Neutral Citation Number: [2021] EWHC 351 (QB)

Case No: QB-2019-000130

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 February 2021

Before :

GAVIN MANSFIELD QC
(Sitting as a Judge of the High Court)

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Between :

JUŠTE PUHARIĆ	**Claimant**
- and -	
SILVERBOND ENTERPRISES LIMITED	**Defendant**

- -
- -

Mr Christopher Bamford (instructed by **Karam, Missick & Traube LLP**) for the **Claimant**
Mr Guy Olliff-Cooper (instructed by **CANDEY**) for the **Defendant**

Hearing dates: 3-6 November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 22nd February 2021.

Gavin Mansfield QC:

INTRODUCTION

1. The Claimant is a Croatian businessman. He is an experienced gambler. By his own description (not disputed by the Defendant) he is a "high-roller" or VIP gambler. He plays in casinos internationally and his preferred game is roulette.

2. The Defendant ("**the Club**") owns and operates a casino known as the Park Lane Club in Mayfair, London. The casino opened in November 2014.

3. Over five nights in May 2015 the Claimant played roulette at the Club. Those nights (described as his "trip") were the first and last times he played at the Club. Despite a loss on his first night the Claimant was successful overall: he won £1,240,900.

4. The Claimant was paid his winnings. This claim concerns an additional amount: a bonus or incentive. The Claimant claims an incentive was offered to induce him to play at the Club. He says he would not have played at the Club without such an incentive.

OUTLINE OF THE PARTIES' POSITIONS

The Claimant's Primary and Alternative Claims

5. The Claimant's primary case is that he entered into an oral contract with the Club for a bespoke incentive. He claims the Club orally offered to pay 0.9% of his table turnover when he played roulette, and he accepted the offer by playing. He claims £243,518.59, which is 0.9% of his total turnover of £27,057,621.

6. There are differences between the Claimant's pleaded case and his evidence as to the terms of this agreement. I allowed the trial to proceed on the basis of the evidential case the Claimant wished to present. I deal with the inconsistencies between the pleadings and the evidence in more detail below.

7. The Claimant's alternative case is that, even if there was no bespoke agreement, he was put into the Club's default commission scheme and he is contractually entitled to be paid the commission which accrued under that scheme. The Club's computer system shows an accrued commission of £225,156.17, which is the sum claimed on the alternative case. In the further alternative, in the event that the Club had a discretion as to whether to pay out accrued commission, it is alleged that the Club has breached a number of implied terms restricting the exercise of that discretion.

The Club's Position

8. The Club denies there was any contract as to bonus/incentives. It disputes the Claimant's account of what was said. It may have said that it would be prepared to consider matching terms that the Claimant received elsewhere, but the Club would have needed to be told the terms the Claimant received elsewhere and to have verified them. Further, it would only have offered an incentive that fitted

within one of the existing schemes that the Club operated at that time. The Club argues that what was said between the parties indicated a lack of intention to create legal relations and was too uncertain to give rise to a contract.

9. As to the alternative claim, the Club's case is that in the absence of any specific agreement the Claimant has no right to a sum over and above his winnings because the Club's commission scheme was only a mechanism for generating a fund from which the Club could choose whether or not to pay an incentive.

ORAL CONTRACTS

10. The legal requirements for formation of a contract are straightforward and not in dispute. The Club relied on the summary of principles set out by Leggatt J (as he then was) in ***Blue v Ashley*** [2017] EWHC 1928 (Comm) paragraphs 49- 61; the Claimant agreed with that summary. At paragraph 49 Leggatt J said:

> "Generally speaking, it is possible under English law to make a contract without any formality, simply by word of mouth. Of course, the absence of a written record may make the existence and terms of a contract harder to prove. Furthermore, because the value of a written record is understood by anyone with business experience, its absence may – depending on the circumstances – tend to suggest that no contract was in fact concluded. But those are matters of proof: they are not legal requirements. The basic requirements of a contract are that: (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable: see e.g. Burrows, "A Restatement of the English Law of Contract" (2016) section 2."

11. The key issues in this case are whether there was an offer capable of acceptance; whether there was an offer that was intended to be legally binding; and whether there was an agreement sufficiently certain and complete to be enforceable. These three issues overlap. The Club further relies on an absence of communicated acceptance.

12. The Club also raised a point as to the authority of its employees to enter into a binding agreement. By the end of the trial the point had fallen away. The Claimant relied specifically on an offer being made by Mr Walker; the Club accepted that Mr Walker had authority to enter into an agreement.

EVIDENCE BASED ON THE WITNESSES' MEMORY

13. I have to evaluate the witnesses' recollection of what was said in a casino five and a half years ago. I have regard to well-known judicial observations on the reliability, or otherwise, of witness evidence.

14. At paragraphs 66-70 of ***Blue v Ashley*** Leggatt J set out his own observations about the unreliability of human memory in ***Gestmin v SGPS SA v Credit Suisse***

(UK) Ltd. [2013] EWHC 3560 paras 16-20. He expanded on those observations by referring to two findings of psychological research (para 69):

> "In addition to the points that I noted in the Gestmin case, two other findings of psychological research seem to me of assistance in the present case. First, numerous experiments have shown that, when new information is encoded which is related to the self, subsequent memory for that information is improved compared with the encoding of other information. Second, there is a powerful tendency for people to remember past events concerning themselves in a self-enhancing light."

15. In ***Martin v Kogan*** [2019] EWCA Civ 1645 the Court of Appeal said the following about Leggatt J's observations in ***Gestmin***:

> "88. We start by recalling that the judge read Leggatt J's statements in *Gestmin* [2013] EWHC 3560 (Comm) and *Blue v Ashley* [2017] EWHC 1928 (Comm) as an "admonition" against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in *CXB v North West Anglia NHS Foundation Trust* [2019] EWHC 2053 (QB), *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay "The Judge as Juror: The Judicial Determination of Factual Issues" (from *The Business of Judging* (Oxford, 2000)). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."
>
> 89. Secondly, the judge in the present case did not remark that the observations in *Gestmin* [2013] EWHC 3560 (Comm) were expressly addressed to commercial cases. For a paradigm example of such a case, in which a careful examination of the abundant documentation ought to have been at the heart of an inquiry into commercial fraud, see *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 and the apposite remarks of Males LJ at [48]–[49]. Here, by contrast, the two parties were private individuals living together for much of the relevant time. That fact made it inherently improbable that

details of all their interactions over the creation of the screenplay would be fully recorded in documents.

16. I accept the Claimant's submission that this is not a commercial dispute. Although the Club was running a business, from the Claimant's perspective he was gambling for fun, not as a business activity. In this context one may not expect to see an agreement documented in the same way as a commercial deal. Any assessment of the evidence as to an oral agreement needs to be sensitive to the context. I must consider all of the evidence in the round and must consider the disputed witness evidence in its proper context, including the agreed facts and the documentary record. Leggatt J's observations remain a useful warning as to the fallibility of memory.

17. It was apparent from the evidence at trial that none of the witnesses claimed to have a perfect recollection of what was said in 2015. Both parties relied on a mixture of witness recollection and the surrounding circumstances, which were said to make one version of events more or less likely than the other.

THE PRIMARY CLAIM: WHAT WAS SAID ABOUT THE TERMS OF GAMBLING BEFORE THE CLAIMANT STARTED GAMBLING AT THE CLUB?

The Common Ground and the Documents

18. The Claimant was a well-known figure in the casinos of Mayfair, London. He was known as a roulette player who gambled large sums. He was well known at casinos including Les Ambassadeurs, Crockfords and the Playboy Club.

19. Management and staff often move from one casino to another. From the time it opened, the Club's Managing Director was Mr Bob Walker. Mr Neil Gallacher joined as Head of Gaming on 11 February 2015. The Club's Marketing Director was Mr Sotirios Hassiakos from 1 May 2015, though he may have had some involvement with the Club prior to that date. All three had worked at other casinos and all three knew the Claimant from their previous casinos. Ms Celina Rekowska was the Club's senior cashier in 2015. She had previously worked at the Playboy Club, though she did not know the Claimant from her time there. Mr Gallacher gave evidence for the Claimant. Mr Walker and Ms Rekowska gave evidence for the Club. I did not hear evidence from Mr Hassiakos.

20. There is a benefit to casinos in attracting high profile players to play. Casinos are therefore prepared to offer a variety of incentives to gamblers. Depending on the profile of the player and the type of game, these incentives may take different forms. Some players may be attracted by free hospitality (food and beverages, hotel rooms, flights to London) or tickets to sporting events. Other players (particularly high stakes players) may be attracted by financial incentives, which may take a number of different forms.

21. Each of Mr Gallacher, Mr Hassiakos and (to a lesser extent) Mr Walker took some steps to invite or encourage the Claimant to play at the Club. The pleaded case is very broad – paragraphs 9 to 10 of the Particulars of Claim allege that the Club made an offer to the Claimant in conversations which took place on various occasions between January 2015 and May 2015 between the Claimant, Mr

Walker, Mr Gallacher and Mr Hassiakos. In fact, on the basis of the Claimant's own evidence, the case depends on a smaller number of conversations between late April 2015 and 26 May 2015.

22. Mr Walker showed the Claimant round the site of the Club at some point before it opened in November 2014, while it was being fitted out. The Claimant confirmed in cross-examination that this was his only relevant conversation with Mr Walker prior to 30 April 2015. The Claimant's evidence was that Mr Walker said that if the Claimant played at the Club he would give him the best deal in town. Mr Walker disputes that he said that, but even if he did the words were no more than a vague and general encouragement.

23. On some occasions Mr Gallacher saw the Claimant on the street in Mayfair and encouraged him to play at the Club. The Claimant says that Mr Hassiakos did the same. There is little weight to be attached to these conversations, even on the Claimant's own evidence:

    a) The encouragement by Mr Gallacher was of a general nature. Specific terms were not discussed or agreed, save for one occasion in April 2015 when the Claimant says he and his friend Mr Predrag Racic had a conversation on the street with Mr Gallacher. I return to that conversation below.

    b) Mr Gallacher did not have authority himself to agree an incentive with the Claimant, and the Claimant was aware that he did not have authority.

    c) In any event, these conversations on the street were followed by more specific discussion and agreement in the Club itself.

    d) Mr Hassiakos' employment at the Club did not begin until 1 May 2015.

24. Matters then moved from the street to the Club where, as a result of the Club's system for logging visitors, it is possible to pinpoint the relevant dates. The Claimant is first shown as visiting the Club on 30 April 2015. He did not gamble on that occasion but he did join the Club. He completed and signed membership registration and membership declaration forms. During the course of this visit there was a three way conversation between the Claimant, Mr Walker and Mr Gallacher. The Claimant's case is that Mr Walker agreed the terms on which the Claimant could play at the Club. Mr Walker denies this. I return to the disputed oral evidence below.

25. The membership declaration signed by the Claimant stated that the Claimant agreed to be bound by the rules of the casino and by-laws. That was a reference to a two page document "Rules of the Club". It was not clear on the evidence whether the Claimant was provided with a copy of these rules, but there was no dispute that these were the applicable rules which bound the parties. Rule 6.11 provides:

> "The Proprietor, herewith gives notice that there will, from time to time, be in operation various and multiple bonus

> schemes. At the discretion of the Company, a percentage of any generated bonus funds may be considered in respect of expenses incurred by members and their guests."

26. There are no documents setting out any agreement or discussion as to specific terms offered to the Claimant on 30 April. Not only was no document given to the Claimant (other than the membership registration and declaration forms), there is no internal Club document referring to any incentive agreement.

27. The Claimant visited the Club on 25 May (going into the early hours of 26 May – for each of these night-time visits I use the date of arrival). He had dinner with friends in the Club's restaurant but he did not play.

28. The next night (26 May) the Claimant visited the Club again. He had dinner with friends, joined by Mr Gallacher and he played for the first time. He bought in £450,000 of chips. He suffered a loss recorded by the Club's systems as £213,732. The Claimant's case is that prior to playing he had a private conversation with Mr Walker, during which Mr Walker confirmed the terms on which the Claimant could gamble. This is disputed, and I return to the oral evidence below.

29. Once again, there is nothing in writing between the parties as to any incentive scheme on either 25 or 26 May. Indeed, there is nothing in writing between them at all, apart from the membership registration and declaration forms signed on 30 April.

30. On 26 May Mr Mills, an employee of the Club, created a "Player Program Agreement" for the Claimant. The parties agree that this is not an agreement. It is an internal document that was not provided to the Claimant. The Player Program Agreement sets out four programs under the heading "Available Program Terms" each containing commission rates for roulette and baccarat. The program selected for the Claimant is Program 4. For "Bonus Roulette" Program 4 has a commission rate of 0.8% (the highest rate for roulette). The document itself sheds no light on either (a) the numbers to which the indicated percentage falls to be applied; or (b) the nature, if any, of the Club's obligation to pay out the commission generated.

31. Information about the Claimant's gambling can be seen in a system called "Intelligent Gaming" ("**IG**"). This is a third party software system, used by the Club and by other casinos. A table produced from IG ("**the Gaming Details Sheet**") showed a summary of information relating to each night of the Claimant's gambling, with columns (among others) for turnover, win/lose amount and "commission". The Club's witnesses explained (and I accept) that IG also recorded more detailed information in relation to each stake placed by a player, recorded by a member of staff on an iPad as each game was played but that level of detailed information was only kept for a year.

32. In total the Claimant's trip comprised five consecutive nights (26-30 May) playing roulette at the Club. The Gaming Details Sheet shows that over the course of those five nights the Claimant bought in for chips worth £975,000. His

table turnover was £27,057,621. His "win" total was £1,466,056. IG records a generated commission of £225,156.17.

33. After some confusion during the course of the trial, the parties agreed the correct winnings figure had been paid to the Claimant. Paragraph 21-22 of the Particulars of Claim plead that the Claimant's net winnings were £1,466,056; the Defence admits that at paragraph 33. The Claimant's witness statement, paragraph 36, says he was paid £1,240,900. The parties agree that this latter figure is what was paid, and that it is the correct winnings figure. I gave the parties permission to amend the Particulars of Claim and Defence to reflect the true position on Day 3 of the trial. It appears that £1,466,056 in the win/loss column of IG is the total of net winnings and the commission generated by IG.

Commission and Incentives

34. The Claimant points to the fact that the Club placed him on a commission scheme under which commission accrued to him over the course of his trip. The Claimant relies on this in two ways:

    a) He argues that it supports his primary case that there was an express agreement between the parties: in essence, the fact that he was placed on a scheme shows that the parties must have agreed that he would be entitled to an incentive.

    b) The Claimant's alternative case is that he is entitled to receive the commission accrued under the Club's default scheme.

35. The Club's case is that there is a distinction between "commission" and "incentives". Incentives are additional benefits that casinos can offer to players, but they are not obliged to do so. Commission is a figure which accrues when a player plays and which is put aside in order to fund incentives should the casino choose to offer them.

36. The Club's evidence was that it operated an enhanced odds scheme for roulette ("**Bonus Roulette**") which generated commission. Mr Parsons (the Club's current Managing Director) gave evidence that IG calculates commission by applying a percentage to each customer's winning bet. The accrued commission could be used to offer customers different rewards or incentives. Mr Baum (a former Managing Director), and Ms Rekowska gave evidence to the same effect.

37. Mr Gallacher accepted the distinction between incentives and commission, the latter being the mechanism for funding incentives. I accept the Club's evidence as to the meaning of commission as it appears in IG.

38. In fact, part of the Claimant's accrued commission was used to settle his own expenses. It was also used, in error, to settle the expenses of another unrelated player. That error was corrected but stands as an example of the Club using part of accrued commission to settle expenses, rather than paying out the accrued amount to the customer. After payment of the Claimant's expenses the remainder of the commission was not paid to the Claimant. It was "credited back to the tables" (i.e. booked as revenue for the Club) in February 2018.

39. There was considerable debate during the course of evidence as to the forms of incentive that the Club and other casinos offered, and their respective methods of calculation. The Claimant's position is that the incentive he was given at other casinos, and which the Club agreed to match, was a "rolling turnover" scheme, under which he was entitled to a percentage of every bet, win or lose.

40. The Club's evidence was that players of roulette have only been offered two types of reward: payment of hospitality expenses and "discount on losses", by which commission was used to reduce the amount of a player's loss. It was not the Club's practice to offer an incentive in the form of payment of a percentage of winning bets. It did not offer a turnover programme of any kind to roulette players, though turnover programmes were offered to baccarat players.

41. The Claimant's evidence, supported by Mr Gallacher, is that he was given incentives to play roulette at both Les Ambassadeurs and Crockfords. I did not hear evidence from a representative of either casino, but the Claimant relied on letters from Mr Pearce of Genting Casinos (owners of Crockfords) dated 25 September 2018 and Mr McGowen of Les Ambassadeurs dated 3 March 2020. Those letters each suggest that those clubs offered 0.9% turnover bonus on roulette. The Club did not have the opportunity to cross-examine the authors of the letters. A number of matters are unclear in each case: the nature of the turnover bonus and its method of calculation; the period of time when it applied (Mr Pearce refers to an offer in October 2013); and the terms and conditions attached to such bonuses (Mr McGowen says that options were discussed and offered "*based on acceptance of terms and conditions*"). It was clear from the Claimant's own evidence in cross-examination that he did not understand how his bonuses were calculated at those casinos, nor was he interested to find out. He said he believed that a turnover bonus was paid on the total amount he put on the table, but he did not know how it was calculated, and he did not check the amounts he was given.

> "*I don't give a shit. I don't care. I'm playing for me, they are just chips. When I lose, at the end of the evening I come to him and say "How much is it?" They tell me 50/70/100,000, can you give me? Okay and they give me. I never check how much it is, but I always get. Only from you I didn't get nothing*." [Day 1 p.17].

42. It is not necessary for me to decide the exact nature of the bonuses the Claimant received from other casinos. I accept the Claimant's evidence that he was receiving some form of bonus from other casinos, and that for some period it may have been as much as 0.9% calculated on some measure of "turnover".

43. I also accept the Club's evidence that it did not operate a turnover programme for roulette in 2015. Mr Gallacher accepted this in cross-examination. He said that before the Claimant nobody had been offered a turnover roulette programme and he could not remember anybody else being offered such a programme up until the time he left the Club, later in 2015. He accepted that such an offer would have been unique.

The Oral Evidence

44. I turn to the witness evidence concerning the three material conversations: the conversation on the street in late April 2015 between the Claimant, Mr Racic and Mr Gallacher; the conversation in the Club on 30 April 2015, the night the Claimant joined the Club; and the conversation between the Claimant and Mr Walker in the Club on 26 May 2015, the night the Claimant played roulette there for the first time.

45. The Claimant said that in the conversation on the street Mr Gallacher told him that the Club's incentive/bonus would be better than he had elsewhere. The Claimant asked whether the Club would provide more than 0.9% bonus on turnover and £3,000 maximum on a number. Mr Gallacher said he would need to confirm this with the management team. Mr Racic gave evidence to the same effect.

46. Mr Gallacher gave slightly different evidence. He says that he was asked whether the Club could offer a maximum bet of £3,000 and "better bonuses". He told the Claimant that he would have to discuss with his team, but that the Club would as a minimum match the Claimant's incentive/bonus elsewhere in Mayfair. He said he discussed terms the Claimant was receiving elsewhere in Mayfair, but he could not remember what those terms were. Mr Gallacher's witness statement makes no mention of 0.9%, or any percentage. On any view, no offer was made to the Claimant in this conversation.

47. The Claimant's evidence was as follows:

    a) On 30 April 2015 he went to the Club to seek confirmation of his incentive/bonus offers, following the conversation with Mr Gallacher on the street. He spoke to Mr Gallacher at the bar, who confirmed that the Club could not agree what he had asked for (more than 0.9% turnover bonus and £3,000 maximum on a number), but that the Club would match the Claimant's current incentive scheme at Les Ambassadeurs and Crockfords of 0.9% turnover and £2,000 maximum on a number. He said that "later on the same day" Mr Walker joined them at the bar and confirmed that the Club could make "this matching offer".

    b) The Claimant accepted that there was no discussion of threshold requirements, the time for which the bonus offer would last, or the way in which the "turnover" bonus would be calculated. His position was that he was a sufficiently valuable player that none of those things needed to be discussed.

    c) On 26 May, after dinner but before he started playing, he had a private conversation with Mr Walker, in which Mr Walker confirmed "once again" the offer of £2,000 maximum on a number and 0.9% turnover bonus.

48. Mr Gallacher's evidence was that there was a three way discussion between himself, Mr Walker and the Claimant prior to the Claimant playing at the Club in

which an offer to match the Claimant's turnover bonus regardless of win or loss and a maximum bet on a number was made and agreed (WS para 10). Although he went on to explain his understanding of the nature of a turnover bonus, he does not suggest that this was talked about in the meeting. Mr Gallacher recalls that a £2,000 maximum was approved by Mr Walker and agreed by the Claimant. He could not recall the exact percentage for turnover discussed. He says that he would not have been able to persuade the Claimant, or any other VIP player, to play at the Club without desirable incentives and maximums.

49. Mr Gallacher did not say exactly when this conversation took place. He does not refer to any specific dates when the Claimant attended the Club, whether 30 April, 26 May or any other date. His evidence was of a more general nature as to the period.

50. When cross-examined it was clear that Mr Gallacher had no recollection of 0.9% being mentioned by the Claimant on any occasion. He said that the events occurred when he was on notice and about to move overseas, and he had "*a million and one things going through [his] head at the time*". The one consistent thing he said he recalled is that the Claimant asked for £3,000 maximum bet. He maintained a position that he was fully confident that a turnover programme was agreed between the Club and the Claimant, though he did not know, or rather could not recall, what the percentage was.

51. Mr Gallacher also said [Day 2 p.52] "*it was agreed because I was in the restaurant what [sic] they agreed and he said, "Okay good" he went and played*." He repeated "*I remember categorically that it was agreed, he started to play*". The Claimant started to play, of course, on 26 May. There are two respects in which this evidence is at odds with the Claimant's evidence. First, the Claimant described a private conversation with Mr Walker on 26 May; Mr Gallacher was not present for that conversation. Second, on the Claimant's evidence (supported by Mr Racic) the Club made its offer on 30 April in a conversation to which Mr Gallacher was party. On that evidence, terms were offered and then it was nearly four weeks before the Claimant first played.

52. Mr Gallacher, in his witness statement, said that the confirmation of the offer was authorised by the Club's owner, Mr Melniks, and signed off by Mr Walker. In cross-examination he accepted that there was nothing in writing concerning the offer and said that by "signed off" he was not referring to anything in writing.

53. I found Mr Gallacher's evidence unhelpful. He was evasive and unwilling to answer questions directly. He had a tendency to try to anticipate the thread of questions and critique the relevance of them, despite my reminders on two occasions that he should focus on answering the questions. As a result, I was left with the impression that he was more concerned to argue his position than to assist the court with his recollection of events.

54. Both the Claimant and Mr Gallacher suggested that there were more interactions between them, Mr Walker and Mr Hassiakos at the Club, or outside, between 30 April and 26 May. These other interactions were not relied on by the Claimant's counsel in closing. The evidence demonstrated a vagueness, and some

inconsistencies, that are material to assessment of the witnesses' recollection of the key conversations.

a) Mr Gallacher's said there were multiple interactions with the executive team, including Mr Walker, over a week downstairs at the Club over a coffee or a drink. Mr Gallacher said that the main reason for the Claimant being there was to get the deal he wanted so he could start to play. I reject that evidence. The thrust of the Claimant's evidence is that he was reluctant to play at the Club and needed persuasion; it is unlikely that he would repeatedly attend the Club to negotiate a deal.

b) I note that in paragraph 31 of his witness statement the Claimant states that the offer of incentives/bonus "*had already been confirmed at the bar by Neil and Bob many times between 30 April 2015 and 25 May."* I reject that evidence. First, there is no evidence that the Claimant attended the Club, even the bar, on any date after 30 April and before 25 May. The Club records indicate that he did not. The Claimant alleged that the records had been altered or his presence not recorded. I reject those suggestions. Second, it is difficult to see why the offer would need to be repeated many times. Third, whereas Mr Gallacher suggests that the Claimant attended "multiple interactions" to negotiate a deal, the Claimant's suggestion is that an offer that was acceptable to him was repeated multiple times. Neither account seems plausible.

c) The Claimant's evidence was that after 30 April he saw Mr Hassiakos in the street on two to three occasions and on each occasion Mr Hassiakos confirmed that the Club would match his incentive scheme at other Mayfair casinos. When he was asked about these conversations in cross-examination he could not, understandably, recall when he spoke to Mr Hassiakos or exactly what was said [Day 1 p.64]. He went on to say that Mr Hassiakos said "*come, we will give you the best"* and "*we will give you more, we will give you whatever you want*". Such statements (whether they reflect the actual words or the gist of them) are different to an agreement that the Club could match, but not beat, terms received by the Claimant elsewhere. They are also different to a specific offer to pay 0.9%. If Mr Hassiakos made such statements after 30 April then far from Mr Hassiakos confirming what had been offered on 30 April, they suggest either that such an agreement had not been reached, or that Mr Hassiakos was not aware of it.

55. Mr Racic's evidence was as follows:

a) He visited the site of the Club in Autumn 2014 before it opened with the Claimant and Mr Walker. Mr Walker told the Claimant that whatever bonus he was receiving from other casinos, the Club would offer more. They did not go into the details of the bonuses.

b) The Claimant told him he was receiving a 0.9% turnover bonus and maximum £2,000 bet per spin at Crockfords and Les Ambassadeurs.

c) In the Spring of 2015 he and the Claimant were stopped several times by Mr Gallacher or Mr Hassiakos who encouraged them to come to the Club. The conversations were informal, and they repeated the offer that the Claimant would have "better" incentives and bonuses than at other clubs. They did not discuss percentages, though on one occasion the Claimant asked Mr Gallacher if the better incentive will be £3,000 maximum and more than 0.9% bonus, to which Mr Gallacher indicated he would have to get confirmation.

d) When he visited the Club with the Claimant he was not present at any discussions about incentives or bonuses, even though Mr Gallacher and Mr Walker joined them at one time or another. He says he saw the Claimant and Mr Walker have a private conversation on the second occasion, though he also says (in the same paragraph) that he understood that the terms of playing had already been agreed by that time. He says that the Claimant told him that Mr Gallacher and Mr Walker confirmed that the Club could match 0.9% and £2,000 maximum on a number.

e) In cross-examination he said that the Claimant told him that the Club promised "*better and better*" [Day 2 p.122]. He says he thought the Club must have offered at least 0.91% as that is better than the 0.9% the Claimant received in other casinos. That evidence was inconsistent with the Claimant's case and his own witness statement which said that 0.9% was agreed; and that the Club had told the Claimant that it could match terms but could not give better terms.

56. The only witness called by the Club who had any dealings with the Claimant prior to him commencing playing at the Club was Mr Walker, who was its Managing Director from its opening until May 2016. In his first witness statement he said that he did not speak to the Claimant prior to his admission to the Club. He spoke to the Claimant when he played at the Club but did not discuss any terms or programmes with him (WS1 paras 9-10). At that point, Mr Walker was responding to a case pleaded in the Particulars of Claim that relied on conversations "*on various dates between January 2015 and May 2015*" between Mr Walker, Mr Gallacher and Mr Hassiakos and the Claimant and no particular conversations were pleaded.

57. In his second witness statement, Mr Walker addressed the specific meetings alleged by the Claimant and his witnesses.

a) He accepts that he may have seen the Claimant on the street and shown him round the site prior to the Club opening. He denies that he would have offered better terms than the Claimant was receiving elsewhere, as he did not know what those terms were.

b) Similarly, he denies that on 30 April he reached an agreement with the Claimant or made any offer capable of acceptance. He may have said the club would consider matching terms, but he would have needed to know what those terms were, and to verify them, and the terms would

have needed to have fallen within one of the schemes the Club already offered.

c) He denies that he confirmed the same offer on 26 May.

58. I found that Mr Walker gave his evidence in a clear and straightforward way, and did his best to assist the court with his recollection of events which concerned his former employer and took place some five and half years earlier.

59. The evidence of the Claimant's two further witnesses, Mr Chainrai and Mr Everett, did not assist on the key issues. Neither Mr Chainrai nor Mr Everett were present at any of the relevant discussions between the Claimant and the Club.

The Pleaded Case as to the Offer and the evidence

60. I have so far set out the Claimant's case as it was set out in his witness statement and in the oral evidence he gave. His pleaded case is different.

61. First, there are differences as to when the offer is said to have been made. The Claimant's pleaded case is that "the Offer" was made in a number of conversations between January 2015 and May 2015. The Particulars of Claim do not make any specific allegations as to what was said on any given occasion. As I have set out above, the Claimant now relies on specific conversations with Mr Walker on 30 April and 26 May. While each of those conversations fall within the broad pleading in the Particulars of Claim, it is noteworthy that there was no mention of the specific conversations until the Claimant served his witness statement for trial on 18 September 2020, more than five years after the relevant events.

62. Second, and more significantly, there is a difference in the alleged terms offered. According to paragraph 10 of the Particulars of Claim, the offer was that if the Claimant gambled on roulette at the Club he would do so on the same or better terms than those he had the benefit of at other Mayfair casinos. Paragraph 13 of the Particulars of Claim explains in some detail the effect of the Offer. If the Club's standard terms were more favourable to the Claimant than the best terms he enjoyed elsewhere in Mayfair, then the Club's terms would apply. If the Club's standard terms were less favourable than the best terms he enjoyed elsewhere in Mayfair, then those better terms would apply.

63. Paragraph 15 pleads that the Club (through Messrs Walker, Gallacher and Hassiakos) knew that the terms the Claimant enjoyed at Crockfords and Les Ambassadeurs included an entitlement to 0.9% of all money gambled on roulette, regardless of whether the gambling resulted in a win or a loss.

64. This pleaded case is quite different to the evidence given that there was an offer to match, but not beat, the specific 0.9% turnover bonus the Claimant said he was receiving elsewhere.

65. In cross-examination the Claimant initially said that Mr Walker told him (on 30 April) both that the Club would match the terms that the Claimant received at

other casinos from time to time and that the Club could not give him more than 0.9% but could match that figure. Those two propositions are inconsistent. When questioned further, the Claimant accepted that if his percentage bonus at another casino improved his percentage at the Club would not automatically improve – he would try to get a higher rate from the Club and there would need to be another conversation. When it was put to him that this was inconsistent with his Particulars of Claim the Claimant did not seem able, or willing, to grasp the contradiction. He maintained that he was told both that he was offered specifically 0.9% turnover and that he was told that the Club would match whatever terms other casinos were giving him.

66. This inconsistency was raised by Mr Olliff-Cooper on behalf of the Club in his Skeleton Argument. He argued that if the Claimant wished to run the case set out in his evidence, he would need to apply to amend his pleading. No such application was made. On Day 3 of the trial, after the completion of the Claimant's case, his counsel did make an application to amend the Particulars of Claim. However, the amendment was to correct a mistake as to the amount of winnings. The Claimant did not seek to make any amendments to regularise the inconsistency between his evidence and his pleaded case as to the terms of the oral contract. Rather, the Claimant maintained a position that there was no inconsistency.

67. Without prejudice to his pleading point, Mr Olliff-Cooper dealt with the Claimant's evidential case on its merits and both the pleaded and evidential cases were explored fully at trial. In those circumstances, I shall deal with the substance of the case on its merits, rather than as a formal matter of pleading. In my judgment, the Claimant's pleaded version of the "Offer", one in which the Club's incentives would change if the incentive received by the Claimant at other casinos changed, is unsustainable on his own evidence. Further, the conflict between the pleaded case and the evidence casts significant doubt on the Claimant's case as a whole.

Events following the Claimant's "trip": the development of the dispute

68. In June 2015 a winner's cheque for the Claimant was stopped by the Club. The matter was resolved and the winnings were paid. The Club accepts that it was wrong to stop the cheque. The Claimant did not ask for his bonus at this time. Nor did he raise the issue of bonus at all. His explanation was that he wanted to resolve the issue of his winner's cheque first. Further, he did not need the money at the time and often leaves money with casinos when he does not need it.

69. I found that explanation implausible. I accept the Claimant's evidence that his normal practice is to leave funds with casinos when he does not need the money. However, in this instance he was in dispute with the Club. He had instructed solicitors, Blake Morgan, to contact the Club and proceedings were threatened.

70. To explain why he did not ask for his bonus, the Claimant said in cross-examination that he did not know how much money the bonus was; he was surprised when he was later told that the commission figure was over £225,000. He said:

> "*I had in my pocket £10 million or £20 million, why need to think about 100,000 or 50,000. I didn't even know how much it is I was surprised actually when they told me 225 or something. I didn't know how much it is. Only years after they told me how much it is …"* [Day 1 p.95-96]
>
> "*I didn't care about 30,000/50,000. I didn't know it was so much money, I thought it was 30,000 maybe, 50,000 I didn't know how much I had and I didn't care, for me it's important that I collect my 1.5 million first*" [Day 1 p.97]

71. I doubt this evidence was a true reflection of the Claimant's state of mind at the time. Once he was in dispute with the Club over the stopped cheque, it is likely that the Claimant would have wanted to be paid out for all and any money of his that the Club held.

72. On the other hand, if this evidence was a true reflection of the Claimant's state of mind then (i) he did not care about what were, on any view, significant sums of money; and (ii) he seems to have been unable to work out the bonus figure even though he says the calculation was simply 0.9% of his turnover. In answer to a question in cross examination, he said he did not know how much he had turned over in his "trip" at the Club [Day 1 p.98]. Given that his turnover was a little over £27 million, I find it unlikely that he would not have a good idea of the turnover. If the Claimant's evidence is true as to his lack of regard for the figures and for the size of his winnings, it does not suggest that the Claimant was a man who was unwilling to play at the Club without an incentive. Rather, it suggests he was a man who played for fun, without careful consideration of the exact gain to him.

73. The Claimant did not approach the Club again until August 2016. He says he visited the Club to make enquiries regarding his bonus/incentives earned. He says that he was told to return the following day, but when he did so he was told that he was banned. On this second occasion he hand-delivered an undated letter which reads as follows:

> "*I require a complete breakdown of my player profile to include any bonus schemes that I have been enrolled in, but not made aware of where funds held in a commission pot have not yet been released to me*."

74. The letter suggests that the Claimant believed that there may be funds which he was due. However, he makes no reference to any agreement regarding bonus/incentives. Rather he asks about bonus schemes that he was enrolled in "*but not made aware of*". If the Claimant had an agreement as to incentives, I would have expected him to refer to that, rather than asking for details of schemes of which he was unaware. When asked in cross-examination why he did not set out his entitlement to a 0.9% turnover bonus in this letter the Claimant said he did not know why he had written the letter that way [Day 1 p.101].

75. On a Saturday in September 2016 the Claimant hand delivered another letter to the Club. That letter is lost, but a passage from it is quoted in an email from Mr Baum (by then Managing Director of the Club) to Mr Walker. The quoted passage reads as follows:

> "*before I began to play in Park Lane Casino I was informed by the directors you offered the same bonus scheme as operated by other London Casinos. I must have accumulated Hundreds of Thousands of pounds and I would like this returned to me immediately*."

76. I must be careful not to read too much into this passage for two reasons. First, English is not the Claimant's first language, though my assessment when he gave evidence was that his English was very good. Second, we do not have the whole of the letter, though if it had said more about bonus schemes I would have expected Mr Baum's email to refer to it. The purpose of his referring to the letter was to ask Mr Walker if what the letter said about bonus was true. With those reservations in mind, the passage is inconsistent with the Claimant's evidence that he was specifically offered 0.9% bonus. It is also inconsistent with a case that the Club offered terms which were better than those the Claimant received elsewhere. It is even inconsistent with a case that the Club agreed to offer terms which matched the specific terms that the Claimant was offered by other Clubs. On the contrary, the contention appears to be that a statement of fact was made that the schemes offered generally by the Club where the same as those offered by other casinos.

77. "The Claimant was asked about his reference to "*Hundreds of Thousands of pounds*" in this letter, which appears at odds with his evidence that in 2015 he thought the amount of bonus would be around £30-50,000. His answer was:

> "*when you have 20 million in your pocket, 20,000 or 200,000 is the same, it's still 0, it's very little." And then "For me 200,000 is … 20 minutes playing, 15 minutes playing. I don't see that as money, I see that as chips, I am a gambler*" [Day 1 p.105]. ""

78. On 19 September 2016 Mr Murray, on behalf of the Club, wrote to the Claimant enclosing the Claimant's customer details sheet and Gaming Details Sheet. Mr Murray said:

> "*the gaming details sheet shows your visits, play and related details. Regretfully, I am not able to enter into communication with you regarding any bonus schemes that you may or may not have been entered into; this is a matter for gaming operations*."

79. That response was unhelpful, but the Claimant did not follow up with gaming operations, nor did he respond to the letter. Indeed, the Claimant appears to have taken no further action until 29 January 2018, some 16 months later, when his solicitors wrote to the Club raising the matter of "*outstanding commission payments owed*" to the Claimant and asking for payment of £225,156.17, which was the sum shown in the Commission column of the Gaming Details Sheet. That request was put on the basis that the Club's "*own gaming history confirms that*

our Client is owed the sum of £225,156.17". There was no mention of any agreement between the parties, and the letter did not set out the basis on which the Claimant was said to be entitled to receive the commission.

80. The Club's solicitors responded on 5 February 2018 to say that the Claimant's membership had been terminated, and so too had his "*variable enhanced odds programme*".

81. In response, on 8 February 2018 the Claimant's solicitors asked for full details of "*our client's commission agreement with your client"* and made a subject access request under the Data Protection Act 1998. The Club's solicitors provided information pursuant to that request on 20 March 2018. That letter stated that the commission column in the Gaming Details Sheet were internal records of a sum which theoretically could be used, at the Club's discretion to apply against any gaming loss incurred by the Claimant.

82. The matter then went quiet again until the Claimant's solicitors wrote a letter before claim on 17 October 2018 ("**the Letter Before Claim**"). The case set out in the Letter Before Claim is substantially the same as the pleaded case in the Particulars of Claim.

83. When the Claimant was asked in cross examination why he did not refer to the 0.9% turnover bonus agreement when he contacted the Club in 2015 and 2016 he said his recollection had improved over time [Day 1 p.107], that "*you don't remember everything at a time when it's not important to you. When it is important, then you sit and think through every single detail*". I do not accept that the Claimant's later recollection is likely to have become more accurate over time.

84. It is clear from the Claimant's own evidence that his memory has been influenced by discussion with others – others who would have no reason to have as good a recollection as the Claimant himself. The Claimant and Mr Gallacher had discussed their recollection of events [Day 1 p.39]. I have set out above the flaws in Mr Gallacher's recollection.

85. The Claimant and Mr Racic discussed what was said during the course of preparation of the case [Day 1 pp.114, 116, 118]. In cross-examination he said that he asked Mr Racic "*do you remember any deal? Any talk? What was it? How much I had here in this casino? How much I have in this casino? We were discussing and he told me "I believe it was 0.9%."* On the Claimant's evidence, Mr Racic first reminded the Claimant of the 0.9% figure in 2018. That was three years after the events, in the context that the Claimant throughout gambled in many different casinos on many different terms. I do not accept that Mr Racic would have a clear recollection of being told the Claimant's terms (not even his own terms).

86. It is likely that his current recollection is both unduly favourable to himself, and influenced by subsequent events. On his own account, the Claimant only came to think hard about his trip at the Club at a time when he was "out of money" [Day 1 p 98]. By that time he had come to form a very negative view of the Club as a result of the stopped cheque incident. It is highly likely that his version of events,

reached in discussion with others is not what happened, but what he would like to have happened.

Conclusion on the question of what was said prior to the start of the Claimant's gambling trip

87. In my judgment, no agreement was reached between the parties on 30 April, 26 May, or at any other time. No offer was made by the Club. I accept Mr Walker's evidence – there was no more than a discussion of what the Club might have been willing to offer, but the Claimant did not provide details of his arrangements elsewhere and nothing was concluded.

88. It is by no means an easy exercise for the witnesses to attempt to recollect what was said in conversations in an informal setting more than five years ago. The Club, quite fairly, puts its case not on the basis that the Claimant is lying as to what was said to him, but that he is mistaken in what he has come to believe. In my judgment the Club is right about this. I do not doubt that the Claimant now believes that he was made an offer of an incentive to play at the Club and has rationalised to himself that he would have had no reason to play at the Club without such an incentive. But, in my judgment, that is not what happened.

89. I have carefully considered a number of points that support the Claimant's position. Mr Gallacher supports the claim that there was discussion of bonuses before the Claimant played at the Club. The Club regarded him as the sort of player who would warrant an incentive and placed him in its "Player Program" at the top rate of commission. Something led the Claimant to play his trip in the Club when there were other Mayfair clubs where he was well regarded and received good incentives.

90. However, the problems with the Claimant's case are too many and too strong. I have particular regard to the following factors:

    a) The Claimant's evidence is significantly at odds with his own pleaded case.

    b) Despite the best efforts of the Claimant's counsel to argue otherwise, the available documentary evidence is inconsistent with the agreement now alleged by the Claimant. The Player Program Agreement might be evidence that some sort of agreement was reached before the Claimant started playing, but the document is inconsistent with his own case in any of its formulations. The document places the Claimant into a bonus roulette program that generated 0.8% commission. That is not the 0.9% alleged to have been agreed. It is a worse rate than the Claimant received at other casinos. It is highly implausible that the parties agreed either 0.9%, or to match or better the known rate at other casinos, and then the Club went on to record a 0.8% commission rate.

    c) The way the Claimant put his complaint to the Club, in 2015 and 2016 – much closer in time to when the alleged agreement was made - was inconsistent with the agreement now alleged.

d) Having listened carefully to the Claimant's oral evidence, and with appropriate allowances for the fact that English is not his first language, I was left with a clear impression that he was uncertain, and in some respects confused, as to exactly what was said to him and when.

e) As I have set out above, there are inconsistencies between the Claimant's evidence and Mr Gallacher's and internal inconsistencies in the evidence of both.

f) The case now advanced by the Claimant is not entirely his own recollection, but has been prompted by discussion with others, in particular that of his friend Mr Racic, who was not present during the key conversations where the offer is alleged to have been made.

91. A key theme in the Claimant's evidence is that he must have been offered an incentive, and the incentive must have been at least as good as he was receiving from other casinos, otherwise he would have had no reason to play at the Club. I do not accept this.

a) The Claimant supports the point by saying that he was not attracted to the Club because he had heard bad things about it. He said [Day 1 p.81] that it was the worst Club in London, ever. He described the Club as a "war zone" in answer to one question [Day 1 p.84]. I do not accept this evidence. I have seen no details of any of the things the Club is said to have done to give it such a reputation. It is unlikely, in my judgment, that the Club could have garnered such a reputation by May 2015, when it had only been open for a few months. There is no doubt that the Claimant subsequently felt badly treated by the Club, both in relation to the stopped cheque in 2016 and this dispute. I am left with the clear impression that the Claimant has allowed his later animosity towards the Club to colour his recollection of his state of mind in 2015.

b) The Claimant was on good terms with Mr Hassiakos and Mr Gallacher, who encouraged him to play at the Club.

c) It was clear from his evidence that he regards gambling, even at the high-stakes level at which he plays, as a hobby and something he does for fun. His attitude to both his terms of play and the sums of money he was winning was in some respects cavalier. He said the following about his terms at other casinos:

> "*it was never business deal, it was always friendly informal talk and that's how all casinos were treating big players. Never with any papers and never with any contracts and I don't know, it's not business, it's fun for everybody*." [Day 1 p.19]

And later:

> "*This was not business for me. For me this was hobby, like going to cinema. You are talking about some contracts, I'm talking about people that I trusted. They tell me something, I trust them. Then they break their word, kick me out and we are in court. Okay. For me it was not business and I didn't think about contracts and I didn't think about -- I just didn't want to come in and they were trying to get me, that was what was happening. With all possible means. And promising me this and that only if I come. Then I did came [sic] and then they didn't deliver on what they were promising*." [Day 1 p34]

d) This evidence shows an attitude that is consistent with the notion that the Claimant did not treat gambling in a new casino as a business proposition. This evidence indicates the Claimant played for fun, and his decision-making was not driven by a detailed consideration of his potential financial gain. It is likely that he chose to play at the Club for fun, because it was new, and he was encouraged to do so.

92. I accept Mr Walker's evidence that he may have discussed matching the terms offered at other casinos, but that he did not reach an agreement to do so.

a) An agreement in the terms of the pleaded case, which would have resulted in the terms the Claimant received at the Club changing if his terms at other Clubs changed is an unlikely one. In any event, the Claimant's own evidence does not support the pleaded claim.

b) The Claimant's case advanced in evidence is possible, but again unlikely. To enter into any agreement based upon the terms the Claimant received elsewhere (whether in the pleaded "variable" form or in the fixed 0.9% form advanced at trial) would have required some sort of verification, or at least explanation, of the terms the Claimant was receiving elsewhere. I accept the Claimant's point that the senior staff at the Club were all experienced and knowledgeable, and had worked at other casinos. That does not mean that any of them would have been confident that they knew the terms another casino was offering to players at any given time. The Claimant's own evidence indicated that the terms offered by casinos differed between each other and changed often [Day 1 p.108].

93. I also accept Mr Walker's evidence that any incentive agreement would have needed to fit within an existing programme offered by the Club at the time, and the agreement the Claimant alleges was outside those programmes. It is possible that a casino in the Club's position might reach a bespoke agreement outside its existing programme. But it is unlikely that the Club would do so, and I do not accept that it did.

a) The Club was new and seeking to establish itself. Although it needed to attract players it also needed to protect its own financial position. There

is evidence that there was discussion internally at the Club in early 2015 as to the form of incentives that may be offered. To fund its incentives the Club had put in place four programs (set out in the Player Program Agreement), each of which generated commission.

b) There was considerable debate at trial about the nature of various incentive schemes and how commission was generated. However, the Club's evidence was that the Club did not operate a turnover roulette programme. Mr Gallacher's evidence was that the Claimant would have been the first person to be offered such a programme, and he could not remember anyone else being offered such a programme while he was working at the Club.

c) The most generous of those programs generated commission at a rate of 0.8%. However, the Claimant claims that he was promised 0.9% bonus. To have reached such an agreement the Club would have needed to be prepared to go outside its existing programs, but also would have needed to work out how it was going to fund an incentive payment that may have been more than the amount of the commission accrued. Yet there is no evidence that the Club did so, either before or after the relevant meetings. Indeed, as I have set out above, the documents show the Club simply put the Claimant into one of its standard programmes.

THE PRIMARY CLAIM: INTENTION TO CREATE LEGAL RELATIONS, ACCEPTANCE AND CERTAINTY OF TERMS

94. Given that I have found there was no agreement reached at all, I can deal with these points briefly. As Mr Olliff-Cooper put it in closing, each point overlaps with the central question of whether there was any contractual offer.

95. In my judgment, the discussions between the Claimant and Mr Walker were no more than an invitation to treat. The parties did not intend that a contract would come into effect simply by the Claimant starting to play in the Club. Further discussion and agreement were necessary.

96. The Club also argued that the Claimant did not accept the alleged offer. The general rule is that for a contract to be made an offeree must communicate acceptance of the offer. The Claimant argued that he accepted the offer by beginning to play. In principle, an offer can be accepted by conduct. It would be possible, in an appropriate case, that starting to play roulette could amount to an acceptance of an offer about the terms of play. However, it is first necessary to determine whether a sufficiently clear offer was made, and whether the circumstances indicate that it was an offer capable of being accepted in that way. Given my findings that no clear offer was made, I do not need to consider the requirement of acceptance further.

97. The Club submitted that a number of features remained uncertain, and that uncertainty indicates (i) the parties had not come to an agreement; or (ii) the lack of certainty renders the agreement unenforceable. The Club raised five points of uncertainty (i) ambiguity as to whether the agreement was to match the terms

offered elsewhere from time to time, or to pay a specific percentage; (ii) lack of clarity as to the relevant percentage; (iii) uncertainty as to the figure to which the percentage was applied – e.g. to the total staked or to losing bets; (iv) no discussion as to threshold requirements; and (v) no discussion as to how long the incentive would last for.

98. The first two of these points are central to the finding I have already made that there was no offer capable of acceptance. To a lesser extent, the lack of clarity as to the third point also contributes to my assessment that no offer was made as the type of bonus is the sort of thing the parties would have been likely to have agreed. I am not persuaded that the fourth or fifth points were necessary for any agreement to be concluded or enforceable.

THE ALTERNATIVE CLAIM

99. The Claimant's alternative claim was that, even if there was no bespoke incentive agreement, the Club applied a default incentive program under which he accumulated an entitlement to £225,156. This figure derives from the Gaming Details Sheet commission column.

100. The alternative claim was not pursued with any vigour at trial. Realistically, Mr Bamford accepted in closing that I may take the view that if the Claimant cannot succeed on his primary case it may be very difficult to succeed on the alternative case.

101. In my judgment, the Claimant has failed to establish a contractual obligation to pay commission accrued under the Player Program Agreement.

    a) The Claimant does not rely on an express agreement. It is difficult to see how he could: his primary case is that he was offered a bespoke arrangement. I have rejected both formulations of his primary claim on the basis that there was an offer. There is no evidence to support an alternative offer or agreement.

    b) Although various implied terms were pleaded, Mr Bamford did not advance that argument on behalf of the Claimant. In closing he realistically accepted the difficulties of an argument based on an implied term.

102. The award of incentives was, on the evidence, a matter of discretion for the Club. The Club's evidence, which I have accepted, was that the commission calculated by the IG system was not a sum to which a player was entitled. The commission function generated a "pot" from which the Club could choose to make incentives available to a player or not.

103. The Particulars of Claim plead an alternative argument on behalf of the Claimant. In the event that payment out of the commission accrued under the default program was discretionary, it is alleged that the discretion was subject to implied limitations, and that there had been no proper exercise of the discretion not to pay out the accumulated commission (Particulars of Claim 34-43). This argument did not feature at trial at all. It did not feature in the agreed list of issues, nor was it

argued in opening or closing, nor was it explored in evidence. Were the argument to succeed it would have required careful exploration and argument.

CONCLUSION

104. In my judgment there was no concluded agreement reached between the parties about bonuses or incentives. The Club was not obliged to pay the Claimant commission which accrued when the Claimant played at the Club. The Claimant was paid his winnings and is entitled to no further sum. Accordingly, I dismiss the claim.