase contract" represented an offer to contract by the customer to the Defendant. The Claimant accepted this in paragraph 12 of his skeleton argument. At the point the Claimant ceased to deal with that document it was not therefore a contract of sale. In my judgment this is an important point as the Claimant in his evidence confirmed that he accepted he would only be paid his commission under a contract of sale and the commission structures refer to either "*sale price*" or "*job sold at*". Therefore any calculations the Claimant made at the time of his visit or following his visit of his commission could only have been an estimate. The Claimant accepted this in evidence when he confirmed his calculation at that time would not be 100% correct.

vi) The purchase contract, as called, would then be provided to the Defendant who could choose whether to accept the offer or not. If the Defendant accepted the offer then this was a contractual acceptance and, at this point, a contract arose between the parties. In accordance with section 2 of the Sale of Goods Act 1979 the contract was an agreement to sell as the goods had to be manufactured and installed so the transfer of property was to take place at a future time. Further the contract was conditional as the purchase contract made clear a survey of the customer's property would then be needed.

vii) If the survey showed the work could not be done the Defendant had the right to cancel the contract. If the survey showed that the purchase contract details needed to be changed whether by modification or variation then the parties would seek to agree this. It is therefore clear from the purchase contract that by the time the survey took place a contract was in place between the customer and the Defendant. However the exact terms of what the Defendant would supply to the customer was not yet fixed as either the contract could be cancelled or if needed it could be varied or modified.

64. The Claimant in his closing submissions asserted initially that there was no evidence in any of the eight test cases that the customer had agreed to any modifications or variations to the purchase contracts and therefore the purchase contracts remained as produced by the Claimant. This is not however correct as in Smout, Taberner, Scott, Lodge and Yousufi order variation and confirmation forms were signed.

65. Further using Holmes as an example, at the conclusion of the survey of the property by the surveyor a customer would sign the guard door survey, the window survey and the site/risk assessment. The first two of these documents contained a confirmation from the customer that "*I have read this survey and installation report together with Safestyle's terms and conditions of trading and agree that the company may manufacture accordingly.*" The site/risk assessment customer confirmation required the customer to sign "*I hereby accept that all the information on the surveyors report is an accurate account of the work we require. I understand all the above explanations and that you may manufacture accordingly. If I am signing on behalf of the above, I confirm that I am authorised to do so*".

66. The documents signed by the customer included any changes made to measurements, to the products supplied, to the type of glass used, the venting, the hinges to fire escapes, and access solutions. If the survey therefore had made the changes in those regards the surveys were signed variation or modification agreements in writing between the customer and the Defendant to the purchase contract. When this was drawn to the Claimant's attention he withdrew his assertion that no variations had been agreed in writing.

67. In the Holmes case the customer after the survey also sought to add new products to the order and to change the financing structure. However there is no evidence that this was agreed or the goods supplied given that all the documentary evidence before the Court relates to the sale of one door and 6 windows being the number of items listed in the purchase contract.

68. It is correct to note that changes which occurred after the contract had arisen and after the survey visit, for example, by the QC survey team, were changes made that were not always agreed in writing or countersigned by a customer. However there is evidence in the bundles that in some cases (e.g. Holmes) the changes were discussed with customers and agreed. I accept however that this was not always the case.

69. Initially in his closing submissions the Claimant stated that this meant that the additional or varied items were not sold by the Defendant to the customers but were gifted by the Defendant to the customers. When questioned on this during closing the Claimant withdrew that point and accepted that the items supplied to the customers were all sold, and the services provided for were all sold, to the customers. This was a sensible concession to make given that if changes were made orally, or even unilaterally by the Defendant at no cost to the customer, to the purchase contract this was a matter between the Defendant and the customer.

70. As a result of the above, in my judgment the "*list price*" from which the "*percentage out*" was to be calculated can only be the listed price of the items actually sold to a customer by the Defendant. For the Court to find otherwise would be to ignore clause 1.2 of the Sales Agency Contracts and to ignore the terms of the purchase contracts signed by the consumers which are contrary to the interpretation sought by the Claimant. Only once the purchase contract had been accepted by the Defendant did a contract arise and then it was a conditional contract until the technical survey was completed and any necessary discussions following such took place. Until this point the goods to be supplied to

customers, and the price of the job or the sale, was still conditional and, in accordance with the purchase contract itself, subject to change.

71. In any event the purchase contract was a conditional agreement to sell not a sale (see the Sale of Goods Act 1979). When this is understood the submission of the Claimant that the relevant prices for the calculation of his commission were the prices in the purchase contract document cannot be accepted as a logical meaning of the words in the commission structure as it ignores the factual matrix and the need under the commission structures for a sale to have occurred. Regulation 7 does not assist the Claimant given the terms of the commission structure in this case.

72. Further in the light of the factual matrix which applies in this case the interpretation contended for by the Claimant does not accord with business sense for the Claimant as if the customer called the Defendant after their meeting with the Claimant to add items to the order then despite being the person who introduced the work to the Defendant the Claimant would be denied commission on that work. Hence the Claimant's commission would put the Claimant in a worse position than his rights under Regulation 6.

73. Nor does it make business sense for the Defendant to have bound itself to paying commission in respect of what is, in essence, a quote before the contents of a final contract were agreed.

74. Further the Claimant's construction has the risk of working capriciously as if the commission was limited to the purchase contract the Defendant would be committed to paying commission in respect of an order that, potentially, it may be unable to fulfil in part, or a sales agent may be encouraged to sell items to a

customer which they know (or ought to know) the Claimant did not need for the purposes of increasing their own commission.

75. In contrast the Defendant's construction does not work capriciously. If a sales agent sold items in accordance with their training and the Defendant's policies, there should be no discrepancy between the listed price of the items a sales representative offered for sale and those that are ultimately sold to a customer by the Defendant.

76. In my judgment taking all the above matters into account the proper interpretation of the commission structures throughout the period of the Claimant's self-employment with the Defendant was that "*list price*" meant the list price of the items actually sold to the customer. I accept the words used in the commission structure were vague and not defined. However when the Court looks at the factual matrix this is the only construction which accords with commercial common sense and the text of the commission structures. The Court does not therefore need to rely on the co*ntra proferentem* rule in determining this issue.

77. I do not therefore need to consider the alternative case put forward by the Defendant on this issue.

Issue 2

78. Given the terms of the agreed list of issues of the parties and given my conclusion on issue 1, issue 2 does not arise for consideration in this case. I would however note for the benefit of the Claimant that if I had had to deal with this then in relation to the broad categories of disputes between the parties I would have concluded that:

i) The Claimant conceded that differences in measurements would affect his commission;

ii) The errors in relation to scaffolding and how this should be entered on the Polaris system was a mistake by the Claimant which would affect his commission on his contractual interpretation given the Claimant accepted that all Polaris did was change how purchase orders were prepared not the basis on which they were prepared. Scaffolding had always been accounted for as a list price item. Given Polaris was simply a new contractual recording method and the underlying policy did not change there was therefore no valid reason for the Claimant to enter scaffolding as a building works charge, nor did the Claimant require training above the training he received on this;

iii) Where the need for scaffolding or the type of scaffolding was changed by the surveyor or the QC team then this was due to a mistake by the Claimant which would affect his commission on his contractual interpretation given the Claimant had received full training in relation to the use of scaffolding. It is clear that the Claimant did not follow his training and did not properly view sites before setting out his access solutions. It was staggering that the Claimant considered that he could produce an access solution that he says should bind the Defendant without properly looking at the site layout and in one case, Holmes, without even looking at where the window was.

iv) Save in relation to fire escapes the Guide to FENSA Regulations insofar as it allowed for like for like replacements was a like for like replacement

scheme for windows and not for rooms ("*Replacement windows"*). To the extent the Claimant therefore assessed on a room by room basis and not a window by window basis he was wrong and this was a mistake which would affect his commission on his contractual interpretation.

v) In relation to fire escapes an order for replacement windows had to comply with two requirements. First windows had to be replaced with at least like for like replacements. Second if a room was a bedroom the room also had to have a fire escape. If therefore the purchase contract did not provide both for "not make worse" windows and a fire escape for a bedroom as a whole then this was a mistake which would affect the Claimant's commission on his contractual interpretation.

vi) Toughened glass had to be offered in accordance with the Guide and if the Claimant did not do so that was a mistake by him which would affect his commission on his interpretation.

vii) Products could only be offered for sale as offered by the Defendant and if the Claimant offered an item for sale which the Defendant could not fulfil, i.e. selling a door without flags where there was a continuous cill, this was a mistake by the Claimant which would affect his commission on his contractual interpretation.

79. I am satisfied that any mistakes set out above were not caused by a breach of regulation 4(2)(b) or regulation 12(1). As a matter of fact the Claimant had the necessary information to provide quotations to customers and Regulation 12 (1) refers to the details that must be provided on a commission statement. None of

the above errors were or could have been caused by the details on a commission statement.

80. Finally I am satisfied that the Claimant's arguments on causation/*novus actus interveniens* raised for the first time in his skeleton argument are wrong. Any mistakes he made were his mistakes to follow the training and guidance he had received. He did not require additional training.

Issue 3

81. Issue three relates not to the commission structure but the *"£100k Bonus Club*". The Claimant's pleaded case in this regard, as already noted, refers to eight cases with only one of these cases being a test case. The remaining seven cases mentioned in the Re-Amended Particulars of Claim related to different customers. As already noted the Claimant in his skeleton argument for trial however referred to the eight test cases being the relevant cases for the bonus structure and on that basis I agreed to hear this issue.

82. The pleaded case of the Claimant regarding the bonus structure is rather scant. The Re-Amended Particulars of Claim provide:

"*The Claimant is also owed a further £4000.00 in respect of the 100k Club Bonus. The Defendant undervalued the following orders by the following amounts in calculating the eligibility of the Claimant for a £4,000 100k Club Bonus for the month of October 2018:*

Order	*Customer*	*Amount of Defendant's undervalue of order*
1291412	*Bould*	*£1,414.58*
1290573	*McCabe*	*£23.61*
1292514	*Cooper*	*£387.25*

1291955	*Park*	*£1,778.00*
1294122	*Gibson*	*£468.00*
1290637	*Firth*	*£563.00*
1291680	*Spivey*	*£1,143.00*
1292180	*Traberney*	*£417.12*

Total £11,944.31

The Claimant reserves the right to amend the claim in respect of the 100k Club Bonus upon receipt of correct calculations in respect of all additional extras supplied by the Defendant to customers whose orders had been completed following successful sales by the Claimant.''

83. The Claimant did not therefore provide the basis of his calculation of the undervalues of the orders to the Court nor did he explain how the undervalue of the orders was said to relate to the bonus structure.

84. The Defendant denies the claim in this regard and in its Re-Re-Amended Defence pleads that to be eligible for a bonus for a particular month of the year the aggregate list price of items sold by the sales agent and fitted within the month in which the bonus is to be claimed must exceed a certain threshold. There are 12 thresholds. The Defendant pleads that in relation to the year 2018 the first three thresholds were £100,000, £107,500 and £115,000 respectively. The Defendant further pleads that the Claimant had already claimed a bonus twice in the calendar year : May 2018 and June 2018. The Defendant asserts that the bonuses and the thresholds were sequential and therefore the May 2018 bonus related to the first threshold, the June 2018 bonus related to the second

threshold, and any claim by the Claimant as asserted before this Court must therefore relate to the third threshold and the relevant sales would have to be £115,000.

85. Further the Defendant asserts that in order to be eligible for discount the sales agent had to also achieve an average discount on the fitted business sold of between 42 and 48%. The Defendant notes that the Claimant does not in his Re-Amended Particulars of Claim plead that he achieved £115,000 in fitted business in the relevant month nor does it refer to the average discount. Finally the Defendant notes that the Claimant does not plead the basis on which the Defendant is said to have undervalued the orders as asserted by the Claimant in his Re-Amended Particulars of Claim.

86. As already noted given this is a civil matter the burden of proof rests on the Claimant to prove his claim in relation to the bonus on all grounds. It is therefore surprising that the Claimant in his four witness statements relied on at trial did not address the bonus issue. The Claimant did produce the £100k Bonus Club literature and has disclosed an e-mail from him claiming a bonus under that scheme with some figures in it but not the calculations in relation thereto.

87. The evidence from the Defendant in this regard came from Miss Kayleigh Whitfield. Miss Whitfield, at paragraphs 28 to 36 of her statement, set out the Defendant's factual contentions in relation to the bonus. Miss Whitfield candidly admitted that in early 2018 the team she worked for had little knowledge of the bonus club. The bonuses were not therefore handled by her team but were handled by an individual called Anna-Marie in the old sales management team. Anna-Marie left the Defendant's employ in 2019.

88. Miss Whitfield told the Court that in 2018 her team started assisting with the bonuses having become aware of the terms of the bonus structure from posters on the walls. They applied those terms. Miss Whitfield was clear that the bonus club consisted of three elements: the value of the orders that were fitted, the average efficiency for the month, and the average discount. She was also clear that the thresholds were sequential in 2018. Again she candidly admitted that the situation changed in 2019 when, following complaints from agents, the brackets were made non-sequential. She exhibited to her statement an e-mail showing when that change was made.

89. In order to succeed in his claim for the bonus it is for the Claimant to prove on the balance of probabilities that he was entitled to the bonus. It is therefore necessary for him to show that he had complied with the conditions applicable to the bonus.

90. On the evidence before me the Claimant has singularly failed to do so.

91. I am satisfied having considered all the evidence before me that the Defendant is correct in its contentions that to achieve a bonus the Claimant must satisfy a sales threshold, an efficiency bonus and a fitted discount bonus. This is clear from the poster promoting the Bonus Club. The Claimant has neither pleaded a case nor provided any evidence showing that he fulfilled these requirements. The highest his case gets is that but for errors on the Defendant's part he would have achieved the sales threshold. However he has singularly failed to address the other two elements.

92. In relation to the sales thresholds the poster promoting the Bonus Club is clear that the thresholds are sequential: "*Potentially this can be achieved 12 times in*

a calendar year. Once you have achieved the first bracket you then move on to the next one, you remain on this bracket until it is achieved. Each bracket can only be claimed once within a calendar year."

93. In his closing submissions the Claimant seemed to allude, but he went no further than that, to the sequential requirement having been disapplied by the previous sales team working for the Defendant prior to Miss Whitfield's involvement. However as noted this was an allusion it was not a firmly put submission. Further it was an allusion backed with no evidential support. There is no evidence in the papers before the court either documentary or witness evidence, nor was there any evidence adduced at trial, to show that the Defendant's sales team had disapplied the sequential requirement prior to 2019. The possibility of such happening is not the same thing as it happening and there is insufficient evidence for this Court to conclude that it did happen particularly given the Claimant has never raised this point in evidence before.

94. As to the qualifying sales of the Claimant for the relevant month the evidence before the Court shows that the Claimant in the relevant month made sales as valued by the Defendant of approximately £106,000. The relevant threshold for that month was £115,000. The Claimant pleaded that the sales were undervalued. However he has not evidenced that this was the case. The only case he has addressed in his evidence is Taberner. However given my conclusions on issue 1 this sale, with all the test cases, was not undervalued and therefore is insufficient to meet the sales threshold.

95. As to the remaining pleaded cases the only evidence relied upon by the Claimant is an e-mail he sent the Defendants in 2018. However that e-mail does not assist

the Claimant. The e-mail simply lists customer numbers, customer names and figures it does not assert how the undervalue is said to have arisen or explain the figures. For the Claimant to succeed on this issue the Court needed that to be addressed in the evidence. It was not. The Claimant has not therefore shown that he met the relevant sales threshold.

96. The Claimant seemed to assert that he did not need to address the above issue as in correspondence with the Defendant at the time the Defendant did not raise the sales threshold issue. This is however wrong. The Defendant raised the sales threshold as an issue in its pleaded case. It was entitled to do so as a party is not required as a matter of law when asserting that a person is not entitled to a remedy under a contract to set out all of the arguments they will then rely on in court. Having raised the sales threshold as a pleaded issue the Claimant needed to address this. He did not do so. As a result, the Claimant has failed to show that he qualified for the bonus. This head of claim is therefore dismissed.

Conclusion

97. It is the judgment of this Court that insofar as the standard commission structure was concerned "*list price*" means the list price of products sold by the Defendant to its customers. It does not mean the sales price of the items set out in the purchase order completed by the Claimant. As a result, the Claimant's claim to additional commission on the eight test cases is dismissed.

98. Further the Claimant's claim to the bonus under the "*100k Bonus Club*" fails as the Claimant has failed to prove that he qualified for the bonus. The claim to the bonus under that scheme is therefore dismissed.

99. As noted, this case is a preliminary issue trial. The court will need to hear submissions from the parties as to what happens next although it would appear from the Claimant's pleaded case that the claim stands to be dismissed. To ensure that the Claimant is able to fully address the Court as to next steps a costs and consequential hearing will be listed by the Court. That hearing will also consider all other matters ordered to be dealt with at a costs and consequential hearing by Judges under previous orders.