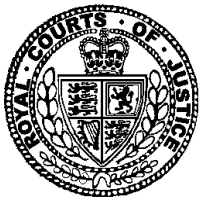

Neutral Citation Number: [2018] EWHC 3296 (Comm)

Case No: CL-2017-369

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
The Rolls Building
London, EC4A 1NL

Date: 30/11/2018

Before:

ANDREW BURROWS QC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between:

HARRY GREENHOUSE	**Claimant**
and	
PAYSAFE FINANCIAL SERVICES LTD	**Defendant**

- -
- -

Mr Andrew George QC and Mr Daniel Cashman (instructed by **Northridge Law LLP Solicitors**) for the **Claimant**

Mr Hugh Norbury QC and Mr Adil Mohamedbhai (instructed by **Fieldfisher LLP Solicitors**) for the **Defendant**

Hearing dates: 5, 6, 7 November 2018

- -

JUDGMENT

ANDREW BURROWS QC:

1. INTRODUCTION

(1) General

1. This is a dispute about the alleged non-payment of commission in the context of e-wallets and online gambling/gaming. The defendant, Paysafe Financial Services Ltd (formerly known as Optimal Payments Ltd), operates a global electronic money payment service allowing users to send and receive payments online. In other words, users are provided with e-wallet facilities. Neteller is one of the defendant's brands. As this case is concerned with Neteller's operations, it is convenient to refer to the defendant throughout as Neteller. The events with which we are concerned occurred between May 2013 and October 2014. The bulk of Neteller's business was then (and remains) in providing e-wallet facilities to participants in online gambling and gaming (especially online poker). Neteller had contractual relationships with merchants, particularly those operating online gambling and gaming sites, whereby Neteller was paid a percentage fee when a Neteller account was used to pay money to those merchants.

2. Neteller referred to the users of its facilities as its 'members'. Members were able to sign up to Neteller directly through its website. Neteller also ran an 'affiliate programme' whereby 'affiliates' would promote Neteller's services in return for commission on transactions using Neteller undertaken by the members they had recruited. If recruited by an affiliate, members were 'tagged' to the affiliate who had recruited them. In short, the affiliate was paid commission on transactions using Neteller by members tagged to that affiliate.

3. Harry Greenhouse, the claimant, was well-known in the poker community and remains so. Prior to the events with which we are concerned, he had played mid to high stakes poker for many years and he ran a poker coaching business between 2006 and 2014. From early 2013 his business interests included promoting various brands providing online payment services to, amongst others, online poker players. In May 2013 he approached Neteller with a view to becoming one of its affiliates. The person he dealt with at Neteller was Lee-Ann Johnstone. She was in charge of Neteller's affiliate programme (in her capacity as Vice-President of Marketing for Neteller between 2011 and 2016). On 9 July 2013, a contract – 'the affiliate agreement' – was entered into between Mr Greenhouse and Neteller (or, to be precisely accurate, Optimal Payments Ltd which was the company behind Neteller at that time). This case is about elements of that contractual relationship. As is common ground, the affiliate agreement was lawfully terminated on 26 October 2014 under an express termination clause (Neteller having given Mr Greenhouse the required 30 days' written notice of termination).

4. This is a split trial so I am dealing with liability only. The determination of quantum awaits, and is dependent on, this judgment. Prior to, or during the course of the trial, the disputed issues have been narrowed down to four. I shall refer to them as follows: the 'affiliate consent form issue'; the 'merchant exclusion issue'; the 'unilateral notice issue'; and the 'daily reporting issue'. The law that I have to apply and most of the relevant facts are not in dispute. What is in dispute throughout is how the law applies to the facts.

(2) Some features of the contract with Mr Greenhouse

5. When Mr Greenhouse approached Ms Johnstone in May 2013, he made clear to her that, because of his extensive contacts in the poker world, he could recruit many new members for Neteller. Very importantly, he also suggested that he could encourage existing members of Neteller, who had not been using their Neteller accounts for many months (perhaps because they were using an account of one of Neteller's rivals, in particular Skrill), to start using their accounts again. He was therefore seeking, and was given, a bespoke affiliate agreement. The contract (ie the affiliate agreement) entered into on 9 July 2013 (which comprised Neteller's standard affiliate terms modified by terms set out in a letter of 5 July 2013 including a schedule attached to that letter) was, at the time it was entered into, unique to Mr Greenhouse. Three particular features of that contract differed from Neteller's standard affiliate agreement. First, and most importantly, he was allowed to have tagged to him existing members, whom he had reactivated, provided they had not used Neteller for a period of six months and provided they were not already tagged to another affiliate. Secondly, he was given a choice of allocating a 'referred member' (ie one of the members he had recruited, whether a new or a reactivated member) to one of three affiliate accounts: a Gold VIP account, an Exclusive VIP account or a Super Affiliate account. There were different rates of commission for him on each of the three accounts. In practice, as we shall see, Mr Greenhouse only ever allocated members to the Gold VIP account although one of his claims (relevant to the 'merchant exclusion issue') was that he would have allocated members to the Exclusive VIP account if Neteller had not, in breach of contract, applied merchant exclusions to that account. Thirdly, the agreement was to continue for (at least) one year (terminable after that date by either party giving written notice of 30 days) but, after one year, Neteller had the right to amend the terms of the agreement by giving Mr Greenhouse 60 days' notice of such amendments.

(3) The two main witnesses

6. I should indicate at the outset my impressions of the two main witnesses, Mr Greenhouse and Ms Johnstone. Much of the relevant evidence is contained in contemporaneous documents, especially emails, but, in addition to their witness statements (dated 17 and 18 September 2018 respectively), both Mr Greenhouse and Ms Johnstone gave oral evidence for the best part of a day each.

7. I regarded Mr Greenhouse as a reliable and credible witness. He was 'on top of' the documents on which he was asked to comment and gave careful and considered responses. Counsel for the defendant, Hugh Norbury QC, accused him at times of being evasive and putting forward inappropriate legal arguments instead of his own evidence. My view was that he was rightly taking his time to ensure that he understood the context of the emails that he was being asked about; and it was not surprising that he saw matters through the lens of the legal case that he was bringing. He came across as clever, with an acute business mind, and driven by making money. He also came across as someone who was willing to manipulate others to his own advantage and his business ethics will strike many as questionable. In particular, he made available online what became known as 'the cashback bible' which told online gamers how they could 'play the system' so as to maximise cashback deals and such like from the merchants operating online gaming sites. His advice may be viewed as encouraging people to mislead those merchants by, for example, depositing money

with merchants to attract cashback deals without any intention of going on to spend much, if any, money with those merchants. Mr Greenhouse saw it rather as explaining the tricks of the trade, within the rules, and having the legitimate aim of maximising gains from the deals offered.

8. Ms Johnstone, in contrast, seemed at times to be out of her depth during her cross-examination by counsel for the claimant, Andrew George QC. She responded to a number of questions by saying simply that she had no answer to the question. While I regarded her as a witness who was doing her best to be as honest and accurate as possible, two general features of her evidence are noteworthy. The first was that, as made clear by the contemporaneous emails and her evidence in relation to the merchant exclusion issue, she had occasionally thought it necessary, in order to protect Neteller's interests (ie out of loyalty to Neteller) to tell Mr Greenhouse one thing while those within the company, herself included, were aware that the actual position was rather different. Secondly, her understanding was that at all relevant times it was perfectly acceptable for Neteller to change the terms of the affiliate agreement made with Mr Greenhouse if it was in Neteller's interest to do so. It may well be, as she thought, that that was permitted under some of the other contracts with which she was dealing. But that was certainly not the case in relation to the affiliate agreement with Mr Greenhouse: it is not in dispute that unilateral amendments were only permitted after one year and then only by giving 60 days' notice to Mr Greenhouse.

9. I also heard evidence on behalf of Neteller from Mark Jeffrey and Sara Rita who were both employed by Neteller at the time of these events. Both were reliable and credible witnesses but only the former added anything of real relevance and even that was of very limited significance.

2. THE RELEVANT LAW

10. As I have said, the law applicable to this case is not in dispute. There are five main areas of law in play: (1) contractual interpretation; (2) implied terms; (3) variation of a contract; (4) promissory estoppel; and (5) interpretation, and withdrawal, of a unilateral notice of amendment. I shall now look at each of these five areas in turn before going on to consider the application of the law to the four issues in this case.

(1) Contractual interpretation

11. The modern approach in English law to contractual interpretation is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. Important cases of the House of Lords and Supreme Court recognising the modern approach, which marks a shift from an older more literal approach, include *Investments Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, HL, especially at 912-913 (*per* Lord Hoffmann giving the leading speech),

and *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900. The Supreme Court in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, clarified that the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain. In *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, at [14], Lord Hodge, with whom the other Supreme Court Justices agreed, said that there was no inconsistency between the approach in *Rainy Sky* and that in *Arnold v Britton*: 'On the approach to contractual interpretation, *Rainy Sky* and *Arnold* were saying the same thing.' His Lordship also pointed out, at [12], that contractual interpretation 'involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated…'.

(2) Implied terms

12. In the light of the well-known speech of Lord Hoffmann in *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, there has been a debate as to whether the exercise of implying terms (of fact) can be distinguished from interpretation of the contract. Lord Hoffmann suggested that they were both part of the same exercise. However, it was made clear by the Supreme Court in *Marks and Spencer plc v BNP Paribas Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, that at a practical level the two exercises of interpretation and implication of terms (of fact) are, and should be kept, distinct. The former is concerned with what is there; the latter is concerned with inserting what is not there. Moreover, it was confirmed that the two long-established tests for implying terms (of fact) remain as useful and important as they have traditionally been. These are the 'officious bystander' and 'business efficacy' tests. The first focuses on whether the term is so obvious that it goes without saying. The test is whether, were an officious bystander to ask, at the time the contract was made, if the term was meant to be included, the parties would answer 'Of course': see *Shirlaw v Southern Foundries (1927) Ltd* [1939] 2 KB 206, 227 (*per* MacKinnon LJ). The second test is whether, at the time the contract was made, the term was necessary for the business efficacy of the contract: see, for example, *The Moorcock* (1889) 4 PD 64, CA.

(3) Variation

13. A contract may be varied by the agreement of the parties. It is trite law that the formation requirements for an agreement to count as a valid enforceable contract apply equally in deciding whether there has been a variation by agreement: see generally *Chitty on Contracts* (ed Beale) (33rd edn, 2018) paras 22-032 – 22-039. There must therefore be an agreement to vary, which can almost always be broken down into offer and acceptance, supported by consideration. Again, as shown in the leading case of *Goss v Lord Nugent* (1833) 5 B & Ad 58, which concerned a contract for the sale of land, if the contract is one that is required to be in writing, a variation of the contract will also need to be in writing. It also follows that just as the offer and/or acceptance for the formation of a contract may be constituted by the conduct of a party (*Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 is a classic illustration) so may the offer and/or acceptance for a variation.

(4) Promissory estoppel

14. Even if there is no contractual variation, a promise to give up (ie to waive) one's rights may be legally binding, at least to some extent, under the doctrine of promissory estoppel. This has been one of the most discussed doctrines in English law since it was relied on by Denning J in *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130. Promissory estoppel does not create a cause of action but operates as a defence, which means in practice that it applies to a promise to give up an existing right (most commonly, a right under a contract between the parties) but not to a promise to confer a new right: see *Combe v Combe* [1951] 2 KB 215, CA; *Baird Textiles Holdings Ltd v Marks and Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737.

15. Assuming that it is being used as a defence and not as a cause of action, the three central requirements of the doctrine are as follows. First, the promise (or representation as to one's future conduct) must be clear and unequivocal. That there was no such promise/representation was the reason the doctrine could not be made out in *Woodhouse AC Israel Cocoa SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, HL. Viscount Dilhorne said, at 761: 'To found an estoppel, the representation must be clear and unequivocal. In my opinion, the [relevant] letter … could not reasonably be understood to contain or to imply a clear and unequivocal representation of the nature alleged.' Secondly, the promise must have been relied on by the promisee although it is a controversial question whether reliance is sufficient or whether detrimental reliance must be shown. In *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, CA, Lord Denning MR thought that reliance alone (ie acting on the promise) was sufficient and that there was no need for detriment. But in *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser* [1981] 2 Lloyd's Rep 695, Robert Goff J regarded the crucial question as being whether it was inequitable for the promisor to enforce its rights and, on the facts, detrimental reliance was held to be required and was not present. Thirdly, the promise must not have been induced by the promisee's inequitable conduct, such as duress (as in *D & C Builders v Rees* [1966] 2 QB 617, CA) or misrepresentation.

16. Where the doctrine is made out, it may in some cases extinguish the original rights of the promisor but often it merely suspends those rights so that the original rights can be reverted to at least by giving reasonable notice: see the difficult case of *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761, HL; and generally *Chitty on Contracts*, paras 4-097 - 4-098.

17. What is particularly critical in this case is the application of the requirement that the promise or representation be clear and unequivocal. It is important to recognise that the relevant promise or representation may be made by conduct as well as by words. Mr Norbury drew to my attention, in support of that proposition, *Glencore Grain Ltd v Flacker Shipping Ltd, The Happy Day* [2002] EWCA Civ 1068, [2002] 2 Lloyd's Rep 487, at [67] (*per* Potter LJ) and see generally *Chitty on Contracts*, paras 4-091 – 4-093. Mr George relied on an especially helpful passage from *Snell's Equity* (ed McGhee) (33rd edn, 2015) at para 12-024, written by Professor McFarlane, as to what is meant by the 'clear and unequivocal' requirement in promissory estoppel. I here set out that passage in full (omitting footnotes which refer to the relevant authorities):

'[T]he promise, or encouragement must be "clear and unequivocal" in the sense that, objectively understood, it makes apparent to B that A's right will not be enforced. If A's conduct is instead capable of a number of different reasonable interpretations, at least one of which is inconsistent with A's right not being enforced, no promissory estoppel may arise. If, for example, B's claim is that he or she was encouraged to believe that a right would be suspended, there must be certainty as to the specific right of A's in question and as to the period of the supposed suspension. A must have encouraged B to believe that A's right would not be enforced: if A's conduct can instead be reasonably understood as involving only advice, a suggestion or even a threat that A may act in a particular way, there are no grounds for a promissory estoppel.

As the effect of a promissory estoppel is to prevent A's enjoying the full benefit of a particular right, and as such an estoppel can arise without any contractual consideration's being provided by B, a court will naturally be cautious in ascertaining whether A did give the required clear and unequivocal encouragement to B. So, whilst it is clear that a promissory estoppel may arise even in the absence of an express statement by A, a court will require clear evidence before finding that A impliedly encouraged B. If, for example, it would not have objectively appeared to B that A was even aware of the right in question, encouragement is likely to be implied from A's course of conduct only if A created the impression that A was willing to "abandon any rights that he might enjoy which were inconsistent with [A's] course of conduct". Further, the general position is that mere silence and inaction by A cannot found a promissory estoppel, as A's failure to act, if capable of communicating anything, will generally be open to differing reasonable interpretations, at least one of which will be inconsistent with A's right not being enforced. …'

(5) Interpretation, and withdrawal, of a unilateral notice of amendment

18. There are two points of law that are relevant to the 'unilateral notice issue'. The first is that the question whether a communication constitutes the giving of notice is a matter of interpretation of the communication and, as shown by, for example, *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, HL, an objective and contextual approach should be applied. In other words, the same, or at least a directly analogous, approach to interpretation of a notice should be taken as is applicable to interpreting a contract. The second point of law is that the general rule is that, once a unilateral notice has been given, it cannot be withdrawn except by mutual consent. As Diplock J said in *Riordan v War Office* [1959] 1 WLR 1046, 1054 (affirmed at [1961] 1 WLR 210, CA), in the context of an employee's resignation notice: 'It is a unilateral act, requiring no acceptance by the other party, and, like a notice to quit a tenancy, once given it cannot in my view be withdrawn save by mutual consent.' See to the same effect *Willoughby v CF Capital plc* [2011] EWCA Civ 1115, [2012] ICR 1038.

3. THE FIRST ISSUE: THE AFFILIATE CONSENT FORM ISSUE

19. I now turn to the first of the four issues that I have to decide. The claimant seeks a declaration that 'the defendant was not entitled to require a hard copy of an affiliate consent form to be signed and for a copy of such form to be sent to it as a prerequisite

to becoming a referred member under the affiliate agreement.' Resolution of this issue involves my applying to the facts the first four of the five areas of law that I have just set out. But I start by examining some of the general evidence on this issue.

20. Affiliate consent forms were not used for new members. New members could sign up to Neteller directly through the Neteller website. As I understand it, if they did so, there were questions that they needed to answer as part of the signing on for an account. Similarly if a new member was recruited by an affiliate, including by Mr Greenhouse, the new member would be directed by the affiliate to use a hyperlink that would lead the new member to the signing on process.

21. The affiliate consent form issue therefore only arose because Mr Greenhouse was being permitted, uniquely at the time the contract was made with him, to reactivate members who would be tagged to him. As Ms Johnstone said in her witness statement (at paragraph 34):

'Such an agreement with an affiliate whereby they could "retag" inactive members was unprecedented at the time and no other affiliates had received this opportunity…'

She thought that it was not until 2014 that Neteller began to provide re-tagging rights to other affiliates. It may also have been relevant that, as Ms Johnstone knew, Mr Greenhouse would not be operating a website to attract new or existing members.

22. The first mention of the need for an affiliate consent form was in an email (with a blank consent form attached) from Ms Johnstone to Mr Greenhouse on 18 July 2013, nine days after the contract had been made. But while indicating, consistently from that date on, that that affiliate consent form needed to be sent in, it is significant that, in the initial months of the agreement (and probably until early April 2014), Ms Johnstone was tagging members to Mr Greenhouse prior to any consent form being sent in by that reactivated member. There were emails indicating that from Ms Johnstone to Mr Greenhouse dated 2 September 2013, 7 October 2013, 1 November 2013, and 4 November 2013. So, for example, in the last of those emails she wrote:

'The consent form is meant to be given to me as soon as you have had a member tagged to you… I have been doing it without at the present time – and I really have to stress that this cannot carry on – it is a compliance rule that this process is adhered to so I need you to get your members to start completing this form and sending them in… The consent form acknowledges that the member realises they are now part of your network of customers.'

23. In line with this, Mr Greenhouse's evidence in his witness statement (at paragraph 77) was that:

'For significant periods of the Affiliate Agreement, Neteller did not require the form as a pre-requisite to the re-tagging of Existing Members even after it was introduced.'

In cross-examination he confirmed that, as he understood it, at least initially (and he thought until about April 2014) he was being paid commission on the transactions of those reactivated members whether or not they had sent in the affiliate consent form. He did not know how many of the members tagged to him had sent in the forms and how many had not. An email from Ms Johnstone to Mr Greenhouse dated 10 April

2014 indicates that, by that date, Neteller would not tag a member to Mr Greenhouse until the signed affiliate consent form had been sent in. This was consistent with Mr Greenhouse's oral evidence at trial as summarised in the following exchange (see transcript, day 2, p 7, lines 12-25):

'JUDGE (ANDREW BURROWS QC): … does that then mean that you realised at the beginning of April [2014] that [as regards] the affiliate consent form, you were not going to be paid if you didn't use that [form]?

[MR GREENHOUSE]: Yes, I realised that they had taken that position, yes.

Q: And you weren't paid thereafter.

A. To my knowledge I was not, no.

Q: So up until the beginning of April you were being paid, as you understood it, whether there were affiliate consent forms or not, but after early-ish April I think you are saying, after that point you weren't being paid without the affiliate consent form.

A. Correct.'

24. Mr Norbury for Neteller submitted that the need for a signed affiliate consent form to be sent in to Neteller by reactivated members was provided for by an express term of Mr Greenhouse's affiliate agreement with Neteller; but that, if that was incorrect, a term should be implied to that effect. In any event, if there was no term as to the affiliate consent form in the contract at the time it was made, the parties had varied the contract by agreement so that such a term became part of the contract. Even if that was incorrect, the doctrine of promissory estoppel applied so that Mr Greenhouse could not deny that the sending in of a signed affiliate consent form was a requirement. For Mr Greenhouse, it was submitted by Mr George that none of those arguments could succeed: the sending in of a signed affiliate consent form was never a contractual requirement, whether at the time the contract was made or by any variation; and the doctrine of promissory estoppel could not here be made out because there was no relevant clear and unequivocal promise or representation made by Mr Greenhouse.

(1) Did an express term require the sending in of a signed affiliate consent form?

25. Was Mr Norbury correct in submitting that clause 4.1.1 of the schedule (attached to the letter amending the standard affiliate agreement) required the sending in of a signed affiliate consent form? The clause reads as follows:

'4.1 In order to [be] eligible to be allocated to the "GOLD VIP" Affiliate Account, a Referred Member:

4.1.1 will need to satisfy NETTELLER's normal due diligence and customer verification procedures; and

4.1.2 must satisfy the minimum VIP TT Volumes in a month…'

By the definitional clause in the contract, the 'TT Volumes' referred to the total monetary amount of transfers made to merchants by a member using a Neteller wallet.

26. Mr Norbury submitted that the sending in of a signed affiliate consent form fell within the 'normal due diligence and customer verification procedures' in clause 4.1.1. This in turn referred to Neteller's standard terms of use and KYC ('know your customer') requirements. All that Neteller was here doing was applying a new procedure to the new situation posed by allowing Mr Greenhouse to tag reactivated members. The affiliate consent form was the normal procedure for this new situation.

27. I cannot accept that submission. The affiliate consent form was not the 'normal' procedure at all. It was an abnormal step which, subsequent to the making of the contract, Neteller came up with to deal with what, at the time, was the novel situation raised by the unique agreement with Mr Greenhouse allowing him to tag reactivated members (and, in so far as relevant, knowing that he did not operate through a website). Applying the objective contextual approach to interpretation, and even taking into account business common sense and purpose, the sending in of a signed affiliate consent form was not covered by clause 4.1.1 and was therefore not required by that express term.

(2) Was there an implied term requiring the sending in of a signed affiliate consent form?

28. Mr Norbury alternatively submitted that there was an implied term in the affiliate agreement that the sending in of a signed affiliate consent form was a pre-requisite for a reactivated member to be tagged to Mr Greenhouse. He contended that both the traditional tests for the implication of a term were satisfied. Such a term was so obvious that the officious bystander test was satisfied; and the affiliate contract would not work properly without such a term so that the test of being necessary for business efficacy was also satisfied.

29. In considering this, it is instructive to look at Mr Greenhouse's oral evidence as to how he recruited new and existing members. He would send out emails, including promotional emails, or use Skype instant messages, or speak to people on the phone or face-to-face. If the members were new to Neteller, they would be asked to click on the hyperlink that he had been sent by Ms Johnstone which would allow them to set up a Neteller account in the normal way tagged to Mr Greenhouse. If they were existing Neteller members, Mr Greenhouse would send an email to Ms Johnstone giving her the member's email address and/or existing Neteller account number and would ask Ms Johnstone to check whether that existing member was eligible to be tagged to Mr Greenhouse. As I have briefly mentioned, the criteria for an existing member to be tagged to Mr Greenhouse, as set out in clause 5 of the letter amending the standard affiliate agreement, was twofold: first, the member must have been inactive for a period of six months (towards the end of August 2013 that was reduced to three months); and, secondly, the member must not have already been tagged to another affiliate. So that clause reads:

'5. NETELLER will permit "Re-activated Members" to constitute a "Referred Member". A "Re-activated member" is a Member that: (i) has been inactive for a period of six (6) months or more; (ii) is not a Referred Member of any other Affiliate…'

Ms Johnstone would then let Mr Greenhouse know by email whether those criteria were satisfied. If the criteria were met, the reactivated member would be sent a

congratulatory email by Mr Greenhouse indicating that that member had been tagged to Mr Greenhouse and would now be able to take advantage of the benefits of the account to which that person had been allocated by Mr Greenhouse (as well as any deals offered by Mr Greenhouse). It follows from this that, according to Mr Greenhouse's evidence, reactivated members were consenting to being tagged to him albeit that Neteller only knew of that consent indirectly when Mr Greenhouse asked Ms Johnstone to check the criteria.

30. It also helps in deciding whether there was an implied term to think about why Neteller considered that the sending in of a signed affiliate consent form was needed. The various contemporaneous emails are unclear on this as was Ms Johnstone's witness statement and oral evidence (and indeed in cross-examination she struggled to explain why some of the reasons she was giving for an affiliate consent form did not apply equally to new members and yet Neteller saw this as a requirement only for existing members). She made various suggestions. In particular (and this was supported by Mark Jeffrey's evidence), she said that existing members who moved to the Gold VIP account might lose some of their existing benefits and Neteller therefore needed to know that they consented to that. Alternatively she said that it was a compliance (ie data protection) matter because Neteller needed to have the consent of those members to Neteller having their personal information, such as their email address. In his submissions, Mr Norbury suggested that the best interpretation of the evidence was that Neteller wanted the affiliate consent form so as to pre-empt any complaints by existing members that they had not consented to being tagged to Mr Greenhouse. But that was not made clear in Ms Johnstone's evidence, although there is support in the later contemporaneous emails, reinforced by Mark Jeffrey's evidence, that at least at some stage one purpose of the affiliate consent form from Neteller's perspective was to act as a double-check that the reactivated member had indeed consented to being tagged to Mr Greenhouse. However, there was very little in the contemporaneous emails to suggest that, in practice, there were complaints from existing members who had been retagged to Mr Greenhouse that they had not consented to this. In any event, it is not easy to see how it could have been in the interests of Mr Greenhouse to ask for existing members to be tagged to him without their consent given that Neteller would check (with or without the consent form) whether the member was already tagged or active and it was entirely up to the choice of that member whether or not to use his or her Neteller account.

31. I do not consider that either of the tests for the implication of a term is here satisfied. The uncertainty of the evidence as to the purpose of the affiliate consent form supports that conclusion. Even if there was clear evidence that such a form was useful for Neteller, that goes nowhere near satisfying the test that a term requiring the sending in of such a signed form was so obvious that it went without saying or that it was necessary for business efficacy.

32. Although arguably irrelevant to determining whether there was an implied term at the time the affiliate contract was made (see *Chitty on Contracts*, para 13-136), it is perhaps worth reiterating the point, referred to in paragraphs 22-23 above, that the contract was performed for some considerable time (probably until April 2014), with Ms Johnstone tagging reactivated members to Mr Greenhouse and with him being paid commission by Neteller, even though a signed affiliate consent form had not

been sent in. In other words, it was clear with the benefit of hindsight that the contract could work without the sending in of a signed affiliate consent form.

33. There is a further point. In an email of 9 September 2013 from Mr Greenhouse to Ms Johnstone, he suggested that Neteller should allow an electronic signature because it seemed that 'most people' did not want to scan back a signed form. In her reply email, Ms Johnstone appeared to accept that an electronic signature would be fine. But in a later exchange of emails on 7 April 2014, she clearly stated that the form had to be signed by pen because Neteller's legal team had said that this was required. She repeated the same point in emails to Mr Greenhouse of 12 June and 13 June 2014. It is an unattractive submission that, in relation to a business concerned with e-wallets and the digital transfer of money, there was a term – that was so obvious that it went without saying or was necessary for business efficacy – that required the sending back (presumably by scan) of a form signed by pen.

(3) Was the affiliate contract varied so as to require the sending in of an affiliate consent form?

34. Given my decision that the original contract did not contain an express or implied term requiring the sending in of a signed affiliate consent form, the next question is whether the contract was varied by agreement to include such a term. In other words, did Neteller and Mr Greenhouse agree a variation so that, in addition to the two criteria for a reactivated member to be tagged to Mr Greenhouse set out in paragraph 29 above, there was a third (that the reactivated member must send in a signed affiliate consent form)?

35. Mr Greenhouse knew from nine days after the contract was made, and by several reminders in emails, that Neteller was insisting on the sending in of an affiliate consent form. Mr Norbury submitted that, although Mr Greenhouse did occasionally complain about it (eg in his emails of 9 September 2013 and 7 April 2014), his conduct was consistent with his having agreed to a variation of the terms so that the sending in of a signed affiliate consent form was a contractual requirement. In particular, Mr Norbury contended that Mr Greenhouse's acceptance of this as a contractual requirement was part of a variation package agreed in late August 2013 and he relied on an email headed 'Neteller reboot' dated 21 August 2013 from Ms Johnstone to Mr Greenhouse. There is no doubt that, from that date, Neteller agreed to and did reduce the non-activation period for an existing member from 6 months to 3 months. Mr Norbury's submission was that that concession was in return for Mr Greenhouse's agreement that the sending in of a signed affiliate consent form was a requirement (and Mr Norbury pointed to emails from Mr Greenhouse dated 21 August and 25 August 2013 which, he submitted, indicated that Mr Greenhouse had accepted the 'reboot'). In contrast, Mr George submitted that Mr Greenhouse had not agreed to any such variation of the contract. Breaking down the alleged variation into offer and acceptance, he submitted that there was no relevant offer by Neteller and, even if there was, there was certainly no acceptance by Mr Greenhouse. He relied on the evidence showing that Mr Greenhouse had complained about the affiliate consent form.

36. In my judgment, there was no variation of the contract making the sending in of a signed affiliate consent form a requirement for a reactivated member to be a referred member (ie to be tagged to Mr Greenhouse). Mr Greenhouse did not agree to that as a

contractual term. On the contrary, his complaints made clear that this was not something he agreed with. Although he tried his best to ensure that reactivated members did send in the affiliate consent forms, a grudging willingness to go along with what the other contracting party wants is not the same as agreeing to that as a variation of the contract. As regards the 'reboot' in late August 2013, while Neteller did bind itself to the reduced period for inactivity of 3 months (whether by a variation, if there was consideration, or under the doctrine of promissory estoppel) Mr Greenhouse was not accepting the sending in of a signed affiliate consent form as part of that or any other package (see, for example, Mr Greenhouse's general reference to 'we've still got a fundamental disagreement' in his email of 25 August 2013).

37. It is true that Mr Greenhouse carried on with the contract knowing that Neteller wanted affiliate consent forms sent in. But carrying on with a contract, knowing that the other party is insisting on a new requirement, is not the same as agreeing to a variation of it. One might look at it in this way. Let us assume that Neteller's insistence that affiliate consent forms be sent in constituted a repudiatory breach which entitled Mr Greenhouse to terminate the contract. His choice not to terminate the contract did not deprive him of the right to damages for a continuing breach. The mere exercise of a choice not to terminate for a repudiatory breach does not constitute an agreed variation of a contract.

(4) Applying the doctrine of promissory estoppel, did Mr Greenhouse bind himself to giving up his contractual right to have reactivated members tagged to him without sending in a signed affiliate consent form?

38. Mr Norbury submitted that, even if there was no variation, the doctrine of promissory estoppel applied so as to bind Mr Greenhouse. Mr Greenhouse had promised or represented that he was giving up his contractual right for a reactivated member to be a referred member (ie to be tagged to him) without sending in a signed affiliate consent form. Put another way, even if he had not agreed to that variation of the contract, he promised or represented that he was so agreeing.

39. I have set out, at paragraphs 14-17 above, the required elements of promissory estoppel. Mr George denied that the doctrine here applied because there was no relevant clear and unequivocal promise or representation by Mr Greenhouse to Neteller. On the contrary, Mr Greenhouse's complaints were inconsistent with the proposition that he was clearly and unequivocally promising or representing that he was giving up his contractual right that reactivated members would be tagged to him without the sending in of an affiliate consent form. I agree with that submission. Although the relevant promise or representation can be ascertained from conduct as well as, or instead of, words, the promise or representation must be 'clear and unequivocal'. The evidence, especially given the complaints of Mr Greenhouse, falls a long way short of showing that he was making such a clear and unequivocal promise or representation. Promissory estoppel cannot therefore be made out.

40. It follows that it is unnecessary for me to express a view on the difficult question whether, if promissory estoppel had here been made out, it would on these facts have been extinctive or suspensory only (and, if the latter, whether Mr Greenhouse's solicitor's letter of 5 September 2014 would have constituted reasonable notice to revive his original right to have reactivated members tagged to him without their sending in a signed affiliate consent form).

(5) Conclusion on the affiliate consent form issue

41. For these reasons, my conclusion on this issue is that the claimant succeeds. There was neither an express nor an implied term in the affiliate agreement requiring the sending in of a signed affiliate consent form. Nor was there a variation of the contract to that effect. And the doctrine of promissory estoppel cannot be made out. Hence, the claimant is entitled to the declaration sought, namely that the defendant was not entitled to require a hard copy of an affiliate consent form to be signed and for a copy of such form to be sent to it as a prerequisite to becoming a referred member under the affiliate agreement.

4. THE SECOND ISSUE: THE MERCHANT EXCLUSION ISSUE

42. This issue arises only in relation to the Exclusive VIP account (which was one of the three accounts to which Mr Greenhouse could allocate members under the affiliate agreement). By the terms of that account, as set out in clause 5 of the schedule (attached to the letter amending the standard affiliate agreement), Mr Greenhouse was entitled to a flat rate commission of 25% of the net amount Neteller earned on transfers made to merchants by a member tagged to him under this account; and Neteller was bound to pay 0.6% cashback (on those transfers) to the referred member. Very importantly, and this is common ground, the words of clause 5.2 of the schedule - 'any merchants' - made clear that there were no merchant exclusions. So clause 5.2 reads:

    'An Exclusive VIP Referred Member shall be paid 0.6% cashback on all TT transactions made to any Merchants.'

    By the definitional clause in the contract, 'TT' referred to a transfer made to merchants by a member using a Neteller wallet.

43. It is also not in dispute that in the 'reboot' email dated 21 August 2013, Ms Johnstone informed Mr Greenhouse that merchant exclusions, that is exclusions of certain merchants including Full Tilt Poker and Pokerstars, would be applied to the Exclusive VIP account. Mr Norbury submitted that, on the evidence, that was as a result of those merchants objecting to an account offering cashback; or, at least, as Ms Johnstone made clear in her evidence, that Neteller was applying the exclusions as a precautionary measure because it feared that those merchants would object. Mr George disputed that the evidence showed that merchants had at that point made any complaints. He submitted that Ms Johnstone misrepresented the position in her emails to Mr Greenhouse not only by indicating that the merchants had already complained but also by saying in an email dated 27 August 2013 that the terms of the Exclusive VIP account allowed merchant exclusions and that that could not be amended (because it was 'hard coded to our backend based on the terms we agreed'). I agree that that statement in the email of 27 August 2013 was clearly untrue. I find, therefore, that Ms Johnstone did misrepresent the position to Mr Greenhouse. But, as will become clear, nothing ultimately turns on that finding.

44. Mr Greenhouse's evidence, which was not contradicted, is that he did not allocate any members to the Exclusive VIP account. In practice, he only allocated members to the

Gold VIP account. His case is that the reason for that was that Neteller's insistence on the merchant exclusions on the Exclusive VIP account rendered it a poor option for him. In his words in his witness statement (at paragraphs 52-53):

'Once the exclusions were nominally imposed it offered almost no value to my highest value clients and, therefore, offered no value to me. Had Neteller honoured what we had originally agreed, then more individuals would have been eligible for the Exclusive VIP Account as a result of their transaction volumes. … Given the position adopted by Neteller, I had no choice but to refer members who would have been suitable for the Exclusive VIP Account to the GOLD VIP Account. …'

It was therefore submitted on behalf of Mr Greenhouse that Neteller's insistence that merchant exclusions applied to the Exclusive VIP account constituted a breach of contract; and that, although this is a matter for the trial on quantum, he is entitled to damages assessed according to the commission he would have made by allocating members to that Exclusive VIP account had there been no merchant exclusions,

45. On behalf of Neteller it was submitted that, although there were no merchant exclusions at the time the contract was made, the affiliate agreement was varied by agreement so as to permit Neteller to apply merchant exclusions; or that the doctrine of promissory estoppel applies because Mr Greenhouse promised or represented that he was giving up his contractual right that merchant exclusions should not be applied. I shall now deal with each of those two submissions in turn.

(1) Was the affiliate contract varied so as to allow Neteller to apply merchant exclusions to the Exclusive VIP account?

46. Mr Norbury submitted that the affiliate agreement was varied in August 2013. He relied on the 'reboot' email of 21 August 2013 and contended that that reboot comprised a package by which, on the one hand, the period of time that a member could be inactive before being tagged to Mr Greenhouse was reduced from six months to three (we have already seen that); and, on the other hand and in return, merchant exclusions were imposed on the Exclusive VIP account (along with, as Mr Norbury submitted, the affiliate consent form requirement). That was said to have been accepted by Mr Greenhouse (in, for example, emails of 21 August and 25 August 2013). Alternatively or additionally, Mr Norbury relied on other emails from Mr Greenhouse. For example, there was an email of 19 September 2013 from him saying, 'sure you are allowed to change it…'. There was another on 8 October 2013, in which he referred to the merchant exclusions, saying 'that's water under the bridge as far as I'm concerned'. And there were others in similar vein on 18 November 2013 and 3 April 2014. Mr George, in contrast, pointed to several emails showing a pattern of Mr Greenhouse making clear that he objected to the merchant exclusions.

47. I agree with Mr George. Mr Greenhouse was throughout making clear that he did not want merchant exclusions. Prior to the contract being made, he had stressed how important it was for him – he described it as a 'deal breaker' – that there should be no merchant exclusions. Mr Greenhouse did not agree to a variation of the contract by reason of the emails in August 2013, nor did he by reason of any other emails. Throughout, the overriding theme of emails relating to this matter was that Mr Greenhouse objected to the merchant exclusions. As has been said above in relation to the affiliate consent form issue, a willingness to carry on with a contract – although

Mr Greenhouse was carrying on only in the sense that he never used the Exclusive VIP account – does not constitute a variation by agreement. Similarly one cannot say that there was a variation merely because Mr Greenhouse exercised the option to continue with the contract rather than terminating it for a repudiatory breach by Neteller.

48. What emerged clearly from Ms Johnstone's evidence was that Neteller regarded itself as having no real choice other than to comply with the requests, or what they thought were likely to be requests, of the merchants for exclusion. Neteller was commercially dependent on the continuation of good relationships with those merchants. If those merchants stopped people using Neteller accounts on their gaming sites that would be commercially very damaging for Neteller. As far as Neteller was concerned, it was better to break the contract with Mr Greenhouse than it was to risk undermining Neteller's relationship with the merchants. I had the following exchange with Ms Johnstone (see transcript, day 2, p 69, lines 2-11):

'JUDGE (ANDREW BURROWS QC): Is it fair to say that you were operating on an understanding that if these merchants requested or indeed insisted on exclusions, that overrode all the agreements that you [had]?

A. Correct.

Q. That had to be implemented.

A. Yes, my Lord.

Q. Even if that meant you were in breach of contract with Mr Greenhouse, so be it.

A. Correct. That's correct.'

49. I should add for completeness that, although pleaded, Mr George did not pursue with any real conviction an argument that, even if there had been a variation, it was voidable by Mr Greenhouse for Ms Johnstone's misrepresentation (see paragraph 43 above for my finding on that). Mr George was correct not to push that argument. Mr Greenhouse did not rely on that misrepresentation: all that mattered to him was that Neteller *for whatever reason* was insisting on excluding those merchants from that account. In any event, had there been a variation (I have held that there was not), there is no indication that Mr Greenhouse took any steps to rescind that varied agreement.

(2) Applying the doctrine of promissory estoppel, did Mr Greenhouse bind himself to giving up his contractual right that there should be no merchant exclusions on the Exclusive VIP account?

50. We have seen that, for the doctrine of promissory estoppel to operate, there needs to be a 'clear and unequivocal' promise or representation. So here we are asking, did Mr Greenhouse clearly and unequivocally promise or represent that he was giving up his contractual right that there should be no merchant exclusions on the Exclusive VIP account? Put another way, was there a clear and unequivocal promise or representation that he was accepting that merchant exclusions could be applied to that account? In my judgment, the answer is 'no'. Although the law takes into account words as well as conduct, there was no clear and unequivocal promise or

representation by Mr Greenhouse to that effect. The evidence, especially Mr Greenhouse's expressed objections to the merchant exclusions, falls a long way short of showing that he was making such a promise or representation. Promissory estoppel cannot therefore be made out.

51. It follows that, analogously to what I have said in paragraph 40 above as regards the affiliate consent form issue, it is unnecessary for me to express a view on the difficult question whether, if promissory estoppel had here been made out, it would on these facts have been extinctive or suspensory only (and, if the latter, whether Mr Greenhouse's solicitor's letter of 5 September 2014 would have constituted reasonable notice to revive his original right for there to be no merchant exclusions on the Exclusive VIP account).

52. For the purposes of completeness, I should again mention one point that was pleaded but was not taken much further by Mr George. In my view, the misrepresentation of Neteller (see paragraph 43 for my finding on that) would not have prevented Neteller succeeding on promissory estoppel had there been the necessary clear and unequivocal promise or representation by Mr Greenhouse. This is because, as explained in paragraph 49 above, Mr Greenhouse did not rely on that misrepresentation (ie it did not induce him into making the alleged promise or representation).

(3) Conclusion on the merchant exclusion issue

53. For these reasons, my conclusion on this issue is that the claimant succeeds. The affiliate agreement was not varied so as to allow Neteller to apply merchant exclusions to the exclusive VIP account; and the doctrine of promissory estoppel cannot be made out. The imposition of the merchant exclusions was, therefore, a breach of contract by Neteller and the claimant is entitled to damages (to be assessed) for that breach.

5. THE THIRD ISSUE: THE UNILATERAL NOTICE ISSUE

54. Mr Greenhouse seeks a declaration that 'the terms of the affiliate agreement as initially agreed were the applicable contractual terms until the termination of the affiliate agreement on 26 October 2014'. It is common ground that the affiliate agreement was lawfully terminated by Neteller, under the express termination clause in clause 7.2 of the contract, on 26 October 2014 (the written notice of termination having been given, 30 days in advance, on 25 September 2014). But there is a dispute between the parties as to which terms governed between 1 October and 25 October.

55. Neteller was entitled to amend the terms of the affiliate agreement after 9 July 2014 (that is, one year after commencement) by giving 60 days' notice. This follows from the paragraph at the end of the schedule attached to the letter amending the standard affiliate agreement. It is helpful to set out that paragraph in full:

'The amendments set out in this Letter are conditional upon and effective from the date of signature by the Affiliate of the Affiliate Agreement (the "Effective Date") and shall continue for a period of one (1) year from and including the Effective Date.

Thereafter, NETELLER reserves the right to review the terms of the Affiliate Agreement as amended by this letter, and make such amendments to the terms as it sees fit but shall provide you with at least 60 days' notice of such amendments. Any such amendment to the terms shall only apply to Referred Members referred after the date of the change (for the avoidance of doubt, existing Referred Members shall continue on the terms in force at the time they became Referred Members).'

56. Although this does not appear to be how it was put in the pleaded defence, Mr Norbury submitted that Neteller had given Mr Greenhouse notice of new terms by an email of 31 July 2014. The background to this email was as follows. Ms Johnstone had known from the outset that Mr Greenhouse was working as an 'ambassador' (ie the equivalent of being an affiliate) for Neteller's rival, Skrill, at the same time as being an affiliate for Neteller. But in July 2014 Neteller had received information which led Ms Johnstone and her colleagues to believe that Mr Greenhouse was sacrificing Neteller's interests (in particular, that he was encouraging Neteller's customers to stop using their Neteller account for a period and instead to sign up to a Skrill promotion, and then to return to Neteller after a three-month inactive period tagged to Mr Greenhouse). In an email of 28 July 2014, headed 'Terms Change', Ms Johnstone wrote to Mr Greenhouse outlining Neteller's complaint and saying:

'As a result, the senior executive team have made the following decision to change the Terms of business we have, effective immediately…'

The email went on to say that Neteller would no longer operate a three-month inactive re-tagging policy and instead would consider only new members referred by Mr Greenhouse; and it then went on to set out an 'option' for him as to a new affiliate account while recognising that 'existing business will remain as is'.

57. This was then followed by the email of 31 July 2014, on which Mr Norbury relied. In that email, headed 'Commercials – new deal', Ms Johnstone wrote to Mr Greenhouse as follows:

'As I explained in my various emails, our VIP team escalated concerns from NETELLER customers mentioning that you actively encouraged them to stop using their NETELLER account (or close it) in order to convert these customers to a Skrill promotion. This has caused cannibalistic behaviour with our existing client business and reputational damage to NETELLER. As a result a decision was made to remove the 3 month re-tag policy and move in line with your original request of wanting to manage your clients incentivisation directly'.

Ms Johnstone then set out 'the terms of the new commercial deal which Lorenzo has offered' (Lorenzo was Lorenzo Pellegrino, who at the time was Vice-President of Neteller's Digital Business Development). Various details of what was being 'offered' were then set out.

58. It has not been pleaded or submitted on behalf of Neteller that it terminated the affiliate agreement for any repudiatory breach by Mr Greenhouse. Rather Mr Norbury's submission was that that 31 July email constituted an effective 60-day notice of amendment of terms as permitted in the schedule attached to the letter amending the standard affiliate agreement. The notice was of the following amendments: that Neteller would no longer permit Mr Greenhouse to have tagged to

him existing Neteller members even if inactive; and/or that the further changes set out in the 'offer' would come into effect.

59. I cannot accept that submission. Applying an objective contextual approach to the interpretation of the 31 July email, it is important, as Mr George contended, that there is no reference to a 60-day period. The only timescale mentioned is in the earlier email of 28 July which purported to be changing the terms 'effective immediately' (which was a clear breach if and, in so far as, any changes were carried through immediately). Although plainly there can be a valid notice without the word 'notice' being used, the correct interpretation of the 31 July email is that it contained an indication of an immediate amendment (which was contractually ineffective precisely because of its immediacy) along with, as the word 'offer' indicated, what was in law an 'offer' as to other terms (which was an offer that was rejected by Mr Greenhouse in an email of 3 September 2014). It was certainly not a 60-day notice of amendment of terms.

60. Although there were emails from Ms Johnstone to Mr Greenhouse (eg on 5 August 2014) and internally indicating that a 60-day notice had been given on 31 July, that cannot retrospectively alter the position that no valid 60-day notice had actually been given (and Mr Norbury, rightly in my view, did not make any submission that Mr Greenhouse had, by reason of promissory estoppel, 'waived' his right to such a notice by his subsequent conduct).

61. It follows from what I have just decided that I do not need to deal with the further submission by Mr George that, even if the 31 July email had been a valid notice, it was subsequently withdrawn by a letter from Neteller to Mr Greenhouse dated 25 September 2014. Suffice it to say that I am inclined to the view that Mr George was correct that, assuming mutual consent was needed for the withdrawal of the notice, Mr Greenhouse did make clear his consent to that withdrawal by an earlier email of 3 September 2014 and/or by a letter from his solicitors dated 1 October 2014.

62. My conclusion on this issue, therefore, is that the claimant succeeds. It follows that the claimant is entitled to a declaration that the terms of the affiliate agreement as initially agreed were the applicable contractual terms until the termination of the affiliate agreement on 26 October 2014.

6. THE FOURTH ISSUE: THE DAILY REPORTING ISSUE

63. This is the fourth and final issue. The claimant seeks a declaration that 'the Defendant is, and has been since commencement of the Affiliate Agreement, obliged to provide daily reporting to the Claimant detailing the breakdown of the Commission per Referred Member per day under the Affiliate Agreement.'

64. Under clause 3.6 of the standard terms in the affiliate agreement:

'NETELLER shall provide the Affiliate with its standard daily report detailing the breakdown of the Commission per Referred Member per day.'

The following clauses may also be of some relevance to this issue.

'7.2 Either party may terminate Affiliate's participation in the Affiliate Programme upon 30 days' written notice to the other Party.'

'7.3(a) upon termination of this Agreement you will be paid all Commissions owing up to the termination date and you will be paid all Commissions in respect of your Referred Members for the entire lifespan of the Referred Members after the date of termination;'

'7.8 NETELLER may amend or cancel Affiliate Programme upon written notice at any time provided always that any of NETELLER's ongoing obligations to you as contained herein shall not be affected, including but not limited to, ongoing payment and reporting obligations.'

'9.3 This section 9 (Confidential Information) shall continue in force notwithstanding the expiry or termination of this Agreement, whatever the reason for such termination.'

65. It is not in dispute that, while the affiliate agreement was in force, Mr Greenhouse was provided with daily reports of his referred members' Neteller activity, and his commission, but that, after the affiliate agreement was terminated on 26 October 2014, he was provided with only monthly reports.

66. In his witness statement (at paragraph 99), Mr Greenhouse explained why daily reports were important to him:

'The Daily Reports were extremely important, not only in respect of my own financial record keeping, but also in respect of my ability to manage effectively my referrals and Sub-Affiliates, both individually and at a high level. During the term of the Affiliate Agreement, I received Daily Reports that sometimes indicated that I was not on course to qualify for a certain tier of GOLD VIP Account commission at the end of the month. By studying the Daily Reports, I was able to encourage, or instruct Sub-Affiliates to encourage, members to transact more (or transact with High Profit Merchants) in that particular month so that I hit my revenue target and earned my commission. As a preventative measure I would also do this if the Daily Reports showed that particular members were only transacting with a single, Low Profit Merchant. Having this information readily available was particularly important for Sub-Affiliates, who were paid by me based on the net revenue I earned from the members they referred to me. Some of my Sub-Affiliates had referred hundreds of members through me and had businesses generating thousands of dollars per month in income.'

Given that members tagged to him remained tagged to him after termination of the contract, and indeed for life, the importance to him of daily reporting remained the same after termination as before termination. The fact that after termination he could not recruit new members was irrelevant to why he wanted daily reporting.

67. According to Ms Johnstone's oral evidence, the reason why Neteller did not want to give Mr Greenhouse daily reporting after termination of the contract was that the daily reporting was effected by the affiliate having access to the automated reporting system. Once an affiliate's contract had been terminated, it was not appropriate for him to have access to that system because that would allow the affiliate to refer new

members. The monthly reporting was therefore done manually; but it would drain resources to provide daily reports manually. This was made clear in the following exchange (see transcript, day 2, p 169, line 13 – p 170, line 7):

'MS JOHNSTONE: There was no hierarchy within the system, so if an affiliate had been terminated, we would have to terminate their access to the automated reporting system, because if we didn't they would still be able to generate tracking links and they'd still be able to refer new customers. So you were either in the system or out of it. In terms of what this clause is saying is that to -- we would have to manually pull reports daily in order to actually provide that to Mr Greenhouse, which I just can't see how they would have been able to resource that.

JUDGE (ANDREW BURROWS QC): So you are saying that it became a manual operation rather than automatic.

MS JOHNSTONE: Correct. Because we had to exclude him out of the affiliate platform, because there was no way to just provide him access to just the reporting tool in the platform. You are either in the platform or you are not. So when we terminate an affiliate agreement, we have to also terminate access to the reporting tool.'

68. I should interject here that it is common ground - but is worth stressing - that under the affiliate agreement (and this was part of their standard affiliate terms) Neteller was bound to continue to pay affiliates commission, after termination and indefinitely, on the same terms as to commission as were applicable when the member had been tagged to the affiliate. The commercial wisdom of that from Neteller's point of view is not a matter for me to comment on.

69. It is not in dispute that the question I here have to decide ultimately turns on the correct interpretation of the contract. While the general law on which contractual obligations survive termination (as discussed in cases such as *Heyman v Darwins Ltd* [1942] AC 356, HL and *Yasuda Fire & Marine Insurance* [1995] QB 174) may be of general assistance, my essential task is to apply the principles of contractual interpretation, which I have set out in paragraph 11 above, to the affiliate agreement.

70. Mr Norbury submitted that it was important that there were express provisions in the contract - namely, clauses 7.3(a) and 9.3 (set out at paragraph 64 above) - to the effect that certain obligations were to survive termination; and that, where parties have expressly identified which provisions are to survive after termination, this indicated that other clauses did not survive termination. Had Mr Greenhouse wished to continue to be provided with daily reporting he should have negotiated an express term to that effect.

71. I reject that submission. In my view, it is clear that, taking an objective contextual approach, and with business common sense and the purpose of the contract in mind, the payment of commission and daily reporting went 'hand in glove'. As Mr George put it, the obligation to pay commission survived and, because it was ancillary to it, so did the daily reporting obligation. Two further points support that interpretation. The first is clause 7.8, which has been set out in paragraph 64 above. That applied if the affiliate programme itself was stopped or changed. That is not what happened here (where, instead, the agreement with a particular affiliate was terminated by 30 days'

written notice under clause 7.2). Nevertheless, it is noteworthy that, in that somewhat analogous situation, clause 7.8 expressly linked together as continuing both the payment obligation and the reporting obligation. The second point is that, even on Neteller's case, it is accepted that Mr Greenhouse was entitled to a monthly report. Mr Norbury submitted that that arose by reason of an implied term. That was therefore a concession that some form of reporting obligation had to survive after termination. But once one has accepted that, it would seem all the more clear that, instead of inventing a new monthly reporting obligation that did not exist prior to termination, the correct interpretation is that the daily reporting obligation, set out in the contract, is the reporting obligation that survives.

72. Mr Norbury also submitted that the daily reporting obligation in clause 3.6 did not survive because, once the contract had been terminated, the claimant was not an 'Affiliate' so that the obligation to provide 'the Affiliate' with daily reporting did not apply. According to this submission it made all the difference that that clause used the words 'the Affiliate' rather than 'you'. That cannot be correct. The terms 'Affiliate' and 'you' are used interchangeably in the contract; and that that is so is expressly stated in the opening paragraph of the standard terms in the affiliate agreement where it is said that the agreement is between Optimal Payments Ltd and the named Affiliate (here Harry Greenhouse) who will be referred to as '"Affiliate" or "you"'.

73. My conclusion on this issue, therefore, is that the claimant is entitled to a declaration that the defendant is, and has been since commencement of the affiliate agreement, obliged to provide daily reporting to the claimant detailing the breakdown of the commission per referred member per day under the affiliate agreement.

7. OVERALL CONCLUSION

74. For all these reasons, the claimant succeeds on all four issues. It follows that:

(i) On the affiliate consent form issue, there shall be a declaration that the defendant was not entitled to require a hard copy of an affiliate consent form to be signed and for a copy of such form to be sent to it as a prerequisite to becoming a referred member under the affiliate agreement.

(ii) On the merchant exclusion issue, there shall be a declaration that the imposition of the merchant exclusions was a breach of contract by Neteller and the claimant is entitled to damages (to be assessed) for that breach.

(iii) On the unilateral notice issue, there shall be a declaration that the terms of the affiliate agreement as initially agreed were the applicable contractual terms until the termination of the affiliate agreement on 26 October 2014.

(iv) On the daily reporting issue, there shall be a declaration that the defendant is, and has been since commencement of the affiliate agreement, obliged to provide daily reporting to the claimant detailing the breakdown of the commission per referred member per day under the affiliate agreement.

For completeness, I add that a further issue – referred to as the 'multi-currency accounts issue' – was conceded by Neteller during the course of the trial. It follows that there shall also be a declaration that the defendant is obliged under the terms of the affiliate agreement to pay commission in respect of TT volume made by referred members irrespective of the currency account used by that referred member.

75. It remains for me to thank counsel on both sides for their helpful submissions.