Neutral Citation Number: [2021] EWCA Civ 1407 Case No: A2/2021/0247

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
Charles Morrison sitting as a Deputy High Court Judge
[2020] EWHC 3362 (QB)

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 4 October 2021

Before :

LORD JUSTICE COULSON
LORD JUSTICE ARNOLD
and
LORD JUSTICE POPPLEWELL

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Between :

(1) BRETT JOHN BUTCHER **(2) DARREN TRUEMAN**	**Claimants/ Respondents**
- and -	
(1) RICHARD PIKE **(2) ADRIAN ARKELL** **(3) KARL CARTER**	**Defendants/ Appellants**

- -

Kyle Lawson (instructed by **Eversheds Sutherland (International) LLP**) for the **Appellants** **Daniel Goodkin** (instructed by **Flint Bishop LLP**) for the **Respondents**

Hearing date : 9 September 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at

10:30am on 4 October 2021

Lord Justice Arnold:

Introduction

1. This is an appeal by the Defendants against an order dated 11 December 2020 made by Charles Morrison sitting as a Deputy Judge of the High Court granting the Claimants summary judgment on two issues of contractual interpretation and making declarations accordingly. Permission to appeal was granted by Stuart-Smith LJ.

2. The dispute arises out of an agreement dated 20 February 2017 ("the SPA") between the Claimants as vendors and the Defendants as purchasers for the sale and purchase of BPG (UK) Ltd ("BPG"). BPG carries on business as an online lettings agency trading under the name "my-let.com". The services provided by BPG include a facility which enables private residential landlords to advertise their properties for let on various online platforms, including Rightmove and Zoopla ("the Platforms"). BPG is able to provide this service by virtue of its "residential lettings membership" of the Platforms, for which it pays membership fees.

3. The Claimants' claim is for two sums of £100,000 due by way of deferred consideration under the SPA. The Defendants' defence is that they are entitled to set-off sums counterclaimed by way of damages for breach of a warranty contained in paragraph 8.3 of Schedule 3 of the SPA that BPG "has not defaulted under any agreement or arrangement to which it is a party" and/or for misrepresentation. The Defendants contend that, contrary to what they say they were led to believe prior to entering into the SPA, BPG operated in breach of a restriction imposed by the Platforms' contractual terms which prevented BPG from advertising lettings on behalf of other commercial lettings agents. The Claimants dispute this.

4. By their application for summary judgment the Claimants sought the determination in their favour of two key issues in the proceedings. The first is whether the Platforms' terms prevented BPG from advertising lettings on behalf of other commercial lettings agents as alleged by the Defendants ("Issue 1"). The second is whether the Claimants are entitled to rely upon disclosures made to the Defendants prior to the SPA otherwise than in a Disclosure Letter referred to in the SPA for the purposes of clause 6.2 of the SPA ("Issue 2").

5. For the reasons given in his judgment dated 7 December 2020 [2020] EWHC 3362 (QB) the judge held that the Platforms' terms did not prevent BPG from advertising lettings on behalf of other commercial lettings agents and that the Claimants were entitled to rely upon disclosures otherwise than in the Disclosure Letter for the purposes of clause 6.2 of the SPA.

6. The Defendants' grounds of appeal are that the judge wrongly construed the Platforms' terms and wrongly construed the SPA. The Defendants do not contend that the judge was wrong to determine these points of construction by way of summary judgment.

Issue 1

7. Although expressed to be a single issue, Issue 1 requires separate determinations in relation to each of the Rightmove and Zoopla terms since these terms are quite different

to each other. It is nevertheless convenient to address two general points before turning to the individual terms.

8. The first is that, in support of their application for permission to appeal, the Defendants submitted that, in relation to Issue 1, there was a compelling reason why the appeal should be heard regardless of its prospects of success, which was that the judge's decision affected thousands of contracts between the Platforms and their members in circumstances where neither of the Platforms was a party to the proceedings. StuartSmith LJ accepted that submission. The Defendants do not suggest that these considerations can affect the correct construction of the relevant terms, however. The Defendants do rely upon the fact that the Platforms have stated that they consider that their terms have the effect contended for by the Defendants; but, as the Claimants point out, this is a question which depends upon an objective consideration of the relevant terms and not upon the Platforms' subjective understanding of them. If the Platforms wished to ensure that their own arguments as to the interpretation of their terms were considered by the Court, it was open to them to apply to intervene in the proceedings. Rightmove is certainly aware of the proceedings, since it wrote to the Court below setting out its views. I presume that Zoopla is also aware of them.

9. The second point is that the Defendants rely upon what they allege is the uncommercial effect of the Claimants' interpretation of the Platforms' terms. The judge did not accept that this factor assisted the Defendants, and nor do I. The Defendants argue that it is commercially improbable that the Platforms would permit a member such as BPG to act as a "sleeve" through which other commercial lettings agents could gain access to the Platforms without paying their membership fees. This is not supported by any evidence before the Court, still less any finding of fact, nor is it self-evident. It depends on factors such as: (i) the charging structure applied by the Platforms (as to which, see further below); (ii) the ease with which commercial lettings agents may be distinguished from residential landlords who own multiple properties and their managing agents; and (iii) the extent to which the Platforms derive revenue from the payment of membership fees as opposed to other sources, such as advertising driven by traffic to the websites, which may be increased by a greater volume of listings regardless of the sources of those listings. The Defendants argue that it is not just a question of the Platforms' revenue, but also the reputational risk to them if they cannot control who lists properties or what properties are listed. It is not self-evident, however, that the Platforms' control over their members through their contractual terms is insufficient to address this risk. Furthermore, even if the Defendants are correct as to what is in the Platforms' commercial interests, it remains necessary to construe the words which they have used in their respective terms. As will appear, this is not a case where a straightforward interpretation of the words used leads to a commercially absurd result, nor a case in which commercial common sense must be resorted to in order to resolve an ambiguity in the wording.

Rightmove

10. Although the judge had to consider an earlier set of terms (referred to as "the 2009 Terms") as well, before this Court the Defendants' argument rightly focussed on the version of Rightmove's terms which was current at the date of the SPA ("the 2017 Terms"). So far as relevant to the appeal, the 2017 Terms are contained in three

documents: (i) the membership application form filed in by BPG when it applied to become a member of Rightmove on 16 March 2010 ("the MAF"); (ii) a document

entitled "General Membership Terms and Conditions 2014" ("the General Terms"); and (iii) a document entitled "Technical Guidelines & Data Quality Requirements" dated October 2016 ("the Technical Guidelines").

11. In the MAF BPG ticked a box to indicate that the nature of its business was "UK Residential Lettings". It applied for a "Per Branch Membership – Lettings only" and gave the number of its branches as "one". The form did not, however, give the applicant the option of specifying that it was an online only business. Nor (unlike the Zoopla terms considered below) do the General Terms and the Technical Guidelines contain any separate provisions dealing with online businesses as opposed to traditional "bricks-and-mortar" agencies.

12. The relationship between the General Terms and the Technical Guidelines is addressed in clause 2.4 of the General Terms, which provides, so far as relevant:

> "If there is any conflict between the terms of these Conditions and the … Technical Guidelines …, the terms of these Conditions will prevail. …"

13. The Claimants contend that the Rightmove terms not merely do not prohibit BPG from advertising lettings on behalf of other commercial lettings agents, but expressly permit them. Partly for this reason, I, like the judge, find it convenient to consider various terms which are relied upon by the Claimants before turning to the single term which is now relied upon by the Defendants. These are all contained in the General Terms.

14. Clause 1 ("Definitions") includes the following provisions:

> "'Agent' means any person primarily in the business of selling or letting residential or commercial properties or land on behalf of multiple unrelated third parties.
>
> 'Landlord' means any person marketing and/or managing property they own for let.
>
> 'Locations' means the physical locations identified on Your Membership Application Form which may be varied in accordance with clause 3.3.
>
> 'Membership' means Your entitlement to the Services subject to these Conditions.
>
> 'Property Owner' means a person that has instructed You to market for sale or let his, her or its residential or commercial property.
>
> 'Services' means the services provided by Rightmove … 'Technical Guidelines' means the technical guidelines which

> contains [sic] the description and specification of the Services including procedural rules and guidelines for using the Platforms. These Guidelines are available on our Website and RightmovePlus and may be updated or amended in accordance with clause 11.2 from time to time.
>
> 'You' or 'Your' means the person who has applied for Membership as identified on the Membership Application Form. 'Your Client' means an Agent, Developer, Landlord and/or Property Owner."

15. Clause 3 ("The Services") includes the following:

> "3.1 Rightmove shall supply the Services to You in accordance with these Conditions. You will only be entitled to those Services as specified in Your Membership Application Form.
>
> 3.2 Rightmove shall have the right to make any changes to the Services which are necessary to comply with any applicable law or safety requirement or which do not materially affect the nature or quality of the Services. Rightmove shall notify You in any such event.
>
> 3.3 You may request the provision of further Services at any time in writing and Rightmove may recommend further Services to You at any time in writing. You may also request that additional Locations be added to Your Membership. If both parties agree to the provision of further Services or the addition of further Locations (subject to agreement regarding a variation in the Charges to reflect the additional Services or Locations) then those Services and/or Locations shall be deemed to be added to the Membership Application Form. Rightmove shall keep an up to date list of the Services provided to You and all of Your Locations and shall provide the same to You upon request."

16. Clause 4 ("Your Obligations") includes the following:

> "4.1 You shall:
>
> 4.1.1 ensure that the terms of the Membership Application Form, Your Data and any other information that You provide to Rightmove are complete, accurate and not misleading;
>
> 4.2 You warrant that:
>
> 4.2.1 You (and, where applicable, Your Client) carry on business as an Agent, Developer or Landlord and that You have not misrepresented the nature of Your business to Us".

17. Clause 5 ("Charges and Payment") includes the following:

> "5.1 If Your Membership is accepted, for the duration of the Term and thereafter You will pay our Membership Charges for the Rightmove services You select and use.
>
> 5.2 After expiry of the Term, Rightmove may vary the Charges from time to time. You will be given 30 days' notice of any increase in the Charges and Rightmove will send to You an amended Price Schedule.
>
> 5.3 If when compared with the majority of Our other members, Your locations market or Your Data includes high volumes of property or land and/or Your properties or land are spread over a wide geographical area or We believe Your Data includes details of property or land not from one of Your Locations, then in accordance with any guidelines that We may set and communicate to You from time to time, We reserve the right to charge You for additional locations or in a manner We deem equivalent to Your volume or to charge You on a per property basis.
>
> 5.4 If Your Data does not comply with the requirements in the Technical Guidelines or (in Rightmove's opinion) does not originate from one of Your Locations then You will pay Rightmove's additional charges at the prevailing rate for providing these additional Services."

18. Clause 11 ("General") includes in clause 11.2 provisions enabling both the General Terms and the Technical Guidelines to be amended. In summary, clause 11.2.1 permits Rightmove to amend the General Terms with the consent of the member, failing which either party can terminate the contract, whereas clause 11.2.2 permits Rightmove to amend the Technical Guidelines unilaterally by posting an updated version on its website.

19. The Claimants point out that (i) the definition of "Your Client" includes "an Agent" and (ii) clause 4.2.1 expressly envisages that "You (and, where applicable, Your Client)" may "carry on business as an Agent, Developer or Landlord", where "Agent" means "any person primarily in the business of selling or letting residential or commercial properties or land on behalf of multiple unrelated third parties." In addition, "Landlord" and "Property Owner" are separately defined and included within "Your Client". Thus it is clear, they submit, that the 2017 Terms expressly envisage clients of BPG operating as commercial agents.

20. Furthermore, the Claimants point to clause 5.3, which allows Rightmove to vary its prices as required if a member lists an excessive number of properties or if "We believe Your Data includes details of property or land not from one of Your Locations"; and to clause 5.4 which, they say, makes it clear that Rightmove's exclusive remedy for a member listing a property that does not originate from one of "Your Locations" is that

Rightmove may charge an additional fee for it. This provision, they suggest, demonstrates that, even in the extreme case of a member listing a property on Rightmove where the instructions originated from a physical branch not included on its membership form, that would not be a breach of the 2017 Terms, it would simply constitute an additional service for which the member had to pay.

21. Thus the Claimants contend that the 2017 Terms do not expressly or impliedly prohibit BPG from placing adverts on behalf of other commercial lettings agents. At most, they require BPG to pay for placing such adverts.

22. Against this, the Defendants say that, although the 2017 Terms contain a very broad definition of *who* the potential "Clients" of a member might be, and provide that such persons may include an "Agent", that does not determine *what* a member is entitled to do on behalf of its Clients vis-à-vis Rightmove. The Defendants accept, however, that it remains necessary for them to identify a term which does do that.

23. The sole term relied upon by the Defendants in this Court as containing a relevant restriction upon what a member is entitled to do on behalf of its Clients is clause 4.2.3 of the General Terms read together with clause 22 of the Technical Guidelines.

24. Clause 4.2.3 of the General Terms provides the member warrants that:

> "whenever the … Technical Guidelines … place an obligation or restriction upon You, You will observe and perform that obligation or restriction in full".

25. Clause 22 of the Technical Guidelines provides:

> "Reselling of Rightmove services
>
> You warrant that You will not without Our written permission directly or, in Our opinion indirectly, sell on or provide access to the services and features of Your Membership to third parties."

26. The judge did not discuss clause 22 of the Technical Guidelines specifically in his judgment. He did refer to the corresponding term in the 2009 Terms, clause C19, and stated that a similar restriction was contained in the 2017 Terms. He accepted the Claimants' argument that the terms they relied upon permitted BPG to advertise lettings on behalf of other commercial lettings and rejected the Defendants' argument that other terms, and in particular clause C19 of the 2009 Terms, prevented this. He did not, however, construe C19. Moreover, clause 22 of the Technical Guidelines in any event stands in a different position to clause C19 of the 2009 Terms because the 2009 Terms are not divided into General Terms and Technical Guidelines and there is no equivalent to clause 2.4 of the General Terms.

30. It follows that this Court must construe clause 22 for the first time. As is common ground, we should endeavour to interpret clause 22 and the terms relied upon by the Claimants in harmony with each other; but if they are in conflict, the terms in the General Terms prevail.

31. Again, it is convenient to start with the terms relied upon by the Claimants, and first to consider the Defendants' "who not what" argument. The difficulty with this argument is that the Defendants accept that the principal service which Rightmove provides to its members is the ability to place adverts on its platform. Indeed, the Defendants have not identified any service that the Rightmove terms could enable BPG to provide to its Agent Clients other than listing their properties on the Rightmove platform.

32. Turning to clause 22, the Defendants say that this prohibits not only selling on, but also providing access to, the services and features of BPG's membership, whether directly or (in Rightmove's opinion) indirectly, without Rightmove's consent. The Defendants argue that BPG placing adverts on behalf of other lettings agents amounts to selling on or providing access to the services and features of BPG's membership of Rightmove.

33. There are three main strands to the Claimants' response to this argument. The first concerns the relationship between the Technical Guidelines and the General Terms, the second concerns the wording of clause 22, and the third concerns the interrelationship between clause 22 and the definition of "Your Client".

34. The Claimants begin by pointing out that clause 22 is part of the Technical Guidelines. As explained above, the Technical Guidelines sit lower in the contractual hierarchy than the General Terms, and they can be amended unilaterally by Rightmove. Accordingly, the Claimants argue, the reasonable reader would not expect to find a term having such an important commercial effect as that contended for by the Defendants in the Technical Guidelines. Rather, consistently with the definition of "Technical Guidelines" in clause 1 of the General Terms, the reasonable reader would expect the Technical Guidelines to deal with technical rather than commercial matters.

35. There are two problems with this argument, however. The first is that the definition of "Technical Guidelines" includes "procedural rules … for using the Platforms" and clause 4.2.1 requires members to "observe and perform" any "obligation or restriction" in the Technical Guidelines. Thus it is clear that the Technical Guidelines may contain restrictions upon members' activities with respect to Rightmove's platform.

36. The second is that, as Popplewell LJ pointed out during the course of argument, clause 11 of the Technical Guidelines ("Marketing your properties") includes the following:

> "You warrant that Your Data will only include information on unsold/unlet property or land appropriate to Your Membership:
>
> • Where You or Your Client received the original instruction from a third party at one of Your Locations to sell or let such property or land prior to providing it to Us; …"

37. Since clause 11 is not relied upon by the Defendants as constituting a relevant restriction, it is not necessary to construe it. It is clear, however, that it does restrict the marketing of properties by the member. Thus it is not correct to say that the Technical Guidelines are purely concerned with technical matters and not commercial ones. On the other hand, the presence of clause 11 does make it less likely that clause 22 is intended to restrict the marketing of properties by the member.

38. So far as the wording of clause 22 is concerned, an initial point is that counsel for the Claimants adopted a suggestion made by Popplewell LJ during the course of argument that it meant that the member must not sell on access to, or provide access to, "the services and features of Your Membership". As will appear, this would, if correct, support the Claimants' case that clause 22 does not have the effect contended for by the Defendants. I have to say, however, that I am not convinced this is correct; but nor do I think that it matters. I shall assume, without deciding, that the Defendants are correct

that clause 22 means that the member must not sell on, or provide access to, "the services and features of Your Membership".

39. On that basis, the Claimants submit that: (i) "the services and features of Your Membership" means the ability to list properties on Rightmove, not actually posting a listing; (ii) the words "third parties" have their ordinary meaning, that is, any persons that are not a party to the contract; and (iii) clause 22 is thus concerned with a member either "selling on" the ability to list properties on the Rightmove website to a third party, or "providing access" to the Rightmove website to a third party (which would include doing it gratuitously), such as by handing over a username and password enabling the third party to post listings on the Rightmove website. The purpose of the clause, on this interpretation, is to ensure that Rightmove can control what is posted on its website through its contractual relationship with its members who have the ability to post listings. The Claimants say that Rightmove retains such control even if the properties listed by BPG are properties let by other agents.

40. The Claimants also submit that, if the words "the services and features of Your Membership" cover posting a listing, then no member could post a listing for any property without Rightmove's consent, which is plainly absurd.

41. Recognising this difficulty, counsel for the Defendants submitted that "third parties" should be interpreted as meaning "parties who are eligible for membership of Rightmove, but are not members". In my view this proposition only has to be stated for it to be seen that it is untenable. There is nothing in the wording of clause 22 to support such a reading. Giving the expression "third parties" its ordinary meaning provides strong support for the Claimants' argument that "the services and features of Your Membership" cannot cover simply posting a listing, but rather refers to the ability to list properties on Rightmove.

42. Turning to the interrelationship between clause 22 and the definition of "Your Client", the Claimants submit that the Defendants' interpretation of clause 22 renders the definition of "Your Client" and the reference to "Agent" in clause 4.2.1 mere surplusage, which grant no rights and have no contractual effect. Instead, under clause 22, the member must seek written permission to "sell on or provide access" to any third party. Thus it would be clause 22 that determined to which Clients a member was entitled to provide services. Clause 22 could not have been intended to serve that function because: (i) the definition of "Your Client" does not refer to Clause 22 of the Technical Guidelines; (ii) neither does Clause 22 mention "Agents", or any other type of clients, or cross-refer to the definition of "Your Client"; (iii) there is nothing within the Rightmove terms that indicates any connection between these two clauses; and (iv) the Technical Guidelines contain no guidance about how Rightmove's permission

should be sought, what criteria will be taken into account, what price will be paid, or anything else to do with taking on an Agent as a Client.

43. I am unimpressed with the last of these points. Clause 22 bites unless there is "written permission". I do not see why, if the clause were to be interpreted in the manner contended for by the Defendants, one would necessarily expect it to address such questions. The first three points do seem to me, however, to provide support for the Claimants' interpretation of clause 22.

44. Accordingly, I conclude that the Claimants' interpretation of clause 22 is the correct one.

45. It follows that the judge was correct to hold that the 2017 Terms do not prohibit BPG from placing adverts on behalf of other commercial lettings agents.

Zoopla

46. Zoopla's terms are contained in an undated document entitled "Member Terms and Conditions". This contains the following definitions:

> "'Agent' means an estate agent, lettings agent (and in Scotland, solicitor agents) and/or commercial property agent;
>
> 'Member' means the Agent or the Developer;
>
> 'Online Agent' means an estate agent, lettings agent (and in Scotland, solicitor agents) and/or commercial property agent that operates primarily via a website (rather than a physical branch) and/or does not operate through a local office network;
>
> 'Services' means the services to be provided by Zoopla (or its Group Companies) as set out in the Order Form and which may include any, or a combination, of the following:
>
> - A process facilitating the upload by the Member of property details (including images) to the Website(s);
> - Displaying the Member's properties on the Website(s);
> - Providing the Member with a listing within the agent directory on the Website(s);
> - The provision of Leads to the Member;
> - The provision of advertising services to the Member;
> - The provision of reports and access to reporting tools to the Member; and
> - Any other services provided by Zoopla from time to time."

47. Clause 3 includes the following provisions:

> "3.1 The Member warrant and represents that:
>
> 3.1.10 each of its branch offices will only upload details of properties they received instructions for specifically at each branch office location, and that no branch office will upload details of properties originating from any other branch office location.
>
> 3.3 Zoopla:
>
> 3.3.3 reserves the right to charge the Member for additional fees or in a manner it deems appropriate or on a per property basis if Zoopla has reason to believe that Content uploaded by any of the Member's branch offices is in breach of clause 3.1.10 above.
>
> 3.4 The Member acknowledges and agrees that:
>
> 3.4.8 from time to time Zoopla shall be entitled to increase the fees payable by the Member in the event that following an assessment by Zoopla. it is determined by Zoopla that the number of properties displayed on the Website on behalf of the Member has increased such that the number of properties exceeds the average for Members of a similar type. In assessing the number of properties and the applicable average for these purposes:
>
> - an Agent's properties (and those of other Agents) shall be assessed on a per-branch basis by reference to an appropriate geographical area:
> - a Developer's properties (and those of other Developers) shall be assessed on a per-Development basis:
> - an Online Agent's properties (and those of other Online Agents) shall be assessed by reference to appropriate geographical areas:
>
> and in any event an assessment will be made by reference to any relevant guidelines issued by Zoopla from time to time. Any increase in fees will be calculated on either a per-property or perDevelopment basis so as to fairly reflect the increase in the volume of the Member's displayed properties."

48. The Defendants rely upon clause 3.1.10 as prohibiting BPG from placing adverts on behalf of other commercial letting agents.

49. The judge held that clause 3.1.10 did not bear that meaning. His reasoning, in summary, was that clause 3.1.10 was plainly concerned with physical branches since it referred to "offices" and "locations", and did not apply to "Online Agents" as defined in the Zoopla terms. Since BPG was an Online Agent with no physical branches, clause 3.1.10 did not apply to it.

50. The Defendants contend that the judge should have held that, when dealing with an online agency such as BPG, the website of that agency is to be treated as the equivalent of the "branch office" of a traditional "bricks-and-mortar" agency for the purposes of clause 3.1.10

51. In my view this is a hopeless contention for three reasons. First, I agree with the judge that the wording of clause 3.1.10 is clearly concerned with physical branch offices of a member which has a number of such offices.

52. Secondly, I agree with the judge that the Defendants' interpretation is not an available interpretation given that the Zoopla terms contain a definition of an Online Agency. Although that definition permits an Online Agency to have a single physical branch, it does not extend to agencies with multiple physical branches (in respect of which clause 3.1.10 could still be relevant). Moreover, the definition embraces agencies with no physical branch such as BPG. In those circumstances there is no justification for giving the words "branch office" in clause 3.1.10 an extended meaning.

53. Thirdly, these are not the only problems with the Defendants' reliance upon clause 3.1.10. The Defendants do not rely upon the first part of the clause, but upon the second part: "no other branch office will upload details of properties originating from any other branch office location". The Defendants say that this prevents BPG's single branch office, namely its website, uploading details of properties emanating from other agents. That not only involves treating a clause which on its face is solely concerned with the inter-branch activities of a member as extending to activities of the member vis-à-vis other parties. As Coulson LJ pointed out during the course of argument, it also involves treating the expression "branch office" as having two different meanings in the same part of the same clause – referring to a branch office (or website) of BPG the first time and a branch office (or website) of another party the second time.

54. Finally, I would add that clause 3.4.8 enables Zoopla to increase the fees it charges if it determines that the number of properties displayed by the member exceeds the average for members "of a similar type". It goes on to say that for this purpose "an Agent's properties … shall be assessed on a per-branch basis by reference to an appropriate geographical area" whereas "an Online Agent's properties … shall be assessed by reference to appropriate geographical areas". Not only does this reinforce the point that the terms differentiate between Agents with a number of branches and Online Agents, but also it shows that the pricing mechanism may, at least in some circumstances, enable Zoopla to charge for properties listed by BPG on behalf of other agents.

55. It follows that the judge was correct to hold that Zoopla's terms do not prohibit BPG from placing adverts on behalf of other commercial lettings agents.

Issue 2

56. Clause 1.1 of the SPA contains a definition of "Disclosure Letter" which it is not necessary to set out and defines "Warranties" to mean the representations and warranties contained in Schedule 3.

57. Clause 5 of the SPA provides, so far as relevant:

"5.1 The Warrantors warrant and represent to the Purchasers that (subject to clause 5.2) each Warranty is true, complete and accurate and not misleading at the date of this Agreement.

5.2 The Warranties are subject only to:

5.2.1 any matter which is fully, fairly and specifically disclosed in the Disclosure Letter; and

5.2.2 the provisions of clause 6.

5.3 The Warrantors acknowledge that the Purchasers have been induced to enter into this Agreement by, and are entering into this Agreement in reliance upon, the Warranties which have also been given as representations with the intention of inducing the Purchasers to enter into this Agreement.

…"

58. Clause 6 of the SPA provides, so far as relevant:

"6.1 The Warrantors' liability under the Warranties shall be limited as follows:

6.1.1 no claim for breach of any Warranty shall be made by the Purchasers until the aggregate liability for all claims under this Agreement (including all previous claims whether or not satisfied and including costs) shall equal or exceed £1,000 in which case the whole amount shall be capable of being claimed and not merely the excess;

6.1.2 the Warrantors' maximum aggregate liability in respect of all the Warranties (excluding interest, costs, fines, penalties and surcharges) is limited to the Purchase Price;

6.1.3 no claim for breach of the Warranties:

6.1.3.1 otherwise than in relation to Taxation shall be made unless the claim has been notified in writing to the Warrantors within 6 months of the Completion Date; and

…

6.2 None of the limitations contained in clause 6.1 apply to any claim under the Warranties where there has been fraud or negligent non-disclosure, or, in relation to the Warranties on Taxation, where any Taxation Authority alleges fraud, default, negligent conduct or conduct involving dishonesty on the part of the Company or any person acting on its behalf in relation to the matter giving rise to the claim."

59. The Defendants accept that they did not give notice of their claim within the period specified in clause 6.1.3.1, but rely upon clause 6.2. The Defendants say that (assuming the Defendants are correct on Issue 1) there was "negligent non-disclosure" by the Claimants because the relevant restrictions were not mentioned in the Disclosure Letter. The Claimants contend that it is open to them to rely upon other disclosures. The judge explained that, although this issue appeared to him to be academic given his conclusion on Issue 1, he had been asked to decide it anyway.

60. The judge held that "non-disclosure" in clause 6.2 did not refer only to disclosure in the Disclosure Letter, and hence (at least in principle) the Claimants could rely upon other disclosures. His reasoning, in summary, was that clause 6.2 made no reference to the Disclosure Letter, and its purpose was to provide an exception to the limitations of liability contained in clause 6.1. By contrast, clause 5.2.1 did refer to the Disclosure Letter, and its purpose was to except matters disclosed in the Disclosure Letter from the Warranties.

61. Notwithstanding the contrary submissions of counsel for the Defendants, I consider that the judge was correct for the reasons he gave. I would add three further points.

62. First, it is common ground that the Claimants were under no duty of disclosure. This gives rise to a difficult question as to what is meant by "non-negligent" in clause 6.2, but it is neither necessary nor appropriate to venture any view on that question on this appeal. Counsel for the Defendants argued that, whatever "non-negligent" meant, it was easier to answer the question as to whether a disclosure was negligent or not if the enquiry was confined to the Disclosure Letter. That may or may not be so, but even if it is the short answer to this argument is that that is not what clause 6.2 says. Given that the Disclosure Letter is referred to elsewhere in the SPA, it is to be inferred that the absence of reference to it in clause 6.2 was intentional.

63. Secondly, I agree with the Claimants that it would make little sense to ask whether there was negligent non-disclosure by reference to the Disclosure Letter if in fact that there was disclosure in another communication. That would seem to involve an enquiry as to whether it was negligent for the Claimants not to include the information in the Disclosure Letter even though they had disclosed it elsewhere. But what would be point of that enquiry given that the purpose of the Disclosure Letter is to limit the scope of the Warranties for the benefit of the Claimants, whereas the purpose of clause 6.2 is to provide an exception to the limitations in clause 6.1 for the benefit of the Defendants?

64. Thirdly, I do not accept the Defendants' argument that clause 6.2 should be narrowly construed because it is part of a limitation provision which is a form of exclusion clause. As I have said, clause 6.2 provides an *exception* to the limitations in clause 6.1.

Conclusion

65. For the reasons given above, despite the well-presented submissions of counsel for the Defendants, I would dismiss the Defendants' appeal.

Lord Justice Popplewell:

66. I agree that the appeal should be dismissed for the reasons given by Arnold LJ, subject to one small qualification. I remain attracted to the interpretation of clause 22 of the Technical Guidelines to which Arnold LJ refers at paragraph 38, which treats "selling on" as governed by the word "access". To my mind this draws a coherent distinction between the subject matter of clauses 11 and 22 of the Technical Guidelines. Clause 11 addresses the content of what may be uploaded to the platform, ie what properties may be advertised. By contrast, clause 22 is concerned with technical platform access. If that be right, it provides a further reason why the Defendants' argument cannot succeed, although as Arnold LJ points out, it is not critical to that conclusion.

Lord Justice Coulson:

67. I agree that, for the reasons given by Arnold LJ, this appeal must be dismissed.