

Neutral Citation Number: [2026] EWHC 707 (Ch)

Claim No: CR-2024-LDS-000423

Claim No: CR-2024-LDS-000509

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN LEEDS**  
**INSOLVENCY AND COMPANIES LIST (ChD)**

Date: 25 March 2026 at 10:30AM

Before :

**RECORDER JANET BIGNELL KC**  
**Sitting as a Judge of the High Court**

Between :

**CONTRACT NATURAL GAS (MARKETING)  
LIMITED**

**Applicant**

- and -

**(1) THE JOINT LIQUIDATORS OF  
CONTRACT NATURAL GAS LIMITED**  
**(2) THE JOINT LIQUIDATORS OF CNG  
ENERGY LIMITED**

**Respondents**

**Peter Susman KC and Annette Thomson** (instructed by **Wilson Bramwell Solicitors Ltd**)  
for the **Appellant**

**Matthew Weaver KC and Andrew Brown** (instructed by **Addleshaw Goddard LLP**) for the  
**Respondents**

Hearing dates: 26-28 November 2025

Supplemental Written Submissions Received: 12 December 2025

To be circulated in Draft: 10 March 2026

Further time given to the parties prior to hand down: 16 March 2026

**JUDGMENT**

**Recorder Janet Bignell KC :**

1. By an Order made on 19 August 2024, these two insolvency appeals were directed to be case managed and tried together. In the event only the first appeal requires to be determined. That is the appeal dated 24 May 2024 brought by the Applicant (“Marketing”) pursuant to section 112 of the Insolvency Act 1986 (the “IA”) and rule 14.8 of the Insolvency (England and Wales) Rules 2016 (the “2016 IR”) to reverse the rejection by the Joint Liquidators of Contract Natural Gas Limited (“CNG”) of Marketing’s proof of debt dated 15 February 2022 for £6,444,581.00 (including costs and interest) submitted in the administration of CNG (“the CNG Proof of Debt”).
2. Marketing is presently a non-trading company, with no tangible assets. Prior to CNG’s entry into administration it acted as a commission agent for CNG. The CNG Proof of Debt comprises £5,042,512.00 in respect of commissions asserted to be due and owing by CNG to Marketing under Gas Supply Agreements and £140,124.24 in respect of commissions asserted to be due and owing under Siteworks Agreements.
3. It is Marketing’s case that on the true interpretation of an Agreement dated 9 September 2004 (“the 2004 Agreement”) made between CNG and Marketing, which Marketing alleges was subsequently varied orally in 2005 and 2016, and which Marketing further contends was subject to, and in the case of conflict modified by, the Commercial Agents Regulations 1993 (“the 1993 Regulations”), CNG wrongly deducted various expenses when determining the “gross” profit from which Marketing would derive its commission for Gas Supply Agreements after 2014. Marketing also contends that the machinery for

the calculation and payment of commissions in the 2004 Agreement was void because it derogated to Marketing's detriment from the requirements of the 1993 Regulations. Fundamentally, Marketing says the calculation of its commission can only properly be carried out in accordance with the 1993 Regulations on a transaction-by-transaction basis.

4. Marketing also submits the 2004 Agreement was varied orally to alter the percentages and sums due to it in respect of Siteworks Agreements and to provide for payments where CNG installed Free of Charge Meters. It contends that these variations are binding notwithstanding a no oral modification clause in the 2004 Agreement. Marketing claims unpaid sums for Siteworks Agreements that it estimates were due to it in the period before CNG entered administration.
5. The Joint Liquidators say they have required Marketing to prove its claims on both a factual and legal basis and identified any issues with the claims that the general body of creditors, whose interests are directly impacted by the claims, would raise. Their position is an independent and impartial one as officers of the court and office holders with a duty to protect the general body of creditors. As such, it was not in their gift to simply admit Marketing's proofs as to do so would materially affect the balance of creditors with repercussions on the percentage dividends to the general body of creditors.

### **The Nature of an Insolvency Appeal**

6. The formal particulars of what is required in a proof are prescribed by R.14.4 2016 IR. Amongst other matters, a proof must be authenticated by the creditor or a person authorised on a creditor's behalf; state the total amount of the

creditor's claim (including any valued added tax) as at the relevant date; and contain particulars of how and when the debt was incurred by the company:

R.14.4(1)(a), (d) and (f).

7. The office holder may call for the creditor to produce any document or other evidence which they consider is necessary to substantiate the whole or any part of the claim: R.14.4(3) 2016 IR.

8. R.14.5 2016 IR provides:

*“Unless the court orders otherwise –*

- (a) Each creditor bears the cost of proving for that creditor's own debt, including costs incurred in providing documents or evidence under rule 14.4(3).”*

A rule rooted in the concept that the general body of creditors should not ordinarily bear the costs of an individual creditor to prove the validity of their own debt.

9. In Re BV9 Limited (in administration) [2023] EWHC 3048 (Ch) at [9], ICCJ Jones held that the contents of a proof must be sufficiently detailed to enable an office holder, who had no personal knowledge of the facts and matters of the claim, to adjudicate upon it. The detail on the proof is a fundamental facet of the adjudication process and cannot be altered in the appeals process.

10. R. 14.8 2016 IR provides that:

*“(1) If a creditor is dissatisfied with the office holder's decision under rule 14.7 in relation to the creditor's own proof ..., the creditor may apply to the court for the decision to be reversed or varied.”*

11. An insolvency appeal is not an appeal proper. It is not for the court to review the decisions of the Joint Liquidators here to decide if their decision to reject a

proof of debt was correct. As explained in Re Kentwood Construction [1960] 1 WLR 646 at 647-648, referred to in Re Trepca Mines Ltd [1960] 1 WLR 1273 at 1275-1276, and Cadwell v Jackson [2001] BPIR 966 at 967, per Neuberger J, the question whether a proof of debt should be admitted is to be approached afresh by reference to the facts and arguments put before the court at the date of the hearing.

12. The burden of proof falls upon the applicant to make out its case on appeal on the balance of probabilities. The burden is not upon the office holders to disprove the applicant's case: see, for example, Fielding v Hunt [2017] BPIR 554, Stephen Davies KC, sitting as a High Court judge.
13. It is relevant to note here that cross examination of witnesses only occurs where the court makes an order to such effect. That is typically upon the application of one of the parties: R.12.28(3) 2016 IR. The traditional common law rule in Browne v Dunn [1893] 6R 67 applies that a party is required to challenge in cross examination the evidence of any factual witness of the opposing party if they wish to submit that the evidence should not be accepted on that point.
14. In general, although the matter is always highly fact sensitive and no hard and fast rules apply, in the absence of cross examination the court is not entitled to reject the evidence of witnesses without cross examination where that evidence was apparently credible and neither inherently improbable nor contradicted by incontestable extraneous evidence: Long v Farrer v Co and Farrer [2004] EWHC 1774 (Ch); Fielding v Hunt (as cited above)

## **The CNG Proof of Debt**

15. The Particulars given by Marketing in the CNG Proof of Debt of how and when the debt was incurred are as follows:

*“The debt has arisen because of unpaid commission owed to [Marketing] for the period 1 January 2014 to 24 November 2021. [Marketing] disputes the original method of calculation used by [CNG] and therefore believes it is owed significant back payments in commission. The amount claimed is based on [CNG’s] own figures which have not been independently verified by [Marketing] and [Marketing] therefore believes that the figure stated ... is likely to be the minimum amount due. With full disclosure and the correct method of calculation, [Marketing] believes the figure could be far higher.”*

16. The reference to CNG’s figures is primarily a reference to the figures contained in a spreadsheet relating to Gas Supply commissions which was initially produced by CNG at a meeting with Marketing in May 2020 when a dispute arose regarding commissions (“the CNG Spreadsheet”). The CNG Spreadsheet asserted that £1,500,206 was due to CNG from Marketing for the period 1 January 2014 to 31 March 2020. A matter Marketing disputed contemporaneously.
17. Marketing’s evidence on this appeal explains that for the purposes of the CNG Proof of Debt it has made a series of adjustments or corrections to CNG’s figures on the CNG Spreadsheet as shown on its Amended Spreadsheet resulting in the total debt it identifies in respect of Gas Supply commissions. Firstly, the CNG Spreadsheet was updated to include sales and costs provided by CNG for Gas Supply Agreements to 31 July 2021. Secondly, Marketing’s accountant, Mr Horner of Lithgow Perkins LLP, removed the expenses / costs which Marketing says CNG wrongly took into account in the CNG Spreadsheet to arrive at the Gross Margin for calculating commission on Gas Supply Agreements under clause 9 of the 2004 Agreement and/or the 1993 Regulations.

That is agent's commission (including commission paid to agents introduced to CNG by Marketing), finance costs and revenue assurance. Thirdly, Mr Horner removed all sums where the CNG Spreadsheet showed a negative or, as CNG terms it, gross loss. Fourthly, Marketing added £200,000 which it estimated was due to it in respect of Gas Supply Agreements introduced to CNG by Marketing. Finally, in the absence of evidence of any actual figures for the period 1 August 2021 to 7 November 2021, Marketing added estimated commissions it claims were due to it in respect of Gas Supply Agreements by extrapolating figures provided by CNG for the previous year to arrive at an additional figure of £250,770. Sums have also been claimed in respect of Free of Charge meters because of the alleged oral agreement by CNG and Marketing in 2016 to vary the 2004 Agreement.

18. As regards the Siteworks component of the CNG Proof of Debt, Marketing's evidence explains that it has extrapolated figures to support its claim to unpaid commissions from a Siteworks spreadsheet which was provided to it by CNG in November 2021, to cover a period during which the Joint Liquidators acknowledge that Marketing continued to carry out Siteworks for CNG and received no payment for its work. Marketing has applied the oral variation that it alleges was made to the 2004 Agreement in respect of the calculation of these sums. It says that it was agreed in 2005 that 50% commission was payable by CNG regardless of whether a Secondary Agent was involved.
19. At box 5 of the prescribed form of Proof of Debt, a debtor is asked to provide:

*“Details of any documents by reference to which the debt can be substantiated (Note: There is no need to attach them now but the*

*administrator may call for any document or evidence to substantiate the claim at their discretion ...”.*

Marketing completed this box as follows in the CNG Proof of Debt:

*“Please refer to legal claim already lodged with [CNG]. Relevant papers attached. Further information in support of the claim can be provided on request”.*

20. Marketing’s reference to the “legal claim already lodged” is a reference to High Court proceedings under Claim No. BL-2020-LDS-000040 between Marketing and CNG relating to Marketing’s commission (“the Claim”). The Claim was automatically stayed prior to disclosure under paragraph 43(6) of Schedule B1 of the Insolvency Act 1986 on CNG’s entry into administration.
21. The Claim comprised a claim and counterclaim. On 25 September 2020 Marketing issued proceedings against CNG seeking an account in respect of alleged unpaid commissions. At the date of the Claim Form these commissions were estimated to be in the sum of £1.5 million. CNG defended the claim and denied that any commission was due. CNG counterclaimed it had overpaid commissions to Marketing in the sum of not less than £2.1 million and sought restitution of overpayments.

### **The Rejection of the CNG Proof of Debt**

22. The CNG Proof of Debt was adjudicated upon and rejected by the Joint Liquidators by letter dated 13 March 2024 (received by Marketing’s solicitors in May 2024). It was rejected on the basis that any claim by Marketing should have been brought against CNG Energy Limited (“Energy”). A stance which the Joint Liquidators maintained for almost 3 years from 23 December 2022

until late November 2025 when the Joint Liquidators' Skeleton Argument for this appeal was exchanged and the contention was not pursued.

23. It was against this background that Marketing submitted its second proof of debt on 1 February 2023 in the administration of Energy ("the Energy Proof of Debt"). The Energy Proof of Debt was adjudicated upon and rejected by the Joint Liquidators of Energy on 12 April 2024 on the ground that insufficient information to substantiate Marketing's claim had been provided. The rejection of the Energy Proof of Debt was the subject of Marketing's second listed appeal dated 30 April 2024.
24. It is the correspondence which took place with Marketing in respect of the Energy Proof of Debt which the Joint Liquidators draw to the attention of the Court in respect of their own stance on this appeal. The Joint Liquidators say Marketing was asked to prove and failed to prove:
- i) CNG wrongfully deducted valid expenses from the calculation of commissions,
  - ii) the 2004 Agreement was properly varied, both in the context of the non-oral modification clause it contained, and as a matter of fact, which would primarily affect the Siteworks commission,
  - iii) the applicability and effect of the 1993 Regulations on the 2004 Agreement, which the Joint Liquidators contend do not operate as a matter of law to void the 2004 Agreement,
  - iv) the factual accuracy of the accounting data of the companies giving rise to the alleged commissions, and

- v) the reasoning behind the growth of Marketing's unpaid commissions claim from about £1.5 million at the time of the unresolved Claim between Marketing and CNG in 2020 to £6,444,581 in the proof of debt in 2022.
25. Specifically, the Joint Liquidators explain they had regard to the fact that, before CNG became insolvent, CNG disputed many of Marketing's currently alleged claims in the unresolved Claim then on foot.
26. The Joint Liquidators make clear that Marketing's case as to the effect of the 1993 Regulations on the quantum of the CNG Proof of Debt is not understood and this effect has not been quantified by Marketing.

### **The Appeal**

27. It will be apparent that the unresolved legal issues in the Claim relate directly to the content of the CNG Proof of Debt on this appeal. However, the sufficiency of the information in the CNG Spreadsheet and other materials Marketing relies upon to support the figures in the CNG Proof of Debt is at the heart of this appeal too. It is common ground between the parties that the primary material Marketing places before the court in the form of the CNG Spreadsheet as amended is not the relevant underlying data to evidence the actual sums due as between CNG and Marketing. That material can only be accessed through the use of CNG's Equinox and other software.
28. Marketing has very little accounting data of its own in circumstances where it relied upon CNG. Fundamentally, it was a central feature of Marketing's case that because of a decision taken by either the Joint Administrators or Liquidators

(and the Joint Liquidators did not confirm which), not to renew CNG's software licences for CNG's accounting software and containing its relevant records the underlying raw data which the Joint Administrators and /or Liquidators would otherwise have held to evidence the CNG Proof of Debt or any transaction by transaction calculation of the sums properly due to Marketing up to the date of CNG's administration was not available. Marketing says it should therefore be afforded indulgence in its use of, and reliance upon, the CNG Spreadsheet in respect of Gas Supplies and also in its calculation of the Siteworks debt owed to it.

29. The Joint Liquidators submit that Marketing's legal arguments in support of the CNG Proof of Debt are either misconceived or take it nowhere on the basis of the material that is before the court. It is for Marketing to prove its debt. They say the CNG Spreadsheet was neither created nor endorsed by the Joint Liquidators and the underlying figures cannot simply be accepted by the court without verification. They submit that this is not a case where CNG's raw data has been destroyed or no longer exists. CNG's software licences could have been renewed so that data could have been obtained for this appeal, but this process would have necessitated a cost.
30. From the court's perspective, the fact that further or better evidence could have been obtained does not mean that Marketing's claim must necessarily be rejected, provided there is a rational basis on which to hold that it has discharged the burden of proof to demonstrate that the sums set out in the CNG Proof of Debt are due and owing to Marketing on the balance of probabilities. That said, the appeal does not concern a claim for damages, where it is clear that if the

claimant has suffered a substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence. On an insolvency appeal of this kind, Marketing must discharge the burden of proof to either establish the quantum of its debt as set out in the CNG Proof of Debt or at least the quantum of a component part or parts of its debt as set out in the CNG Proof of Debt.

### **The Agreed Debt**

31. Subject to these matters, in closing at the hearing the Joint Liquidators identified and accepted debts due to Marketing in respect of Siteworks Agreements, based on available Siteworks Commissions Reports, for £5,782.85 dated 2 January 2020; £2,989.20 dated 3 February 2020 and £7,791.78 dated 2 March 2020.

### **The Legal Issues to be determined on Appeal**

32. On 27 June 2025 the following issues were directed by the court for determination on appeal:
- i) the applicability of the 1993 Regulations;
  - ii) the interpretation of the 1993 Regulations and their implication in relation to the 2004 Agreement;
  - iii) the appropriate commission and costs under the 2004 Agreement;
  - iv) whether a Transfer Agreement had the effect of novating Marketing's contractual relationship from CNG to Energy;

- v) Marketing's claim that, if successful on appeal, they are entitled to damages, whether alone or in addition to aggravated / exemplary / punitive damages.
33. The broad issues in respect of the application and interpretation of the 1993 Regulations and their implication in respect of the 2004 Agreement were directed for trial notwithstanding that the relevant disclosure which Marketing had previously identified as required in the CNG Proof of Debt and its initial Witness Statements was, as set out below, not by then to be made. As a result, there is no evidence before the court to establish the state of the account between CNG and Marketing if the calculation is carried out on the transaction-by-transaction basis which Marketing contends is required under the 1993 Regulations or to compare that sum with the sum set out in the CNG Proof of Debt.
34. In such circumstances it remained unclear at the end of the hearing of the appeal how Marketing's primary line of argument based upon the 1993 Regulations assisted Marketing to discharge the burden of proof that the sums set out in the CNG Proof of Debt were legally due and owing to it. Marketing's own witness criticised the CNG Spreadsheet in his witness statement as:
- "estimates and ... made up of proportions of figures rather than individual transactions"*.
35. As set out above, the Joint Liquidators no longer seek to pursue the issue that they had raised as to alleged novation of the 2004 Agreement to Energy. No submissions were therefore made on this issue. Mr Susman KC confirmed in opening the case for Marketing that Marketing's damages claim was no longer pursued.

## **The Evidence**

36. The evidence before the court comprises the CNG Proof of Debt; the Claim; the First, Second and Third Witness Statements of Mr Walls, the First Witness Statement of Mr Leworthy and the Witness Statements of Mr Minors of Wilson Bramwell Ltd and the First and Second Witness Statements of Mr Horner of Lithgow Perkins LLP on behalf of Marketing; the First, Second and Third Witness Statements of Mr Dwyer and the First Witness Statement of Mr Christopher England, former director of CNG, filed by the Joint Liquidators in September 2025; the CNG Spreadsheet compiled in 2020; and Marketing's amended version of this CNG spreadsheet as amended by its accountant, Mr Horner, and attached to the CNG Proof of Debt.

## **The Parties and the Background**

37. A longstanding relationship existed between the directors of Marketing, Mr Michael Walls and Mr John Leworthy, and the CNG Group.
38. CNG was incorporated in February 1994. The Joint Liquidators describe it as a wholesale gas shipper which supplied gas, balancing and shipping services to 29 suppliers, who in turn served approximately 1.2 million meter points. Together with Energy, it was part of a larger group structure, the CNG Group.
39. Mr Walls and Mr Leworthy are both experienced qualified gas engineers. Mr Walls and Mr Leworthy worked for British Gas for 14 years from 1980, including in the Commercial and Industrial Departments. They then joined CNG as employees. Their roles with CNG were to obtain contracts from customers for the supply of Gas Supply Agreements, and to organise the

installation of gas meters and other equipment which was installed at customers' premises under Siteworks Agreements.

40. In or around 1995, Mr Walls and Mr Leworthy ceased to be employees of CNG and instead became commission agents acting on behalf of CNG carrying out the very same work. Mr Walls says this was at the prompting of the then Managing Director of CNG, Colin Gaines.
41. Mr England joined CNG in May 1996 and became Financial Controller of CNG over the next two years.
42. Marketing was incorporated on 21 October 1997 to provide a limited liability entity to enter into commission arrangements with CNG in place of Mr Walls and Mr Leworthy. Mr Walls says this was also at the prompting of Mr Gaines. Marketing's day to day business included finding and dealing with purchasers of natural gas (Gas Supplies) and organising the installation of gas meters and ancillary equipment at the purchaser's own premises under Siteworks Agreements. Many of these were major projects and required Marketing to organise for the assistance of other companies.
43. Mr England says that in addition to his work for CNG he was the Company Secretary for Marketing between October 1997 and July 2020.
44. On 29 June 1999, CNG and Marketing agreed a written contract whereby commission would be payable to Marketing on an estimated monthly basis which was to be updated once accurate profits were determined, with an amortised adjustment to subsequent payments to account for any underpayment or overpayment of commissions ("the 1999 Agreement"). The 1999 Agreement

recited the parties would seek to agree a “*formal contract*” as soon as practically possible.

45. The belated date of this first written contract, and the fact that it represented an interim arrangement, appears to reflect the close working relationship between CNG and Marketing and the degree of trust which Mr Walls and Mr Leworthy placed in CNG. In the event, the arrangement endured for almost 5 years.
46. In February 2002, Mr England became a director of CNG. Up to 2021, he held the positions of Operations Director, Finance Director and Trading Director.
47. On 9 September 2004, CNG and Marketing executed a written contract (“the 2004 Agreement”) appointing Marketing as sales agent to market, retain and obtain supply customers in exchange for commission. The material terms of the 2004 Agreement are set out below. Mr Walls’ evidence is that the 2004 Agreement was drafted by Mr Gaines.
48. There were regular discussions between the parties about commissions. These included discussions around CNG’s production of spreadsheets calculating Gas Supply commissions which were compiled by Mr England and provided to Marketing. It is Marketing’s case that the alleged oral variations to the 2004 Agreement upon which it relies were made from time to time during these discussions.
49. From November 2005 (or possibly earlier), Mr England says he looked after the bookkeeping and VAT returns for Marketing. He says this information was then provided to the company accountants to complete the annual accounts.

50. A management buyout of CNG was completed in November 2011 by Ms Jacqui Hall, Mr Tim Jones and Mr England.
51. The Joint Liquidators state that prior to the Covid-19 Pandemic, Energy was operating on thin margins and reliant on financial support from the wider CNG Group, specifically CNG and Glencore Energy UK Limited. A corporate re-organisation of CNG Group in November 2019 led to the division of the CNG Group into separate retail and wholesale entities. Thereafter, CNG began providing shipping services to the Group's wholesale customers, while they say Energy emerged as a key retail entity and the principal supplier of gas to retail customers.
52. In Marketing's evidence, Mr Walls explains that in about January 2020 Mr Paul Stanley was appointed as the new chief executive officer of CNG Group. He asked Mr Amman Boughan to deal with Marketing in place of Mr England. At a meeting in May 2020, CNG produced the CNG Spreadsheet. Marketing then appointed its accountant, Mr Robert Horner of Lithgow Perkins, to review and seek to understand the CNG Spreadsheet and to negotiate with CNG.
53. In September 2020 Marketing issued the Claim against CNG for an account.
54. The Joint Liquidators' evidence is that between September and October 2021 CNG lost 4 major customers due to insolvency, significantly impacting its cash flow from revenue loss and bad debts. Despite efforts to save the business, supported by Ofgem, CNG executed a funded and managed wind down of its business before entering administration on 17 December 2021.

55. Energy was placed into administration by its directors on 30 November 2021. On 17 December 2021, CNG was placed into administration by its directors with the appointment of Claire Winder and William Wright as Administrators.
56. The CNG Proof of Debt was submitted in the administration of CNG on 15 February 2022. Over 19 months later, on 28 September 2023, CNG moved to creditors voluntary liquidation. The administrators, Claire Winder and William Wright, were appointed as Joint Liquidators.
57. The final progress report in respect of CNG's administration states that £35,180,744.00 was to be transferred from CNG's administration and paid across to the liquidation. The report stated it was expected that a distribution would be made to unsecured creditors.
58. A letter addressed by the Joint Liquidators of Energy to Marketing, dated 4 December 2023, stated that £46,304,736.00 was to be transferred from Energy's administration and paid across to the liquidation and that it was intended to make an interim distribution to unsecured creditors, expected to be in excess of 50p in the pound.
59. On 24 October 2023, Claire Winder was replaced as a Liquidator by Joshua Dwyer.
60. On 21 December 2023, the Joint Liquidators' solicitors, Addleshaw Goddard LLP, wrote to Marketing's solicitors to inform them that the Joint Liquidators were going to carry out an account under R.14.25(2) IR 2016 to determine the net balance due between CNG / Energy and Marketing arising from Marketing's Claim. This never happened.

61. On 13 March 2024 Marketing filed an application to lift the stay of the Claim and to re-start its proceedings. It did so on the basis that CNG was no longer in administration and the CNG Proof of Debt had yet to be adjudicated to its knowledge.
62. Following the Joint Liquidators rejection of the Energy Proof of Debt, on 30 April 2024 Marketing issued its application to appeal the rejection of the Energy Proof of Debt. The Witness Statement prepared by Mr Minors of Wilson Bramwell dated 30 April 2024 explained that the basis upon which Marketing had calculated the commission set out in the Energy Proof of Debt was as articulated in the Claim. Mr Minors also said there was no issue between Marketing and CNG that an account was due. He further explained that it was Marketing's case that the most proportionate and effective course of action would be to lift the stay of the Claim. The issues which required determination were the same, subject to the determination of the Joint Liquidators' new additional issue as to whether Marketing's claim properly lay against CNG or Energy.
63. Following the Joint Liquidators rejection of the CNG Proof of Debt, on 24 May 2024 Marketing issued its application to appeal the rejection of the CNG Proof of Debt. Mr Minors' Witness Statement in support of the application sought a direction that the Claim and the insolvency appeals should be case managed and tried together.
64. The Joint Liquidators opposed Marketing's application to lift the stay of the Claim.

65. On 19 August 2024, District Judge Bond dismissed Marketing's application to lift the stay and gave directions in the insolvency appeals.

### **The Issue of Disclosure of CNG's Raw Data for the Appeals**

66. Given that both parties made detailed submissions regarding the background to the absence of the underlying data on this appeal, I set out the history relied upon in some detail.
67. The initial directions given on 19 August 2024 included that Marketing was to file evidence setting out the basis of the insolvency appeals and the Joint Liquidators were to respond. Marketing's evidence was to include an exhibit of all evidence available to Marketing which it intended to rely on and a list of specific documents and classes of documents which Marketing did not have and required the Joint Liquidators to disclose. The Joint Liquidators' witness statements in response were to include an exhibit of all documentary evidence on which they intended to rely, disclosure of the specific documents and classes of documents requested by Marketing, and were to set out the availability of, and their willingness to produce, those documents requested that they had not disclosed.
68. Marketing filed the First Witness Statements of Mr Horner, Mr Walls and Mr Leworthy. In Mr Walls' Witness Statement he explained that Marketing required disclosure of CNG's accounting records. Specifically, the documents set out in Marketing's case document dated 14 May 2021 filed in the Claim.
69. Mr Walls said it was important to note that Marketing had not been able to verify the data which had been provided in the CNG Spreadsheet and the provision of

that information was not supported by a statement of truth as to its veracity. He said it was important that Marketing was provided with data up to the point that CNG ceased trading at some time in December 2021.

70. Under the heading “*Marketing’s Case*” Mr Walls says Marketing’s case on the appeal was fully articulated in the Claim and:

*“In summary, Marketing’s case is that the 2004 Agreement, as varied by oral agreement, is subject to and modified by the provisions of the Commercial Agents Regulations 1993 such that commission due to it stands to be calculated as follows:*

*39.1 identify those CNG’s customers who were introduced to it by Marketing and those introduced to it by a sub-agent of Marketing;*

*39.2 identify the date of the first transaction for the supply of gas to each such customer and the date of the first (if any) Site works Agreement relating to each customer; information must also be provided on whether customer transactions are raised more than 12 months after the date of the first transaction, because the rate of commission on any transaction is variable according to how long the customer has been a customer of CNG;*

*39.3 identify each transaction (sales invoice) for the supply of gas to a customer introduced by Marketing or by a sub-agent introduced by Marketing, which specifies:*

*39.3.1 the volume of gas supplied to the customer for a particular transaction (in therms or a cubic measure);*

*39.3.2 the price charged to that customer by CNG for the gas, together with any direct charge to that customer by CNG, for storage or transportation of that gas;*

*39.3 any Value Added Tax and any other appropriate levy or taxation, such as Climate Change Levy, to be reckoned as part of the price, because of the omission from clause 9 of the 2004 Agreement of any exclusion of the same, such as that to be found in its clause 10.1(a), and the legal principle of construction of contractual language that the explicit reference in clause 10.1(a) implies that such a reference is not intended to apply when omitted from clause 9;*

*39.4 identify the relevant purchase invoice relating to the purchase by CNG of the bulk volume of gas from which the gas was extracted for the particular transaction of supply to a customer, which specifies:*

- 39.4.1 *the bulk volume of gas (in terms or a cubic measure);*
- 39.4.2 *the price paid by CNG for that bulk volume of gas, together with any direct charge to CNG by its own supplier for storage or transportation of that bulk volume of gas;*
- 39.4.3 *any Value Added Tax and any other appropriate levy or taxation, such as Climate Change Levy, to be reckoned as part of the price for the same reason as set out above;*
- 39.5 *divide the volume of gas bought in bulk by CNG by the volume of gas supplied to that customer, to ascertain the fraction of the bulk supplied to that customer;*
- 39.6 *calculate CNG's gross profit, by applying the aforesaid fraction to the price paid by CNG for the bulk and subtract from it the price charged to the customer;*

*however*

- 39.6.1 *any other costs such as finance costs, third party agents' commissions, and revenue assurance (ie bad debt insurance premiums) should not be taken into account, they being proper deductions with regard to estimated indirect costs or overheads in assessing net profit in general, but not direct costs with regard to gross profit on a transaction with a particular customer;*
- 39.6.2 *CNG's position (in the CNG claim), that the calculation of commission should be based upon what in the 2004 Agreement is called the Defendant's 'Yearly Retail Gross Gas Margin', is objectionable, on the ground that it replaces and is inconsistent with the 1993 Regulations, in not providing for calculation on a transaction by transaction basis, and on the ground that it averages all business conducted by CNG with parties, whether introduced by Marketing or not, and thus offends against the prohibitions in the 1993 Regulations, which preclude derogation from those Regulations;*
- 39.7 *if in relation to any transaction, applying the fraction demonstrates that CNG paid more for the gas than it charged its customer, so as to make a loss, rather than a gross profit on the transaction, that transaction must be ignored for purposes of calculating commission due, since otherwise Marketing would be paying CNG a negative commission and in effect would be contributing to insurance of CNG's business against loss, again contrary to the 1993 Regulations, which preclude derogation;*
- 39.8 *in relation to Siteworks Agreements, the same methodology is to be adopted, except that CNG's costs of a particular installation*

*transaction are to be gleaned from CNG's records, instead of the need to calculate the cost of bulk supplies of gas;*

*39.9 interest on outstanding commissions stands to be calculated from the date on which it was payable, namely, no later than the last day of the month following the quarter in which either CNG did or should have executed its part of a particular transaction (by making the supply to the customer concerned), or that customer did or should have executed its part of the transaction (by paying for the supply), whichever was the sooner (in accordance with the regulation;*

*39.10 interest...”*

71. The Joint Liquidators filed the First Witness Statement of Mr Joshua Dwyer in response. Mr Dwyer is one of the two Joint Liquidators and a director of Interpath. It would have been of rather greater assistance to the court if Mr Wright had provided a witness statement on behalf of the Joint Liquidators instead. Mr Wright was one of the joint administrators of CNG from the date of CNG's entry into administration on 17 December 2021 until his appointment as Joint Liquidator. He should therefore have been able to give relevant first-hand evidence and a rather more detailed account of decision making and the course of events.

72. In Mr Dwyer's Witness Statement he said he had reviewed Marketing's request for disclosure together with Addleshaw Goddard and that:

*“33. There are barriers to accessing Equinox now, which I discuss below. For completeness, I was not appointed as administrator at the time of CNG's administration so my commentary in this section is based on my discussions with others at Interpath that did work on the administration of CNG.”*

73. Mr Dwyer explained Equinox is an industry invoicing and customer system with heavy customisation packages built for CNG on a licensed platform. Data held on Equinox is split across several Microsoft SQL server databases and servers. The “barriers” in accessing Equinox Mr Dwyer identified were as follows:

- “34. *Following CNG's entry into administration, immediate steps were taken to secure the data on CNG server, as is standard practise. Although it was recognised that some data might be inaccessible without CNG's specific software, all data on CNG servers was copied as a matter of course. Typically, software licences are not maintained post trading cessation due to the lack of day-to-day necessity and no tangible benefit to creditors, coupled with the loss of staff expertise necessary for data interpretation.*
35. *Consequently, CNG's licence for Equinox was neither renewed nor maintained.*
36. *CNG's licence for Equinox will need to renewed (sic) before the platform can be accessed.*
37. *As the CNG Liquidators cannot currently access Equinox, they cannot confirm whether any of the data requested by Marketing is stored on it. There are also no CNG or CNG Energy employees employed with the technical knowhow needed to assist with Equinox. Furthermore, there are no remaining employees from CNG or CNG Energy with the technical expertise required to navigate Equinox. Consequently, the feasibility of managing or interpreting the data, should access be reestablished, is uncertain.*
38. *Furthermore, I understand that Equinox was heavily customised for CNG's purposes and used a number of “add-on” software options that were bespoke to CNG. At this stage, the CNG Liquidators are not able to confirm whether - if access to Equinox was reinstated - further licences would need to be obtained for those add-ons.*
39. *Assuming the above issues can be resolved, I understand from my Data Team that there will be additional hardware required to transpose any data collected from Equinox onto. This will come at additional cost, coupled with the time costs required to perform this function.*
40. *To assist the Court, and based on discussions with Interpath's Data Team and an Equinox supplier to determine the feasibility, process and cost of renewing the Equinox licence, I summarise the high-level costs of renewing and accessing Equinox below: (a) circa £10,000 onwards to renew the licence; (b) circa £800-£1,000 for consultancy on the system with the Equinox supplier; (c) circa £1,000-£1,500 for the required computing hardware; and (d) the cost of Interpath's time over the required number of days it would take to perform the process; and (e) all other incidental costs incurred to access Equinox”.*
74. Marketing's solicitors Wilson Bramwell wrote to Addleshaw Goddard on 3 December 2024 enquiring whether the Joint Liquidators would now confirm that the CNG Spreadsheet figures could be agreed, as being a reasonably

accurate record of the information stored on CNG's servers, for the purpose of informing the basis upon which the court would determine the insolvency appeals. Alternatively, if the Joint Liquidators intended disputing the figures, whether it was their intention to undertake the necessary work, as described in Mr Dwyer's witness statement, for the purposes of accessing and disclosing the information stored in CNG's servers, in order to substantiate any dispute concerning those figures.

75. In the correspondence which followed the Joint Liquidators stance was that they were unwilling to agree the figures because they were unable to verify them against information contained on CNG's servers. The correspondence demonstrates the Joint Liquidators' position that it was for Marketing to bear the cost of proving their debt under IR 14.5.
76. Marketing appears to have accepted that this was indeed the case if it wanted the CNG data. The common understanding apparently being that it was within Marketing's power to ask for the licences to be reinstated and to pay the associated costs and obtain the data.
77. In a letter dated 6 January 2025 from Addleshaw Goddard to Wilson Bramwell the Joint Liquidators revised their estimated costs for accessing Equinox up to £106,597.90.
78. Against this background, a second Order for Directions was made on 9 January 2025. In order to assist in determining what specific documents and / or information were required and how they might be accessed, the Order directed that, by 4.00 pm on 31 January 2025, representatives nominated by the parties, who had sufficient expertise and experience, were to hold an initial

meeting to discuss the nature and categories of documents required to resolve the issues in the appeals; identify the relevant third party service providers which could provide access to the categories of documents required; and consider the options available for using third party service providers to access the categories of documents required.

79. The meeting took place on 29 January 2025. In Mr Horner's Second Witness Statement dated 28 February 2025 he explained that it was disheartening that the knowledge of those attending the meeting on behalf of the Joint Liquidators was very limited. He said it was important to confirm, before any data was accessed or paid for, whether the Joint Liquidators would confirm that they would accept a sampling exercise to confirm the accuracy of the data contained in the CNG Spreadsheet.
80. Given the difficulties accessing the materials and the Joint Liquidators refusal to agree the figures in the CNG Spreadsheet, Marketing suggested that there was an alternative way forward. That was to replicate the directions that had been made in the Claim and for a preliminary issue to be determined to resolve the substance of Marketing's claim for commission, with a second hearing to determine the quantum of those commissions, if the parties were then unable to agree. Mr Horner asked for clarification of the dramatic increase in the Joint Liquidators' estimate of the costs of accessing the data.
81. In Mr Dwyer's Second Witness Statement dated 27 March 2025 he said an exhaustive search, including a review of folders associated with Mr Boughan and a keyword search, failed to locate any pertinent documents. No records were discovered that contained monthly Equinox data downloads or monthly

trial balances. Additionally, an attempt had been made to manually reconcile the data from March to May 2021, which resulted in findings that were inconsistent with the figures listed in the CNG Spreadsheet. Without the software licences for Equinox or Access Dimensions it was not feasible to form any meaningful plan for handling the data.

82. In terms of the costs, Mr Dwyer said it was important to highlight that in the context of renewing the software licences for Equinox and Access Dimensions, the Joint Liquidators were unable to provide assurance regarding the integrity or completeness of the data recovery process. Specifically, there was no guarantee the data retrieved would meet the necessary requirements or expectations. They could also only rely on the data available at the time the CNG images were taken.
83. Mr Dwyer gave a breakdown of the costs of resurrecting Equinox in the total sum of £10,528. Provided the data backups of the servers were intact, the Equinox data would be extracted in a useable format which could be stored and easily accessed for the appeals.
84. Mr Dwyer said that his office had liaised further with Access Dimension between 7 and 25 February 2025 to see whether the previous quoted licence cost of £106,597.90 could be reduced. Mr Dwyer explained that this quote was for a 24 month period, but it had now been confirmed that a 6 month licence was available at the cost of £34,190.12 (excl VAT). To this sum he said there needed to be added 1.5 days of consulting time to restore and install the application at a cost of £2,025 (excl VAT) payable in advance. Plus, any further advice required would be charged at £1,350 (excl VAT) per half day. In addition, the

Joint Liquidators would need to allocate and charge for office holder time. Mr Dwyer listed assistance from a former CNG employee familiar with the system, which he had not investigated, and estimated that would cost £75 to £100 per hour. Approximately 9 hours of Interpath's Data Team's time to transfer the raw data and review the data / reports extracted, charged out at £1,010 per hour, was required.

85. Mr Dwyer set out that the Joint Liquidators opposed Marketing's suggestion that there should be a preliminary issue hearing.
86. Marketing did not seek any further order for disclosure.
87. On 27 June 2025, District Judge Bond gave final directions for evidence and trial. Marketing did not seek a direction for live evidence of witnesses of fact to be given or any order for cross examination. As at this date, Mr England's Witness Statement had not been served, of course.

### **Marketing's Evidence on the use of the CNG Spreadsheet for the Calculation of Commissions and CNG Proof of Debt**

88. In Mr Walls' Witness Statement he recounts that from about 2004 to 2014 Mr England of CNG would provide Marketing with an excel spreadsheet setting out the amount of commission owed to Marketing. The data was obtained from CNG's proprietary Equinox software. The spreadsheet provided a summary of the value of the transactions. Marketing did not have access to the full range of data from Equinox and relied upon Mr England's assurances that the information provided by him was accurate. Thereafter:

*“For reasons that were not properly explained to me, CNG ceased to provide commission calculations to Marketing after 1/1/2014, but continued to pay Marketing based on previous levels of commission, as an approximation of likely amounts due, calculated by Mr England’s spreadsheet.”*

89. Mr Horner’s Witness Statement provides further detail as to Marketing’s case in respect of the spreadsheets produced by CNG. Mr England had developed a spreadsheet that extracted and summarised data from CNG Group’s accounting systems and calculated commission due to Marketing for a relevant financial year, on a month by month basis, in relation to Gas Supply Agreements. This was not always done annually and generally every few years. Commission was paid monthly, using previous calculations as an approximation of the likely amounts due. When the calculations were brought up to date, the commission payments were adjusted to align with the actual commission calculated and underpayments or overpayments corrected.
90. Mr England described the Gas Supply commission payment mechanism as follows in his own Witness Statement provided a year later:

*“Following the 2004 Agreement between CNG and Marketing, I put together a spreadsheet to cover the method of calculating the Gas Supply commission values based on the information provided by both parties as I did not see the wording of the agreement at that time. This methodology was agreed by Colin Gaines, Tim Jones, Mike Walls & John Leworthy, and apart from some amendments over the years (such as adding CNGM percentage, revenue assurance, and CCL, etc), the main basis of the calculations remained the same through to 2021. When I did see the actual agreement (sic) at a later date, I believed the calculation methodology was correct.*

*The main principle for the calculations was based on Marketing receiving 25% of CNG’s margin applied to each gas supply contract for the first 12 months and then reducing to 15% for as long as the site remained with CNG.*

*A contract would be priced up by calculating the gas cost, transportation cost, and the CNG company margin. Where an agent/broker had negotiated the contract, they would add their own margin on top. This is why the*

*calculation shows the gas, transportation and agents' costs, which are then taken from the sales receipts per month.*

*The purpose of the revenue sharing with Marketing was to allow them to have an interest in the profit flowing to CNG from their work and incentivise them, and naturally this would come out of the profit that CNG would otherwise be making. The calculations used in Marketing's claim are the same as CNG's except for the exclusion of agents' commissions, finance costs, and Revenue Assurance (all of which are expenses that would reduce CNG's profit margin). Agents' commissions were deducted as they do not form part of CNG's profit margin and were paid to third-party agents. Finance costs relate to gas & transportation security costs. The existence of finance facilitated calculated risk and expansion that allowed a growth in the portfolio which also benefited marketing through the growth. ...*

*Marketing would be responsible for providing updates, and once agreed by CNG and Marketing, Marketing's percentage would be updated, and the commissions would be re calculated.*

*On an annual basis, I would meet with Mike and John to go through the numbers that had been calculated from the previous year's business, and agree the new monthly payments to Marketing which were paid on account of expected profits. If money was owed to Marketing, then this would be spread over the next 12 months by increasing the monthly payments and vice versa if Marketing had been paid too much in the previous year. There was one exception to this, in 2018 when the "Beast from the East" caused issues for CNG, the annual review didn't go ahead, instead of review occurred in April/ May 2019 when a reduction in the monthly payments from £60k to £40k per month was agreed starting with the invoice dated 10th May 2019 ... This was due to the financial stress placed upon CNG due to the adverse weather conditions."*

91. In Mr Wall's Third Witness Statement he said Mr England was wrong to say meetings took place annually to go through the numbers. He said the last occasion when there was a "review" was in 2014:

*"What in fact occurred is, effectively, that CNG simply decided what it would pay us monthly and did so".*

92. Mr Horner's Witness Statement contains Marketing's account of the meeting in May 2020 between Mr Paul Stanley and Mr Walls and Mr Leworthy to discuss commissions. He sets out that a spreadsheet was produced by CNG at the meeting which covered the period from 1 January 2014 to 31 March 2020. CNG then asserted that Marketing had been overpaid commissions. He reports:

*“In broad terms, the commission payable for Gas Supply Agreements was based on the gross margin of gas sales made to customers introduced by Marketing and/or agents of Marketing. This involved identifying relevant gas sales to CNG customers and deducting the cost of the gas supplied, its transportation to the customer and other associated costs. I understand that, for a long time, margins did not vary greatly and therefore, continuing payments of these commissions in the absence of actual figures was not seen as a great concern by either Marketing or CNG.*

*However, in the period between 1/4/2014 and May 2020, severe weather conditions, principally the so called Beast from the East in 2018, meant that CNG had not contracted to buy enough gas to satisfy demand. The high cost of gas in the market, that CNG was forced to buy, led to gross margins collapsing. This meant that actual commissions, had they been calculated, would be far less than the commissions that were being paid. Thus, when Paul Stanley and the new Finance Director, Amman Boughan, assessed the position, using the same spreadsheet methodology used by Chris England, for the relevant period, it showed an amount owed by Marketing to CNG, in relation to Gas Supply Agreements, for the period from 1/1/2014 to 31/3/2020, in the sum of £1,500,206.*

*Given this large demand for payment, I was asked by Marketing to review the spreadsheet calculations and the 2004 agreement and liaise with Amman Boughan, to see if I could understand and verify this figure.”*

93. Mr Horner was not given access to CNG’s underlying accounting records when liaising with CNG. Mr Boughan provided a written methodology as to how the CNG Spreadsheet was constructed and the data sourced and summarised.

Following his discussions with Mr Boughan, Mr Horner understood that:

*“The spreadsheet worked by extracting total turnover for gas sales to all customers from CNG Group’s accounting records. It then ascertained what percentage of these total sales related to customers supplied by Marketing and Marketing’s agents, by reference to a list of such customers and the monthly sales made to them.*

*It then applied that percentage of Marketing related sales to total sales to overall costs of gas, transportation and other costs it considered relevant, by reference to the 2004 Agreement. The gross margin was then calculated by deducting the costs attributable to Marketing’s customers from the sales attributable to Marketing’s customers. An estimated commission percentage was then applied to this figure to arrive at commission due. This was some kind of weighted average of 25% and 15%, because commission on new customers was 25% and on existing customers 15%. ... it was described on the spreadsheet as “estimated”.*

*Thus CNG group was using summarised data from its accounting system and assumed percentages to calculate the proportion of sales relating to Marketing and its agents and gross margin. It was not a summation of individual transactions with each gas customer introduced by Marketing or its agents. The Spreadsheet also assumed that where a gross loss arose, instead of zero commission being due to Marketing, it assumed that commission was due to CNG by Marketing.”*

94. Mr Horner adds:

*“As such my initial thoughts were that, whilst it did not seem an unreasonable method for approximating commission due, it was not entirely in accordance with the requirements of the 2004 Agreement, as it contained estimates and was made up of proportions of figures rather than individual transactions for each relevant customer. I also queried whether it was possible, under the terms of the 2004 Agreement, to have commission payable by Marketing to CNG, where a gross loss arose.”*

95. After Mr Boughan left CNG, in October 2021 Mr Horner corresponded with Mr Tom Shires, CNG’s Senior Commercial Finance Manager. Mr Shires provided a copy of the CNG Spreadsheet which contained the underlying spreadsheet formulas and commission calculations up to 31 July 2021 for Gas Supplies.

96. Mr Horner asked Mr Shires to confirm Marketing’s Amended Spreadsheet figures on the basis that Marketing’s costs deductions from the CNG Spreadsheet were assumed to be correct. These were calculated from 1 January 2014 to 31 July 2021 in the sum of £4,591,743 and from 1 April 2015 to 31 July 2021 in the sum of £3,626,394.

97. I note that the first calculation mirrors the dates for an account that Marketing identified in the Claim and the second mirrors the dates for an account that CNG identified in the Claim. An issue that was not addressed by Marketing on appeal.

98. Marketing's approach to the adjustment and correction of the CNG Spreadsheet is summarised by Mr Horner as follows:

*"I further understand that Marketing has also taken the view that certain costs deducted in the Spreadsheet, to arrive at the gross margin for calculating commission on Gas Supply Agreements, should not be deducted, either under the terms of the 2004 Agreement and/or under the Regulations. These costs included: agents' commission, including commission paid to agents introduced to CNG by Marketing; finance costs; and revenue assurance.*

*It was clear that if we were to accept the Spreadsheet as a reasonably accurate basis for ascertaining commission due, but recalculate commissions by removing those costs listed above, instead of Marketing owing CNG £1,500,206, it would be significantly less, with the possibility that CNG actually owed Marketing further commission.*

*In order to establish some way of trying to negotiate a settlement, I was asked by Marketing to use the Spreadsheet as a reasonable basis for ascertaining commission, but to adjust for these costs.*

*Accordingly, after CNG's accounting staff had subsequently updated the Spreadsheet to include sales and costs to 31/7/2021 ..., with their assistance, I took those figures and removed those costs listed above, leaving only costs relating to gas costs, transportation costs and Climate Change Levy. I also removed any instances where the Spreadsheet calculated a gross loss.*

*On the assumption that Marketing could claim commission from 1/1/2014, the figures to 31/7/2021 produced an amount owed to Marketing of £4,591,742 ... ("the Amended Spreadsheet")."*

99. An estimate of commission due in respect of Gas Supply Agreement for the period 1 August 2021 to 7 November 2021 in the sum of £250,770 was added to this sum. Mr Horner explains:

*"In order to arrive at this figure, commission figures for the previous year were extrapolated."*

100. In Mr Minors' Witness Statement he therefore explains the jump in value from the Claim to the CNG Proof of Debt as follows:

*"[Marketing's] accountants, Lithgow Perkins, have been in dialogue with individuals employed in CNG's accounts department, since it went into*

*administration and, based on information provided by CNG, Lithgow Perkins' best estimate of commission due under the [2004 Agreement] was increased from the initial estimate of about £1.5 million, pleaded in the Claim Form, to the figure of £5,158,512.00, which is reflected in the proofs of debt”.*

101. Mr Horner shared his Amended Spreadsheet and his correspondence with the CNG Group accounts department with the Joint Liquidators on 12 May 2022 in support of the CNG Proof of Debt.
102. Mr Horner adds Mr England approached him in January 2022 as an individual, rather than as a representative of the Joint Liquidators. He mentions that as a shareholder who would participate in any surplus on liquidation and knowing the size of Marketing's claim, Mr England made clear he would actively try and minimise the size of the claim and his motivation was to attack the method of calculation he had previously produced. Mr England provided various spreadsheets which purported to be a more accurate assessment of the amount owed. Mr Horner said it was impossible to reconcile these with the existing spreadsheets and it seemed clear a large part of Mr England's reason for reducing Marketing's claim was the rejection of the idea that agent's commission should be excluded from the calculation of gross margin.
103. Mr Horner expressed the view that the acceptance of his own Amended Spreadsheet would be the practical, pragmatic basis for working out commission due or payable under the 2004 Agreement. The CNG Spreadsheet had been used historically, endorsed by Mr Boughan, and was compiled by CNG's accounting department. As such:

*“On the assumption that it accurately reflects the underlying financial transactions, it appears to be a reasonable approximation of commission due in respect of Gas Supply Agreements and can be easily adjusted for*

*Marketing’s view of the costs which should properly be deducted to arrive at a gross margin.”*

The alternative course was to examine CNG’s accounting systems to extract the data sought by Marketing in the Claim as set out by Mr Walls in Marketing’s Statement of Case.

104. Against this background, Mr Walls describes the CNG Spreadsheet as amended by Mr Horner as:

*“in the circumstances, the best estimate that we can make, based on the data that we have.”*

105. Mr Walls nevertheless describes difficulties with Marketing’s calculation of the commissions owed to it using the CNG Spreadsheet and materials. First, and as indicated by Mr Horner, commissions were calculated in the CNG Spreadsheet on the basis of some kind of weighted average of 25% and 15% making the calculation of commissions inaccurate. Second, the calculations did not take into account a variation to the 2004 Agreement in June 2016 whereby CNG agreed to compensate Marketing for the loss of commissions arising from CNG installing Free of Charge meters at 50% of CNG’s gross profit on all gas supplies to customers whose meters had been installed free of charge. Third, the CNG Spreadsheet did not take into account Gas Supply Agreements introduced by some of Marketing’s sub-brokers. Separately, Mr Walls pointed out that Marketing has certain of CNG spreadsheets only to calculate commissions owed to it in respect of Siteworks Agreements.

106. Mr Walls says Marketing was only paid commission on Siteworks Agreements up to and including December 2019. In about November 2021, he was provided with a set of spreadsheets produced by CNG which showed that gross profits

made by CNG on Siteworks Agreements for the period January 2020 to September 2021 totalled £233,070. Marketing says it was entitled to 50% of these profits. £116,000 had therefore been included in the CNG Proof of Debt.

107. I return to the evidence given regarding alleged oral variations to the 2004 Agreement in respect of Siteworks Agreements and Free of Charge meters below.

### **The 2004 Agreement**

108. Putting the data on one side, the appropriate starting point is the 2004 Agreement between CNG and Marketing. It is set out on CNG headed paper.

109. The recitals state that:

*“CNG as Buyer wishes to appoint [Marketing] as Seller to market, retain and obtain Gas Supply Agreements and Siteworks Agreements. All Agreements to be contracted using the Seller company name and licence.”*

110. Clause 5.1 effectively provides a definition of “Secondary Agent” as:

*“holding a separate Agency Agreement approved by the Seller recommended and managed by the Buyer in respect of the sales, marketing and retention of Gas Supply Agreements and the sales, marketing of Siteworks Agreements”.*

111. Clause 6 defines the commission payable by CNG as follows:

*“The Buyer shall pay to the Seller a commission calculated in accordance with Clauses 9 and 10 below on all payments received by the Seller for Gas Supply Agreements generated and sold by the Buyer and authorised by the Seller, including deemed contracts as defined in network code, and Siteworks Agreements*

*Where a Secondary Agent has been appointed Commission to the Seller will be calculated in accordance with Clauses 9 and 10 but will be net of Commissions paid to the Secondary Agent.*

*Where a Gas Supply Agreement has ceased to exist with the Buyer and the site has been transferred to a deemed contract status and the Seller having been notified has failed to reinstate a [sic] new Gas Supply Agreement the Buyer reserves the right to reinstate a new Gas Supply Agreement without paying Commission to the Seller providing the Seller has not been involved in the transfer and the transfer has involved a visit to the site by a representative of the Buyer.*

*When a site held by the principal has ceased to pay for gas used and a third party has been appointed to collect outstanding debt, Commission will not be paid to the Seller for that site from the date of appointment. Should a new enduser takeover the site this will not apply from the date the new enduser takes over the site.”*

112. Clause 9 is fundamental to the dispute between the parties. It sets out the rates of commission payable to Marketing:

*“9.1 The yearly Wholesale Gross Gas Margin of the Buyer is defined as the Gas Sales Income from wholesale (in cleared funds), less the addition of the Gas Costs (including Storage) and Gas Transportation costs.*

*9.2 The yearly Retail Gross Gas Margin of the Buyer is defined as the Gas Sales Income from retail (in cleared funds), less the addition of the Gas Costs (including Storage) and Gas Transportation costs.*

*9.3 End User is defined as meaning the Buyer’s Contracted Gas Customers or the Buyer’s Deemed Gas Customers, connected to a live gas supply, purchasing and paying for gas invoiced by the Buyer as per the Buyers Standard Terms and Conditions.*

*9.4 New Gas Business (wholesale or retail) is defined as Gas Supply Agreements contracted to the End User on behalf of the Buyer by the Seller, connected to the Gas Transportation Network for the first time, and will be defined as New Business for a period of twelve months from the connection date (commonly known as the live start date), irrespective of any change in End User ownership.*

*9.5 The Siteworks Gross Margin of the Buyer is defined as the Siteworks Sales Income (in cleared funds), less the Costs of installation.*

*9.6 An additional margin has been agreed to be paid following authorisation by the Buyer for certain “one of” transactions. The payable commission to the Seller for these transactions is determined by multiplying Transaction Gross Margin of the Buyer by 50%.*

*9.7 Existing Gas Business (wholesale retail) is defined as Gas Supply Agreements contracted to the End User on behalf of the Buyer by the Seller, connected to the Gas Transportation Network for a period*

*greater than the first twelve months from the original Transportation connection date (ordinarily known as the live start date) irrespective of any change in End User ownership.*

9.8 *The rate of commission payable to the Seller is determined as follows [in summary]:*

- a) for new Wholesale (W) Gas Business [25%]
- b) for new Retail (R) Gas Business [25%]
- c) for existing Wholesale (W) Gas Business [15%]
- d) for existing Retail (R) Gas Business [15%].

113. Clause 10 set out the rate of commission for Siteworks Agreements, which were the installation of physical meters and apparatus at a retail “*End User*”. In summary:

- i) The Siteworks Gross Margin was defined as the Siteworks Sales Income (in cleared funds nett of VAT and any other appropriate levy or tax) less the Costs of installation;
- ii) For new Siteworks without the involvement of a Secondary Agent, Marketing was to receive a 50% commission of the “Siteworks Gross Margin”;
- iii) For new Siteworks with the involvement of a Secondary Agent:
  - a) Marketing to receive 25%
  - b) The Secondary Agent to receive 25%.

114. Clause 11 set out the mechanism for the payment of commission to Marketing:

*“The Buyer shall make payment to the Seller of the Seller's Commission on or before the last day of the month following the month in which the Buyer has received payments from its customers (in cleared funds) in respect of Authorised Agreements sold by the Seller in the territory,*

*11.1 The Buyer shall make payment to the Seller of the Seller's Commission for Gas Supply Agreements on the following basis:*

- a) *The Buyer shall determine an Equal Budget Monthly Payment based on Clause 9 and the Buyer's expected company performance of Gross Margin for the Financial Year.*
- b) *These Equal Budget Monthly Payments will be corrected to updated values by the Buyer on a quarterly basis and appropriate financial adjustments (positive or negative) made to the original Equal Monthly Budget Payments. These new Equal Budget Monthly*

*Payments to be amortised over the remaining months of the Financial Year and called the Forecast Value.*

*11.2 The Buyer shall make payment to the Seller of the Seller's Commission for Siteworks Agreements on the following basis:*

*a) The Buyer shall determine the Commission Payment based on Clause 10 and shall pay the commission due (in cleared funds) 7 working days after which the Buyer has received payments from its customers."*

115. Clause 21 is an entire agreement and non-oral modification clause. It prevents any variation to the 2004 Agreement unless it is in writing and signed by CNG's managing director and an authorised individual of Marketing:

*"21.1 This Agreement constitute [sic] the entire Agreement between the Parties with respect to the subject matter of this Agreement and supersedes and extinguishes any representations understandings previously given or made, other than those contained herein, and no variation shall be effective unless contained in a written document which dated and refers to this Agreement and its date identifies the clause or clauses which are to be varied and has been signed by the Buyer Managing Director and countersigned by an authorised representative of the seller."*

116. No evidence has been provided of any written variations to the 2004 Agreement in accordance with clause 21. The alleged variations upon which Marketing relies, and which are discussed below, were originally made orally.

### **The Claim**

117. In circumstances where the CNG Proof of Debt refers to Marketing's case in the Claim it is necessary to examine the Claim. The facts relating to the Claim comprise the legal arguments advanced by Marketing and CNG. They evidence the steps which the Court considered necessary at that stage for the proper determination of Marketing's claim and CNG's counterclaim.

118. The Particulars of Claim were pleaded by Marketing’s present Leading Counsel, Mr Susman KC. Marketing claimed deductions had been made improperly from the sums that were due to it and sought an order for an account of all commissions due for the successive quarters starting with the quarter commencing on 1 January 2014. Marketing sought a consequential order for the payment of all sums due and interest.
119. Marketing sought a direction from the Court that the account should be taken on a transaction-by-transaction basis. This reflected Marketing’s pleaded case that the 2004 Agreement was modified by the 1993 Regulations, and specifically Regulations 4(1), 5(1), 7 and 10.
120. Marketing alleged the 2004 Agreement was varied by an oral agreement in or about 2005 between Mr Gaines on behalf of CNG and Mr Leworthy on behalf of Marketing. This was that CNG would pay Marketing commissions for Siteworks Agreements under the 2004 Agreement at the rate of 50% rather than 25% of CNG’s gross profit on transactions for Siteworks Agreements even if a Secondary Agent was involved. The agreement was made in consideration of Marketing continuing to manage CNG’s business as before.
121. Marketing alleged that the 2004 Agreement was further varied by an oral agreement in or about 2016 between Ms Jaqueline Hall, CNG’s then managing director, Mr England, CNG’s then finance director, on behalf of CNG, and Mr Walls and Mr Leworthy on behalf of Marketing. This variation was to the effect that if and whenever CNG considered it to be in its own business interest for installation of a gas meter to be free of charge to a purchaser (“an FOC Customer”), CNG would compensate Marketing for loss of its 50% commission

on the siteworks by paying Marketing at the rate of 50% of CNG's gross profit on all Gas Supplies to that customer.

122. CNG's Defence and Counterclaim was dated 4 December 2020 and pleaded by David Lewis KC. It was supported by a statement of truth signed by Mr Stanley, CNG's then CEO and a Director of the company.
123. CNG denied that improper deductions had been made from commissions due. On the true interpretation of the 2004 Agreement, CNG pleaded that the "Costs of Gas" included gas, finance costs, transportation, agents' commission (third party agents' commission), Climate Change Levy and revenue assurance. It also alleged that Marketing was not entitled to commission on Gas Supply Agreements not generated and sold by Marketing or by intermediary brokers not appointed and managed by Marketing.
124. CNG admitted that the 1993 Regulations applied to the 2004 Agreement but denied that there was an unlawful derogation from Regulation 10(2). At all times before and after the commencement of the 2004 Agreement Marketing had raised a monthly invoice in respect of Gas Sales and Siteworks Agreements. CNG's positive pleaded case was that the commission arrangements which had been adopted had been more beneficial to Marketing, who had on average received more commission than would have been payable based upon the transaction-by-transaction basis for which Marketing contended.
125. CNG denied Marketing's claim that the 2004 Agreement was varied orally in 2005. Although CNG pleaded that it could not specifically plead to the alleged oral agreement, it alleged that the rate of commission payable to Marketing where the Secondary Agent, CNG Energy Limited (previously called Total

Energy Gas Supplies (“TEGS”), a company wholly owned by CNG), was involved, had at all times remained at 25%. CNG denied Marketing’s claim that the 2004 Agreement was varied orally again in 2015.

126. CNG alleged that other different oral variations were made to the 2004 Agreement. CNG alleged that an oral variation had taken place in about late January 2012 at a meeting between Mr England, Ms Hall and Mr Jones for CNG and Mr Walls and Mr Leworthy for Marketing whereby the parties agreed CNG would cross charge Marketing for services it supplied, including servicing Marketing’s account. It alleged that a further oral variation took place in 2012/2013 at a meeting between Mr England and one or both of Mr Walls and Mr Leworthy. At that stage, the parties had agreed that an annual bonus would be paid by CNG to Marketing by reference to CNG’s net profit and netted off against the cross charges. Until 2016, CNG said the portfolio and weighted averages were netted off annually.
127. CNG counterclaimed that from April 2015 to 2020 Marketing was overpaid commissions for various reasons including an overestimation of the Retail Gas Margin for 2018 and 2019. In those years, increased demand driven by the “*Beast from the East*” weather front required CNG to purchase additional gas supplies at inflated prices, significantly eroding profit. Either on the taking of an account or alternatively on the quantification of its counterclaim in restitution for unjust enrichment, CNG pleaded that a substantial overpayment would be found due from Marketing to CNG in the region of £2,100,000.
128. CNG pleaded that any court ordered account should not commence earlier than April 2015 because a binding reconciliation had taken place and settled the

account between the parties to March 2015. CNG specifically denied that any account should take place on the transaction-by-transaction basis sought by Marketing under the 1993 Regulations.

129. In Marketing's Reply and Defence to Counterclaim dated 11 December 2020, Marketing joined issue with CNG on the facts and matters in the Defence and Counterclaim.
130. Marketing's application dated 15 December 2020 for summary judgment against CNG was dismissed at a hearing on 27 April 2021 before District Judge Adlestone. The Judge directed that a series of agreed preliminary issues should be tried. First, as to what extent, if any, the 2004 Agreement was varied by the 1993 Regulations. This was described in the order as a matter for argument. Second, as to what extent, if any, the 2004 Agreement was varied from time to time by way of oral agreement. Described in the order as a matter for evidence. Third, as to whether the account should be taken on the basis for which Marketing contended, transaction-by-transaction, or on the basis for which CNG contended in the Defence and Counterclaim. Fourth, as to the way in which any practical difficulties in taking an account were to be resolved.
131. The trial of the preliminary issues in the Claim was to be listed for 4 days. Dates to avoid were to be provided between 20 July and 1 October 2021.
132. In the Court ordered document dated 14 May 2021 Marketing set out how an account on a transaction-by-transaction basis was to work in practical terms. Marketing explained that the court would first be asked to determine the start date for the account. Marketing would then require the production and analysis of data from electronic documents stored on Equinox for review. This was to

identify CNG's customers introduced by Marketing; each relevant transaction for the supply of Natural Gas; the volume of gas and price charged to the customer for that transaction; the bulk volume and price paid for gas; to calculate the fraction of the bulk gas supplied to the customer; to calculate CNG's gross profit and the appropriate percentage commission due and the date payable; and to enable the preparation of a running account. Marketing described the adoption of equivalent steps in respect of Siteworks transactions without any need to consider bulk supplies.

133. At a hearing on 29 September 2021 before District Judge Pema further directions were given. These included the updating of the list of issues; disclosure; and the exchange of witness evidence.

134. The agreed issues for disclosure included:

- i) requests by both Marketing and CNG of each other for emails, text/Whatsapp messages or other electronic communications passing between either Mr Walls and/or Mr Leworthy and Mr England and or Ms Hall and/or Mr Jones concerning the pleaded variations to the agreement and/or any internal notes, diary entries or memoranda concerning those meetings and regarding the payment of commission by CNG from time to time. Including personal web-based email accounts used by Mr Wall and/or Mr Leworthy;
- ii) documents held by CNG and Marketing relating to the account and reconciliation undertaken by CNG in August 2015, including internal and external emails, notes and other memoranda, and drafts of and/or comments on the commission report originally provided by Mr England, restricted to the period July to August 2015 only;
- iii) an illustrative printed out sample of the electronic documents stored on Equinox constituting a list of CNG's customers introduced by Marketing and introduced by a sub-agent introduced by Marketing and evidencing the date of the first transaction for the supply of natural gas to each customer and the date of the first (if any) Siteworks transaction;
- iv) CNG's request for documents held by Marketing concerning its engagement of any individual customers and/or TPIs it claimed to have referred to CNG and thereafter managed on its behalf, including any

internal notes / spreadsheets or lists concerning Marketing's portfolio and relevant emails or other correspondence between Marketing and CNG and Marketing and any customers and/or TPIs;

- v) Marketing's request for an illustrative printed out sample from Equinox of the electronic documents stored on Equinox or an alternative electronic sales ledger constituting an electronic sales invoice relating to each transaction for the supply of gas, from the start date of the account onwards, to a customer introduced by Marketing or a sub-agent introduced by Marketing specifying volumes of gas for that transaction, the price charged to that customer for the gas together with any direct charge for storage or transportation, any VAT or other appropriate levy or taxation such as Climate Change Levy.

### **The Evidence on the Alleged Oral Variations**

135. The evidence in respect of Marketing's case that the 2004 Agreement was the subject of oral variations is now limited to the material contained in and exhibited to the witness statements filed in this appeal.
136. In Mr Walls' First Witness Statement dated 16 September 2024 he said that in 2005 the 2004 Agreement was varied. He and Mr Leworthy did not consider it fair that they only received 25% of the profit on Siteworks Agreements where Secondary Agents were involved. Mr Leworthy and Mr Gaines therefore agreed at a meeting in around September 2005 at the Tannin Level Restaurant in Harrogate that CNG would pay Marketing commission at the rate of 50% of CNG's gross profit on Siteworks Agreements where a Secondary Agent was involved.
137. Mr Leworthy's Witness Statement corroborates that the 2004 Agreement was varied in 2005 as set out in Mr Wall's First Statement. He said he was also able to provide additional evidence concerning the meeting he attended on behalf of Marketing with CNG. This was that the agreement CNG would pay Marketing

50% of CNG's gross profit on Siteworks Agreement where a Secondary Agent was involved:

*“was because we found that the siteworks which had been handled by Secondary Agents had not been carried out effectively, so it was agreed that Marketing would deal with these contracts and be paid at a 50% commission rate for doing so.”*

138. In Mr Wall's Second Witness Statement dated 19 August 2025 he gave further evidence about this same meeting. He explained:

*“The involvement of Secondary Agents in CNG's siteworks operation proved troublesome to say the least and more often than not involved John or me having to rectify their mistakes in order to provide a successful installation for the customer.*

*This is what lead to the meeting held in or around September 2005 ...”.*

139. He added that in those days they had a good relationship with Mr Gaines and any agreements were verbal and usually undocumented:

*“John and I trusted that what was agreed at these meetings would be implemented without the need for a formal written agreement.”*

140. Mr Walls exhibited a copy of a commission report dated 2 January 2020 which related to a number of Siteworks installations carried out at the end of December 2019. The commissions were split 50/50.

141. In Mr Wall's First Witness Statement, Mr Walls recounted that Marketing also had an issue where CNG was installing FOC gas meters, as it was in CNG's interests to do so. This meant Marketing was not earning any commission on the installation of the meters. In or about June 2016, Mr Walls had a meeting with the then managing director of CNG, Ms Hall, and Mr England at CNG's offices. They agreed this was not working for Marketing and that CNG would compensate Marketing for the loss of commission by paying commissions at

50% of CNG's gross profit on all Gas Supply Agreements relating to any FOC meter customer.

142. Mr Walls exhibited a diary entry of 21 June 2016 which he believes relates to the meeting at CNG's offices. He also exhibits a spreadsheet provided to him prior to the meeting by CNG's Energy Connections (Siteworks) Manager detailing the income and profit generated to CNG from gas supply contracts of customers who had FOC meters installed. Mr Walls said he used this at the meeting to persuade Ms Hall and Mr England to increase Marketing's commission payments to compensate them for the loss of siteworks commission from FOC meter installations. CNG agreed that Marketing would be compensated and to put this into immediate effect they agreed that Marketing would invoice an additional £10,000 per month from that point on.

143. Mr Walls said all the invoices were paid in full and it was not a problem:

*“Again, in those days, we had a relatively good relationship with Jacqui and Chris, and we did not formally document our agreements or make minutes of the meetings. If there were any problems, we would talk them through.”*

144. In Mr Dwyer's Third Witness Statement dated 24 September 2025 he confirmed, having reviewed the 2019 Commission Report, that the commission payments received by CNG appeared to reflect a 50/50 split of the profit of the Siteworks Agreements and there were no amounts relating to agents' commissions included within the 2019 Commission Report.

145. The Joint Liquidators also belatedly identified other commission reports relating solely to Siteworks Agreements for the period between 8 October 2010 and 2 March 2020. These showed that where a Secondary Agent was involved

the applicable agents' commission fees had been deducted first. The remaining profit appeared to be split equally 50/50 between CNG and Marketing.

146. In Mr England's Witness Statement he says it was agreed that Marketing would receive 50% of CNG's profit margin with respect to Siteworks Agreements, which again excluded fees made by agents and brokers. He said there was an exception to this when CNG purchased Total Energy Gas Supplies Ltd. In cases where TEGS were involved Marketing would receive 25%.
147. Mr England's evidence was all Siteworks jobs were recorded on the siteworks system by the team. At the start of every month a report would be produced showing all Siteworks jobs processed the previous month. These Siteworks Commission Reports were passed to Marketing for review. Once Marketing confirmed that they were satisfied they would issue an invoice to CNG for their share of the CNG margin after the deduction of agents' commissions.
148. Mr England recalls that in November 2011 a level of cross charge was agreed between CNG and Marketing at a meeting. This was based on their portfolio and commission percentages. Mr Walls disputed this to be the case in his own Third Witness Statement.
149. Mr England says he remembers a meeting regarding FOC meters, which may have been in 2016. The meeting did agree that there was going to be a shortfall for Marketing due to the loss of their Siteworks commission, but no final figure was agreed. He said final determination of any increase in commission owed to Marketing was left to a later date once more information was available.

150. It is Marketing's case that although the FOC 2016 agreement reached is disputed in Mr England's evidence, the £10,000 per month increased payment is evidenced in the materials exhibited by Mr Walls.

### **Issue 1: The Applicability of the 1993 Regulations**

151. Mr Susman KC's short opening on behalf of Marketing was largely devoted to the application of the 1993 Regulations. A matter he submitted to be the "logical starting point". As contended in the Claim, Marketing's primary case on appeal remains that as a result of the application of the 1993 Regulations to the 2004 Agreement CNG was liable to account to Marketing every quarter for commissions on a transaction-by-transaction basis and to pay those commissions not later than on the last day of the month following the quarter in which they became due, commencing with the quarter beginning on 1 January 2014.
152. The application of the 1993 Regulations was admitted by CNG in the Claim, but any derogation was denied. The Joint Liquidators' position on appeal is that the 1993 Regulations apparently apply to the relationship between CNG and Marketing, but they do not accept that this is the case. Specifically, the Joint Liquidators express concern that the exception at Regulation 2(2)(b) may apply such that the 1993 Regulations are not applicable to the 2004 Agreement. In any event, derogation is denied.
153. Regulation 2(1) of the 1993 Regulations provides:

*"In these Regulations –*

*"commercial agent" means a self-employed intermediary who has continuing authority to negotiate the sale .... of goods on behalf of another*

*person (the “principal”), or to negotiate and conclude the sale ... of goods on behalf of and in the name of that principal ...”.*

154. It is agreed by the parties that Marketing is a “*commercial agent*”. It is also agreed that gas constitutes “*goods*” for the purposes of the 1993 Regulations: Tamarind International Limited v Eastern Natural Gas (Retail) Limited [2000] 6 WLUK 183, applied in Green Deal Marketing Southern Limited v Economy Energy Trading Ltd [2019] EWHC 507 (Ch), [143].
155. The Joint Liquidators point out that Regulation 2(2)(b) states that the Regulations do not apply to “*commercial agents when they operate on commodity exchanges or in the commodity market*”. Mr Weaver submits Marketing must therefore demonstrate how the deregulated gas market which, as he put it, appears to be general trading in a commodity and which allows for individual consumers to switch suppliers at will does not constitute an open market such that the exception in paragraph 2 of the Regulations applies here.
156. Mr Weaver argues that the court in Tamarind did not consider the question whether supplying gas in this way was a supply in the commodity market or what was the ambit of the commodity market. Mr Susman submits that the Joint Liquidators’ approach on this point is unarguable, and this was not a matter for Marketing to prove. Mr Susman relied on passages from the judgments in Tamarind and W Nagel (a firm) v Pluczenik Diamond Co NV [2018] EWCA Civ 2640.
157. It is correct that in Tamarind it was not disputed by Eastern Gas that each of the claimants was a commercial agent within the definition at Regulation 2(1), [22]. As a matter of fact, as I understand the evidence relating to Marketing, the description of the agents in Tamarind as chosen and appointed expressly for

their expertise in direct selling, marketing and promotion to customers [31] and as selling Eastern's contracts and promoting its image to generate customers [32], is directly akin to the kind of specific customer focussed retail work which Marketing undertook for CNG under the 2004 Agreement. Securing contracts for CNG's gas supply to individual customers and carrying out siteworks for them.

158. Although it was not strictly necessary for the Court of Appeal to go on to consider the interpretation of the "commodity market exception" in Regulation 2(2)(b) in W Nagel (a Firm) v Pluczenik Diamond Co NV [2019] Bus LR 692, the Court of Appeal did consider the issue given that its view differed from that of the judge at first instance and the general importance of the point. I consider the analysis to be of significant assistance.

159. In W Nagel the claimant acted as a broker in the diamond industry for the defendant in negotiating the purchase of rough diamonds from De Beers which De Beers sold to wholesalers throughout the year at "*Sights*". The rough diamonds that the claimant purchased for the defendant at "*Sights*" were processed by the defendant into polished diamonds and jewellery for retail sales or re-sold.

160. The judge held that the claimant was a "commercial agent" but the sales at "*Sights*" were made on "commodity exchanges or in the commodity market" within the meaning of Regulation 2(2)(b). Accordingly, the 1993 Regulations did not apply to the parties' contractual relationship.

161. The Court of Appeal agreed that the term "*commodity*" would not reasonably be understood to denote any tangible goods. The text of the Directive in

German and Italian would be translated into English as “raw materials”. As the judge had observed, in the commercial world the term “commodities” includes oil and gas products for example, at [69]. The Court of Appeal held that the exception did not however apply to the claimant’s purchases at the Sights.

162. Taking first the concept of a “commodity exchange”, Leggatt LJ said at [76]-[80]:

“76. ...*The nature of an “exchange”, as I believe the term would generally be understood, is a place where trading takes place among members of the exchange and subject to its rules. The corresponding phrases in the French and German text (“les bourses du commerce” and “Handelsbörsen”) have a similar connotation. Thus, well-known examples of commodity exchanges in the UK are the London Commodity Exchange, which in 1996 merged to become part of the London International Financial Futures Exchange (“LIFFE”) and the London Metal Exchange. ... What would in my view be regarded as an essential feature of a commodity exchange is that the commodities (or rights to buy and sell commodities) which are traded on the exchange can be freely bought and sold among the participants.*

*The commodity market*

77. *I agree with the judge that the fact that the Directive uses two different expressions (“commodity exchanges” and “the commodity market” in the English version) indicates that the two expressions must be intended to have different, even if overlapping, meanings. Thus, the phrase “the commodity market” must be wider than simply connoting the sum of all commodity exchanges; otherwise its inclusion would be superfluous. But equally, the phrase “the commodity market” must be given a meaning which does not make the inclusion of the reference to “commodity exchanges” superfluous. That is achieved, as it seems to me, by interpreting “commodity exchanges” as typical or paradigmatic instances of “the commodity market”. Thus, transactions negotiated or concluded in the commodity market are transactions of a similar kind as those which are negotiated or concluded on a commodity exchange. So understood, the commodity market encompasses any general trading in commodities that takes place in the open market.*

78. *In my view, Sights held by De Beers would not be understood by commercial people as a commodity exchange nor would sales made by De Beers at such Sights be understood as trading in the commodity market in the relevant sense. ...*

*The purpose of the exception*

79. ... Although the judge found it difficult to identify any clear rationale for the commodity market exception, he had no difficulty in identifying the purpose of the Directive to which the Regulations give effect as being “to protect agents by giving them a share of the goodwill which they have generated and from which the principal has benefited after the agency agreement has been terminated ...
80. On the interpretation that I would give to its wording, the commodity market exception is consonant with this purpose. The trading which takes place on a commodity exchange is not an activity by which members of the exchange who buy and sell on behalf of clients build up goodwill for their principals with counterparties. It is trading of a nature where the identity of a counterparty is largely irrelevant. Sales are made to whoever is able and willing to pay the agreed price. Considerations of customer or supplier loyalty and goodwill are of little or no significance. Indeed, the rules of an exchange are usually intended to promote this by providing confidence that any contract made between members of the exchange will be honoured.”
163. In my judgment, and by analogy with the discussion in the limited material to which I was referred on this point, the commodity market exception does not apply to Marketing’s role under the 2004 Agreement. Marketing was not engaged in any general trading on the open market. Its role as CNG’s commission agent simply required it to sell direct to specific individual customers and to build up goodwill for CNG in order to retain their custom. I therefore hold that the 1993 Regulations apply to the 2004 Agreement.

**The 1993 Regulations**

164. Where the 1993 Regulations apply the duties of the commercial agent to their principal are set out in Regulation 3. They include that:
- “(1) In performing his activities a commercial agent must look after the interests of his principal and act dutifully and in good faith.
- (2) In particular, a commercial agent must –
- a. make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;

b. *communicate to his principal all the necessary information available to him.”*

165. The duties of the principal to the agent are set out in Regulation 4. They include:

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

*(2) In particular, a principal must –*

...

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

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

166. Regulation 5 provides that the parties may not derogate from Regulations 3 and

4. Regulation 6 provides for the form and amount of remuneration in the absence of agreement:

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

...

*(3) Where a commercial agent is not remunerated (wholly or in part) by commission, regulations 7 to 12 below shall not apply.”*

167. It is therefore apparent that there is no requirement for a commercial agent to be paid by way of commission. However, where payment is by commission, the provisions relating to commission payments must comply with the

requirements of Regulations 7 to 12 insofar as those Regulations cannot be derogated from.

168. Regulation 7 states:

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

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

*(b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.”*

169. Regulation 10 concerns when commission falls due and when it must be paid:

*“(1) Commission shall become due as soon as, and to the extent that, one of the following circumstances occurs:*

*(a) the principal has executed the transaction; or*

*(b) the principal should, according to his agreement with the third party, have executed the transaction; or*

*(c) the third party has executed the transaction.*

*(2) Commission shall become due at the latest when the third party has executed his part of the transaction or should have done so if the principal had executed his part of the transaction, as he should have.*

*(3) The commission shall be paid not later than on the last day of the month following the quarter in which it became due, and, for the purposes of these Regulations, unless otherwise agreed between the parties, the first quarter period shall run from the date the agency contract takes effect, and subsequent periods shall run from that date in the third month thereafter or the beginning of the fourth month, whichever is the sooner.*

*(4) Any agreement to derogate from paragraphs (2) and (3) above to the detriment of the commercial agent shall be void.”*

170. The “*third party*” here is the customer. I note that any derogation from Regulation 10 (2) or (3) does not itself render the agreement void. The derogation must be to the detriment of the commercial agent.

171. Regulation 11 concerns the extinction of the right to commission:

- “(1) The right to commission can be extinguished only if and to the extent that –*
- (a) it is established that the contract between the third party and the principal will not be executed; and*
  - (b) that fact is due to a reason for which the principal is not to blame.*
- (2) Any commission which the commercial agent has already received shall be refunded if the right to it is extinguished.*
- (3) Any agreement to derogate from paragraph (1) above to the detriment of the commercial agent shall be void.”*

172. Regulation 12 provides for the periodic supply of information as to commission due and the right of inspection of the principal’s books:

- “(1) The principal shall supply his commercial agent with a statement of the commission due, not later than the last day of the month following the quarter in which the commission has become due, and such statement shall set out the main components used in calculating the amount of the commission.*
- (2) A commercial agent shall be entitled to demand that he be provided with all the information (and in particular an extract from the books) which is available to his principal and which he needs in order to check the amount of the commission due to him.*
- (3) Any agreement to derogate from paragraphs (1) and (2) above shall be void.*
- (4) Nothing in this regulation shall remove or restrict the effect of, or prevent reliance upon, any enactment or rule of law which recognises the right of an agent to inspect the books of a principal.”*

## **Issue 2: The Application of the 1993 Regulations and their Implication in relation to the 2004 Agreement**

### **Marketing’s Case that Commission must be calculated on a Transaction-by-Transaction Basis**

173. Marketing draws attention to the consideration of the objective of the non-derogation provisions in the 1993 Regulations in Page v Combined Shipping and Trading Co Ltd [1997] 3 All ER 656. In Page, Staughton LJ said at 660 e to h that reading the Directive and the Regulations themselves the objective was what:

*“appears to be a motive of social policy, that commercial agents are a down-trodden race, and need and should be afforded protection against their principals ... [The non-derogation provisions] are regulations to protect and improve the position of commercial agents.”*

174. Marketing refers to the apparent approval of this statement in Bell Electric Ltd v Aweco Appliance Systems GmbH & Co KG [2002] EWHC 872 (QB) per Elias J at [48] and in Tigana Limited v Decoro Limited [2003] EWHC 23 (QB) per Davis J at [81].

175. Marketing submits that the decision of HHJ Mackie KC in Shearman v Hunter Boot Ltd [2014] EWHC 47 (QB) and the decision of the European Court of Justice in Honyvem Informazioni Commerciali Srl v De Zotti, Case C-465/04 [2006] All ER (D) 343 (Mar), support its position that a concluded agreement between parties cannot override the non-derogation provisions of Regulation 10(4) of the 1993 Regulations.

176. For effect to be given to the provisions of the 1993 Regulations, Marketing says it must follow that any accounting for commission due to Marketing under the 2004 Agreement must only be upon a transaction-by-transaction basis and that it can be on no other basis: paragraph 56 of Marketing’s Skeleton.

177. Marketing stresses the focus of the 1993 Regulations is upon “transactions”. It points to the use of the word “*transactions*” in each of the provisions of

Regulations 2(1), 3(2)(a), 4(2)(b), 6(1), 7, 8 and 10. It says a transaction is concluded when it is made and executed when it is performed: Tigana Limited v Decoro Limited [2003] EWHC 23 (QB) [54].

178. Marketing refers to the European Court of Justice's decision in Heirs of Chevassus-Marche v Groupe Danone [2008] 1 WLUK 200 at [19], that:

*“It follows from ... article 10 ... that the commercial agent's right to commission arises either when the principal has or should have carried out his obligation, or when the third party to the agency contract, that is the customer, has or should have carried out his obligation.”*

179. It submits that under Regulation 10(2) its entitlement to be paid commission by CNG was triggered no later than when, as regards a particular transaction, CNG made, or should have made, the supply under its agreement with its customer. Under Regulation 10(3), it says CNG was therefore liable to account to Marketing every quarter for commissions on a transaction-by-transaction basis and to pay those commissions not later than on the last day of the month following the quarter in which they became due. That is no later than within a further 4 months from the supply.
180. Although CNG paid some commissions to Marketing from time to time, it says CNG refused or failed to account to Marketing in full for all such commissions due to Marketing from the quarter beginning 1 April 2014, or to do so in accordance with the 1993 Regulations on a transaction-by-transaction basis.
181. Marketing submits Regulation 11(1) has the effect that Marketing's right to commission under Regulation 10 may be extinguished, but only in the circumstances set out in paragraphs (a) and (b). In this regard, Marketing says, the burden of establishing any such facts lay on CNG.

182. Marketing points to ERGO Poist'ovňa v Alžbeta Barliková C-48/16, decided by the European Court of Justice, Judgment of the Court (Fourth Chamber) of 17 May 2017, [2018] Bus LR 41, where Directive 86/653 was applied by analogy. It was held that the words “to blame” (which have been re-enacted in Regulation 11(1)), should not be given a narrow definition, otherwise the payment of commission might be evaded by the principal as a result of their own conduct [57]. Where issues of fact were raised, it was held that those fell to be determined taking into account:

*“all the legal and factual circumstances for which the principal is to blame”, [61].*

183. Against this background, Marketing submits that CNG’s calculation of commission based upon CNG’s “*Yearly Retail Gross Gas Margin*” under the 2004 Agreement is objectionable because it replaces, and is inconsistent with, the 1993 Regulations in not providing for calculation on a transaction-by-transaction basis.

184. It further submits CNG’s methodology is objectionable on the ground that it averages all business conducted by CNG with parties, whether introduced by Marketing or not, breaching the prohibition precluding derogation from the 1993 Regulations. That it was not appropriate under the 1993 Regulations for CNG simply to charge Marketing as it did with a percentage of the commissions which CNG was obliged to pay Secondary Agents, across all transactions, whether or not a Secondary Agent was involved, based on a percentage of what CNG said was the percentage of CNG’s customer profile which was attributable to Marketing.

185. Manifestly, Marketing says, the practical application by CNG of an estimated commission percentage”, which Mr Horner describes as “*some kind of weighted average of 25% and 15%*” in calculating commissions due to Marketing, derogates from both the 1993 Regulations and the 2004 Agreement. The importance of a transaction-by-transaction approach was clear given Marketing had no visibility as to the percentage of CNG’s portfolio assigned to Marketing.
186. Marketing adds that the problem with CNG’s approach to calculation is also demonstrated by reference to the installation by CNG of FOC meters. A point relating to the alleged oral variation of the 2004 Agreement. Marketing says it is only possible to apply any increased percentage rate of commissions in respect of FOC meters by reference to a calculation on a transaction-by-transaction basis, taking into account the specific commission percentage of either 25%, 15% or 50% of CNG’s gross profit on Gas Supply Agreements in the appropriate cases.
187. Further, Marketing points to the CNG Spreadsheet where, it says, it was assumed by CNG that where a gross loss arose, instead of zero commission being due to Marketing, it was instead assumed commission or negative commission was due to CNG from Marketing. It says this means Marketing was contributing to the insurance of CNG’s business, and that this would be in derogation of the 1993 Regulations. Marketing contends the relevant transaction should properly have been ignored by virtue of the provisions of the 1993 Regulations and in accordance with clause 16 of the 2004 Agreement.

### **The Joint Liquidators’ Case**

188. The Joint Liquidators assert that it must be the agreement which derogates from the 1993 Regulations and not the practical actions of the principal. So, if the 2004 Agreement complies with the provisions of the 1993 Regulations, and it is the practical actions of CNG which differ and do not comply, the 2004 Agreement would not be avoided.
189. The Joint Liquidators submit that Marketing's case as to the inter-relationship of the 1993 Regulations and the 2004 Agreement is wrong. Regulations 10 and 11 do not state how commission should be calculated. In fact, the 1993 Regulations contemplate that parties will agree how remuneration works between them. Regulations 10 and 11 do not prescribe any particular figures for use in the calculation. They do not state that commission must be calculated by reference to each transaction. The only requirement is that the commission on a particular transaction can be calculated at the time that the commission falls due.
190. The Joint Liquidators say it is implicit in the Regulations that the sum payable by way of commission on a transaction must be capable of calculation, at the latest, when the customer "executes", that is makes payment in respect of, that transaction. They say there is therefore no difficulty in principle with the use of business-wide revenue or costs as part of such commission calculations.
191. The Joint Liquidators also say it is not immediately clear that the timing of payment by CNG to Marketing under clause 11.1 of the 2004 Agreement does offend Regulation 10(3). The clause provides that the payment of commission is to be made on or before the last day of the month following the month when CNG receives payment from its customer. The timing could therefore be

identical, and it is not clear that it would be longer than a quarter, which does not offend Regulation 10(3). The Regulations provide commission is to be paid no later than the month after the quarter when the transaction completed.

192. The Joint Liquidators submit that the mechanism for calculating and adjusting commission in clause 11 of the 2004 Agreement does not extinguish Marketing's right to commission. Instead, an estimated commission is initially calculated based on the company's expected financial performance for the year divided into monthly payments, and that commission calculation is subject to later refinement and adjustment once accurate final figures are received. The process corrects any underpayments or overpayments caused by the necessary use of estimated figures rather than meter readings at various times but does not extinguish rights. In the event that the estimate produced by CNG was exceeded by the reality of an actual meter reading, a top up payment would be required to be made to Marketing on the basis that they had not received as much as they should have. Potentially, that could fall outside the last day of the quarter when it became due under Regulation 10(3). However, that is not necessarily right as clause 11.1(b) of the 2004 Agreement requires that estimates would be reviewed and corrected on a quarterly basis with appropriate adjustments.

193. The Joint Liquidators add there is simply no evidence before the court that this review and correction had not happened. It is not therefore clear to the Joint Liquidators that the contractual corrections were not being made within the relevant period under the 1993 Regulations. However, if the top up mechanism could have this effect, they accept that could potentially be a derogation.

194. The Joint Liquidators also suggest some guidance might be applied from CJEU case law in the case of long term contracts. They refer to Ergo (as cited above), and the Court’s provided commentary on the operation of Article 10(1) and its interaction with Article 11(1) at [39]-[40]:

*“... although the commercial agent is entitled to commission in respect of transactions that the principal concludes with clients that the agent has found, that right materialises only at the time that the transactions in question are executed or that those transactions should have been executed. It may thus be inferred from this that the commission becomes due as that execution progresses, which, in the case of long-term contracts in which execution is ongoing, such as the insurance contracts at issue in the main proceedings, is spread out over time. If the commission becomes due only in the proportion to which those transactions are executed, the right to commission is extinguished to the extent that those transactions have not been executed. The first indent of article 11(1) of that Directive must therefore be interpreted as covering also cases of partial non-execution of the contract concluded between the principal and the third party.”*

195. In relation to the operation of Article 11, the Court held in Ergo at [43]-[44] that a clause obliging the agent to refund, on a pro rata basis, part of their commission in the event of partial non-execution of the sales contract did not constitute a derogation to the detriment of the commercial agent, so as to become unenforceable, provided that the part of the commission subject to the refund obligation is proportionate to the extent to which that contract has not been executed. Applying this guidance by analogy to the context of estimated payments under the 2004 Agreement, the Joint Liquidators suggest that the pro rata “refund” of the estimated commission under clause 11 would not be a derogation in reducing subsequent payments to accord with the actual figures.

196. In the alternative, even if the machinery set out in the 2004 Agreement did derogate from the 1993 Regulations, the Joint Liquidators say it is necessary to compare what Marketing would receive under the 1993 Regulations and under

the 2004 Agreement to see whether there is a detriment to Marketing. Here the critical question is whether the 2004 Agreement mechanism which entails that the initial calculation of commission is not final is detrimental to Marketing. The Joint Liquidators submit that this is plainly not detrimental. All the system created by the 2004 Agreement does is provide a system where Marketing will be paid the exact amount of the commission that it is due:

- i) in a market where it is impossible to accurately quantify profits in 30 days due to the multiplicity of meter readings needed,
- ii) by providing a regular and constant cash-flow to Marketing,
- iii) which will be adjusted later either upwards (if payments were too low) or downwards (if payments were too high), and
- iv) that will always be updated so Marketing receives what it should.

197. As such, the 2004 Agreement and CNG's system did not use prospective estimates for the calculations which were not revised even if found to be inaccurate. It did not require any "reverse commission" from Marketing. Simply an adjustment of subsequent payments to account for CNG's overpayments in the estimated payments made if the profits were less than expected.

### **Conclusions as to the Impact of the 1993 Regulations**

198. The only authorities to which I have been referred in respect of the interpretation of the 1993 Regulations are the cases mentioned above.

199. I agree with the Joint Liquidators that the 1993 Regulations must be applied here to the terms of the 2004 Agreement between CNG and Marketing. The fact that CNG's practices in compiling its spreadsheets departed from the express terms of the 2004 Agreement by applying weighted averages of between 15 and 25% in place of the agreed commission percentages stated in the 2004 Agreement as payable to Marketing does not render any of the provisions of the 2004 Agreement void. It was, without more, a breach of the 2004 Agreement, however.
200. Whilst Regulation 7 provides that an agent is entitled to commission on transactions and Regulation 10 provides for the timing of the payment to the agent of commission on transactions, the Regulations do not prescribe the constituent elements which may or may not be taken into account in formulating the sum of the commission that is to be paid in respect of such transactions.
201. I do not therefore agree with Marketing's assertion that each and every element of the total commission due must be calculated on a transaction-by-transaction basis. That is essentially by reference only to the bespoke attributes and costs of each specific transaction.
202. In my judgment, there is no reason why the commission which is payable to an agent in respect of a transaction cannot be agreed to be calculated by reference to a formula which takes into account the principal's wider business costs through the provision of an average which is applied to all transactions. Accordingly, I do not consider that the provisions in respect of the rates of commission payable to Marketing under clause 9 of the 2004 Agreement derogate from the 1993 Regulations through the use in those calculations of

CNG's "*yearly Wholesale Gross Gas Margin*" and CNG's "*yearly Retail Gross Gas Margin*".

203. Furthermore, even if I was wrong in this analysis, and if clause 9 of the 2004 Agreement did derogate to the detriment of Marketing as Marketing alleges, then the effect would be, on the basis of Marketing's case, that the relevant clauses in the 2004 Agreement are void and Marketing must necessarily fall back on Regulation 6. However, Marketing has failed to advance any case on customary practice or, in the absence of customary practice, any case as to reasonable remuneration for the purposes of Regulation 6.
204. Marketing has not adduced any evidence on this appeal to demonstrate the "*customarily allowed*" remuneration for natural gas agents in the relevant period and geography. It has not put forward any evidence as to what a "*reasonable remuneration taking into account all aspects of the transaction might be*". The Court has not therefore been presented with any evidence to support the CNG Proof of Debt on such basis.
205. I add that under Regulation 6, customary practice and reasonable level of remuneration are not alternatives. The court must look first to see whether there is a customary practice and, if so, apply that practice. Only if there is no such customary practice does the court consider the ultimate fallback of assessing reasonable remuneration.
206. Because there can be no idea how much commission would be calculated on a transaction-by-transaction basis it is impossible to conclude that any right to commission was extinguished under Regulation 11. The court is also not in any

position to hold that the sum that would result is such sum as Marketing set out in the CNG Proof of Debt.

207. As regards those cases where a Secondary Agent was involved, I do not consider that the provisions of clauses 6 and 10 of the 2004 Agreement derogate from the 1993 Regulations. There is nothing in Regulations 10 and 11 about Secondary Agents payments or calculations to support any derogation. Even if it was, no evidence of any detriment has been evidenced to Marketing because of the provisions of these clauses or the practice described. And, again, even if there was a detriment, Marketing has failed to address the position that it would advance under Regulation 6 or to support the CNG Proof of Debt on that basis.
208. Similarly, I do not consider the provisions of the alleged oral agreement as to the payments to be made where a FOC Meter was installed by CNG breached the provisions of the 1993 Regulations. It is a separate matter whether CNG's actual treatment of the commissions it calculated in practice breached the alleged agreed terms. If that was the case, Marketing's remedy would be for breach of contract.
209. The balancing machinery for the payment of commission due to Marketing in respect of Gas Supply Agreements under clause 11 of the 2004 Agreement is not compliant with the provisions of Regulation 10(3) of the 1993 Regulations, however. The scheme set out in clause 11 provides for CNG to make estimated Equal Budget Monthly Payments in advance to Marketing on account of the commissions expected to be earned. Marketing was therefore to receive a set payment each month regardless of whether or not any commission had become due in respect of a relevant transaction or transactions under Regulation 10(1)

or (2) or was payable to Marketing in that month under Regulation 10(3). These “*Equal Budget Monthly Payments*” were then to be “*corrected to updated values*” by CNG on a quarterly basis and “*appropriate financial adjustments (positive or negative)*” made to the original Equal Monthly Budget Payments. On balancing, it was provided under clause 11 that the new Equal Monthly Budget Payments were ascertained and amortised over the remaining months of the Financial Year.

210. As a result, in the event CNG’s quarterly correction revealed that a positive financial adjustment was required to be made in favour of Marketing, clause 11(1)(b) of the 2004 Agreement contains no express provision in accordance with Regulation 10(3) that the corrected commission due to Marketing (under Regulations 10(1) and (2)) shall be paid not later than the last day of the month following the quarter in which it became due. That may or may not have been the case. I add that the relevant quarters for the purposes of Regulation 10(3) are as described in that Regulation.
211. Again, derogation is not the end of the story, however. Regulation 10(4) provides that any agreement to derogate from Regulations 10 (2) and (3) is only void if the agreement to derogate is to the detriment of the commercial agent. It must therefore be considered whether clause 11.1 was to the detriment of Marketing such that it is indeed void and, if void, what consequences then follow. In my view, this exercise can only be conducted by comparing Marketing’s position under clause 11 of the 2004 Agreement and Marketing’s position if the provisions of Regulation 10(3) had been replicated in clause 11.

212. Against this background, in so far as the balancing element of the machinery formed an integral part of the accounting machinery as a whole, it is apparent that clause 11 of the 2004 Agreement aimed to provide Marketing with a regular monthly estimated payment enabling it to receive a constant cash flow which was then refined upon the acquisition of specific meter readings and knowledge of the actual amount of gas supplied to any given customer, and an updated bill for them. Waiting for the calculation of actual figures would delay payment to Marketing, but the machinery in the 2004 Agreement avoided delay and therefore apparently benefited Marketing. I therefore agree with the Joint Liquidators' analysis of the benefit that such an overall approach afforded to Marketing, rather than detriment.
213. Whilst Marketing asserts detriment in general terms in respect of its case that commission should have been paid on a transaction-by-transaction basis, Marketing has provided no specific example of detriment due to the adoption of the balancing machinery for the payment of commission. It has placed no supportive financial evidence before the court in its Witness Statements or submissions to enable the court to compare the way in which balancing under clause 11 actually worked with any different dates on which final commission would otherwise have been received by Marketing if the commission, or the balancing element of the final commission, had been paid differently in accordance with Regulation 10(3).
214. It is therefore impossible to assess or to quantify any financial detriment for the purposes of supporting the CNG Proof of Debt. Specifically, when the CNG Proof of Debt is calculated by reference to the CNG Spreadsheet and CNG's

adoption of either the methodology in clause 11 or its own alternative procedures in so far as the dates of final payment differed from the date in Regulation 10(3).

215. As to Marketing's submissions and Mr Horner's evidence in respect of negative commission, I consider that the limited selection of negative figures which Marketing points to in the CNG Spreadsheet are balancing adjustments where Marketing had been overpaid previously. I do not consider this to be a derogation from the Regulations. In my judgment, there was no extinguishment of the right to commission here in derogation from Regulation 11. Furthermore, the 1993 Regulations are not concerned with liability clauses or the subject matter of clause 16 of the 2004 Agreement.
216. Ultimately, there is a fatal circularity in Marketing's primary case based upon the application of the 1993 Regulations to the 2004 Agreement on this appeal. Even if I am wrong about the impact of the 1993 Regulations on the 2004 Agreement, the CNG Spreadsheet upon which Marketing relies as the starting point for the calculation of the sums claimed in the CNG Proof of Debt was not a transaction-by-transaction based calculation. Marketing placed no evidence before the Court in respect of any other method of calculation to replace the terms it contended were invalidated under the 1993 Regulations or of the sum that would have resulted from the application of that methodology in respect of the CNG Proof of Debt.
217. At trial Mr Susman discontinued Marketing's case on appeal that to the extent that CNG failed to make or preserve records with the result that it put it beyond its power the ability to account to Marketing for commissions in the manner

required under the 2004 Agreement and the 1993 Regulations, Marketing was entitled to damages or aggravated or exemplary damages for breach of the provisions of the 2004 Agreement, as varied and to the extent modified by the 1993 Regulations. Such damages being based on Marketing's best estimate of the commissions which CNG should have paid, together with interest. No submissions were made in respect of the operation of Regulations 3 and 12.

### **Issue 3: The Appropriate Commission and Costs under the 2004 Agreement**

#### **Interpretation of the 2004 Agreement**

218. There is no dispute about the principles that apply in interpreting the 2004 Agreement. The principles set out in Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173 are summarised in Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd [2023] UKSC 2 at [29] and discussed in some detail in Chitty on Contracts (25<sup>th</sup> edition) and in The Interpretation of Contracts (8<sup>th</sup> edition) by Sir Kim Lewison. I apply these principles.
219. The core principle is that an agreement must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would have been reasonably available to the parties when they entered into the contract, would have understood the language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task: Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900 at [14]; Arnold v Britton [2015] UKSC 36, [2015] AC 1619 at [15].

220. The court must also consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.
221. Finally, interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and its consequences are investigated.
222. In the present case, it is common ground that the 2004 Agreement was not drafted by legal representatives. It is set out on CNG's own headed notepaper. In Mr Wall's Witness Statement he says that it was drafted by the CEO of CNG. The definition of the parties as "*Seller*" and "*Buyer*" are unhelpful, for example. That said, I consider that the purpose of the Agreement is clear from the recitals.
223. The contracting parties to the 2004 Agreement were controlled by individuals with long experience of the gas supply industry and its practices. Mr Walls and Mr Leworthy had been employed by CNG and then worked for CNG as independent commission agents. CNG and Marketing had traded together since 1997. I also note that the 1999 Agreement contained substantially similar commission machinery to the 2004 Agreement.

**The Parties' Cases on Interpretation and Calculation in respect of Commission for Gas Supply Agreements under the 2004 Agreement**

224. Marketing made no submissions in opening its appeal in support of its interpretation of the 2004 Agreement. I have carefully considered and reflected on their case as set out in their Skeleton Argument and in their submissions in reply to the Joint Liquidator's submissions.

225. Subject to the issues of the deduction of costs, it is accepted by Marketing and the Joint Liquidators that the rates of commission payable by CNG to Marketing under the 2004 Agreement were 25% for new gas business sourced by Marketing and 15% for existing business.
226. Marketing submits the 2004 Agreement specifies which costs are to be taken into account in arriving at a figure for CNG's gross profit for the purposes of calculating commissions due to Marketing in relation to Gas Supply Agreements and that no other costs ought therefore to be taken into account. Under clauses 9.1 and 9.2 of the 2004 Agreement the costs are specified as "*Gas Costs (including Storage) and Gas Transportation Costs*". In essence, where the parties differ, is Marketings contention that "*Gas Costs*" has a narrow ambit and that it was far too widely interpreted by CNG in the CNG Spreadsheet.
227. The terms "*Gas Costs*" and "*Gas Transportation Costs*" are not defined in the 2004 Agreement despite being capitalised. They do not appear as defined terms in the Uniform Network Code or the Transportation Principle Document, which provide the industry regulations for gas supply.
228. Marketing says that under clause 9 of the 2004 Agreement costs such as finance costs, third party agents' commissions and revenue assurance (that is bad debt insurance premiums) should not have been taken into account by CNG as "*Gas Costs*" or "*Gas Transportation Costs*" for the purposes of the calculation of its commission. It submits that these are not direct costs with regard to gross profit. They are only proper deductions with regard to estimated indirect costs or overheads in assessing net profit in general. Accordingly, Marketing deducted

these sums from the figures in the CNG Spreadsheet when formulating the CNG Proof of Debt.

229. Marketing also contends that CNG is not entitled to deduct VAT or any other levy or taxation such as Climate Change Levy in arriving at its gross margin on gas sales. It says no mention is made of such matters in clause 9. Particularly, Marketing submits, in circumstances where VAT is the subject of specific reference in clause 10.1(a) in respect of Siteworks Agreements.
230. Marketing relies on the legal principle of construction of contractual language applied in Hare v Horton (1833) 5 B & Ad 715 for example, that the explicit reference to VAT in clause 10 implies that VAT was not intended to apply for the purposes of clause 9 given no similar reference to the tax was made there.
231. The Joint Liquidators' stance is that the Costs described in clause 9 can rightly include these deductions. These matters were addressed in detail by Mr Brown in oral submissions on behalf of the Joint Liquidators.

### **Conclusions on Costs and Gas Supply Agreements under the 2004 Agreement**

232. As a starting point, the label "*Gas Costs*" and the fact the parties expressly stated that the Gas Costs were to include "*Storage*" reflect an objective intention that the relevant costs were not intended to be limited to the costs of Storage. Although Marketing did not identify any other permissible Gas Costs or deductions at trial, the drafting plainly supports a clear intent that there were other costs which were intended to be Gas Costs.

233. In my judgment, when interpreting the ambit and components of these undefined Gas Costs it is important to bear in mind that the 2004 Agreement was a commission agreement. As such, its purpose was to incentivise Marketing by giving Marketing a share of the profit to which CNG was entitled. Against this background, I consider that CNG was entitled to deduct its finance costs as part of the Gas Costs, for example.
234. The Joint Liquidators also refer to the parties' prior 1999 Agreement which was intended to precede the formal contract. The 1999 Agreement explicitly included reference that CNG's finance costs, the cost of the "*Bond*", were to be included in the gross gas margin for 1999 "*and onwards the cost of the Bond would be included in the Gross Margin calculations*".
235. It is not disputed by Marketing that the deduction of finance costs was the acknowledged and settled practice between CNG and Marketing prior to the 2004 Agreement. In circumstances where Marketing has not sought to suggest that the 2004 Agreement was intended to reverse the deduction of finance costs, I consider that this forms part of the matrix of fact as relevant extrinsic factual evidence for the purposes of interpreting the "*Gas Costs*".
236. As to third party agents' commissions, the 2004 Agreement expressly contemplates that other agents' work may sometimes be required or involved in obtaining the Gas Supply Agreements or Siteworks Agreements. The parties stated at clause 6 of the 2004 Agreement that:

*"Where a Secondary Agent has been appointed Commission to the Seller will be calculated in accordance with Clauses 9 and 10 but will be net of Commissions paid to the Secondary Agent."*

237. Reading clauses 5 and 6 of the 2004 Agreement together, I consider that it is tolerably clear that it was intended any Secondary Agent would have an Agency Agreement with CNG but be managed by Marketing. The Secondary Agent was to receive its commission first. Marketing's commission would then be calculated on that net sum. Accordingly, in my judgment, CNG was correct to deduct any Third Party or Secondary Agent's costs as Gas Costs under clause 9.
238. Revenue Assurance is an analogous cost which I again consider that CNG was entitled to deduct. It is described as a technological mechanism or product acquired by businesses to assist in the management and collection of its debts. It relates directly to the production of the funds from which commission will be paid. It is not a general or overall kind of business expense that is not directly linked to the production of the relevant funds. As such, CNG's incurring of this cost was an objective benefit to both CNG and to Marketing in generating its gross margin.
239. In my judgment, on the true interpretation of the 2004 Agreement, VAT was also properly and rightly included by CNG in the calculation of the Gross Gas Margin for the purposes of clause 9. VAT was not a sum which CNG collected or retained on its own behalf as part of its own business profits or revenue. The VAT was collected by CNG on behalf of HMRC. CNG was obliged to account for the VAT to HMRC and to remit the VAT to HMRC.
240. I do not consider that Marketing's reliance upon the terms of clause 10 provides a firm foundation for its argument that the parties did not intend VAT should be part of the Gas Costs. Marketing is, of course, correct that VAT was expressly

stated to be a deduction in respect of Siteworks Sales Income in clause 10, and that clause 10 immediately followed clause 9 and stands in juxtaposition to it. Factors which may have borne weight if the 2004 Agreement was professionally and carefully drafted. Here, however, the specific issue to be determined arises precisely because the 2004 Agreement is not the product of careful drafting. The parties omitted definitions of terms which were apparently intended to be defined. Regrettably, and read as a whole, the 2004 Agreement presents as an example of incomplete or careless drafting. This factor therefore has little weight.

241. Moreover, the suggestion that VAT was not intended to be treated identically for the purposes of clause 9 and clause 10 makes no objective sense on a holistic reading of the 2004 Agreement. There is no obvious reason, and no reason at all has been identified by Marketing, why there should have been a different, and conflicting, treatment of VAT for the purposes of the commission calculation in respect of Gas Supply and Siteworks costs. If anything, the express reference to VAT in clause 10 is suggestive of oversight in failing to include a similar express deduction in respect of tax in clause 9 or that the deduction was so obvious an element of the Gas Costs that the parties' emphatic focus fell elsewhere.

242. I agree with the Joint Liquidators' reading that clause 10 deals specifically with Siteworks Agreements wherein the ambit of deductible costs are significantly fewer than those that might be related to the purchase, storage and supply of gas from third parties within the larger national pipeline network, while in contrast clause 9 adopts general, non-specific terms as to costs which are clearly

intended to encompass a number of potential costs. Clause 10 indicates that the parties did have it in their minds that VAT or levies collected by CNG should not form any part of any calculation of profit for commission.

243. Ultimately, if Marketing's interpretation of clause 9 was correct, the calculation of its commission for Gas Supply would have included the payment to it of commission on the VAT to which CNG was not entitled and for which Marketing did not have to account to HMRC. I do not consider that can have been the parties' objective intention.
244. In my judgment, on the true interpretation of the 2004 Agreement, Climate Change Levy ("CCL") was also properly and rightly included by CNG in the calculation of the Gross Gas Margin for the purposes of clause 9. Each of the same points set out above in respect of VAT applies equally to CCL. CCL is a tax levied on businesses who consume various commodities such as natural gas. It was not revenue which CNG was entitled to retain as profit. It was required to be remitted to HMRC.
245. Standing back and conducting an iterative check as to each parties' case regarding each of the relevant terms of the 2004 Agreement, I consider that Marketing's constrained reading of the undefined terms used in clause 9 represents an uncommercial interpretation of the 2004 Agreement and does not accord with the basic purpose of the commission arrangement. I do not therefore accept the principle of Marketing's case that CNG made unlawful deductions in respect of the Gas Costs or Gas Transportation Costs as alleged.
246. Separately, as mentioned already, Marketing points to the CNG Spreadsheet where, it says, it was assumed by CNG that where a gross loss arose, instead of

zero commission being due to Marketing, it was assumed commission was due to CNG from Marketing. Marketing relies upon clause 16 of the 2004 Agreement (as well as the 1993 Regulations), to assert that if, in relation to any particular transaction, CNG paid more for gas than it charged its customer, so as to make a loss, rather than a gross profit on the transaction, that transaction must be ignored for the purposes of calculating commission.

247. As explained above, I am not persuaded that Marketing's reading of the CNG Spreadsheet is correct in this regard. I do not consider the relevant entries relate to gross loss or that clause 16 of the 2004 Agreement has any relevance to these figures. At face value, and in the absence of any contradictory oral evidence as to the compilation of the CNG Spreadsheet, the negative figures shown in the Spreadsheet simply represent CNG's operation of the balancing process under clause 11 following the obtaining of actual figures in place of the estimated figures upon which monthly commission payments had already been made to Marketing. Rather than supporting any alleged CNG requirement that Marketing should pay commission to CNG as Marketing suggests, these figures represent the reconciliation of the account. They are not, therefore, to be added back as Marketing contends. They should not form part of the sum in the CNG Proof of Debt.

248. In my judgment, as a matter of pure contractual construction, the Joint Liquidators are correct that Marketing seeks to remove valid Gas Costs within the scope of clause 9 of the 2004 Agreement from the calculation of the commission that was due under the 2004 Agreement.

## **The Evidence as to the Commission due in Secondary Agent Cases under the Alleged Oral Variation**

249. In Mr Walls' First Witness Statement he said the 2004 Agreement was varied such that CNG would pay commission at the rate of 50% not 25% for Siteworks where Secondary Agents were involved. Marketing therefore claimed a blanket 50% commission during the period when it carried out Siteworks but has no data. The Joint Liquidators assert that Marketing cannot rely upon any oral variation and, in any event, that it cannot discharge the burden of proof that there were oral variations to increase the percentage of Siteworks Agreements from 25% to 50% based upon the alleged 2005 agreement.
250. In the Claim, CNG denied both the oral variations upon which Marketing relies. In his Witness Statement, Mr England appears to accept that Marketing was entitled to a 50/50 share in cases where a Secondary Agent was used, subject to those cases where TEGS acted. As is apparent on a review of the CNG Spreadsheet the historic involvement of TEGS made relatively little financial difference in practice. It is evident that the cases in which TEGS acted were fairly minimal overall.
251. The Siteworks Commission Reports show that there were certain instances where a zero appears in the Secondary Agent's column and 50% would therefore have been properly payable under the 2004 Agreement. It is equally clear that the Siteworks Commission Reports record that 50%, rather than 25%, was paid to Marketing during this period in cases where a figure was given for a Secondary Agent. Notwithstanding the denial pleaded in the Claim, this apparently evidences the longstanding and identical treatment which Marketing

asserts was agreed. It is material which may well have supported an estoppel argument as between CNG and Marketing in the absence of production of a written variation of the 2004 Agreement in accordance with clause 21.

**The Evidence as to the Commission due in respect of Free of Charge Meters under the Alleged Oral Variation**

252. Given the conflicting evidence before me in respect of FOC meters, in the absence of the scope of the disclosure contemplated in the Claim with regard to the issue of these alleged variations, and without the benefit of cross examination of the relevant witnesses, I am not persuaded that the documentary evidence upon which Marketing relies is sufficiently strong on its own to satisfy the burden of proof that the oral variation for which Marketing contends in respect of FOC meters is made out. This is not a case where the statement of one party is obviously lacking in credibility: Browne v Dunn [1893] 6R 67; Fielding v Hunt [2017] BPIR 554.

253. In addition to Mr England's Statement, the alleged oral variation was denied in the Claim in circumstances where CNG alleged it had overpaid Marketing.

**The Legal Effect of the Alleged Oral Variations to the 2004 Agreement in 2005 and 2016**

254. As a matter of principle, Mr Susman KC submits that Marketing's alleged variations to the 2004 Agreement in respect of Secondary Agents and FOC meters are simply a matter of evidence. I disagree that Marketing's position is so straightforward. The 2004 Agreement contains a clear no oral modification clause at clause 21.

255. Where a non-oral modification clause exists, then even if both parties agree an oral variation of a contract that variation is invalid: MWB Business Exchange Centres Ltd v Rock Advertising [2019] AC 119.

256. The potential exception to the enforcement of a no oral modification clause is the principle of estoppel. As Lord Sumption explained in MWB at [15]-[16]:

*“15. ...What the parties to such a clause have agreed is not that oral variations are forbidden, but that they will be invalid. The mere fact of agreeing to an oral variation is not therefore a contravention of the clause. It is simply the situation to which the clause applies. It is not difficult to record a variation in writing, except perhaps in cases where the variation is so complex that no sensible businessman would do anything else. The natural inference from the parties’ failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with their eyes open.*

*16. ... In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which*

*the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA [2003] 2 AC 541, paras 9, 51, per Lord Bingham of Cornhill and Lord Walker of Gestingthorpe.”*

257. The correct starting point is therefore that clause 21 of the 2004 Agreement operates to prevent any of the alleged oral variations to the 2004 Agreement from having any legal validity. It is for Marketing to seek to establish an estoppel if that is the basis of its claim. No estoppel was pleaded by Marketing (or CNG) in the Claim and Marketing did not advance a case based upon any form of estoppel in its Skeleton Argument or in opening the appeal.
258. Marketing has, however, exhibited material on appeal which does show a contemporaneous 50/50 split made by CNG where a Secondary Agent was used and material in respect of payments in FOC meter cases which it says reflects the additional oral variation it says was made in 2016.
259. The Joint Liquidators say that for the court to allow circumvention of clause 21 by any estoppel so as to increase the claimed percentage owed to Marketing would directly impact upon the larger body of creditors of CNG by inflating the potential of Marketing’s claim. They say that as a matter of law which cannot be resiled from by the Joint Liquidators, the alleged oral variations are simply invalid.

260. Mr Weaver submits that even if there had been an oral modification which the court considered gave rise to an estoppel, the problem Marketing has is that an estoppel created by CNG as debtor does not bind the Joint Liquidators and the court cannot therefore give effect to it. An estoppel, while binding on a company or individual who gives it, cannot bind a liquidator (or trustee in bankruptcy).
261. Mr Weaver submits this is the case for very good reason. It is not the liquidator or office holder who gave rise to the estoppel. The Joint Liquidators are bound by the statutory scheme of the 1986 Act which requires them to only pay out dividends to a company's true creditors.
262. The Joint Liquidators refer to In re Van Laun [1907] 1 KB 155, where the Court of Appeal, consisting of the Master of the Rolls Vaughan Williams LJ and Buckley LJ, expressly adopted and approved the judgment of Bigham J in the same case, holding:

*“The trustee’s right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against [the trustee]. In the present case the trustee desires to satisfy himself that the claims for costs represent a real indebtedness. He can only do this by seeing and examining the bills.”*

263. In Re Van Laun, there were a series of accounts stated between the bankrupt and the creditor for solicitors' bills. They were all matters where the bankrupt had plainly assented to the bills being charged and agreed the amounts of them and plainly would have, if there were any alteration of position by the solicitor charging the bills, been estopped from denying that there were accounts stated

and being liable upon those accounts. These matters were held not to bind the trustee.

264. The Joint Liquidators also rely upon Re Exchange Securities & Commodities Ltd (In Liquidation) [1988] Ch 46, where, following a review of the historical authorities, Harman J said at [58D-E]:

*“The liquidator, ..., is entirely free to say ‘I am not the company for this purpose. I am here fulfilling the statutory function of considering the debts of company and paying its true creditors. Let all creditors come in and satisfy me as to their true debts regardless of what may have been the position caused by estoppels, which are only, of course, rules of evidence, as between the company and you before it went into liquidation’”.*

265. And at [60]:

*“... the court must consider the nature of the obligation imposed by the statutory scheme - that is, to distribute such assets as there are rateably amongst the true creditors and then to say, ‘Will an estoppel operate in any way to defeat that?’ and the answer plainly is ‘Yes’, because it will allow inflated or fictitious creditors to come in and deplete the estate. It seems to me that that observation is entirely material and relevant to the decision here.*

*Therefore, in my judgement, the matter is capable of being dealt with and should be dealt with under paragraph (2) of each summons by my saying that in any case the provisional liquidator, the official receiver, must value the unsecured claims according to their true values without regard to any alleged estoppels arising against the companies ...”*

266. On the facts of Re Exchange, since it was the companies and not the liquidator which had issued the fictitious monthly reports upon which the alleged estoppels sought to be relied upon were based, the liquidator was not estopped from resiling from such representations.

267. Mr Susman and Ms Thomson’s submissions in response to the Joint Liquidators’ arguments about the effect of clause 21 were to the effect that Re

Exchange is simply authority that an estoppel will not bind in cases where there has been some kind of fraudulent scheme. That is not correct.

268. It is apparent that there is some degree of uncertainty as to the circumstances in which a company liquidator may be bound by an estoppel arising against the company. It is clear that a liquidator will be bound by an estoppel arising as a result of a representation, in a share certificate issued by the company, that the shares are all paid up: Re British Farmers Pure Linseed Cake Co [1878] 7 Ch D 533, for example. Assuming all the components of estoppel are made out, the liquidator cannot claim a contribution from the representee, even where the shares were not in fact fully paid up.
269. That said, as the authors of *The Law of Waiver, Variation, and Estoppel* (3<sup>rd</sup> ed.) suggest at para. 9.149, the share cases may not be examples of cases where a liquidator was bound by a pre-existing estoppel but examples of a new estoppel arising against the liquidator. As they suggest, the most credible approach reflects Harman J's narrower ground in Re Exchange and is that the liquidator is bound by estoppels arising against the company except where the effect would hinder the carrying out of a statutory duty.
270. Taking these matters together, regardless of the fact CNG may have been bound by an estoppel regarding the payment of Siteworks commission at 50% regardless of the involvement of Secondary Agents, and may have been so bound in respect of FOC meters payments if there was stronger paper evidence, I hold that the Joint Liquidators are not bound as a matter of law or evidence in the performance of their statutory duties by the alleged oral variations.

271. As a result, in circumstances where any estoppel would not bind an office holder, the Joint Liquidators are correct to point out that in the absence of any facts as to whether there was or was not a Secondary Agent involved in the relevant transactions during the period to September 2021, it is wrong for Marketing simply to assume that 50% is necessarily the correct commission figure to be applied in all cases and to seek to multiply any relevant sum by that figure.
272. When any estoppel would not bind the office holder, the 50% figure would be correct if no Secondary Agent had been used, but only 25% was payable under the 2004 Agreement in those cases where a Secondary Agent was used. The underlying data is therefore needed to evidence Marketing's percentage was correctly applied throughout, but no data has been produced.
273. Accordingly, for the reasons set out by the Joint Liquidators, Marketing's case that it is owed a full 50% commission on all Siteworks profits is not made out on the evidence before me. Marketing was entitled to 50% of Siteworks profits under the 2004 Agreement by way of commission only where it introduced the customer. It was entitled to 25% of Siteworks profits under the 2004 Agreement by way of commission where another agent did so.
274. I note that it is probable that the renewal of CNG's software licences and the ability to obtain the kind of disclosure that CNG was bound to make in the Claim would have removed the calculation issue. It is also possible that disclosure of the kind ordered in the Claim may have evidenced that there had been a formal variation in accordance with the requirements of clause 21 setting out the oral agreements which Marketing describes.

## **The Reliability of the CNG Spreadsheet and Extrapolation on Appeal**

275. There remains the basic issue of the reliability of the CNG Spreadsheet and Marketing's approach to the figures for the purposes of the CNG Proof of Debt, in any event.
276. Mr Susman KC submitted in opening that when the Joint Liquidators were appointed they had access to the raw data available on CNG's Equinox system held on computers. This data could have been printed out or transferred to another computer on the date the Joint Liquidators were appointed and before the decision was taken not to renew the software licences required to access it. He said the Joint Liquidators must have known that the Claim was on foot and there were disclosure obligations in the Claim. The fact their solicitors had stated that an account was going to be carried out to determine the balances shows they must have had sufficient documents and information to carry out that exercise at that stage.
277. Mr Susman said that he did not submit that this was a case of misconduct or "extreme naughtiness", but the fact the Joint Liquidators did not take easy steps to preserve the data was very unfortunate. As Mr Susman put it, this should enable the court to draw inferences that may not otherwise have been drawn and entitle Marketing to some indulgence or leeway in doing the best that it could in the circumstances to use the CNG Spreadsheet and to extrapolate and reconstruct data. Particularly, as these were matters in the Claim and Regulation 12 of the 1993 Regulations specifically provides that a commercial agent shall be entitled to demand that he be provided with all the information which is

available to his principal and which he needs in order to check the amount of the commission due to him.

278. Mr Susman submits that because Mr Horner's Amended Spreadsheet relies on the CNG Spreadsheet and certain materials which came from CNG the information is reliable and should be given material weight. Where any difficulty arises as a result of the lack of relevant information it should be resolved in favour of Marketing, unless contradicted by other available evidence. In this regard, Mr Susman relied on Infabrics Ltd v Jaytex (No 2) [1985] FSR 75 and Malhotra v Dhawan [1997] 2 WLUK 464.
279. The Joint Liquidators urge the court to be cautious about taking such an approach and simply accepting these figures. They say Marketing has not sought or supplied the underlying financial data to accurately ascertain their debts. The court and the general body of creditors cannot accept an estimate of debt based upon assumptions.
280. The Joint Liquidators identify as a fundamental issue the inherent evidential accuracy or otherwise of the CNG Spreadsheet as the foundation of Marketing's appeal. Amongst other matters, in circumstances where it is apparent that a comparison of the CNG Spreadsheet for the Siteworks with the Siteworks Commission Reports produced for the same periods of time demonstrates the figures in each are not identical they say there must be a question as to how much confidence can, or should, properly be placed in the spreadsheets in respect of the commission claims for Gas Supply as well. An issue they assert could potentially have been resolved if this appeal had been advanced on the

basis of the relevant primary data. They also challenge the basis for, and logic of, Marketing's extrapolated figures.

281. In my judgment, even if I am wrong about Marketing's reliance on the 1993 Regulations and / or any element of the interpretation of the 2004 Agreement or the alleged variations to the 2004 Agreement, the facts here are rather different to those considered in Infabrics. There, the court was faced with the difficulty that most of the relevant paper invoices, stock records and similar documents which were in the Defendant's possession at the relevant dates had been physically lost or destroyed by the Defendant's employees after the action commenced. The effect of the destruction of the documents in that case was that the evidence was lost to everyone forever. A state of affairs the Judge described as "*most lamentable*" and "*wholly inexcusable*".
282. Whilst bearing in mind the principle that the onus rested on the plaintiff to prove they had suffered damage in that case, the judge said that in these circumstances he was not prepared to give the Defendant the benefit of any doubt or to draw an inference in their favour where a document, if not destroyed would have established the matter beyond doubt, and that he was prepared to assume that sales were made on or after the relevant date where the fate of the relevant garments in the case was wholly unaccounted for.
283. In a case where prejudice was deliberately caused to the plaintiff as they could no longer obtain access to material to support their claim or to undermine the wrongdoer's defence, it was entirely appropriate that the judge treated the defendant's evidence with caution and declined to give the wrongdoer the benefit of the doubt.

284. In Malhotra v Dhawan (as cited above), proceedings were issued in 1980, but a Defence was not served until October 1983. In March 1984 the Defendant moved offices and in connection with that move destroyed the files of clients for whom he no longer acted, but the primary accounting records remained, as did other contemporaneous materials. It was found as a fact that the files were not destroyed for the deliberate purpose of destroying the evidence in the claim.
285. Morritt LJ (with whom Saville LJ and Sir Patrick Russell agreed) set out the limits of the relevant principle in play that if the wrongdoer prevents the innocent party proving (there) how much of his property has been taken, then the wrongdoer is liable to the greatest extent possible in the circumstances. First, if it is found that the destruction of the evidence was carried out deliberately so as to hinder the proof of the plaintiff's claim, then such finding will obviously reflect on the credibility of the destroyer. In such circumstances it would enable the Court to disregard the evidence of the destroyer in the application of the principle. Second, if the Court has difficulty in deciding which party's evidence to accept, then it would be legitimate to resolve that doubt by the application of the presumption. But, thirdly, if the judge forms a clear view, having borne in mind all the difficulties which may arise from the unavailability of material documents, as to which side is telling the truth, the application of the principle cannot require the judge to accept evidence he does not believe or to reject evidence he finds to be truthful.
286. In the present case, there is no evidence before me on this appeal that the decision that was taken by the insolvency practitioners not to renew the software licences was related to the Claim or the dispute with Marketing. Irrespective of

the view that may be taken relating to the decision to allow the software licences to lapse given the disclosure obligations in the stayed Claim and the need to calculate unpaid sums accepted to be due to Marketing for its work in the run up to the administration, and / or to do so without first ensuring there was a physical copy made of all potentially relevant data, it is also the case that CNG's data has not been proved to have been lost or destroyed in the true sense of that word.

287. The evidence before the court is that the raw data remains available in this case, albeit at the cost of restoring the software licences to access it. I have been shown a single page print out which lists the folders which were / are held on the server.
288. It is only if the software licences had been restored and CNG's data had been accessed and found to be corrupted or destroyed that I consider the opportunity to utilise the relevant primary evidence would truly have been lost or destroyed in this case. Alternatively, potentially, if the probability of corruption or destruction was so high that the considerable costs of restoring those licences could not properly be justified.
289. Mr Weaver stressed in answer to my question regarding Mr Dwyer's Witness Statement and the content of the correspondence that Mr Dwyer's evidence as to the possibility of corruption or missing documentation was simply made by way of a Joint Liquidator's standard disclaimer. He confirmed these comments were not in fact based on any actual information that this was thought likely to be the case here.

290. In my judgment, in so far as it was the substantial costs of renewing the software licences and associated costs and/or any risk of CNG's raw data having lost its integrity that deterred Marketing from pursuing the restoration of the licences at its own cost and drove its decision to rely upon the CNG Spreadsheet and other materials, it was open to Marketing to exercise its ability under the exception to the general rule in IR 14.5 to seek to apply first to the court for an order that the insolvent estate should bear the costs of restoring the licences to retrieve the data instead.
291. The application of IR 14.5 is fact specific. Each of the points which Mr Susman made by way of submission as to Marketing's reasons for seeking indulgence in considering the CNG Spreadsheets and the various extrapolations could instead properly, and powerfully, have been deployed in support of such an application under IR 14.5. However, no such application was attempted.
292. Mr Weaver points out, without conceding what the outcome of such application may have been, Marketing could have supported its stance that CNG's data and materials were essential by providing evidence that it could not afford to pay for the restoration of the licences as Marketing is itself insolvent. The court is aware that in the liquidations of CNG and Energy or either of those liquidations there are funds in the estate of tens of millions of pounds.
293. The court may have concluded that it was unfair for Marketing to pay to obtain data in the possession of the Joint Liquidators on these facts when the data formed part of CNG's books and records which would have been immediately available to it if held in a different form. Alternatively, the court may have concluded that it was unfair for the reasons advanced by Mr Susman that the

licences were allowed to lapse without CNG's data having first been printed off or transferred in circumstances where the Claim was stayed. Alternatively, when it should have been understood that services had been provided by Marketing to CNG for 2 years up to the date of the administration for which it had not been paid and where CNG's records would be required.

294. In addition, Marketing could have pointed to the Joint Liquidators' consistent refusal to accept the figures in the CNG Spreadsheet despite the data problems caused to Marketing; their opposition to the lifting of the stay on the Claim where the relevant disclosure had been due to be given by CNG without the payment of the costs of that process by Marketing; and their objection to Marketing's suggestion that the appeal should proceed instead by taking a series of legal preliminary issues first against a background where the parties were proceeding on the basis it was for Marketing alone to pay these substantial costs or face the risk Marketing could not discharge the burden of proof to support the CNG Proof of Debt.

295. There was, therefore, a procedural avenue available to Marketing under the IR which it did not seek to explore in order to obtain the underlying raw and up to date data if the software licences were restored. Indeed, it remained open to Marketing to seek to make such an application at the hearing of the appeal in response to Mr Weaver's submissions. Marketing did not do so.

296. It is also right to note that added to the lack of CNG's data is a relative lack of data from Marketing itself. Marketing's contemporaneous accounting data, books and records have not been disclosed to support its appeal. This material would appear to be directly relevant. It ought to show the monies which were

coming in and going out and Marketing's assets and liabilities, including the debts owed to it. However, it has not been placed before the court.

297. Just as the Joint Liquidators could not accept the CNG Spreadsheet, and regardless of Marketing's case as to the need for a transaction-by-transaction calculation or the deductions it contends were wrongly made or the commissions that should have been applied, Marketing has not discharged the burden of proof to satisfy the court that the content of the CNG Spreadsheet provides a satisfactory and reliable basis for the calculation of the CNG Proof of Debt as matters stand. As Mr Horner indicates in his own evidence for Marketing, to accept the CNG Spreadsheet it is necessary to assume that it accurately reflects the underlying financial transactions.

298. In the present circumstances, there is insufficient evidence before the court to justify the making of such assumptions that the relevant underlying data in respect of Gas Supplies is accurately represented. The Witness Statements set out good reasons to question the accuracy of the methodology and calculations that CNG carried out in producing all the spreadsheets it presented to Marketing.

### **Marketing's Calculation of the Siteworks Claim**

299. As regards Siteworks commissions, Marketing says that the only available information concerning commission for Siteworks Agreements is set out in the CNG spreadsheets which reflect that gross profit was made by CNG on Siteworks Agreements for the period January 2020 to September 2021 in the total sum of £233,070. In its Skeleton Argument it submitted that Marketing's proof should be admitted in the sum of £116,535, 50% of the total sum.

300. Marketing has compared the information contained in the CNG spreadsheets with the information contained in Siteworks Commission Reports, where information for a particular period is available from both sources. That is for the period May 2019 to February 2020. As set out in a table compiled by Marketing's counsel in their Skeleton Argument, none of the corresponding figures is identical. Marketing submits that the differences in CNG's own sets of figures support the conclusion that CNG was apparently under reporting gross profits made on Siteworks Agreements in the Siteworks Commission Reports. It therefore relies on the CNG spreadsheets showing higher figures to claim its commission.
301. The Joint Liquidators point to the fact that in terms of the figure of £233,070 shown on the CNG spreadsheet for January 2020 to September 2021 as CNG's Gross Profit for this period, Marketing's counsel themselves therefore raise an issue as to the accuracy of this figure. They say there is no obvious logic why CNG should have been under reporting profits in the commission reports so the court should rely upon the CNG spreadsheet, or that the spreadsheet should not require adjustment.
302. On studying the Spreadsheet, I can see that in some cases there was a significant difference between the CNG spreadsheet and the commission report that was also available. In the majority of cases the figure on the CNG spreadsheet is higher than the figure stated in the commission report, although that is not the case in August 2019 if VAT is included in the commission report or in November 2019. This is unsatisfactory.

303. As the CNG spreadsheets do not extend to the period October to December 2021, Marketing extrapolated data from the CNG Spreadsheets for the preceding 3 months to account for this additional period. It says this shows CNG had made a total gross profit of £47,178.48 and that it had taken 50% of this sum giving £23,589.24. The total sum of £140,124.24 is £116,535 plus £23,589.24.
304. There is no legitimate rationale for extrapolating figures from CNG's spreadsheet for July, August and September 2021 in the absence of any figures to evidence CNG's Siteworks profits for October to December 2021. The fact that these were the figures for the preceding three months does not compel the conclusion these figures were likely to be replicated or provide any evidence the extrapolation is likely to be accurate.
305. On examination of Marketing's Siteworks Commission Spreadsheet, all but the last 3 entries for January to March 2020 were paid to Marketing. During the hearing, the Joint Liquidators therefore accepted that the final three entries on that spreadsheet were properly due and owing to Marketing.
306. Although Marketing originally looked at CNG's profit and divided by 50% to reflect its case Marketing's junior counsel, Miss Thomson, also explained matters slightly differently on the first day of trial. She set out the calculations she had carried out from 2010 based on the Siteworks spreadsheet she produced. That involved taking the figures for Siteworks Agreements in the spreadsheet to March 2020 and then applying the same overall percentage as she said appeared to have been used in 2020 and 2021 of about 43% rather than 50%.

For the reasons set out above, Marketing is not entitled to a flat rate percentage commission of 50%, or indeed 43%, based on its alleged oral variation.

307. It is accepted by the Joint Liquidators that Siteworks were carried out and Marketing was not paid during this period. However, the Joint Liquidators submit that Marketing is asking the court to rely upon an unsatisfactory spreadsheet and to assume that some profit was made where no financial evidence exists and to assume that this is correct and to apply 43% to that figure.
308. For the reasons set out by the Joint Liquidators, Marketing's reliance on estimated and extrapolated data is not sufficient to discharge the burden of proof in respect of the Siteworks claim. This is most unfortunate when it is accepted that Marketing is owed a debt in respect of the Siteworks it carried out. There is, however, presently no reliable evidence before the court to support the calculations it has carried out for the purposes of the CNG Proof of Debt. The estimated basis Marketing advances is not satisfactory to prove the actual quantum of its claim. It is also unfortunate that Marketing has not, for example, attempted to calculate the commission on the basis of its own evidence as to the number and nature of Siteworks projects it carried out, or upon the basis of its own introductions and those of Secondary Agents.
309. Again, this is all the more regrettable when access to CNG's raw data should have provided entirely accurate figures for the Siteworks carried out by Marketing during the entirety of the relevant period. Thus, enabling both Marketing and the Joint Liquidators to quantify the actual debt due to it for the works carried out for CNG.

### **Marketing's Further Submissions**

310. In closing submissions Ms Thomson advanced some alternative calculations for the first time. As these had not been set out in writing, or provided to the Joint Liquidators in advance, I asked that they be set out in writing so there could be no doubt as to what was proposed. I gave time for that and time for the Joint Liquidators response to 10 December 2025.
311. The detailed alternative calculation proposed operated on the basis that the court found against Marketing on its contentions that deductions for agents, finance and Revenue Assurance should not be taken into account in arriving at a figure for gross margin, from which its commission for Gas Supply Agreements is to be derived, but nonetheless finds that Marketing is owed unpaid commissions for the period January 2020 to December 2021. Ms Thomson's methodology arrived at a figure for unpaid commissions for the period April 2020 to December 2021 of £426,074.
312. The Joint Liquidators submit that Marketing seeks to provide a fundamentally different approach to attempting to calculate a proof of debt at odds with the CNG Proof of Debt and its case at the hearing. Such a change of position is not appropriate in light of there having been no application to amend the CNG Proof of Debt or for the court to consider a different basis for the debt claimed.
313. They also remind the court that Marketing's counsel made no submissions as to why it was wrong to remove agents, finance and Revenue Assurance as a matter of contractual construction, and did not contest the Joint Liquidators submissions as to why removal was correct.
314. They point out that if the court is not willing to work from the estimates on the various spreadsheets, Marketings calculation is irrelevant in any event, and that

the calculations are predicated on the acceptance of Marketing's submissions about the treatment of negative figures.

315. Regardless of the issue as to the need for amendment and Marketing's change of position, my findings as to the unreliability of the underlying figures in the CNG Spreadsheet and other spreadsheets mean that I necessarily reject Marketing's alternative calculations based on those materials. Furthermore, I consider that all the heads of deduction were appropriate and that Marketing's case as to the treatment of negative figures is misconceived.

### **Disposal**

316. For the reasons I have given, and except in so far as the Joint Liquidators have agreed that a small portion of the CNG Proof of Debt should have been admitted, I dismiss Marketing's appeal against the rejection of the CNG Proof of Debt.
317. I invite the parties to liaise to attempt to agree a draft order for my consideration to give effect to this judgment. This should include provision in respect of any applications as to the payment of the costs. If the parties cannot agree on a suitable form of order, they should provide a draft composite order, together with brief written submissions on the outstanding consequential matters. Unless I otherwise direct, I will proceed to deal with the outstanding matters on paper. Arrangements will be made for the formal handing down of this judgment.