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Case No: LM-2021-000010

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14/11/2024

Before :

His Honour Judge Bird sitting as a Judge of this Court

Between :

Mr LEE GIBSON

Claimant

- and -

TSE MALTA LP (t/a BETFAIR)

Defendant

William Mitchell (instructed by **Ellis Jones Solicitors LLP**) for the **Claimant**
Jonathan Davies-Jones KC, Sarah Tulip and **Devon Airey** (instructed by **Keystone Law**) for
the **Defendant**

Hearing dates: 1st, 2nd, 3rd, 4th, 8th, 9th, 10th, 11th and 12th July 2024

Approved Judgement

This judgment was handed down remotely at 10.30am on 14 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THE HIGH COURT

His Honour Judge Bird:

Introduction

1. Between 1 November 2009 and 11 April 2019 Mr Gibson lost £1,480,728.84 gambling on the outcome of sporting events (usually football matches) on a betting exchange hosted by the Defendant or its predecessors. He now seeks to recover the greater part of those losses (those suffered in the 6 years prior to the issue of his claim) from the Defendant (“Betfair”).
2. The Gambling Act 2005 (“the Act”) forms a vital backdrop to the present claim. It represented a watershed in gambling regulation, recognising the economic benefits that safe gambling can bring whilst at the same time introducing protections to safeguard vulnerable people (including problem gamblers) against its dangers. Betfair’s activities (because it was a company registered abroad) became subject to the Act on 1 November 2014. From that date, in order to operate the betting exchange, it was required to hold and comply with the terms of an operating licence issued by the Gambling Commission. Betfair is licensed as a “*betting intermediary*” defined at section 13 of the Act as “*a person who provides a service designed to facilitate the making or acceptance of bets between others*”.
3. Mr Gibson asserts that he was a problem gambler and that Betfair knew, or ought to have known, that that was the case. He says that Betfair breached the terms of its licence by failing to take appropriate steps to protect him from losing money and that the breach gives rise to a personal right of action in tort or contract and a consequent right to damages. Further, he suggests that when Betfair was in breach of the terms of its licence it was operating unlawfully so that each individual bet he placed in that time was void.
4. Betfair’s knowledge (constructive or actual) of his problem gambling (and the fact of his problem gambling) is therefore of central importance to most aspects of his claim (the exception being the claim arising out of illegality). If he was not a problem gambler, or if Betfair cannot be taken to have been aware that he was a problem gambler, then most of his claim will fail.
5. The claim in contract relies on the implication of a term that Betfair would operate in accordance with the terms of its licence. That in turn requires a consideration of the extent to which the contract (or potentially contracts – Mr Gibson says that each bet he placed gave rise to a separate contract with Betfair) could operate without such an implied term.
6. The claim in tort requires that I find (in summary) that the relationship between Mr Gibson and Betfair was such that a duty was imposed on Betfair to take care to avoid or prevent gambling losses. Mr Gibson accepts that his situation is novel (and by implication

difficult) and suggests that Betfair assumed responsibility for his losses or, in the alternative, that a duty arises because gambling losses were foreseeable, the nature of the relationship with Betfair (the proximity of the relationship) was such that it is fair and it is reasonable to impose a duty. The context of the argument is that his losses are not only purely economic losses, but they are caused by his own actions. This formidable combination of hurdles (“*doubly exceptional*” as Professor Janet Sullivan has described it) caused Briggs J (as he then was, see *Calvert v William Hill* [2008] EWHC 454 Ch) to describe the imposition of duty in similar circumstances as a “*journey to the outermost reaches of the tort of negligence, to the realm of the truly exceptional*”.

7. Mr Gibson also (in addition to his problem gambling point) relies on the fact that his account was managed by a VIP team within Betfair and that from time to time he was offered financial encouragements to bet.
8. If Mr Gibson establishes that a duty of one kind or another is owed, he must go on to establish that Betfair has failed to fulfil the duty and that some or all of his loss have been caused by that breach. The causation arguments require me to consider what Mr Gibson would have done if Betfair had fulfilled its duty.
9. The claim that contracts were void, so that a right to restitution arises (Betfair having had and received monies in the form of commission), requires me to consider if the Act prohibits the making of contracts or makes contracts already made void.
10. The Act touches on all aspects of the claim: in contract because the operation of the Act will inform the question of whether it is necessary to imply a term that licence conditions will be complied with, in tort because the Act regulates the relationship between the parties and in illegality because the existence of a remedy depends on the terms of the Act.

This Judgment

11. I will deal with matters under the following main headings and at the following paragraphs:

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The trial and an overview of the evidence

12. I heard from a number of lay witnesses who gave evidence in support of Betfair's case and from four experts: two in the field of psychiatry and two in the field of gambling with particular reference to problem gamblers and social responsibility. There was a large measure of agreement between them.
13. I had the benefit of a document management system, a live transcript of evidence and submissions and comprehensive written and oral submissions from both parties. It is not necessary in this judgment to refer to every aspect of the evidence or to every argument advanced I have, however, considered the transcript and the submissions in detail.
14. I formed the view that those who gave evidence in support of Betfair were reliable witnesses. Some of them, for example Stuart Rourke who was Mr Gibson's VIP manager, and Susan Lawson, head of responsible gambling at Betfair between November 2017 and November 2018, were former employees of Betfair. One, Mr Browne is the operations director of Betdaq, a competitor of Betfair. Ms Lawson and Mr Rourke stood out as impressive witnesses. Ms Lawson plainly took her role with Betfair very seriously and was keen to ensure that appropriate steps were taken to identify and support problem gamblers. I would go so far as to say that Ms Lawson was dedicated to her work. Not simply because she was a loyal employee, but because she had a real and human interest in helping those with gambling issue. She had taken steps to inform herself of the problems faced by problem gamblers and had studied addiction, counselling and psychology. Mr Rourke was an equally impressive witness but for different reasons. Mr Gibson makes three serious allegations against him: first, that on 15 December 2016 and on 31 December 2018 (but possibly on other occasions) he "*encouraged and aided*" Mr Gibson to avoid or circumvent responsible gambling checks, in particular by telling him how to reply to queries posed by Betfair. Secondly, on 7 November 2015, in the Betfair hospitality suite at Old Trafford, Mr Rourke had joked about the extent of Mr Gibson's gambling debt in front of his family. Thirdly that after his account with Betfair had been suspended, Mr Rourke suggested that he simply used an account in another person's name. The first allegation is pleaded, the second and third are raised in Mr Gibson's witness statement. Mr Rourke dealt with those serious allegations carefully and thoughtfully. I formed the view that he was bemused by the allegations which appear to have been based on the premise that Mr Rourke had a financial interest in keeping Mr Gibson enthralled to Betfair.
15. It emerged, as he gave evidence that Mr Gibson finds himself in a very difficult position. He accepted more than once that (if he had a gambling problem at all) he had kept that fact to himself. At no point did he tell Betfair he had a gambling issue and, to the contrary, he assured them at every turn that he was comfortable with his gambling and

could afford his losses (at one point telling them he was a multi-millionaire). I took from his evidence that he believed that Betfair ought to have picked up on his addiction because of the level of his losses (the case advanced on his behalf also points to other factors). The difficulty with that is, until his account was closed, he had passed every money laundering inquiry and makes no complaint about Betfair's approach to money laundering. There is no real suggestion that the vast amount of financial information he provided to Betfair was materially inaccurate (he felt some of it might have been exaggerated). There was therefore nothing objectively concerning about the level of losses. Although they were very large, they appeared to be sustainable.

16. I formed the view that Mr Gibson was an unreliable witness. He accepted that the account given in his witness statement of falling into panic very early in his gambling relationship with Betfair was not true. Detail he had provided in his witness statement, which might have been taken to support his evidence, was shown to be untrue. For example, Mr Gibson quickly accepted that the forensic detail he had given about the 7 November 2015 incident was fundamentally flawed in that he may have the date wrong. In fact, I am satisfied that Mr Gibson only changed his evidence on the point because he was aware that Betfair's disclosure revealed that Mr Rourke was not at the specified match. Further, when faced with any difficult question Mr Gibson sought to pass the blame to others, often Mr Rourke. He maintained throughout that Betfair had destroyed WhatsApp messages between him and Mr Rourke in order to deliberately bolster their case. That was a serious and wholly unsupported allegation. It was also clear from Mr Gibson's evidence that he had misled Betfair within the litigation by failing to give a candid explanation of his gambling after his relationship with Betfair had ended and there was evidence (which led to a reminder of his right to assert a privilege against self-incrimination) that he had made untruthful applications for bounce back post-covid loans.

17. Where there are differences between the evidence of Mr Rourke and the evidence of Mr Gibson, I prefer the evidence of Mr Rourke. I reject the complaints set out above made about Mr Rourke. Each is based only on the oral testimony of Mr Gibson which I have found to be generally unreliable. Further, the allegations are serious and, if I were to accept them, would require me to find that Mr Rourke had acted in a wholly unprofessional and sometimes dishonest manner. The evidence comes nowhere near establishing such serious allegations.

Gambling regulation

The lead up to the Act

18. In 2001 the Gambling Review Body made certain recommendations on how the regulation and control of gambling might be improved. The Government's response is set

out in a paper entitled “*a Safe Bet for Success*”. It recognised an overwhelming need to modernise the law but acknowledged the need to protect children and the vulnerable (including problem gamblers) from dangers presented by gambling.

19. The government noted that statutory safeguards could not of themselves do away with problem gambling and that the introduction of excessive controls could make matters worse for vulnerable people by encouraging the growth of illegal gambling. Under the heading “*dealing with the downside*” the paper notes:

“The Government agrees with the Review Body’s conclusion that the Gambling Commission should issue formal codes of practise in relation to social responsibility which should become part of the conditions of licences to operate. These codes should cover such matters as...provision for players to bar themselves from gambling... the provision of information to customers about problem gambling and what people who think they might need help should do... The Gambling Commission will be responsible for ensuring compliance with its codes, and more broadly for monitoring the social impact of the increased access to gambling products and services which new legislation will bring.”

The Act

20. In brief, the relevant provisions of the Act can be summarised as follows:

- a. Section 20 establishes the Gambling Commission. By paragraph 16 of schedule 4 of the Act, the Commission is required to prepare an annual report of its activities which the Secretary of State will then lay before Parliament.
- b. Section 24 requires the Commission to issue codes of practice “*about the manner in which facilities for gambling are provided*”. Codes must (see section 24(2)) “*describe arrangements that should be made by a person providing facilities for gambling for the purposes of ...protecting children and other vulnerable persons from being harmed or exploited by gambling*”. Such provisions (when identified by the code as being included in pursuance of section 24(2)) are described as “*social responsibility provisions*” (see section 82(2)(b)).
- c. Section 24(8) provides that:

“A failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but this subsection is subject to any provision of or by virtue of this Act making an exception to an offence dependent on compliance with a code”.

- d. By section 28, the Gambling Commission is authorised to institute criminal proceedings (outside Scotland) in respect of an offence under the Act.
 - e. Section 33 provides that a person commits an offence if he provides facilities for gambling unless certain statutory defences apply. One important defence is that the person (see section 33(2)) (a) holds an operating licence authorising the activity, and (b) the activity is carried on in accordance with the terms and conditions of the licence.
 - f. Section 82 makes clear that any operating licence is subject to the condition that the operator ensures compliance with any relevant social responsibility provision contained in a code of practice.
21. It is clear from the scheme of the Act, and consistent with the Government's aim for the Act, that the Gambling Commission was entrusted with the primary responsibility of ensuring that licenced persons act appropriately. The power to bring criminal proceedings under Section 28 is an important power. The obligation to report to Parliament on its activities annually is a reminder of the public interest in ensuring the Commission fulfils its statutory role. In their first licensing, compliance and enforcement policy statement, published in 2009, the Gambling Commission notes that "*enforcement forms an essential part of the commission's work to keep gambling fair and safe for all.*"

Regulation after the introduction of the Act to April 2019

22. In March 2006, the Commission published detailed proposals on regulation generally but included steps that would be taken to protect problem gamblers. It noted "*at this stage*" it would:

"...not be prescriptive about the kinds of customer actions and behaviours that should trigger intervention by an operator. We accept that operators and their employees cannot be expected accurately to identify every symptom of problem gambling. However, we will expect operators to develop policies on the types of behaviour that its employees should treat as requiring immediate intervention and as "at risk" behaviour to be noted/recorded by staff, which may require intervention when combined with other aspects of the customer's behaviour."

23. The same document also notes that intervention is a "sensitive issue". It continues:

"There is general agreement that individuals who demonstrate signs of problem gambling should be offered, sometimes even encouraged or required

to seek, help. But there are also concerns about invading people's privacy and about the practical difficulties of knowing when, where and how to intervene. Employees are not trained as therapists or psychologists. We consider however that there are circumstances in which operators should intervene when they suspect an individual has a gambling problem.”

24. Dealing generally with its approach to operating licences, the Gambling Commission noted at paragraph 2.1.6:

“Generally, we will set out what needs to be achieved and leave it to operators to decide on the most appropriate means although, where appropriate, we indicate best practise in relation to the management of gambling activities. It is for businesses to decide how to organise and control their activities, subject to other legal requirements.”

25. The Gambling Commission first published licence conditions and codes of practise (“LCCP”) in October 2008. They followed the philosophy set out in the March 2006 consultation document. The October 2008 LCCP (which came into force on 1 November 2009) dealt with problem gambling at paragraph 2 under the heading protection of children and other vulnerable persons:

“2.1 combating problem gambling

Licensees must have and put into effect policies and procedures intended to promote socially responsible gambling.

Licensees’ policies and procedures for social responsible gambling must include but need not be confined to:

- ***the specific policies and procedures required by the following provisions of Section 2 of this code....”***

26. Paragraph 2.4 under the heading “customer interaction” provided as follows:

“Licensees must put into effect policies and procedures for customer interaction where they have concerns that a customer's behaviour may indicate problem gambling. The policies must include:

- ***identification of the appropriate level of management who may initiate customer interaction and the procedures for doing so***
- ***the types of behaviour that will be logged/reported to the appropriate level of staff and which may trigger customer interaction at an***

appropriate moment

- *the circumstances in which consideration should be given to refusing service to customers...*
- *training for all staff on their respective responsibilities, in particular so that they know who is designated to deal with problem gambling issues...*

27. The requirements placed on operators (which would be triggered where the operator had concerns that a customer's behaviour may indicate problem gambling) were not particularly onerous and were certainly not "prescriptive" about triggers. They required operators to develop policies and procedures dealing with the "who" (who should interact with the customer), "when" (what behaviour should trigger interaction), "what" (what would trigger the need to consider banning someone) and "how" (how should staff make the system work) of interaction in very high level terms.

28. In August 2014, when the 2008 conditions had been in place for almost 5 years, the Gambling Commission published a consultation document entitled "*proposed amendments to the social responsibility provisions in the licence conditions and codes of practise for all operators*". The Commission's February 2015 paper referred to below, notes that the starting point for the August 2014 consultation:

"was to affirm the central thesis on which our system of gambling regulation is based: the principle that responsibility for delivering the licencing objectives rests first and foremost with gambling operators. Provided that there is a genuine commitment in the business to ... protecting children and the vulnerable, operators are much better placed to understand the practical trade-offs between minimising harm cost effectively, innovation and customer experience- or, in short, fun."

29. The consultation raised questions about appropriate triggers for customer interaction (the "when" question). It was noted that, "*to date operators have tended to rely on a fairly narrow range of overt behavioural indicators to guide staff in making interventions. Those indicators have focused in the main on obvious signs of distress, agitation or aggression...*" The commission's proposal was to "*update the social responsibility code provision to make clear that operators' policies and procedures on customer interaction must make specific provision for identifying customers potentially experiencing harm but who are not displaying overt physical behaviours.*" There was no obvious departure from the desire not to be "prescriptive" about specific triggers.

30. Following the consultation, in February 2015 the Commission published a further paper "*Strengthening social responsibility*" which set out new provisions. It was noted (in

chapter 5 considering “customer interaction”) that:

“When the LCCP was first drafted in 2007, it was anticipated that good practise would develop over time. Good practise has been relatively slow to develop, and evidence from a range of compliance cases over recent years has made it clear that this is an area where the industry continues to experience significant challenges in terms of implementation of their existing policies and procedures”.

31. The paper was updated in April 2015. The new provisions came into force from the 8 May 2015:

***“Social responsibility code provision 3 .1.1
Combating problem gambling
All licences***

1 Licensees must have and put into effect policies and procedures intended to promote socially responsible gambling including the specific policies and procedures required by the provisions of Section 3 of this code

2...”

32. Section 3 comprises paragraphs 3.1 to 3.9. Paragraph 3.4 (the only relevant part of section 3 of the code) deals with customer interaction as follows. Sub-paragraphs (e) and (f) have been added:

***“Social responsibility code provision 3.4.1
Customer interaction - SR code
All licences, except non-remote lottery, gaming machine technical and gambling software licences***

1 Licensees must put into effect policies and procedures for customer interaction where they have concerns that a customer's behaviour may indicate problem gambling. The policies must include:

a. identification of the appropriate level of management who may initiate customer interaction and the procedures for doing so

b. the types of behaviour that will be logged/reported to the appropriate level of staff and which may trigger customer interaction at an appropriate moment

- c. the circumstances in which consideration should be given to refusing service to customers...*
- d. training for all staff on their respective responsibilities, in particular so that they know who is designated to deal with problem gambling issues*
- e. specific provision for making use of all relevant sources of information to ensure effective decision making, and to guide and deliver effective customer interactions, including in particular
 - i. provision to identify at risk customers who may not be displaying obvious signs of, or overt behaviour associated with, problem gambling: this should be by reference to indicators such as time or money spent*
 - ii. specific provision in relation to customers designated by the licensee as 'high value', 'VIP' or equivalent**
- f. specific provision for interacting with customers demonstrating signs of agitation, distress, intimidation, aggression or other behaviours that may inhibit customer interaction."*

33. These amended conditions still stopped short of prescription. They represent a more detailed guide as to how policies should develop, making it clear that exclusive focus “*on obvious signs of distress, agitation or aggression*” was not good enough. Now, operators needed to consider how they would use more subtle, gambling related “indicators” when considering the need for interaction. The same provisions were kept in an update to the LCCP which took effect on 6 April 2017.

34. In June 2017, when the updated conditions had been in place for nearly 2 years, the Commission issued a document entitled “*The importance of interacting with customers*”. It noted that customer interaction was a key area of social responsibility. It continued (the emphasis appears in the original):

*“We want you to be focusing on measures which enable you to identify and help players who are at risk of harm to try to **prevent** them becoming problem gamblers. Customer interaction is a proactive thing. An interaction with the customer is part of a process, not an end in itself. It is important to understand what impact your interactions have.”*

35. Referring to LCCP paragraph 3.4, the document noted that the provisions set out minimum standards that licenced bodies are expected to comply with. It went on to pose a series of questions: “*are you effectively identifying customers whose behaviour may*

indicate that they are at risk of harm from gambling? Are you focusing on the outcome of a customer interaction? Are you interacting appropriately with VIP\ high value customers in relation to social responsibility?” It ended with this:

“We know that the industry is making progress, but we want you to do much more to put consumers, and particularly vulnerable consumers, at the heart of your business”

36. This 2017 intervention appears to be a shift in emphasis (but without a change to the licence conditions) towards prevention and outcome. This was the first step towards what the Commission later identified as the 3 elements of customer interaction (identify, act and evaluate).

After April 2019

37. Although post April 2019 regulation cannot assist Mr Gibson directly, it is useful to have a broad overview of the direction regulation was taking.
38. With effect from 31 October 2019, LCCP social responsibility code provision 3.4.1 was effectively rewritten:

“1. Licensees must interact with customers in a way which minimises the risk of customers experiencing harms associated with gambling. This must include:

- a. identifying customers who may be at risk of or experiencing harms associated with gambling***
- b. interacting with customers who may be at risk of or experiencing harms associated with gambling***
- c. understanding the impact of the interaction on the customer and the effectiveness of the Licensee's actions and approach***

2. Licensees must take into account the Commission's guidance on customer interaction.”

39. The Commission’s guidance on customer interaction was published in July 2019 and included guidance on identifying the right customers, on affordability, vulnerability and spotting harmful gambling. The 2019 rules formalised the approach taken by the Commission in June 2017 and placed the emphasis firmly on prevention (or at least “minimising the risk” of a customer being harmed) and outcome (“understanding the impact” of an interaction).

40. The October 2019 changes appear to acknowledge that the non-prescriptive approach adopted before then, leaving it to organisations to develop good practice over time, was not working. The introduction of formal guidance on customer interaction which had to be taken into account is a clear indicator that (in summary) there was a need to do more .
41. In May 2020, during the COVID outbreak, guidance was issued to take account of the obvious heightened risk that might be caused by lockdown. This included a requirement to “*stop bonus offers or promotions to customers display displaying indicators of harm*”. On various dates between September 2022 and October 2023, the LCCP was further updated. The customer interaction provisions required licensees to “*implement effective customer interaction systems and process is in a way which minimises the risks of customers experiencing harms associated with gambling. These systems and processes must embed the three elements of customer interaction - identify, act and evaluate - and which reflects that customer interaction is an ongoing process as explained in the Commission's guidance.*”

The up to date position

42. In 2023 the government published a white paper entitled “*High stakes: gambling for the digital age*”. As Professor Janet O’Sullivan explains in her article “*Disorder, financial loss and suicide- a journey to the outer reaches of the common law*” Current Legal Problems Vol. 76 [2023] 173 – 200:

“It is now recognised by all political parties that, in the modern digital world, the Gambling Act regulatory regime is inadequate...”

43. Professor O’Sullivan notes that a proposal put forward by the House of Lords Select Committee report which preceded the White Paper recommended that express provision be made for civil liability by amending the Act “*to provide expressly for civil actionability for breach of the licence conditions and social responsibility codes of practice*”. As she goes on to say,

“Alas, this proposal has not been produced in the White Paper, it has been quietly dropped. Instead, the White Paper proposes the creation of a gambling ombudsman... With the disappearance of the breach of statutory duty tort proposal, the only route to full civil redress is to reconsider Calvert and rehabilitate the common law of negligence in the gambling context.”

44. Chapter 4 of the 2023 White Paper deals with “*dispute resolution and consumer redress*”. At paragraph 7 the following is set out:

“Licensees’ obligations around preventing harm, which are set out in the LCCP or Gambling Commission guidance, are not generally part of terms and conditions and so do not form part of the contract between the customer and licensee. Therefore, where a complaint relates to whether the operator complied with the Gambling Commission’s social responsibility requirements to prevent harm, it is out of scope of ADR provision. This includes, for example, complaints that an operator... should have taken greater steps to identify a customer at risk of harm and stepped in earlier to prevent unaffordable gambling. In these circumstances, customers sometimes report their complaints to the Gambling Commission as the sector’s regulator. However, the Commission has no power to order redress to individual complainants following social responsibility code breaches. Customers are told that their information will be used for used for regulatory purposes, but that the Commission will be unable to resolve their individual dispute.”

Betfair’s Licence

45. Betfair’s licence was subject to the October 2008 LCCP from 1 November 2014 to 8 May 2015 and from that date (insofar as is relevant to Mr Gibson) to April 2019 it was subject to the LCCP published in April 2015. The 2 sets of conditions are broadly similar. The overarching inquiry relevant to breach over the entire period, is did Betfair have and put into effect, appropriate “*policies and procedures for customer interaction*” in cases where they had “*concerns that a customer’s behaviour may indicate problem gambling*”.

Compliance

46. Against this background I turn to consider what steps Betfair took to comply with its licence obligations between November 2014 and April 2019.

47. It is appropriate to consider Betfair’s direct interaction with the Gambling Commission, Betfair’s policies and the implementation of those policies.

Interactions with the Gambling Commission

48. Between 2016 and 2019 Betfair was required to submit annual assurance statements to the Gambling Commission detailing what it was doing to comply with (amongst other things) its social responsibility obligations. In December 2016 Betfair explained that it identified problem gamblers by reference to “*both behavioural and data-driven analysis.*”

49. Despite the generally positive nature of these statements, in October 2018 Betfair agreed to pay a regulatory settlement of £2.2m including a £1.7m payment in lieu of a financial penalty and divestment of £500,000 of moneys received. The Gambling Commission found and Betfair's parent company accepted, that certain companies in the Paddy Power Betfair Group, including the Defendant "*had breached social responsibility code provision 3.4.1(1) which relates to customer interaction when 5 customers were able to gamble extensively despite indicators of problem gambling*". Betfair accepted that there were "*weaknesses in its responsible gambling and AML policies and procedures which meant there were breaches of the licence condition.*" The Gambling Commission accepted that it had demonstrated insight into its failings and had cooperated in an open and transparent manner affording full and timely disclosure of all material facts during the process.
50. It appears from press releases that as a result of Betfair's failings "*significant amounts of stolen money flowed through [the] exchange.... Operators have a duty to all of their customers to seek to prevent the proceeds of crime from being used in gambling*". The failures in respect of customer interaction seem to relate to these and other customers. The absence of detail, in particular explaining what the customers were doing that ought to have triggered interaction and the link between AML failures and interaction failures, mean that it is impossible to understand if these accepted breaches are in any way relevant to Mr Gibson's position. The mere fact that there was a breach in these 5 cases, plainly does not mean that there was a breach in respect of Mr Gibson.

Betfair Policies

51. The experts have agreed what relevant policies, procedures and systems Betfair had in place whilst Mr Gibson was a customer. The list is a long one, comprising some 43 separate items. It is not necessary to describe each policy, procedure and system in detail. I accept the conclusions reached by the experts and summarise them below. The microsite referred to is a website which lists steps a customer can take to limit their gambling by, for example, imposing value limits on bets.
- a. In 2009 Betfair had a responsible gambling policy and a self-exclusion policy.
 - b. In 2010 there were two updates to the responsible gambling policy, a customer interaction policy and a responsible gambling training policy.
 - c. In 2011 the responsible gambling policy was updated twice.
 - d. In 2012 the responsible gambling policy was updated once and the Betfair responsible gambling website (or microsite which listed player protection tools and other features that were available to any customer who felt they were struggling with their gambling) was launched.
 - e. In 2013 the microsite was updated twice and there was a fresh iteration of the customer interaction policy.

- f. In 2014 (when Betfair first became subject to the Act's licencing requirements) the microsite was further updated twice, and a new version of the customer interaction policy was introduced.

From 2015

- g. In 2015 the microsite was again updated, the responsible gambling policy was twice updated, a responsible gambling policy specifically for high value customers was introduced, a new version of the self-exclusion policy was introduced, a responsible gambling training policy was updated and the new responsible gambling decision matrix introduced.
- h. In 2016, a customer service training policy was introduced, the microsite was updated, a new policy dealing with cooperation between responsible gambling and AML teams was introduced, the AML risk calculator was introduced, and the responsible gambling (RG) risk calculator was introduced.
- i. In 2017 the microsite was again updated.
- j. In 2018 there were further updates to the microsite, the responsible gambling policy was updated this time as a joint Paddy Power and Betfair policy and a new joint policy in respect of responsible gaming online was introduced.
- k. In early 2019, the microsite was again updated.
52. The experts note that not all of the policies that Betfair had in place are now available. I find that those policies described as drafts were implemented, and so can be relied upon. Although Mr Reeman (the expert called by Mr Gibson) appeared to take a different view in his report, suggesting that the draft policies could not be regarded as ever having been implemented, he effectively abandoned that point during cross examination.

Evidence about the policies and their application

53. I heard from Kelly Clynes, a gambling data analyst with Betfair from June 2015 to November 2016. She recalled that she was recruited with a view to supporting Betfair policies introduced in 2015 as a result of the upgrading of the social responsibility provisions in the LCCP. Miss Clynes had no specific recollection of seeing the documents, but her written evidence is that she was "sure" that she would have been made aware of the "draft" responsible gambling policy then in force (from 29 April 2015) and of the responsible gambling matrix.
54. The responsible gambling policy outlines how Betfair would interact with customers when faced with "*any issue surrounding responsible gambling*". Interaction (described as being defined by the Gambling Commission as "*the point at which a member of staff provides guidance, advice, or signposting to the relevant sources of guidance and advice regarding problem gambling*") would take place when a customer self-identified as

needing help, when the activity of a customer gave rise to concern during contact with the help desk, or where “*customer behaviour gives cause for investigation through Betfair’s monitoring programme without prior notification by the customer....*”.

55. The policy explains that “*there are many customers that will use Betfair but not contact our help desk. This means that in order to protect these customers Betfair needs to have an effective monitoring programme in place that allows us to proactively engage with customers and provide a point of consideration during their play*”. The concept of “monitoring” is explained as operating :

“Via a series of alerts that scans all customers and all transactions and highlights to the team that there might be a customer we should reach out to. The team can choose to take a number of actions including, but not limited to, forcing a limit on the account, suspending the account, calling the customer, emailing the customer information etc. Each case should be reviewed as there is not one action that fits all, what is important is that someone looks at the account and makes a note of any course of action. Betfair must be careful not to make assumptions but be able to assess customers that might be at risk....”.

56. The policy goes on to provide a sample of the alerts referred to in the previous paragraph. Miss Clynes recalled that she and her colleague Gerry Callaghan, would receive daily reports of the type listed in the policy together with a list of customers who had been escalated to the responsible gambling team by other parts of the business for review.
57. Miss Clynes told me she would make 20 to 30 “*responsible gambling*” calls every day to non-VIP customers (any interaction with a VIP customer would be actioned through the VIP team). Not every call would be answered. It was clear that Miss Clynes adopted a nuanced approach to these calls in line with the requirements of the policy. In particular, if a customer said they were comfortable with their spend that was not necessarily an end of the matter. She said: “*Obviously every person is so different.... after some experience, you would get a sense of whether you needed to maybe ask some more questions... it was very much a case by case basis.*” She told me that she felt her role was to protect problem gamblers and she recalls that on occasion she would, after speaking to a customer, take action if she had concerns, for example, directing a suspension.
58. I also heard from Susan Lawson. She joined Betfair in February 2016 after the merger with Paddy Power and after working at Paddy Power for a number of years. In May 2016 she became Betfair's head of training and development. Between August 2016 and May 2017, she was the “*Responsible Gambling*” manager at Betfair. In November 2017 she became Head of Responsible Gambling. Ms Lawson has worked in the gambling industry for some time. It was clear to me that she took her role very seriously. She told me that she had studied addiction, counselling and psychotherapy, had worked with academics and with other organisations in order better to understand problem gambling. I found her

to be an impressive and knowledgeable witness with a genuine interest in issues related to problem gambling.

59. Ms Lawson told me that there were 3 elements to Betfair's responsible gambling programme: first, the CAAP programme (described further below and referred to in the 2016 Gambling Commission return). Secondly, a reactive system based on alerts or triggers. Thirdly, a referral process from others within Betfair including the AML team. She also described the "*responsible gambling risk calculator*" (designed using the McGill research described below) and told me that its output (expressed as a score between 0 and 100) would help to determine what, if any, further action might be needed. If any action was required a low score would warrant contact by e-mail, a higher score contact by telephone. A very high score might lead to an immediate account suspension whilst further inquiries were carried out. The calculator would be used in a variety of situations, including after an internal referral and after the generation of reports. Miss Lawson felt that the AML escalation policy introduced apparently in 2016 was probably in use before that date.
60. She referred to further warning reports introduced in 2017 including weekly reports flagging high losses and reports of customers who had cancelled a pending withdrawal. These CPW reports would arise when customers had changed their mind having placed a request to withdraw money from their account. A CPW report would lead to an e-mail rather than a direct interaction by way of phone call.
61. She was referred to DSM IV and the PGSI. It was suggested that these provided a clear and efficient way to identify a problem gambler. The former contains 10 diagnostic criteria assessed on a four-point scale according to frequency. A total score of between 0 and 10 is possible and a problem gambler is one who meets at least three of the relevant criteria. The latter was developed for use amongst the general population rather than within a clinical context. It contains 9 factual statements each is assessed on a four-point scale according to frequency scores or summed up to give a total from zero to 27. A score of 8 or more indicates problem gambling. The PGSI also identifies at risk gambling by reference to two further categories: Low risk of harm (a score of one or two) and moderate risk of harm (a score of three to seven). The PGSI categories are: (i) I bet more than can afford to lose, (ii) I need to gamble with increasing amounts of money, (iii) I have been chasing losses; (iv) I have borrowed money or sold items to get money to gamble; (v) I have felt that I might have a problem with gambling, (vi) gambling has caused me health problems including stress or anxiety; (vii) people have criticised my betting or told me that I have a gambling problem; (viii) gambling has caused financial problems for me or my household; (ix) I have felt guilty about way that I gamble or what happens when I gamble.
62. It was suggested to Ms Lawson that these indicators would be a far more efficient way to identify a problem gambler (or a customer at risk of becoming a problem gambler) than

the methods set out in the Betfair responsible gambling policy (or the 3 elements set out above) and that the answers to the questions could be worked out for a particular customer. In the face of these criticisms, Ms Lawson's evidence was clear. She could not see how these criteria could be used in practice, and she was quite content with the systems Betfair was using including the CAAP system.

63. Dealing with the problem of how to identify a problem gambler, she said:

“I think it would be very difficult to define what harmful gambling is for different people.... what is harmful for you may not be harmful for me, or what is harmful for me may not be harmful for someone else. So, I think it would be very difficult to define what it was. So there has to be in my opinion an action taken, either telling the company that you have a problem, or your behaviour on site.... is an indicator that you have a serious problem.... ”

64. Ms Lawson provided further evidence in relation to CAAP. She explained its primary output was an e-mail to customers which highlighted the activity and drew their attention various tools that they could use to limit their gambling. The CAAP system (which used algorithmic approach to seek to predict those customers who might go on to self-exclude) was developed by Paddy Power following research by Dr Jeffrey Derevensky at McGill University in September 2014. It was in use at Betfair from August 2017. The aim was to identify markers for the early identification of problem gamblers. Broadly speaking, the research analysed the behaviour of persons who had self-identified as problem gamblers and used their traits to identify others who might become problem gamblers.

65. Mr. Mitchell criticised that methodology because it assumed that those who have closed their account are representative of problem gamblers. Ms Lawson did not accept the criticism. She explained that the study looked at the playing lifetime of those who had self-excluded in order to identify points at which their behaviour had changed. She explained that in order to identify conduct which was indicative of a gambler being at risk of harm, it was helpful to look at the behaviour of problem gamblers. Miss Lawson accepted that the system was not perfect, but she felt it was at the cutting edge of then current thinking, built on the findings of well-respected academics and implemented in good faith.

66. Ms Lawson explained how the responsible gambling team would produce a series of key performance indicators (“KPIs”) every month. These allowed Betfair to know how many customers were receiving communications from Betfair and what impact, if any, those communications had on their gambling habit. By December 2017, her evidence was about 9% of all customers across both Paddy Power and Betfair received some form of responsible gambling notification. That was “*significantly ahead of target*”. She dealt with the regulatory settlement made in October 2018. She told me that both Betfair and Paddy Power “*had moved a very long way from the past customer experiences that the*

statement was referring back to”.

67. I heard from Mr O’Keeffe, a responsible gambling analyst at Betfair from October 2016. His daily duties included running safer gambling reactive reports, reviewing customer accounts, and engaging with customers over the telephone in responsible gambling interactions. He gave evidence that everyone at Betfair must take part in regular responsible gambling training, the aim of which was to ensure that all staff members had a base level understanding and awareness of key issues as well as indicators of problem gambling. He explained that he had drafted a script of the type referred to by Ms Lawson (at least for general customer interactions). He told me that the main aim of a responsible gambling intervention was to ensure that the customer was comfortable with their level of spend to assess whether or not the customer may be at risk of experiencing harm.

68. The approach to customer interactions changed in 2021 when more open questions would be employed, much closer to the PGSI and DSM IV questions. He explained that all responsible gambling interactions, whenever undertaken, are:

“Intended to ensure that a customer is comfortable with their level of activity spend on site to assess whether or not the customer may be at risk of experiencing harm. It would also serve to inform and educate the customer to make them aware of all player protection tools available on site. We were trained to know that it was important on the call to listen to the customer both in what they are saying and how they are saying it. The customer may answer they are comfortable with their play but sound doubtful or hesitating the answer, in this instance we will probe little further to ensure they are comfortable.”

69. He was taken to what appear to be draft KPIs produced in June 2017 to Betfair’s risk committee. The draft introduction notes Betfair’s aim *“to monitor, detect and interact with players who display behaviours attributed to problematic gambling, as defined by the operator”*.

70. He was taken to a Betfair policy document *“responsible gambling/anti-money laundering escalation and review process/procedure”* from September 2016. It explains that during an *“enhanced due diligence”* (*“EDD”*) AML review: *“the AML team will assess a customer’s account for accepted RG (responsible gambling) behavioural traits during the investigation process. We have defined the following attributes that if found will be escalated to the RG team.”* Then follows a list of eight *“attributes”* which if met, should result in an escalation to the RG team. They include the presence of spikes, relevant losses and spending beyond their means.

71. He was asked about the responsible gambling risk calculator. Mr O’Keeffe explained that the risk calculator was only part of the exercise. The responsible gambling team were not

blinkered to the risk calculator results. It was simply one of a number of inputs that they would take into account in reaching a view. Mr O’Keefe told me that there were six types of monitoring reports which applied to Mr Gibson’s account at different and overlapping periods from February 2016 onwards. These supplemented any direct referrals from any other method.

72. I heard from Bradley Williams was an account manager at Betfair for managed customers in the VIP team between 2013 and July 2018. He told me that gambling promotions were in place to foster loyalty rather than encourage gambling. Mr Williams explained that the VIP cohort comprised tens of thousands of customers. They were divided into tier 1 and tier 2, with tier 1 customers being managed by the VIP team. If resource allowed, some tier 2 customers would also be managed. Mr. Williams was taken to the “VIP bonus plan” from 2016. From that it appears that VIP managers could earn a bonus of up to 30% of their base salary. Two-thirds of that maximum bonus was “*linked to the achievement of individual performance objectives underpinned by the VIP account team revenue targets.*” Mr. Williams explained that the bonus was calculated not just on revenue achieved from managed clients but from all those within the VIP cohort.
73. I heard evidence from Mr Conor Ryan. He joined Betfair’s AML team in 2017 after the merger with Paddy Power. He explained that the AML teams received internal reports of various types including a “rolling overall loss report” which showed losses suffered over the previous 365 days and others included deposits in a day and over the previous 90 days. Mr Ryan did not accept that unusually high losses were an indicator of problem gambling but emphasised the need “*to look at the whole context and the customer as a whole as opposed to just one part*”. His evidence was that if he found any information during the course of an AML review that might suggest a customer had a gambling issue, he would refer the matter to the responsible gambling team.
74. I also heard from Mr Neil Burke who was a senior analyst in the AML team. He conducted a review of Mr Gibson’s gambling for AML purposes in November 2018. He too emphasised that losses alone, and without more context, were not a cause for concern. He, like Mr Ryan, was asked about the detail of the AML review process.
75. Mr Devlin provided 3 witness statements. He was a performance manager (at the time of giving evidence his job title was “exchange performance analyst”) and produced a good deal of analysis of Mr Gibson’s account. He accepted he had no formal mathematical or statistical qualifications. He was not called at an expert and was simply presenting data in a helpful way.
76. Mr Browne is the operations director at BETDAQ. The thrust of his evidence was that Mr Gibson could have placed large bets with BETDAQ on the betting exchange in the same way he had placed bets with Betfair. That is an important issue, and it goes to causation.

Dealings between Betfair and Mr Gibson

77. A running account of Mr Gibson's losses and gains shows that from time to time he enjoyed substantial success. However, an overview of the account shows a clear pattern of steadily increasing losses. I accept that through a series of alerts Betfair would have been aware of the state of this account and would often receive alerts on a daily basis. The account shows the following:

- a. Until 25 February 2010 the account was in profit.
- b. From 12 March 2010 until 13 May 2012 it was in deficit.
- c. Until 11 June 2012 the account remained in profit but on 16 June dropped from a positive total position of £15,014 to a negative position of £15,640.
- d. After 11 June 2012, the account remained at all times in deficit.
- e. His losses first exceeded £100,000 on 26 December 2012.
- f. By 29 December 2013 losses had reached £200,000.
- g. By 10 October 2014 losses were at £300,000.
- h. By 11 October 2015 they reached £400,000.
- i. By 18 December 2015 losses were at £500,000
- j. By 11 July 2016 losses reached £600,000
- k. By 30 November 2016 losses were at £700,000
- l. By 4 September 2017 losses reached £800,000
- m. By 29 October 2017 they reached £900,000
- n. Losses reached £1 million on 30 January 2018.
- o. The £1.1m loss mark was reached on 2 September 2018
- p. Losses reached £1.2m on 6 October 2018
- q. By 19 December 2018 losses were at £1.3m
- r. By 10 February 2019 they were at £1.4m
- s. By the last entry on 11 March 2019 total losses were £1,480,728.84

Contact with Betfair

78. It is plain from disclosed emails, from the fact that many communications have (as I accept) been lost and from a detailed log of interactions running from August 2013, that Betfair was in regular contact with Mr Gibson. What follows is a broad outline of that contact.

79. From 2013 Mr Gibson was offered a number of promotional incentives. Initially they included invites to golfing and tennis events and incentives to bet on those sports, but those non-football related offers were soon reduced. There were several relatively low value (£100 cash back) incentives offered in the first half of 2014 and some general promotions (for example "price rush" and "New York Cash Race") in the second half of the year. In 2015 there were fewer offers, these comprised cash back offers (including one

£100 credit for “midweek frequency”), bonuses and football hospitality. There were no further cashback offers after 2015. There were very few incentives in 2016 and in 2017 offers to attend football matches, cash incentives to bet on horse racing (£500 to bet at Cheltenham) and golf invitations. It is clear that these offers and incentives decreased over time.

80. It is in my view impossible to separate AML requests from responsible gambling interactions. First, an AML check is designed to ensure that a customer is gambling within his means (see the internal email below of 2 May 2018 and the email to Mr Gibson on 31 December 2018) and AML requests addressed to Mr Gibson expressly sought information about Mr Gibson’s ability to fund his account (which would include funding his bets and funding his losses). Secondly, Betfair’s responsible gambling programme included (as Ms Lawson explained) interaction between AML and responsible gambling, and thirdly, (certainly from 2017) the AML and responsible gambling teams often copied information to each other and (probably from 2018) appeared to share an email address.
81. The first recorded AML requests came in 2015. The required information was supplied, and Mr Gibson was cleared to use his account on 13 August 2015.

2016

82. There was a further AML request on 13 October 2016. By then his losses were at £648,000. This followed the decision to conduct an AML review taken on 30 September 2016 following a loss of £21,000 on 28 September 2016. The review was initiated by Mr Carlos Barrocas. The email appears to be in a standard form. After setting out a reason for the email (“*to undertake an extra level of due diligence.... This process requires a higher level of verification from customers to ensure that they are gambling sustainably and responsibly*”) it went on to ask Mr Gibson to provide “*additional information and supporting documentation*” about how his Betfair account was funded. He was asked for a “*full explanation as to how you are funding your account*” together with certain documents. Mr Gibson was asked to be “*as specific as possibleso that we can demonstrate that we have enough knowledge to be comfortable with your level of gambling activity*”. The information was to be provided within four weeks.
83. On 4 November 2016 Mr Gibson emailed Mr Rourke. Providing an answer to the questions posed in the October 2016 e-mail, he said “*I am director of my own property company and [fund] my lifestyle with my earnings. Hope this is sufficient. I will now forward on my bank statement/utility bill*”. On 9 November 2016 Mr Rourke replied asking Mr Gibson for more detailed evidence of his income. By 1 December 2016, Mr Gibson had still failed to supply any documents. The account was suspended that day. On 3 December 2016, Mr Gibson sent a single front page to a Halifax account statement. It covered the period 8 October 2016 to 1 November 2016 and showed deposits of

£72,677.97 and outgoings of £48,730.74. After clearing an overdrawn balance of £7,953.35, the credit balance on the account was recorded as £15,993.88.

84. Mr Rourke responded on 5 December 2016, forwarding comments from Betfair's "verifications team" as follows: "*this is insufficient as it doesn't explain the origin of the funds he has been using at Betfair it shows a large amount of funds coming into the account and a good balance as well, but no information on the source of wealth. He will have to provide an explanation for the source of wealth and provide evidence of this, full bank statements, pay slips, invoices, tax returns, etc. for us to review...*". Later that day, and after an exchange with Mr Rourke, Mr Gibson emailed Mr Rourke and said "*I am a property landlord, this is where my wealth comes from. Hope this satisfies*". At the same time, he forwarded a full copy of his September 2016 bank statement.
85. The bank statement showed a number of entries ticked. He told me in evidence that ticked entries indicated income and the ticks were for his accountant. Totalling the sums ticked by Mr Gibson, the statement shows an income in September 2016 of £64,000. The account also shows receipts from property sales and from re-mortgaging of £94,000.
86. In fact, the picture painted by the bank statements was not wholly accurate. The income received that month was not a true picture of Mr Gibson's monthly income. The rental payments shown were sometimes due monthly, but sometimes quarterly, and sometimes over other periods. When analysed on the true basis, the actual amount of monthly income (before expenses are paid) is £30,882.54. Mr Gibson estimated his monthly expenses (including mortgage payments) were about £10,000.
87. It is important to note that Mr Gibson was clearly frustrated that his account was not re-activated quickly. He was very keen to return to gambling. On 5 December 2016 he made a call to the VIP team. The Betfair operator confirmed that the bank statements had been received. Mr Gibson said "*I know they've been received. They were received 4 hours ago. I know they've been received. It's either opening it or I'll just go with Betdaq. They are quite similar to you*". After a further exchange he continued: "*If you don't get me on now, today I'm cancelling the lot with you. So, you've done, you've lost me. I'll go with Betdaq. I've already opened a Betdaq [account]*." The call is long. It is quite clear that Mr Gibson was attempting to use the fact that he had just opened an account with Betdaq to encourage Betfair to re-open his account. He was playing Betfair off against Betdaq. In the same phone call, he twice told the operator he was a "*multi-millionaire*".
88. The evidence shows that Mr Gibson deposited £1,200 with Betdaq on 3 December 2016 and withdrew the same sum (after commission) on 5 December 2016 at 5:32pm, shortly after his discussion with the VIP team at Betfair.
89. I heard from Mr Barrocas, a member of the defendants AML team. He carried out the EDD review in respect of Mr Gibson which commenced on 30 September 2016 and

ended in December 2016. He explained to me that the review was in two stages, first there was online research to gather general information in respect of the individual and then a “*more in depth consideration of the documents provided*”. He accepted the review of this kind was “*an important safety net for customers who may have a gambling disorder*” because the review would take a deep dive into the customer’s finances. He accepted that in carrying out the review a member of the AML team would be conscious of the need to look out for problem gambling indicators. Like other witnesses before him, Mr Barrocas did not accept that identifying a problem gambler was a mechanistic endeavour. As he put it more than once “*it depends on the case*”.

90. The account was re-opened on 6 December 2016.

2017

91. In 2017, Mr Gibson attended two Manchester United home games, one against Wigan in January the other against West Bromwich Albion in April. On each occasion he took three guests. Internal records at Betfair show that on each occasion Mr Gibson was a good guest, engaged fully with others, and contributed to a convivial atmosphere. He was invited to other games but was unable to attend.

92. Betfair internal emails from September 2017 suggest that further contact was made with Mr Gibson about responsible gambling. On 5 September 2017 Mr Gibson’s account was subject to a second AML review. It was conducted by Conor Ryan. Mr Ryan forwarded Mr Gibson’s details to the responsible gambling team. On the following day Mr Doolan, a responsible gambling analyst, sent an e-mail to Mr Ryan copying in both the AML and the RG teams. Referring to Mr Gibson, Mr Doolan wrote “*we have reviewed this customer, and they are scoring medium low risk. We have forwarded this customer our RGI awareness mail and we will continue to monitor the customers activity.*”

2018

93. Betfair’s responsible gambling interactions with Mr Gibson peaked in 2018. On 4 April 2018, Mr Gibson’s activity triggered an exchange report. That led to a further responsible gambling e-mail. On 1 May 2018 Mr Sean Taylor of the RG team emailed Mr Rourke about Mr Gibson. He had “*[a]ppeared on our reports today and has triggered for an RGI. Could you please contact the customer and ensure he is not spending beyond his means, is in control of his gambling and is aware of different player protection tools available on site?*”. On the 2 May 2018 Mr Ryan emailed Stuart Rourke, and both the RG and AML teams. He had conducted an AML review of Mr Gibson’s account and determined his account to be medium risk. He noted that up to date information was required to understand the source of Mr Gibson’s wealth: “*to ensure he is still gambling*

within his means". Mr Ryan asked Mr Rourke to approach Mr Gibson and added that the information should be provided within eight weeks of the date of the e-mail, otherwise the account would be suspended. Addressing the responsible gambling team Mr Ryan said, "*can you also please review this customer again and advise on if you have any concerns you would like [Mr Rourke] to address [when communicating with Mr Gibson]?*" The Salesforce system records that on the 10 May 2018, Mr Rourke sent a responsible gambling text message to Mr Gibson.

94. The next disclosed interaction comes on 19 June 2018. By then Mr Gibson's losses were around the £1m mark. Mr Rourke emailed Mr Gibson asking for AML information asking for a "*full explanation as to how you are funding your account (eg salary or other income) along with documentation that illustrates this (eg other bookmaker betting statement wage slip company property ownership etc)... Given our regulatory requirements we must inform you that you have until Wednesday 27 June 2018 to provide us with the above information. If after that time the information has not been received your account activity may be impacted. I fully appreciate that you have provided this information previously and that this process is an inconvenience, however we require updated versions of the documents to comply with our regulatory requirements.*" On the 26 June 2018 Mr Gibson emailed Mr Rourke "*as requested, I fund my account with my salary, I am a property company owner with a portfolio of houses.*" He appears to have sent a scanned copy of a tax calculation for Lee Gibson Properties Limited for the year ended 30th of April 2017. That document shows trading profits of the company of £109,929. Mr Rourke responded on the 27th of June "*unfortunately our verifications team have told me that they cannot accept the provided company documents as source of funds. Are you able to send over updated documentation in relation to properties you own/rent out and derive income from as you did previously?*". The account appears to have been suspended from 27 June 2018.
95. On the 27 June 2018, Mr Gibson sent a detailed, but short, spreadsheet to Mr Rourke. It sets out 13 properties (the properties he "*derived an income from*") and records the value of each. The total value, which does not appear as a figure within the spreadsheet, is £4,535,000. Outstanding mortgages are recorded as £2,645,000. The spreadsheet therefore gives a net valuation of £1,890,000. Monthly rents are recorded as £30,177.69 with the mortgage costs of £7,624.71 leading to a monthly profit after the payment of mortgages of in excess of £22,000. When asked about this table, Mr Gibson told me that it was in effect a reflection of the maximum value of his portfolio if all properties were let and each was renovated. It is however plain that the table was presented by Mr Gibson to Betfair as an accurate picture of his worth and specifically in response to the request made in June 2018 of a "*full explanation as to how you are funding your account*". Mr Rourke sent the table to Mr Ian Brogan of Betfair on the same day. Mr Brogan replied (15.59) saying that he could not accept the spreadsheet and would need to "*get bank statements showing payments received and the actual rental agreements.*" When the request was put to Mr Gibson, he asked for the Defendant's "*rules and regulations*" in

order to understand the point of the request. Thereafter he provided the individual tenancy agreements as requested. The information was sent to the AML team for analysis. On the 29 June 2018, another AML analyst, Mr Conor Ryan, told Mr Rourke the evidence received still fell short of the mark:

“In total we have calculated rental income in 2017 to be approximately £320k to £350k. In 2017 alone he lost £342k. We appreciate he recently sold a property however this still does not explain how losses could have been so high in 2017. With this in mind it's also clear that there are outstanding mortgages on some of these properties which need to be offset from rental income. We also have to take into consideration income tax. We need the customer to clearly demonstrate to us his affordability for the levels of losses seen on this account, we appreciate the amount of documentation sent in however from what we have seen so far, the figures simply don't add up.”

96. On the same day Mr Ryan emailed Stuart Rourke *“I have reviewed the remortgage details, and this is still a long way off as being comfortable with his source of wealth. We need to see the customer can comfortably afford the levels of spend seen on his account after living expenses and taxes etc. If the customer is querying terms and conditions, please point him to the following link....”*.

97. Mr Gibson was again frustrated. In WhatsApp messages to Mr Rourke, he queried why in previous years the information he had provided had been sufficient. He said *“...Betfair are admitting negligence in previous years. My solicitor would like to see what has changed in the last 8 years. Betting companies have been fined for negligence / advertising through e-mail encouraging you to bet with incentives ie cash back. Betfair obviously shouldn't be giving encouragement to bet with incentives if high losses are occurring. Can you give me the correct details to correspond to with this matter. I'm sorry it's ended like this....we will need this information to contact the correct department in writing to lodge our claim.”*

98. On the 2 July 2018 Mr Gibson sent further information to Mr Rourke, again by way of WhatsApp he said, *“I also sold three houses at the end of 2016 and early 2017 net 140K I didn't mention to you. My solicitor has just informed me Stuart as he is struggling to see the affordability test you have done with me failing it.”* In cross examination Mr Gibson told me that where he suggests, here and in other places, that he has sought legal advice, that suggestion is false. Matthew Brown of the AML sent an internal email on 6 July 2018:

“I have checked that the customer owns all the properties which they have provided rental statements for. According to Land Registry information 8 out of the 9 properties are in this individual's name. I have calculated that the individual makes a profit of approximately £208K when the mortgage

payments are subtracted from the sums made from their rental income. I have no reason to suspect that the mortgage payments that the customer has provided are fictitious. There are also 4 more properties which he has not supplied rental statements for which may also provide him with an income. He has owned the property since 2008 which is the year before he opened his Betfair account. The rental income provides the individual with a sustainable income to offset the average yearly loss on the account of £133.6K we also have additional comfort from the information on this individuals company on due diligence. This company has net assets of £1.6 million and fixed assets of £4.3 million a shareholder funds of £1.57 million the customer had a large spike in activity of 342 K in 2017 which is larger than their yearly estimated rental income. We have proof of 3 property sales which gave him a profit of approximately 88K in September 2016 which gives him additional funds to sustain the spike in activity in Q1 (losses 138.4K). We also have evidence that he remortgaged another one of his properties in September 2017 which gave him an additional income of 47 K to support his losses of 163K sustained on the account in Q4 of 2017. We also have evidence of a house sale in January 2018 for 335K which gives us additional comfort that the customer can sustain their activity going forward (although it is unlikely that this is all profit). As the rental agreements are handwritten, I would like to see some evidence of payments from tenants into a bank account. One this is received; I am content for the account to be re-opened”.

99. Details of the four properties referred to in the e-mail are set out in a separate document. They show an estimated yearly profit of £75,500. Thereafter, on the 13 July 2018, Mr Gibson provided more bank statements showing the receipt of rents in respect of the tenancy agreements which had been supplied. On the 16 July 2018, Matthew Brown emailed Stuart Rourke confirming he had reviewed all of the information and that “we now have sufficient evidence that the customer has the SOW to offset the level of loss sustained over the lifetime of their Betfair account. I have re-opened the account and will be in touch if we need anything further from the customer.”

100. Once the account was reopened, on 16 July 2018 Mr Rourke sent an e-mail to Mr Gibson with the subject line “Betfair responsible gambling”. He notes that responsible gambling was very important, the aim of the e-mail was to ensure that Mr Gibson was “comfortable with your level of spending and aware of the player protection tools available to you?”. On the 19 July 2018 Mr Gibson confirmed he was. He wrote: “Hi Stuart, I confirm I am comfortable with my levels of spend and [am] aware of the player protection tools available. Thanks, Lee.” On 20 July 2018 Betfair added £1,000 to Mr Gibson’s account, apparently as compensation for inconvenience. On 24 July 2018 Mr Gibson's activity triggered an exchange report. He was sent a responsible gambling e-mail.

101. On the 9 September 2018 Mr Gibson's activity triggered a rolling overall loss report (a spike report) which showed losses of £303,574 . An RG risk calculator score in the middle band warranted a responsible gambling intervention (not simply an email). On 14 September 2018, an email was sent to Mr Gibson: "*our responsible gambling team have asked me to confirm that you are comfortable with your current levels of spend and are aware of the on site player protection tools available to you?*". Mr Gibson's reply was "*yes, all OK mate, just couldn't buy a goal was doing OK. Will be OK, discipline*".
102. On 16 November 2018, Gary O'Donoghue, a responsible gambling operational analyst, sent an e-mail to Stuart Rourke. He pointed out that Mr Gibson had triggered a report that day and had been found to present a medium risk after use of the responsible gambling calculator. Concern was expressed about the high number of failed deposits and the number of pending withdrawals that were cancelled. High losses were also noted and Mr Rourke was requested to put in a responsible gambling call to Mr Gibson "*to ensure that they are comfortable with their level of play and spend on site and that they are aware of the player protection tools available on site*". On the 28th November Mr Rourke emailed the responsible gambling team and the AML team confirming he had spoken to Mr Gibson and carried out a responsible call. He wrote: "*Hi all, I have just had a long chat with [Mr Gibson] on the phone. He has confirmed again that he is comfortable with his levels of spend and is aware of the on site player protection tools available to him. I also reminded him that he can turn off the CPW tool which he is aware of. He appreciated that we are contacting him with regard to responsible gambling but assures me that all is well....no concerns.... I will be meeting with him face to face next week where I will mention all of this to him again.*" Mr Gibson then attended a Manchester United game on the 29th November 2018.
103. The Defendant's internal Salesforce recording system notes that there were further responsible gambling interactions in October, November (4 interactions) and December 2018. Those emails have not been disclosed and cannot be found. I accept that they were sent. Mr O'Keeffe gave evidence about them and was not challenged. An e-mail sent by Mr Rourke on 27 November 2018 to the AML team and the responsible gambling team, records a discussion with Mr Gibson on the telephone "*again that he is comfortable with his levels of spend and is aware of the on site player protection tools available to him.*"
104. On 31 December 2018 Mr Neil Holland of Betfair contacted Mr Gibson by e-mail. "*Hi Lee, I am contacting you today in regard to your Betfair account. I tried to call you today to speak about the recent increase in activity on your account. If you wish to speak about your account, please advise of a time that I could call and please confirm your current contact number. Alternatively, you can respond to the below questions. Do you feel you are in full control of your gambling on site? Are you currently spending within your own financial means and at a sustainable level? Do you think gambling could be becoming an issue for you? Are you comfortable with your losses? If you do not reply to this e-mail your account will be suspended. We also wish to make you aware of the tools*

that we have in place from deposit, loss limits, as well as account closure options such as self-exclusion.” This appears to be a new and improved RGI email. It appears that there followed a conversation between Mr Holland and Mr Gibson on the same day, the Salesforce record shows that after the RGI e-mail was sent, “*RGI conducted*”.

2018 to 2019

105. Between 25 November 2018 and 17 January 2019 Mr Gibson lost £134,693. Between those dates 8 alerts were received in respect of Mr Gibson’s activity. Most lead to some form of interactions but some were so close to previous interactions that no action was taken.
106. On 28 January 2019, the standard AML e-mail noting the need to “*undertake an extra level of due diligence*” was sent. On 7 February, a further new and improved responsible gambling email was sent by Jamie Domansky. On 8 February Mr Ryan Perry conducted the responsible gambling intervention and noted: “*spoke to customer, he claims he is in full control of his gambling, comfortable with his losses, he is aware of PP tools and said he would apply himself if needed.*”
107. The AML request resulted in Mr Gibson again providing his bank statements. His account was suspended from 15 March 2019. It is clear that Mr Gibson was frustrated with the suspension. On 11 April 2019 when his account had been suspended for six weeks he wrote in an e-mail to Mr Rourke “*I really want to make a complaint with Betfair. I think I'm owed a lot more from them.*” On 12 April Mr Rourke wrote to Mr Gibson in these terms “*following careful review, our verifications team have informed me that they will not be in a position to reopen the account. This is a business decision in accordance with terms and conditions and unfortunately will not be changed. I wish you all the best for the future. Cheers Stu.*”
108. Mr Gibson replied on the 15 April 2019 “*no problems Stuart we was expecting this. Can you please resend the e-mail have as we haven't got it. Also, as we can't get into the account, we need a full statement right back to when the account was opened with every transaction listed with dates shown to all bets....*” In further email correspondence Mr Gibson says “*ten years I've been with Betfair and feel like I've been chewed took my Commission and spat out. If there isn't a proper reason I will spend as much as it costs to find out. It sounds like they are worried that they should have verified my account from the first year not just after eight years this we will find out if I don't get a fair income, we will go down the route of Betfair being negligent and not fulfilling their obligations to meet their gambling responsibilities. Ellis Jones solicitors experts in this will take on the case from the opening of my account right away through..... I'm lost Stewart. I will spend 100K on this with top lawyers and go to papers and i know I've got something*”. On 18 April he wrote that the closure came “*after 10 years of offering free 200 bets dangling*

carrots then spitting me out, emails saying bet we will give you money to bet then this it really is disgusting.” Mr Gibson fought at every stage to keep his accounts live.

Summary of interactions

109. A number of points appear from these interactions. Mr Gibson consistently and often reassured Betfair that he was able to fund his gambling (including his losses) and none of the information he provided to Betfair painted a different picture. The fact that he consistently satisfied AML checks (and raises no complaint about that) makes it impossible for Mr Gibson to argue that the size of his losses was, of itself, enough to raise reasonable concerns. Indeed, even after the trial, there is no real suggestion that Mr Gibson could not afford his gambling.
110. It is plain that Betfair knew he was selling properties and re-mortgaging them, but there is nothing obvious in the transactions revealed to Betfair that would suggest he was doing anything other than acting broadly in the normal course of business. Mr Gibson told me in evidence that he was remortgaging “*when I couldn't get any more credit*”. I do not accept that evidence. I am satisfied that remortgaging was a normal and everyday part of Mr Gibson's management of his portfolio. The evidence shows that remortgaging was not a matter of last resort when all other lines of credit had been severed.
111. Mr Gibson was so determined to gamble that he deliberately misled Betfair about the important issue of legal advice. He told Betfair more than once in 2018 that he had legal advice that Betfair was acting in a way that infringed his rights.

Sources of wealth

112. I heard a good deal of evidence about the source of Mr Gibson's gambling funds. In my view much of this evidence goes to a point that does not much assist him. In essence he now appears to invite me to look at the sources of his wealth, conduct a forensic examination of those sources (without any expert or relevant factual evidence to assist) and conclude that he could not afford his losses. Armed with that conclusion he invites me to conclude that Betfair should have known he was a problem gambler. The difficulty with this approach is that ignores the presentation of facts given to Betfair at the time and it ignores (as I have explained) the fact that it is accepted that all AML checks were correctly carried out.
113. Bearing these points about the limited value of the evidence in mind, I found it unsatisfactory. I formed the impression that Mr Gibson had provided an incomplete picture. There was no evidence from his accountant, no full audited or even management accounts for his businesses, and no expert forensic accountancy evidence. Instead of

exercising any of these options, Mr Gibson left me with only a partial picture.

114. It appears, as I understand it, that there were 3 sources of money for Mr Gibson's gambling: Lee Gibson Properties Limited ("LGPL"); LG Properties; and loans from family and friends.

LGPL

115. LGPL was incorporated in 2015. Ostensibly it appears to have been formed to hold rental properties and receive the income from those properties. By then there were 16 rental properties.

116. The company accounts for the year ended 30 April 2015 recorded the value of its fixed assets (although it is unclear what properties could properly be recorded as its assets) at £4,372,693. Long term liabilities, likely to be secured lending, were recorded at £2.78m with net assets of £1.5m. Mr Gibson felt that represented the value of all 16 properties. It is not clear how (if at all) money might have been taken out of the company by way of salary, dividend or director's loans. I have come to the view that these issues are not things I need to deal with. In one way or another the properties and the income they generated were at Mr Gibson's disposal.

Loans

117. Loans came from Alex Carter, Paul Gibson (Mr Gibson's father) and James Smith. In the period to 15 March 2019:

- a. Borrowings from Mr Smith totalled about £46,000. Mr Gibson had repaid £48,430 by 15 March 2019.
- b. Borrowings from Mr Kinghorn totalled £173,000 of which £13,060 appeared to be outstanding as at 15 March 2019.
- c. By 15 March 2019, Mr Gibson appeared to owe his father £122,658.12.
- d. On the same date, Mr Carter had loaned Mr Gibson about £217,000 and Mr Gibson had repaid all that sum plus an additional £3,900.

118. These loans were not formally documented and there is no suggestion that Betfair had any detail of them. There may have been some reference in the bank statements disclosed as part of Betfair's AML checks, but mere mention of a loan is of no relevance. Some of Mr Gibson's bank statements refer to loan payments to or from Mr Gibson's father but it is not possible to tell from the account the full extent of borrowing or whether Mr Gibson is the borrower or the lender. Mr Gibson was asked to explain his sources of wealth on very many occasions. He did not refer to these loans.

LG Properties

119. Income from LG Properties was £4,400 in 2015; £17,400 in 2016, £30,200 in 2017 and in 2018 £31,000.

Was Mr Gibson a problem gambler?

120. The British Gambling Prevalence Survey 2010 offer the following definition:
“*problem gambling is gambling to a degree that compromises, disrupts or damages family, personal or recreational pursuits.*”

Mr Gibson’s view of his gambling and his spending

121. Mr Gibson told me that his gambling became unaffordable and unsustainable from 2015 onwards (some 3 years or so after he started to panic about the money he was losing). Until then it had been “*enthralling and exciting*”. Between October 2014 (when his losses were at £300,000) and April 2015 (when his losses were at £389,000) Mr Gibson paid for a property, which he had contracted to buy earlier in 2014, in Mallorca. The purchase price was €498,000 of which €324,000 was borrowed by way of mortgage. Taking into account the value of the rental properties as shown in the company accounts, his own home valued at somewhere in the region of £300,000, and the Spanish property, Mr Gibson's properties were worth in the region of £5,000,000.

122. In December 2016 he spent £10,000 as a deposit on a Range Rover Vogue, in May 2017 he spent £11,200 on Rolex watches and in December 2019 (after his account with Betfair had been closed) he spent £23,000 on watches. I accept that the watches were later sold or gifted.

The expert view

123. I heard evidence from Dr Frazer (who was called by Betfair) and from Dr Needham-Bennett (who was called by Mr Gibson). Both experts gave their evidence in a clear and helpful way.

124. By taking all of the information available to them in the run up to trial, they agree that Mr Gibson suffered at the relevant time from a gambling disorder of moderate severity. Each scored Mr Gibson as 6 out of 10 using the DSM IV test (although for different reasons).

125. The DSM IV diagnostic tool only works if the questions it sets out are answered honestly. To some extent it is therefore always likely to be a retrospective test because, as everyone accepted, those with gambling problems may well actively cover up, and not

reveal the true extent of, their symptoms. Diagnosis, whilst a problem gambler is in the full thrall of the condition, is therefore difficult. Dr Frazer noted that it is difficult to identify if a person has a gambling disorder (even for those who are medically trained) unless that person is prepared to give full disclosure.

126. I agree with Dr Needham-Bennett that Mr Gibson’s problem gambling took hold in 2015. That coincides with the point he told me his gambling had ceased to be “*enthralling and exciting*”. I therefore accept that Mr Gibson was a problem gambler from 2015.

127. I do not accept the suggestion advanced by Mr Gibson in opening that he was “*addicted to gambling on the exchange*”. The expert evidence does not support such a finding. I accept that the exchange was something that Mr Gibson enjoyed but I do not accept that his gambling problem was limited to it.

Did Betfair know, or should they have known that to be the case?

128. It cannot in my judgment be said that Betfair knew or ought to have known that Mr Gibson had a gambling problem at any time between 2009 and 2019.

129. The difficulties faced by Mr Gibson in making good this point include that he kept his gambling problem to himself, he could (at least on the face of the information he gave to Betfair) afford to fund his gambling, he misled Betfair about his gambling and it is very difficult to identify a problem gambler who is not being honest. Taken together these difficulties are in my judgment insuperable. In my view Mr Gibson did not simply fail to share information about his gambling problem, he took steps actively to hide it and to portray to the world at large, and to Betfair in particular, a wholly inaccurate picture.

130. During the course of the evidence, it was suggested to Betfair’s witnesses (in particular Miss Lawson) that Betfair might have chosen more efficient ways to identify problem gamblers. In particular, Mr Mitchell emphasised that the DSM diagnostic test was plainly the most obvious and best way for Betfair to identify problem gamblers. Criticism was also levelled at, for example, the CAAP system because (it was said) its methodology was flawed. These criticisms in my view add nothing to Mr Gibson’s case. Betfair was under no regulatory (or other) obligation to implement the very best or most efficient system to identify problem gamblers. Its obligation was to have appropriate policies in place. In my judgment it did that.

131. Mr Gibson suggested that he had shared his gambling problems (or at least the size of his losses) with others (an unnamed tall man at Betfair’s hospitality box at Old Trafford and the landlord of his local pub in Leeds). I reject that evidence. It was wholly uncorroborated, and I have found Mr Gibson to be unreliable.

132. On the facts as I have found them (that Betfair was not aware and cannot be taken to have known about Mr Gibson's gambling problem) I am satisfied that Betfair were not in breach of the LCCP.
133. In reaching that conclusion I bear in mind: first, that it would have been (and remains) very difficult to identify a problem gambler from data analysis alone; secondly, that Betfair's approach to compliance evolved over time and was driven in my view by a desire to root out problem gamblers; thirdly (as I have explained above) the fact that there might have been better ways to identify problem gamblers does not assist Mr Gibson; fourthly, the relevant licence provisions in place until 2019 were relatively undemanding.
134. I am satisfied that Betfair had appropriate policies in place and applied them. I found Betfair's evidence on this compelling and clear. Since 2004 or 2005, Betfair had had a (small, but nonetheless functioning) responsible gambling team. At least in the early days (and possibly until 2015), Gerry Callaghan may have been its only member. Kelly Clynes joined the team in June 2015. It is clear that customers (whether managed as VIPs or not) were contacted from time to time. These interactions may or may not have resulted in action. Each was taken on a case-by-case basis.
135. The gambling industry experts agree that Betfair's policies changed, and effectively became more sophisticated, in 2015. Before then they had identified problem gamblers by reference to fairly obvious indicators like self-identification and heavy losses. After 2015, there was an increased focus on the wider use of data above and beyond these obvious indicators. For example, a system of monitoring via alerts was introduced from April 2015 and risk calculators were introduced in 2016 and CAAP from August 2017. The experts rightly comment that the change in approach coincides with the imposition of tighter LCCP in 2015.

What Mr Gibson did after the Betfair account was closed

136. After Betfair closed down his account, Mr Gibson continued to gamble on other platforms both in his own name and using an account of a friend. Between 29 March 2019 and 18 November 2020, and despite the introduction of the new and far more stringent social responsibility code provisions in place for most of that period, he appears to have lost at least a further £406,978.80.
137. Using an account in his name, between 29 March 2019 and 30 January 2021 he lost a total of £326,178.80.
- a. Between 29 March 2019 and 30 January 2021, he deposited a total of £502,000 with Betdaq. He withdrew a total of £220,715.62. He therefore

incurred losses in his own name over that period of £281,484.38. There were over 600 occasions when Mr Gibson won or lost more than £2,000 on Betdaq.

- b. On 21 April 2020, he deposited £1,000 with Bet365 Poker and lost £995.64 on the same day.
- c. Between 12 July 2020 and 17 September 2021, he deposited £20,020 with Skybet and lost all but £4.01 and £8,500 with bet365 losing all but £17.26.
- d. Between 28 July 2020 and 31 October 2020, he deposited £33,200 with William Hill and lost everything.

138. Between 26 May 2020 and 8 June 2020, he used an account in the name of James Smith to continue to bet at Betfair. In that time, he deposited £80,000. Between 4 September 2020 and 18 November 2020, he deposited £80,800 with Betdaq using an account in Mr Smith's name. Using Mr Smith's account, he therefore appears to have lost a further £160,800 between 26 May 2020 and 18 November 2020, taking his total losses to £406,978.80.

139. Mr Gibson signed up to GAMSTOP, a general self-exclusion system which prevents the opening of new gambling accounts on 15 September 2021. By then these proceedings were well underway.

Legal Issues

140. Mr Gibson originally advanced four different bases for his damages claim. First, that Betfair was in breach of statutory duty. Secondly, that it was in breach of a term implied into its contract with him that it would comply with its licencing obligations. Thirdly, that it is in breach of a term implied into the contract by statute, and finally that the defendant has acted negligently. I will deal with each basis in turn.

Breach of statutory duty

141. The claim for damages arising out of breach of statutory duty is no longer pursued. In their closing argument Betfair describe this, now abandoned, part of the claim as “*hopeless*”. In order to succeed it would have been necessary for Mr Gibson to establish what the statutory duty was, and that Parliament intended that Mr Gibson should have a private right of action in respect of any breach of that duty (see X (Minors) v Bedfordshire CC [1995] 2 AC 633). If Mr Gibson had pursued that part of the claim, Betfair would have relied on the observations of Simler J (as she then was) in Ritz Hotel v Safa Abdullah Al Geabury [2015] EWHC 2294 expressing “*real doubts*” as to whether a private law remedy for breach of statutory duty could arise under the Act.

142. In my view Mr Gibson was plainly right to abandon (or, as Betfair put it “*quietly drop*”) this part of the claim. Section 24(8) precludes such a duty.

Breach of contract

143. Before dealing with any claim based on contract it is necessary to deal with two preliminary matters. First, how a betting exchange operates and secondly, the express contractual terms governing Mr Gibson’s relationship with Betfair.

144. A betting exchange is an online marketplace. In *R (William Hill Organisation Ltd) v Horserace Betting Levy Board* [2012] 1 WLR 3504, Stanley Burnton LJ accepted the following description:

“Users of the exchange indicate the bets they wish to make and identify the odds they are willing to offer or accept and the sums they are willing to bet. The exchange then matches up one or more ‘backers’ (i e those who want to bet at particular odds that a particular event will occur: ‘I bet that Camelot will win the Derby’) with one or more ‘layers’ making an opposing bet (i e those who are prepared to bet at the same odds that the particular event will not occur: ‘I bet that Camelot will not win the Derby’). The exchange charges commission on the winnings of the successful party. The exchange itself takes no risk.”

145. Smith and Monkcom in “*The Law of Gambling*” (4th Ed) offer the following explanation at [2.157]:

“The exchange promoter will set up a betting exchange website and invite customers to register with the site to use its services. Customers registering will be required to transfer funds by credit or debit card to be held by the promoter on account of stakes. Customers will then be free to post on the website offers to enter into bets which other customers are able to accept. When one customer accepts, and others offer a betting contract between them comes into existence. The exchange promoter will be authorised to deduct from the account of each of the customers his stake on the bet and to transfer it to a holding account pending the outcome of the bet. Once the outcome of the bet is known, the exchange promoter will then transfer the winnings to the account of the winning customer, deducting its own commission for the service provided. There are many variations on this basic business model.... However, the fundamental principle remains the same; the exchange operator is acting as an agent to effect a binding contract between the customers.”

146. The trial bundle contains more than one iteration of the terms and conditions governing the relationship between Mr Gibson and Betfair. From November 2014, the terms and conditions make plain that “*where customers bet with each other on the Exchange, Betfair solely acts as a facilitator and does not act as a counterparty*”. That term is entirely in line with Betfair’s licence to operate as an “*intermediary*”.
147. Taking the terms in force as at 1 November 2014, the following terms are of some importance:
- a. Under the heading “*betting*”, the customer is told that the terms “*apply to you and to each of your betting transactions*”
 - b. The outcome of the contract is that the customer opens an account with Betfair. In doing so, under the heading “*your account*” the customer makes certain representations which Betfair rely on. There is an obligation to keep Betfair informed of any changes in certain details (like country of residence)
 - c. By clause 11 Betfair reserves the right to amend the terms and conditions.

Implied terms

148. Mr Gibson argues that every time he entered into a betting transaction on the exchange, a fresh contract was made not only with his betting counterparty, but also with Betfair. He asserts that each such contract contained an implied term that Betfair would comply with its licence conditions, in particular those relating to social responsibility.
149. In my view each transaction does not create a new contract with Betfair. I accept Betfair’s analysis that a contract with Betfair is formed when a customer opens an account. Each customer has (and can only have) one account. The contract envisages that the customer will engage in a number of transactions but cannot be read so as to create a different contract for each transaction. The representations made by a customer (and given some prominence in the terms) are made once, at the time the contract is entered into. The express obligation to keep Betfair informed of any changes in some key details would be unnecessary if a separate contract was formed each time a transaction was entered into. Equally the right to vary the terms and conditions would be unnecessary if each transaction gave rise to a separate contract. These points accord with accepted definitions of an exchange. As a matter of interpretation viewed objectively, the contract read by an informed bystander would be understood to create a single contract governing many transactions.

By common law implication

150. Mr Gibson invokes the well-known principles set out in *Marks & Spencer v BNP Paribas SST (Jersey) Ltd* [2015] UKSC 72. A term will be implied where its existence is so obvious as to go without saying or where the implication is necessary for business efficacy. Mr Gibson relies on four matters in particular: First, the obligations he seeks to imply into the contract are intended to protect him so that it would have been obvious to a reasonable person that “*both parties were proceeding on the basis that Betfair would comply with its regulatory obligations and the protections implemented by parliament to protect him against the development of an addiction and potentially very significant losses*”. Secondly, the Act makes it plain that non-compliance with the regulatory obligation would mean that Betfair was committing a criminal offence. Such serious consequences would again make it obvious “*that both parties were contracting on the basis that Betfair's regulatory obligations would be complied with*”. Thirdly, if Betfair failed to comply with its obligations there was a risk that the contract would become void for illegality. In those circumstances business efficacy demanded the implication of terms. Finally, if Betfair’s obligations are not incorporated in the contract, Mr Gibson would be without any remedy under the statute.

151. The term contended for is plainly not one that is so obvious that its presence in the contract would “*go without saying*”. Indeed, Chapter 4 of the Government’s 2023 White Paper (cited above) comes to the opposite view. It confirms that in the general run of things, the absence of such a provision is the norm. It makes plain that “*licensees’ obligations around preventing harm [set out in the LCCP] are not generally part of terms and conditions and so do not form part of the contract between the customer and licensee*”.

152. In my view Betfair’s contract with its customers works perfectly well without the need for the implied term. That is because it works within the framework provided by the Act. The 2023 White Paper proceeds on that basis. It followed a call for evidence which received almost 16,000 responses. There is no suggestion that the present regime, which provides for no direct redress to an individual customer when a licenced provider of gambling services is in breach of its obligations save through ADR, does not work. The White Paper (as Professor Janet O’Sullivan has pointed out) falls short of recommending the imposition of a direct right of action and instead opts for a redress system under an ombudsman. Even future proposals for improvement therefore stop far short of what Mr Gibson says is necessary.

By statute

153. The parties agree that the contract between them was subject to terms implied by section 13 of the Supply of Goods and Services Act 1982 up to 1 October 2015 and, insofar as I did not accept Betfair’s analysis of the contract, Betfair agreed that thereafter section 49 of the Consumer Rights Act 2015 would apply. In each case the implied term is that Betfair would perform, or carry out, “the service” with reasonable care and skill. Mr Gibson points out that regulatory codes of practice may be relevant in defining reasonable

care and skill and provides the example of *Brandeis (Brokers) Limited v Black and others* [2001] 2 Lloyds Rep 359 at 363.

154. What is “the service” to which the obligation relates? Betfair argues that the service provided under the terms of the contract was that of facilitating the placing of bets. There can be no doubt that that service (facilitation) had to be provided with reasonable care and skill. Mr Gibson suggests in the Reply that the relevant contractual service is the interaction Betfair would carry out with a problem gambler. There is however no contractual obligation to interact for the reasons I have set out above. That term implied by statute relates to the standard of a service to be performed, not to the existence or otherwise of that service.
155. Further in my judgment it is important to read these statutory provisions in the context of the Act and in particular section 24(8). If Mr Gibson was right, then a failure to comply with the LCCP would make a person “*liable to civil proceedings*” (for breach of contract). The approach taken by Betfair avoids that obvious clash. For all of those reasons statutory implication of terms does not assist Mr Gibson.

The claim in negligence

Is there a duty at common law?

156. Mr Gibson's case is that Betfair owed him a duty to take reasonable care to prevent him, as a customer who was being actively managed and whom Betfair knew or ought to have known was a problem gambler, alternatively, likely to have a pathological gambling disorder, from suffering financial harm by the provision of gambling facilities.
157. I have set out above at the beginning of this judgment that Mr Gibson’s claim is “*doubly exceptional*” because he asserts there is a duty to prevent pure economic loss brought about by his own actions.
158. In advancing this argument, Mr Gibson must deal with the Court of Appeal’s decision in *Calvert v William Hill* [2008] EWCA Civ 1427. Although the facts giving rise to the claim arose before the coming into force of the Act, the Defendant bookmakers in that case had adopted codes of practise for dealing with problem gamblers in anticipation of the new regime. Under the terms of the code of practise bookmakers could offer telephone gamblers like Mr Calvert, an opportunity to self-exclude. Mr Calvert entered into a self-exclusion agreement with the Defendant, but the Defendant failed to implement it. At first instance, the Judge declined to find the Defendant had a general duty of care to protect problem gamblers from the consequences of their compulsive problems. There was no appeal against that finding. The Judge did however find in Mr Calvert's favour on his narrower case, that the Defendant had assumed responsibility to

implement the self-exclusion agreement so that a duty of care arose. The Judge found that “but for” causation was satisfied but that (because such a conclusion “*by no means concludes the causation analysis*”) Mr Calvert had not established, as a matter of common sense, that the failure to implement the self-exclusion agreement had caused his losses. The Judge found that Mr Calvert would, even if the agreement had been actioned, have ended up in the same financial position (financial ruin) because he would have bet with other bookmakers. The claim therefore failed as a matter of causation. The appeal was dismissed.

159. The general position is that a person does not owe a common law duty of care to prevent others suffering harm as a result of their own acts. The assumption of responsibility (and so the duty of care) in *Calvert* arose because Mr Calvert had declared himself to need the assistance of the bookmaker, and the bookmaker had accepted that request.

160. Mr Gibson relied on *Customs and Excise Commissioners v Barclays* [2006] UKHL 28 to support his argument that on the facts of his case, a duty of care arises. In *Barclays* (which was cited to Briggs J in *Calvert*) the Claimant had obtained freezing orders in respect of accounts held by third parties at Barclays. Having been put on notice of the freezing orders, the Defendant nonetheless permitted the third parties to dissipate funds. The Claimant sought to recover sums from the Defendant on the basis that it owed a duty of care to prevent economic loss. At first instance the Judge had found the bank owed no duty of care. The Court of Appeal allowed an appeal against that finding. The House of Lords allowed an appeal against the Court of Appeal’s decision.

161. The House of Lords determined, as Briggs J explained in *Calvert*, that “*no single common denominator could be identified among the available tests used in considering whether a defendant owed a duty of care, but rather that each case depended upon its detailed facts, and the particular relationship between the parties in the context of their legal and factual situation taken as a whole.*”

162. Mr Gibson suggests that the facts of the present case are novel so that the correct way to determine if common law liability arises is to consider the matter afresh, without following *Calvert*. He submits that I should first consider if there has been an assumption of liability. If so, that would be an end of the inquiry. If not then he suggests that the three-fold test of foreseeability of damage, proximity, and the requirement that it is fair and just to impose a duty (the three stage test) should be applied. He submits that the question of whether or not a duty exists should not be determined simply by reference to the decided cases, in particular *Calvert*.

Assumption of responsibility?

163. Did Betfair assume responsibility to take reasonable care to prevent Mr Gibson from suffering economic loss by using the gambling services it offered? Mr Gibson argues that Betfair assumed that responsibility because it actively managed his betting (through Mr Rourke) and because, and this is the key matter, it knew or ought to have known that he was a problem gambler. In my judgment there was no assumption of responsibility. I reach that view for a number of reasons.
164. If Mr Gibson had asked to be excluded from Betfair or had asked that some formal restriction be placed on his gambling, I think it very likely that Betfair would have become responsible to honour those requests. Betfair would have assumed responsibility. But where there was no such request, it is necessary to examine if Betfair had constructive knowledge of Mr Gibson's issues and so constructive knowledge of the need to support him. I have found that Betfair did not know, and it cannot be said that they ought to have known that Mr Gibson was a problem gambler. Mr Gibson portrayed himself as a wealthy man (as indeed he appeared to be) and able to afford his losses. He was often reminded of controls that he could impose on his gambling. In reality, he had no interest in imposing any limit on his ability to gamble and hid his difficulties (which I accept were real) very effectively. In those circumstances, it is difficult to see on what basis Betfair assumed any responsibility to prevent him losing money. Given Mr Gibson's masking of his condition (and my finding that it cannot be said that Betfair ought to have known about it), I find the view expressed by Briggs J in *Calvert* holds good: it was "*wholly unrealistic to suppose that in the ordinary course of its business a bookmaker can be expected to be able to identify that sub-class by way of what amounts to a process of medical diagnosis.*"
165. In my judgment, the fact that he had a VIP manager (Mr Rourke) and that he received incentives to gamble does not, absent knowledge (imputed or actual) of a gambling issue, elevate the case to one where responsibility is assumed. Mr Rourke was simply a single point of contact for Mr Gibson. It was clear from his evidence that Mr Gibson thought that Mr Rourke should have been "*looking out*" for him. In other words, Mr Gibson felt he had a special and close relationship with Mr Rourke of the type that might give rise to an assumption of responsibility. I am satisfied that Mr Gibson was wrong about that. The VIP team was (as Mr Williams explained) about fostering customer loyalty. I formed the view that Mr Rourke performed the role in a thoroughly professional manner. He encouraged loyalty and assisted Mr Gibson when he could. The LCCP acknowledge and accept (see the May 2015 update) that some customers will be managed in this way. There was no suggestion before me that Betfair's VIP team acted outside of what might be regarded as industry norms. In my judgment VIP management adds nothing.
166. It is key when considering whether there has been an assumption of responsibility to consider the "*detailed facts, and the particular relationship between the parties in the context of their legal and factual situation taken as a whole*". This factor also arises when considering the three-stage test. One such matter is that the parameters of the legal

relationship between the parties are lay down by the Act. Section 24(8) is important. Subsection 8 is in two parts. First, it sets out the general proposition that a person's failure to comply with a provision of a given code does not "*of itself*" make the non-compliant person liable to criminal or civil proceedings. In this context "*liable to*" must mean "*open to*". Left at that, the subsection would conflict with the terms of sections 33 and 82 of the Act. By section 33, a person who provides facilities for gambling commits an offence unless that person has an operating licence which authorises the activity and the person complies with the terms of that licence. Section 82 provides that an operating licence is subject to the condition that the licensee complies with any relevant social responsibility provision of a code. It follows that "*a failure to comply with a provision of a code*" can, without more (and so "*of itself*") make the licensed person "*liable to criminal proceedings*". To resolve the conflict, the second part of subsection 8 goes on to provide that the first is "*subject to any provision of... this Act making an exception to an offence dependent on compliance with a code*". Section 33 is such a provision. It "*makes an exception*" to an offence by excluding a person who has and complies with a licence from the category of persons who are committing the offence. The Act entrusts matters of enforcement to a specialist regulator. It provides for no private right of redress. The statutory scheme is public in nature.

167. For all of these reasons, and bearing in mind the facts as I have found them to be, the particular relationship between Mr Gibson and Betfair is not such that Betfair can be said to have assumed any responsibility.

The three-stage test

168. Dealing with the three stages, I accept that foreseeability is established. In my view the relationship between Betfair and Mr Gibson was not so proximate that it would be appropriate to impose a duty of care. In any event, and even if my conclusion on proximity is wrong, it is plain that it would be neither fair nor reasonable to impose a duty of care. The reasons for that are those I have already mentioned. This approach also accords with the approach in *Calvert*.

Conclusion on the question of duty

169. I have therefore reached the view that Betfair owed no relevant duty to Mr Gibson.

The alternative case: if there is a duty

170. If a duty was owed it would be necessary to consider if there has been a breach of that duty and if that breach had, in a legally recognisable way, resulted in loss.

171. It is difficult to deal with these points in the absence of a positive finding that a duty was owed. Nonetheless, I have concluded at para 132 above that the defendant did not breach the LCCP. I have also concluded, for the reasons set out below, that even if there had been a duty and if that duty had been breached, the claim would in any event have failed.

Causation

172. Had I found a breach of duty I would have concluded that Mr Gibson would in any event have gone on to lose at least the same sums elsewhere.

173. Mr Gibson was determined to gamble. If Betfair had stopped him gambling in 2015 or at any time I am quite satisfied that he would have gambled elsewhere and to the same extent. He would have remained a moderate problem gambler with large sums of money at his disposal and he would have continued to hide his problems. The best evidence of that is what he actually did when Betfair would no longer deal with him.

174. I do not accept the argument that other gambling providers would have recognised him as a problem gambler and ceased to deal with him. The evidence shows, and I have found, that he kept his problem under wraps, was able to afford to bet at the level he did (he passed all AML investigations), would not tell the truth when asked if he was comfortable about his losses, and would not use tools to limit his gambling.

175. It follows that even if I am wrong about duty, Mr Gibson's claim would still fail.

Unlawful transactions

176. The issue here is this: does s.33 of the Act imply a prohibition on entering into gambling contracts otherwise than where facilitated by a party complying in full with the terms of its licence, such that any breach of the licence in relation to a particular customer would render the contract with the customer *void ab initio*?

177. Mr Gibson relied on Cornelius v Phillips [1918] AC 199 and Phoenix Insurance v Halvanon Insurance 1988 1 QB 216. Betfair refer to Okedina v Chikale [2019] EWCA Civ 1393 and Hughes v Asset Managers [1995] 3 All ER 669. Both parties accept that section 33 contains no express prohibition which would operate to render contracts void. Mr Gibson must therefore rely on an implication that Parliament intended all relevant

contracts to be void.

178. The Court of Appeal in *Okegina* notes (see paragraph 18) that, where a statute provided that no person should “*buy or sell or otherwise deal in*” certain foods unless they were licenced to do so, the contract was held to be unenforceable because the prohibition applied to both contracting parties so that in effect, the activity was prohibited. If the activity is not prohibited, and the statute operates to prohibit one party from entering a contract, or imposes a sanction on one party, the position may be different (see paragraph 22 citing the *Phoenix* case). In such cases, the law requires that public policy (bearing in mind what the statute is designed to prevent), consequences to the innocent party and other relevant considerations are taken into account. In some cases, the public interest may be satisfied by the imposition of a criminal sanction on the defaulting party.
179. Betfair’s position is that section 33 of the Act does not impose a blanket prohibition but imposes a penalty on one party. It points out that the regime created by the Act is a bespoke regime. In particular, Part 17 of the Act (legality and enforceability of gambling contracts) includes an express power (section 336) for the Gambling Commission to void an unfair bet and provides that where a bet is voided “*any contact or other arrangement in relation to the bet is void*”. Further it points out that public policy would not support the voiding of contracts. One need only consider the position of a gambler who had placed a successful bet. It would (at least in the common case where the provider was a counter party to the bet) be contrary to public policy if that gambler was deprived of their winnings.
180. Mr Gibson submits that on its true construction, section 33 operates as a ban on the activity of gambling. If he is wrong on that he submits that a consideration of public policy leads to the same result.
181. I prefer the arguments of Betfair. In my judgment section 33 does not ban gambling as an activity and cannot have been intended by Parliament to operate so as to void contracts. It simply imposes a penalty on one party. In my view, public policy overwhelmingly favours the enforceability of gambling contracts even when the operator is in breach of his licence. A successful gambler should not be deprived of the fruits of his bet, but equally in my judgment a losing gambler should not be able to escape the consequences of his decisions. Section 336 supports that view. It makes clear that Parliament intended that bets would only be voided where the bet was unfair. Further, in my view the bespoke regulatory regime set out in the Act (and explained in the 2023 White Paper) would be impossible if contracts were voided in this situation. If Mr Gibson is right, the outcome of the 2018 investigations (where there were breaches of the LCCP, but the contracts were not considered void) would be flawed. Finally, if Mr Gibson were right, the gambling industry would potentially be thrown into chaos. Every unsuccessful gambler would potentially be able to claim lost stakes back on the basis of a breach of the

LCCP. That outcome would run counter to the intention of the Act.

182. Had I found Betfair to have been in breach of the LCCP I would have dismissed the claim that contracts made with Mr Gibson at that time were void.

Conclusion

183. Mr Gibson's claim must be dismissed in its entirety. Given my findings I do not propose to deal with quantum issues, issues of contributory negligence or issues of limitation. I am grateful to all counsel for their assistance.