Neutral Citation Number: **[2023] EWHC 1989 (TCC)**

Case No: HT-2022-000253

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Rolls Building
Fetter Lane
London, EC4A 1NL

31/07/2023

Before :

MRS JUSTICE JOANNA SMITH DBE

- -

Between :

EE LIMITED

Claimant

- and -

VIRGIN MOBILE TELECOMS LIMITED

Defendant

- -
- -

Alex Charlton KC and Gideon Shirazi (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Claimant**
Adam Zellick KC, Philip Ahlquist and Gillian Hughes (instructed by **Baker & McKenzie LLP**) for the **Defendant**

Hearing date: 19 April 2023

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APPROVED JUDGMENT

This judgment was handed down remotely by email on Monday 31 July 2023 by circulation to the parties or their representatives by email and release to the National Archives.

Mrs Justice Joanna Smith:

1. The Defendant ("**VM**") applies pursuant to CPR r. 3.4(2) and/or r. 24.2 for strike out and/or reverse summary judgment of the claim brought by the Claimant ("**EE**"). The application invites the court to construe the provisions of an exclusion clause in a Telecommunications Supply Agreement entered into by the parties on 28 August 2013 ("**the TSA**") and in particular to determine that the EE claim in these proceedings for breach of an exclusivity provision is properly to be described as a claim for "anticipated profits" such that it is excluded by virtue of that clause. EE opposes this application, contending that it raises a question that can only be dealt with at trial.

The Background:

2. Both EE and VM provide their respective customers with mobile telephone and mobile data services. As one of four Mobile Network Operators in the UK ("**MNOs**"), EE owns and operates its own physical radio access network. As a Mobile Virtual Network Operator ("**MVNO**"), VM does not have its own radio access network but must contract with one or more of the MNOs (i.e. EE, Vodafone, Three and O2) to make use of their mobile networks.
3. Pursuant to the TSA, EE was required to supply to VM various services as more particularly set out in Schedule 2 to that agreement ("**the Services**")[1], including the provision of access to its mobile network to enable VM's customers to be provided with 2G, 3G and 4G mobile services. At clause 10 ("**the Exclusivity Clause**"), VM agreed that, for the duration of an Exclusivity Period as defined in the TSA, it would use EE's radio access network exclusively for the provision of such services to its customers. In consideration for the Services provided by EE, VM agreed to pay EE the charges set out in Schedule 3 to the TSA ("**the Charges**"), which depended on the level of usage of the EE network by VM's customers. The TSA included a Minimum Revenue Commitment, which (it is common ground) VM has exceeded at all material times.
4. In its original form, the TSA did not make provision for 5G services, which were not, at that time, current. However, the TSA was subsequently amended on three separate occasions and on 9 December 2016 ("**TSA Amendment No. 2**") it was amended with a view to the provision by VM of 5G services to its customers. The amendments at clauses 5B.1 and 5B.2 (which are at the heart of the dispute between the parties in these proceedings) provided for potential agreement between EE and VM in relation to the provision of 5G services using EE's network or, in the absence of such agreement, for VM to be entitled to provide 5G services to its customers from a different network owned by one of EE's MNO competitors. Specifically, clause 5B.2 provided that:

> "where VM sources 5G services from an alternative supplier and a customer of VM **is provided with such 5G services sourced from an alternative supplier** then VM shall also be entitled to provide such customer of VM with 2G services, 3G services and 4G/LTE services sourced from such alternative supplier…" (**emphasis added**).

At the same time, the Exclusivity Clause was varied so that it became subject to the exception identified in clause 5B.2.

[1] These were defined in the TSA as the "EE Hosted Services" and the "VM Controlled Services".

5. In May 2019, EE launched its 5G service and thereafter VM issued a request for proposals to all four UK MNOs, including EE. Absent agreement with EE, VM subsequently entered into an agreement for the supply of 5G services from Vodafone and from around January 2021, VM began to migrate customers from the EE network to the Vodafone network. Although it is common ground that VM was entitled to enter into a separate arrangement with another MNO pursuant to the terms of TSA Amendment No. 2, a dispute has nevertheless arisen as to whether VM has acted in breach of the Exclusivity Clause.
6. In short, EE contends that, wrongfully and in breach of the Exclusivity Clause, VM has migrated non-5G customers onto the Vodafone network (and later the O2 network) and/or that VM has added new non-5G customers to the Vodafone network (and later the O2 network) rather than the EE network, even though those customers were only provided with 2G-4G mobile services. This contention arises in the context of a fundamental disagreement between the parties as to the true construction of clause 5B.2 of TSA Amendment No. 2; in particular whether a customer who does not have a 5G-capable handset can be said to have been "provided" with 5G services. In addition, EE alleges that VM's breaches were "reckless and/or wilful".
7. By its Particulars of Claim, EE asserts that by reason of VM's breaches, it has suffered loss and damage which it says:

> "is represented by the revenue [EE] would have received from [VM] under the terms of the TSA for the 2G-4G services that each of [VM's] customers would have consumed had they remained or been added to the EE network rather than migrated or added to the Vodafone network or O2 or VOLT network".

   EE estimates this "loss of revenue (claimed as damages)" at around £24,635,684 and explains that it has been "deprived of revenue that it would otherwise have earned".
8. By its Defence, VM denies that it has acted in breach of the Exclusivity Clause and denies that any breach was reckless and/or wilful. Further and in any event, VM denies that "loss of revenue" represents the correct measure of damage, contending instead that:

> "the correct measure in principle would be [EE's] loss of profit, which (a) would need to take into account for example its costs of providing the services to customers which it no longer provided once those ceased to be on the EE network and (b) **is in any event excluded by clause 34.5(a) of the TSA…**" (**emphasis added**).

9. Clause 34.5(a) of the TSA falls within a much longer exclusion clause, the full terms of which I shall set out in a moment. Its true interpretation lies at the heart of this application. For present purposes, I note that (subject to one caveat) it excludes damages claims by either party in respect of "anticipated profits".
10. In its Reply, EE denies VM's alternative characterisation of its loss, pleading, first that "there was no, or no material, cost to [EE] associated with additional end customers being provided with services on the EE network", and second, a bare denial as to the exclusionary effect of clause 34.5(a). EE characterises its claim as being "in respect of a liability for Charges…".
11. By its application, VM contends that EE's claim for loss plainly falls within the clear and natural meaning of the words "anticipated profits", that this is a short point of pure construction and that accordingly the court should grasp the nettle and determine now

that EE's claim is excluded by clause 34.5(a) and must accordingly fail. EE disagrees, contending that the point is wholly unsuited to summary determination. Before turning to consider the arguments in more detail, I must first set out the relevant terms of the TSA.

Relevant Contractual Provisions and Context

12. It is common ground that the TSA is a sophisticated, lengthy and bespoke agreement drafted by sophisticated parties. It covers a range of services creating significant obligations on both parties, whilst also envisaging additional and Bespoke Services (in clauses 11.2 and 13). Its original term was 4 years and 7 months from 28 August 2013 to 31 March 2018, but its term was extended to 31 December 2021 by TSA Amendment No. 2. Although VM had a right to extend the TSA beyond this date, it was in fact terminated in accordance with its terms on 31 December 2021 – no issue arises in these proceedings by reason of such termination.
13. Relevant terms of the TSA, as amended by TSA Amendment No.2, are as follows:

> "3. **Provision of Services and Capabilities**
>
> 3.1 EE shall provide the EE Hosted Services on the terms and conditions set out in this Agreement. The EE Hosted Services shall be provided as follows:
>
> (a) As at the Services Start Date, EE shall provide the EE Hosted Services that EE is obliged to or has agreed to provide to VM immediately prior to the Services Start Date under the Telecommunications Supply Agreement.
>
> …
>
> 3.2 EE shall commence the provision of the VM Controlled Services for individual Customers on such date as determined in accordance with Schedule 9…From such commencement date, EE shall provide the VM Controlled Services to VM on the terms and conditions set out in this Agreement.
>
> 5B. **5G Services**
>
> 5B.1 In the event that EE and/or BT and/or any member of the EE Group or the BT Group (or any other flagship brand of EE and/or BT from time to time) launches mass market 5G services in the Term to its own consumer retail customers (excluding any trials only) in the UK then in accordance with Clause 5B.2 below EE will make a proposal for the enablement of 5G services to Customers on the Full MVNO Infrastructure.
>
> 5B.2 EE shall ensure that the 5G proposal will be shared with VM no later than one (1) month after such launch of 5G services to consumer retail customers on the Network with the aim of enabling 5G services for Customers on the Network and the Full MVNO Infrastructure within six (6) months of receipt of the EE proposal subject to agreement in writing between EE and VM of the applicable commercial, technical and legal terms (both Parties acting reasonably and in good faith). In the event that EE and VM do not reach agreement of such terms within such six (6) month period then where VM sources 5G services from an alternative supplier and a customer of VM is provided with such 5G services sourced from an alternative supplier then VM shall also be entitled to provide such customer of VM with 2G services,

3G services and 4G/LTE services sourced from such alternative supplier, subject to compliance with the conditions in Clause 11.1".

…

10. **Exclusivity**

10.1 Without prejudice to Clauses 11.1 and 27.2[2] but subject to Clauses 5B.2, 10.4[3] and 39.3.1[4], VM shall not and shall ensure that no other member of the VM Group shall for the duration of the Exclusive Period:

(a) procure for supply in the UK from any Third Party Supplier any Exclusive Service; or

(b) supply to the customers in the UK any Exclusive Service that it has not procured directly from EE,

provided that nothing in this Agreement shall prevent VM from entering into a Standard MNO Reselling Arrangement"[5].

…

16. **Customer Care and Invoicing**

…

16.2 …VM shall make payment to EE of all Charges applicable to Customers in accordance with this Agreement…

…

17. **Customer Network Spend**

17.1 This Agreement contains a Minimum Revenue Commitment[6]…

17.2 As soon as reasonably practicable after the 1st of each month immediately following each Quarter commencing from 1 January 2017, EE shall compare the relevant Customer Network Spend in the previous three (3) months (the "Assessment Period")…against the Minimum Revenue Commitment for the relevant Assessment Period…

…

17.4 The Customer Network Spend in respect of each Assessment Period shall be equal to or more than the Minimum Revenue Commitment for the relevant Assessment Period.

17.5 Subject to Clause 17.6, if the Customer Network Spend in any Assessment Period is less than the Minimum Revenue Commitment in respect of that Assessment Period, VM shall pay EE the difference between such Customer Network Spend and the Minimum Revenue Commitment as additional Charges within forty-five (45) days following receipt of a written invoice from EE for the relevant amount.

…

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[2] Clauses 11.1 and 27.2 are concerned with VM's ability to obtain services from Third Party Suppliers but not to permit unauthorised access by any Third Party to the Systems, i.e. to the information systems leased or used by EE in connection with the provision of the Services.

[3] Clause 10.4 disapplies the exclusivity provisions in clause 10.1 in the event of VM acquiring another entity supplying mobile communications services to business users in the UK as an MVNO or a reseller through an existing agreement with a UK MNO.

[4] Clause 39.3.1 disapplies the exclusivity provisions in clause 10 during any Run Off Period following termination.

[5] Schedule 1 to the TSA defined "Exclusive Service" as "Telecommunications Services that fall within the standards of GSM, GPRS, UMTS and 4G-LTE" (i.e. 2G-4G), and "Third Party Supplier" as "a supplier to VM, other than EE, of services or functionality". The Exclusive Period ran to 31.12.21 or, in the event of an extension of the Term under clause 2.3 to 31.12.26.

[6] Defined in Schedule 1 to the TSA as "the relevant minimum amounts specified in the table at Paragraph 35 of Schedule 3 for aggregate Voice, SMS Messages and Packet Switched Data…usage…".

17.7 VM shall not be: (i) in breach of any term of this Agreement; or (ii) required to pay the Minimum Revenue Commitment to the extent that such breach or failure to meet the Minimum Revenue Commitment was a direct result of any act or omission of EE…or failure by EE to perform its obligations in accordance with the terms of this Agreement…

…

18. **Charges**

18.1 VM shall pay EE the Charges for the provision of the Services from the Services Start Date.

…

18.3 Without prejudice to EE's rights in the event of breach of this Agreement by VM (including but not limited to any right of EE to recover interest or damages in the event of VM's failure to pay Charges or late payment thereof), EE acknowledges and agrees that payment of the Charges and any other payment obligations identified in this Agreement (as amended from time to time in accordance with this Agreement) shall be the only amounts payable by VM for performance of the Services and the Service-related obligations identified in this Agreement.

…

18.5 …The Parties will agree, acting reasonably and cooperatively, a format for invoices for any other Charges which shall include sufficient information to demonstrate to VM that the Charges in the relevant invoice have been calculated in accordance with the principles set out in Schedule 3 (Charges)...

…

18.7 Notwithstanding any other obligations set out in this Agreement relating to Charges, Inbound Revenues or any other amounts payable by EE to VM pursuant to this Agreement, should either Party subsequently identify Charges, Inbound Revenues, or any other amounts payable by EE to VM pursuant to this Agreement which should have been invoiced to the other Party, then the Party which identifies them shall inform the other and these may still be invoiced provided they relate to a period after the Effective Date.

18.8 The Parties will comply with their respective obligations set out in Schedule 3 (Charges).

…

34. **Limitations of Liability**

34.1 Except as set out in Clauses 34.2 or 34.6, the Parties agree and acknowledge that neither Party shall be liable to the other under this Agreement (including any liability of a Party arising out of any indemnification of the other Party specifically provided for under this Agreement) to the extent that the aggregate liability of that Party (for all claims made under this Agreement), in any Annual Period would exceed the lesser of:

(a) fifteen per cent (15%) of the total Customer Network Spend paid or payable by VM in the twelve month period preceding the event giving rise to liability (and in the first year of the Term, fifteen per cent (15%) of the total charges (excluding interconnect charges) paid under the Telecommunications Supply Agreement in the twelve (12)

month period prior to the Effective Date); or

(b) ten million pounds (£10 million).

34.2 In addition to any other exceptions or exclusions set out in this Clause 34, the Parties agree that the limitation of liability set out in Clause 34.1 shall not apply to:

(a) VM's liability to pay any Charges and any other sums payable under Clauses 17 and 39[7];

(b) EE's liability to pay any revenue that EE is obliged to pass through to VM under this Agreement or other amounts which have been agreed to be payable by EE to VM from time to time pursuant to the Agreement Change Control Process and documented in accordance with that process; or

(c) any liability for damage or loss arising from reckless or wilful misconduct or gross negligence of either Party, its employees, agents or permitted sub-contractors (or any other person for which it is responsible for performance or conduct).

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

(a) VM promptly notifies EE in writing of the Service which it believes has been discontinued, withdrawn or not supplied…

(b) the discontinuance, withdrawal or refusal to supply relates to a Service that is used by VM to deliver services to Customers that result in Customer revenues in excess of seven and one half per cent (7.5%) of VM's total Customer Revenues…for the twelve (12) month period preceding the discontinuance, withdrawal or refusal to supply the Service in question…

(c) VM applies at the first practicable time for interim or other urgent equitable relief in response to the discontinuance, withdrawal or refusal to supply the Service in question…and any action claiming damages continues to claim equitable relief and the re-instatement of the affected Service as its primary remedy, with damages claimed only to the extent that equitable relief is not granted or only in respect of losses suffered by VM in the period from the initial discontinuance, withdrawal or refusal to supply the Service in question until re-instatement of the affected Service pursuant to the equitable relief actually obtained.

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

34.5 Except for any damages claims by VM pursuant to Clause 34.2(c), to which Clause 34.3 applies (which EE acknowledges may include claims

[7] Clause 39 is concerned with the consequences of Termination.

of damages for loss of profits), and for no other damage claims whatsoever, neither Party shall have liability to the other in respect of:

(a) anticipated profits; or

(b) anticipated savings.

34.6 Neither Party excludes or limits liability:

(a) to the extent that such liability arises from death or personal injury of any person…; or

(b) for a fraudulent misrepresentation by a Party or its employees; or

(c) for direct physical damage to or physical loss of the property of the other…

34.7 Except as expressly stipulated in this Agreement, any representations, warranties, terms and conditions (whether implied by law, custom or otherwise) are hereby expressly excluded to the extent permitted by law and the provisions of this Clause 34 specify the entire liability of either Party under or in connection with this Agreement whether arising in contract, tort (including negligence) or otherwise.

…

47 **Equitable Relief**

47.1 Each Party acknowledges and agrees that in the event of a breach of this Agreement, or any other agreement entered into pursuant to it, damages may not be an adequate remedy; and that the other Party shall be entitled to seek an injunction, order for specific performance or such other equitable relief as the court of competent jurisdiction may see fit.

14. Schedule 2 to the TSA identifies the Services to be provided by EE in the form of the VM Controlled Services and the EE Hosted Services. The VM Controlled Services include a radio access network service, a voice service, an SMS service and international roaming. The EE Hosted Services are set out in tabular form under headings such as "Voice Service", "Voicemail", "Directory and Operator Services" and "Interconnect and Roaming Services".
15. Schedule 3 to the TSA sets out the Charges for the various Services. As amended by TSA Amendment No.2, paragraph 1.3 of Part A identifies the unit rates applicable for Voice, SMS Messages and Packet Switched Data traffic and paragraph 1.4 provides that the rates for those services multiplied by the volume of units used "shall be the only Charges that are measured in calculating whether VM has met its Minimum Revenue Commitment". Paragraph 32.1 provides that "VM shall pay all Charges specified in the Agreement", including (amongst others) under clause 17 (Customer Network Spend) and clause 18 (Charges). Paragraph 35 provides for a Minimum Revenue Commitment which sets a floor on the amount which VM was obliged to pay in each Assessment Period. Thus, by way of example, the Minimum Revenue Commitment for each quarter of 2019 to 2021 (inclusive) is £33 million.
16. Schedule 4 to the TSA makes provision for VM to provide forecasts to EE reflecting its anticipated requirements (including as to its Customer base) on a monthly basis. As amended by TSA Amendment No.2, paragraph 2.1.2 provided for VM to pay to EE an additional sum in the event of actual aggregate usage being lower than the forecast aggregate usage by more than 5%.
17. It is common ground that a critical aspect of EE's business and source of revenue is providing network access to MVNOs, such as VM. It is also common ground that the Exclusivity Clause was of commercial significance to EE and that VM was aware of that commercial significance and of the fact that the inclusion of exclusivity provisions

in MNO/MVNO contracts is standard industry practice and is "a given" in such contracts. TSA Amendment No. 2 provided for specifically worded carve outs to exclusivity including at clause 5B.2.

The Evidence

18. In support of the application, VM relies upon a statement of its solicitor, Mr Marc Thorley, which sets out the background to the TSA, the circumstances giving rise to EE's claim and his belief that there are no reasonable grounds for bringing the claim. In response, EE relies upon a statement from Mr Harrap, one of the lead negotiators for EE at the time of the TSA. Mr Harrap confirms that the Charges for the Services set out in Schedule 2 are based on actual usage generated by VM customers and that VM's customer traffic has always exceeded the Minimum Revenue Commitments set forth in the TSA. At paragraphs 16-19, Mr Harrap gives evidence as to the understanding of the parties at the time the TSA was negotiated. Although this is not pleaded by EE, its case at the hearing was that the evidence in these paragraphs amounts to relevant factual matrix evidence which the court must take into account in considering the merits of the application. I shall return to it shortly. At paragraphs 20-22, Mr Harrap provides context as to the importance of the Exclusivity Clause, context which EE also relies upon as relevant factual matrix evidence. Finally, at paragraphs 25-30, Mr Harrap expresses his views as to the true characterisation of EE's claim.
19. VM served evidence in reply to Mr Harrap's statement in the form of a statement from Mr Jonathan Strickland, Director of Products and Partnerships at VM. Mr Strickland was involved in the negotiations for TSA Amendment No.2 but was not involved in the negotiations for the TSA. He acknowledges that exclusivity in MNO/MVNO contracts is standard industry practice.

Strike Out/Summary Judgment – law and practice

20. The approach to be taken to an application of this sort is uncontroversial:
    a. the court may strike out a statement of case pursuant to CPR 3.4(2)(a), read together with 3.4(1) on the grounds that it "discloses no reasonable grounds for bringing the…claim". In considering a strike out application, the court must assume that the facts pleaded in the relevant statement of case are true and ask itself whether the claim advanced on the basis of those facts has a real prospect of success;
    b. the court may grant summary judgment under CPR 24.2(a)(i) and (b) if it considers that the claimant has "no real prospect of succeeding on the claim or issue" and there is no other compelling reason why the case or issue should be disposed of at trial. In determining a summary judgment application, evidence is admissible to establish that the pleaded case is fanciful – albeit that the court will be very cautious about rejecting the claimant's factual case at the summary stage.
21. In the present case, where it is accepted that the key question for the court is whether to deal with a point of construction, I am not clear that the strike out application is entirely apposite – for the purposes of construction it is necessary to have regard (amongst other things) to the relevant factual context, something which is addressed in

the witness evidence[8]. However, neither party sought to make anything of the distinction between the strike out and summary judgment application and both parties relied upon the well-known judgment of Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:

> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at

[8] There is clear authority for the proposition that evidence regarding the claims advanced in the statement of case is inadmissible for the purposes of a strike out application – see *King v Stiefel* [2021] EWHC 1045 (Comm) per Cockerill J at [27].

> trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

22. Mr Charlton KC, on behalf of EE, also drew my attention to three recent judgments in the Court of Appeal (*Begum v Maran (UK) Ltd*, *Rushbond plc v JS Design Partnership LLP* [2021] EWCA Civ 1889 and *Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318). However, I do not find any of these authorities of particular assistance – they are concerned with summary judgment/strike out applications in the context of disputes over the scope and existence of a duty of care. It is perhaps of no surprise that in cases of that sort, the Court of Appeal should provide a gentle warning against speculative applications (see *Rushbond* per Coulson LJ at [41]-[43]). I note, however, that in *Begum*, when setting out the applicable test for summary judgment/strike out, Coulson LJ made the general point that "in essence, the court is determining whether or not the claim is 'bound to fail'" (*Begum* at [22(a)]).
23. As I have already said, the application relates specifically to a point of construction of clause 34.5 of the TSA and its applicability to the claim alleged by EE against VM. Although VM denies that it has acted in breach of the Exclusivity Clause and that any breach was deliberate or wilful, for the purposes of this application I will proceed on the basis that the breaches alleged in the Particulars of Claim are capable of being established at trial.

Approach to construction of Exclusion Clauses

24. The parties cited a great many cases as to the approach to be taken by the court to the interpretation of exclusion clauses. However, ultimately I was unable to detect any real points of difference.
25. As Lewison LJ observed in *Interactive E-Solutions JLT v O3b Africa Ltd* [2018] EWCA Civ 62 at [13], the general approach to the interpretation of contracts is not in doubt. Guidance is to be found in a trilogy of cases over the last few years in the Supreme Court (*Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24). The principles that emerge from those cases were succinctly summarised most recently by Lord Hamblen in *Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2, [2023] 1 WLR 575 at [29], by the Court of Appeal in *Soteira Insurance v IBM* [2022] EWCA Civ 440 at [30]-[33] per Coulson LJ and in *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821 at [18] by Sir Geoffrey Vos, Chancellor (as he then was), adopting a passage from the judgment of the court below:

> "i) The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see *Arnold v Britton* [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619 per Lord

Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

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

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

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

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

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

vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2018] 1 All ER (Comm) 51, [2017] AC 1173 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent– see *Wood v Capita Insurance Services Ltd* (ibid.) per Lord Hodge JSC at paragraph 13; and

viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain – see *Arnold v. Britton* (ibid.) per Lord Neuberger

> PSC at paragraph 20 and *Wood v. Capita Insurance Services Limited* (ibid.) per Lord Hodge JSC at paragraph 11".

26. At [23] Sir Geoffrey Vos repeated the words of Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 (at [12]), to the effect that the process of interpretation required is "a unitary exercise" (an observation also adopted by Lord Hamblen in *Sara & Hossein Holdings* at [29]), observing that:

> "it starts with the words and the relevant context, and moves to an iterative process checking each suggested interpretation against the provisions of the contract and its commercial consequences. The court must consider the contract as a whole and give more or less weight to elements of the wider context in reaching its view as to its objective meaning".

27. As for the approach to be taken to the interpretation of exclusion clauses:
    a. The exercise of construing an exclusion clause must be undertaken in accordance with the ordinary methods of contractual interpretation. Commercial parties are free to make their own bargains and to allocate risks as they think fit; exclusion and limitation clauses are an integral part of pricing and risk allocation. The principle of freedom of contract requires the court to respect and give effect to the parties' agreement (see *Interactive E-Solutions JLT v O3b Africa Ltd* [2018] EWCA Civ 62 at [14] per Lewison LJ and *Triple Point Technology Inc v PTT Public Co Ltd* [2021] AC 1148 at [108] per Lord Leggatt with whom Lord Burrows agreed).
    b. However, a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law. In construing an exclusion clause, the court will start from the assumption that in the absence of clear words the parties did not intend to derogate from those normal rights and obligations. (*Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) Ltd* [1974] AC 689 per Viscount Diplock at page 717H; *Triple Point* at [108]-[110]; *Soteira v IBM* at [34] and *Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] 1 WLR 575 per Lord Hamblen at [48]).
    c. The more valuable the right, the clearer the language of the exclusion clause will need to be if it is to be given effect (*Stocznia Gdynia v Gearbulk Holdings* [2009] EWCA Civ 75, per Moore-Bick LJ at [23]; *Triple Point* at [110] and *Soteira v IBM* at [35], [37] and [60]).
    d. Unclear words will not suffice; if linguistic, contextual and purposive analysis do not disclose an answer to the question with sufficient clarity, any ambiguity or lack of clarity must be resolved against the party seeking to exclude liability (*Dairy Containers Ltd v Tasman Orient Line CV (The Tasman Discoverer)* [2004] UKPC 22 at [12], per Lord Bingham of Cornhill and *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128 at [16]-[19] and [21] per Briggs LJ).
    e. However, "[i]n commercial contracts negotiated between business-men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne…it is…wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only…" (*Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 per Lord Diplock at page 851 and *Fujitsu* at [49]).

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

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

28. I bear all of these principles firmly in mind in determining this application.

Should the Court "grasp the nettle"?

29. VM invites me to grasp the nettle and determine the issue of construction in relation to clause 34.5(a) in its favour. This requires the court to be satisfied that it is able to determine the true construction of that clause at this stage, such that there is no reason for that determination to await trial.
30. In opposing this approach, EE contends that this issue requires (i) analysis of the relevant factual matrix; (ii) analysis of what is being claimed and whether, and if so what, anticipated profit is included in that claim; and (iii) reference to a considerable number of authorities. In the circumstances, EE says that the issue of construction is neither a short point of law, nor amenable to summary determination. Instead, this is an issue which can only be determined at trial.

A large number of authorities

31. Given the broad agreement between the parties as to the principles to be applied to the construction of contracts generally and (more specifically) the construction of exclusion clauses, I cannot accept that the mere fact that the authorities bundle for the hearing contains a substantial number of authorities means that the issue of construction identified by VM is a matter which can only be dealt with at trial. Indeed I did not understand Mr Charlton to pursue this point with any vigour in his oral submissions. Although it is true that the parties disagree over the significance of four or five cases

which have considered contractual exclusion provisions involving "loss of profit", I do not consider that such dispute is incapable of being determined at a summary hearing. It is not suggested, for example, that this would involve making a decision in a developing area of law.

The nature of the claim

32. The nature of EE's claim is not, of course, a question of construction, but rather an issue as to the true and proper characterisation of the claim as it is advanced by EE in its statements of case. Although it was suggested by EE that further "analysis" of this issue would be required at trial, I find it very difficult to see why. EE's statements of case identify the claim that is being advanced in the terms I have set out above and its true characterisation is a matter of law. I cannot see that any further evidence could possibly affect the position at trial and Mr Charlton did not identify any particular evidence on which EE would wish to rely, beyond the evidence already set forth in Mr Harrap's statement, to which I shall return in a moment. Accordingly, I am satisfied that there is no reason to think that the court's ability to determine this issue will be improved by permitting the matter to proceed to trial.
33. EE's case (described in its submissions as its primary case) is essentially that its claim is for "Charges unlawfully avoided". It accepts that this is a claim for damages, but it says that it is neither a loss of profits claim nor a claim for wasted expenditure but rather a "different beast" entirely. VM, on the other hand, submits that the nature of EE's claim is not determined by the name that is given to it by EE in its pleadings, or the name that has been used to describe it in court or in the evidence. Instead the court must look to the substance of that claim.
34. Although in its skeleton argument EE appeared to elide the obligation to pay Charges due under the TSA and the obligation to pay "Charges unlawfully avoided"[9], Mr Charlton accepted in submissions that the obligation to pay Charges created a contractual debt and that the same could not be said for a claim for "Charges unlawfully avoided" (see by way of analogy *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC) per Carr J (as she then was) at [52] and [68]-[71]). In other words he accepted that EE's claim can only be a claim for damages.
35. Although the point is no longer pursued, I observe for completeness that the attempted elision of the obligation to pay Charges due under clause 18.1 of the TSA and the obligation to pay "Charges unlawfully avoided", confuses a claim in debt to recover for a failure to pay for the Services (which have in fact been provided to customers pursuant to the terms of the TSA) and a claim for damages for the diversion away of customers (to whom no Services have been provided). As Lloyd J (as he then was) observed in *Clea Shipping Corp v Bulk Oil International Ltd ("The Alaskan Trader")* [1984] 1 All ER 129 at page 138j the owners in a contract for services "earn their remuneration by performing the services required. If they are wrongfully prevented from performing any services, then, as in any other contract for services, the only remedy lies in damages".
36. Here, EE alleges that it was wrongfully precluded by VM's breach of the Exclusivity Clause from providing the Services to customers. However, clause 18.1 does not give EE an entitlement to payment in respect of Services which have not in fact been

[9] It was submitted that clause 34.5 was not intended to apply and does not apply to Charges and so, by the same token, could not apply to Charges unlawfully avoided. It was also submitted that if a claim for Charges unlawfully avoided could be excluded by clause 34.5, then that would apply to any claim for non-payment of Charges.

provided; on the contrary, the Charges are due "for the provision of the Services" (clause 18.1) and "for performance of the Service" (clause 18.3). In the circumstances, EE's only recourse lies in a claim for damages.

37. The starting point for an analysis of EE's claim for damages, as Mr Charlton accepts, is the compensatory principle as famously articulated by Baron Parke in *Robinson v Harman* (1848) 1 Exch 850, at 855, where he said that a party who suffers loss as a result of breach of contract is entitled, so far as money can do it, "to be placed in the same situation, with respect to damages, as if the contract had been performed" (see more recently the reference to this "governing principle" in *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha ("The Golden Victory")* [2007] UKHL 12; [2007] 2 AC 353 at [9] per Lord Bingham and [29] per Lord Scott). This means that a claimant is only entitled to compensation for his net loss, which may (in general terms) be articulated in one of two ways; the claimant can either claim its expectation loss (or loss of bargain) or its reliance loss. However, it is clear on the authorities that it cannot claim both (see *Soteria* at [40]).
38. Teare J's explanation in *Omak Maritime v Mamola Challenger* [2010] EWHC 2026 (Comm) at [15]) of the mechanics of the compensatory principle bears repetition:

> "In a typical claim for damages for breach of contract on the expectancy basis both expected profits and necessary expenses will be taken into account. The claimant will claim a sum equal to the benefit he expected to earn from performance of the contract less the costs he would have had to have incurred in order to earn that benefit, which costs would include not only any sum he would have had to pay to the party in breach but also any expenses he would have had to incur in preparation for performance of the contract. Damages calculated in that way would put the claimant in the position he would have been in had the contract been performed. The measure of loss thus compensates for the loss of bargain and in doing so takes account of the expenses the claimant would have incurred in reliance on the contract being performed. To ignore those expenses when assessing damages would put the claimant in a better position than he would have been in had the contract been performed. Equally, if those expenses had already been incurred at the date on which the contract was repudiated, to award those expenses in addition to damages for loss of bargain would put the claimant in a better position than he would have been in had the contract been performed".

39. Here it is not suggested that EE's claim is a claim for wasted expenditure and accordingly, however it is described in the pleadings or in submissions, it is, to my mind, a claim for loss of bargain – in this case loss of profit: EE seeks to recover the profit it would have made if the VM customers (alleged to have been wrongfully diverted to alternative networks) had used the Services offered by EE under the terms of the TSA. To suggest otherwise appears to me to be fanciful. While this is pleaded as a claim for "loss of revenue" and the full amount of the Charges that would have been paid to EE absent the breach is claimed, that does not mean it is not, in law, properly to be regarded as a claim for loss of profit. Whether it is a claim that falls within the scope of clause 34.5(a) is of course a different question to which I shall return in a moment.
40. I can see nothing in the evidence of Mr Harrap that either affects that analysis or raises an issue that can only be dealt with at trial. In his statement, Mr Harrap deals with the

details of EE's financial claim in paragraphs 25-30, explaining that the claim is for "lost revenue" and is made up of two components:

> "…firstly, the actual usage of VM customers wrongly utilising 2G, 3G and 4G on the Vodafone network in the relevant period, which VM has refused to share with us; and, secondly, the Charges set out in Schedule 3 to the TSA that EE was entitled to apply to such usage in that period.
> "

It was not suggested by VM that there was any dispute as to this and I note that Mr Strickland's reply evidence does not seek expressly to gainsay anything in paragraphs 25-30 of Mr Harrap's statement. There appears to be no dispute that this is an accurate factual description of the circumstances giving rise to EE's claim. Although Mr Harrap goes on to join issue with the assertion by Mr Thorley in his statement that EE's claim is in reality to be characterised as a claim for "anticipated profit", on close analysis there is no real factual dispute between the parties and no reason to suppose that the court will be in a better position to determine the question at trial. The real dispute appears to me to be as to the proper legal characterisation of the claim, and that is a dispute which can be determined now; I reject the suggestion that it involves the court engaging in a mini trial.

41. Mr Thorley makes the point in his statement in support of the application that any loss or damage incurred by EE would need to take into account the costs EE would have incurred in providing the Services to customers who were wrongly connected to an alternative network. Mr Harrap's response is that EE incurred both capital costs and operational costs in providing the Services and that, in addition, it would have incurred costs and overheads by reason of facilitating additional capacity on the network. He points out that EE would not regard the revenue received from MVNOs as pure profit "without taking into account the cost of providing the services and looking at EE's finances more broadly". He goes on to confirm that "Although I believe that the revenue that should have been paid by VM would have contained an element of profit, I cannot currently say what that figure would amount to".
42. This evidence is plainly designed to support the proposition (apparently contrary to the pleaded case in the Reply) that the entirety of the claim for "Charges unlawfully avoided" is not profit and so cannot fall within the words "anticipated profits" in clause 34.5(a) and I shall return to this in a moment. However, in substance it appears to me to be an acknowledgement of the very point that Mr Thorley is making – EE would have made a profit but it would also have incurred additional costs in providing the Service to customers who have been diverted elsewhere. In such circumstances, the compensatory principle does not permit the recovery of the full consideration for the provision of the Services, but only the profit that would have been made once those costs are netted off: an entirely conventional approach to a loss of profit (or loss of bargain) analysis.
43. On the assumption that the breaches alleged against VM are made out, taking account of the costs that EE would have incurred in providing the Services appears to me to be the only way in which EE will be put back into the position it would have been in if the TSA had been performed. Even if it were the case (as EE suggests in its Reply) that it incurred no costs in connection with the provision of its Services such that its loss would in fact amount to the value of the Charges that it would have received had customers not been diverted, I cannot see that this is anything other than a claim for loss of profits. I fail to see how EE's claim for "Charges unlawfully avoided" can somehow fall within

a different category of loss which would enable EE to escape the strictures of this fundamental principle. I consider that EE's argument to that effect is bound to fail.

44. I am fortified in this view by the decision of Leggatt J (as he then was) in *Yam Seng Ptd Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB) at [177]-[185]. As Leggatt J explained, a claimant is not entitled to damages for breach of an exclusivity obligation on the expectation measure if it cannot "prove what profit it would have made or indeed that it would have made a profit at all if [the party in breach] had fully performed its obligations under the agreement". A claim for "loss of revenue" that does not give credit for the costs incurred by the claimant so as to reflect only the claimant's loss of profit plainly falls foul of the expectation measure and the overriding compensatory principle.
45. Furthermore, I consider that my conclusion is supported by the decision in *Fujitsu,* a case in which the alleged breach of workshare provisions in an IT supply contract led to a claim for loss of profit, articulated as "the sums [the claimant] would otherwise have been paid" for undertaking the work, subject to giving credit for any costs and expenses that would have been incurred in doing so. Although in that case it was expressly pleaded that the claim was for "loss of profit", I can see no real distinction between what was described by Carr J (as she then was) in that case at [53] as the "obligation to pay damages if the work is not allocated" and the obligation that arises in this case to pay damages if customers are diverted in breach of the Exclusivity Clause.
46. Of course, the fact that as a matter of law a claim is properly to be viewed as a claim for lost profits, does not necessarily mean that it will fall foul of a clause seeking to exclude "loss of profits" or "anticipated profits". That may be because the words "loss of profits" in the clause are not apt on the particular facts of the case to encompass the claim that is being made, or because they are narrowed in scope by their particular textual and/or factual context. There may also be claims for expectation loss which in all the circumstances of the case cannot properly be characterised as claims for "loss of profits".
47. Mr Charlton drew my attention to a line of cases which in his submission support the proposition that EE's claim is not for a loss of profit. In the first two cases (*Alexander Tsavliris & Sons Maritime Company v OSA Marine Limited (The Herdentor)* (1996) Folio 2557 unreported and *Ease Faith Ltd v Leonis Marine Management Ltd (The Ease Faith)* [2006] EWHC 232 (Comm), both shipping cases concerned with whether a claim was excluded by a clause excluding liability for "loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever", the court formed the view, on the particular facts, that the loss claimed could not properly be characterised as a loss of profit, but rather that it was "more akin to a diminution in price". Mr Charlton submits that a direct analogy can be drawn with EE's claim in this case. I disagree.
48. In *The Herdentor*, the claimant (who had contracted with a third party to provide salvage services in respect of a ship called the Atlas Pride) sued the defendant pursuant to a contract for the hire of a tug (which it required to enable it to provide the salvage services) for damage caused by reason of the tug abandoning the salvage job without completing it. The claimant alleged that the repudiation of the tug contract meant there would be a lower award in the arbitration determining the amount paid to salvors and that it would consequently receive a smaller amount under its award-sharing ISU contract. The defendant tug owner argued that the claim was excluded as a "loss of profit" claim, but Clarke J accepted the submission (at page 846 and 847) that the true position in relation to the claim was that the claimant had "received less money as

payment for their services than they would have done. It has therefore in effect cost them more. It is as if they have suffered a diminution in the price which they were to receive for the salvage services".

49. In my judgment, that analysis is in no way analogous to the facts of this case, where (on the assumption of breach) EE has suffered the diversion away of customers to whom it would otherwise have been providing a service for a commensurate cost. In fact, no such service was provided and thus, no invoices could be rendered under the TSA and no Charges levied. EE has not provided services which have cost it more; on the contrary, it has not provided any services at all.

50. In *The Ease Faith*, the owner of a vessel claimed damages under a tug hire contract for the late delivery of the vessel to a buyer in China, such damages being referable to the reduced sale price of the vessel owing to the late delivery. No doubt this difference in sale price caused Andrew Smith J to express the view that he took comfort in his decision on construction from *The Herdentor*, because in common with that case, "it does seem to me that here too the loss, in the words of Clarke J, 'is more akin to a diminution of price than a loss of profit'". However, once again the facts are very different to those with which I am concerned and there is no "difference in price" analysis available to EE.

51. While these two cases illustrate that a claim for expectation loss/loss of bargain will not always be characterised as a claim for loss of profit – at least in the context of construing the scope of an exclusion clause in the contract, they are of no direct relevance to the question with which I am presently concerned: namely the true nature of EE's claim. I shall return to *The Ease Faith* in the context of the construction of clause 34.5 in a moment.

52. Mr Charlton also relied upon *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87 (Comm), *University of Wales v London College of Business Limited* [2015] EWHC 1280 (QB) and *Galtrade Ltd v BP Oil International Ltd* [2021] EWHC 1796 (Comm), but once again, I do not see that they support EE's position on this specific point. I shall have to return to *University of Wales* and *Galtrade* in considering the question of construction but for present purposes I need say only that it was common ground (i) in *University of Wales* that the case concerned a claim for damages that were referable to loss of revenue and profits; and (ii) in *Galtrade* that it was concerned with a claim for wasted expenditure (which is not the case here). Nothing in these cases affects my analysis as to the true nature of the claim in this case.

53. *Glencore* was a claim for damages for repudiation of a contract for the supply of oil, namely the difference between the contract price and the market price. Cooke J rejected the argument that the claim was excluded by a contract provision which referred, amongst other things, to "loss of anticipated profits". He held at [98] that the "contract price/market price differential is not a computation of lost profit" pointing out that the only claim pursued at trial was a claim based on section 50 of the Sale of Goods Act 1979 ("**the 1979 Act**"), and (at [100]) that "no one who understood the way in which the 1979 Act works, would refer to this measure of loss as 'lost profits' or 'loss of anticipated profits'.

54. During the course of his submissions, Mr Charlton drew my attention to The Law of Contract Damages 3rd Edition, Chapter 25 at 25-24, where Adam Kramer KC considers the decision in *Glencore*, opining that it is wrong and that it "cannot be justified on the basis that the literal meaning of the words 'loss of anticipated profit' does not cover the loss claimed", albeit going on (as Mr Charlton pointed out) to justify the decision on other grounds. I do not need to decide that *Glencore* was wrongly decided. The case is plainly distinguishable from the facts of the case before me in circumstances where

it concerned a specific claim under the 1979 Act. There is no analogy to be drawn between the claim as it is advanced by EE in this case and the claim advanced in *Glencore*. Once again, I shall return to Glencore in the context of the arguments on construction.

55. What is clear from my detailed reading of the cases on which EE relies is that the true nature of the claim, and thus whether it will fall within the terms of a potentially relevant exclusion clause, is unsurprisingly a case sensitive issue. It depends on understanding how the claim is advanced, its true nature and whether it is genuinely concerned with a loss of profit (as opposed to, say, wasted expenditure or a diminution in price, both of which are of course simply different means of achieving an appropriate outcome by reference to the application of the overarching compensatory principle).
56. In this case, I have no doubt on the factual evidence of Mr Harrap as to the nature of the claim (which is not disputed), that the claim for "Charges unlawfully avoided" can only be a claim for loss of profit. The fact that Mr Harrap disagrees takes matters no further. Equally, the fact that the court is not currently in a position to determine what the net profit might be after deduction of overheads (as was suggested by EE in its skeleton) does not justify this matter proceeding to trial. Once it is accepted that this is a claim for loss of profit, the next question for the court is whether there remains any reason why the construction issue cannot be dealt with summarily.

Factual Matrix Evidence

57. I have already identified that Mr Harrap's evidence addresses the background context to the TSA, which EE says the court will be required to investigate at trial. There are three aspects of this evidence upon which reliance is placed: (i) the importance of the Exclusivity Clause; (ii) the understanding of the parties as to the sort of commercial situation which might give rise to claims for anticipated profits; and (iii) the evidence that EE did not regard the Charges as pure profit. None of these aspects is expressly pleaded as being relevant factual matrix, but it is common ground that for the purposes of an application of this sort, the court must have regard to the evidence that can reasonably be expected to be available at trial (see *Easyair*, at [15](v)), although, of course, this only extends to admissible evidence.
58. By way of preliminary observation, I have given very careful consideration to the question of whether any of the facts and matters on which EE relies is sufficient to preclude the court from seizing the nettle on the construction issue at this stage (or put another way whether they give rise to a real, as opposed to fanciful, prospect of success at trial). In so doing, I have borne in mind the need to exercise caution in making a summary determination, the need to consider the clarity and materiality of the available evidence together with the potential for other evidence to be available at trial which is likely to bear on the issues. I have also borne in mind the need to avoid conducting a mini-trial. Ultimately I have concluded that there is nothing in Mr Harrap's evidence to suggest (i) that a proper understanding of the context of the TSA requires the resolution of any disputed issues of fact (which could only be resolved at trial); (ii) that there is any admissible factual matrix evidence which requires further analysis at trial; or (iii) that the evidence which would be available to the court at trial will be materially different from the evidence that is now before the court.
59. If a party wishes to rely upon the availability of further evidence at trial, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then

be able to determine whether there is some substance in the point or whether that party is simply hoping that something may turn up.

Exclusivity

60. I can deal with the importance of exclusivity in short order. It is, as I have already said, common ground that exclusivity in MNO/MVNO contracts is standard industry practice. Although Mr Strickland does not agree with all of the detail provided by Mr Harrap as to the exact significance of exclusivity to EE, the essential facts are uncontroversial. I cannot see that there is really anything further to be achieved by putting off a final determination until trial.
61. Relevant context for the purposes of the construction of the TSA includes the fact that it was subject to the Exclusivity Clause and that this was a standard provision in contracts of this sort. This overall picture will not alter at trial and the additional detail provided by Mr Harrap in his statement takes matters no further. In my judgment, there is no basis for believing that the court's understanding or assessment of this overall picture and context will be affected to any material degree by the evidence at trial. I did not understand Mr Charlton to suggest otherwise.

The Understanding of the Parties

62. At paragraphs 16 to 19 of his statement, Mr Harrap says this:

> "16 At the time the TSA was negotiated both VM and EE had a good understanding of the sort of commercial situation which might give rise to claims for anticipated profits.
>
> 17 For example, if there was a network outage, this could cause VM to lose anticipated profits in its separate contractual relationships with its customers; it could also arguably include loss of anticipated profits due to negative impacts on its brand and future sales to customers. In addition, if EE undertook Bespoke Development work as envisaged by section 10 of Schedule 3, but did the work badly and caused delay, there might be anticipated profits which VM might claim to have lost. The same can be said in relation to the obligations and services EE agreed to provide in relation to the Transition.
>
> 18 I believe it was also understood that a breach of the TSA by VM could cause EE to lose profits that it may otherwise have anticipated. For example, clause 11.1 of the TSA permitted VM to obtain services from Third Parties provided that it did not (among other things) result in equipment being directly connected to EE's network or any harm or damage to EE's RAN. If VM was to put equipment on EE's RAN, that could cause EE's network to be affected and/or consequently cause damage to EE's brand, EE may lose some of the profits it would otherwise have made from separate contractual arrangements with its retail customers. I would also refer to the VOIP and VOLTE rules at section 3.1 of Schedule 3 where various conditions were attached to VM's entitlement to operate and promote VM VOIP. The concern here was that VM's offering to its customers might be poor and reflect badly on EE's network. Breach by VM of those conditions could have damaged EE's reputation and brand and hence its profitability.
>
> 19 I also take the view that, at the time the TSA was negotiated, it was fully understood and known by VM as well as EE that anticipated profits contemplated by clause 34.5 did not apply to the Charges which EE was

> entitled to levy for use of its 2G, 3G and 4G network (see clauses 18.3, 18.7 and 34.2 which expressly refer to the ability of EE to sue for its charges). I believe the drafting of the TSA makes that clear as well as the importance of the exclusivity provisions which I address next."

63. In my judgment:

a. It is clear from this evidence (and it is not disputed) that at the time of the TSA the parties "understood that a breach of the TSA by VM would cause EE to lose profits that it may otherwise have anticipated". Assuming this to be admissible, it is uncontroversial.

b. On its own, Mr Harrap's evidence in paragraphs 16-18 comes nowhere near establishing an admissible "factual matrix" context to the TSA. Mr Zellick KC, on behalf of VM, pointed out that Mr Harrap does not explain how the "good understanding" to which he refers was obtained and nor does he suggest that there were any discussions or other communications which "crossed the line" between the parties on the subject. This is true, but in my judgment the more fundamental issue with his evidence is that his subjective belief as to the true interpretation of the relevant clause, or the understanding of the parties, is quite simply inadmissible for the purposes of construction.

c. Furthermore, on close analysis, Mr Harrap's statement does not suggest the likely availability of any additional relevant and admissible factual matrix evidence. There is no suggestion in his evidence that the parties understood (for whatever reason), or were operating on the shared assumption, that the words "anticipated profits" had any particular meaning in the context of the TSA and, of course, there is no claim for rectification based on any such evidence.

d. Absent something more (and nothing is suggested) it is fanciful to think that evidence which, on a proper reading, goes no further than to say that, in Mr Harrap's subjective view, the parties understood that there were a variety of circumstances which might give rise to a damages claim for anticipated profits, is capable of influencing the approach of the court to the true interpretation of clause 34.5.

e. To my mind Mr Harrap's evidence is insufficient to establish any relevant or admissible factual matrix to the TSA and accordingly, it really does no more than suggest that "something might turn up" at trial - but this is not enough to escape an application for summary judgment. It is fanciful to suggest that Mr Harrap's evidence provides a real prospect of success for EE on the construction issue at trial and unrealistic to suppose that anything further in the way of relevant evidence will become available. No such evidence was intimated by EE.

f. In the circumstances, it is perhaps unsurprising that Mr Charlton frankly acknowledged during his submissions that he was unable to say what, if any, evidential basis there was to support a proposition that "anticipated profits" had any particular meaning to the parties. He certainly did not suggest that further evidence on this score would be available at trial and it is perhaps of significance that EE's skeleton argument made no reference to this section of Mr Harrap's evidence in the context of submitting that not all relevant evidence is before the court at this stage such that the matter should go to trial.

g. Paragraph 19 of Mr Harrap's statement is uncontroversial – there is no question that clause 34.5 does not apply to Charges, which as I have said are recoverable

as a debt. It is also common ground that exclusivity was important to the parties. There is no need for the case to go to trial on these points.

The Evidence that the Charges were not pure profit

64. I have already referred to Mr Harrap's evidence that EE did not regard the Charges as pure profit. However, I fail to see how that affects either the nature of the claim or the court's ability to determine the issue of construction which has been identified – it is in any event not disputed. There is no reason to suppose that any additional evidence on this point will be available at trial which will affect the issue of construction one way or the other.
65. I reject the suggestion that if this application is to succeed I must be satisfied that every element of the Charges that would have been due represents loss of "anticipated profits". That appears to me fundamentally to misunderstand the function and operation of the compensatory principle and the claim for loss of profit.

Conclusion

66. As I have already said, I am very conscious that the court should proceed with caution when invited to make a final decision without a trial, but in the circumstances of this case, in my judgment there is no impediment to my making such a decision and I intend to do so in accordance with the approach set out in proposition (vii) of *Easyair*.
67. In summary and in light of the analysis set out above:
    a. The true nature of EE's claim is a matter of law which can be decided now. Alternatively, if it is more accurately to be described as a mixed question of fact and law – then all the necessary facts are before the court. There is no reason to suppose that any additional evidence will be available to the court at trial which bears on the determination of the issue. In my judgment it is fanciful to suggest that EE's claim is anything other than a claim for loss of profit;
    b. The question of the true interpretation of clause 34.5(a) is a short point of construction, largely dependent upon an analysis of the terms of the TSA itself;
    c. I am satisfied that the court has before it all the evidence necessary for the proper determination of that point of construction. There is no obvious conflict of fact on any issue which is likely to bear upon that question. It is not in dispute that the contractual context must include the requirement of exclusivity. There is no factual matrix evidence which takes matters any further and no suggestion that additional relevant factual matrix evidence will be available at trial. Accordingly, there is no reason to believe that a fuller investigation into the facts of the case would materially add to, or alter, the evidence available to the trial judge and so affect the outcome of the case; and
    d. I do not consider there to be any other reason why I should decline to decide the point, and none was suggested.

Is VM's liability to EE in respect of its claims for breach of the TSA excluded by clause 34.5(a) of that contract?

68. Applying the principles to which I have referred above, I am satisfied that on a true interpretation of clause 34.5(a), any liability on the part of VM for damages for the unlawful diversion of its customers to alternative networks falls within the terms of the exclusion. My reasons are as follows:
69. The language of clause 34.5(a) is on its face clear and unambiguous. With one express exception, liability for anticipated profits in claims for damage is excluded. There is

no other qualification or limitation. The obvious implication is that the parties were seeking to cast the net as widely as possible.

70. I have already found that EE's claim is a claim for loss of profits, so a question of course arises as to whether it falls within the scope of clause 34.5(a), including whether a claim for loss of profits of this type is capable of being encompassed by the words "anticipated profits". However, in common with the view taken by Adrian Beltrami KC in *Galtrade,* at [139], I consider that the reference in 34.5(a) to there being no liability in respect of "anticipated profits" is fairly susceptible of one meaning only. Construed with reference to the principles to which I have already referred, there is no reason to suppose that it was intended to do anything other than exclude damages claims for loss of profit. Giving the phrase "anticipated profits" its natural meaning in the context of clause 34.5(a), it is seeking to exclude damages claims for loss of profits of any kind which it was foreseeable would be made by either party. To my mind, there is no distinction between 'anticipated profits' and 'lost profits' for these purposes. Put another way, I cannot see how a claim for damages for "Charges unlawfully avoided" can be anything other than a claim for damages for anticipated or expected profits on the natural meaning of those words. There is nothing in the clause to suggest a narrower, more restricted meaning.
71. On the contrary, I consider that the wording of the rest of clause 34.5(a) itself amply supports such a broad construction:
    a. The clause provides for a specific carve out in respect of damages claims by VM pursuant to clause 34.2(c). In providing for this carve out, the parties appear expressly to have considered whether there should be any exemptions (including in relation to claims for damages for wilful or reckless misconduct or gross negligence), deciding only that such claims on the part of VM (where they fall within clause 34.3) would be so exempt[10].
    b. The clause includes in parenthesis the acknowledgement by EE that if a claim is made by VM pursuant to clause 34.2(c) such claim "may include claims of damages **for loss of profits**" (**emphasis added**). It is difficult to regard the inclusion of a reference to loss of profits in the context of this carve out as anything other than recognition on the part of the contracting parties that claims for damages for loss of profits would otherwise be excluded by the operation of clause 34.5(a). In other words that the concept behind the terms "loss of profits" and "anticipated profits" is the same such that they are, in effect, interchangeable.
    c. Having identified the one carve out to which I have referred, the parties were content to provide that "for no other damages claims whatsoever" would liability exist in respect of anticipated profits. This is unequivocal and appears intended to exclude argument in any other case.
72. I reject EE's submission that one gets "the colour of the anticipated profits from the reference in the same clause to "anticipated savings", in the sense that construing these two concepts together makes it clear that "the parties were talking about things other than Charges". Once one appreciates that a claim for Charges would be a claim for a debt and so not caught by clause 34.5(a) in any event, it is very difficult to see how this submission works. If and in so far as this submission was designed to suggest that clause 34.5 should be read as being subject to a caveat that it does not apply to claims in respect of Charges that have not in fact been incurred, such a reading cannot be

[10] EE expressly disavow any suggestion that this imbalance informs the issue before the court.

reconciled with the express wording of the clause or the very specific and limited carve out provided for by the parties.

73. As Carr J made clear in *Fujitsu* at [36], the fact that the language is clear and unambiguous is not, without more, the end of the question. The words of the exclusion must be read in the context of the whole exclusion clause, the contract as a whole, the material background and circumstances as at the time the TSA was entered into. The starting presumption is that neither party intends to abandon any remedies arising by operation of law. Clear express words must be used in order to rebut this presumption (see *Gilbert Ash*). The ascertainment of the meaning of apparently clear words is itself a process of contractual construction which requires consideration of those words in their wider context (see *Kudos* at [22]).
74. However, in my judgment, there is nothing in the context or surrounding clauses of the TSA that points to any different construction than that arrived at by a simple reading of the words of clause 34.5(a) itself. Furthermore, as I have already said, there is no evidence of any factual matrix material that affects the position.
75. Indeed a consideration of all the relevant circumstances (which bear many similarities, as Mr Zellick submitted, to the circumstances in *Fujitsu*) provides support for a straightforward and unrestricted reading of the words:
    a. The TSA (including the amendments to it) is a bespoke, lengthy and detailed contract negotiated by two sophisticated parties operating in the field of telecommunications. There is no suggestion that the negotiations occurred on anything other than a level playing field and no suggestion that further evidence as to the circumstances of the negotiations would be required at trial. The main body of the TSA runs to 65 pages. Attached to it are 10 separate Schedules designed to address, in considerable detail, various aspects of the parties' contractual relationship. It is more likely in such a case that the TSA can be successfully interpreted "principally by textual analysis" (see *Wood v Capita Insurance Services* per Lord Hodge at [13]).
    b. It is clear from the terms of the TSA that detailed consideration has gone into the risks and rewards for each party, no doubt with regard to their individual commercial priorities; thus by way of example, EE has ensured a Minimum Revenue Commitment and the ability to recover an additional sum from VM in circumstances where usage is lower than forecast; VM has ensured that if the Services are withheld by reason of the misconduct of EE, it has the right to an unrestricted claim for damages. Both parties have agreed to the liability cap in clause 34.1, subject to certain exceptions.
    c. Clause 34 as a whole contains (as was also the case with the relevant clause in *Fujitsu*, see [38(b)]), "detailed provisions governing the parties' rights to remedies as between each other". It consists of a detailed regime in seven parts which, amongst other things, provides for a liability cap; the disapplication of the liability cap in relation to particular claims (including VM's liability to pay Charges and any liability for damage arising from reckless or wilful misconduct or gross negligence by either party); the creation of a particular process applicable to intentional acts by EE resulting in a withdrawal of the Services to VM (acts which are also exempt from the exclusion of claims for damages for anticipated profits or anticipated savings); the exclusion of liability for indirect, consequential, special or incidental loss; the exclusion of claims for anticipated profits or anticipated savings; together with standard form saving provisions in 34.6 and 34.7.

d. Clause 34.5 was a tailor-made, stand alone, clause apparently intended to have a wide reach. It is plainly part of the risk allocation exercise between the parties. It is not qualified by its surrounding provisions and there is nothing surprising about its positioning or context (see by way of comparison the case of *Kudos* in which the relevant clause was qualified by its surrounding provisions and did not appear in the place in which one would expect to find a wide-ranging exclusion clause (see [24] per Tomlinson LJ)). It is clear from the points I have already made above as to its specific wording that the parties expressly applied their minds to its scope.

e. Clause 34.5 uses clear express words rebutting any presumption that the parties did not intend to abandon their respective claims for damages for anticipated profits, howsoever arising.

f. Clause 34.5 applies equally to damages claims for anticipated profits and anticipated savings made by both parties. It does not exist for the benefit of one party alone. Although there is a specific carve out in relation to very particular claims by VM pursuant to clause 34.2(c), it is a clause that affected the rights of EE and VM alike. By way of example, if, other than in circumstances of wilful or reckless breach or gross negligence, EE was unable to provide the Services to VM's customers, VM would have no claim for damages for anticipated profits.

76. In the circumstances, I consider that the parties can be taken, on the wording of the clause and its context, to have meant what they said.

77. It is noteworthy that EE has not advanced a consistent case in relation to the interpretation of clause 34.5:

a. First it sought to contend that clause 34.5 was not intended to apply to Charges payable under the TSA and so could not possibly apply to Charges unlawfully avoided. It sought to support this point by reference to the provisions of clause 34.2(a) which expressly excluded the liability to pay Charges from the liability cap in clause 34.1. However, with the acknowledgement that the non-payment of Charges for Services rendered gave rise to a debt claim, this argument inevitably fell away. It was wrong for reasons I have already given: the present claim is not a claim for Charges and nor is it concerned with VM's "liability to pay any Charges" pursuant to clause 34.2(a). The submission made by EE that it would be illogical for the parties to have agreed to pay Charges under clause 18 or clause 34.2(a) whilst at the same time agreeing to exclude a claim for damages based on Charges unlawfully avoided carries no weight. I accept VM's submission that it is irrelevant that clause 34.5 does not apply to the Charges.

b. Second, and possibly related to the first contention, was the submission that clause 34.5 might be applicable to breach of other obligations under the TSA, but it could not possibly apply to breach of the Exclusivity Clause. It was submitted that, looked at in this way, effect could be given to clause 34.5 because it would apply to breaches of the type identified by Mr Harrap in his evidence. However, as Mr Zellick submitted, the wording of clause 34.5 ("no other damages claims whatsoever") makes it impossible to conclude that the parties intended the clause to apply to breach of some obligations in the TSA but not others and I did not understand EE to provide any real answer to this point. This construction would plainly require a re-write of the words used in the clause.

c. Third, in his oral submissions, Mr Charlton initially suggested that the words "anticipated profits" in the TSA were capable of including profits that would have accrued pursuant to the performance of the contract (albeit that he did not identify what these might cover). However, in EE's skeleton and later in oral submissions (by reference to Mr Harrap's suggested "examples" at paragraphs 17 and 18 of his statement) it was submitted that "anticipated profits" related only to business losses that might accrue "outside" the TSA or in relation to activities with third parties, which I understood to mean indirect or consequential losses falling within the second limb of *Hadley v Baxendale*. Bearing in mind that this construction requires the court to limit the natural and ordinary meaning of the words, Mr Charlton did not explain how or why this was the proper construction on a textual analysis of the clause and the wider contract terms and nor did he grapple with the fact that indirect or consequential losses were already excluded by virtue of clause 34.4. Although EE's submissions appeared to depend heavily upon Mr Harrap's evidence as to the types of loss that he considers were envisaged by the words "anticipated profits", such evidence is inadmissible for the purposes of construction.

78. To my mind, these arguments merely exposed the difficulty for EE in seeking to deny the obvious and natural meaning of the words in clause 34.5.

79. The high-water mark of Mr Charlton's submissions was *University of Wales*, on which he relied in support of his submission that "anticipated profits" meant only business losses outside the TSA. *University of Wales* concerned the purported termination and repudiatory breach of a validation agreement pursuant to which the University validated courses provided to students by the college. It was common ground that the damages sought were referable to loss of revenue and profits but the key question was whether this claim was excluded by virtue of the words "loss of any anticipated or future business, revenue, goodwill or profit". The court construed these words as excluding only "business losses outside" the validation agreement. However, it is clear from the reasoning at [108] that this was primarily on the basis of the context of the entire clause (which was itself concerned with losses which were not reasonably foreseeable at the date of the agreement) and the fact that a wider construction would have had the "remarkable effect" in the event of a breach of negating the primary commercial benefit of the contract for each party. The context is different in this case, where clause 34.5 is a stand-alone provision, and I reject the suggestion that a construction in VM's favour denudes the TSA of all commercial value for reasons to which I shall return below.

80. Although the judge in *University of Wales* did observe (at [108(4)]) that the interpretation he favoured was "also suggested by the words 'anticipated or future', which indicated "that what is in mind is business future to, or anticipated outside of, the Validation Agreement", I reject the proposition that the same applies here. Whilst I am not sure that I agree with the learned judge that the words "anticipated or future" indicate business "anticipated outside" the agreement, which seems to me to read rather more into those words than they would ordinarily bear, I agree with Mr Zellick that there is no need for me to find that this case was wrongly decided. The Judge's observation at [108(4)] was plainly made in light of, and was likely influenced by, the conclusions he arrived at on construction in [108(1)]-[108(3)]. The clause in *University of Wales* was contained in a very different contract, its context and its words were different from those with which I am concerned (here there is no reference to "future") and I have no doubt that the case may be distinguished on that basis. It does nothing to dissuade me from the conclusion that the words used in the TSA are clear and unambiguous on their face.

81. Notwithstanding EE's submissions to the contrary, this case is also plainly distinguishable from *The Ease Faith*, where, on the particular wording of the relevant clause and its context, the court (at [143] and [144]) construed the term "loss of profit" as referring to loss of profits generated by future use of the tug by the tug owner or hirer as the case might be. Importantly the wording of the relevant exclusion clause (excluding "loss of profit, loss of use, loss of production or any **other** indirect or consequential damage for any reason whatsoever" **emphasis added**), enabled the court to confine the clause to the exclusion of liability for indirect loss of profit.
82. Clause 34.5(a), and its context, is entirely different and I gain no assistance from *The Ease Faith*. As Carr J observed in Fujitsu at [81]:

> "*Ease Faith* confirms that 'loss of profit' exclusions have to be construed in context. In appropriate cases, they can be construed so as to mean indirect or consequential loss. In *Ease Faith*, the decision to construe the reference to loss of profit as meaning loss of profit from the future use of the tug or tow was justified on the basis of the contract as a whole".

83. In my judgment, there is no justification in this case for construing, or re-writing, clause 34.5(a) in a manner which limits the basic exclusion in respect of anticipated profits to indirect and consequential loss; indeed so to do would likely render the clause otiose in light of the clear words of 34.4 which already excludes liability for "any indirect or consequential or special or incidental loss whatsoever". That clause is itself a freestanding provision and there is no basis for concluding that the words of clause 34.5 are in any way limited or restricted by the wording of clause 34.4.
84. Furthermore, referring again to the reasoning of Carr J in *Fujitsi* at [77]:

> "…given the obviousness of the point, one would expect it to be made clear if the intention was only to exclude indirect loss of profit. The fact that losses of profit can be direct or indirect is well-known: see for example *Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals & Polymers Ltd* [1999] 1 Ll Rep 387".

85. I have considered whether the admitted background to, and wider context of, this contract, namely (and crucially) the importance of exclusivity, is sufficient to cast doubt on the clear and natural meaning of the words used in clause 34.5, but have concluded that it is not. The authorities are clear that the court should not apply a strained meaning to an exclusion clause, or effectively rewrite its language, where the words of the clause are clear. The court is not privy to the commercial considerations of the parties at the time of the negotiations, including their private calculations as to the risks and rewards to be obtained under the contract, although it is plain from the provisions to which I have referred that detailed calculations of this sort were made on both sides. Exclusivity was obviously a key provision of the TSA for EE, but no doubt reliable provision of the Services was equally important to VM. It was mutually agreed that claims for damages for anticipated profits and anticipated savings would be caught by 34.5(a), save for the express carve out and it is difficult to see why the court should not give effect to the clear words of that agreement.
86. Whilst I accept that language is a flexible instrument and that if it is capable of more than one construction, the court should choose that which seems most likely to give effect to the commercial purpose of the agreement, I cannot see that the words in this clause are capable of any other construction: to give them the narrower construction for

which EE contends would require the court to read into the existing words a limitation on their scope which was not provided for by the parties. The clause could have said that it applies only to anticipated profits "in respect of losses arising outside the TSA", or "in respect of losses arising in connection with third parties", but it does not. It could have said that it does not apply to claims made for breach of the Exclusivity Clause, but it does not.

87. Mr Charlton made a number of additional arguments in favour of the more limited construction of clause 34.5 for which EE contends, and I can deal with these as follows:

The terms of clause 18.3

88. On the basis that EE's claim is really to be viewed as a "failure to pay Charges", Mr Charlton pointed out that the provision in clause 18.3 that payment of the Charges shall be the only amounts payable by VM for the performance by EE of the Services was expressly agreed to be without prejudice to EE's rights in the event of a breach by Virgin "including but not limited to any right of EE to recover interest or damages in the event of VM's failure to pay Charges or late payment thereof". Mr Charlton suggested that the claim in this case falls within the meaning of the words "failure to pay Charges" and that, in circumstances where this clause expressly refers to EE's right to recover damages in the event of VM's failure to pay Charges, it would be odd to find that the parties had agreed to exclude such claims.
89. I find this wholly unconvincing. The reference in clause 18.3 to the failure to pay Charges can only be to a failure to pay Charges which have become due following the provision of the Services (see clauses 18.1 and 18.3). No Charges are due in the circumstances of this case owing to the fact that the customers were diverted and no Services provided to them – hence the claim for damages.
90. Even if that analysis is wrong, clause 18.3 does not create rights in favour of EE; it does no more than preserve any right to recover damages that may exist pursuant to the terms of the agreement. Clause 34.5 does not exclude all claims for damages, but only claims for damages for anticipated profits and anticipated savings. A claim for interest is not a claim for damages for loss of profit or anticipated savings and would not be excluded under clause 34.5. Equally one can envisage direct claims for loss caused by a failure to pay Charges that would also not be excluded by clause 34.5.
91. In my judgment, clause 18.3, when properly understood, does not support the proposition that the parties cannot have intended the broad exclusion of claims for damages for anticipated profits in clause 34.5(a).

The terms of clause 34

92. Second, Mr Charlton submitted that, looking specifically at clause 34.1, it cannot have been the parties' intention to allow VM to breach the Exclusivity Clause, cause irrecoverable loss of profit to EE and thereby unlawfully reduce the Customer Network Spend (which is dependent upon the Charges) with the effect that the first limb of the liability cap was also reduced. However, this argument holds no water when it is appreciated that, as Mr Zellick points out, the Customer Network Spend is calculated for the purposes of clause 34.1 by reference to that spend in the "12 months **preceding** the event that gives rise to liability" (**emphasis added**). Any damage caused by reason of the unlawful diversion of Customers to another network will not affect the level of the Customer Network Spend in the 12 months prior to that diversion.
93. Mr Charlton sought, in his oral submissions, to address this point by postulating a scenario in which two breaches of the TSA had occurred, submitting that if the second breach is, say, a breach that has resulted in damage to property, an earlier breach of the Exclusivity Clause, especially if it had gone undiscovered, could have the effect of unfairly manipulating the level of the Customer Network Spend. However, I agree with

Mr Zellick that this is not a proper application of clause 34.1. I cannot see that it has any impact on the true and proper interpretation of clause 34.5(a).

The views of ordinary people

94. Third, picking up a point raised by Adam Kramer KC (in the passage to which I have already referred from The Law of Contract Damages at 25-24), Mr Charlton submitted that "ordinary people" would not regard the lost profits incurred by EE by reason of customers being unlawfully diverted elsewhere in breach of the Exclusivity Clause as "lost" or "anticipated" profits. Accordingly, that cannot have been what the parties meant when they included the words in clause 34.5(a).
95. Aside from the fact that I agree with Mr Zellick that it is not at all obvious that an ordinary person would take this view, I do not consider this to be an appropriate approach to construction. As Lord Clarke pointed out in *The Rainy Sky* at [21]:

> "…the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, **that is a person who has all the background knowledge which would have reasonably been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant**. In doing so the court must have regard to all the relevant surrounding circumstances…" (**emphasis added**).

The meaning of "loss of profit" in the authorities

96. Fourth, Mr Charlton submitted that EE's interpretation of clause 34.5 "accords with a long line of authority on exclusions of "loss of profit", citing *The Herendetor, The Ease Faith, Glencore, University of Wales* and *Galtrade*.
97. I have already dealt with a number of these cases in detail. In short, they are incapable of carrying the weight that EE seeks to place on them, primarily because:
    (i) As Mr Charlton frankly acknowledges, authorities dealing with similar expressions in other contracts must be treated with caution owing to the fact that "different contracts use different words, involve different backgrounds and different commercial common sense".
    (ii) I reject the suggestion that they are consistent in supporting the general proposition that the expression "loss of profit", or "anticipated profits" should be read narrowly. In my judgment, they show no more than that those words may be differently construed depending on their contractual context.
    (iii) Only one of the authorities referred to contains any (apparently) general statement as to the meaning of "loss of anticipated profits". That statement is entirely consistent with VM's case ("the term 'loss of anticipated profits' is on its proper interpretation intended to exclude the recovery of conventional claims for loss of profit (whether falling under either limb of *Hadley v Baxendale* (1854) 9 Ex 341)" – see *Galtrade* at [139(a)]).

Deliberate Breach

98. Fifth, EE emphasises that if VM's construction is correct, then clause 34.5(a) would have the effect of excluding even reckless or wilful breaches, in respect of which the parties went to the trouble (in clause 34.2(c) of the TSA) of excluding the liability cap. EE also submits that this in turn is a reason why the words "anticipated profits" should be construed narrowly.
99. Whilst it is true that on VM's construction clause 34.5(a) does have the effect of excluding damages claims for anticipated profits and anticipated savings, including

those arising from reckless or wilful breaches, it is clear from the carve out to which I have already referred, that the parties expressly considered the effect of the clause in connection with the earlier provisions as to reckless or wilful breaches and decided to provide only for a limited carve out. Furthermore clause 34.5 is not concerned with excluding breaches, but with excluding types of loss. I agree with Mr Zellick that there would appear to be no restriction on a claim for reliance loss in the form of wasted expenditure, a proposition that I did not understand to be challenged by EE.

Illusory Bargain

100. Sixth, EE contends that on VM's interpretation of clause 34.5, EE "would have no remedy at all" for VM's breach of the Exclusivity Clause, depriving it of all contractual force and turning it into a mere statement of intent. EE says the contract should be construed so as to avoid this absurd result. Mr Harrap supports this submission in his evidence, saying that "[i]t makes no commercial sense whatsoever for EE to agree to a contract whereby the MVNO could wilfully default on exclusivity and leave EE without a financial remedy".

101. In support of this proposition, EE relies upon *Kudos*, a case concerning a claim for lost profits arising by reason of the repudiatory breach of a contract for the provision of catering services. The Court of Appeal construed a clause referring to lost profits in its particular context, so as to have a narrow meaning, namely lost profits arising by reason of the defective performance of the agreement and not lost profits arising by reason of a refusal or disabling inability to perform it. In so doing, Tomlinson LJ observed (at [19]) that it was inherently unlikely that the parties could have intended the clause to have a wider effect in circumstances where that would render the agreement as "effectively devoid of contractual content since there is no sanction for non-performance".

102. However, this observation is explained by his finding at [18] that it was:

> "wholly unsustainable…that the appellant could perform this contract without the full-hearted cooperation of the respondent. I also have serious reservations as to whether a court would in any event compel an operator of venues such as those operated by the respondent to continue to employ a caterer in which it had lost confidence…".

103. I do not regard *Kudos* as providing any particular assistance on the facts of this case for two main reasons:

a. First, because the words used in clause 34.5 are clear. In *Fujitsu* at [49], Carr J described what was in that case referred to as "the statement of intent rule" as being:

> "of little assistance in circumstances where, as here, the wording is plain, the exclusion clause of mutual benefit and detailed in its form. As quoted above, Lord Diplock made it clear that in commercial contracts it is wrong to place a strained construction on words in an exclusion clause which are clear".

See also *The GSF Arctic III* per Moore-Bick LJ at [28] to the effect that the principle:

> "does not in my view provide sufficient justification for overriding the parties' intention where that has been clearly expressed. The principle of freedom of contract, which is still fundamental to our commercial

> law, requires the court to respect and give effect to the parties' agreement".

b. Second, unlike in *Kudos*, this is not a case in which the construction advanced by VM denudes the TSA of all commercial effect. Mr Harrap's subjective belief about what would be commercially appropriate is irrelevant to, and inadmissible in respect of, the court's interpretation of clause 34.5. It is not enough that EE may now regret its bargain or that it considers it is left "without a financial remedy". VM's construction of clause 34.5 excludes liability only for specific types of loss. It would not preclude a claim for wasted expenditure[11] and nor would it preclude a claim for injunctive relief against VM for breach of the Exclusivity Clause. I agree with Carr J in *Fujitsu* at [62] that:

> "As for granting of specific performance orders or negative injunctions, whatever difficulties and uncertainties there might be in an application for such relief, it cannot be said that such relief could not be sought and would be doomed to failure. This much is apparent from cases such as *Bath and North East Somerset District Council v Mowlem plc*. Everything would turn on the facts and circumstances pertaining at the time".

104. Indeed I am inclined to agree with VM that in a case of breach of the Exclusivity Clause, there would likely be a strong claim for injunctive relief, including interim injunctive relief in appropriate circumstances. I note that although Mr Harrap asserts in his evidence that VM's construction would leave EE "without a financial remedy", he does not suggest that it would be without a remedy, or without an "effective remedy".

105. Furthermore, it appears to me to be important that on VM's construction of clause 34.5, EE remains contractually entitled to the payment of Minimum Revenue Commitments under clauses 17 and 39 of the TSA and remains entitled to bring a claim for debt for payment of any sums that are due and unpaid under these clauses. These are substantive rights and remedies which remain available to the parties. It is wrong to suggest, as EE does in its skeleton, that VM's construction leaves it "without the fundamental consideration that it required for entering into the contract, i.e. the Charges". Although these rights and remedies do not provide a remedy for breach of the Exclusivity Clause, I agree with Mr Zellick that they are an important part of the context. In particular, they are relevant to an overall assessment of the commerciality of the TSA. Even if exclusivity was breached, VM remained obliged to continue to pay very substantial sums for access to the network.

106. This is not a case in which it could possibly be suggested that the effect of clause 34.5(a) is to relieve VM of all liability for breach of any of its obligations under the TSA. Accordingly, I do not regard this as a case in which it would be appropriate for the court to turn to the "illusory bargain" principle as a last resort.

Overall Conclusion

[11] In this context I note the discussion in *Soteria* at [68] about the distinction between loss of profit/loss of revenue/savings claims and claims for wasted expenditure. The Court of Appeal expressed the view that the former are types of potential loss which "are routinely excluded" because they are difficult for the contract breaker to estimate in advance. This was regarded in *Soteria* at [70] as "unsurprising from a commercial perspective".

107. I am satisfied that properly construed, EE's claim for damages against VM is excluded by the terms of clause 34.5(a) of the TSA. Accordingly, I am going to grant summary judgment on EE's claim in VM's favour.

108. I invite the parties to liaise over an appropriate order reflecting this decision.