

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

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

Date: 11/10/2013

**Before :**

**MR JUSTICE HENDERSON**

**Between :**

|                               |                         |
|-------------------------------|-------------------------|
| <b>MATCHBET LIMITED</b>       | <b><u>Claimant</u></b>  |
| <b>- and -</b>                |                         |
| <b>OPENBET RETAIL LIMITED</b> | <b><u>Defendant</u></b> |

**Mr Bernard Weatherill QC and Mr James Pickering** (instructed by **Bell Lax Limited**) for  
the **Claimant**

**Mr Kenneth MacLean QC and Ms Zoe O'Sullivan** (instructed by **Nabarro LLP**) for the  
**Defendant**

Hearing dates: March 13, 18-22, 25-6; April 9-12, 16-18; May 1-2, 2013

**Judgment**

**Mr Justice Henderson:**

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## **Introduction**

1. This is a claim for damages for alleged breaches of a software licensing and development agreement ("the SDLA") entered into between the parties on 9 May 2006.
2. The claimant, Matchbet Limited ("Matchbet"), was incorporated on 26 November 2004 to carry on the business of developing betting exchange software and systems. The promoter, principal director and chairman of Matchbet was at all material times Dr Benedict ("Ben") Gabriel Seifert ("Dr Seifert"), an Oxford-based academic mathematician and businessman. The particular concept which Dr Seifert originally sought to develop and exploit through Matchbet was a new form of online betting exchange service with enhanced "liquidity", making use of an algorithm which he had devised and patented for matching trades in the financial sector.
3. "MatchBet" had previously been the trading name of a company called Virtual Betting Exchange Limited ("VBX"), which Dr Seifert incorporated for the purpose of applying the technology and principles developed by him in the financial sector to the making of bets in the betting industry. VBX was the parent company of Matchbet, owning approximately 65% of Matchbet's issued share capital. VBX was itself a nearly wholly-owned subsidiary of Oxford Virtual Markets Limited ("OVM"), another company of which Dr Seifert was a director and shareholder. The intellectual property which Matchbet sought to exploit was owned by VBX and licensed by it to Matchbet.
4. The defendant, Openbet Retail Limited, was at all material times named either Alphameric Leisure Limited or (from 30 March 2007) Alphameric Solutions Limited, and I will therefore refer to it in this judgment as "Alphameric". It formed part of the Alphameric group of companies, headed by Alphameric Plc (later renamed Timeweave Plc, before changing its name to Timeweave Limited). Alphameric was, and is, a market leader in the supply of technology to bookmakers for use in their physical premises at licensed betting offices ("LBOs"). This technology included electronic point of sale ("EPOS") systems, and a proprietary information display

system known by the acronym “ALBOS” (Alphameric Licensed Betting Office Systems).

5. Alphameric’s customers included the “Big Three” high street providers of betting shops, Ladbrokes, Coral and William Hill, as well as smaller independent chains and sole traders. The group chief executive of Alphameric Plc from April 1995 until April 2010 was Mr Alan Morcombe (“Mr Morcombe”).
6. Matchbet obtained its funding from a group of private investors and corporate funders. Its lack of adequate capitalisation and chronic under-funding are recurrent themes in the evidence. One of the funders approached by Matchbet in 2005 was Alphameric. After protracted negotiations, the parties signed written Heads of Terms on 23 December 2005 (“the Heads of Terms”). The provisions of the Heads of Terms were agreed not to be legally binding except where the contrary was expressly stated. In broad outline, they envisaged that Alphameric would lend Matchbet £250,000 in instalments linked to the achievement by Matchbet of milestones to be specified in a development and licensing agreement to be entered into between the parties (i.e. the future SDLA), in return for which Matchbet would grant Alphameric exclusive worldwide rights to distribute access to the Matchbet Betting Exchange (“MBE”) service which was in the course of development by Matchbet. The first instalment of £50,000 was payable immediately on the signing of the Heads of Terms.
7. After further negotiation, the definitive agreement between the parties was set out in the SDLA. By virtue of clause 31, the SDLA was stated to contain “the entire agreement and understanding between the parties”, and to supersede “all proposals and prior agreements, arrangements and understandings between the parties, relating to its subject matter”.
8. I will need to examine the terms of the SDLA in considerable detail later in this judgment. For now, it is enough to record that it included terms whereby:
  - (a) Alphameric would lend £250,000 to Matchbet by five instalments (including the £50,000 already paid), on payment dates (other than the first) specified in Schedule 3 by reference to completion of Stages 2, 3, 4 and 5 of the Implementation Plan set out in Schedule 2;
  - (b) Matchbet would develop the betting exchange service and associated computer programs and would provide them to Alphameric by no later than 28 weeks from the date of the SDLA;
  - (c) Alphameric would then have an exclusive and perpetual licence to market access to the service and programs to operators of LBOs throughout the world, and would act as Matchbet’s agent in securing end-user agreements between such operators and Matchbet on terms to be prescribed by Matchbet; and
  - (d) Matchbet would make royalty payments to Alphameric during the currency of the agreement at the rate of 50% of gross revenue derived by Matchbet from end user agreements, and 10% of all other revenue received by Matchbet arising out of the supply of the service.

9. The SDLA was mainly drafted by Alphameric's in-house lawyers, and it is a striking feature of it that it imposed relatively few express obligations on Alphameric. It is nevertheless Matchbet's case that, on the true construction of the SDLA as a whole, including in particular the stages of the Implementation Plan as formulated in Schedule 2, and/or by a process of necessary implication, Alphameric came under obligations, broadly stated:
  - (a) to achieve integration of the Matchbet service and programs with its own EPOS and ALBOS systems;
  - (b) to act as Matchbet's marketing agent and secure end-user agreements with LBOs; and
  - (c) to promote, and not to hinder, the commercial purpose of the SDLA, which according to Matchbet was the achievement of such an integrated system and its marketing and commercial exploitation for the mutual benefit of both parties.
10. The remaining instalments of the £250,000 loan were duly paid by Alphameric to Matchbet, although the timetable slipped by a few months from that laid down in the SDLA. The MBE was also developed to at least the stage of a working prototype, and it was successfully demonstrated by Alphameric at the Birmingham Betting Show in October 2007. But although the prototype attracted some interest in the industry, and although Mr Morcombe, among others, remained enthusiastic about its commercial potential, by April 2008 no bookmaker had yet reached the stage of agreeing to buy the product. Presentations were made to Ladbrokes and Coral, and there was some exploration of other possible marketing opportunities, but for various reasons they all came to nothing.
11. The reasons for this failure lie at the heart of the present case. The court's assessment of those reasons will depend on a careful examination of what actually happened, viewed in the light of the parties' respective obligations under the SDLA. Matchbet's case, in outline, is that Alphameric breached its alleged obligations under the SDLA (see paragraph 9 above) by failing to integrate the MBE with its own systems in such a way that the MBE could be marketed generally to LBOs, and by failing to take any adequate steps to find purchasers or market the product. Alphameric's answer to this is that the SDLA, properly construed, did not oblige it to do any of those things, but even assuming it did, Alphameric performed its obligations satisfactorily.
12. Matters came to a head in April 2008. According to Matchbet's pleaded case, a meeting took place on 16 April between Dr Seifert, Mr Morcombe and a French friend and business associate of Dr Seifert's, Mr Guy Somekh, at which Alphameric allegedly made it clear for the first time that no integration of Matchbet's service and programs with Alphameric's system had taken place, that Alphameric was not taking any steps to enable such integration to take place, and that it would not do so in the future unless the costs of the exercise were to be funded by a customer or potential customer. It is claimed that Alphameric was thereby acting in repudiatory breach of the SDLA, and that Matchbet accepted the repudiation by a letter to Alphameric dated 8 May 2008. Alphameric's defence to this allegation is that it was not in breach of the SDLA at all, let alone in repudiatory breach, and that Matchbet's letter of 8 May 2008 was itself a repudiatory breach of the SDLA which Alphameric subsequently

accepted, either by a letter dated 16 June 2008 (which was in other respects stated to be “without prejudice”) or alternatively by service of its defence.

13. In their written opening submissions at the start of the trial on 13 March 2013, counsel for Alphameric (Mr Kenneth MacLean QC leading Ms Zoe O’Sullivan) sought to characterise Matchbet’s case as:

“... an extravagant and fanciful claim, brought by a start-up company which was hopelessly under-capitalised at all material times, in respect of an untested product for which it had done no market research, whose development was not nearly complete at the date of the contract, and in which no bookmaker has shown any serious interest at any time.”

14. By the time of their written closing submissions, prepared after 15 days of trial, counsel for Alphameric had upped the stakes, describing the claim as “a speculative, avaricious and mendacious claim pursued in bad faith”. This submission was then amplified as follows:

“2. Having received from Alphameric all that it was entitled to receive under the [SDLA], it was Matchbet, not Alphameric, which repudiated it in May 2008. Matchbet did so in order the better to cultivate and reap (in conjunction with a long standing contact of Dr Seifert, Mr Somekh) what it then perceived to be more lucrative opportunities in France and elsewhere free of and unrestricted by any obligation to Alphameric.

3. When those opportunities proved to have as little substance as all the other aspects of Matchbet’s grandiose plans, Matchbet launched these proceedings for jackpot damages no doubt hoping that Alphameric would prefer to settle with Matchbet rather than incur the costs, risks and distraction of a protracted legal dispute.”

15. As the tendentious reference to “jackpot damages” implies, the quantum of Matchbet’s claim was initially pitched very high. The pleaded particulars of loss and damage, in paragraph 18 of the particulars of claim, sought to recover no less than £64.64 million representing loss of anticipated profit over four years. The losses were further said to be “continuing”, with updated particulars to be provided at trial. The pleaded particulars did not, however, explain how the damages were calculated, and provided no more than a breakdown for each year of the expected loss of profit from LBOs and from online business, with the former beginning to outstrip the latter in the third year. In response to a request for further information, Matchbet then set out its case on how the damages were calculated in a document dated 19 December 2011. In relation to both LBOs and online clients, Matchbet explained that the rate of “roll out” of the integrated product by Alphameric was based on a spreadsheet which had been prepared in May 2007, with input from Alphameric, for the purpose of seeking investment from the specialist investment bank Investec. A fuller explanation of the relevant assumptions was later given by Dr Seifert in his principal witness statement which he signed on 19 October 2012.

16. That remained Matchbet's pleaded case on quantum until almost the eve of the trial. Following service on 28 February 2013 of the supplemental report of Matchbet's accounting expert, Mr Christopher Swinson, Matchbet belatedly realised that its claim for damages on the basis originally pleaded was in some major respects unsustainable. It also decided to abandon its claim for loss of profits from online business, presumably accepting the force of the obvious point that this was a claim for consequential loss which was precluded by the express terms of the SDLA. The result was to reduce the quantum of the claim by more than three quarters, in relation to the four year period from 2007 to 2010, to a figure of less than £11 million. Matchbet nevertheless argued that it did not need to amend the particulars of claim, because it was merely "updating" its original claim in the light of its own recently obtained expert evidence. Matchbet also sought to extend the claim for a further two years, by a process of simple extrapolation from the figures for 2010, without any disclosure of documents relating to the later years and without any examination of the question whether the underlying assumptions for 2010 remained valid.
17. Even though the net effect of these proposed changes was greatly to reduce the pleaded quantum of the claim, Alphameric understandably, and in my view correctly, took the position that changes of this magnitude could not possibly be described as mere updating, and argued in correspondence that it would be necessary for Matchbet to seek, and obtain, permission to amend its statements of case in order to advance its claim on the new basis. That in turn would require Matchbet to satisfy the stringent criteria for the grant of permission to amend at such a late stage: see generally Swain-Mason v Mills & Reeve LLP [2011] EWCA Civ 14, [2011] 1 WLR 2735.
18. These matters were raised with me on the first day of the trial. I made it clear that in my view an application to amend was necessary, and indicated my provisional view that if a properly formulated amended pleading were produced I would be minded to grant permission to Matchbet to pursue its claim in relation to the first four years on the new basis, but to refuse permission for any extension of the claim to 2011 and 2012. In giving this indication, I was influenced by Mr MacLean's acceptance in oral argument that the proposed changes in relation to the first four years could probably be accommodated within the agreed trial timetable without prejudice to Alphameric. Perhaps fortunately from Matchbet's point of view, the Easter vacation was anyway going to intervene before Alphameric's main witnesses of fact, and the expert witnesses on both sides, were scheduled to give their evidence.
19. The first day of the trial was Wednesday, 13 March 2013. The parties knew that, due to other commitments, I would not be able to sit on 14 or 15 March, so day 2 was Monday, 18 March. By then I had been supplied with a draft of Matchbet's amended particulars of quantum, and I heard argument from leading counsel on both sides on the application to amend. I gave my ruling at the start of day 3. For the reasons which I then gave, I saw no reason to depart from my provisional view on day one. I therefore indicated my willingness in principle to grant permission to amend in respect of the first four years, refused permission to extend the claim to later years, and gave Matchbet until 1 pm on 21 March to finalise the draft amendments with a view to resolving any outstanding points of detail on the following morning. Accordingly, Matchbet produced a further revised draft, together with an associated spreadsheet, on 21 March; and on 22 March I granted permission for those amendments to be made, subject to removal of a potentially misleading reference to

“loss of a chance” to make future profits. As Mr Weatherill QC readily accepted, Matchbet’s claim was never intended to be a claim for loss of an opportunity, in the sense explained in the “loss of a chance” cases, but was instead a claim to recover the expected loss of profits caused by Alphameric’s alleged breaches of contract. Thus clarified, the claim for damages down to the end of 2010 was finally quantified as £10.88 million, all of it representing future loss of profits derived from LBOs.

### **Licensed betting offices, betting exchanges and the Matchbet Betting Exchange**

20. In this section of my judgment I will set out some mostly uncontroversial background material about LBOs, betting exchanges and the MBE. Much of what I have to say about LBOs and betting exchanges is drawn from the expert evidence.

#### **(1) LBOs**

21. LBOs are for the most part typical high street betting shops. In the British market as at 31 March 2008, the “Big Three” high street operators, together with Betfred and the Tote, accounted for approximately 80% of the LBO market, with the remaining 20% represented by smaller chains of independent LBO operators (such as Paddy Power, Better Bet and Mark Jarvis) and by single shop operators.
22. By far the largest part of UK betting turnover in LBOs has traditionally been attributable to horse racing. Statistics published by the Gambling Commission for 2009/10 show that 59% of turnover in LBOs was represented by horse racing, followed by greyhound racing (15%), football (10%), random number bets (9%) and other sports (6%).
23. In terms of expenditure, the contribution of the betting industry to the British economy in 2008 was around £3.7 billion. Of this amount, around £2.9 billion was generated from LBOs, and the remainder from telephone, internet and exchange betting organisations.
24. In the field of horse racing, LBO operators will typically set and offer their own odds on the morning of a race. These odds are referred to as early morning prices. In fixing the odds on offer, the bookmaker will include a profit margin over what he estimates to be the true probability of the horse in question winning the race. Bets offered may be singles, multiples or accumulators; punters may also choose to back a horse each way (meaning that it will either win or be placed in the top three, or within some other range depending on the number of runners).
25. The early morning prices offered by different LBOs tend to converge quite quickly, as odds fluctuate in the light of bets which have been placed, and as bookmakers seek to reduce their exposure by placing bets themselves with other bookmakers, including by “laying off” (i.e. by placing bets that a horse which has been backed will lose). Once the early morning market has settled down, the bulk of bets are taken from noon onwards, and as the time of a race approaches “starting prices” will be displayed in LBOs and used to settle the thousands of bets taken off-course. Meanwhile, on-course bookmakers will typically “chalk up” their prices (nowadays shown on an LCD display board) approximately ten minutes before the race is scheduled to begin.

## **(2) Betting exchanges**

26. Betting exchanges operate in a wholly different way. As counsel for Matchbet put it in their written closing submissions:

“Rather than the punter betting against the bookmaker as in fixed odds betting, punters bet against each other. The betting exchange therefore has no interest in the outcome, and instead makes money by matching the punters and taking a commission.”

27. In a little more detail, a betting exchange was described as follows in Betfair’s 2010 prospectus for the initial public offer of its shares (quoted by Stanley Burnton LJ in R (William Hill) v Horse Race Betting Levy Board [2012] EWHC 2039 (Admin), [2012] 1 WLR 3504, at [15]:

“The betting exchange is an order-driven system which allows customers to bet at odds sought by themselves or offered by other customers. A bet is only confirmed on the betting exchange once its risk is exactly matched by Betfair with another customer or group of customers with an equal and opposite view. When betting on the betting exchange, customers can either place a “back” bet or a “lay” bet. A “back” bet is a bet on something to happen (for example, a football team to win a match) and a “lay” bet is a bet on something not to happen (for example, a football match not to end in a draw). Betting on the betting exchange allows a customer not only to “back” or “lay” a selection, but also to choose the price at which that customer wishes to “back” or “lay” and how much he or she is prepared to risk. If the price at which the customer wishes to bet improves while a customer is in the process of placing his bet, that customer will be automatically matched by the best available price – higher for “backing”, lower for “laying” – in other words, in accordance with the “best execution principle”.”

28. Stanley Burnton LJ continued at [16]:

“It is, I think, pertinent to point out that the sequence in which transactions are concluded (to use wholly neutral terms) may be unknown to the user of the exchange when he inputs his order. When he seeks to bet that Camelot will win the Derby, it may be that someone else has already indicated that he is willing to accept that bet. It may also be that the transaction is concluded in part with someone who has already entered the countervailing bet on the exchange website, and in part with someone who does so subsequently ... Furthermore, even if a customer can see on the Betfair website that someone has offered to accept his bet, by the time he enters his bet someone else may have taken up that bet, so that the customer, believing

that he is accepting an offer, in fact makes one that may or may not be accepted by a later customer.”

29. The issue in that case, I should explain, was whether customers of betting exchanges were “bookmakers” for the purposes of section 27(2)(a) of the Betting, Gaming and Lotteries Act 1963 and thus liable to pay horserace betting levy. By virtue of section 27(2)(a), the levy was only payable by a “bookmaker”, defined in section 55 as “any person ... who ... carries on ... the business of receiving or negotiating bets”. Stanley Burnton LJ dismissed a challenge to a decision by the Horserace Betting Levy Board that customers were not “bookmakers” within this definition, holding that a customer of a betting exchange may “find himself receiving a bet”, but “he does not carry on the business of receiving bets”: see paragraph [60]. The decision has recently been affirmed by the Court of Appeal, although on somewhat different grounds: see [2013] EWCA Civ 487.
30. The betting exchange market in the UK is dominated by Betfair, which became commercially established in 2001. The only other betting exchange of significant size is Betdaq, which was acquired by Ladbrokes in January 2013 for a consideration which included cash of approximately €30 million.
31. Because the prices offered on a betting exchange do not have to include a margin for the bookmaker, the prices on offer tend to be better than those offered by LBOs. This was explained in a draft business plan prepared for VBX by a director of Matchbet, Mr Tobin Ireland, in February 2005:

“Betting exchanges were first introduced in the UK in 2001, and have since been a phenomenally successful component of the enormous UK betting industry, mainly due to the success of the market leader Betfair. Betfair has grown from a standing start four years ago to seeing weekly matched bet volumes of around £100m, generating some £8m in monthly commission, and is still growing rapidly.

...

Over the last three years, bookmakers have lost increasing market share to the betting exchanges, mainly due to the higher odds available to punters on the exchange mechanism ... There is no end in sight to the relative as well as absolute growth of the betting exchange model. The ability for users to define the odds required generally results in a more competitive “purer” market with more value than traditional bookmakers can offer where a profit margin is always included in the odds offered.

The reason for the great attraction of the exchange model is very simple: it is that, generally, the prices on offer are better than those offered by the bookmakers. 20% better prices (actually a bit less on average), liquidity, winners welcome (traditional bookmakers will black list you if you win too much), in-play, range of events and bets, functionality, and critically, reliability. Successful punters don’t suffer the

problem of having the size of their bets restricted. They also allow you to bet in-running on the majority of horse races.”

32. The success of any betting exchange is, however, dependent on “liquidity”, that is to say the availability of bet offers to be matched against each other. This caused problems for smaller exchanges trying to break into the market dominated by Betfair. As Mr Ireland put it:

“When comparing exchanges, of any sort, it is a common practice to focus on liquidity. In terms of betting exchanges, this can be measured in terms of debt (the size of the bet on offer), tightness (the spread between the back and lay sides) and immediacy (the availability of the bets on offer). In simple terms, betting exchanges require liquidity in order to survive, whilst the traders that use them seek to reduce their trading costs. The search for economies of scale and liquidity has proved [elusive] for many of the smaller exchanges, and they have thus been forced, for their survival, into competing on the basis of low commission rates.”

33. The explosion in internet betting brought with it the potential for vastly increased liquidity. As Alphameric’s accountancy expert, Mr Simon Oaten, explained in paragraph 6.9(e) of his first report:

“Internet betting, both exchange and bookmaking, has led to more transparency in prices and increased liquidity, where liquidity refers to the number of participants involved in the exchange, in turn leading to price efficiency improvements in the industry.”

Betfair’s business has at all times been exclusively online, and according to Dr Seifert Betfair achieves a great deal of liquidity from a small number of professional gamblers known as “the Betfair 500”. These are people who wish to bet on a large scale, but are unable to place bets with traditional bookmakers because the risks are greater than they are prepared to accept.

34. Betfair’s business model depends on the availability of free public access to its electronic platform, and this freedom is potentially available to competitors as well as to Betfair’s own customers. In its 2010 prospectus, Betfair stated that it had developed:

“... a unique, open and organic ecosystem through its application programming interface (“API”), which allows a range of businesses and individuals to interact with, and develop applications linked to, the Exchange Platform. The Directors believe that Betfair’s Betting Exchange prices are accessed and used extensively by other betting companies (including traditional bookmakers) to assist with odds compilation and anti-arbitrage strategies ... In addition, the API provides a platform for third party developers and software vendors to create and integrate their applications into the

Exchange Platform. In the year ended 30 April 2010, the API was used by approximately 38,000 Betfair customers, over 850 direct access developers and more than 60 third party software vendors. The software and applications developed and integrated through the API further contribute to the “network effect” for Betfair, helping to grow its customer base and community.”

**(3) The Matchbet Betting Exchange**

35. In the draft business plan which he prepared for VBX in February 2005, Mr Ireland described the main difference between the MBE and existing betting exchanges as follows:

“9. The fundamental difference between MATCHBET and the current betting exchanges lies in the fact that MATCHBET is capable of generating and channelling liquidity from one set of products to related products, using a model “virtual bookmaker” technology. The virtual bookmaker is equipped with “betting expertise”, represented by a sophisticated and proprietary algorithm, thus enabling the exchange to bet against a collection of punters, each of whom is able to bet on the event that is of interest to them without relying on having to receive a matching bet from another punter. The virtual bookmaker is risk-averse and when in the default mode avoids all possible market risk. In other settings, a bookmaker (using the white-label service) can take an element of risk and thus increase his profit margin within strict bounds, agreed with the Company.

10. This approach allows an unprecedented range of betting opportunities to be offered to punters, who will be able to define their own bets, rather than selecting from a pre-defined and restrictive menu. This is akin to “over the counter” financial market[s], serviced by banks which can create structured products, as opposed to exchanges that can only offer a limited number of predefined contracts. Investors will note that the over the counter markets tend to carry much higher margins than standardised exchanges. None of the current bookmakers, or exchanges delivers such range, liquidity or diversity of betting offers. As a result, the casual punter can indulge their prejudices and beliefs, whereas professional punters are able to trade sophisticated dynamic strategies, laying as well as backing events that represent their specific requirements. Bookmakers can lay off their exposure in the marketplace or use their expertise to exploit “soft arbitrage opportunities”. Bets can be placed prior to or during sporting events, elections or other dynamically evolving events.”

36. Leaving aside the promotional language, it appears that the main advantages of the MBE were perceived in February 2005 to include:

- (a) the ability to generate increased liquidity through use of the proprietary “virtual bookmaker” technology;
- (b) the ability to offer an increased range of betting opportunities to punters; and
- (c) the facility for LBOs using the service either to eliminate all risks, or to undertake a chosen and strictly controlled margin of risk.

37. By the date of the SDLA in May 2006, the general nature of the MBE was set out in a “product description” contained in Schedule 4. This contained a fuller description of the so-called “related market liquidity”, the purpose of which was to enable the matching of bets in different “markets”. In this context, a “market” meant a different type of bet within a particular area such as betting on football, so that (for example) a bet on the correct score, or on the total number of goals scored in a game, could be matched against bets on the first goal scorer or the correct score at half time. The product description also explained how a bookmaker operating the Matchbet platform would, if it wished, be able to add a margin to the prices generated by the exchange before they were offered to the customer. The potential appeal of this facility to LBOs was expressed as follows, under the heading “Synthetic pricing”:

“The object of this service proposition is to enable the bookmaker to have access to a supply of betting propositions, generated by the Matchbet engine, that they can offer to their clients and, when accepted by that client, simultaneously laid off in the exchange, with a spread determined by the bookmaker.

...

This service works by means of showing the bookmaker synthetic prices and volumes, based on the current order book of the exchange: The bookmaker automatically lays off the bets taken with the client on the exchange, with a margin determined by the bookmaker themselves.

...

This functionality would enable a bookmaker (either on the Internet or on the High Street) to run their business without incurring the expense of either risk management or odds compiling professionals.

Under this service proposition, the bookmaker is fully in charge of his/her client relationship and determines the level of access to the full market they wish to provide to the client. For instance, the system can be configured so that the client can only back, and not lay, and does not directly see the spreads or margin by either Matchbet or the bookmaker.”

38. In his witness statement, Dr Seifert placed particular emphasis on the supposed attractions of the MBE to LBOs, and on the free access that could be obtained to

Betfair's liquidity. In support of his assertion that access to Betfair's liquidity was "freely available" through its published API, Dr Seifert appended to his statement a copy of Betfair's website page which purportedly confirmed this. Inspection of the page reveals, however, that the free access API was "intended for private use only". Anybody who wished to use Betfair data in any commercial context was referred to their commercial licensing page. A further note stated:

"If you are a Software Vendor wanting to use the Free Access API to develop software for customers, you need to obtain a Software Vendor licence."

This is a small, but in my judgment typical, example of Dr Seifert's tendency to gloss over possible difficulties, and to talk up the supposed attractions of the MBE at the expense of complete accuracy.

39. The descriptions of the MBE to which I have referred are framed in fairly general terms. A rather more detailed version of the product description was worked up in draft by Alphameric after the date of the SDLA. The first draft of this document was produced by Mr David Poirier in September 2006. He then re-drafted it in May 2007, and revised it following comments from a colleague, Mr Philip Siers, in July 2007. Like its predecessors, however, this document did not purport to provide a detailed technical explanation of how the MBE actually worked. Nor has Dr Seifert provided any such explanation in his written evidence. This is no doubt understandable, for reasons of commercial confidentiality. But it does have the consequence that the technical viability of the MBE, although not put in issue by Alphameric, is something which the court has had no opportunity to evaluate for itself. The position might have been different if there were evidence that Matchbet had succeeded in selling or developing the concept after the rupture with Alphameric in 2008; but such evidence is conspicuous by its absence. Nevertheless, despite some indications in the documents and witness statements that a number of people with whom Matchbet dealt found it difficult to understand how the product was intended to work, or were sceptical about its viability, I accept the submission of counsel for Matchbet that I should approach this case on the basis that the MBE was technically sound. Indeed, Alphameric's principal witness, Mr Morcombe, confirmed as much, both implicitly in his witness statement (para 155) and expressly in cross-examination (transcript, day 10, page 3).

### **The witnesses of fact**

#### **(1) The witnesses for Matchbet**

40. The witnesses of fact who gave evidence for Matchbet, apart from Dr Seifert himself, were:
- (a) Mrs Anne-Marie Harvatt, née Bryceson;
  - (b) Mr David Poirier;
  - (c) (under a witness summons) Mr Philip Zenon Siers;
  - (d) Mr Charles James ("Jamie") Maskey;

(e) Mr Guy Somekh; and

(f) Mr Daniel O'Mahony.

**Dr Seifert**

41. Dr Seifert took a degree in economics and politics at the University of Columbia, followed by an MSc in mathematics at the University of London. He then studied for a DPhil in mathematics at Merton College, Oxford, but before completing it moved to the University of California at Berkeley. He was awarded his doctorate in 1979 from Berkeley, and then worked at the Institut des Hautes Etudes Scientifiques in Paris before returning to Oxford in 1985 as a lecturer in pure mathematics at Corpus Christi College. Dr Seifert combined his interests in mathematics and economics in relation to general equilibrium theory, which he describes as being “concerned with the way in which matching of supply and demand in free markets is expected to clear markets (reach equilibrium)”. He also studied the mathematical principles of chaotic dynamics, which “seek to deal with systems which ultimately cannot be predicted with precision”. He then applied these principles to the study of financial markets, and began to develop the algorithm to which I have already referred. One feature of this algorithm involved the matching of trades in different currencies, at the best prices reasonably obtainable. These principles were then developed by Dr Seifert in the field of matching bets, and his work led in time to the incorporation of VBX and Matchbet.
42. Dr Seifert would probably be the first to admit that he is a better mathematician than businessman. I would accept the view of Mr Siers, who said when giving evidence in chief:

“Ben is a typical what I would call boffin. He was clearly a very intelligent man and had a product which had potential, but I didn't think Ben's business skills were perhaps the match of his skills in creating algorithms for financial modelling.”

To similar effect, Mr Morcombe said of Matchbet in an email which he sent on 4 January 2008 to Investec that “They have egg-heads and no business sense”. Under cross-examination, Dr Seifert described his role in the following terms (transcript, day 3, page 66):

“My role in the organisation, as I keep spelling out, at least aspirationally, is to create the algorithms that make this platform work, and to the extent that I can find other people like Ian Winton, Tobin Ireland, who are infinitely more experienced and confident than me in these areas, I get them to write business plans, and when that's not possible because they are not available, then I will ask Anne-Marie [*Bryceson*], for example, to, if you like, co-ordinate the process by which information will be collated from competent sources, which neither she nor I were.”

This answer was given in response to a question why Dr Seifert had delegated to Ms Bryceson (as she then was) the important task of putting together financial projections for a presentation to Investec.

43. Dr Seifert's lack of business experience manifested itself in a number of ways. Early in his cross-examination he accepted that in 2005 he had no first hand knowledge of the UK betting industry, and had never held a position of responsibility in any organisation whose business was to supply services to the gaming or betting industry. Furthermore, despite describing himself as an enthusiastic amateur gambler, who would often bet £1,000 on sports like tennis which particularly interested him, he was not in the habit of visiting LBOs because he did not consider them to be particularly appealing places. Despite these limitations, however, he never carried out or commissioned any independent market research into the commercial viability of the MBE. Thus, the commercial virtues of the product which Mr Ireland was extolling in the product description designed by him to raise money from potential investors – an endeavour in which he was wholly unsuccessful – were untested and remained purely hypothetical.
44. A further illustration is provided by Dr Seifert's apparent lack of any clear vision about how to raise funds, or how best to exploit the MBE. By his own admission (transcript, day 2, page 85) Matchbet was seriously under capitalised from the very beginning. The evidence shows that Dr Seifert was not always as careful as he should have been in statements that he made to potential investors, while expressions of interest, however qualified, were prone to be regarded by him as firm commitments. A number of examples of this were given by counsel for Alphameric in paragraph 19 of their closing written submissions, which I accept but need not repeat. As to commercial exploitation of the MBE, I consider that Dr Seifert had no guiding principles and would take up one idea after another in uncritical fashion.
45. Mr MacLean's cross-examination of Dr Seifert occupied well over two days, spread over four sitting days. For most of the time he gave his evidence clearly and frankly, and I had no difficulty in accepting what he said as essentially truthful, even if at times it betrayed characteristic tendencies to exaggeration, embellishment or self-delusion. On occasion, however, I felt that Dr Seifert was being deliberately evasive, or that he was not telling the truth to the best of his ability. I will deal with these occasions as and when they arise in my review of the facts, and in particular when I consider the crucial evidence relating to the termination of the SDLA.

### **Mrs Harvatt**

46. Mrs Harvatt has recently married, but it was as Anne-Marie Bryceson that she joined Matchbet at the age of 22 in January 2006, having recently graduated from Oxford University with a degree in English. She had previously been employed by Centrica for a few months, but had no prior knowledge of the betting industry. She was employed by Matchbet as general administrator, and this remained her role during 2007. She has continued to work for Matchbet or OVM until the present day.
47. Mrs Harvatt was cross-examined by junior counsel for Alphameric, Ms O'Sullivan. She was obviously nervous, but was a transparently honest witness who did her best to assist the court.

**Mr Poirier**

48. Mr Poirier is now an IT solutions architect. From 2005 until January 2008 he worked for the Alphameric group in various posts on its technical side. In the Spring of 2006 he was product director of Alphameric, and in that capacity he became involved in the negotiations with Matchbet which led to the conclusion of the SDLA. In particular, it was his task to validate the technical aspects of the various milestones which had to be achieved, and he worked with Dr Seifert in their formulation.
49. In around August 2006 Alphameric decided that Mr Poirier should take forward the planning and technical side of the Alphamatch project, and he then attended regular joint planning meetings, as did Mr Siers, Dr Seifert and Mr Morcombe. Mr Poirier continued to play a significant technical role in relation to the project until October 2007, when he handed in his notice and (after the expiry of his three month notice period) went to work for Alphameric's chief competitor, Finsoft, in January 2008.
50. Almost immediately after his arrival at Finsoft, Mr Poirier became involved in discussions between Finsoft and Matchbet for the integration of the MBE with Finsoft's own systems. He realised that Matchbet could not enter into a contract with Finsoft in relation to LBOs while Matchbet was still in a contractual relationship with Alphameric, and he had of course been closely involved in the Matchbet project at Alphameric for some 18 months. None of this deterred him from his rapid switch of allegiance, although to be fair to Mr Poirier there is no suggestion that he acted in breach of any contractual or other obligations which he owed to Alphameric after he joined Finsoft. It is, however, a striking fact that in his witness statement he says nothing about his role with Finsoft, saying merely "I was offered another job and decided to leave Alphameric". His involvement with Finsoft (by whom he is still employed today, albeit under a different name) had to be elicited by Ms O'Sullivan in cross-examination, as did the fact that Mr Poirier had helped Dr Seifert to gather evidence for the purpose of these proceedings.
51. Mr Poirier said, and I accept, that he has not been paid to give evidence, nor has he been promised a share of the damages if Matchbet wins. Nevertheless, it appears that, for whatever reason, Mr Poirier is a supporter of Dr Seifert and no friend of Alphameric. He would clearly have been content for the court to know nothing about his move to Finsoft, or his immediate involvement in what was essentially the same project on behalf of Alphameric's main commercial competitor. I need to bear these points in mind when evaluating his evidence.
52. That said, I have no criticisms to make of Mr Poirier's oral evidence. He did not seek to disguise the nature of his involvement at Finsoft when it was put to him, and in general he gave his evidence in a clear and objective manner. Much of his evidence was unchallenged, and in my view its value is enhanced by two factors: first, his close involvement in the technical aspects of the project over a considerable period; and, secondly, his position as a middle-ranking executive at Alphameric who, at least until his departure, had no obvious axe to grind and was well placed, as an informed observer and participant in the project, to help the court understand the history of events from Alphameric's perspective.

## Mr Siers

53. Mr Siers is now 61, and has a lifetime of experience in the betting industry. He was still in his twenties when he managed his first betting shop. From 1977 to 1988 he worked for the Horserace Totalisator Board, and from 1992 to 1998 he was the managing director of Tote Direct. He then moved to the Alphameric group where he held a number of posts, including that of group business development director from 2004. During his time with Alphameric, Mr Siers was responsible for the development and marketing of its EPOS and ALBOS technology. He was also heavily involved in the development of a ground-breaking project called “Turf TV”. This became a joint venture between Alphameric Plc and a number of leading racecourses, carried on through a special purpose vehicle, Amalgamated Racing Limited (“AMRAC”). Later on, Mr Siers left Turf TV and went to work for its competitor, Satellite Information Services (“SIS”). He then spent two years at SIS, before moving to Betfred by whom he is still employed today in a senior managerial post.
54. Mr Siers was an unwilling witness. He attended court in response to a witness summons, and declined to provide any witness statement. When questioned by Mr Weatherill about his reluctance to give evidence, Mr Siers said this (transcript, day 5, pp 168-9):

“To be completely frank, I’m not here on the basis that I want to be here. I have associates and friends on both sides of this argument, and I was reluctant to come here today. I had a court case last year ... and it wasn’t a great experience for me, and I don’t necessarily like being in court.”

The reference to a court case was to the trial of a claim for breach of confidence and breach of contract brought by Racecourse Media Group Limited and AMRAC against Mr Siers in the Queen’s Bench Division of the High Court in June 2012. In his judgment handed down on 13 July 2012, His Honour Judge Reid QC found in favour of the claimants and disbelieved Mr Siers’ evidence in several material respects.

55. A consequence of this was that I had the unusual experience for a trial judge today in civil proceedings of hearing Mr Siers give his evidence in chief over a long period. Due to various timetabling difficulties, it was unfortunately necessary for Mr Siers to give his evidence on parts of three separate days (days 5, 6 and 7) amounting to approximately one day in all. Despite his unwillingness, however, Mr Siers was not a hostile witness. On the contrary, he gave the court the benefit of his recollections and experience with expansive impartiality. There were no issues about his credibility, and he was only lightly cross-examined by Mr MacLean. My only criticism of his evidence is that it was, at times, rather egocentric, with the result that I need to be careful before accepting uncritically either his opinions of other people or his assessment of his own achievements. I also need to remind myself that, despite Mr Siers’ undoubted and extensive experience in the racing industry, he was called as a witness of fact, not an expert.

**Mr Maskey**

56. Mr Maskey is currently a director of a company based in Brighton called 2B Affiliates, which he joined in December 2012. Before then he was employed as a general manager by Amaya Gaming Group, which is based in Quebec. He was their general manager in Armenia. At the time relevant to the present action, between 2005 and 2008, Mr Maskey worked for Finsoft on a self-employed basis as a sales and marketing consultant. In that role he played a significant part in the development of Finsoft's EPOS technology, obtaining for it a significant part of the UK retail market.
57. In his witness statement Mr Maskey describes how he first met Dr Seifert in or around late 2005, and "instantly saw the huge potential of the MBE". He says he warmly recommended it to Finsoft, but to his "great frustration" Finsoft was for various reasons unable to take up the opportunity and Matchbet proceeded instead with Alphameric. Mr Maskey is disparaging about Alphameric, saying that when he next met Dr Seifert at the Birmingham Betting Show in October 2006 he voiced to Dr Seifert his concerns about Alphameric, including "their reputation for consistent failure to deliver promised enhanced technical upgrades to their systems and their reputation for poor delivery and even poorer service". He says he was "hugely disappointed" by Matchbet's decision to join up with Alphameric, but they both agreed to remain in touch and be open to any future opportunities that might arise. In view of his low opinion of Alphameric's management and technology, he was "not entirely surprised" to find out later from Dr Seifert about the failure of Matchbet's project with Alphameric. His statement concluded as follows:
- "27. Unfortunately, at the time when Dr Seifert told me that Matchbet's relationship with Alphameric had come to an end, sometime in 2008, Finsoft as a company had been sold to GTECH Corporation ("GTECH"). The entrepreneurial and innovative board and management style of Finsoft that had existed up until then and which had been passionate about the land based betting industry then became subordinate to the much more "corporate" approach of GTECH, who had more of a focus on gaming applications with none of the previous board's interest in the land based betting market."
58. It would not be apparent to a reader of this statement that Finsoft had in fact been taken over by GTECH before November 2007, and that active negotiations between Matchbet and Finsoft, in which Mr Maskey played a part, had begun in December 2007 and were still continuing when the relationship between Matchbet and Alphameric came to an end in April 2008. Nor does Mr Maskey see fit to mention that, shortly before signing his statement, he had become a shareholder in Matchbet's ultimate parent company, OVM. These points were only elicited by Ms O'Sullivan in cross-examination. Taken together with the highly partisan tone in which Mr Maskey's statement is drafted, they leave me in real doubt about his reliability save in relation to uncontroversial matters of fact. I therefore treat his evidence with considerable caution.

**Mr Somekh**

59. Mr Somekh is a French national and the chairman of Groupe Dynnovations, a technology brokerage firm which specialises in the transfer to the private sector of defence and energy research carried out for the French government. Mr Somekh is a civil engineer by training, and has been the chairman of Groupe Dynnovations for 25 years. The company has five employees, and typically operates by taking up and developing an innovative product, carrying out market research, formulating a business plan, and then transferring the product either to a major group or to a start-up company. Mr Somekh has no other business ventures, having decided to make the company the focus of all his business activities. Because his work bridges the gap between government and the private sector, he has many contacts within the French government and enjoys what he describes as “excellent relations with French government officials at the highest level, including those within the state controlled gambling industry”.
60. Mr Somekh first met Dr Seifert when he was developing and marketing his Virtex system in the financial sector. As a technologist, he found it an exciting concept, and they remained in regular contact. In or around 2005 Dr Seifert told Mr Somekh about Matchbet, and they met in Normandy (where Dr Seifert had a home) to discuss whether the Matchbet technology would be attractive to the French market. Mr Somekh was interested in this as a business opportunity, because the French gambling market had in his view stagnated by reason of the monopoly enjoyed by the two State run betting organisations, Française des Jeux (“FDJ”), which mainly operated terrestrial lotteries and fixed odds betting on games and sports, and Pari Mutuel Urbain (“PMU”), which ran horserace pools betting. The French government had plans to liberalise the French betting industry, and it was in the context of such proposed liberalisation that Mr Somekh saw enormous potential for exploiting Matchbet’s technology. In the event, this liberalisation did not materialise until much later, but its enticing prospect, no doubt fostered by Mr Somekh’s high-level contacts at FDJ, formed the backdrop to Mr Somekh’s involvement in the present case.
61. Mr Somekh is a fluent and reasonably good English speaker. He said that he prepared his witness statement in English, and he was able to give his oral evidence without an interpreter. There were occasions when he did not immediately understand the questions put to him by Mr MacLean, but (subject to one important point which I mention below) any misunderstandings were quickly sorted out.
62. In general, I found Mr Somekh to be a shrewd and intelligent witness, confident in his own abilities and anxious to stress his influential links with the French establishment. Since he played a key role in the events leading up to the termination of the SDLA, and since Alphameric now accuse him and Dr Seifert of having orchestrated a plan to bring the SDLA to an end, I will (as with Dr Seifert) deal with that aspect of his evidence when I review the facts.
63. There is one, however, point which it is convenient to clear away at this stage. In their closing submissions, counsel for Alphameric relied on one answer by Mr Somekh in cross-examination as amounting to an admission that in giving his oral evidence he regarded the truth as an entirely expendable commodity. The point arose when Mr MacLean was questioning Mr Somekh about a letter which he wrote on 18 August 2008 to Mr Morcombe, accusing Alphameric Plc of having made a fraudulent

misrepresentation in a public rights issue prospectus to the effect that Matchbet was “now being fully integrated with Alphameric’s EPOS payment and ALBOS price broadcast systems”, thereby causing Mr Somekh grave embarrassment and loss of credibility in France. In this letter Mr Somekh said, among other things:

“I deeply resent that the callous actions of your Executive Directors have caused me this deeply humiliating and damaging situation. I have been dismayed by the cynical disregard and casual contempt for the truth displayed by the executive directors of your company, with whom I have met on a number of occasions who seem to consider the truth as an entirely expendable commodity when money is at stake.”

Mr MacLean put this passage to Mr Somekh, and continued “That sentence perfectly describes the evidence which you have been giving to this court today, doesn’t it?”, to which Mr Somekh replied “Yes”.

64. In my judgment it is fanciful to suppose that in giving this answer Mr Somekh was making a sudden admission about the quality and veracity of his own oral evidence. My understanding of his answer, and of the way in which he gave it, was not that he had been driven under pressure of cross-examination to confess that he had been giving dishonest evidence, but merely that he meant to convey that the sentiments expressed by him in the letter corresponded with the evidence to similar effect which he had been giving in the witness box. In other words, he was averring the consistency of his approach, and nothing more. I feel no real doubt on this point, but even if I did, I would give Mr Somekh the benefit of it. He may well not have understood the intended thrust of the question, which was ambivalently phrased. Bearing in mind that Mr Somekh was giving evidence in a foreign language of which his command is less than perfect, I think it was incumbent on Mr MacLean to spell out the intended implication of his question with much greater clarity if he wished to rely on the answer as an admission of dishonesty.

### **Mr O’Mahony**

65. Mr O’Mahony was in 2005 the commercial director of Boylesports Limited (“Boylesports”), a bookmaking firm with a large number of retail betting shops throughout Ireland. In his statement he describes how he was introduced to Dr Seifert and met him in Ireland in September 2005 to discuss the MBE and the possibility of Boylesports becoming one of its first online clients. His initial opinion of the MBE was that it was “very interesting and clever”, and he saw the project as possibly offering a good component of Boylesports’ internet business. Negotiations ensued, and a draft agreement was discussed at a meeting held in January 2006. However, the negotiations never came to anything, in particular because Mr O’Mahony was concerned about potential liability for Irish VAT if Boylesports participated in the MBE. Various other outstanding issues were highlighted by Mr O’Mahony in a long email which he sent to Dr Seifert on 13 April 2006.
66. Mr O’Mahony was not required to attend for cross-examination, so his evidence is unchallenged.

**(2) The witnesses for Alphameric**

67. The witnesses of fact who gave oral evidence for Alphameric were:

- (a) Mr Morcombe;
- (b) Mr Christopher Ian Lindsey;
- (c) Mr Eduardo Ovidio Addario; and
- (d) Mr Stephen Charles Sutton.

In addition, Alphameric served a notice under section 2 of the Civil Evidence Act 1995, indicating their intention to rely on hearsay evidence contained in an email dated 19 September 2012 from Mr Jamie Hart of William Hill to a Mr Sam Dibb. The notice stated that Mr Hart would not be called to give evidence because he was unwilling to provide a witness statement.

**Mr Morcombe**

68. Mr Morcombe is a very experienced chief executive in the betting industry. He was Group Chief Executive of Alphameric Plc (later renamed Timeweave Plc) from April 1995 until April 2010, having previously been Operations Director at British Aerospace Communications. He was then chief executive of the Horsemen's Group, which represents the common interests of five professional associations connected with horse racing, until the end of 2012, when he retired. During his 15 years as Group Chief Executive of Alphameric Plc, Mr Morcombe also held operational positions for shorter periods in some of its subsidiaries, including AMRAC and Alphameric.
69. Having been a very busy chief executive with a number of complex operational responsibilities, Mr Morcombe frankly concedes in his witness statement that he is sometimes unable to remember the details of particular meetings or documents, especially as the events in question took place several years ago. He therefore attempts in his statement to distinguish between matters which he can recall unprompted, and his reconstruction of what he thinks he would probably have said or done in cases where he has no direct recollection. Mr Morcombe was criticised for this by Mr Weatherill, but in my view the criticism was unfair. Mr Morcombe was open about his inability to remember many details, and in cases where he could not remember reconstruction was the only alternative available to him, short of refraining from comment altogether. I do, however, accept that I need to be alert to the difference between Mr Morcombe's positive recollections and his reconstructions, and I acknowledge that the latter are likely to carry less weight than the former.
70. Near the beginning of his statement, Mr Morcombe gives a brief description of the Alphameric group and its business which was substantially unchallenged, and which it is convenient to reproduce:

“7. Alphameric Plc was the holding company of the Alphameric Group, which comprised two businesses, Leisure and Hospitality. The Leisure business supplied proprietary bet

settling systems and display systems to [LBOs] the Leisure Business was operated through Alphameric.

8. Alphameric was the market leader in the provision of bet settling and display systems to LBOs, delivering its first product to Coral in 1989. Alphameric marketed and sold a range of systems for LBOs in the UK and Ireland. It sold two different bet settling systems. The first, marketed as “SCS” or “Slip Capture System”, was used by smaller and medium sized bookmakers and the second, referred to as EPOS, was more sophisticated and included a terminal device marketed as “iTerm”, and was used by larger bookmakers. In addition, Alphameric marketed and sold a display system referred to as [ALBOS] that displayed on television screens all betting opportunities being offered to punters and live television pictures within the [LBOs] utilising the Alphameric systems. All of the systems were integrated to the extent that they utilised a common data feed.

9. The products were established on various hardware platforms that were frequently updated but in all cases utilised Alphameric’s proprietary software. It was common for the hardware platforms to be built after receipt of a customer order and prior to delivery, in order to take advantage of the latest and most cost effective hardware platforms available. In the case of major customers, like Ladbrokes, William Hills and Coral, if the customers wanted to ensure that their hardware platforms were identical into the future they would purchase sufficient items of hardware for their rollout needs at the time of the original order, and these would be stored by Alphameric to be called off by the customer at a future date. Whilst Alphameric’s systems utilised proprietary software, the hardware platforms utilised industry standard PC hardware and Microsoft operating software.”

71. Mr Morcombe was cross-examined by Mr Weatherill for the best part of two and a half days, so I had ample opportunity to observe him giving evidence. In general, I found him to be an impressive witness. He remained courteous and patient at all times, despite the repetitive nature of some of Mr Weatherill’s questions, and I am confident that he was doing his best to assist the court. It was put to him by Mr Weatherill on various occasions that he was dissembling, or being evasive, but I do not accept those criticisms. Given his frequent lack of direct recollection, he was understandably cautious about the answers which he gave relating to events which had taken place between 2006 and 2008. He was also often asked about events or documents before he had been taken to the relevant material and given an opportunity to refresh his memory. Here again, it is unsurprising if his answers were careful and non-committal. His evidence was in general calm, measured and thoughtful, and it is to his credit that he did not pretend to remember more than he actually did. He was also commendably willing to accept (as I have already noted) that the MBE was technically viable and had real commercial potential.

72. Nevertheless, there were a few occasions when Mr Morcombe's lack of direct recollection led him to reconstruct events in an unduly partisan and inaccurate manner. In particular, I am satisfied that the account given in his written statement of Matchbet's initial involvement with Alphameric was in some material respects unbalanced and unfair to Matchbet: see paragraphs 101 to 102 below.

### **Mr Lindsey**

73. Mr Lindsey was the IT director for retail at Ladbrokes Plc from October 2000 to December 2009. Ladbrokes is one of the largest betting companies in the UK, owning over 2,400 LBOs in the UK and Ireland. At the relevant time, Ladbrokes' retail business unit was primarily concerned with the company's LBOs rather than its online initiatives. Mr Lindsey explains that Ladbrokes' LBOs use Alphameric's ALBOS system but not its EPOS technology.
74. Mr Lindsey's written evidence (after excision of a paragraph of opinion evidence, which I ruled inadmissible) was mainly devoted to a presentation by Matchbet of the MBE to the retail board of Ladbrokes in January 2007, and an explanation of why Ladbrokes eventually decided not to proceed with Matchbet. Both sides agree, and I accept, that Mr Lindsey was a completely honest and reliable witness.

### **Mr Addario**

75. Mr Addario was employed by Alphameric as its research and development (R & D) and technology director from 24 July 2006 to 15 August 2008. He initially held that post in the Hospitality Division, but with effect from January 2007 he took over responsibility for the Leisure Division as well, following a reorganisation by Alphameric of the two divisions. At all material times Mr Poirier reported to Mr Addario within Alphameric.
76. In his statement Mr Addario records his involvement with Matchbet and the MBE from January 2007 until the termination of the SDLA in May 2008. As in the case of Mr Lindsey, both sides agree, and I accept, that Mr Addario was an honest witness who did his best to assist the court. It is worth mentioning in this context that Mr Addario has no continuing relationship with Alphameric, having left the company several years ago.

### **Mr Sutton**

77. Mr Sutton was chief technology officer at Alphameric Plc from 30 September 1993 until 26 March 2009. He then became development and systems director at AMRAC, where he had been seconded by Alphameric in November 2006, and remained in that post until April 2013, since when he has been AMRAC's technical director. He attended his first meeting with Matchbet in about April or May 2005, but was more heavily involved with Matchbet from about February 2006 until his secondment to AMRAC at the end of that year. At that stage Mr Sutton's effective involvement with Matchbet came to an end.
78. Mr Siers described Mr Sutton's role in Alphameric as being that of "a technical guru". Mr Sutton bridled at this description when it was put to him in cross-examination by Mr Pickering, and said that it was "fundamentally incorrect". He emphasised that he

had commercial experience to match his technical expertise, and said he had negotiated a large number of commercial contracts on Alphameric's behalf. Consistently with this, he had been given responsibility for running development in the Leisure Division in January 2006, although on the basis that this would be a temporary appointment until a more appropriate candidate was found. After Mr Sutton moved to AMRAC, he was replaced in this role by Mr Addario.

79. The impression which I gained of Mr Sutton when giving evidence was that he is a rather prickly character and not always the easiest of colleagues. He accepted in cross-examination that when he was replaced by Mr Addario "there were certainly people in Alphameric who were very keen for me not to be there". Mr Sutton also has a sceptical, and at times pessimistic, cast of mind. He described himself in cross-examination as a man of few words, with the ability to see problems where no one else sees them. He said he was notoriously a "glass half empty" man, in contrast to Mr Siers for whom the glass is always half full. Perhaps for this reason, Mr Sutton was always doubtful about both the technical and the commercial merits of the MBE.
80. In their written closing submissions, counsel for Matchbet submitted that in one passage of his cross-examination Mr Sutton had invented the existence of a fictitious email in a clumsy attempt to assist Alphameric's case, and that this undermined his credibility generally. The incident in question concerned the MBE's functional specification, which according to Dr Seifert was signed off by Alphameric on 5 October 2006 after an amended copy of it had been supplied to Mr Poirier. When this was put to Mr Sutton, he said he had not been involved in this at all, and Mr Poirier had signed off the specification without contacting him or any of the technical staff at Alphameric. Mr Sutton said he thought he had become aware of this in the last week in November, and had been shocked. He then wrote to Mr Morcombe on 7 December, expressing his dismay that the documents had been signed off without his sight or approval, and saying that "this would come back to haunt us".
81. No letter or email in those terms has been disclosed, whether dated 7 December 2006 or around that time. Nor is there any reference to it in other documents. It is therefore likely, in my view, that Mr Sutton's recollection was mistaken. It is also strange that he claimed to remember the precise date of his communication to Mr Morcombe, especially as he would by then have moved to AMRAC. Possibly he was mis-remembering the content of an email which he had sent to Alphameric's general counsel, James Soulsby, and copied to Mr Morcombe, on 7 November 2006. In any case, although he was in my view probably mistaken, I do not believe that Mr Sutton fabricated this evidence. I accept that he was shocked when he discovered that Mr Poirier had signed off the specification without reference to himself, and I believe that he either complained, or intended to complain, about this to Mr Morcombe. The complaint may have been made orally, or an intended email may never have been sent. The episode shows that Mr Sutton's evidence is not always wholly reliable, but I would acquit him of attempting to mislead the court.
82. Mr Sutton's witness statement was served on 21 February 2013, only three weeks before the start of the trial, in response to the second statement of Dr Seifert. Its main purpose was to address the technical and commercial issues involved in marketing new products to LBOs. I found Mr Sutton's evidence on these factual questions to be clear and generally convincing, although I bear in mind that he is still employed by AMRAC and is therefore not an independent witness.

**Mr Hart**

83. I agree with counsel for Matchbet that I should disregard the hearsay evidence of Mr Hart. It is impossible to make a fair evaluation of what he said in his email of 19 September 2012 to Mr Dibb without any knowledge of its context or of the questions put to him in the prior conversation which the email was intended to confirm. Nor has any explanation been provided of why Mr Hart could not be called to give evidence, if necessary under a witness summons. In the circumstances, I am unable to gain any assistance from his evidence; and I note that, sensibly, no reference was made to it by counsel for Alphameric in their closing submissions.

**Events leading up to the SDLA**

84. Matchbet's initial business aim, before Alphameric appeared on the scene, was to compete directly with existing betting exchanges and "aggressively take market share from [them]": see paragraph 4 of Mr Ireland's draft business plan for VBX. This would clearly have been a considerable challenge, as Mr Ireland went on to explain when commenting on the "difficulties facing other smaller players". Matchbet's answer to this problem lay in its supposed ability to generate superior liquidity.
85. In January 2005 Matchbet approached Investec as a possible source of funding. An initial presentation was made, and on 10 February Investec said they liked the concept enough to take it to the next stage, which "should include an emphasis on the business plan and financial outlook".
86. Meanwhile, VBX also initiated discussions with Alphameric and a first meeting took place on 31 January 2005, attended by Dr Seifert and Edward Porteous for VBX and Alphameric's director of business development, Phil Smith. In his follow-up email sent to Mr Smith on 1 February, Dr Seifert said that he and Mr Porteous had been much impressed by the extent of Alphameric's trade links with LBOs in the UK and Ireland. He continued:

"We are pleased to confirm that we shall be most interested in receiving your proposal/draft specifications in respect of your suggestion that we may collaborate in developing a new service offering to your clients, which you would roll out initially to one or several of your independents, and which in due course could be offered to all your bookmaking clients.

If we understood your thinking, such a service would be based on your existing real time data services to the industry, and use VIRTEX in "finite risk mode", i.e. in a way in which the specific expertise of the odds compiler, in terms of risk management as well as estimates of probabilities and trading strategies, could be combined, in a real time computational sense, with the VIRTEX matching capabilities.

...

We understand that you intend to send us a proposal/draft specifications on how such a combined product offering should work ...

We also understand that, subject to internal deliberations, you may wish to put forward ideas in respect of either a direct (but low key) investment in Matchbet, or a more high profile investment that may involve you offering an “Alphameric Exchange” to your bookmaking clients. We would be most interested in either of these arrangements ...”

87. According to Dr Seifert, Mr Smith had said at the meeting that Alphameric were very keen to invest in new services and products, that Alphameric’s market value was £100 million, and that they had made £6 million in the last year. A further possible attraction of proceeding with Alphameric was that Investec were Alphameric’s financial advisers and brokers.
88. On 13 February 2005 Mr Ireland sent the latest version of the VBX business plan to Dr Seifert and Mr Porteous. In his covering email he posed a number of questions, including the following:

“Do we know that the bookmakers will want to put an exchange product in their shops which directly competes with their fixed odds sports book? This seems like a bit of a red herring to me – the reason FOBT [*Fixed Odds Betting Terminals*] have worked so well is that they are simple games that fill the minutes of boredom between races for the unsophisticated punter who still spends his time in the traditional betting shop. These people are unlikely to be tech savvy enough to operate a betting exchange product from a touch screen in store ... Or is this where the Alphameric discussion comes in?”
89. Around the same time Matchbet scored an initial success. An online bookmaker, Blue Square, agreed to pay £29,000 for a pilot of Matchbet’s online exchange. However, the pilot was evidently not a success. On 1 August 2005 Blue Square reported to Dr Seifert that “not many of our guys actually tried to place bets and those who did found it difficult and not straightforward. Those who did not got confused by the interface”.
90. On 16 March 2005 a meeting took place between Dr Seifert and Mr Morcombe, Mr Smith and Mike McLaren of Alphameric. Mr McLaren was a director of Alphameric Plc. This was probably the first occasion on which Dr Seifert and Mr Morcombe met. In his statement Mr Morcombe says that he was first introduced to Dr Seifert by Rodney Hornstein, the then chairman of Alphameric Plc, who shared an interest in real tennis with Dr Seifert. I think Mr Morcombe was mistaken in this recollection, because the documents show that Dr Seifert met and played real tennis with Mr Hornstein on 2 November 2005, in a context which strongly suggests that they had not previously met, and still less that Mr Hornstein had introduced him to Mr Morcombe earlier in the year.

91. Dr Seifert described the meeting on 16 March as “most successful” in an email which he sent to Mr Ireland later the same day. A fortnight later, on 31 March, Dr Seifert supplied Mr McLaren with Matchbet’s current business plan and share register. In his covering email, he said that Matchbet was “in a number of investment discussions with institutional investors”, and continued:

“As you know, we attach great significance to the synergies that we believe could flow from a business relationship with Alphameric and hence would have a clear preference to an investment that would go hand in hand with collaboration along the lines we have discussed with you.”

The enclosed business plan was a substantial document, running to 64 pages and appendices.

92. On 6 April Ed Cottrell of Investec emailed Dr Seifert asking for some help in understanding what he described as the “black box” of the VIRTEX platform. In reply, Dr Seifert promised to provide him with worked examples.
93. On 15 April Dr Seifert updated Alphameric on matters relevant to Alphameric’s potential equity participation in Matchbet and the potential commercial collaboration between the two companies. He said Matchbet “would very much welcome your investment, but from our viewpoint it is the commercial collaboration that is crucial”. Shortly afterwards, Alphameric brought in Mr Siers and Mr Sutton to reinforce their Matchbet team, and on 21 April Mr Siers emailed Dr Seifert to introduce himself and Mr Sutton and to ask for a technical demonstration of the Matchbet System. Mr Siers said that they wanted “to look at the system from a practical and technical perspective, and what it can do”.
94. A meeting was then arranged for 26 April 2005 at Alphameric’s offices. At the meeting Mr Siers was impressed, and Dr Seifert was able to answer his questions to his satisfaction. A further meeting was arranged for 12 May. This was a technical meeting, and again Dr Seifert’s impression was that it went well. Mr Siers remained enthusiastic, and said there was scope for a very profitable enterprise if the Matchbet system could be delivered to Alphameric’s customers through Alphameric’s systems. There was further discussion of commercial co-operation along these lines at a meeting on 23 June between Dr Seifert, Mr Siers and Mr Morcombe. According to Dr Seifert’s recollection, which both Mr Siers and Mr Morcombe were prepared to accept as substantially accurate, the discussion envisaged that Matchbet would develop the system to a stage where it could be connected to Alphameric’s own systems for LBOs, and Alphameric would then market the service to its LBO customers over the next year. Alphameric also made it clear that they wanted to have an exclusive licence to market and use the developed system.
95. The meeting on 23 June had been joined, at Alphameric’s suggestion, by representatives from Investec, and on 24 June Dr Seifert emailed Matchbet’s latest financial statements to David Currie of Investec. He commented that if Alphameric and Matchbet were to “join forces to bring the exchange to the offline betting world, this will add another, potentially huge component, which is not reflected in the business plan or projections”. He said it was proposed to value Matchbet’s current

share capital at £6 million. The basis of this proposed valuation is obscure to me, and in view of Matchbet's recurrent financial difficulties I suspect it was over-optimistic.

96. On 11 July 2005 Mr Siers sent an initial draft of possible heads of terms to Dr Seifert, who responded on 14 July with detailed amendments. He suggested an early meeting "to take stock and move forward". He added:

"If you wish to invest, then it would be useful to know this as soon as possible, and to understand whether Investec have endorsed our valuation.

We are convinced that, joining forces, we can indeed bring about a revolution in the betting market, and we look forward to working with you to this end."

97. Negotiations on the draft heads of terms continued throughout July and August 2005, but there was a set-back for Matchbet when Investec made it clear that they were not interested in investing in Matchbet at that stage. On 23 August Mr Cottrell emailed Dr Seifert saying:

"I have spoken to Alan [*Morcombe*] and made it clear that we are not interested in investing [*in Matchbet*] with Alphameric at this stage and that we needed further proof of concept before doing so."

Dr Seifert put a characteristically optimistic and inaccurate gloss on this disappointing news by saying in an email to Mr Siers later the same day:

"At this stage in time we have agreed with Investec that we shall not enter into an investment agreement with them, but will keep them informed ... of the progress of our pilot."

98. Alphameric were not deterred by Investec's decision from continuing to negotiate with Matchbet, but as Mr Siers had said in an email to Dr Seifert on 23 August the decision was "not something we can ignore". Mr Siers also emphasised that all of their discussions were subject to board approval. For its part, Matchbet was anxious to follow up other possible leads. A first meeting with Finsoft (Alphameric's main competitor) was arranged for 26 August 2005, and in September Dr Seifert made an initial presentation to Boylesports in Ireland.
99. By the beginning of October 2005, however, Matchbet was in a desperate financial plight. Dr Seifert explained the problems in an email to his fellow directors of Matchbet, Mr Porteous and Mr Winton, on 1 October. He said, among other things, that the funding which Mr Ireland had been confident he could easily raise from external investors had "turned out to be totally illusory", and that there was a desperate need to find £20,000 over the next week, with another £20,000 by the end of the month "to be reasonably solvent".
100. On 8 November 2005 Mr Siers sent Dr Seifert a proposal for further discussion, subject to contract and subject to Alphameric board approval. The proposal was for Alphameric to invest £250,000 in Matchbet by way of convertible loan stock, to be

issued in five tranches against milestones to be formulated by Matchbet. This proposal was the germ of what subsequently became the Heads of Terms, and following further discussions Mr Morcombe on 12 December 2005 sent Dr Seifert draft Heads of Terms which had been prepared by Mr Soulsby. The draft was then the subject of further discussion and amendment in the usual way, before the Heads of Terms were signed on 23 December 2005 by Dr Seifert on behalf of Matchbet.

101. I have already provided a brief summary of the Heads of Terms in paragraph 6 above. I must now refer to them in more detail, because Matchbet submits that they are both relevant and admissible in construing the SDLA. Before I do so, however, there is one general point which it is convenient to dispose of at this stage. In his written evidence, Mr Morcombe paints a disparaging picture of the proposals which Matchbet initially put to Alphameric. He says his initial impression was that the product being promoted by Matchbet was “similar in operation to Betfair”; that it would only support sports betting and not horse racing; that it could be accessed only via the internet; and that it had little chance of success, because Betfair were already established operators in the marketplace and Matchbet was under-funded. He says he recommended that Alphameric should not invest in the Matchbet proposition as proposed by Dr Seifert, but the situation then changed when Alphameric approached Dr Seifert with a different proposition “that had been brainstormed inside Alphameric by our new business development personnel and other like-minded individuals”. The essence of the new proposal, according to Mr Morcombe, was to use Alphameric’s LBO technology as a way of offering the MBE to punters in LBOs. He says the idea for this solution was Alphameric’s, and it “was a completely different proposition to the one offered by Dr Seifert to Alphameric”.
102. Mr Morcombe was cross-examined effectively by Mr Weatherill on this version of events, which I am satisfied does not correspond with reality. The inference which I draw from the documents, and from the substantially unchallenged evidence of Dr Seifert and Mr Siers, is that the proposed marriage between Matchbet’s original concept and Alphameric’s LBO technology was first suggested by Phil Smith on 31 January 2005 and then evolved in the course of discussions between the two companies. Mr Morcombe was not much involved in the detail of those discussions, and I do not accept that he ever recommended that Alphameric should not invest in the proposition first put forward by Dr Seifert (a recommendation for which Mr Morcombe was unable to point to any documentary evidence). Nor do I accept that the proposal was the fruit of a brainstorming exercise within Alphameric. I am sure Mr Morcombe did not intend to misrepresent the position in his evidence, and in cross-examination he was ready to concede that his memory may have been at fault in various respects. Nevertheless, I think the episode does betray an undue readiness on his part to belittle Matchbet and its proposed product, and a lack of objectivity probably engendered by the subsequent history of the dispute as he saw it.

### **The Heads of Terms**

103. The main relevant provisions of the Heads of Terms were as follows:

“BACKGROUND

...

(B) [Alphameric] has been in discussions with Matchbet in relation to the possible investment by Alphameric in Matchbet by way of a loan to enable the completion of the development of the Matchbet Software and the subsequent grant to Alphameric of exclusive distribution rights in relation to access to the [MBE].

(C) These heads of terms set out principal terms and conditions subject to which Alphameric is willing to proceed with the proposed transaction, which is to include:

(i) the development by Matchbet of the Matchbet Software under a development and licensing agreement to be agreed and entered into between the parties (“the Development Agreement”);

(ii) a loan of £250,000 payable by Alphameric to Matchbet in instalments linked to the achievement by Matchbet of milestones to be set out in the Development Agreement;

(iii) the creation by Matchbet of special Convertible Redeemable Loan Notes (“the Loan Notes”) and the issuing to Alphameric by Matchbet of the Loan Notes in respect of the loan payments made by Alphameric, such Loan Notes to be redeemable or convertible into shares in Matchbet, full details of which are to be set out in a Loan Note Instrument to be agreed between the parties and executed by Matchbet (“the Loan Note Instrument”);

(iv) the grant to Alphameric of exclusive worldwide rights (with the exception of specific exclusions) to distribute access to the [MBE] service, intended to be by way of a “front end” to be known as AlphaMatch which is to operate on EPoS systems or such other suitable devices as Alphameric may choose and permit communication with and operation in conjunction with the Matchbet Software and [MBE] (“AlphaMatch”).

(D) These heads of terms are not exhaustive and are not, and are not intended to be, legally binding between Alphameric and Matchbet except as expressly set out in this letter.

It is agreed as follows:

*[Paragraphs 1 to 3 dealt with the proposed loan of £250,000 bearing interest at 7.5% per annum, the first instalment of £50,000 to be payable on signature of the Heads of Terms; the issue of the Loan Notes; the share capital of Matchbet; and the intended terms of the convertible loan stock]*

#### 4. SOFTWARE DEVELOPMENT

4.1 The principal purpose of the loan provided by Alphameric to Matchbet is to enable Matchbet to complete the development of the Matchbet Software. The parties shall use reasonable endeavours within the period of exclusivity referred to in paragraph 9 below, to negotiate and enter into [*the Development Agreement*].

4.2 The Development Agreement shall contain provisions under which Matchbet shall be obliged to develop the Matchbet software in accordance with the detailed specifications (the “Specifications”) to be agreed between the parties. The Specifications shall be signed off by the parties in accordance with the Development Agreement.

4.3 Under the Development Agreement, Matchbet shall also be obliged to achieve the development Milestones referred to in the Development Agreement not later than the dates set out in the Project Plan. Following acceptance by Alphameric of the software developed by Matchbet under the Development Agreement, Alphameric shall progress to roll out as referred to in paragraph 5 below and in accordance with the Development Agreement.

#### 5. ROLLOUT AGREEMENT

5.1 The Development Agreement shall also contain provisions under which, following the completion of the development of the Matchbet software in accordance with the Development Agreement, Matchbet shall provide to Alphameric the application protocol interface required by Alphameric to enable it to develop AlphaMatch as a front end user interface to the Matchbet Software and the service available through the [*MBE*].

5.2 Following completion of the integration work Alphameric and Matchbet shall run the Integration Tests to be referred to in the Development Agreement. Upon successful completion of those Integration Tests, Alphameric shall market and roll out the AlphaMatch platform to enable its customers to connect to the [*MBE*], owned and run by Matchbet, and its associates, in accordance with the Project Plan and the Development Agreement.

...

#### 7. EXCLUSIVE DISTRIBUTION

7.1 This clause 7 is binding on Alphameric and Matchbet.

7.2 In consideration of the initial payment of £50,000 to be made by Alphameric to Matchbet under paragraph 1.1 of this Heads of Agreement, Matchbet grants to Alphameric a perpetual licence to market to operators of LBOs, and to permit operators of LBOs to access, the [MBE] service (as provided by the Matchbet Software) worldwide via AlphaMatch (or any other front end software developed by or on behalf of Alphameric for that purpose).

7.3 The licence referred to above shall be an exclusive worldwide licence under which, subject to paragraphs 7.4, 7.5 and 7.6 below, Matchbet may not itself (or permit any third party to):

(a) sell, or permit any person or entity which is an operator of LBOs to enable LBO based access or use of, the [MBE] or the LBO service which the [MBE] provides;

(b) sell, or permit any operator of LBOs to enable LBO access or use of, any other betting exchange which uses the Matchbet Software, or the LBO service which any such betting exchange provides.

7.4 Notwithstanding paragraph 7.3 above, Matchbet shall be entitled to licence the Matchbet Software to internet or credit bookmakers:

(a) for access via the Internet;

(b) for access via any other channel other than LBOs;

for the purpose of permitting access to and use of the [MBE]. The terms of this Exclusive Licence Agreement are more fully set out in the Development Agreement.

...

7.7 Matchbet shall provide Alphameric with all reasonable assistance in connection with the marketing of the [MBE] service under clause 7.3 above.

7.8 The licence terms applicable to the Matchbet Software and the [MBE] shall be set out in detail in the Development Agreement.

7.9 Matchbet shall be obliged to provide and make available the [MBE] as a service to customers of Alphameric on terms to be agreed between the parties. It is intended that such terms will be set out in the Development Agreement.

## 8. REVENUE & PROFIT SHARE

8.1 The Development Agreement shall contain provisions under which:

(a) Alphameric shall be entitled to receive 50% of the gross revenue received by Matchbet arising from the use of the [MBE] by any operator of LBOs (to include but not be limited to spread income, commission margin, and trade roundings); and

(b) Alphameric shall be entitled to receive 10% of the gross revenue received by Matchbet arising from the use of the [MBE] not falling within paragraph 8.1(a) above.

...

## 9. EXCLUSIVITY

9.1 This paragraph 9 is legally binding on Alphameric and Matchbet.

...

9.9 The parties shall each use their reasonable endeavours to negotiate in good faith with a view to agreeing the terms of the Loan Note Instrument, the Development Agreement, and any other related documentation required to put into effect the matters contemplated by this Heads of Agreement, not later than the end of the Exclusivity Period.

## 10. INTERPRETATION

10.1 In this Heads of Agreement:

(a) "LBO" means licensed betting offices in the UK, and any betting or bookmaking business in other jurisdiction in which betting is conducted between a business and its customers through physical premises;

...

## 11. GOVERNING LAW ...

11.1 This heads of terms shall be governed by, and construed in accordance with, English law ..."

104. It is apparent from the Heads of Terms that Alphameric was only prepared to invest in Matchbet by way of a convertible loan, to be drawn down in instalments linked to the achievement by Matchbet of milestones yet to be specified. Alphameric was not prepared to take an immediate equity stake in Matchbet, although that is what Matchbet would ideally have preferred. Furthermore, the initial loan instalment of

£50,000 (which was in fact not paid until 4 January 2006) was only made available by Alphameric in return for the immediate grant by Matchbet to Alphameric of a perpetual, exclusive and worldwide contractual licence to market the MBE (when it had been developed) to operators of LBOs. The terms of the licence in paragraph 7 did not impose any obligation on Alphameric to market the MBE to LBOs, even though the exclusive nature of the licence (subject to a limited exception contained in paragraph 7.5) meant that Matchbet would itself be precluded from undertaking such marketing itself. By contrast, paragraph 7.4 expressly provided that Matchbet would be entitled to licence the Matchbet Software to internet or credit bookmakers, for the purposes of permitting access to and use of the MBE.

105. Paragraph 5.2 of the Heads of Terms expressly contemplated that Alphameric would market and roll out the AlphaMatch platform once the integration work had been successfully completed. For what it is worth, the words “shall market and roll out” in paragraph 5.2 are in my view more naturally read in their context as connoting an intended future obligation under the SDLA, rather than a mere statement of what the parties expected to happen in the future. Unlike clause 7, however, the provisions of clause 5 were not contractually binding. That is made clear beyond any possibility of doubt by recital (D). I conclude, therefore, that although Matchbet had committed itself irrevocably to the grant of the licence contained in clause 7, the question whether Alphameric would ever come under an obligation to market and roll out the MBE to LBOs, although contemplated by the parties, was deliberately left open.
106. Consistently with the Heads of Terms, Matchbet remained at liberty to develop and market its online betting exchange business. So, for example, the discussions between Matchbet and Boylesports, which had begun in September 2005, continued into 2006 before petering out in the light of unresolved concerns raised by Mr O’Mahony. Alphameric had no objection to Matchbet’s efforts to develop its online business because Alphameric had already decided to confine its investment to the LBO side of Matchbet’s business, subject to receipt by Alphameric of 10% of gross revenue received by Matchbet from online use of the MBE: see paragraph 8.1(b) of the Heads of Terms.
107. Meanwhile, negotiations between Alphameric and Matchbet continued in the early months of 2006. There were also further discussions between Matchbet and Investec, but again it turned out that Investec was unwilling to provide funding at such an early stage in the development of the MBE. Investec spelt out its position in an email sent by Mr Cottrell to Dr Seifert on 8 March 2006:

“A firm letter of support is not something I am able to deliver at this stage. I re-iterate continued interest from us, and that is, I hope, evident from the amount of time we have spent on this project and the conversations we have had, but I know that the position of our investment committee is and will remain that we will be interested in funding Matchbet at a “revenue roll out” stage rather than in the “technology roll out” stage. By revenue, I mean trading or exchange revenue rather than fees that may be earned through founder members pre-trading. We are not in a position to adequately assess the technological risks in getting to “revenue roll out” and hence we would like to see

that being funded by founder members of the exchange and other interested parties, like Alphameric, who can participate.

I hope this clarifies the position and please remain in contact.”

108. Shortly afterwards, Mr Morcombe was appointed to the board of Matchbet. On 15 March Mr Morcombe emailed Dr Seifert expressing pleasure at his appointment and saying he looked forward to attending the next board meeting.
109. On 9 May 2006 the SDLA was signed. Like the Heads of Terms, the SDLA was substantially drafted by Alphameric’s in-house lawyers, headed by Mr Soulsby. Mr Soulsby was also the group commercial director at this date, and it was in fact he who signed the SDLA on Alphameric’s behalf. The in-house lawyer principally concerned with the drafting was the group solicitor, Mark Heather. For its part, Matchbet could not afford to pay for a commercial lawyer, but Dr Seifert obtained some help from a trainee solicitor, Madelene Holdsworth, who had previously worked for him part time when she was a student. At a later stage, Matchbet also instructed a solicitor, Mr Izaz Ali. The SDLA was signed on behalf of Matchbet by Dr Seifert.
110. Against this background, I will now describe the main terms of the SDLA.

### **The SDLA**

111. The main body of the SDLA runs to 38 clauses and some 30 pages of small type. There are nine schedules, not all of which were used. The only parties to it were Matchbet and Alphameric.
112. It is convenient to begin with the entire agreement clause:

#### **“31 Entire Agreement**

31.1 This Agreement (together with all other documents to be entered into pursuant to it) sets out the entire agreement and understanding between the parties, and supersedes all proposals and prior agreements, arrangements and understandings between the parties, relating to its subject matter.”

It is thus clear that the provisions of the SDLA superseded those of the Heads of Terms, including those which had contractual force. The parties could hardly have made it more clear that their contractual relationship was thenceforth to be governed by the terms of the SDLA alone.

113. There is only one recital to the SDLA, headed “Background”:

“Matchbet has agreed to develop certain computer programs for the purpose of providing a betting exchange service, to enable Alphameric to develop the necessary interfaces to enable Alphameric’s products to operate in conjunction with the betting exchange service, and to appoint Alphameric as its exclusive distributor of access to the betting exchange service from retail bookmaking outlets and to provide the other

services described in this Agreement upon the terms and conditions contained in this Agreement.”

114. Clause 1.1 contains definitions, of which the following may be noted:

“(b) **Alphameric System** means any equipment and/or software which Alphameric may, in its discretion, provide to End Users for the purpose of accessing the Programs and the Service;

(c) **Betting Exchange** means an exchange service of the type described in the Product Description;

...

(f) **Completion Date** means the date specified in the Implementation Plan by which Matchbet is to provide the Deliverables Ready for Use, or such extended date as may be set pursuant to any provision of this Agreement;

...

(h) **Deliverables** means the Programs, the Service and any other deliverables which this Agreement states are to be delivered by Matchbet to Alphameric;

(i) **End-User** means a person who is a party to an End-User Agreement with Matchbet in respect of the Service and who was introduced (or deemed to be introduced) by Alphameric pursuant to, and during the term of, this Agreement;

(j) **End-User Agreement** means the standard terms and conditions of Matchbet setting out the terms and conditions on which an End-User is permitted to access and use the Service, to be provided by Matchbet prior to the commencement of marketing of the Service;

...

(t) **Implementation Plan** means the timetable for the completion of the Stages of preparation and delivery of the Deliverables as specified in Schedule 2;

(u) **LBO** means:

(i) any licensed betting office in the UK; and

(ii) any betting or bookmaking business in any other jurisdiction in which betting is conducted between a business and its customers through physical premises;

...

(w) **Loan Notes** means the 7.5% Convertible Loan Notes in the capital of Matchbet issued pursuant to the Loan Note Instrument;

(x) **Loan Note Instrument** means the Loan Note Instrument dated 9 May 2006 constituting the Loan Notes;

(y) **Loan Payment** means the payment of £250,000 to be made by Alphameric to Matchbet by way of a loan as consideration for the performance by Matchbet of the Services, as specified in Schedule 3;

...

(cc) **Product Description** means the general description of the functions, facilities and technical architecture of, the Programs and the Service, set out in Schedule 4;

(dd) **Programs** means the computer programs (including the relevant application protocol interfaces) to be written by Matchbet pursuant to clause 4 and/or any other computer program created by Matchbet which provides betting exchange functionality;

(ee) **Ready for Use** means fully tested and accepted in accordance with clause 8;

(ff) **Service** means the betting exchange service which is provided by the Programs and which is to be supplied by Matchbet to End Users under this Agreement and/or any other Betting Exchange service which is provided by Matchbet to any person (whether using the Programs or otherwise);

...

(hh) **Stage** means a stage of the Implementation Plan;

..."

115. By clause 2.1, Matchbet agreed to (a) write the Programs and develop the Service; (b) provide the Deliverables ready for use by the Completion date; (c) provide User Manuals and training; and (d) provide the Service to End Users under End User Agreements entered into between Matchbet and each End User, in each case upon the terms and conditions set out in the Agreement. Clause 4.1 obliged Matchbet to "write a series of applications programs which shall provide the Service". The Service had to comply with the Functional Specification created as part of Stage 1, and to satisfy specified performance criteria.
116. Clause 5 provided that, in consideration for the performance by Matchbet of its obligations under the SDLA, Alphameric would pay the £250,000 Loan Payment to Matchbet in the manner, and at the times, specified in Schedule 3. It was further agreed that Matchbet would immediately issue to Alphameric a Loan Note in respect

of the first instalment of £50,000 (which had already been paid pursuant to the Heads of Terms), and that further Loan Notes would be issued as and when each further instalment of the loan was paid.

117. Under clauses 6.1 and 6.2, Matchbet undertook to “complete each Stage by the date specified in the Implementation Plan”, and to “provide the Deliverables Ready for Use on or before the Completion Date”. Clause 6.3 said that if Matchbet failed (inter alia) to complete any Stage by the dates specified, and failed to remedy such failure within 30 days after receipt of a request in writing from Alphameric to do so, Matchbet should be treated as being in material breach of the SDLA.

118. Clause 6.4 reads as follows:

“If Matchbet is delayed or impeded or obliged to spend additional time in the performance of any of its obligations under this Agreement because of any failure by Alphameric to comply with its obligations under this Agreement (including the supply by Alphameric of any incorrect or inadequate data, information or instructions) then, notwithstanding anything else contained in this Agreement, any time specified for the performance by Matchbet of any of its obligations (including, where relevant, the Completion Date and/or any relevant date specified for the completion of a Stage) shall be extended accordingly, and Matchbet shall be entitled to charge Alphameric in accordance with the Standard Rates in respect of any additional time spent by Matchbet in the performance of its obligations under this Agreement to the extent that it is made necessary solely and directly as a result of a failure by Alphameric to comply with its obligations under this Agreement.”

119. Clause 14, headed “Marketing of Access to the Service”, is important and needs to be quoted almost in full:

“14.1 Upon acceptance of the Deliverables at the final Stage in accordance with clause 8 above, Alphameric shall be licensed, on an exclusive and perpetual basis:

(a) to licence LBO Operators throughout the world to access and use the Programs and the Service for use in, and access from, the LBO businesses operated by such LBO Operators; and

(b) to be the marketing agent of Matchbet throughout the world for the purpose of securing End-User Agreements with prospective licensees who are LBO Operators for the purposes referred to in (a) above.

14.2 Alphameric may only market the Service for use by LBO Operators for use in, and access from, the LBO businesses operated by such LBO Operators ...

14.3 Alphameric shall secure End-User Agreements in accordance with the licence and support fees specified by Matchbet from time to time and in accordance with the terms of this Agreement.

14.4 Except as expressly set out in clauses 14.5 and 14.6, Matchbet shall not during the continuance of this Agreement in any part of the world:

- (a) appoint or permit any other person to sell or market the Service and/or the Programs to LBO Operators; or
- (b) itself sell or market the Service and/or the Programs to any LBO Operator; or
- (c) permit or enable access to, or use of, the Service and/or the Programs by, or for the benefit of, any LBO Operator, other than LBO Operators who are End Users.

14.5 Notwithstanding the provisions of clause 14.4 or any other provision of this Agreement, Matchbet shall be entitled to permit access to and/or use of the Service by any internet or credit bookmaking business where such access is made via the internet or via any channel other than an LBO ...

14.6 Notwithstanding the provisions of clause 14.4, if at any time after the completion of the final Stage under this Agreement any prospective licensee:

- (a) to whom Matchbet already provides the Service via any method specified in clause 14.5 above; and
- (b) who is also an LBO Operator;

also wishes to gain access to the Service for any LBO business operated by that prospective licensee, Matchbet shall notify Alphameric in writing of its existing customer's requirement and Alphameric shall be permitted to market the Service to that prospective licensee for use in its LBO business. If Alphameric is unable, within 3 months after the date on which it receives Matchbet's notice under this clause, to procure that the prospective licensee enters into an End-User Agreement for the supply of the Service to the LBO business of that prospective licensee, Matchbet shall itself be permitted to procure that the prospective licensee enters into an end-user agreement for the supply of the Service to that prospective licensee's LBO business. For the avoidance of doubt, when the prospective licensee signs an End-User Agreement, that prospective licensee shall be treated as an End-User for the purposes of this Agreement, notwithstanding that Alphameric may have been unsuccessful in marketing to the licensee in question, and

Alphameric shall be entitled to 50% of the Gross Revenue from the supply of the Service to that prospective licensee in accordance with clause 17 below.

14.7 Notwithstanding the provisions of clause 14.4, if at any time after the completion of the final Stage under this Agreement Matchbet becomes aware of any LBO Operator who is a prospective customer of the Service and notifies Alphameric in writing of the existence of that prospective customer then if Alphameric declines (or fails within 3 months after the date on which it receives Matchbet's notice under this clause) to procure that the prospective customer enters into an End-User Agreement for the supply of the Service to the LBO business of that prospective licensee, Matchbet shall itself be permitted to procure that the prospective customer enters into an End-User Agreement for the supply of the Service to that prospective customer's LBO business (if necessary, via an alternative marketing agent to LBO Operators other than Alphameric). For the avoidance of doubt, when the prospective customer signs an End-User Agreement, that prospective licensee shall be treated as an End-User for the purposes of this Agreement and Alphameric shall be entitled to 50% of the Gross Revenue from the supply of the Service to that prospective licensee in accordance with clause 17 below.

14.8 Matchbet shall provide Alphameric with such technical assistance as is reasonably requested by Alphameric in connection with the marketing and promotion of the Service, and shall endeavour to answer as soon as reasonably possible all reasonable technical queries raised by Alphameric concerning the use or application of the Service and which may arise in connection with Alphameric's efforts in relation to the marketing of the Service. For the avoidance of doubt, Matchbet shall not be expected to incur unreasonable or disproportionate costs in relation to the provision of such assistance.

14.9 Matchbet shall promptly provide Alphameric with the newest commercially available versions of the Programs and/or the Service.

14.10 If, during the term of this Agreement, Alphameric itself, or any Alphameric Group Company, enters into any arrangement with a third party whereby Alphameric is to market or promote any Betting Exchange which competes with the Service then Matchbet shall be entitled, at its option by notice in writing to Alphameric, to make the licence granted to Alphameric in clause 14.1 non-exclusive."

120. Clause 17 sets out the income sharing provisions, under the heading "Royalty Payments":

“17.1 During the term of this Agreement Matchbet agrees to pay to Alphameric:

(a) 50% of the Gross Revenue received by Matchbet arising out of or in connection with the supply of the Service to, or use of the Service by, any LBO Operator that is party to an end-user agreement with Matchbet; and

(b) 10% of all other Gross Revenue (not falling within 17.1(a) above) received by Matchbet arising out of or in connection with the supply of the Service;

in each case including, but not limited to, spread income, commission margin and trade roundings.”

121. Clause 23 sets out “Alphameric’s Responsibilities”, as follows:

“23.1 Alphameric shall:

(a) at all times act in good faith and conduct its business in a manner which will reflect favourably upon the Service and upon the good name and reputation of Matchbet;

(b) supply to Matchbet such reports, returns and other information relating to orders and projected orders for the Service and regarding prospective End-Users and such other assistance as Matchbet may from time to time reasonably require;

(c) use Matchbet’s trademarks and trade names relating to the Service only in the registered or agreed style in connection with the marketing of the Service ...

(d) deliver copies of the Functional Specification (and any product description relating to the Service) only to prospective licensees it reasonably believes to be bona fide; and

(e) permit Matchbet and its authorised agents at all reasonable times on reasonable notice to enter Alphameric’s premises for the purpose of ascertaining that Alphameric is complying with its obligations under this Agreement.”

122. Clause 26 deals with termination of the SDLA. By virtue of clause 26.2, Matchbet was not entitled to exercise its rights of termination under the Agreement “if any Loan Note is still outstanding or any amount of the Loan Payment is still owed by Matchbet to Alphameric”. Since no part of the loan was ever repaid, it follows that Matchbet never became entitled to exercise any of the termination rights expressly conferred on it by the SDLA.

123. Clause 29.2 provides that:

“... notwithstanding anything else contained in this Agreement, in no event shall either party be liable to the other for special, indirect or consequential loss or damage or loss or damage arising from the other party’s failure to comply with its obligations to that party.”

124. The Implementation Plan in Schedule 2 of the SDLA begins by saying that “Each Stage will be treated as having been completed when all the criteria specified for that stage in the table below have been met”. The table then specifies the criteria for each of the five stages, with separate columns headed “Responsibility of: Matchbet”, “Responsibility of: Alphameric” and “Responsibility: Joint”. The final column specifies the date for completion of the stage, by reference to a number of weeks from the date of the SDLA: six weeks for Stage 1, 10 weeks for Stage 2, 20 weeks for Stage 3, 28 weeks for Stage 4 and (again) 28 weeks for Stage 5. The expiry of 28 weeks also defines the Completion Date when Matchbet was to provide all Deliverables Ready for Use.

125. It is noteworthy that, although Matchbet was assigned specific responsibilities at each stage, the column for responsibilities of Alphameric was left blank for all five stages. The joint responsibility column has the following entries:

“Stage 1: The parties have set up a joint planning group for the purposes of planning, and monitoring progress of, the project under this Agreement;

Stage 2: The parties have agreed on a joint programme for the integration of the Programs/Service with the Alphameric System, as well as fees (and any other commercial terms) for any technical input to be provided to Alphameric for such assistance;

Stage 3: *[None]*

Stage 4: Integration of the Programs/Service with the Alphameric System.

The integrated system [i.e. the Alphameric System operating in conjunction with the Programs and the Service] has successfully completed integration tests to be carried out by the parties to agreed test scripts (referred to in Stage 1 above), and in accordance with clause 8 of this Agreement.

Stage 5: (a) the Programs and the Service, as integrated with the Alphameric System, has successfully completed final acceptance tests to be carried out between the parties to agreed test scripts (referred to in Stage 1), and in accordance with clause 8 of this Agreement (such tests, for the avoidance of doubt, to include performance

testing in a proven live environment) and, through such tests, have demonstrated compliance with the Functional Specification and the Performance Criteria.

(b) the parties have agreed test scripts/test harness to be used for the acceptance testing of the items referred to in the first column of this Stage 5; and

(c) commercial terms for the development by Matchbet of the additional functionality for the Programs/Service referred to in the first column of this Stage 5 have been agreed between the parties.”

126. Schedule 3 specified the amount of the Loan to be paid by Alphameric to Matchbet at the completion of each stage. It recorded that £50,000 had already been paid on signature of the Heads of Terms, and provided for further payments as follows: nil on the completion of Stage 1; £70,000 on completion of Stage 2; £75,000 on completion of Stage 3; £25,000 on completion of Stage 4; and £25,000 on completion of Stage 5. Provision was again made for the immediate issue by Matchbet to Alphameric of a Loan Note upon payment of each future instalment.

127. Paragraphs 1.2 and 1.3 of Schedule 3 contain provisions which applied to those items specified in the joint responsibility column of the Schedule 2 table which were not subject to acceptance under the so-called “objective procedure” set out in clause 8. These items were described as “Subjective Items”, and in relation to them paragraph 1.3 provided as follows:

“Alphameric shall not withhold or delay payment for non-completion of a Stage if:

(a) the only items outstanding under that Stage are Subjective Items; and

(b) the reason that such Subjective Items have not been completed is that Alphameric has unreasonably withheld or delayed its approval, co-operation or agreement on such items, notwithstanding the fact that Matchbet has done everything which is reasonably within its power or control to achieve completion of the Subjective Items in question.”

128. Schedule 4 of the SDLA contained the product description of the MBE, from which I have already quoted an extract in paragraph 37 above.

**Are the Heads of Terms admissible in construing the SDLA?**

129. The first question which I need to decide is whether, and if so to what extent, the Heads of Terms are admissible in construing the SDLA.

130. Alphameric submits that they are not admissible, for two main reasons. First, the Heads of Terms formed part of the process of negotiation which led up to the SDLA, and they are therefore excluded from the factual matrix of admissible background material known to both parties by the exclusionary rule reaffirmed by the House of Lords in Chartbrook Limited v Persimmon Homes Limited [2009] UKHL 38, [2009] 1 AC 1101: see the discussion of the rule by Lord Hoffmann at [28] to [42], with which the other members of the Court agreed, and the observations of Lord Hope, Lord Rodger of Earlsferry and Baroness Hale of Richmond at [2] to [4], [69] to [70] and [99] respectively. Secondly, the parties expressly agreed by clause 31.1 of the SDLA that it superseded all prior agreements, arrangements and understandings between them relating to its subject matter. This agreement, it is said, operated as a contractual estoppel which prevents either party from seeking to rely on the Heads of Terms, either directly or indirectly: see Springwell v J P Morgan Chase [2010] EWCA Civ 1221 per Aikens LJ at [143] to [144] and [169].
131. Counsel for Matchbet disagree. They submit that the Heads of Terms form part of the factual matrix of the SDLA. They rely, in particular, on paragraph 9 which created a legally binding obligation on the parties to negotiate in good faith with a view to agreeing the terms of the SDLA so as to put into effect the matters contemplated by the Heads of Terms. They submit that it is not just permissible, but positively necessary, for the court to investigate and take account of the matters contemplated by the Heads of Terms in construing the SDLA. The practical application of this principle is said to be that the court should “lean in favour of construing the SDLA on the basis that, where and to the extent that the language chosen permits it, all matters expressly contemplated by the [*Heads of Terms*] as being provided for in the SDLA are either expressly provided for or are otherwise implicit in it”. This applies above all to paragraphs 4.3 and 5.2, the provisions of which were clearly intended to be reflected in the SDLA.
132. Mr Weatherill characterised Alphameric’s approach to this question as “excessively arid”, but in my judgment Alphameric’s submissions are broadly correct. To the extent that the provisions of the Heads of Terms were not contractually binding, they were no more than steps in the pre-contractual negotiations between the parties and, as such, they are excluded by the exclusionary rule. Those provisions include paragraphs 4.3 and 5.2, to which particular significance is attached by Matchbet. To the extent that the provisions of the Heads of Terms had contractual force, that is to say where the parties expressly agreed that they should be binding on them, the contract remained binding until it was superseded by the SDLA. When that happened, however, the position for the future was governed exclusively by the terms of the SDLA, and the previous agreement between the parties ceased to be relevant by virtue of clause 31.1. The whole point of an entire agreement clause, in these or similar terms, is to ensure that the parties’ rights and obligations are to be ascertained by reference to the single agreement which contains the clause. The agreement must, of course, still be construed in its matrix of admissible fact; but to include in that matrix any prior agreement between the parties relating to the same subject matter would run counter to the very purpose of the entire agreement clause. To that extent, therefore, the clause operates as a contractual estoppel. The legal efficacy of such agreements has been endorsed by the Court of Appeal in the Springwell case, and I can see no reason why clause 31.1 should not be given effect accordingly. Put simply, the provisions of the Heads of Terms have not been truly superseded if it

remains permissible to have recourse to them as a guide to the construction of the SDLA.

133. Nor am I deterred from reaching this conclusion by paragraph 9.9 of the Heads of Terms. It is true that this provision, which had contractual force, obliged the parties to use their reasonable endeavours to negotiate in good faith with a view to agreeing the terms of, inter alia, the contemplated Development Agreement, and thereby to put into effect the matters contemplated by the Heads of Terms, including the provisions of paragraphs 4.3 and 5.2. If it were not for the entire agreement clause in the SDLA, I would agree with Matchbet that this obligation was a relevant part of the background to the SDLA, and that it should incline the court to interpret the provisions of the SDLA in a manner that achieved conformity with the Heads of Terms. But in my view the entire agreement clause makes all the difference. The parties thereby agreed to make a fresh start, unencumbered by previous agreements, including their previous agreement contained in paragraph 9.9.
134. It is also important to note that Matchbet founds its claim exclusively on the SDLA. It does not argue that any of the contractually binding provisions of the Heads of Terms somehow retained their contractual force after the SDLA was entered into. Nor does it argue that the SDLA should be rectified, or that it does not represent the entire agreement between the parties, or that its provisions were in any way overridden or varied, for example through an estoppel by convention or a variation of its terms by subsequent conduct.

### **The obligations of Alphameric under the SDLA**

135. The basic structure of the SDLA is in my judgment reasonably clear. Matchbet was obliged to write the necessary computer program, develop the service, and provide the service to end users under standard terms and conditions which Matchbet was to specify before marketing of the service began: see clause 2.1 read with the relevant definitions. These obligations were backed up by the extensive warranties given by Matchbet in clause 10.1. The end users would be parties to an end-user agreement with Matchbet who had been introduced by Alphameric pursuant to, and during the term of, the SDLA: see the definition of End-User. In consideration of the performance by Matchbet of its obligations, Alphameric was bound (by clause 5.1) to pay the loan of £250,000 to Matchbet in the instalments and at the times specified in Schedule 3, read with the Implementation Plan in Schedule 2. Matchbet undertook (by clause 6.1) to complete each stage by the date specified in the Implementation Plan. There was no corresponding express obligation on Alphameric in relation to the joint responsibilities in the Implementation Plan, but clause 6.4 provided Matchbet with a remedy (in the form of extensions of time, and/or the right to charge Alphameric for additional time spent) in the case of any failure by Alphameric to comply with its obligations under the agreement.
136. Marketing was dealt with by clause 14. Upon completion of stage 5, and acceptance of the deliverables in accordance with clause 8, Alphameric would have an exclusive and perpetual licence (a) to licence LBO operators worldwide to access and use the program and the service in their LBO businesses, and (b) to be Matchbet's marketing agent worldwide for the purpose of securing end-user agreements with such LBO operators: see clause 14.1. By virtue of clause 14.3, Alphameric was obliged to secure end-user agreements in accordance with the licence and support fees specified by

Matchbet from time to time and in accordance with the terms of the SDLA. Clause 14.4 then precluded Matchbet from itself selling or marketing the service and/or the programs to LBO operators, or appointing or permitting any other person to do so, subject to the exceptions contained in clauses 14.5 and 14.6. Clause 14.5 contained an express saving for Matchbet's internet or credit bookmaking business accessed via the internet or otherwise than through an LBO. Clause 14.6 dealt with the situation where a person to whom Matchbet already provided the service in a manner permitted by clause 14.5 also wished to gain access to the service for an LBO business. In short, Matchbet was obliged to offer Alphameric the opportunity to market the service to such a person for use in his LBO business, but if Alphameric was unable to secure an end-user agreement within three months Matchbet was entitled to take up the opportunity itself, but only on the footing that Alphameric would still be entitled to 50% of the gross revenue if an end-user agreement materialised.

137. A further, and more important, exception to clause 14.4 is contained in clause 14.7. In effect, this enabled Matchbet to market the service to a prospective LBO customer of whom it had become aware, if Matchbet notified Alphameric of the customer's existence and Alphameric then declined or failed within a three month period to procure an end-user agreement with that customer. As under clause 14.6, however, Alphameric would in those circumstances still be entitled to receive 50% of the gross revenue from supply of the service to the customer.
138. Clause 14.8 obliged Matchbet to provide Alphameric with technical assistance "in connection with the marketing and promotion of the Service", and to answer Alphameric's technical queries concerning the use or application of the service which might arise "in connection with Alphameric's efforts in relation to the marketing of the Service". Finally, it is worth noting clause 14.10 which provided that if Alphameric, or any Alphameric group company, made an arrangement with a third party to market or promote any betting exchange which competed with the MBE, Matchbet would then be entitled by service of written notice to make Alphameric's licence under clause 14.1 non-exclusive.
139. By clause 17.1, Matchbet agreed to pay Alphameric "royalty payments" consisting of 50% of gross revenue received by Matchbet from supply of the service to LBO operators with end-user agreements with Matchbet, and 10% of all other gross revenue "received by Matchbet arising out of or in connection with the supply of the Service". Thus Matchbet would be obliged to pay Alphameric 10% of its revenue from supply of the service online, even though online marketing fell outside the scope of Alphameric's licence. This no doubt reflected the weak bargaining position in which Matchbet found itself. Having been unable to obtain funding from Investec, or from other institutional or private investors, Matchbet needed the loan of £250,000 from Alphameric in order to complete development of the MBE, and without such funding it would be in no position to supply the service to any customers, whether online or in LBOs.
140. Clause 23.1 set out various specific responsibilities of Alphameric, including an obligation to act at all times in good faith. Matchbet does not allege that Alphameric is in breach of any of these obligations.
141. Conspicuously absent from the SDLA is any express obligation on Alphameric to market the service once it had been developed. Clause 14.1 granted Alphameric a

licence; but a licence is by its nature permissive, even if it is exclusive or nearly exclusive. Of course, a licence may be coupled with an obligation to carry out the licensed activity; but in that case one would expect to find the obligation expressly stated, especially in an agreement which is the fruit of a lengthy period of negotiation, and which is expressed to set out the entire agreement and understanding between the parties. Clause 14 contains detailed provisions relating to the marketing of access to the service. If the intention of the parties was that Alphameric should not merely be enabled, but also obliged, to market the service to LBOs, why was the opportunity not taken to say so in terms?

142. Matchbet submits that such an obligation is implicit in clause 14.3, which requires Alphameric to secure end-user agreements. However, the clause has to be read as a whole and in its context. So read, it is clear that the focus of clause 14.3 is on the content of end-user agreements, and the obligation is to ensure that any such agreements which Alphameric procures comply with the fee structure specified by Matchbet from time to time and with the terms of the SDLA. In other words, it is not a free-standing obligation to secure end-user agreements, but is rather a provision designed to prevent Alphameric from entering into bespoke end-user agreements in non-standard terms.
143. The correctness of this interpretation of clause 14.3 is in my judgment reinforced by a number of indications in clause 14 that Alphameric was not positively obliged to market the service to LBOs. First, the reference in clause 14.6 to Alphameric being “permitted to market the Service” to the customer notified by Matchbet for use in its LBO business is strangely worded, if Alphameric was anyway under an obligation to market the service. Secondly, the same point may be made about the reference in clause 14.7 to Alphameric “declining” to procure that the prospective customer enters into an end-user agreement. The language suggests that Alphameric has a choice in the matter, not that it is in breach of an obligation. Thirdly, the reference in clause 14.8 to “Alphameric’s efforts in relation to the marketing of the Service” again suggests activity which is elective rather than compulsory. Fourthly, clause 14.10 provides for a situation where Alphameric (or a group company) has agreed to market or promote a betting exchange which competes with Matchbet’s. This is readily understandable if Alphameric was never under an obligation to market the MBE. If, however, it was under such an obligation, I have difficulty seeing how the parties could have contemplated Alphameric entering into such an arrangement with a third party consistently with Alphameric’s duty of good faith in clause 23.1.
144. I now turn to the way in which Matchbet’s case on the construction of the SDLA is pleaded. Paragraphs 10 and 11 of the particulars of claim read as follows:

“10. Further, there were express or implied terms of the SDLA that [Alphameric] would:

- (1) Co-operate with [Matchbet] in relation to the performance and fulfilment of the SDLA and in particular would co-operate with [Matchbet] in relation to the performance and fulfilment of:

(a) the joint responsibilities referred to in schedule 2 of the SDLA within the timescale referred to within that schedule; and

(b) the commercial purpose and objectives of the SDLA, namely the integration of [*Matchbet's*] program and service with [*Alphameric's*] system ("the Integrated System") and the marketing and commercial exploitation of the same ("the Commercial Purpose");

(2) Not prevent, impede, hinder or otherwise frustrate the performance or fulfilment of the SDLA and in particular would not prevent, impede, hinder or otherwise frustrate the performance and fulfilment of:

(a) the joint responsibilities referred to in schedule 2 of the SDLA within the timescale referred to within that schedule; and

(b) the Commercial Purpose.

(3) In its capacity as marketing agent of [*Matchbet*] throughout the world for the purpose of securing End User Agreements in respect of the Integrated System with prospective licensees, act in good faith towards, and in the best interests of, [*Matchbet*] in accordance with the Commercial Purpose.

Further or alternatively, the express terms of the SDLA are to be construed on the above basis.

11. In the above circumstances, under the terms of the SDLA ... [*Alphameric*] was, amongst other things, under express and/or implied obligations:

(1) To bring about and perform, together with [*Matchbet*], the joint responsibilities referred to in schedule 2 to the SDLA within the timescale referred to in that schedule and/or to co-operate with [*Matchbet*] in respect of the same and not to prevent, impede, hinder or otherwise frustrate the performance or fulfilment of the same.

(2) Following the performance of the responsibilities referred to in schedule 2 to the SDLA, to act as the marketing agent of [*Matchbet*] throughout the world for the purpose of securing End User Agreements in respect of the Integrated System with prospective licensees and to do so in good faith and in the best interests of [*Matchbet*] in accordance with the Commercial Purpose."

145. In its defence, Alphameric denies the existence of any express or implied terms as alleged in paragraphs 10 and 11 of the particulars of claim. As to express terms, Alphameric says (para 22 of the defence) that the SDLA “in fact imposed very few express obligations on Alphameric, its principal obligation being the obligation under clause 5.1 to make the Loan Payment in accordance with Schedule 3”. As to implied terms, reliance is placed on clause 10.3 of the SDLA as expressly excluding any implied terms to the fullest extent permitted by law. Clause 10.3 provides as follows:

“Except as expressly set out in this Agreement all warranties, conditions, terms, undertakings and obligations which would otherwise be implied by statute, common law, custom, trade usage, course of dealing or otherwise, are excluded to the fullest extent permitted by law.”

Further and in any event, says Alphameric, the terms pleaded in paragraphs 10 and 11 would not be implied at common law “as they are too uncertain to be enforceable and/or are neither necessary nor so obvious as to go without saying”.

146. Alphameric also denies Matchbet’s pleaded version of the “commercial purpose” of the SDLA. In paragraph 18 of the defence, Alphameric says that:

“The commercial purpose of the SDLA was that Alphameric would fund the development of the Matchbet Programs and Service by means of a loan of £250,000, in return for which Matchbet would deliver the Programs and Service to Alphameric, and Alphameric would enjoy the exclusive worldwide right to grant access to End Users.”

### **Construction of the SDLA: discussion and conclusions**

147. To the extent that Matchbet’s pleaded case alleges the existence of express terms or obligations binding on Alphameric, it may in my judgment be rapidly disposed of. No express terms or obligations of the nature pleaded are to be found anywhere in the SDLA. Nor is there any express statement of the commercial purpose of the SDLA in the form set out in paragraph 10(1)(b) of the particulars of claim. In relation to the marketing of the MBE, clause 14.3 may at first sight appear to impose an obligation on Alphameric to secure end-user agreements, but as I have explained I do not consider that to be the right interpretation of the clause read in its context. The obligation in my judgment relates only to the content and terms of such end-user agreements as Alphameric may obtain in exercise of the licence granted to it under clause 14.1: see paragraph 142 above.
148. In closing, counsel for Matchbet submitted that the existence of an obligation to secure end-user agreements under clause 14.3 is reinforced by the provisions of clauses 14.6, 14.7 and 14.8, and by the definition of End User in clause 1.1(i). I am unable to accept these submissions. I can find nothing in the language or content of clauses 14.6, 14.7 or 14.8 which points clearly towards the existence of such an obligation, as opposed to a shared intention and expectation that Alphameric would seek to exploit the licence which it had been granted for the future commercial benefit of both parties. Nor can any assistance be gained from the definition of End-User,

which again merely assumes that an End-User Agreement with Matchbet has been concluded pursuant to an introduction made by Alphameric.

149. Furthermore, in the absence of any express obligation on Alphameric to market the MBE and obtain end-user agreements, it seems to me a hopeless endeavour to try to spell out of the SDLA an implied obligation to the like effect. If that is what the parties had intended in an agreement of this nature, they would have said so, and not left an obligation of such fundamental importance to be gathered by a process of implication. Nor can it be said that the implication of such a term is necessary in order to give commercial or business efficacy to the agreement. Of course the parties hoped and expected that Alphameric would market the product to LBOs pursuant to the licence which it had been granted, but a licence is by its nature permissive, and from Alphameric's point of view there were obvious advantages in retaining the flexibility to decide whether or not to exploit it. Can it therefore be said that the retention of such flexibility would somehow make the whole agreement between the parties commercially unworkable? In my judgment, obviously not. Alphameric's exclusive licence related only to marketing of the developed product to LBOs. Matchbet remained free to market and exploit the product in all other areas, including the online market place for which the MBE had originally been designed. Furthermore, clause 14.7 enabled Matchbet to intervene if it became aware of a business opportunity with an LBO operator which Alphameric might for any reason be unable or unwilling to follow up. In these circumstances, it cannot be said that the commercial logic of the SDLA required Alphameric to be under a binding contractual obligation to market the product to LBOs. No doubt Matchbet would have preferred there to be such an obligation, but Matchbet was in a weak bargaining position. It was in desperate need of funding to develop the MBE into a marketable product, and Alphameric was the only available source of funds. Alphameric was undertaking a substantial commercial risk by agreeing to lend up to £250,000 to a start-up company, without any third party guarantees or security for the loan. It therefore occasions no surprise to find that the SDLA imposed no obligation on Alphameric either to market the product or to obtain end-user agreements.
150. I now come to the more difficult question whether any (and, if so, what) obligations were implicitly undertaken by Alphameric in relation to the stages of the Implementation Plan in schedule 2 of the SDLA. The language of "responsibility" in the three column headings may be thought to carry with it the implication of a duty to ensure that each stage would be duly fulfilled. On the other hand, the immediate function of the stages was merely to identify the criteria which had to be satisfied before the future instalments of the loan became payable; and for that purpose Matchbet already had the protection of a number of express provisions in the SDLA. First, under clause 23.1(a) Alphameric was obliged at all times to act in good faith and to conduct its business in a manner which would reflect favourably upon the Service and upon the good name and reputation of Matchbet. Secondly, under clause 28 (the "further assurance" clause) Alphameric was obliged to do "all such further ... things as may be necessary to carry the provisions of [*the SDLA*] into full force and effect". Thirdly, schedule 3 made express provision for what was to happen if Alphameric withheld or delayed payment for non-completion of a stage in circumstances where the only items outstanding under that stage were "Subjective Items", and where Alphameric had "unreasonably withheld or delayed its approval, co-operation or agreement on such items". It should be noted in this context that

“Subjective Items” were by definition ones which fell within the joint responsibility column in the schedule 2 table.

151. In my opinion the combined effect of these provisions gave Matchbet adequate protection in relation to the future fulfilment of stages 2 to 5, and it is not necessary to imply any further obligations on Alphameric in order to make the implementation plan workable. Quite apart from the normal need to satisfy the test of necessity for implication of a term, the parties went out of their way in clause 10.3 of the SDLA to exclude the implication of any terms “to the fullest extent permitted by law”. I accept that a clause of that nature may have to give way where its application would deprive one party’s stipulations of all contractual force, or would turn them into mere statements of intent: see, for example, the observations of Lord Wilberforce in Suisse Atlantique Société d’Armement Maritime SA v N. V. Rotterdamsche Kolen Centrale [1967] 1 AC 361 at 481-2, and Astrazeneca UK Limited v Albemarle International Corporation [2011] EWHC 1574 (Comm) at [313] per Flaux J. But in my judgment the present case is not of such a character. The most that can be said, in my view, is that Alphameric had again driven a hard bargain, and left itself with the maximum degree of flexibility compatible with doing the minimum needed to facilitate completion of the five stages for drawdown of the loan.
152. Furthermore, unless Matchbet can somehow extract from the provisions of schedule 2 an obligation on Alphameric which goes beyond the limited purposes of the loan timetable, any question of breach of that obligation by Alphameric is academic. It is not in dispute that the loan was drawn down in full, or that the five stages were completed, albeit rather later than originally contemplated. No part of Matchbet’s current claim relates to the loan timetable, nor is there any allegation that Alphameric has acted in breach of clauses 23 or 28 of the SDLA. What Matchbet instead seeks to do is to rely on the obligations which it says are implicit in schedule 2 as part of the wider contractual framework which is said to justify implication of the terms pleaded in paragraphs 10 and 11 of the particulars of claim, and in particular that Alphameric failed in some ill-defined manner to bring about integration of Matchbet’s program and service with its own EPOS and ALBOS systems. In my view this approach places excessive emphasis on schedule 2, and it has wrongly led Matchbet to identify the commercial purpose of the SDLA in terms which required, rather than enabled, Alphameric to perform the process of integration.
153. In my judgment the surest guide to the commercial purpose of the SDLA is to be found in the single recital to it which I have quoted in paragraph 113 above. It is notable that this recital uses the language of enabling (twice) in relation to the integration phase of the project, while also referring to Matchbet’s agreement to develop the programs and the service, and to Alphameric’s appointment as exclusive distributor of access to the service from retail bookmaking outlets (i.e. LBOs). Consistently with this facilitative approach to the process of integration, the definition of “Alphameric System” in clause 1.1(b) gives Alphameric an apparently unfettered discretion as to the equipment and/or software which it may provide to end users for the purpose of accessing the programs and the service. In my view this discretionary language meant what it said, and Alphameric was at liberty to provide such equipment and/or software to end users as it thought fit. There was no obligation on Alphameric to ensure that access would be provided through its existing EPOS and ALBOS systems, even though in practice that was what the parties probably contemplated.

Here, as elsewhere, the SDLA was drafted by Alphameric's lawyers to give Alphameric as much latitude as possible.

154. For these reasons, I consider that there is no sound basis for implying into the SDLA the terms pleaded in paragraphs 10 and 11 of the particulars of claim. Since I have also held that there were no express terms to the like effect, and since Matchbet's claim is for breach of the pleaded terms, with no alternative claims based on rectification, estoppel or variation of the SDLA, it follows that the claims must fail in their entirety, liability not having been established. I could therefore end my judgment at this point, and simply say that the claim must be dismissed. The parties were, however, united in asking me to decide as many issues as I felt I properly could; and I cannot ignore the possibility that a higher court may later decide that I have erred in my construction of the SDLA. Accordingly, I am satisfied that I should at least continue my judgment so as to deal with the history of events down to the termination of the SDLA, and that I should consider the issues of breach which would arise if Matchbet's construction of the SDLA were, at least broadly, correct. Bearing in mind the conclusion which I have already reached, I will confine my narrative to the main events which appear to me to be relevant.

### **Events after the SDLA**

155. The first meeting of the joint planning group took place on 8 June 2006. Those in attendance included Mr Morcombe, Mr Siers, Mr Soulsby, Mr Winton and Dr Seifert. In advance of the meeting, Mr Siers had emailed Dr Seifert on 1 June saying that the purpose of the meeting was "to set the ground rules re planning the product from development to release". He added:

"I need to plan sales strategy, [*Alphameric*] integration and agree the [*marketing*] plan with Ian [*Winton*]. I expect to meet weekly until I am comfortable that my investment will realise the sales expectation. It is also essential that we are clear on time to market.

Ben sorry to be blunt, there has been considerable misunderstanding on getting this to market, I intend to take control of this project, failure is not an option, I am sure you will sympathise with that."

A combined agenda and discussion paper was also prepared for the meeting, with input from both Mr Siers and Dr Seifert.

156. The minutes of the meeting on 8 June recorded that it was held primarily in order for Matchbet to inform Alphameric of technical progress, to agree on the future operation of the planning group and the meaning of the joint program for integration under the SDLA timetable, and to discuss the sales and marketing plan. It was hoped to complete Stages 1 and 2 within the near future, following which "Alphameric will commence integration with the Matchbet API, assisted as required by Matchbet's technical team". It was agreed that the permanent members of the joint planning group would be Mr Siers, Dr Seifert and Mr Winton, with others joining them as required. The minute in relation to integration reads as follows:

“6. Joint planning for integration of Programs/Service with Alphameric: The meeting discussed the operational meaning of the clause in the agreement (Stage 2 joint responsibility deliverable). The meeting took note of the fact that the agreement envisages the integration to be done via the Matchbet API, and hence that the concrete planning must be under the sole control of Alphameric’s technical team. However, it was agreed that Matchbet would hold itself available for any consultancy and joint meetings that may be required, in order to do its utmost to facilitate and accelerate this task. Matchbet will have access to a substantial technical team to provide such assistance. It was agreed that this understanding should represent the “joint deliverable” under Stage 2 of the agreement, and that, subject to the satisfactory nature of Matchbet’s technical deliverables, Stages 1 and 2 would be deemed to have been completed.”

157. In relation to marketing, it was agreed to begin formal sales meetings from September 2006, using a marketing and sales plan to be jointly produced by Mr Siers and Mr Winton. The forthcoming Birmingham Betting Show in October was seen as “an outstanding opportunity to demonstrate the transactable pilot platform as part of the Alphameric stand”. Mr Siers was to determine whether this would be possible, and if so what material would be required. It was noted that Matchbet had not yet finalised any end client agreements, and was still considering various models “which will be discussed and defined in due course”.
158. On 28 June 2006 Mr Morcombe attended his first Matchbet board meeting. The minutes record that Mr Morcombe reviewed the principal terms of the SDLA, “and reiterated Alphameric’s view of the importance of the relationship and his commitment to the success of the joint venture and to committing the necessary technical resources to the integration project”. In relation to marketing to LBOs, it was noted that the SDLA provided for Alphameric to take the lead, and that the joint planning committee had agreed to the production of a marketing and strategy plan in parallel with technical planning.
159. On 5 July 2006 Dr Seifert sent a preliminary draft of the Matchbet API to Alphameric, for consideration by Alphameric’s technical team. A meeting was arranged to discuss the technical issues, which took place on 13 July. It was agreed at the meeting that “the functional specification needs to be further developed and clarified”. It was further agreed that Matchbet would address Alphameric’s concerns:

“... by providing two complementary documents, one providing an architectural description of the Matchbet platform, and another which would precisely describe the workflow and service to bookmakers offered by the exchange. This would result in a clear description of how (from the Matchbet viewpoint) the platform would be used by LBOs in conjunction with Alphameric’s systems.”

160. The technical meeting had been attended by Mr Sutton, who was distinctly unimpressed. On 16 July he sent an email to Mr Morcombe, Mr Soulsby and Mr Siers saying:

“I have grave fears as to the reality of this proposition. The meeting last week clearly showed that they don’t have a system or a viable plan to get one and are nowhere near meeting their contractual obligations. Bluntly they don’t have a clue how to move this on; they can’t even work out how to express a betting opportunity in a data base!

Turning their undoubtedly smart algorithms into a viable betting exchange is a task which looks beyond them given the statements they made last week. We will only achieve our business goals by taking control of this situation. I’d like us all to meet early this week to agree a strategy before anything else is committed to these guys.”

161. Mr Siers said in evidence that he agreed with Mr Sutton’s assessment that it was necessary for Alphameric to take control of the situation, and “unless I took control of it and made sure that it happened, it wasn’t going to happen” (transcript, Day 6, page 112). Mr Siers thought that Mr Morcombe’s reaction would probably have been the same as his, although he would not have understood the technical issues involved.
162. Over the course of the summer, further meetings of the joint planning group took place (by conference call), and further technical material was supplied by Matchbet to Alphameric. On 19 August 2006 Mr Poirier joined the project as head of Alphameric’s technical team, which Dr Seifert for one regarded as a positive development. At the planning group meeting on 25 August, matters discussed included the forthcoming Birmingham trade show and a projected pilot demonstration of the system at a single betting shop in Dorking which Alphameric used to demonstrate products. At a meeting of the full Alphameric board held on 5 September 2006, it was recorded that the second phase of the Matchbet software had been delivered and was being evaluated by Mr Poirier. The expectation was that a working product would be available by the end of September which could be demonstrated to potential customers.
163. On 18 September 2006 Matchbet sent a revised specification of the API to Alphameric, and on 28 September Alphameric agreed that Stage 2 of the timetable had been met and payment of the next £75,000 instalment of the loan had been triggered. The payment was actually made on 5 October. On 6 October Dr Seifert emailed Mr Poirier and Mr Siers to thank them for their help in completing the signing off on Stage 2. In relation to integration, he said this:

“We also need to discuss how we approach the joint responsibilities under the agreement, in particular the joint integration planning. I realise that we have in fact varied the terms of the agreement in the sense that you clearly preferred to develop the joint programme for integration once we have had both the API and a working platform, and I am sure we share the desire to be practical and flexible, but we should discuss

this process sooner rather than later. We need to know your mind on this, as it has implications for business and financial planning for Matchbet. There is no joint responsibility in Stage 3, but Alphameric has agreed to have completed integration by Stage 4, with a target date of mid November. This is a big challenge, and we need to discuss.”

164. The Birmingham Betting Show took place on 25 and 26 October 2006. A display illustrating the Matchbet system featured prominently on Alphameric’s stand, and was seen by (among others) the director of IT for Ladbrokes’ retail business, Mr Chris Lindsey. Mr Lindsey was favourably impressed, and discussed the Matchbet system at some length with Dr Seifert. Mr Lindsey also told Mr Siers on a later occasion that, after many years of attending the Birmingham show, which was the biggest industry event in the calendar, “the Matchbet offering was the most exciting new development he had ever seen”. In cross-examination Mr Lindsey did not dispute that he had said this, although he thought he must have been feeling effusive at the time. He agreed, nonetheless, that it was “quite exciting”, and that “it could offer something quite different and new to the betting environment” (transcript, day 7, pages 15 to 16). Mr Lindsey did not, however, gain a detailed understanding of how the product was intended to work, and from his point of view the next step would be to refer the matter to his commercial colleagues on the Ladbrokes’ board following a presentation by Alphameric and Matchbet.
165. At the Betting Show Dr Seifert also had discussions with both Betfair and Betdaq, and it was agreed that a meeting would take place between Mr Siers and William Hill. It seems clear, therefore, that a significant degree of interest in the product was generated, not only with the leading betting exchanges but also with two of the three leading operators of high street LBOs.
166. On 2 November 2006 the joint planning group met by telephone conference call to discuss feedback from the trade show. Mr Poirier expressed the view in relation to Ladbrokes that they would initially be interested in being a market maker, and only when there was clear evidence of customer demand from smaller operators would they be likely to push the Matchbet system out to their shops. Mr Lindsey agreed in cross-examination that this surmise tallied with his actual thinking at the time. Other matters discussed at the meeting were the practicalities of the projected live pilot in Dorking, and a review of the implementation timetable under the SDLA. It was agreed that both parties were now behind schedule, and that the target date of integration by 21 November 2006 could not be met. This reflected “resource issues” on the part of Alphameric, the resolution of which lay outside the planning group’s remit. It was further noted that meetings with William Hill and Ladbrokes were expected to be scheduled in the near future, and that Matchbet would be available for both of them.
167. On 6 November Mr Siers commented internally to Alphameric on a high-level summary of the proposed Dorking pilot prepared by Mr Poirier. Mr Siers said that the proposal looked fine “but a touch ambitious”. He added:

“Thanks, finally getting there.

This will be a massive success, if the exchange works.”

In cross-examination Mr Morcombe (to whom Mr Siers' email was copied) agreed with this assessment.

168. An initial meeting with the retail board of Ladbrokes took place on 24 November 2006. The presentation was headed by Mr Morcombe, who according to Dr Seifert did an effective job of presenting the business case for the AlphaMatch system. No minutes of the meeting survive, but Ladbrokes were clearly interested enough to wish to take the matter forward, and in December 2006 Alphameric and Matchbet entered into a Non-Disclosure Agreement with Ladbrokes prior to a presentation to the full Ladbrokes' retail board which was scheduled for January 2007.
169. Meanwhile, in late November 2006 Dr Seifert sought to rekindle a prior expression of interest in the MBE by the Irish group Paddy Power. In an email of 28 November to Patrick Kennedy of Paddy Power, Dr Seifert referred to earlier correspondence between them in January and continued:

“We have since had an extremely successful official launch at the Birmingham Betting Show, hosted by our business partners, Alphameric Plc. Alphameric have entered into a comprehensive business relationship with Matchbet which will enable Matchbet to provide access to its exchange via Alphameric's EPOS and Albos Systems ...

We are operating exclusively as b2b exchange for the benefit of bookmakers, and a growing number of these are signing on to the exchange, both as market makers and as takers of the exciting betting propositions we offer.”

It was put to Dr Seifert in cross-examination that the statement in the second paragraph which I have quoted was untrue, and Dr Seifert was constrained to admit that it was indeed incorrect because no contracts had yet materialised. I would add that he must have known the statement to be untrue. To be blunt, it was a lie, based on wishful thinking about what Dr Seifert hoped would materialise (transcript, day 3 pages 60 – 61).

170. In December 2006 there was some discussion about a formal variation of the terms of the SDLA, but nothing came of this. Meanwhile, there were some important changes in personnel. Mr Sutton moved to AMRAC with effect from the beginning of the month, and was replaced by Mr Addario. On 6 December, Mr Steve Mansfield joined Alphameric as managing director of the hospitality division.
171. On 18 December, Alphameric paid the next loan instalment of £75,000. This payment was authorised by both Mr Soulsby and Mr Morcombe. Alphameric must therefore have been satisfied that Matchbet had duly performed its obligations under Stage 3, or been content to waive full performance. It will be remembered that there were no joint responsibilities to be performed under the implementation plan in respect of Stage 3.
172. The scheduled meeting with the retail board of Ladbrokes took place on 9 January 2007. It is clear that the retail board was still interested, but Mr Lindsey says he distinctly remembers a concern being raised by the then managing director of

Ladbrokes, Richard Ames, about the prospect of displaying better odds to a punter via the MBE than those which Ladbrokes were already offering on the same event in their shops. Mr Lindsey returned to this point on 30 January, when he replied to a chasing email from Mr Morcombe asking whether he had any interest in following up on the recent presentation. Mr Lindsey promised to take the matter up with his colleagues in the retail and trading divisions. In reply, Mr Morcombe sought to reassure Mr Lindsey that the pricing did not need to be better than that provided by Ladbrokes in their own shops.

173. It soon transpired, however, that despite its initial interest the retail board was not prepared to progress with any pilot unless the initiative was sponsored by Ladbrokes' online and trading departments. Mr Lindsey explains that within Ladbrokes it was explicitly left to those departments to take the project forward if they felt it was appropriate. Internal discussions took place, but there was insufficient interest to take the matter further at a time when a large number of high priority activities were being undertaken. On 14 February 2007 Mr Lindsey informed Mr Morcombe that the retail board was unwilling to take the matter forward on its own without the backing of the other departments. Replying on the same day, Mr Morcombe asked whether Ladbrokes would like another meeting to discuss a way forward, but there seems to have been no response to this suggestion.
174. Meanwhile, the proposals for the Dorking pilot were worked up within Alphametric, and the pilot went live in Alphametric's Dorking shop on 7 March 2007. The pilot did not purport to offer integration with Alphametric's existing EPOS or ALBOS systems. It was a self-contained trial, which seems to have begun with a computer screen behind the counter on which prices were displayed for the football events which were all that the MBE then encompassed. At a later stage, a slightly more sophisticated version appears to have been made available in the shop, with a customer service terminal with a touch screen linked to the computers behind the counter. Dr Seifert fully understood that the pilot was a stand alone offering which would show customers the kinds of bet which they could make through the MBE, but which was not as yet integrated with the systems supplied by Alphametric to LBOs. Dr Seifert says that he thought the pilot was a worthwhile interim measure before integration was completed, and he worked with Mr Poirier on the specification needed for it to go live.
175. Alphametric, for its part, was acutely conscious that the Dorking pilot was something of a stop gap solution, and certainly not the kind of full integration envisaged by the SDLA. In an email which he sent to Mr Soulsby on 13 February 2007, Mr Morcombe said:

"This is becoming embarrassing; we can't deliver Matchbet and DP [*David Poirier*] is also struggling on D-EPoS. If he can't deliver for you then action must be taken. You will have seen the latest financial figures which are very poor. Most of our problem relates to a lack of delivery.

Please read the attachment from Matchbet and make DP aware that his lack of delivery is causing personal concern and the company financial concern.

No more time to waste on this.

I also had feedback from a very supportive customer who is clearly stating that if we can get D-EPoS delivered then he will buy but he can't wait any longer as the competition is ready to offer an alternative.

Please get back to me with your solution to this serious issue."

In an email sent on the same day to Mr Addario, Mr Soulsby commented:

"Ed, this adds urgency on us finding some PM [*Project Management*] resource. Can we discuss?"

176. Mr Morcombe said in cross-examination that his motive in sending this email to Mr Soulsby was to shake him a little bit and try to elicit some improved performance. That may well be so, but the inference which I draw is that there was a perceived problem of lack of delivery in relation to Matchbet which needed to be rectified as a matter of urgency. A major part of the problem, at least from Mr Soulsby's perspective, was a lack of adequate human resources; although I think Mr Morcombe was justified in saying in cross-examination that this "is not always the answer. Sometimes the answer is more focus less resource" (transcript, day 10, page 121).
177. On 16 February 2007 Ms Holdsworth on behalf of Matchbet wrote to Mr Heather at Alphameric suggesting a possible variation of the terms of the SDLA, following discussions between Mr Morcombe, Mr Winton and Dr Seifert. The letter suggested that both sides were seeking to perform the spirit of the SDLA; that Matchbet had now fulfilled all its obligations up to and including Stage 5, subject only to approval of a final roll out plan by Alphameric; but that Alphameric had not complied with its integration responsibilities, and was not in a position to provide firm dates for doing so. Ms Holdsworth said she understood "that this defect of performance is not wilful but simply results from resource constraints that you are currently facing, and that Alan [*Morcombe*] has expressed his desire to see variation of terms that help both sides to progress as rapidly as possible towards the mutual objectives". She recommended in the circumstances that the parties should now agree a joint programme for integration, and that Matchbet should invoice Alphameric on a time and material basis for its work on providing the live platform at Dorking to Alphameric. Mr Heather acknowledged receipt of this proposal on 16 February, and said he would discuss it with Mr Morcombe. In the event, however, this proposal, like all others for a formal variation of the SDLA, was taken no further.
178. Around the same time, Dr Seifert was in negotiations with Betfair about the terms on which Betfair might permit Matchbet commercial access to its liquidity and API. On 12 March 2007 Betfair sent some proposed heads of terms to Matchbet.
179. The early indications of the Dorking trial were promising, but trading volumes were low at the Dorking shop. Dr Seifert therefore proposed that the trial should be extended to up to a further 20 LBOs. On 15 March 2007 Mr Poirier put this proposal by email to his colleagues at Alphameric, and identified a number of issues which would arise. For example, he said that there would be a cost of approximately £3,710 per shop for equipment, communications and installation, and he asked who should

cover that cost. He said it would also be necessary to enter into tripartite agreements between Alphameric, Matchbet and the customer for each shop; to prepare and supply marketing materials and customer support; training costs would be extra; and there would be expenditure on dismantling equipment at the end of the trial. Mr Poirier concluded:

“So, though there are benefits to expanding the trial, it’s not a trivial exercise and does require a commitment from Alphameric. What are your thoughts?”

180. Mr Siers was not copied into this email, and he was therefore unwilling to comment on it. Mr Morcombe says in his statement, and I accept, that he was not prepared to absorb the extra cost without concrete commitment from a potential customer. This reflected a theme to which Mr Morcombe returned consistently in his evidence, to the general effect that it was not Alphameric’s normal commercial practice to carry out speculative developments of new products at Alphameric’s own expense. Unless funding was available from third parties, Alphameric would normally expect the customers to put up the necessary funding.
181. In a circular letter to Matchbet shareholders sent on 6 March 2007 (although mis-dated 6 March 2006) Dr Seifert engaged in some customary hyperbole, saying that Alphameric had invited Matchbet to discuss “the precise rollout plan to 100 shops”, and inviting further investment from the shareholders of up to £400,000.
182. On 16 March 2007, Dr Seifert spoke to Mr Soulsby who promised to authorise payment of the two remaining instalments of the loan, totalling £50,000. The payment was made shortly afterwards.
183. On 9 April 2007 Dr Seifert met Mr Somekh in Deauville, and on the next day Mr Somekh wrote to Matchbet on behalf of GASM Développement offering to act as Matchbet’s commercial representative in France in return for 20% of the net revenue of the French operations. A few days later Dr Seifert forwarded this letter to Mr Morcombe, Mr Siers and Mr Heather, asking for Alphameric’s reaction to the proposal. Dr Seifert said he had known Mr Somekh for a number of years, and knew that he was extremely well connected in the French business and political establishment. He said he had personally seen some of the Française des Jeux presence in the land-based market in France, and it was “clearly a gigantic organisation with monopoly position”. He concluded:

“My own view is that we should vigorously pursue this opportunity, in parallel with the UK rollout which we have agreed to move forward over the next three months, as discussed in Godalming. I propose we discuss this at the next Matchbet Board meeting.”
184. Around this time, efforts were made to obtain substantial further funding from Investec. The initiative came from Mr Morcombe, who had discussed Matchbet with Investec in early March 2007. Mr Morcombe informed Investec of the progress that had been made, and Investec said it would be prepared to review Matchbet’s business funding requirements. Mr Morcombe informed Dr Seifert of this by email on 8 March, adding:

“What this means is if you are happy to put in some effort on a presentation they would be prepared to discuss a number of potential funding schemes that could help drive the business forward much quicker than we are currently able.”

No doubt Mr Morcombe had in mind that, if further funding from Investec were forthcoming, finance would be available for the full integration and roll out of the MBE which, in accordance with its usual practice, Alphameric was not prepared to fund itself.

185. Following further discussions, Investec indicated to Alphameric that it might be interested in making an immediate loan to Alphameric of several hundred thousand pounds, ring-fenced for deployment on the AlphaMatch project. For this purpose, Matchbet would have to produce a business plan based on project management and clear time lines, budgets and objectives. Mr Morcome and Mr Siers discussed the way forward at a meeting with Dr Seifert on 13 April, and on 15 April Dr Seifert wrote to them setting out his understanding of what had been agreed. Dr Seifert thought that the investment could be available from 1 May, subject to the necessary information being provided. In relation to the business plan, he said this:

“We agreed that Matchbet would produce a draft 3-month “mini business plan” which would clearly set out the Alphameric/Matchbet objectives, based on the specific Matchbet system that would be available and live within three months from 1 May, including product coverage, Alphameric integration with EPOS, ALBOS, customer terminals, feeds, hardware, hosting solution, and performance, as well as project manager and budgets.”

In response, Mr Morcombe said he was not sure that the finance would be available from 1 May (“that might be a little optimistic”), and that the urgent thing was to produce the business plan: if Investec liked it, they would then make a decision to invest or not.

186. Over the next few days, Matchbet put together a first draft of the business plan. The task was clearly perceived as one of great urgency, and the role of co-ordinating production of the document, as well as obtaining much of the necessary information, was delegated by Dr Seifert to the young and inexperienced Ms Bryceson. It was, however, agreed that the draft plan would be submitted to Alphameric for their input, especially in relation to the integration process which would be under Alphameric’s control. On 20 April Mr Morcombe emailed Dr Seifert, saying he was confident that Investec were receptive and the key thing was to present a good proposal. He said he looked forward to receipt of the draft, “and I will ensure that we add some value to help Investec make a positive decision”.
187. When received by Alphameric, the draft was extensively amended by Mr Siers. His amendments are conveniently shown in blue and red ink on the version of the business plan in the core bundle. It is worth noting what Mr Siers considered it appropriate to say in relation to integration of the MBE with Alphameric’s systems:

“To maximise the return on the business plan, Matchbet will be working with Alphameric to get the Matchbet exchange system coupled with an Alphameric EPOS integration package operational. Once completed, the integrated Alphameric/Matchbet platform will be offered as a generic option to those bookmakers using Alphameric terminals (circa 15,000+ terminals), installed in major Alphameric client licensed betting office (“LBO”) across the UK and beyond.”

And later, under the heading “Alphameric Integration”:

“Initial planning work has started on the integration of the Matchbet exchange product into Alphameric’s EPOS and ALBOS systems. This includes the Alphameric CST “Customer Service Terminal” system. It is intended that a phased approach will see a complete suite of retail products being developed starting with a stand alone CST in Quarter 3 – 2007, followed by a full Epos and display solution towards the last quarter 07 or first quarter 08. A combined development is underway with Alphameric, assisted by Matchbet.”

188. In general terms, it is fair to say that the interim business plan in its amended form was, as counsel for Alphameric put it in their closing submissions, “a sales presentation with an upbeat message”. The roll out projections (which until the start of the trial formed the basis of Matchbet’s pleaded case on loss) were, astonishing though it may seem, left to Ms Bryceson to prepare. She set about her task by updating some earlier projections which Mr Ireland had prepared in 2006 for other investment opportunities, and she obtained further assistance from Tim Huddart, an external financial adviser who helped Matchbet from time to time. Mr Huddart’s assistance was of a generic nature, and Ms Bryceson still lacked any detailed roll out assumptions for take up of the integrated Matchbet product by LBOs. This gap was eventually filled by Mr Siers, in response to a telephone enquiry by Ms Bryceson. He dictated the figures to her, which she took down on a scrap of paper which she then threw away after she had inputted the figures into the draft financial projections. Mr Siers had no positive recollection of this episode, but he did not doubt that it had happened, and nor do I.

189. On 24 April 2007 Mr Poirier informed Dr Seifert about feedback from the Dorking pilot, to the effect that “prices were generally a little better but most customers were put off by unfamiliarity and complexity of the offering”. He added:

“This is something we’ll need to watch.”

190. On 26 April 2007 there was a board meeting of Alphameric Plc. Mr Steve Mansfield, who had been the managing director of Alphameric from mid-2006, was now appointed to the board of the parent company. In relation to Matchbet, the minutes record as follows:

“The Board discussed the current progress made with the Matchbet system. [Mr Morcombe] advised that it has a short term funding requirement of circa £500k which would see it

through until the end of August for a 200+ pilot and would cover development costs, 2/3 employees and the establishment of a data centre. At the end of August the product would be fully integrated with Alphameric hardware and software. This would require management attention and there is a shortage of Project Directors. In September it would require a further £2 - 4 m but the potential returns could be significant.

It was agreed that a further strategy presentation would be made to the Board at the next meeting on the 24 May which would include timelines.”

191. On 8 May 2007 a meeting took place between Alphameric and Matchbet, attended by Mr Morcombe, Mr Siers and Dr Seifert. It was noted that Investec had not yet put forward a specific investment proposal, and that “they may be quite tough”. There was therefore an urgent need to identify potential alternative sources of funding, including Betdaq and Betfair. Other marketing opportunities were discussed, including further contact with Ladbrokes and Mr Somekh. In relation to integration, Mr Morcombe and Mr Siers said that this would happen in two phases. The first phase would run from May to August 2007, and would be based on customer terminals which would allow direct entry of customer orders. They said that this would be expensive for Alphameric if they funded the start up costs (approximately £400,000 for 200 shops). The second phase, which would run from August 2007 until 2008, would involve full integration with Alphameric’s EPOS and ALBOS systems. There is no record in the draft minutes of this meeting of any dissent by Dr Seifert to the proposed two phase approach to integration, and I infer that he accepted it on behalf of Matchbet.
192. On 22 May 2007 Mr Morcombe circulated an update on Matchbet to his colleagues on the Alphameric board, in advance of the board meeting scheduled for 24 May. The update reads as follows:

“The Matchbet product is poised for a major step forward which could ultimately end in a 200 site trial commencing in September 2007.

The product has stood up well to a limited trial at our betting shop in Dorking and now needs a mixture of finance, focus, intellect and seriously competent Project Management. Earlier this month a meeting was held with Investec Bank to ascertain their interest in providing more finance (£500k - £1M is needed to deliver a production product) and they are currently considering the proposal. If they come forward with the cash it will almost certainly have some strings attached that will involve Alphameric fronting the next phase of development and driving the product forward; hence my previous comment about Project Management.

The attached business plan outlines the next steps and also the bigger picture.

My view is that this is a seriously good opportunity but one that Alphameric cannot deliver piecemeal; if it is to succeed it requires focused and dedicated resources.

The timeframe from start to finish is short consisting of just three months.”

193. The attached version of the interim business plan included a description of the proposed two phase marketing plan, prefaced with a description of marketing efforts to date in the following terms:

“To date, Matchbet and Alphameric have conducted limited marketing on an informal basis, and identified significant interest from bookmakers across a broad spectrum, ranging from some of the biggest LBO (including one of the big three) and online bookmakers (including both of the exchange market leaders) to specialist firms, including City style financial betting operators and single shop firms on the High Street. A number of formal expressions of interest have been received, one firm has conducted and paid Matchbet for its contribution to a live pilot, and one substantial bookmaker has bought an option over Matchbet participation. It is on the basis of this clear evidence of market demand for the Matchbet proposition, and in particular its appeal to the LBO market place, that Alphameric and Matchbet are now embarking on the major technical rollout and marketing plan described in this document.”

194. There is nothing to suggest that the version of the business plan which Mr Morcombe circulated to his colleagues at Alphameric differed in any material respect from the final version of the plan which Ms Bryceson had submitted to Investec a few days earlier, on 14 May 2007. On 16 May Mr Morcombe, Mr Huddart and Dr Seifert presented the business plan and projections to Investec, and according to Dr Seifert “Mr Morcombe argued powerfully on our behalf”. Mr Pinder was positive about the presentation, and promised to take the proposal forward internally. As before, however, it emerged in due course that the investment committee was not prepared to back the project and no funding from Investec materialised.
195. At the board meeting of Alphameric Plc on 24 May 2007, Mr Morcombe reported on progress. It does not appear from the minutes that there was any substantive discussion of the Matchbet project.
196. On 30 May Mr Morcombe gave Dr Seifert his assessment of Investec’s thinking:

“I think Investec are coming at it from the following angle:

1. They are keen on the Matchbet proposition but of course they want to get as much of the action as possible; I guess you have to defend your valuation to the extent that you don’t lose their interest and willingness to invest.

2. They do not think the business will go anywhere without full buy-in and commitment from Alphameric. Alphameric is the gate keeper to your marketplace – the Licensed Bookmaker Offices. They think their investment will provide the funding to enable Alphameric to commit to the delivery plan and timescales. I think they are right.

3. I think they see a lack of day-to-day management skills within Matchbet. If necessary Alphameric could take management ownership of the next phase of delivery (June, July, August & September) but I would have to bring in someone to own the challenge. I have someone in mind if you are interested in this option.

4. Valuation – I think £6.0M is the right number and Investec may well live with this figure. Alphameric can't invest any more cash at this stage due to other commitments such as AMRAC and our own development requirements. I think therefore that Investec is your best option. They will also be in a good position to float or sell the business for you in the future.

5. You might think about creating a new JV vehicle that protects your shareholders and incentivises Investec and Alphameric. We could all have a shareholding in it, reflecting our cash input and perhaps other attributes that contribute to the success of Matchbet. What this would do is focus much more clearly the interests of Matchbet, Investec and Alphameric ...”

197. In June 2007 Mr Poirier produced an internal discussion paper in which he questioned the effectiveness of product delivery within Alphameric. In this paper he identified a number of projects which were accorded high or medium priority, but where there was little or no current activity, including Matchbet. He commented:

“While it is true that there is a limited amount of development that can be performed with the current resource pool, there is no visibility as to what the resources are actually doing, and when resources will be available to perform these tasks. Similarly, there is no forum or unified mechanism for changing business priorities to be discussed and accepted.”

Mr Poirier's proposed solution to the problem was for Alphameric to institute a “permanent Products function”, headed by a Director of Products and encompassing a number of responsibilities currently held by different areas of management.

198. This critical assessment by Mr Poirier is reflected in his witness statement, where he identifies a number of factors which by mid 2007 were in his view causing Alphameric to stall or play for time in the integration of the MBE. One difficulty was the launch of AMRAC and Turf TV, which was by now taking up most of the time of Mr Morcombe and Mr Siers. Another difficulty was that Alphameric had won a major contract from William Hill to install an EPOS system into an extra 180 shops.

This was stretching Alphameric's resources, because the work was difficult and William Hill were pressing for progress.

199. Other internal communications within Alphameric in June 2007 evidence an awareness of the need to get a grip on the Matchbet project. On 16 June Steve Mansfield assured Mr Morcombe that he thought Matchbet had good potential, and said he would personally get behind it. On 19 June Mr Addario gave Mr Mansfield the latest timing estimates for Phase 1 of the integration, estimating that about 120 man days would be needed for its delivery. A technical specification for the Phase 1 CSTs had also been produced, making it clear that the system was intended to be a "throw-away" for quick deployment, and would involve no integration with the rest of Alphameric's EPOS system.
200. On 26 June 2007 Dr Seifert informed his colleagues on the Matchbet board that he had succeeded in obtaining a convertible loan of £200,000 from a shareholder which would enable Matchbet to progress Phase 1 of the rollout plan. In his email informing them of this development, Dr Seifert said that Matchbet was moving forward "in close co-operation with Alphameric", although "a bit more slowly" than Mr Morcombe and he would have liked, and said he "would be surprised if we did not sign the investment agreement, to finance the joint rollout with Alphameric, within the next few weeks". This email seems to me to evidence a clear acceptance by Dr Seifert that integration was now to proceed in two phases, with the second phase funded by external investment, which at that stage it was still hoped Investec would provide.
201. On 27 June, a meeting took place between Mr Morcombe and Investec, at which Mr Morcombe gained the impression that Investec was still ready to move things forward if Matchbet could solicit support from a bookmaker. Around this time, Mr Morcombe also informed Dr Seifert that Steve Mansfield would assume the role of project sponsor going forward, as it needed more focus than he was currently able to commit.
202. In early July 2007 Dr Seifert had a lengthy meeting with Mr Somekh to discuss various propositions that might be put to Française des Jeux. On 10 July Dr Seifert reported to Mr Morcombe by email with a brief summary of the meeting.
203. On 11 July Mr Poirier informed Dr Seifert that the costing for Phase 1 was likely to be signed off the following week. Based on what he had been told previously, Dr Seifert expected that the CST would then be up and running about five weeks later.
204. On 19 July Mr Morcombe sent Dr Seifert a draft Matchbet product description (version 0.3) which covered the two phases of integration. This was then discussed at a meeting between Alphameric and Matchbet held in Godalming on the following day. It was agreed, among other matters, that Phase 1 should start in early September 2007, and that the planned start date for Phase 2 would be the first quarter of 2008, i.e. by March 2008. It was further agreed that the stand alone CST should be included on the Alphameric stand at the Birmingham Betting Show in October. In relation to Investec's wish to see a bookmaker take up the service before making a decision, it was suggested by Nigel Ely of Alphameric that Mark Jarvis (with about 70 shops) would be an ideal candidate to be the first user of the service. It was agreed that Mr Mansfield would urgently arrange a meeting with Mark Jarvis in Leicester at which a presentation would be given.

205. On 14 August 2007 Dr Seifert met Mr Somekh and his team in Normandy for a day of discussions. He reported on those discussions to Mr Morcombe by email on 19 August. Various possible commercial relationships were discussed, in the light of the likely elimination of the monopoly position of Française des Jeux. It was agreed that Mr Somekh would present Matchbet with a draft memorandum of understanding for further consideration. Dr Seifert ended his email with the words “I see the FdJ opportunity now taking shape”.
206. On 3 September 2007 Mr Poirier assured his colleagues at Alphameric and Dr Seifert that the technical development of Phase 1 was still running to schedule, in time for a complete release by the end of September. On the same day, Dr Seifert forwarded Mr Somekh’s proposed memorandum of understanding to Mr Morcombe, commenting “I believe Guy is optimistic that we will have an early opportunity to present to FdJ”.
207. Matchbet was by now in the familiar position of running out of money. On 5 September Dr Seifert asked Mr Morcombe whether Alphameric might be willing to provide some interim funding, adding “Without that, we are really struggling and may need to call an emergency board meeting soon”. A few days later, Mr Mansfield reported that Coral had agreed to a presentation and discussion, and the necessary arrangements for this were soon put in hand.
208. Around this time, Alphameric Plc issued a profits warning to the market, saying that its forecast profit from the combined businesses of bookmaking and hospitality was expected to be materially lower than previously expected, even though the year-end result would still produce a profit before any losses associated with the AMRAC start-up operation were taken into account. In a letter to his colleagues, Mr Morcombe emphasised the need to maximise opportunities for sales before the year end in November, and also to maximise opportunities “around the bringing to market of our new products such as Matchbet ...”. Despite this homily, however, both Mr Morcombe and Mr Mansfield found themselves unable at the last minute to attend a meeting with Mark Jarvis which had been arranged for 26 September. The reaction of Mark Jarvis was to cancel the meeting, which caused Dr Seifert justifiable annoyance given the potential significance of the meeting on the fund-raising front.
209. By late September Matchbet’s financial situation had become critical, and Dr Seifert put various proposals to Alphameric. One proposal, which Alphameric had already rejected on a previous occasion, was that Matchbet should invoice Alphameric for assistance which Matchbet had provided in relation to integration. Another proposal was that Alphameric should provide some further short term funding. This elicited a somewhat less unfavourable response from Mr Morcombe, who said that if Matchbet could satisfy Alphameric’s finance department on their profit and loss account and balance sheet, and if the Birmingham Show went well, a financing proposal would be put to the Alphameric board for consideration.
210. The Birmingham Show, on 17 to 18 October 2007, did go well. On 18 October Dr Seifert emailed Mr Morcombe in effusive terms:

“Dear Alan,

On behalf of the Matchbet team, many thanks to you and all your colleagues, and in particular Steve, Phil and David, for,

once again, hosting us on your stand in Birmingham and being so persuasive in the various discussions with the potential clients.

I believe that the Show has been invaluable in moving forward our joint offering, and I think we have exciting times ahead for Alphameric/Matchbet.”

211. At the show there was a screen showing a live display of prices from the Matchbet Exchange, together with two CSTs through which people could place bets. The betting mechanism was coin-operated, and because of a technical glitch it allowed people to put money in to place a bet, but would not pay out if they won. Dr Seifert says that when Mr Morcombe saw that this did not work, he angrily criticised Mr Poirier and was “visibly livid”. Counsel for Alphameric invited me to discount this evidence as a typical exaggeration by Dr Seifert, on the grounds that Mr Morcombe was clearly not the kind of person who would lose his temper and criticise an employee in public. Nothing turns on the point, but I am inclined to think that on this occasion Mr Morcombe may momentarily have lost his habitual cool. Nevertheless, I am satisfied that the malfunction was of a trivial nature, and that it did not detract from the general success of the Phase 1 demonstration at the Birmingham Show. Moreover, this favourable view was shared by Alphameric. Despite his view that Alphameric had been stalling over the summer, Mr Poirier wrote to his team on 19 October thanking them for their hard work “which resulted in a successful demonstration of the product at the Betting Show this week”. He added:

“There was considerable interest in the system, and I expect that we will shortly be planning to take the product on to the next stage.”

It was shortly after this that Mr Poirier was offered employment with Finsoft and handed in his notice with effect from January 2008.

212. On 23 October 2007 Ms Holdsworth wrote to Mr Heather on behalf of Matchbet with a proposal that Matchbet should invoice Alphameric for fees totalling £169,100 plus VAT. She argued that, in view of the failure to reach agreement on a variation of the SDLA, Matchbet was “entitled to invoice Alphameric for services rendered, on a contractual, quantum meruit and estoppel basis”. She said that Matchbet would be prepared to accept £85,000 plus VAT in settlement of their entitlement to fees in relation to past services rendered.
213. This initiative received a dusty answer from Mr Morcombe, who wrote to Dr Seifert on 24 October as follows:

“On another matter I am surprised that you have tabled the concept of raising an invoice on Alphameric for “services” rendered. I can only assume that this is driven by your financing difficulties and not reality. I know the agreement we have covers the possibility of Alphameric buying services from Matchbet but it also states that Alphameric must agree to the extent and the price of any services provided. This is something

that Alphameric has not done and as far as I am concerned has no intentions of doing.

I think that any attempt to go down this route will cause real damage to our relationship and this would be a shame especially as Alphameric has contributed so much cash and resource to helping you launch your business.

I'm hopeful that the tabling of this issue has been a mistake and look forward to you clarifying the matter."

214. The meeting with Coral took place on 1 November 2007, after Coral had signed a non-disclosure agreement on 15 October. At the meeting Dr Seifert made a power point presentation to senior staff at Coral, including the then trading director, Jamie Hart. Dr Seifert felt that the meeting went well, and on 3 November he wrote in upbeat terms to Mr Morcombe:

"Meanwhile, you will have heard from your team that the Corals meeting went very well, and that Jamie Hart has agreed in principle to act in the Matchbet exchange, give us their order flow electronically, and himself become a personal customer. Once [*he*] has had some experience with Matchbet, he will make his report to the IT director who will then decide on potentially rolling out the CST to one of their flagship "City style" shops on Broadgate in London."

215. As so often happened, Dr Seifert's optimism was not shared by others who attended the meeting. On the Matchbet side, a director, Tony Klim, found that the meeting confirmed two major concerns which he had previously raised with Dr Seifert: first, that punters might not use the system, either because it was too sophisticated or was not sufficiently attractive a proposition; and secondly, that the business case for the LBOs was not strong enough. He said these concerns were shared by "the guys from Corals", who "also stated that they were not that interested in the riskless aspect as they were in the business of taking risk and they made more money by doing so". Dr Seifert did his best to respond to these points in an email to Mr Klim of 7 November. He agreed that Matchbet had not been sufficiently alert to the issue of over-sophistication, and he also agreed that the business case for LBOs had "probably been too woolly".
216. Within Alphameric, Mr Ely, the director of major accounts, reported to Mr Mansfield on 7 November giving a brief résumé of the meeting. He concluded that it was difficult to gauge the value of the product to Coral at that stage, as they were not giving much away. He said "I would rate it as a 40% chance of something happening at the moment".
217. These more sober assessments proved to be well-founded. Although Jamie Hart had been invited to take a personal account to try out the betting exchange for himself, it seems that he never did so, or at least that he quickly lost interest. Indeed, on 29 November Dr Seifert himself acknowledged, in an email to Mr Siers, that "Corals are being very slow, and success there is uncertain".

218. On 12 November 2007 Mr Morcombe resigned as a director of Matchbet. He explained his reasons in an email of that date to Dr Seifert:

“This is because I am unable to provide the appropriate time and attention to the specific role and the company doesn’t, by nature, operate on a conventional basis. We have a recent problem with the accounts but on a bigger scale, Board meeting [s] are not regular and the company has no fixed corporate governance policies.

Regardless, I am keen to continue in my support role for the business and to do whatever I can to further the joint initiative we have started.”

The “recent problem with the accounts” to which Mr Morcombe alluded was a typical failure by Matchbet to file its statutory accounts within the stipulated time limit, which had led to their being finalised and signed as a matter of great urgency.

219. In his reply on 12 November, Dr Seifert said he understood Mr Morcombe’s frustration at the lack of conventional procedure and the delay in submitting the accounts on time, for which he apologised. He said he had spoken to Mr Siers, who had confirmed willingness to serve on the Matchbet board, which would ensure continued representation of Alphameric’s interests at board level. Dr Seifert added:

“On another matter, we are of course keen to meet with Steve Mansfield to help plan the marketing strategy of the CST to the LBOs.”

220. Despite his resignation, and despite his preoccupation with litigation relating to Turf TV, Mr Morcombe did not lose interest in Matchbet and I am satisfied that his offer of continuing support was genuine. For example, an internal Alphameric email chain on 14 November shows Mr Morcombe persuading Mr Mansfield of the merits of further contact with Française des Jeux:

“The French opportunity could be massive, it should have some focused attention and another day spent on Matchbet might be worth it. FdesJeux are loaded and if they wanted to spend £500k on a pilot it wouldn’t even make their monthly management accounts. Worth a meeting to see if we can extract some spend from them.”

221. On 25 November 2007 one of Matchbet’s early shareholders, Piers Turner, raised a number of concerns about Matchbet with Dr Seifert. Dr Seifert’s reply is revealing, and merits quotation at some length:

“1. Discrepancy between forecasts and reality: you are right, there is huge discrepancy. How is this to be explained (but see below)?

When you and the other early shareholders came on board, the plan was for us to raise an initial 100K or so and

simultaneously raise 1.5 million. We had taken on Tobin Ireland, a plausible City character who thought that raising this amount was an easy thing to do. Unfortunately he completely failed to raise any money at all, although he became an investor on a limited scale, and resigned when it became clear that he could not help.

We managed to land a big deal commercially by linking up with Alphameric, which remains our most immediate commercial prospect. They have invested 250K and suggested that they would wish to invest a further 1 million and, later, to get Investec to do so. Despite the fact that they have been and remain a valuable ally, promoting us at two successive betting shows, they have been hugely behind schedule in terms of completing the integration with Matchbet and their systems, so that it was only a few weeks ago that there was any viable product linking us directly into the betting shops available, and even that product is not fully integrated and hence not yet a complete product. It does provide a viable product. Nevertheless, the crisis in their relations with bookmakers has completely halted discussions with Ladbrokes and Hills and has a potentially slowing effect on the discussions with Corals. We are here talking about the biggest crisis in the UK betting and racing industry in many years, and it is just bad luck that our key partner is an integral part of that. That is why the potential end to this crisis would be manna from heaven!!!!

In summary: Our projections provided to you and others explicitly assumed that Matchbet would have funds of 1.5 million to be able to provide an industrially capable Internet betting site. What we have had to do instead is building a temporary site, hosted by ourselves, and overcome the huge difficulties of maintaining such a site with resources which, despite the support from private investors, are basically shoestring. So, mea culpa for our dismal failure to get institutional investment, but nevertheless we are still on course to get there despite an impressive list of mishaps that might well have destroyed the company ...

2. Developing an online business. You are right, that is basically the main objective. It was somewhat neglected because the route to the LBOs was such an extraordinary resource which only Matchbet has acquired so it seemed a logical way to start in the tactical sense. The problem was this: When Ian Winton came to the company, it was his view that we could only establish ourselves through bookmakers, since a direct Internet strategy, in competition with Betfair and Betdaq, would require a massive marketing spend (15 million/year is what Betfair spend apparently). Hence we proposed the service to a number of bookmakers, but the problem we found there

was dual: First, whilst there is certainly a business case to bookmakers, there are also quite a lot of hurdles to overcome since much of what we do potentially implies that the bookmaker's investments and staff are made redundant. So the deals are not straightforward. The main problem is that, until we have managed to roll out a much more general platform (which we just managed to do for the Birmingham Show in mid-November), our offering (football matches only) was not general enough ...

In view of this, we have now decided to revisit the decision of developing our online business only via bookmakers. There are two current initiatives:

The first is to build an online business by working closely with partners with whom there are totally uncomplicated synergies, e.g. organisers of sports events: They do marketing for us and we add to the thrill of attending or watching matches ...

The second is the initiative developed by Tony Klim: It is a direct approach to high rolling and professional gamblers some of whom we have got among our shareholders. Tony is going to run workshops to see how to structure deals along these lines.

...

In summary: We have to overcome a lot of obstacles, not to mention the absolutely breathtaking bureaucratic obstacles with the Gaming Board, and the due diligence of Royal Bank in setting up accounts and establishing payment mechanisms so that the three years have been rather full. I am sure we could have handled lots of issues better but the important thing is that, slowly but I think surely, we are climbing the mountain."

222. This reply is of interest for a number of reasons. First, it shows Dr Seifert accepting personal responsibility ("mea culpa") for Matchbet's dismal failure to attract institutional investment. Secondly, it shows him attempting to blame the failure to attract investment from the "big three" on the dispute relating to Turf TV, which had indeed led to bitterly contested litigation between Alphameric and (among others) Ladbrokes and William Hill, although not Coral. Thirdly, Dr Seifert's statement that Alphameric had suggested they would wish to invest a further £1 million was in my view a typical exaggeration. In cross-examination he unconvincingly said that the suggestion had been made in the early days of the relationship, in 2006. I am unable to accept that explanation. Fourthly, the email shows that Dr Seifert was well aware of significant problems that would have to be overcome if the MBE was to be successfully marketed to LBOs. He accepted in cross-examination that no reference had been made to any of those difficulties in the interim business plan submitted to Investec. Finally, it is notable that Dr Seifert still saw development of the online business as "basically the main objective".

223. On 28 November 2007 Dr Seifert circulated within Alphameric and Matchbet a confidential briefing paper in advance of the meeting with Française des Jeux scheduled for 11 December. The paper included a list of questions which it would be necessary to address at the meeting, for example about the current status of “full EPOS/ALBOS integration”, the existence of updated projections for the marketing to UK LBOs, and the proposed commercial terms for deploying the system. On 29 November Mr Mansfield emailed Mr Morcombe, saying that in his view these questions needed urgent answers between Alphameric and Matchbet (or actually between the two of them personally in the first instance) “as it would be in appropriate for a debate to happen on the day”. He added:

“I have raised these questions internally and we will give an update but I think you and I need to discuss Matchbet in wider terms relating to its funding, [*Alphameric’s*] obligation (if any) to continue R & D investment and the sales opportunity that exists.

At the moment I do not have any Matchbet spend or income in the 2008 draft, not because we won’t do it but because we need the discussion. This is separate to whether Plc should fund Matchbet. We produced a demonstrable product on a non-viable CST for the show (as agreed as the only way to meet the timescale) so work would have to be done there.

To my mind the most likely use of Matchbet would be through the internet or through integrated EPOS and the ability to take Matchbet odds through the till ...”

224. By way of reply, Mr Morcombe appended his comments to Mr Mansfield’s email. In relation to the question about full EPOS/ALBOS integration, he merely said “This is something that David Poirier would have been the font of knowledge about”. Other answers were similarly vague or non-committal, but included the statement “Mark Heather is the contracts expert but as far as I am concerned we have fulfilled all of our contractual obligations”. Mr Morcombe concluded:

“Matchbet is an opportunity that is real and large. It needs a champion and someone who understands the possibilities. Until you find a suitable individual I fear it will just drift from one failed challenge to another.

If you can identify someone in the business to own the product I will spend some time with him/her discussing my views.”

225. Mr Morcombe accepted in cross-examination that he had placed Mr Mansfield in charge of the Matchbet project, and that progress to date had been disappointing as no orders had been secured. He said that his comments were intended to give Mr Mansfield “a serious push”. He also said, and I accept, that Mr Mansfield’s reference to “a non viable CST” referred only to commercial viability, and was not intended to suggest that the CST did not work technically.

226. Mr Siers had a very low opinion of Mr Mansfield's abilities, and on 29 November he informed Dr Seifert that he would probably be unwilling to attend a meeting with Française des Jeux if Mr Mansfield was also there. I am in no position to form a view whether Mr Siers' low opinion was justified, as Mr Mansfield was not called as a witness by either side.
227. On 4 December Mr Addario provided his own input on Mr Mansfield's list of questions. In his answer to the question about integration, he described the Phase 1 "prototype/demo version" and said that only three units existed. In relation to Phase 2, he said there was a plan for a Matchbet product which integrated with Alphameric's EPOS and ALBOS systems, but no development would be assigned until the project was approved by Alphameric.
228. On 6 December 2007 Dr Seifert circulated a draft presentation for Française des Jeux, based on those which had previously been made to Ladbrokes and Coral. In his covering note he said that there were likely to be probing questions about the readiness of the CST and EPOS and ALBOS integration. This was a difficult time for Dr Seifert, as his father had recently died; but he pressed on with preparations for the meeting with Française des Jeux, seeing it as a valuable opportunity which should not be allowed to lapse. It seems that, however belatedly, Alphameric took the same view. On 7 December Mr Morcombe emailed Mr Mansfield and Mr Siers, saying "Am I right to assume that we are unprepared to do this meeting justice?", to which Mr Siers responded "No, you are not, I am redrafting the presentation over the weekend. This is vitally important and I intend we do our best". Mr Morcombe described this in cross-examination as a typical Phil Siers response, and what he would have expected. Mr Siers "was very proactive and knew the market place well". Mr Morcombe also said that he had confidence in Mr Mansfield to do the job that he had asked him to do, and did not share Mr Siers' low opinion of his abilities.
229. On 9 December Mr Siers sent Dr Seifert an amended version of his presentation for Française des Jeux. The slides gave details of Alphameric's customer base, including approximately 9,000 LBOs in the UK and Ireland which used Alphameric products. They said Matchbet was working with Alphameric "to commercialise the platform for retail betting use and has already generated significant pre-sales interest from a number of leading bookmakers in the industry".
230. In the event, the meeting was postponed by Française des Jeux at the last minute and it was subsequently rearranged to take place in January 2008. On 11 December Dr Seifert emailed Mr Siers, Mr Morcombe and Mr Mansfield, saying that Française des Jeux were "suitably contrite over the last minute postponement" and thanking them again for their "excellent draft presentation document".
231. Dr Seifert had been anxious to go to the meeting with Française des Jeux with a credible deal with a UK-based bookmaker already concluded. To that end, he arranged a meeting with Ian Hogg of BetterBet, an independent chain which had expressed some interest in the CST at the Birmingham Show. There was, however, a potential problem, in that BetterBet used Finsoft as well as Alphameric systems, and Finsoft (which had recently been taken over by GTECH) was Alphameric's main competitor in the supply of EPOS and display screen services to the UK betting industry. It is therefore probably no coincidence that in late November 2007 Dr Seifert reactivated his earlier contacts with Finsoft through Mr Maskey. On 30

November Dr Seifert sent an email to the managing director of Finsoft, Mr Predrag Popovic, and Mr Maskey saying that he looked forward to seeing Mr Popovic at his London office on the following Wednesday:

“This is pursuant to a conversation with Jamie [*Maskey*] who suggested there may be interest in GTECH distribution of the Matchbet exchange.

I would also like to discuss integration with Finsoft’s products for the use of bookmakers in the UK.”

The proposed meeting was then cancelled on 2 December, following the death of Dr Seifert’s father over the weekend, but was later re-fixed for 14 December at Finsoft’s Hatton Garden offices.

232. Meanwhile, Dr Seifert returned to his campaign to elicit further investment from Alphameric. In an email to Mr Morcombe dated 12 December, Dr Seifert said that an existing Matchbet investor, David Cripps, had put up an additional £25,000 in November, and had offered a further £20,000 per month for six months if Alphameric would do the same. Dr Seifert expressed the hope that Alphameric would be willing to do this, and said that in the absence of their investment “the cash position of Matchbet will become difficult and possibly fatal before the end of this month”. Alphameric was not prepared to entertain this proposal, for reasons which Mr McLaren explained internally to Mr Morcombe on the same day.
233. Also on 12 December, Dr Seifert sent an email to Mr Siers, headed “private and strictly confidential”, in which he said this:

“I blind copied you in on the email sent to Alan, as I was somewhat concerned by the implication in our conversation on Monday that Alphameric may wish to delay the investment under discussion to some time in 2008, which would be far too late for our purposes.

...

The point is that we simply cannot pursue a strategy which, however wonderful in principle, does not ensure survival. You will not be surprised to hear that quite a few potential partners are courting us with a number of tempting prospects which would solve our cash flow problems, prospects which I have not put to the Board, as they may potentially conflict with our mutual [*joint venture*] which I consider absolutely a priority, but clearly I would be both an idiot and in violation of my fiduciary duties if I turned down any opportunities if these were to be the sole method of survival. While I am having exploratory discussions along these lines, to be able to propose alternatives, I have no wish at all to do so unless I am forced into this position.

...

I do not wish to say all of this to Alan at this stage, since I am not wishing to appear to put pressure on him, but since we have a personal confidential relationship, I think you should be clearly aware that the investment Alan has indicated he wishes to put to your 17 December Board meeting, if deferred, would seriously compromise our practical ability to get as far as an FdJ meeting in January as JV partners.”

234. Dr Seifert accepted in cross-examination that he wished to keep this communication with Mr Siers secret from Mr Morcombe, and that he had a personal confidential relationship with Mr Siers. He also thought that when he referred to potential partners courting Matchbet, he almost certainly had Finsoft in mind. He denied, however, that he was threatening to take any steps inconsistent with Alphameric’s contractual rights under the SDLA unless Alphameric made a further investment. All he meant, he said, was that “unless Alphameric were to actually implement the integration which would produce the AlphaMatch system, which could then be sold to the bookmakers, we would have to go to someone else who would create such a system. We were being blocked commercially” (transcript, day 3, page 147). Dr Seifert said his default assumption was still that Alphameric would be integrating, and they would have the opportunity to roll out the AlphaMatch system. I found this evidence unconvincing. The whole thrust of the email was about investment, not integration; and in my view Mr MacLean QC was right when he put it to Dr Seifert that it was designed to convey a message through Mr Siers to Mr Morcombe that Matchbet had other potential irons in the fire if Alphameric refused to put up some more money. Mr Siers’ response to the email was merely to say that he understood, would research the situation and speak to Dr Seifert in due course. Dr Seifert replied on 13 December “Thank you Phil, I will today talk to Guy in the light of your emails”.
235. On the same day Mr Morcombe confirmed his resignation from the Matchbet board, and asked for it to be processed forthwith. He emphasised, however, that his commitment to Matchbet was still in place, and he said he would work hard on the operational and delivery side. He also said he was discussing Matchbet’s funding request with Mr McLaren and would revert shortly on it.
236. Dr Seifert’s meeting with Finsoft took place on 14 December. There is no reference to it in Dr Seifert’s lengthy statement. On 17 December he emailed to Mr Popovic his summary of what had been discussed, together with some other comments:

“1. We established that there may be an opportunity for Matchbet, integrated with Finsoft’s systems to be put forward to Finsoft’s parent company GTECH as a consumer facing exchange.

On this point, I should say that Matchbet is in discussions with another company, currently providing a lottery and gaming business, on a monopoly basis, in a Continental country. The company in question is facing an end to their national monopoly position in view of EU directives. The discussions concern the supply of Matchbet technology in that country but also the creation of a betting exchange business. A crucial meeting will take place on 11 January.

2. We established that a number of current Finsoft clients, including Boyle, could be potential users of Matchbet ... This creates an opportunity for us jointly provided you were able to either integrate to Matchbet's API or we were able to do so. In that latter case, in the current circumstances, we would need either your client or Finsoft to fund our development work.

We agreed that an early discussion should take place to clarify what each of us would commercial gain from an association, depending on who put what resources into both marketing and technical integration.

In this regard, Matchbet has established models but is willing to consider any commercially interesting proposal.

...

We are keen to diversify our partnerships and need to make swift decisions in relation to business opportunities, and therefore would welcome your early thoughts on the above.

Please consider that these comments and any subsequent responses from you and discussions in this direction are covered by the confidentiality agreement between us since the nature of these is potentially for our business, and probably for yours, very sensitive indeed."

237. On 17 December Mr Morcombe informed Dr Seifert that it was "most unlikely" that Alphameric would be able to invest any more cash in Matchbet in the short term. There had been no time to discuss the matter at the Alphameric board meeting earlier in the day, due to other urgent issues. Mr Morcombe said he would raise the issue again at the next board meeting, but he was not hopeful that any further funding would be forthcoming. On 18 December Dr Seifert reverted to Mr Morcombe with a suggestion that Alphameric might at least be prepared to match funding by David Cripps to the tune of £20,000 for January only. He continued:

"In the absence of any financial commitment at all, David is pushing us to focus on alternative strategies of business development. I continue to be fully committed to what we both realise can be a huge business, but I am of course dependent on those who are prepared to pay the bills until we find revenue. Without David's continued support the company would be in immediate difficulties, although OVM is willing to come in with substantial funds in January (based on a sale of assets)."

Unsurprisingly, Dr Seifert said nothing about his meeting with Finsoft which had taken place four days previously.

238. Mr Morcombe forwarded Dr Seifert's email to Mr McLaren and Mr Mansfield, the latter of whom responded half an hour later giving a number of reasons why in his view Alphameric should not fund further development of the Matchbet concept. Mr

McLaren also replied, saying that he would not support any further investment without proper due diligence being carried out “and a belief that there is a real market for this product”. He said there were no resources then available within the group to carry out such due diligence, nor had he ever seen a credible business plan. He concluded:

“It’s not like we have a choice at present; cash is very tight and profit non-existent. I think we have to walk away and let them find funding from elsewhere.”

239. A meeting with Ian Hogg of BetterBet took place on 20 December 2007, attended by Dr Seifert and two representatives of Alphameric. As usual, Dr Seifert thought the meeting had been very successful, and Mr Hogg agreed to set up a personal account to test the Matchbet system. On 21 December Dr Seifert gave Mr Hogg some further information and assured him that Matchbet were talking to Finsoft about integration in relation to another Finsoft client bookmaker, and that Mr Popovic had expressed an interest in meeting other potential clients. He added:

“Given that Alphameric and Finsoft are direct competitors, we need to maintain Chinese walls between Alphameric and Finsoft discussions, as I am sure you will appreciate.”

240. An important development over the period of Christmas and the New Year was the resolution of most of the Turf TV litigation. On Christmas Eve Coral announced that it had entered into a contract with AMRAC for Turf TV, and in early January 2008 both Ladbrokes and William Hill followed suit. On 2 January 2008 Dr Seifert wrote to congratulate Mr Morcombe on this “brilliant success”, adding “I very much hope that we can see similar progress on our mutual joint venture in January. It is long overdue!” He also wrote in similar terms to Mr Siers.

241. On 2 January 2008 Dr Seifert also sent good wishes for the New Year to Mr Popovic, saying he was “very interested in progressing discussions between us, both in relation to potential joint clients in the UK, and in relation to potential GTECH involvement”. On 3 January Dr Seifert renewed contact with Mr O’Mahony of Boyle Sports, saying:

“... Matchbet expects integration with Finsoft’s systems to occur in the near future, and for a number of Finsoft clients to take up the Matchbet service. This would seem a good time to resume our discussions, as these were issues of concern to you when we last spoke.”

242. The meeting with Française des Jeux was re-fixed for 24 January 2008. On 11 January Dr Seifert emailed Mr Morcombe to inform him of this, and also said he had been “heavily committed to discussions with an investment bank” (in fact Close Brothers) with a view to securing an investment of £5 to £10 million in new betting shops. He continued:

“Obviously, assuming that Alphameric continue to be committed to our jv and can integrate, then this would be an ideal start for commercial deployment of our integrated systems. We have always found it difficult to deal with

bookmakers who have got your systems but also Finsoft (like BetterBet) so this is a huge opportunity potentially.

As to the 6-month plan, I apologise that, in view of the above, it is being a bit delayed.

However, the 6-month plan to a large extent is independent of the above project, it involves necessary steps as readying the system for fully commercial deployment, including completion of an automated management, monitoring and control system which we need for large scale deployment, completion of the horse racing product ... dealing with multiple external feeds and the like.

These things needs to be and are being done, we are just trying to wrap our internal plans into a format that you would be able to use for your Board.

Alan, we both realise that there is huge scepticism among our respective Boards and shareholders in view of the crisis of last year and the lack of visible progress in our jv. I am grateful for your continued personal support, and am fully convinced that, given the investments we have both made, we should try to complete the task.”

There was no reference in this email to the discussions that Dr Seifert was engaged in with Finsoft.

243. On 14 January Dr Seifert prepared, and sent to Mr Morcombe, a six month cash flow projection. He did this in response to a request from Mr Morcombe, who said that he would spend some time reviewing another investment in Matchbet now that he was not so stressed about other things (a reference to the successful resolution of the Turf TV dispute). Around the same time, Dr Seifert also prepared and sent to Mr Morcombe a background paper in relation to the potential investment.
244. On 15 January Dr Seifert sent an email in French to Mr Somekh, responding to the latter’s concern that no memorandum of understanding with Alphameric had been signed. Dr Seifert said that he was due to see Alphameric’s former chairman, Mr Hornstein, the next day, and Finsoft on the following Thursday. He continued (in English translation):

“I believe that, without an MoU, under the circumstances we should exclude (“nous devrions exclure”) Alphameric, and perhaps invite GTECH, a partner with global reach who might interest FdJ still more, since they could open the way to a distribution network in 50 countries throughout the world.”

The translation of this email in the bundle renders the words “nous devrions exclure Alphameric” as “we should not count on Alphameric”, but that is an obvious mistake and Dr Seifert agreed in cross-examination that “exclude” is the correct translation of “exclure”. Mr MacLean put it to Dr Seifert that in his discussions with Mr Somekh

on 15 January he was talking about excluding Alphameric, to which Dr Seifert replied “Yes, potentially”.

245. The projected meeting with Finsoft and GTECH took place on Thursday 17 January, and in the evening Dr Seifert gave a brief account of it in an email to Simon Miller, an entrepreneur and former potential investor in Matchbet who had once been Dr Seifert’s neighbour. It seems that Mr Miller had come forward with an offer of some kind of business relationship, and Dr Seifert wished to explore opportunities with him. In his email to Mr Miller, he said:

“However, we have had very interesting discussions with GTECH, the gaming company, who are very interested in investing in Matchbet and in helping creating businesses.

They would be keen to get involved in any concrete Matchbet related business opportunity and, if and when we have something specific to propose, we could meet with them;

they could be an alternative partner to Alphameric for electronic point of sale and customer service betting terminals (they have thousands of games machines and run a number of national lotteries across the world), and a partner with very deep pockets.”

246. Dr Seifert also gave a fuller account of the meeting in an email which he sent on 19 January to Mr Popovic and various recipients at Matchbet. It appears from this that the discussions had focused on a possible initial investment in Matchbet in the context of the creation of a chain of new fully automated betting shops financed by Close Brothers, together with distribution of Matchbet-based online services through GTECH’s worldwide distribution systems.
247. On 22 January Dr Seifert informed Mr Somekh that neither Alphameric nor GTECH would be attending the meeting on 24 January. In the case of Alphameric, Dr Seifert said Matchbet had been encouraged by Alphameric to offer the CST as an existing and available product. This seems to have been a typical example of wishful thinking by Dr Seifert, as the CST displayed in Birmingham had on any view been only a prototype which was not yet ready for commercial exploitation.
248. The meeting with Française des Jeux on 24 January took place in Paris. It was attended by two senior executives of Française des Jeux, Mr Somekh on behalf of his company GASM, and (for Matchbet) Dr Seifert and the marketing director, Mr Winton. It was made clear at the meeting that, while the State monopoly remained in place, it would be impossible for Française des Jeux either to launch the MBE in France or to invest in Matchbet. Any commercial relationship would therefore have to await relaxation of the French gambling regime, and Française des Jeux was unwilling to be drawn on when this might take place. Française des Jeux did, however, express interest in the Matchbet model, and wished to see a demonstration of the CST in England where (according to Dr Seifert’s minutes of the meeting) they “could explore the Matchbet customer experience”. Matchbet was asked to provide dates for such a visit, for the purpose of seeing “a working CST in a shop”.

249. Dr Seifert must have allowed his enthusiasm to run away with him a little at the meeting, because his minutes record that:

“Inadvertently the impression was created that the Alphameric Dorking shop already had the CST running, and there will be some need to explain that this is not so, and offer an alternate venue where it can be seen.”

He added that from Matchbet’s point of view it was now urgent to prepare the meeting in close collaboration with Alphameric.

250. On 31 January 2008 Dr Seifert sent an email to Mr Popovic in advance of a meeting scheduled for the following day. He said Mr Hogg of BetterBet had indicated interest in participating in Matchbet’s online exchange provided that integration with Finsoft had been carried out. He repeated that Matchbet was in principle interested in carrying out integration based on Finsoft’s API. At the meeting on 1 February, which was attended (among others) by Mr Poirier in his new role as a Finsoft employee, possible areas of collaboration were explored. Dr Seifert was clearly concerned about the exclusive licence granted to Alphameric under the SDLA, and in an email to William Scott of GTECH sent after the meeting he agreed to provide “clarification as to whether or not there would be any contractual constraints on launching services based on Finsoft’s EPOS and/or screen systems to an LBO business”. He promised to do this by early in the following week. He added that Matchbet was under no constraints in relation to its online business.
251. Meanwhile, Dr Seifert remained in contact with Mr Morcombe and Mr Somekh. On 6 February he sent a confidential discussion paper to Mr Morcombe, in advance of a meeting which they had scheduled for 8 February. In his covering email, Dr Seifert said the purpose of the paper was to update Mr Morcombe on Matchbet’s development and plans. He said Matchbet needed to move forward, and hoped to do this with Alphameric, taking account of the changed circumstances.
252. Paragraph 1 of the discussion paper set out the background, as follows:

“To date, there is no integrated Matchbet/Alphameric product available to the potential joint clients. Integration of Matchbet and EPOS/ALBOS, while agreed, is not complete and no delivery date has been communicated to Matchbet. A CST has been built but not yet been made available as a product to Matchbet or its potential partners. Matchbet’s Board is aware of continuing interest on Alphameric’s part to develop the AlphaMatch business service, but has not been informed of Alphameric’s technical or commercial plans in any detail.

In these circumstances, while continuing to look to Alphameric to carry out integration as soon as possible, and remaining ready to assist in this process, as agreed, [*Matchbet*] has had to concentrate on its independent efforts to develop its LBO (as well as Internet) business.

We have succeeded in charting a realistic course with our partners, in a manner which at the same time will enhance the ability of Alphameric and Matchbet to provide joint services, along the lines of the agreed business plan submitted to Investec in 2006, as soon as a joint product is available.”

Matchbet’s “strategic plan” in relation to LBO business was then outlined, with a first phase consisting of the creation of (initially five to ten) new UK based LBOs, and a second phase involving Française des Jeux “to expand the business both in the UK and on the Continent”. The final section of the paper shows that Dr Seifert clearly had the contractual position under the SDLA well in mind. He said that, in order to develop their business relationship in the current situation, Alphameric and Matchbet would need to agree a variation of the terms of their current agreement “in order to enable Matchbet to proceed with this plan without contractual difficulties”. He then listed a number of issues that Matchbet would like to discuss, including the provision by Alphameric of a revised schedule in relation to integration, and variation of the “exclusivity provisions” in the SDLA “which are not appropriate and would impede the plan as outlined above”.

253. At their meeting on 8 February, Mr Morcombe reassured Dr Seifert of his personal commitment to progress in their joint endeavours. There was clearly a wide-ranging discussion, and Dr Seifert recorded his views on what had been agreed in a post-meeting email which he sent to Mr Morcombe on 11 February, having consulted his colleagues at Matchbet on a first draft. When circulating his first draft for comment, Dr Seifert said its purpose was “to gently serve notice on Alan that we are not prepared to allow him to walk away from their obligations”. He continued:

“It is perfectly clear that their intention is to wait for a client to sign on before they do the integration. I want them to either realise this is not possible and exposes them to serious risk, and hence get on with it, or acknowledge that they are not complying and will not comply, in which case we can terminate and sue them for damages.”

Two things are clear from this. First, Matchbet was now giving active consideration to terminating the SDLA and suing Alphameric for damages. Secondly, it was “perfectly clear” to Dr Seifert that Alphameric intended to wait for a client to sign on before it proceeded with Phase 2 of the integration.

254. When Mr Morcombe received Dr Seifert’s email on 11 February, he responded by embedding his own comments on it. In relation to Française des Jeux, Dr Seifert had written:

“You have agreed to ensure that Française des Jeux will be able to view the CST on the occasion of their visit to England, and we shall liaise about where this should be.”

Mr Morcombe’s comment was: “early notice with some time to prepare would be appreciated”. In a further comment, Mr Morcombe explained that the CST was not a long term product and Alphameric “would be happy to show it as a mule but for

production would look for a different solution. FdJ would need to think about funding this work”.

255. During the rest of February, inconclusive discussions continued between Matchbet and Alphameric on the one hand, and Matchbet and Finsoft on the other. On 3 March, Dr Seifert chased Mr Morcombe on fixing a date and location for demonstration of the CST to Française des Jeux. On 4 March, Mr Mansfield informed Mr Morcombe of his belief (evidently derived from Mr Addario) that two months’ development would be needed to get the CST to a pilotable state, and either external or new resources would be needed for that purpose “as there is no slack in the team”. Mr Mansfield also said he was told it would not be possible to demonstrate the latest version in Dorking “without development”. With this discouraging information, Mr Morcombe appears to have left Dr Seifert’s chasing email unanswered.
256. On 6 March 2008, Dr Seifert updated Mr O’Mahony of Boylesports on progress with Finsoft. He stressed that no agreement between Matchbet and Finsoft was yet in place, but the aim was “to enter into a commercial relationship with Finsoft, so as to create a marketplace for Finsoft bookmaking clients”. Further discussions between Matchbet and Finsoft took place at a meeting in mid-March, and on 17 March Dr Seifert referred, in an email to Mr Maskey, to “our shifting alliances from Alphameric to Finsoft”. Indeed, it appears from this email and subsequent correspondence that Dr Seifert was also contemplating abandonment of the proposed new alliance with Finsoft in favour of a joint venture with Mr Maskey and a Mr Antony Hopkins. The impression I gain is that Dr Seifert was by now willing to jump at any opportunity which presented itself, and that he had no scruples in following up several conflicting proposals simultaneously.
257. On 11 April Dr Seifert sent an email to Mr Morcombe (copied to Mr Maskey and Mr Siers) saying that he would like to discuss a number of new opportunities with him, both in France and in the UK. He referred to Mr Maskey’s new venture, which had been formed under the name SRS and was apparently “quite independent of Finsoft”. A meeting was then fixed for 16 April, in Godalming. On 13 April Dr Seifert suggested to Mr Morcombe that they should be joined at the meeting by Mr Somekh. Dr Seifert gave two reasons for this proposal: first, Mr Somekh was “in advanced due diligence in relation to a potential investment in Matchbet, and would like to meet you to discuss Alphameric’s deployment plans of the Alpha/Match platform in the UK”; secondly, Mr Somekh had introduced Matchbet to a substantial gaming company in France who were preparing the launch of a new betting business, initially from Malta. Dr Seifert explained in cross-examination that the potential investment in Matchbet was to be made by a Luxembourg based fund called Vencorp fronted by a business partner of Mr Somekh, Mr Kumatli. Dr Seifert said that he had already met Mr Kumatli two or three times in Paris, and the amount which Vencorp proposed to invest was in the order of £1.5 million.
258. On 14 April Dr Seifert emailed Mr Maskey and Mr Hopkins:
- “In view of the potential investment, it would be of interest to have a reply from Finsoft re their willingness to do the integration, in view of online bookmakers, and if we succeed in disentangling ourselves from exclusivity provisions in due course that may open up opportunities with CSTs, etc.”

Dr Seifert agreed in cross-examination that he was at this stage planning to disentangle himself from the exclusivity provisions in the SDLA, as “that seemed to be the only way forward”.

259. For his part, Mr Morcombe prepared for the meeting on 16 April by asking Mr Mansfield and Mr Addario on the previous afternoon for an update “on the technical/commercial status of [*the*] Alphameric/Matchbet platform and CST”. Mr Addario did not reply until 11.53 am on the next day, by when the meeting (which was scheduled to start at 10.30) would already have been well under way. He said:

“We have not made any significant progress regarding Matchbet’s Phase II development. The product still is in the same state as the prototype we displayed during the Bookmaking show last Sept.

I am attaching an e-mail that covers what we have at the moment and the product description which includes Phase II requirements.”

### **The meeting on 18 April 2008 and the purported termination of the SDLA**

260. Dr Seifert’s proposal that Mr Somekh should attend the meeting was accepted, and when it took place at Alphameric Plc’s office in Godalming those present were Dr Seifert, Mr Morcombe and Mr Somekh. Dr Seifert had prepared a short agenda, identifying the matters for discussion (after introductions) as (a) French opportunities online and offline for Matchbet and Alphameric, (b) the technical/commercial status of the Alphameric/Matchbet platform and CST, and (c) GSA’s potential investment in Matchbet/due diligence.
261. Mr Morcombe had no precise recollection of what was said at the meeting, and his account of it in his witness statement is largely a reconstruction. Before coming on to the evidence of Dr Seifert and Mr Somekh about what was said, I will refer to the email which Mr Somekh sent to Mr Morcombe (and copied to Dr Seifert) on the morning of 18 April, the second day after the meeting. The email was warm and friendly in tone (“I wanted to thank you for your welcome to this event already scheduled between you and Ben. It has been a pleasure to add a face to a name. It has also been a pleasure to both have got confirmation and get a better understanding of the potential that really exists in the co-operation between Alphameric and Matchbet.”) It continued with a summary of Mr Somekh’s understanding of the position, coupled with some questions to which Mr Morcombe was politely asked to provide an answer within the next eight days. There was no hint of any criticism of Alphameric.
262. Before replying to Mr Somekh’s questions, Mr Morcombe forwarded them to Mr Addario who informed him that the CSTs would cost around £2,500 per unit, although for volume purchases the price would be lower, and that the estimated cost of Phase 2 of the integration was still about £105,000 and it would take about five months. He said the scope of the integration was very comprehensive, and included Head-end, EPOS and ALBOS. Mr Morcombe then replied to Mr Somekh on 22

April, appending his comments to Mr Somekh's original email and asking Mr Somekh to give him a call when he had had time to review them.

263. In relation to the delayed visit by Française des Jeux to a UK betting shop equipped with the CST, Mr Morcombe's comment was:

"I am waiting for a timetable that will provide me with the date that a demonstration would be ready. The demonstration will be as per the last Betting Shop Show."

In relation to the CST, Mr Somekh had recorded his understanding that this was "still a prototype and not yet a real product", and that the cost of turning it into a product had not yet been estimated. In response to this, Mr Morcombe gave some figures, which differed slightly from those supplied to him by Mr Addario, both for the supply of suitable CSTs and for development of the EPOS functionality.

264. As well as writing to Mr Morcombe on 18 April, Mr Somekh also sent an email on the same day to the Française des Jeux executives who had attended the meeting in January. The purpose of the email was to make arrangements for a meeting in Boulogne, to be attended by Mr Somekh and Dr Seifert. Various dates were suggested, between 24 April and 7 May. There was nothing in the email to suggest that the delay since January had caused any difficulty to Française des Jeux, or any personal embarrassment to Mr Somekh. On the contrary, he said that a good deal of work had been done in the meantime on a retail business model which would be suitable for deployment on a large scale. Furthermore, the proposed investment in Matchbet by Vencorp was still very much on the agenda. On 21 April, Dr Seifert emailed Mr Somekh saying "I think that it's important to keep some time to develop our talks with Vencorp", and suggesting a meeting in the near future. Mr Somekh replied in positive terms, saying a meeting would be arranged as soon as possible and giving details of various other connected meetings which he had either arranged or was in the process of arranging (including the proposed meeting with Française des Jeux).
265. Against this background, it is surprising to read Dr Seifert's written account of Mr Somekh's attitude at the meeting on 16 April:

"293. Guy Somekh was very angry that Mr Morcombe would not carry out integration. He had used his personal credibility to convince the French Finance Ministry (which controls FdJ) that there was a viable land based service offering that could be a huge asset in preparing for an innovative offering in the French café tabac and he was livid to find out that there was in fact no offering. He told me that he was going to write to Mr Morcombe. Therefore, I did not do so."

266. A similar picture is painted by Mr Somekh in his statement, where he says of the meeting on 16 April:

"48. I explained to Mr Morcombe that it was absolutely necessary for AlphaMatch to be ready, deployed commercially and fully tested in real trading before it could be accepted by

FdJ. I explained that FDJ was a huge state owned company that required a commercial and reliable solution including EPoS that was not at pilot stage.

49. At this point, Mr Morcombe told me that Alphameric was only willing to undergo integration with their EPoS system provided that the relevant cost was paid to Alphameric by a customer. There was no integration; Alphameric was not doing any integration and nor did they intend to.

50. After much trouble, time and energy, we had been told the real truth: it appeared clearly that Alphameric had been less than honest to all, including the public market, having used Matchbet's technological and commercial advantages in part to raise funds on the public market."

Mr Somekh then referred to a rights issue prospectus which had been issued by "Alphameric" (it was in fact issued by Alphameric's parent company, Alphameric Plc) in November 2007, which had contained the following statement:

"In the year ended 30 November 2006, Alphameric made a £250,000 investment into Matchbet, a web-based betting exchange platform that allows bookmakers to fully automate their payment and price display processes, in order to further its development. Matchbet is now fully integrated with Alphameric's EPoS payment and ALBOS price broadcast systems."

Mr Somekh also referred to Mr Addario's email to Mr Morcombe on 16 April, where he said that no significant progress had been made with Phase 2 and the product was still in the same state as it had been at the Birmingham Show. Mr Somekh said he had sought advice on how to complain about Alphameric's prospectus, and had been told that he could complain to the Financial Service Authority. He had, however, decided to delay any complaint because of the pending litigation between Matchbet and Alphameric (i.e. the present proceedings).

267. Mr Somekh concluded his statement in terms of outrage and betrayal:

"54. With the full knowledge and support of Alphameric's management, I was encouraged to use my relationship with the French Ministry of Finance who control FDJ to market the presumed but in fact non-existent EPoS integrated Alphameric/Matchbet system.

55. It is impossible at the present time to measure the loss in terms of credibility that I have suffered as a result, not to mention the regret I feel at having been used as an unwitting party to what I regard as very sharp practice.

56. I can think of no more serious breach of trust. Having been personally involved in dealings with Alphameric, and having

disseminated, in a highly significant commercial context Alphameric's public information which I had accepted in good faith, I inadvertently became associated with Alphameric's misrepresentations, which I deeply regret and am deeply embarrassed by.

57. My duty required that I informed those in France that I had inadvertently misled them. I deeply resent that the callous actions of Alphameric's Executive Directors that caused me this deeply humiliating and damaging situation. I have no doubt that Matchbet's reputation in France will also have suffered."

268. Some apparent support for the version of events given by Dr Seifert and Mr Somekh in their statements may be found in an email sent by Mr Somekh to Dr Seifert on 22 April 2008, shortly after his polite exchanges with Mr Morcombe. The email was purportedly based on a careful, although still incomplete, analysis of the SDLA, and complained about Alphameric's failure to deliver integration. This was said to have prejudiced the "European Continental action plan" which had been set up in reliance on Alphameric's representations, and led Mr Somekh to "surmise that all our pending partners are to choose other solutions for integration development because of a lack of an existing solution supplied". When he was cross-examined about this document, it emerged that Mr Somekh had prepared it in consultation with Dr Seifert with the intention that it should then be forwarded to Alphameric. It should also be noted that the email made no reference to the rights issue prospectus of November 2007. Indeed, there is no reference to the prospectus in any of the documents before the termination of the SDLA.

269. When Mr Somekh's email was duly forwarded to them by Dr Seifert, Mr Morcombe and Mr Siers were understandably perplexed. Mr Siers replied on 23 April, saying:

"Ben, thank you for the note, like Alan I am not sure I understand where Guy is coming from."

He thought there might have been a misunderstanding of the slides which he had originally prepared for the postponed presentation in December. Mr Morcombe's response, the previous evening, had been:

"All very interesting Ben but I am not sure what it all means, perhaps it is lost in the translation."

270. Meanwhile, Mr Morcombe had given instructions for a plan to be prepared for demonstration of the CST to Française des Jeux at Dorking. A draft plan was prepared and forwarded by Mr Morcombe to Dr Seifert, with the invitation to share the information with Mr Somekh if he wished. Dr Seifert replied on 28 April, copying in Mr Somekh. His reply reflected Mr Somekh's supposed dissatisfaction with Alphameric, and Dr Seifert said he was "uncertain as to whether and when we are able to arrange for meetings to demonstrate the Alphameric CST". In conclusion, he said that Matchbet's accounts department was no longer willing to defer issue of the invoice previously presented "in relation to the assistance we provided in 2007 to Alphameric's integration".

271. There was subsequently some discussion within Matchbet about the amount of the invoice. On 30 April Ms Bryceson informed Dr Seifert that she had discussed the invoice with John Watson and another colleague, who both thought there was no way they could obtain the third amount claimed and that Alphameric would find it ludicrous.
272. Mr Morcombe was sufficiently concerned about the change in tone of Dr Seifert's email of 28 April to consult Alphameric's in-house lawyers, and on 2 May 2008 he wrote a fairly formal reply which had been drafted with the help of Mr Heather. He sought to rebut any suggestion that Alphameric had been in breach of its obligations, and said Alphameric had never led Matchbet to believe that a fully commercial CST was currently available:

“Our work on the integration continues, as you well know, and on that basis it would surprise me if you had been trying to sell a completed product in France.”

He also said:

“I trust that you are not using the relationship with Guy as a way of trying to circumvent our contractual arrangements. I shall be grateful, therefore, if you will confirm that your activities in France relate to online access only and do not cut across the provisions of the Agreement in this respect.”

273. Mr Morcombe also reminded Dr Seifert that the first instalment of Alphameric's loan to Matchbet was repayable on 9 May 2008, together with two years' interest. He offered to hold off requiring repayment for the time being, provided that their proposed meeting to discuss and agree an action plan for the future took place, and the action plan was agreed, before the end of May. He also asked when Dr Seifert and Mr Somekh would be able to attend the Dorking shop for the demonstration which had been requested. He said Alphameric would be ready for the demonstration any time after 12 May, and concluded:

“If we can get a date in the diary for that demonstration I believe that we can continue to make progress with the integration work and to pursue the opportunities which are available to us in the market at this stage.

I look forward to hearing from you in the very near future.”

274. On the same day, Mr Morcombe emailed Dr Seifert saying that the CST would be ready for review at Shalford the following Friday, and asking whether he wished to come and review the demonstration before it was installed in Dorking.
275. Dr Seifert's response was to send a lengthy letter of termination to Alphameric on 8 May. In a covering email to Mr Morcombe, Dr Seifert said this:

“Dear Alan

With great regret I must inform you that Matchbet have decided to terminate the [SDLA] for the reasons set out in our termination notice which will shortly reach you. Personally this is a matter of huge regret for me.

I have no doubt that neither you nor I would have wished for this outcome at the start of our agreement, which puts an end to a collaboration which both of us know would have produced great fortunes for both of us, but there are obviously forces at work beyond your or my personal control, and individuals with no understanding of what we were trying to achieve. As often happens, these individuals block progress and cause great damage.

Despite our agreement being at an end, Guy Somekh and I are willing to meet with you at an early date, and we will propose dates for a meeting at a mutually convenient time and location.”

276. Dr Seifert put things rather differently in another email which he sent on the same day to Mr Hornstein, with whom he had remained in communication after his retirement as chairman of the board of Alphameric Plc:

“Hi Rodney

Sadly, when faced with explicit written and oral refusal by Alphameric to comply with its obligations, and after extensive discussions with our shareholders, two barristers and one large firm of solicitors, we have had no choice but to terminate. We are hoping that a settlement for damages can be achieved, otherwise not just Matchbet but several of its shareholders will have to take legal action.

This has been a condition for a new investor who is willing to support us in litigation but who is unwilling to invest in us when we have an agreement in place which is treated as a free option by the other side, and brings us nothing, while tying us in knots.

The whole thing is a most sorry saga.

Very sorry that, despite months of efforts, and your own kind offer of help, we could not rescue a hopeless situation.”

277. By an unfortunate oversight, for which Mr MacLean accepted responsibility, this email was not put to any witness in cross-examination. The identity of the “new investor” who was willing to support Matchbet in litigation, but was unwilling to invest in Matchbet while the SDLA remained in place, therefore remains uncertain. The obvious candidate, however, is Vencorp, or some other entity connected with Mr Somekh, and on the balance of probabilities I would if necessary so conclude. In fact, I do not think the identity of the investor is of any great importance. The more

material fact is that termination of the SDLA had been made a condition of support by a potential investor and litigation funder. It is also clear from this email, as is anyway obvious from the letter of termination itself, that Matchbet had taken legal advice before acting.

278. I now turn to the letter of termination itself. It is too long to quote in full, but the following extracts will give its flavour:

“The Board of Matchbet has carefully considered the status of the [SDLA]. We have regretfully reached the conclusion that Alphameric are in repudiatory breach of the Agreement. In the light of the circumstances as set out in this letter, we have no commercial alternative to accepting your repudiatory breach, thus treating the Agreement as being at an end ...

The very core and meaning of the Agreement concerns the integration of Matchbet’s exchange system with Alphameric’s technical systems, thereby providing access to licensed betting offices across the UK. This is set out in detail in Schedule 2 to the Agreement, where it is specified that Alphameric is obliged to integrate Matchbet’s exchange platform with your EPOS and ALBOS systems, within the 28 weeks of signing of the Agreement, hence no later than February 2007. You were also obliged, under Stage 2 of the Schedule, to collaborate with Matchbet to effect this integration, by formulating with us an integration plan which would set out the work we would have to do to assist you in integrating. You have been in breach of this clause for the past two years by refusing to agree this. Matchbet has done everything within our power to persuade you to comply with these terms, and has been as patient as could reasonably be expected of any loyal commercial partner ...

We were further misled into believing that you were trying to comply with the Agreement, despite the obvious delay, when you issued an explicit statement which formed an important part of your rights issue documents provided to the stock exchange [*the relevant passage from the prospectus of 7 November 2007 was then quoted*].

...

In mitigation of our damages, we spent considerable time and energy in assisting your marketing effort in relation to the customer service terminal in Birmingham, again relying on your own repeated assurances that this was a step towards full integration with your EPOS and ALBOS systems, and therefore part of your effort to comply with your duties under the Agreement, which you said was ongoing, with a revised launch date of March 2008.

*[Reference was then made to various statements of support for the project by Mr Poirier, Mr Siers and Mr Morcombe, and the 2007 business case presented to Investec]*

Against the context of these facts, it came as a shock and surprise to us when we finally learned during our meeting that you and I had with Guy Somekh, our French marketing partner and potential investor on 16 April 2008, that in fact not only had integration not been undertaken, but that in fact you had no intention of undertaking it. This was in complete contradiction of numerous assertions made to us and to third parties over the previous months, as well as documents provided to us ...

Matchbet had invited Guy, who was doing due diligence on the status of integration for the purpose of preparing a 1 million pound investment in Matchbet, in order for him to have direct confirmation from you that you were on course with integration ...

*[The letter then dealt with the CST, asserting that it “came as a shock” to be told recently that it was not a product but a prototype]*

Our accounts department is preparing invoices in relation to the work that you have requested ...

*[The letter then sought to quantify Matchbet’s losses, by reference to the financial projections presented to Investec]*

However, despite the immense damage your breach has caused us, and the urgent pressure we are under from existing and prospective investors, who have invested in reliance on Matchbet’s assertion and your own assertion to the Stock Exchange, and at the Birmingham Show, that we were able to operate in 9,000 betting shops, we remain open to an alternative to litigation, provided that a settlement can be reached on a reasonable basis, including:

- Immediate financial compensation in relation to the damages accrued to date
- Extension of your loan for a further two years
- A further loan in order to repay third party loans from individuals relying on your performing your duties under the Agreement ...
- Settlement within 14 days of our invoices in relation to work provided for upon request to you during the term of this Agreement ...

- Agreement on method of compensation for damages we shall incur in the future ...

In the interest of mitigation, we also remain open to entering into a commercial agreement with you provided that such an agreement carry no form of constraint on our ability to do business nor any profit share other than from joint business, and that it shall only take effect in the event that you have demonstrated to us that integration has indeed been performed.”

279. Mr Morcombe replied to the letter of termination on 15 May 2008. He denied liability, and argued that Matchbet’s termination of the SDLA was misconceived and, in itself, a repudiatory breach of the SDLA. He accused Matchbet of having “incorrectly reported or misconstrued the facts to create a picture that justifies your wrongful termination of the Agreement”. In relation to integration, he said this:

“The facts are that the parties had agreed (Schedule 2 Stage 2) to formulate a “joint programme for the integration of the Programs/Service with the Alphameric System”, and that this joint programme was to include “commercial terms”. It so happens that the parties have not, for either technical or commercial reasons, actually agreed the joint programme which includes the integration strategy. The responsibility to agree a plan was a “joint responsibility” and not an obligation on ASL which could result in ASL being in breach. It is unfortunate that the project has proceeded without an agreed programme, but the lack of a programme does not constitute a breach, let alone a repudiatory breach justifying immediate termination.

In fact, ASL has throughout the period of the Agreement sought to provide a platform through which the Matchbet betting service can be deployed. ASL now has an operational product (currently being used in our betting shop, *BET*, in Dorking) ... The integration work for ALBOS and CSTs is still part of the strategy, although we have made the point to you that our initial concern was to get a product ready to demonstrate the service and to secure an order before committing further resource and money to the project.

We do have a product that shows capability and indeed were scheduled to be demonstrating the model this week to you and Guy Somekh before we received a call from your office cancelling the appointment and serving notice of termination of the Agreement. Because the parties have never agreed the integration programme, the scope of the integration work, the products to be integrated, and the timetable against which we would be measured are matters which remain to be resolved.”

280. It is worth noting that in his witness statement (paragraphs 306 to 308) Dr Seifert gave the clear impression that it was only after service of Matchbet's letter of termination that Matchbet entered into negotiations with Finsoft, and that before negotiations with Finsoft had reached an advanced stage, Finsoft was taken over by GTECH who "were not interested in developing their offering in the LBO market". In fact, as the documentation and evidence elicited in cross-examination make clear, Dr Seifert had been involved in active negotiations with Finsoft since late November 2007, when the takeover by GTECH had already taken place. The same misleading impression of the chronology relating to Finsoft was also given by Mr Maskey in his statement, while Mr Poirier did not even disclose that the job to which he had moved in early 2008 was with Finsoft. I infer that this was regarded by all three witnesses as a sensitive matter which they would have preferred the court to know nothing about.
281. It is worth considering why Dr Seifert and witnesses who support him should have been so anxious to conceal the true chronology in relation to the negotiations with Finsoft. After all, from one point of view it is hardly surprising if Dr Seifert and Matchbet were beginning to prepare for the possibility of marketing and exploiting the MBE through a partner other than Alphameric, given the disappointing progress which had been made since the date of the SDLA. The answer, I think, probably lies in the fact that Dr Seifert was well aware of the exclusive nature of the licence granted to Alphameric under the SDLA, and of the inability of Matchbet to bring about a contractual termination of the SDLA while the £250,000 loan remained outstanding. Any negotiations with a competitor of Alphameric to market the MBE to LBOs would therefore have to be dependent on a prior termination of the SDLA at Matchbet's behest, following acceptance of a repudiatory breach by Alphameric.
282. In my judgment, however, the detailed history of events since May 2006, much of which I have traced in this section of my judgment, provided no plausible basis for Matchbet to extract itself in this way from the SDLA. In relation to integration, I am satisfied that by July 2007 at the latest the parties had agreed on the two phase approach proposed by Alphameric, with the second phase not scheduled to begin until early 2008. In relation to marketing, a number of initiatives had been followed up, including presentations to Ladbroke's and Coral, and a working prototype had been successfully demonstrated at the Birmingham Betting Show in October 2007. Furthermore, all of the instalments of the loan had been paid in full, so the implementation plan in the SDLA had on the face of it either been complied with or varied by agreement, while Matchbet still had the active support of influential figures within Alphameric, including (until his departure to Finsoft) Mr Poirier, Mr Siers and Mr Morcombe himself.
283. Against this background, Dr Seifert must in my judgment have realised that he was embarking on a double game when he opened negotiations with Finsoft which included discussions about the integration of the MBE with Finsoft's proprietary systems and marketing of the product to LBOs. I am also satisfied that Dr Seifert did his best to keep these negotiations secret from Alphameric. In cross-examination he said he would never have had any reason to tell Mr Morcombe or Alphameric about his discussions with Finsoft, and had not done so. In re-examination, however, he maintained that Alphameric was in fact aware of his discussions with Finsoft, relying on the tripartite meeting with BetterBet in December 2007 which was attended by Mr Terry Mahoney of Alphameric. The documents show, however, that in advance of the

meeting Dr Seifert had warned Mr Hogg of BetterBet of the “need to maintain Chinese walls between Alphameric and Finsoft discussions” (see paragraph 239 above), and a note of an internal Matchbet meeting held on 18 December records that Dr Seifert had “asked Ian Hogg out of courtesy to Alphameric not to mention Finsoft integration”. I am therefore unable to accept Dr Seifert’s evidence that Alphameric was aware of his discussions with Finsoft.

284. The position became still more complex in early 2008, when Dr Seifert’s discussions with Mr Somekh expressly envisaged the need to “exclude” Alphameric, perhaps in favour of GTECH: see Dr Seifert’s email of 15 January 2008 to Mr Somekh (paragraph 244 above). There is no doubt that by this stage Dr Seifert had the provisions of the SDLA well in mind, because on the previous day he had sent an email to Mr Hornstein, in advance of their meeting scheduled for 16 January, saying that Matchbet had “repeatedly sought renegotiation of the terms of the agreement to reflect the various issues”, but Mr Morcombe had been unwilling to do so:

“So, on the one hand there is, in the opinion of our lawyers, serious breach, on the other hand no desire on our part to do anything other than proceed with completing the task that both sides are committed to.”

285. Whatever advice Matchbet may have received at this stage from its lawyers – in respect of which privilege has not been waived – I do not accept that any breaches of contract by Alphameric could have justified termination of the contract by Matchbet in January 2008. Nor, in my view, had the position materially changed by the time of the meeting on 16 April 2008 which is the foundation of the pleaded case of repudiatory breach. The statements attributed to Mr Morcombe at that meeting in the particulars of claim are that no integration of Matchbet’s programs and service with Alphameric’s system had taken place, that Alphameric was not taking any steps to enable such integration to take place, and that it would not do so in the future unless the costs of doing so were to be funded by a customer or potential customer. There is no doubt that Mr Morcombe made the last of those statements, because he confirmed as much in his written and oral evidence, and the statement accorded with Alphameric’s normal policy. Nor can Dr Seifert have been surprised by it, in view of the email which he had sent to Mr Winton on 11 February 2008: see paragraph 253 above. I do not, however, accept that Mr Morcombe made either of the first two statements attributed to him. It would be surprising if he had, given the agreement which the parties had reached on the two phase approach to integration and the efforts which Alphameric had made to present a functioning CST prototype at the Birmingham show in October 2007. Furthermore, Mr Morcombe said in his oral evidence that he personally regarded the Birmingham prototype as meeting any obligation of integration under the SDLA. This may or may not have been correct as a matter of construction of the SDLA, but it shows the sheer improbability of Mr Morcombe having conceded that no integration at all had taken place. It is also revealing that there is no reference to any such statement in the initial, and friendly, post-meeting email sent by Mr Somekh on 18 April.
286. Having carefully considered all the evidence, I regret to say I am left in no real doubt that the purported termination of the SDLA by Matchbet was a cynical and opportunist exercise, planned by Dr Seifert in collaboration with Mr Somekh. Its immediate object was to extract Matchbet from the fetters of the SDLA on the day

before the first instalment of the loan became due for repayment in accordance with the terms of the Loan Note Instrument. I am satisfied that the indignant tone of the termination letter of 8 May 2008 was largely, if not entirely, manufactured, and that the underlying purpose of the exercise, apart from avoiding immediate repayment of the loan, was to free Matchbet to pursue other investment or marketing opportunities, probably in the first instance with Vencorp, and at the very least to compel Alphameric to agree new terms which would extend the loan for a further two years and would contain no exclusive licence in Alphameric's favour.

**Was Alphameric in breach of the SDLA?**

287. The allegations of breach of the SDLA by Alphameric have two main limbs: breach of an obligation to integrate, and breach of an obligation to market. I have already explained why I do not consider that either obligation was in fact imposed on Alphameric by the SDLA, but for present purposes I must of course assume that I was wrong in so concluding.
288. On that hypothesis, I accept the submission of counsel for Alphameric that the next step must be to examine exactly what it is that Alphameric was obliged to do. Only then can it be ascertained whether Alphameric was in fact in breach of the obligation.
289. I begin with the question of integration. Under the implementation plan in Schedule 2, integration was to be achieved with the "Alphameric System", which was defined in clause 1.1 of the SDLA as meaning "any equipment and/or software which Alphameric may in its discretion, provide to End Users for the purpose of accessing the Programs and the Service". This definition is in my judgment important, for at least two reasons. First, it shows that Alphameric had a wide discretion about the systems which were to be used for delivery of the MBE. Alphameric was not obliged to use its existing EPOS or ALBOS systems. Secondly, it shows that any obligation arose only in relation to the provision of the MBE to end users, that is to say parties to an end-user agreement with Matchbet in respect of the service, and who in the normal way would have been introduced by Alphameric. It follows from this, in my view, that the obligation cannot sensibly be viewed in the abstract, but only in relation to the provision of the Matchbet service to identified end users. In principle, there were several different ways in which this might have been done, and the requirements of individual customers, with existing equipment of different types and levels of sophistication, would not necessarily be the same. Integration was therefore something which Alphameric would have to achieve in consultation with particular customers on a case by case basis, as and when they were introduced. It was not something which Alphameric could be expected to achieve by itself, although there was no doubt much that Alphameric could do by way of preparation to ensure that its existing systems (or any others which it chose to use) were as ready as possible for adaptation to the needs of individual customers.
290. This analysis of the requirements of the SDLA fits well with the substantially unchallenged evidence of Mr Sutton, who explained that there was no single form of integrated product which Alphameric could simply roll out to customers. In relation to a statement by Dr Seifert that "access to the Matchbet exchange would be a part of the suite of computer programmes which every Alphameric customer had, using the computer connections and data feeds in the same way as every other part of the Alphameric systems", Mr Sutton disagreed:

“29. That statement implies a common network using a uniform Alphameric programme and data feed, which is not the case: Alphameric neither “hosts” the majority of systems nor does it have any control over what programming the LBOs do or do not use.

30. Even if, therefore, one could hypothetically integrate “Matchbet” with Alphameric’s EPOS and ALBOS in order to offer the exchange as part of the suite of computer programmes available to an Alphameric customer, that customer would have to specifically request or permit, install, and invariably pay for implementation and roll out. It was not automatic, and it was not even within Alphameric’s control in these cases. With Ladbrokes, any integration would require entirely separate development work to get the system working.”

291. Mr Sutton gave as an example William Hill, which had it wanted to upgrade its Alphameric software to take the Matchbet service would have had to expend several weeks of considerable effort before roll out of the upgrade and testing, which would always be a cost for the customer. As to the two or three thousand smaller Alphameric customers who relied on a central control system operated by a third party, either SIS or Alphameric’s own “bureau” service, Mr Sutton was clear in his view that SIS would never have supported Matchbet in its service as long as it was associated with Alphameric, while in 2006 “the majority of the LBOs dependent on the Alphameric bureau service simply did not have the infrastructure to handle “Matchbet””.
292. Matchbet’s pleaded case is that the only viable or realistic way in which Alphameric could have marketed and rolled out the product to end users was through its existing EPOS and/or ALBOS technology. Counsel for Matchbet also submitted that, in the absence of any express or implied term to the contrary, Alphameric was under an obligation to integrate at its own cost, and it was not open to Alphameric to qualify or dilute that obligation by suggesting that it was subject to the receipt of third party funding. I do not accept either of those submissions. I see no reason to doubt that the discretion afforded to Alphameric in the definition of the Alphameric System was genuine; while the necessary link between provision of the service and the individual circumstances of end users means, in my view, that Alphameric was free to follow its usual funding policy when marketing the product.
293. Viewed in this context, the two stage approach to integration which the parties adopted did not represent a startling change from the (supposed) obligation originally undertaken by Alphameric, but was rather a pragmatic development which reflected (a) the initial failures by both Alphameric and Matchbet to find suitable customers who were willing to commit themselves, and (b) the pressure on resources to which Alphameric found itself subject. The first phase of the revised approach was in my judgment successfully achieved at the Birmingham Show in October 2007. The basic functionality of the Matchbet exchange was demonstrated, at the country’s leading betting industry trade fair, and a number of potential customers expressed interest. If any of those customers had been prepared to follow the matter up, and to fund integration of the product in collaboration with Alphameric, progress could have been

made with Phase 2. In the event, however, this did not happen, and in May 2008 the second phase of integration still remained an aspiration.

294. Was Alphameric to blame for this? In my view there is some force in the argument that Alphameric deliberately dragged its heels on the Matchbet project for much of 2007, and particularly when the Turf TV dispute was at its height and the energies of senior management had to be devoted to it. But there is no pleaded case of breach of the two stage approach to integration; and, even if there were, I do not think it could possibly be characterised as a repudiatory breach. By the early months of 2008, the Turf TV dispute had been substantially resolved, and the evidence shows that Alphameric was still looking for ways to take the Matchbet project forward, albeit at the least possible cost to itself. The most that could be said, in my view, is that Alphameric's conduct had arguably delayed active work on Phase 2 by a few months. Subject to proof of causation and loss, it is therefore possible that a properly pleaded breach of an obligation under Phase 2 might have given Matchbet a remedy in damages for delay in implementation of the project. But it could not have justified Matchbet in treating the breach as repudiatory and terminating the contract. In my judgment Matchbet was well aware of this, and the collusive attempt to engineer a termination in May 2008 was the outcome.
295. I come now to the alleged failure to market, always on the assumption (which I have held to be mistaken) that Alphameric was obliged to do this. Since Alphameric had invested £250,000 in Matchbet by way of an unsecured loan, it seems obvious that it had every incentive to ensure that the project was a commercial success; and this could only be done, so far as LBOs were concerned, by selling it to them. It is therefore hardly surprising to find that Alphameric did indeed make efforts to find customers, although always on the basis (which I have found to be justified) that the cost of integration with Alphameric's systems would have to be borne either by the customer or by some external funder. Thus, Alphameric took steps to display a prototype at the Birmingham Betting Show in October 2006, they then launched a trial at their shop in Dorking in March 2007, and the Phase 1 CST prototype was successfully shown at Birmingham in October 2007. Counsel for Alphameric submit, and I agree, that display of a working model at Birmingham, the leading trade fair in the country, was the most effective way of generating interest in the Matchbet Exchange from the largest number of potential clients. The allegation of breach of an obligation to market, let alone fundamental breach of it, therefore gets off to an unpromising start. Furthermore, it is clear from clause 14.1 of the SDLA that any such obligation must have been to act as Matchbet's marketing agent for the purpose of securing end-user agreements with prospective licensees who were LBO operators. Since Matchbet never provided Alphameric with draft end-user agreements, it must follow in my view that any marketing obligation on the part of Alphameric was limited to obtaining initial expressions of interest and following them up. Matchbet can hardly complain about failure to obtain end-user agreements when it was their own obligation to provide such agreements, but they had failed to do so.
296. The presentations to Ladbrokes and Coral came to nothing, but I do not consider that Alphameric was responsible for this, or that the failure was due to any lack of effort by Alphameric. In the case of Ladbrokes, the primary reason why their initial interest in the product did not proceed to a trial was the lack of support within Ladbrokes from the Trading and eGaming Divisions. Mr Lindsey explained this convincingly in

cross-examination, and I accept his evidence. In relation to Coral, it is clear from Tony Klim's email of 20 November 2007 to Dr Seifert that Coral had two major concerns, which were shared by Mr Klim: the system was too sophisticated for the average LBO punter, and Coral were not particularly interested in using it as a risk management tool, because they were in the business of taking risks and made more money by doing so. The trading director of Coral, Jamie Hart, was offered a personal trading account with Matchbet, but despite an initial appearance of enthusiasm subsequent efforts by both Dr Seifert and Nigel Ely of Alphameric to persuade him to use the account were fruitless. Dr Seifert accepted in cross-examination that Mr Hart had no intention of using the account (transcript, day 4, page 151), and I infer that this was indeed so.

297. No presentation was ever made to the remaining member of the "big three", William Hill, but Mr Siers gave evidence that he had personally attended a meeting with William Hill. When asked about the outcome of the meeting, he said this (transcript, day 6, page 136):

"The outcome of the meeting with William Hill and others was the same. Everybody was interested in the project and interested in the concept. Most of the bookmakers who – forgive me, but most bookmakers are reluctant to spend money, and they wanted – most of the bookmakers wanted something, a demonstrable piece of kit that they could actually see what happened.

Bookmakers unfortunately deal in bookmaking; they're not very good at dealing in technology, so that you have to really take them to the water and make them drink before you actually get them, you know, fed."

A "demonstrable piece of kit" was provided by Alphameric, in the form of the stand alone CST, at the Birmingham Show in October 2007, when representatives of William Hill would have had every opportunity to examine it.

298. Mr Ely was Alphameric's account manager for both Ladbrokes and Coral, and as a major account manager he was financially incentivised to reach targets which were set at the beginning of each year. Mr Morcombe did not know whether he had been given a specific Matchbet target, but said "he would certainly have been challenged to expose the product, solicit interest, and see how we could develop it in those major accounts". Mr Ely was not called as a witness by either side, but the documentary record shows him actively chasing Coral after the meeting in November 2007. There is no written evidence that he was similarly diligent in pursuing Ladbrokes to make a decision on Matchbet, but without the benefit of his oral evidence I am not prepared to infer that he was inactive, or still less that he had been instructed to reduce his efforts. Quite apart from the possibility that he may have chased Ladbrokes orally, I cannot be confident that the documentary record is complete, because (as Mr Warne of Nabarro explained in a witness statement dated 16 November 2012 in the context of an application for specific disclosure) a number of files of potentially relevant documents were erased on an ad hoc basis during the period of nearly three years from the termination of the SDLA in May 2008 to the issue of proceedings on 2 February 2011.

299. In relation to Française des Jeux, the evidence shows that both Matchbet and Alphameric considered this to be an opportunity with massive potential. Despite the pressures of the Turf TV dispute, Mr Siers prepared a power point presentation which he intended to deliver personally at the cancelled meeting with Française des Jeux on 11 December 2007, and Dr Seifert made use of this material at the meeting which eventually took place in Mr Siers' absence on 24 January 2008. It was not Alphameric's fault that Dr Seifert on this occasion gave them the misleading impression that the Phase 1 CST was already functioning and operational in LBOs. Furthermore, Alphameric was in the course of making arrangements for a demonstration of the CST to Française des Jeux when Matchbet served the letter of termination on 8 May 2008.
300. On the assumption (which is nowhere expressly pleaded) that Alphameric was obliged to exercise reasonable diligence in marketing the Matchbet service, I would accept that there were probably some occasions when Alphameric's efforts fell short of this standard. One occasion was when both Mr Morcombe and Mr Mansfield pulled out of the meeting with Mark Jarvis which had been scheduled for September 2007, leading Mark Jarvis to cancel the meeting. There is no evidence that Alphameric made any efforts to reschedule the meeting, and it seems that the initiative was allowed to lapse. Another occasion may have been in the early months of 2008, when Alphameric was dilatory and unenthusiastic in making arrangements for a demonstration to Française des Jeux, at least until Mr Morcombe took an active interest in it. But even assuming that some relatively minor breaches of this nature could be established, by no stretch of the imagination were they repudiatory in character. In general, I am satisfied that Alphameric made serious and concerted efforts to market the Matchbet service, subject to the constraints imposed by its normal policy in relation to funding, and subject to the modified approach to integration which (as I have found) had been agreed with Matchbet.
301. I should note, for completeness, that there was no disagreement between the parties about the principles which determine whether a breach of contract amounts to a repudiation of the contract. In short, only those breaches which are fundamental or go to the root of the contract are repudiatory in character: see Chitty on Contracts, 31<sup>st</sup> edition (2012), paragraphs 24-001 and 24-041 to 042. In the absence of an express refusal to perform the contract by the party in breach, the test is to ascertain whether the actions of that party are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. Furthermore, the renunciation must be "made quite plain": *ibid.*, paragraphs 24-018 and 019.
302. To conclude, I am satisfied on the evidence that Alphameric substantially performed any obligations to integrate or to market the Matchbet service to which it may have been subject under the SDLA, and that if and to the extent that Alphameric was in breach of any such obligations, the breaches were of a comparatively minor nature and gave rise to no more than a potential cause of action for damages. None of the alleged breaches of contract came anywhere near being repudiatory in character, and it was to meet this obvious deficiency in the legal analysis that Matchbet, through Dr Seifert, made the unwise decision to attempt to bring about a termination of the SDLA in concert with Mr Somekh.
303. In my judgment Matchbet succeeded in that objective, but not in the way it intended. There were no repudiatory breaches of contract by Alphameric which gave Matchbet

the right to accept them and terminate the contract. On the other hand, the termination letter of 8 May 2008 was itself clearly repudiatory in character and gave Alphameric the right to treat the SDLA as terminated. Alphameric's pleaded case is that Alphameric accepted the repudiatory breach by a letter dated 16 June 2008 (which was in other respects without prejudice), or alternatively by service of the defence. The letter of 16 June 2008 is not in the bundle, and neither side made any submissions in relation to it. However, counsel for Matchbet did not dispute that, if the letter of 8 May 2008 was repudiatory in character, the repudiation was subsequently accepted by Alphameric. It is therefore unnecessary for me to determine precisely how and when the acceptance took place.

### **Causation, quantum and the expert evidence**

304. In view of the conclusions which I have reached, I do not propose to deal in any detail with issues of causation or quantum. There are two main reasons for this. First, my treatment of the issues would inevitably be hypothetical and unfocused to a high degree, in the absence of any clearly identified breaches of contract. Secondly, it would in my view involve a disproportionate expenditure of further judicial time and effort on what is already a long judgment.
305. I will, however, indicate that, in general, I found Matchbet's case on causation and quantum no more convincing than its case on liability. In relation to causation, I am not satisfied, as matters now stand, that Matchbet has discharged the burden of showing that any bookmaker would have entered into an end user agreement in respect of the Matchbet exchange if Alphameric had performed its alleged obligations. Until shortly before the start of the trial, Matchbet's case on the rolling out of the integrated MBE was based on the figures which Mr Siers provided to Ms Bryceson over the telephone for the purposes of the business plan presented to Investec. Those figures, it seems to me, were largely aspirational, and were based on the assumption that the initial purchasers of the system would have been the "big three" operators of LBOs. But I see no reason to suppose that any of the big three would have been willing to take the initiative in this way, and in any event this approach was abandoned by Matchbet at trial in favour of the model propounded by its industry expert, Mr Leon. He took the view that the first LBOs to take up the service would have been the smaller independent operators, followed by Ladbrokes and Coral only in year three (i.e. between July 2009 and July 2010, Mr Leon having apparently taken July 2007 as his starting point). But, as I shall explain, I found Mr Leon's expert evidence profoundly unsatisfactory, and I am unable to place any reliance on his roll-out projections. Without any solid underpinning in the expert evidence, and having regard to the unchallenged evidence of Mr Sutton, I am left wholly unconvinced that performance by Alphameric of its supposed obligations would have made any material difference to the fortunes of the Matchbet exchange in the market place.
306. In these circumstances, the question of quantum becomes even more remote and hypothetical. I will therefore confine myself to some fairly brief remarks about the expert witnesses on each side.
307. As I have already said, I have grave reservations about the evidence of Mr Leon. He has a lifetime of experience in the bookmaking industry, having started his career in 1964 as a boardmarker with a bookmaker in South London. He then worked in

various capacities for Coral and Surrey Racing, before joining Ladbrokes in 1994 as a middle-ranking executive with responsibility for their development and licensing function. During his nearly 20 years with Ladbrokes, Mr Leon was the lead negotiator in the acquisition of LBO premises, that is to say the physical betting shops. He had no experience, however, of rolling out new technology such as the Matchbet exchange to LBOs, nor was he a main board director of Ladbrokes. The team of about 16 people who reported to him were mainly qualified surveyors, and the activities with which he was concerned were principally of a “bricks and mortar” nature. His only previous experience of giving evidence in court, many years previously, had been in the Crown Court or Magistrates’ Courts, when he gave evidence as a witness of fact on behalf of his employer in licensing cases about local demand for betting shops.

308. Given his lack of relevant experience, Mr Leon had no obvious qualification to give expert evidence about the marketing and roll out of a product such as the MBE, and it soon emerged in cross-examination that the figures in his report were no more than guesswork. What is worse, they were not just his guesswork, but based to a considerable extent on conversations which he had had with Dr Seifert. Far from being an independent expert, Mr Leon came across as a passionate and uncritical advocate for Matchbet’s case. I regret to say that he had no proper understanding of the duties and responsibilities of an expert witness, although he professed to have read and understood the guidance contained in CPR PD 35. Indeed, his evidence exemplified several of the vices which the Woolf reforms and Part 35 of the CPR were designed to eliminate.
309. By contrast, I found Alphameric’s industry expert, Mr Trevor Beaumont, to be an impressive and helpful witness. He has a wealth of experience in the betting, gaming and racing industry, having held the posts of either managing director or chief executive of three of the top five betting and gaming companies in the UK from the mid 1990s until July 2012. After joining Coral Racing as a betting shop manager in 1974, he held various positions before becoming the company trading director in 1988 with responsibility for controlling risk and margin delivery. Between 1996 and 1999 he was joint managing director of Coral, and from 1999 managing director of Coral’s internet operation, Eurobet. At this time Coral had a turnover of about £1.5 billion and operated 870 LBOs, as well as a telephone betting centre and internet operations with 170,000 customers.
310. In December 2001 Mr Beaumont joined the British Horseracing Board as racing director, and in 2003 he became managing director of wagering at UK Betting Plc. In November 2004 he was appointed chief executive officer of the Tote, and remained in that post until July 2011 when the Tote was sold to Fred Done, the owner of Betfred. He then joined the enlarged group as its CEO.
311. In his report, Mr Beaumont explains, to my mind convincingly, why the Matchbet system would never have been commercially attractive to LBOs. Furthermore, his assessment appears to be borne out by experience. Although Matchbet has now been liberated from the SDLA for over five years, there is no evidence that it has yet achieved any significant degree of commercial success with LBOs, or for that matter online.

312. Mr Weatherill argued that Mr Beaumont lacked the necessary independence to give expert evidence on behalf of Alphameric. In the introductory section of his report, Mr Beaumont stated that Mr David Craven, the current CEO of Timeweave Ltd (formerly Alphameric Plc), was known to him personally and professionally, having been a member of his executive team at the Tote. In addition, Mr Beaumont said Mr Siers was recruited by Betfred in January 2012 and then reported to him directly in his capacity as managing director of Totepool. Mr Weatherill devoted much of his cross-examination of Mr Beaumont to a closer examination of his personal and professional links with Mr Craven. It emerged that, although they knew each other primarily through their time at the Tote from 2005 until 2011, they had known each other before then, and when Mr Craven joined the Tote he had been head-hunted by Mr Beaumont. Their earlier links included a period when they had both worked at UK Betting Plc, and the establishment in 2004 of a company called Alfabet Gaming Limited as a vehicle to enable them to do business together if the opportunity arose.
313. Mr Weatherill also placed particular emphasis on the fact, not disclosed by Mr Beaumont in his report, that he had been recruited by Mr Craven personally to act as an expert witness in the present case. At least, that is how counsel for Alphameric put it in their written closing submissions; but it would be more accurate to say that the invitation to act came from Alphameric's solicitors, Nabarro. Mr Craven clearly thought that Mr Beaumont would be well qualified to act, and he telephoned Mr Beaumont to ask if he would be interested in acting as an expert witness if Nabarro were to contact him, to which Mr Beaumont replied "By all means". Mr Craven did not talk to Mr Beaumont about the case during their conversation, and after his appointment as an expert Mr Beaumont had no discussions of any nature with Mr Craven about it.
314. Mr Weatherill was careful not to suggest any deliberate bias by Mr Beaumont, or any conscious tailoring of his evidence to suit Alphameric. He submitted, however, that the long and close connection between them was such that he was incapable of acting as an impartial expert witness. He invited the court to disregard Mr Beaumont's evidence altogether, or alternatively to give it no or only minimal weight. Mr Weatherill relied in this connection on the decision of Evans-Lombe J in Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No. 3) [2001] 1 WLR 2337, where the judge ruled inadmissible the expert evidence of an eminent tax barrister (Michael Flesch QC) on behalf of the defendant, David Goldberg QC, another tax barrister who was a colleague in the same chambers and a longstanding personal friend of Mr Flesch. Evans-Lombe J said at [13]:

"... in my judgment, where it is demonstrated that there exists a relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted however unbiased the conclusions of the expert might probably be. The question is one of fact, namely, the extent and nature of the relationship between the proposed witness and the party."

In reaching this conclusion, the judge differed from the preliminary views which had been expressed by Neuberger J (as he then was) at a pre-trial review when he had

refused to rule Mr Flesch's evidence inadmissible and had stood over the application to exclude it to trial. In taking this course, Neuberger J had expressed the view that the existence of a close personal and professional relationship between Mr Flesch and Mr Goldberg did not mean as a matter of law, or even as a matter of fact, that Mr Flesch was incapable of fulfilling the functions of an expert witness.

315. Mr Weatherill did not refer me to any more recent authority on the subject, presumably because he and his junior had been unable to find any. Counsel for Alphameric, however, were able to refer me to a subsequent decision of a strong Court of Appeal where the approach of Evans-Lombe J in the Goldberg case was disapproved. In R (Factortame Limited) v Transport Secretary (No. 8) [2002] EWCA Civ 932, [2003] QB 381, the Court of Appeal (Lord Phillips of Worth Matravers MR, Robert Walker and Clarke LJ) discussed the position of expert witnesses in paragraphs [63] to [75] of the judgment of the court, in the context of considering the role of a firm of chartered accountants, Grant Thornton, with whom the claimants had entered into a contingency fee agreement. In paragraph [64] the court referred to the overriding duty of an expert to help the court on the matters within his expertise under CPR rule 35.3, and the fact that this duty overrides any obligation to the person from whom the expert has received instructions or by whom he is paid. As the court pointed out, these provisions enunciate principles which are long established, but have not been universally recognised. As Lord Wilberforce observed in Whitehouse v Jordan [1981] 1 WLR 246 at 256-257:

“it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self-defeating.”

316. The court then considered two recent cases in which consideration had been given to the question whether it is essential that an expert witness should have no interest in the outcome of the case in which he is giving evidence. In Field v Leeds City Council [1999] CPLR 833, the Court of Appeal had held that the surveyor employed by the council was not disqualified from giving expert evidence on behalf of the council by virtue of his employment, although the fact of his employment might affect the weight to be given to his evidence. The second decision was that of Evans-Lombe J in the Goldberg case. After citing the passage which I have quoted from his judgment, the Court of Appeal continued:

“70. This passage seems to us to be applying to an expert witness the same test of apparent bias that would be applicable to the tribunal. We do not believe that this approach is correct. It would inevitably exclude an employee from giving expert evidence on behalf of an employer. Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as

possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules."

317. In my judgment it is clear that I should follow the guidance given by the Court of Appeal in Factortame (No. 8), and that Mr Beaumont was not automatically disqualified from giving expert evidence by his previous business and personal relationship with Mr Craven, or any of the subsidiary matters which Mr Weatherill explored with him in cross-examination. Furthermore, I am in no doubt that Mr Beaumont was well aware of his duty to the court under CPR Part 35. He says as much in paragraph 3 of his report, and in my view he displayed the necessary degree of professional independence in both his written and his oral evidence. He very properly disclosed to the court, in paragraph 5 of his report, the fact that Mr Craven was known to him both personally and professionally as a result of their time together at the Tote, and the fact that Mr Siers had previously reported directly to him. In the light of Mr Weatherill's searching cross-examination, I accept that it would have been desirable for Mr Beaumont to go into rather more detail about the nature and extent of his previous links with Mr Craven, and to have disclosed the fact that Mr Craven approached him with a view to his giving expert evidence if invited to do so by Nabarro. But I am satisfied that Mr Beaumont disclosed, albeit in summary form, by far the most important of his business links with Mr Craven, namely the period of some seven years when Mr Craven was a member of his executive team at the Tote. I am also satisfied from Mr Beaumont's oral evidence that he was never a close personal friend of Mr Craven, and their relationship was essentially a business one. Mr Beaumont said that he was "not known to be a friendly boss at all", and his social contact with Mr Craven had mainly been in a business context. They had occasionally stayed in each other's homes, but again only when business-related travel arrangements made it convenient to do so.
318. Taking all the circumstances into account, my conclusion is that the weight which I should attach to Mr Beaumont's expert evidence is not significantly affected by his prior relationship with Mr Craven or the other matters of which complaint is made by Matchbet. Mr Beaumont was giving expert evidence for the first time, but in my view he was well aware of the nature of his duties and his responsibility to the court, and his evidence was not vitiated by any lack of independence, whether actual or perceived. In this respect, his evidence provided a welcome contrast to that of Mr Leon.
319. I can deal more briefly with the evidence of the two accountancy experts, Mr Christopher Swinson on behalf of Matchbet and Mr Simon Oaten on behalf of Alphameric.
320. Mr Swinson is a well-known accountancy expert, with impeccable credentials. The assistance which I was able to derive from his evidence is, however, limited, because (as he was at pains to point out) he was in no position to assess the reliability of the assumptions on which he was asked to base his calculations. As he frankly said in the introductory section to his first report, he had no special experience of the betting and gaming industry or of the roll-out of new software and services in a multi-branch

business. He also expressly stated that he had not audited or otherwise attempted to verify the information on which his report was based. He went on to say, in the summary of his conclusions, that he had been provided with no information about practical experience in the roll-out of new software, the introduction of new systems or the take-up by customers of a new service, although he thought it reasonable to suppose that such practical experience must exist. The absence of such information had “placed a serious constraint” upon the work that he had been able to undertake, and thus on his conclusions.

321. In their closing submissions, counsel for Alphameric advanced two relatively minor criticisms of Mr Swinson’s evidence. The first criticism was that his first report included a number of matters of fact (in paragraphs 52 to 57 and 117 to 123) relating to the ease of the assumed roll-out to LBOs, none of which is to be found either in his written instructions or in Matchbet’s witness statements. As a result of enquiries by Alphameric, it emerged that these facts had been communicated to Mr Swinson at a lunch in 2011 attended by Matchbet’s solicitors and Dr Seifert, but no attendance note had been taken. I agree with counsel’s comment that this “is perhaps a matter of more embarrassment to Matchbet’s solicitors than to Mr Swinson”.
322. The second criticism concerned Mr Swinson’s decision, in his second report, to put forward a purported business model for the Matchbet exchange which had not previously been suggested by Matchbet itself, but was then adopted by it. The most striking feature of this model was that it allowed, for the first time, for a “margin” to be paid to LBOs which agreed to take the Matchbet service. The absence of any such margin in the models previously propounded by Matchbet was indeed a striking omission, because it invited the court to proceed on the commercially unrealistic assumption that LBOs would have been prepared to take up and operate the new service without any financial incentive to do so. Nevertheless, there is force in Alphameric’s point that Mr Swinson stepped somewhat outside the boundaries of the role of an independent forensic accountant in doing this, because his role was not to devise arguments of fact on behalf of the party for whom he was retained.
323. Mr Oaten is a chartered accountant, who joined Deloitte & Touche LLP (now Deloitte LLP) in 2002. He specialises in the betting and gaming sector within Deloitte’s travel, hospitality and leisure group, and has over 11 years’ experience in both online and “bricks and mortar” operations. He now heads the betting and gaming sector of Deloitte’s UK arm, and leads the group’s international practice in that sector. His experience covers all aspects of the international betting and gaming industry.
324. In view of his relevant and wide-ranging experience, it is unsurprising that Mr Oaten did not confine his initial report to pure accountancy issues, but also brought to bear his knowledge and expertise about the gaming industry. In my view he could not sensibly have done otherwise, because expertise cannot be split up into water-tight compartments and an expert must be free to draw on all his relevant expertise even if the issues which he is asked to address are limited to a particular field. Nevertheless, the fact that Mr Oaten approached his task in this way, although helpful to the court, did give rise to a procedural problem. The initial order for expert evidence, made by Master Bowles on 23 November 2011, had given each party permission to adduce the expert evidence of one witness only in the field of accountancy “to assess the losses suffered by [Matchbet] as a result of the non-performance of the SDLA, including loss of anticipated profit”. In the light of Mr Oaten’s report, Matchbet understandably

felt that it might be disadvantaged and that Alphameric had, in effect, sought to adduce the evidence of two experts combined in the same person, an accountancy expert and an expert on the gaming industry. These concerns were raised before Master Bowles at a hearing on 7 February 2013, barely a month before the start of the trial. The Master acceded to Matchbet's request for permission to call expert evidence in relation to the gambling industry, limited to one expert on each side, and directions were given for the service of such reports with an accelerated timetable. Thus it was only very late in the day that Mr Leon and Mr Beaumont were instructed.

325. Mr Weatherill argued that little or no weight should be attached to Mr Oaten's evidence, because his accountancy opinion evidence was infected by his reliance on opinions formed as a result of his expertise in the gambling industry. In my judgment this is an unrealistic submission, and I reject it. Mr Oaten's conclusions on the accountancy issues gain added weight from his deep and wide-ranging knowledge of the gambling industry; and the possible procedural disadvantage to Matchbet was dealt with, as a matter of case management, by Master Bowles' order of 7 February 2013 which allowed Matchbet to call an expert in the gambling industry of their own choice.
326. The main burden of Mr Oaten's initial report was that the revenue assumptions within the business model then relied on by Matchbet were unrealistic, particularly in the absence of any apparent financial incentives for the bookmakers. He concluded that the business model had been inadequately researched in the market and was fundamentally flawed. In his supplemental report, dated 28 February 2013, prepared in the light of the reports of (among others) Mr Swinson and Mr Leon, Mr Oaten confirmed that his conclusion remained unchanged. He proceeded to make various cogent criticisms of Mr Leon's evidence, and explained why in his view a commission-based business model would probably be unworkable in practice. In general terms, I accept his evidence and agree with his conclusions.

### **Matchbet's invoice/quantum meruit claim**

327. As foreshadowed in the termination letter of 8 May 2008, Matchbet submitted two invoices to Alphameric on 28 May in respect of technical assistance allegedly provided by Matchbet to Alphameric between October 2006 and September 2007. One invoice was for £210,400 plus VAT and the other was for £66,500 plus VAT, making a total of £325,357.50 (including VAT). The larger invoice was for work allegedly done in extending the Matchbet service "to agreed new bet types" as requested by Alphameric in preparation for full integration, and used at Alphameric's display at the 2007 Birmingham Betting Show. The second was in respect of various technical matters relating to Stage 2 of the implementation plan. The sums were apparently calculated in accordance with the standard rates set out in Schedule 9 to the SDLA. They are said to be due either under clause 14.8 (as services requested) or clause 6.4 (as additional time spent by Matchbet in the performance of its obligations as a result of a failure by Alphameric to comply with its own obligations under the SDLA).
328. In my judgment no contractual basis for either of these claims has been made out. The claim under clause 14.8 must fail, if only because the clause makes no provision for Matchbet to charge Alphameric for the technical assistance which Matchbet was obliged to provide in response to reasonable requests by Alphameric. The clause

merely provides that Matchbet “shall not be expected to incur unreasonable or disproportionate cost in relation to the provision of such assistance”. Quite apart from that, there is no evidence of any requests having been made by Alphameric for assistance on the matters referred to in the invoices. As to clause 6.4, it can only apply where Alphameric has failed to comply with its obligations under the SDLA, and even then Matchbet’s right to charge Alphameric for additional time is limited to extra work made necessary “solely and directly as a result of a failure by Alphameric to comply with its obligations”. In view of my conclusions on liability, Matchbet is unable to satisfy the threshold requirements for raising an invoice under clause 6.4.

329. It should also be noted that Matchbet was consistently rebuffed whenever it attempted to discuss the question of invoicing with Alphameric during the currency of the SDLA, and it never formulated the basis for such a claim save in the most general of terms. The invoices upon which Matchbet now sues came into existence only after the termination of the SDLA which Matchbet had unjustifiably sought to engineer. In those circumstances, it is no surprise to find that the invoices are as devoid of merit as the purported termination itself.
330. For similar reasons, the alternative quantum meruit claim for the same sums must also fail.

### **Alphameric’s counterclaim**

331. It was common ground by the conclusion of the hearing that Alphameric is entitled to repayment of the loan in the sum of £249,000 (being the £250,000 lent less £1,000 which was converted into shares in May 2006) together with interest pursuant to clause 5.1 of the Loan Note Instrument. I trust that the parties will be able to agree the amount of interest due, but if there are any difficulties they can be raised when this judgment is handed down.

### **Conclusion**

332. For the reasons which I have given, Matchbet’s claim will be dismissed in its entirety and Alphameric is entitled to judgment on its counterclaim.