Neutral Citation Number: [2023] EWHC 3007 (Comm)

Case No: CC-2021-NCL-000002

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
NEWCASTLE CIRCUIT COMMERCIAL COURT

Moot Hall, Castle Garth,
Newcastle upon Tyne NE1 1RQ
(judgment handed down at the Royal Courts of Justice,
Rolls Building, Fetter Lane, London EC4A 1NL)

Date: 30/11/2023

Before :

MR JUSTICE ANDREW BAKER

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Between :

CANON MEDICAL SYSTEMS LIMITED	**Claimant**
- and -	
(1) THE IMAGING CENTRE ASSETS LIMITED **(3) THE IMAGING CENTRE MOBILE LIMITED** **(4) TIC MOBILE LIMITED**	**Defendants**

- -

Simon Goldberg KC and Richard Stubbs (instructed by **Knights Professional Services Limited**) for the **Claimant**
Tim Penny KC and Jamie Holmes (instructed by **Fox Williams LLP**) for the **Defendants**

Hearing dates: 9-12, 17-20, 23-26 October, 1-2 November 2023

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Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
Copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker:

Introduction

1. This litigation arises out of a written contract (the 'Master Agreement') dated 17 March 2017 signed between the claimant, Canon Medical Systems Ltd ('CMS'), and The Imaging Centre Assets Ltd ('Assets'), and (as alleged) a further agreement (the 'Hire Agreement') said to regulate some aspects of the business conducted pursuant to the Master Agreement. As appears later in this judgment, I have concluded that no such further agreement was concluded. The parties' contract here is the Master Agreement; and to a significant extent the case concerns its meaning and effect, properly construed.

2. At the date of the Master Agreement, Assets was called The Imaging Centre Holdings Ltd, and CMS was Toshiba Medical Systems Ltd. CMS changed its name in late 2017 after having been acquired by the Canon Group from the Toshiba Group in late 2016. It will not be necessary to identify whether any given event occurred before or after that change of ownership, or later change of name. CMS's immediate parent company within the Canon Group was and is Canon Medical Systems Europe BV ('CMSE'), previously called Toshiba Medical Systems Europe BV.

3. The Master Agreement continues in force and is scheduled to run until March 2027. One aim of the litigation is to resolve differences between the parties as to the meaning and effect of their contract for the purpose of their continued business together for the remainder of that term, over and above determining any present entitlement on either side to monetary relief.

4. The Imaging Centre Mobile Limited ('TICM') claims a right to enforce that contract although it is not a signatory to it. That right is disputed, as is Assets' right to monetary relief in respect of losses suffered by TICM. In that regard, TIC's case is that (i) TICM, not just Assets, is privy to the contract with CMS, on the proper construction of the Master Agreement, alternatively (ii) TICM is entitled to enforce the contract as concluded between Assets and CMS by operation of the Contracts (Rights of Third Parties) Act 1999, alternatively (iii) Assets can claim damages for losses suffered by TICM under a principle of transferred loss. A further pleaded basis for recovery by TICM, alleging an assignment of rights from Assets to TICM, was not pursued at trial.

5. As I have just done in the preceding paragraph, in this judgment I shall refer to 'TIC' when it is not necessary, for the immediate purpose of what is said, to specify whether that means Assets or TICM or both.

6. Assets and TICM were named as the first and third of six defendants on the Claim Form when proceedings were commenced by CMS in April 2021. The claims and counterclaims dealt with by this judgment, identified below, all arise only between CMS, Assets and TICM, although the fourth defendant, TIC Mobile Ltd ('Mobile') continues to be party to the proceedings for limited purposes.

7. The business in relation to which the parties have fallen into dispute concerns transportable MRI and CT scanning units, that is to say units each comprising an MRI scanner or a CT scanner integrated into a transportable housing. The housings are

either wheeled lorry trailers that can be hauled to and parked at a site ('mobile' units) or portable cabins that can be transported by road between sites on a flatbed trailer ('relocatable' units). These are examples:

A mobile unit

A relocatable unit

8. The units sold to TIC and managed for it by CMS, pursuant to the Master Agreement, have come to be referred to by the parties as the 'First Fleet', to distinguish it from a 'Second Fleet' that, in circumstances I relate below, is now owned by Mobile. The units pictured above carry some Mobile branding, but are in fact First Fleet units. For convenience, I shall refer to the Master Agreement units as the First Fleet throughout, but that should not be taken to indicate an original intention for there to be more than one fleet of units, to be built up pursuant to the Master Agreement, because there was none.

9. It is common ground that under the Master Agreement, 'Units' (as defined – see paragraph below) were to be, and were, sold by CMS to TIC, and immediately leased by CMS from TIC, to be rented out by CMS, directly or indirectly, to healthcare providers. CMS's rental could be to an end user (for example, an NHS hospital trust, a private hospital, or a sports clinic), or it could be to an intermediate business renting from CMS so as to be able to rent the Unit on.

10. In the latter case, in principle, the rental from CMS could be to TIC. Rental back by TIC was always envisaged as one type of arrangement available under the Master Agreement, since it contemplated, and included certain provisions relating to, the use by TIC of First Fleet Units to fulfil contracts for the supply of staffed units. As well as being, objectively, an implication of the terms of the Master Agreement, it was also at all times the actual intention, on both sides, that First Fleet Units might be used by TIC (more specifically, TICM) to fulfil staffed contracts, if it could secure them, including in particular contracts it might secure through the NHS Supply Chain Framework for staffed mobile or relocatable MRI or CT scanning.

11. Bidding for such contracts required TICM to be admitted as an approved supplier on the relevant Framework Lot, which was a TIC business target known to and encouraged by CMS when the Master Agreement was entered into, and which was in fact achieved during 2019. CMS, to TIC's knowledge, had no interest in being such a supplier. It was appreciated on both sides, at all times, that any staffed contract secured by TICM, and fulfilled using a First Fleet Unit, would require coordination with CMS, which would be managing the First Fleet and in possession of the First Fleet Units (subject to the rights to possession of those to whom the Units were rented out from time to time).

12. For consistency, and to avoid using the terminology of the Master Agreement in ways that might beg disputed questions, I shall refer to First Fleet Units as 'rented' when they are rented out by CMS, and as 'unrented' when they are not.

13. The definition of Units in the Master Agreement is: "*[CMS] CT and MRI Scanners, and such other [CMS] equipment as may be developed and produced from time to time in the field, integrated into Mobile Relocatable Units.*" I note that CMS does not manufacture scanners; they are manufactured in Japan by CMS's ultimate parent company, Canon Inc. The definition of 'Mobile Relocatable Units' is slightly circular, but I consider the meaning is clear enough: "*mobile and relocatable units suitable for the housing of the Units*". In short, therefore, a Unit is a Canon CT or MRI scanner (or other Canon equipment in the field of medical diagnostic scanning), integrated into a transportable housing as described in paragraph above.

14. I said in paragraph above that it is common ground that under the Master Agreement there is a sale and instant lease-back of Units. Finding that in the terms of the Master Agreement is not as straightforward as one might perhaps have expected; and it is important to understand that it need not mean anything more than that, as I said at the end of paragraph above, for the duration of the Master Agreement the Units sold by CMS to TIC under it are to be in CMS's possession (when not rented out) and at its disposal to rent out. I return to that when considering the terms of the Master Agreement in detail, because identifying how the terms of the Master Agreement create a sale/lease-back effect (to the extent that they do), rather than just taking it as

read that they do because it is common ground, is part of interpreting the contract terms that are material to the disputed issues.

15. The claims advanced at trial and therefore falling to be determined by this judgment may be grouped together as follows:

(1) the Hire Claim, raising questions relating to the First Fleet of:

(a) whether CMS acted in breach of contract in relation to a new price list sought to be introduced by TIC in 2021;

(b) whether in respect of rented Units, CMS is obliged to pay TIC 100% of the rental income earned, or only 50% of a "*usual prevailing rate*" referred to in Clause 8 of the Agreement;

(c) what payments CMS is obliged to make to TIC in respect of unrented Units; and

(d) in consequence, what (if any) sums are owed by CMS, or what (if any) cause of action there is in favour of CMS in respect of overpayments;

(2) the Warranty/Servicing Claim, asking whether CMS has undercharged or overcharged (and if either, by what amount) for warranties and servicing provided for by the Master Agreement in relation to First Fleet Units, and what (if any) relief can and should be granted as a result;

(3) the Unit Sale Claim, raising questions of whether CMS was and is obliged to sell TIC further Units to grow the First Fleet (and if so on what terms), whether, if it was, it acted in breach of that obligation, and what (if any) damages are recoverable for any such breach; and

(4) the Competition Claim, in which it is alleged that in breach of contract CMS has rented out Units other than First Fleet Units and has assisted CMSE, is assisting it, and/or is threatening and intending to assist it, to establish and operate a fleet of Units competing with the First Fleet.

16. In relation to the Hire Claim, until March 2021 there was no dispute over CMS's obligation in respect of rental income earned from rented First Fleet Units; 100% was to be paid to TIC, rather than 92% as had been the case prior to the Master Agreement. As regards unrented First Fleet Units, again prior to March 2021:

(1) there was no dispute that CMS had an obligation, separate to and different from its obligation to pass on hire earned from rented Units, to which separate obligation I shall refer as CMS's obligation to pay a 'Canon Contribution' to TIC, and there was no dispute about the monthly rate per Unit by reference to which the Canon Contribution was to be calculated;

(2) it was common ground that CMS's maximum obligation was to pay a Canon Contribution for six Units, leading the parties to refer to there being a 'Golden Six' as a feature of their contract;

(3) TIC took the position throughout that the Canon Contribution was a payment due on any unrented Units, up to a maximum of six at any one time, that is to say the Golden Six commitment operated on a 'Last Six' basis, as the parties came to call it;

(4) an issue arose in late 2017/early 2018, but appeared to have been resolved by mid-2018, whether the Golden Six rule *was* that Last Six rule (CMS to pay for all unrented Units, up to a maximum of six) or, rather, a 'First Six' rule (CMS to pay for the number of rented Units fewer than six at any one time). So, for example, if the First Fleet had ten Units, five rented and five unrented, the Last Six rule would require CMS to pay a Canon Contribution on all five of the unrented Units, but the First Six rule would result in a Canon Contribution on only one of them. Or if two were rented and eight unrented, Last Six would mean CMS had to pay a Canon Contribution for six, First Six would mean the Canon Contribution was payable only for four.

17. The monthly rate per Unit by reference to which, it was common ground, the Canon Contribution was to be calculated, differed between MRI Units and CT Units: £17,333 (MRI); £14,083.50 (CT). Whether First Six or Last Six was the contractual rule, the question could arise of which Units should contribute to the Canon Contribution. On a First Six basis, that question would arise any time there were fewer than six rented Units and the unrented Units were not all of one type (MRI or CT). On a Last Six basis, the question would arise any time there were more than six unrented Units and they were not all of one type. If there was no binding agreement between the parties on how to answer that question, it would fall to be answered by the normal English law rule of minimum obligation, meaning that CMS only had to pay for the more expensive MRI Units if there were fewer unrented CT Units than the number of unrented Units for which CMS had to pay. If the Canon Contribution was calculated and paid on that basis, TIC could not say that CMS had not honoured its obligation to pay for the number of Units for which payment was required by the applicable Golden Six rule. That may not be how in practice the parties purported to implement a Golden Six rule; but there was never any variation of the Master Agreement (which requires any amendment to be in writing, and signed).

18. On 2 March 2021, having reviewed the terms of the Master Agreement with solicitors, CMS sent TIC a provocative email asserting for the first time that its obligation to TIC in respect of rented First Fleet Units was limited to 50% of "*the usual prevailing rate of each unit rented*", and that CMS was entitled to retain any rental income earned beyond that. The email also asserted that the Golden Six rule was First Six, and that CMS would be operating the Master Agreement on that basis from then on. I reject CMS's claim that this March 2021 email was not the first time it had suggested TIC was not entitled to all rental income from rented First Fleet Units.

19. The unheralded assertion, four years into the contract, that CMS only had to pay a 50% rental charge in respect of rented First Fleet Units came as a shock to TIC. The immediate response suggested that TIC might seek to take back First Fleet Units that were on hire to third parties, or at least to take control of those rentals, dealing directly with the First Fleet customers. In early April 2021, during the ensuing correspondence, which was not limited to the new issue raised by CMS, Mobile also threatened to repossess certain Second Fleet Units that were on hire to CMS.

20. This Claim followed. It was commenced by CMS to seek a determination by the court of CMS's payment obligations in respect of First Fleet Units, and an injunction to restrain Mobile from repossessing Second Fleet Units. That injunction claim was dealt with by undertakings from both sides, allowing proceedings to be discontinued against defendants other than Assets, TICM and Mobile, but in the case of Mobile the proceedings continued only for a price rebate claim that was resolved prior to trial (except for questions of interest and costs). TIC pleaded counterclaims of such nature and extent that the trial was set to be, for the most part, a trial of those counterclaims. By agreement, the trial hearing was therefore conducted on the basis that TIC was the effective claimant, so that Mr Penny KC took the main burden of opening the case from the documents. He then called TIC's factual witnesses before Mr Goldberg KC called any factual witnesses for CMS; the expert instructed by TIC in each expert discipline gave evidence before the expert instructed by CMS; and Mr Penny KC went first in closing, followed by Mr Goldberg KC, with Mr Penny KC having a right of final reply.

21. The trial was conducted with courteous determination on both sides, and ran to schedule thanks to the impeccable efficiency of counsel and their instructing solicitors. I was grateful throughout for their considerable efforts, and have been much assisted by those efforts in deciding the case and preparing this judgment to set out my conclusions.

22. One final procedural aspect I would mention is the trial documentation. The main trial bundle ran to some 12,312 pages, with a first supplemental bundle of 1,064 pages (but over 80% of those were the materials for the amendment application I mention in paragraph below and an application relating to one of the witnesses). That was supplemented again by a further 792 pages across four more supplemental bundles prepared during the course of the trial, each for sufficient good reason to allow the addition (not that objection was taken in any instance by the party in receipt).

23. The main trial bundle included 500-odd pages of pleadings and court orders in the case, about 340 pages of trial witness statements, and an expert evidence section running to nearly 1,800 pages (because it included all the supporting materials referred to by the experts, not just their reports). That still means there were over 10,000 pages from the parties' disclosure and interlocutory materials from the case. I venture to doubt that the main trial bundle was prepared in accordance with Section J.4.3 of the Commercial Court Guide, which applies in the Circuit Commercial Courts (see Section H.1 of the Circuit Commercial Court Guide). Section J.4.3 urges parties to include in trial bundles "*only documents that the trial Judge will be asked to read or that it is expected will be shown to the Court at trial (including when witnesses are giving evidence)*", and to remember that "*In many cases only a very small proportion of the documents that have been disclosed in the proceedings need to be referred to at trial.*"

24. Having far more in the trial bundle than is required for the trial creates significant practical burdens. That is so for those working from electronic bundles as well as for any still working from paper files, even if the nature of the practical difficulties is different between the two. Beyond that, however, the inclusion of large numbers of documents in a trial bundle that do not need to be there raises acutely the point addressed by the Commercial Court Guide at Section J.8.6. The inclusion of a document in the trial bundle does *not* mean it is evidence adduced at trial; and it will

usually not be appropriate – certainly it would not have been appropriate in this case – to ask the court to treat as trial evidence many thousands of pages of documentary material only a small percentage of which had been referred to at trial (either directly by being deployed in court or indirectly by the court having read the material, as part of the trial, at the parties' request).

25. In those circumstances, at my request towards the end of the trial, but picking up on a suggestion initially made by Mr Penny KC in his opening remarks, I was provided after the trial, to assist me in preparing this judgment, with a reduced trial bundle containing, from the parties' contemporaneous documents and the solicitors' correspondence, only the documents that had been deployed at trial. It is 1,894 pages long. Together with the factual and expert witness evidence adduced at trial, and the supplemental bundles (to the extent I was taken to their contents – and I was helpfully provided also with a fresh single bundle containing only those documents), that post-trial bundle now stands as a comprehensive record of what has been put before the court during the trial.

26. I directed that, subject to one clarification: the post-trial bundle would thus be the definitive collection of the contemporaneous documentary material from the main trial bundle that had been adduced in evidence at trial; fact finding would be based only on that material (and the witness evidence), since in our adversarial system of civil litigation, absent any special consideration such as a possible need to assist an unrepresented party to have a fair trial, it is not for the court to second guess the parties on their selection from the disclosure of the material that the court ought to see. The clarification was that if for a long individual document, the parties preferred to put a place-marker page in the post-trial bundle for where the document fitted, chronologically, noting where the full document appears in the main trial bundle, then of course that would be satisfactory and would be a sufficient record that the document was part of the evidence adduced at trial.

Trial Witnesses

27. Turning, then, to the witness evidence, there was factual witness evidence at trial from:

(1) Anthony (Tony) Kleanthous, the entrepreneur behind, amongst others, TIC and Mobile;

(2) his son, Christian, who is a qualified medical doctor but now works in the business, particularly in relation to the Second Fleet owned and operated by Mobile;

(3) Richard (Ricky) Bartlett, who was until recently COO and Fleet Manager at TIC, and who now works for a competitor;

(4) Mark Hitchman (full name Jonathan Mark Hitchman), the Managing Director of CMS;

(5) Ian Watson, CMS's Director of Commercial Solutions;

(6) Graham Little, the CFO of CMS.

28. Dr Kleanthous was the first witness called. I considered him to be a truthful witness, who gave accurate and credible evidence. He was fair, open, careful and helpful in answering questions in cross-examination. I regard it as safe to rely on his evidence unless on a particular point it is demonstrated clearly that his recollection must be mistaken.

29. Mr Kleanthous was also, in my judgment, an honest witness, whose general recall of important events was consistent with the documentary record and not shown to be faulty. He was sketchier as to detail in his recollections than his son, but he did not try to claim otherwise. That is to say, he was candid with the court where the best evidence he could truthfully give was that he did not remember, or did not remember details. In relation to matters of past fact, in my view Mr Kleanthous' evidence can be regarded as generally reliable.

30. Mr Goldberg KC criticised Mr Kleanthous for having signed the Statement of Truth on various iterations of TIC's Defence and Counterclaim that advanced damages calculations on the Unit Sale Claim that could be seen at trial to be very unrealistic and not arguably sustainable. I accept, so far as it goes, Mr Kleanthous' evidence that the pleaded calculations were not his own work but that of TIC's Finance Director, Panicos Georgiou, who was not a witness. It was however Mr Kleanthous' responsibility, as the individual directing the litigation on behalf of his companies and the Director signing those Statements of Truth, to take real care to engage critically with what was being put forward to make sure he understood it and to ensure he was comfortable that, to the best of his ability to assess this, it was accurate as to allegations of historic fact, realistic, advanced upon reasonable grounds, as to counterfactual matters, and sensible, using fair and realistic assumptions, as to matters of calculation. I consider that Mr Kleanthous did not take proper care of that kind as to what was being alleged by his companies' pleadings, and, therefore, as to how such a massive damages claim was being put together by them (I refer to the amounts claimed, below). That is unworthy of him, but it did not cause me to doubt the honesty or general reliability of his recollections of what did or did not happen in his business dealings with CMS.

31. Mr Bartlett has this year suffered some significant health issues. That, together with the potentially uncomfortable position that in a relatively small business world (by number of significant players) he is now employed by a competitor of TIC and has need of continued good commercial relations with CMS (and, potentially, also with TIC), created a degree of reluctance on his part to attend trial. I am grateful that he overcame that reluctance. His task as witness was only to give a true account, to the best of his recollection, of the facts in which he had been involved while at TIC, to the extent he had been asked about them for the purpose of his written evidence in chief or was asked about them in court (he was cross-examined for less than an hour). I am confident that he did just that, giving honest and generally reliable testimony.

32. I do not consider that Mr Hitchman was a reliable witness on the disputed factual matters that were explored with him at trial. Where his evidence was challenged, I do not regard it as safe to rely on it if it is not supported by the documentary record or other evidence from a reliable source. Most starkly, Mr Hitchman gave evidence in chief that he (and CMS) thought at all times that pursuant to the Master Agreement, TIC was not entitled to the rent earned by rented First Fleet Units. I am confident, from the documentary record and the cross-examination, that that was *never* Mr

Hitchman's view. It is the stance CMS adopted, for the first time, by Mr Watson's provocative email at the beginning of March 2021. There is, I regret to say, no sensible room to find that Mr Hitchman's evidence in chief was honest but mistaken. It advanced a primary narrative of, in effect, Mr Kleanthous having browbeaten CMS into passing on all First Fleet rental income despite believing that was not CMS's obligation, and an inconsistent alternative narrative that passing on rental income in full, without obligation to do so, was a favour to TIC to help it get the business going. In my judgment, neither narrative was truthful.

33. In other important respects, Mr Hitchman's written evidence in chief was strikingly at odds with the factual narrative evidenced by the contemporaneous documents and that Mr Hitchman accepted, or evidently had no real basis for disputing, when cross-examined. Mr Penny KC did not overstate the matter in submitting, as he did in closing, that it became doubtful that Mr Hitchman's trial witness statements really contained his evidence at all.

34. Mr Watson likewise claimed, more so in cross-examination, his trial witness statement having been slightly oblique on the point, that CMS had always thought, and had told Mr Kleanthous long before the March 2021 email, that the contract in relation to rented Units was for payment of a 50% rental charge, not for the passing on to TIC of the rental income earned. That claim is impossible to reconcile with the contemporaneous communications and conduct of the parties over the first four years of the Master Agreement. As with Mr Hitchman, I also do not think the claim is sensibly explicable as honest but mistaken. Mr Watson should have told the simple truth, which (as I judge it) is that the first time it occurred to CMS to consider the possibility that pursuant to the Master Agreement it was not obliged to pass on First Fleet rental income to TIC, in full, was when solicitors were instructed to review the terms of the Master Agreement, in early 2021.

35. That aspect of Mr Watson's evidence does him no credit; nor does his March 2021 email itself, which involved a substantial degree of disingenuous spin. There were other aspects of his evidence that were shown to be misleading, for example a suggestion that the Master Agreement was intended to *limit* the "*relationship proximity between Canon and Tony*" when it evidently deepened and lengthened the relationship, and that I do not consider can have been just honestly mistaken. His evidence on disputed matters of fact, therefore, like that of Mr Hitchman, I regard as evidence it is not safe to accept if it is not corroborated by evidence from a source that I consider trustworthy.

36. Mr Little had more peripheral involvement, as regards the contentious matters of fact, than the central figures at CMS, who were Mr Hitchman, Mr Watson, and others who were not witnesses (particularly Joe Vincent, Jamile Siddiqui, and Carly Drummond). Where he did have personal knowledge, Mr Little was a credible witness and I consider he told the court the truth as best he knew it or could recall it.

37. I have set out those conclusions concerning the quality of the factual witness testimony in deference to the attention paid to it by the parties at trial. That testimony is, however, largely irrelevant to most of the liability issues that I have to resolve, since in the main they raise questions of construction of the Master Agreement, and the relevant factual history, to the extent it might matter, is largely documented. The principal areas where there was more room for witness testimony to matter were (a)

on TIC's side, in examining its appetite and ability to expand the First Fleet in the manner and to the extent proposed by the damages calculation in the Unit Sale Claim, and (b) on both sides, in supplementing the documentary evidence at trial on CMS's dealings with or so as to assist CMSE in relation to rentals in the UK of Units owned by CMSE.

38. There was also expert evidence at trial, in two fields of expertise, namely the market for transportable medical diagnostic scanning units, and accounting.

39. The market expert called by TIC was Pamela Black, who has had a long and distinguished career in radiography. By way of example only, in the last decade she has been President of the Society and College of Radiographers (2013-2014), Chair of the Society's National Clinical Imaging Board (2015-2016), Head of Radiology for Wirral University Teaching Hospitals NHS Foundation Trust (2014-2019), and the National Imaging Transformation Lead (Capital Replacement) for delivery of a £200 million imaging equipment renewal programme. As market expert, CMS called Leigh Melville, who has an accountancy, finance and business management background, including in the diagnostic imaging equipment market. He now runs his own business, Imaging Matters Limited ('Imaging Matters').

40. The accountants called as expert witnesses were Michael Weaver, a Managing Director and the International Valuation Advisory Services Leader in the London office of Duff & Phelps (in recent years rebranded as Kroll), called by TIC, and Henry Pocock, a partner in the Forensic Services practice of FRP Advisory in Birmingham, called by CMS.

41. There were some oddities in the instructions to the experts, particularly some of the matters Mr Melville and Mr Pocock were jointly instructed by CMS's solicitors to assume. However, those were all capable of being explored with them and if they impacted on the opinions they expressed, I am in a position to take that into account. In my judgment, all four experts provided their honest, carefully considered, well reasoned and independent opinions. That applies to Mr Melville, I note specifically, notwithstanding that, as Mr Penny KC put it, his company, Imaging Matters, has some 'skin in the game' arising out of the business it has been doing and is hoping to develop with CMS.

42. Where the experts' views evolved or shifted (for example, most significantly, Mr Melville's views on demand for transportable MRI and CT scanning services moved substantially in TIC's favour under cross-examination), I did not form the view that they had not earlier been giving their honest and considered views. Rather, I formed the view that they demonstrated a proper openness to it being shown that they had been in error, or to there being nuance that needed to be brought out.

The Basic Story

43. Canon is one of the four major manufacturers of medical diagnostic MRI and CT scanners, the others being Siemens, Philips and GE. For the UK market, Canon scanners are sold by CMS, which buys them from CMSE, which in turn buys from Canon Inc. They are priced for supply to the UK market by reference to a 'Local Landed Price', as it is labelled in the Salesforce (aka Compass) software package on

which CMS customer quotes are compiled. The Local Landed Price is in fact a delivered (final UK destination) price.

44. So, for example, in a simple sale by CMS of a new scanner to an NHS trust for installation at an identified hospital, the Local Landed Price by reference to which a CMS quote would be worked up is a price for the scanner, delivered to the hospital. In the context of the Warranty/Servicing Claim, I shall come back in a bit more detail to how CMS supplies are priced using Salesforce.

45. MRI and CT scanners may be suitable for installation into mobile or relocatable housings such as I described in paragraph above. For a range of reasons, demand in the UK to rent mobile and relocatable MRI and CT units has generally risen steadily over the last decade or so and looks set to continue to do so. There was a particular surge in demand for CT units during the main period of the Covid-19 pandemic (Q2 2020 to Q2 2022); but demand remains strong, and rising, and operators of fleets of mobile and relocatable units have been investing in fleet expansion to meet that demand.

46. Mr Kleanthous is a self-made British entrepreneur. He studied motor vehicle engineering at Waltham Forest College, and apart from a job at a BMW garage when he was 16, has always run his own businesses. The first was a vehicle repair centre in North London, and then in the workshops at a Shell petrol station in Tower Bridge. When he was 20, he took over the whole business at that location by becoming the Shell licensee.

47. A few years later, he branched into telecommunications in the early days of the mobile phone era, founding NAG Telecom, which became a major mobile phone retailer and supplier of fax machines and photocopiers to City offices. In 1994, at the age of 28, Mr Kleanthous bought Barnet FC, his local football club, becoming the youngest Football League club chairman. He has gone on to hold senior positions at the Football League and the FA. Barnet FC are ‘The Bees’ and their home ground complex is The Hive, which now includes high quality training facilities that have been used by visiting international teams. For example, The Hive was Italy’s base camp for their successful 2020 European Championship campaign in 2021, when they beat England in the final at Wembley.

48. Mr Kleanthous’ involvement with professional football led him to his interest in medical diagnostic scanning. He had the idea to incorporate a diagnostic imaging centre into his plans for developing The Hive and incorporated The Imaging Centre Limited (‘TICL’) for it. He wanted the imaging centre at The Hive to be of the highest quality and available for use by the public, or by local hospitals or health clinics with surplus demand for diagnostic imaging services. He had some dealings with GE, including a visit to Real Madrid’s facilities to see the use they were making of certain GE scanning equipment, and he did some research into Siemens’ products.

49. In early 2013 Mr Kleanthous met Mr Hitchman, who was working on plans to showcase Canon (at the time, still Toshiba) through the value of modern scanners in the diagnosis of sports injuries. As part of that business development work, Toshiba were sponsors of the 2014 Commonwealth Games in Glasgow, providing transportable scanner units for use at the Games. CMS used a British coachbuilder, W

H Bence Coachworks Ltd ('Bence'), to design and build the mobile and relocatable housings for the transportable units.

50. This initial contact between Mr Kleanthous and Mr Hitchman, who got on well together and shared a vision for expanding the field in diagnostic imaging services, led in due course to a first contract between TICL and CMS. It was a written contract dated 24 January 2014 signed by Mr Kleanthous for TICL and Mr Hitchman for CMS ('the Hive Contract') under which TICL promised, subject to planning permission, to build an imaging centre at The Hive, to be equipped with an Aquilion One CT scanner and a Titan Helios MRI scanner, to be supplied by CMS at 50% of what would otherwise have been its best price, in return for a share of all revenue from fee paying customers of the imaging centre other than players and staff of Barnet FC, London Bees or London Broncos undergoing ultrasound treatment. CMS also promised under the Hive Contract, *inter alia*, to provide maintenance services for the equipment it supplied.

51. The Hive Contract was followed by a binding Heads of Terms between TICL and CMS dated 30 May 2015, again signed by Mr Kleanthous for TICL and by Mr Hitchman for CMS, for the creation and operation of the First Fleet as a joint venture. Under the Heads of Terms, TICL promised to incorporate a new group company (in the event, TICM) to acquire, from CMS, CT and MRI scanners integrated into transportable units. The joint venture was to be for a term of 5 years from the supply of the first unit, but with a right in CMS to terminate after 2 years and 4 years if TIC had by then failed to acquire 4 and 8 units respectively. CMS was entitled to an 8% shareholding in TICM, which TICL promised to transfer to CMS as soon as possible after the Heads of Terms were signed.

52. Further under the Heads of Terms:

(1) TICL promised that TICM would acquire at least 10 units, and CMS promised always to supply at "*the best price supplied to any other customer of [CMS] to date or in the future*";

(2) CMS promised to be responsible for, and to bear the cost of, marketing, surveying, sales and project management for TICM's units, and to pay TICM 92% of the invoice value of the units' earnings;

(3) CMS promised to provide free warranties and free servicing for all units acquired by TICM, for the duration of the joint venture;

(4) CMS promised to prepare in consultation with TICM a price list for rental of TICM's units to hospitals and other medical centres, and in addition CMS:

(a) warranted that the minimum rental would be £8,000 plus VAT per week for an MRI unit and £6,500 plus VAT per week for a CT unit;

(b) guaranteed to TICM rental income from the hiring out of units for 26 weeks per year per unit; and

(c) promised not to compete with TICM in the transportable medical imaging market;

(5) TICL promised to ensure that TICM would not purchase any scanning equipment from any other manufacturer unless CMS was unable to supply equipment from time to time as reasonably required by TICM.

53. If a Unit were on hire for 26 weeks in a year (50% utilisation) at the minimum weekly rates guaranteed under the Heads of Terms, it would earn a monthly average of £17,333 (MRI) or £14,083.50 (CT). The relevant calculations are: £17,333 = 50% of (£8,000 x 52 ÷ 12); £14,083.50 = 50% of (£6,500 x 52 ÷ 12). Those monthly rates were used by the parties in operating the First Fleet under the Master Agreement as the rates by reference to which any Canon Contribution was to be calculated.

54. A fuller, more detailed contract in October 2015, signed (again) between TICL and CMS, replicated and supplemented the Heads of Terms. It is not necessary to say more about that contract. When I refer below to the arrangements under the Heads of Terms, I mean as supplemented by that contract, but nothing will turn on any possible distinction between that and the Heads of Terms alone, for the purpose of resolving the disputed issues between the parties in relation to their present contract under the Master Agreement.

55. The Master Agreement superseded and replaced the Hive Contract and the Heads of Terms. It provided for a joint venture for a renewable 10-year term, to regulate the parties' business in respect of both the static imaging centre at The Hive (and the possible development of more such centres) and also the First Fleet. I shall describe and consider the material terms of the Master Agreement in some detail, below. It is not necessary to attempt any further summary of their effect at this stage.

56. The Master Agreement was intended by Mr Kleanthous and Mr Hitchman to cement and deepen the relationship between CMS and TIC, and to remove some of the cost of the preceding arrangements for CMS. CMS had become unwilling to honour its commitment to supply the scanners for The Hive at a 50% (or any) discount, and it was unhappy about the obligation to give free warranties and servicing on the First Fleet for such a long period, and about the guarantee of minimum rental earnings for the whole Fleet.

57. It is my conclusion from the contemporaneous documents I was shown and my assessment of the witness evidence I heard that the essential bargain struck by CMS with TIC, and intended to be given effect by the Master Agreement, was *inter alia* that (i) the equipment for The Hive would be supplied without price discount, (ii) the First Fleet Units would each have only three years of free warranties and servicing, from delivery, after which there was to be a charge for warranty/servicing of 6.5% of the "*Equipment list price from time to time*", (iii) CMS would no longer guarantee a minimum income across the whole First Fleet, and (iv) in return, while CMS would retain its right to an 8% shareholding in TICM, it would give up any First Fleet revenue share, meaning that 100%, not 92%, of rental income earned by First Fleet Units would be passed to TICM.

58. CMS's case in the litigation calls into question whether the Master Agreement achieved what was intended. There is no claim for rectification, however. A very late application was made by TIC, which I refused at trial, after opening submissions and before any witness evidence had been called, to re-re-re-re-amend the Defence and Counterclaim to introduce a claim for rectification, but only of the reference to the

"*Equipment list price from time to time*" as the price by reference to which the 6.5% warranty/servicing charge is to be paid. I have given my finding as to the bargain struck and intended to be given effect by the Master Agreement because it was contested by the parties on the facts at trial. It is founded upon the evidence of the negotiation of the Master Agreement (as it ultimately became), and so *prima facie* it is inadmissible in the exercise I must undertake of construing the Master Agreement in order to determine, to the extent this is in issue, the meaning and effect of its terms.

59. The vision that Mr Kleanthous had, and that I consider Mr Hitchman shared, was for a thriving imaging centre at The Hive, an expansion of that enterprise to other centres around the country, and a large and successful First Fleet, owned by TIC and managed by CMS, collaboratively with TIC as necessary. That vision has not been realised. The imaging centre at The Hive is built and in use, but it took a lot longer and significantly greater effort and expense to get there than had been envisaged, and it is unclear to me whether it is thriving quite as Mr Kleanthous had hoped it would be. It remains the only TIC static imaging centre. However, none of that gives rise to any claim raised by either side against the other.

60. As regards the Unit rental business, and therefore more pertinently to the litigation:

(1) the First Fleet grew to a maximum size of only 11 Units, and has been static at 9 Units since July 2021;

(2) CMS became uncomfortable with the financial commitment involved under the Master Agreement (as the parties understood it and operated it), giving CMS the full cost of managing and operating the First Fleet, the Canon Contribution obligation (Last Six basis), and no share of First Fleet rental revenue;

(3) CMS eventually made it clear that it would not supply TIC with any more Units under and on the basis of the Master Agreement – in short, it would not allow the First Fleet to grow further – and TIC never asked for the First Fleet to be expanded substantially, at the Master Agreement price per Unit, so that since August 2020 (by delivery date) all Unit acquisitions have been by Mobile, forming a Second Fleet run by it, without cost or obligation on the part of CMS except as provider of warranty and servicing obligations or as an *ad hoc* rental customer from time to time, with a written release from CMS of TIC's exclusivity obligation under the Master Agreement in case that be required to avoid a claim that the Second Fleet infringed it;

(4) the Second Fleet has grown to 16 Units – 5 Philips MRI Units, 2 Philips CT Units, and 7 Canon CT Units (two of which are First Fleet Units transferred to the Second Fleet at CMS's request, hence the drop in the size of the First Fleet from eleven to nine) – with three more on order but not expected to arrive until 2024.

61. The contemporaneous evidence in my view shows that the root cause of the failure to fulfil the original hopes for the First Fleet has been a conservatism and lack of vision on the part of Mr Hitchman's superiors at CMSE in Holland, in particular the CFO there, that has rather tied CMS's hands. The CFO could not see the cost burden of the

First Fleet for CMS as an entrepreneurial investment or did not value it as such; he just saw cash leaving the business.

62. This was a joint venture, with CMS taking an 8% stake in the joint venture vehicle, TICM, even if (for reasons that are obscure on the evidence) the shares to which CMS is entitled have not yet been issued or transferred to it. The idea was to build a business with a very substantial value, 8% of which might justify the outlay (although if that was misjudged, meaning that CMS should have insisted on a larger stake in TICM, it is not for the court to unpick for CMS its poor bargain). As well as CMS's initial profit on the sale of First Fleet Units to TIC, there was a revenue stream in the warranty/servicing charge for the longer term (after the three-year free period for each Unit), and there were important indirect benefits that were real, if difficult to quantify, in having access to First Fleet Units for use in 'blue light' provision (servicing A&E demand when fixed scanner installations suffer down time) and in the maintenance or growth of sales volumes of scanners for fixed installations in hospitals and clinics, which is CMS's primary business activity.

63. It is no doubt simplistic, and in my judgment Mr Kleanthous recognised that, but I agree with some evidence he gave, as a rough and ready indication of the basic investment concept. There was profit for CMS in the sale of Units, a not insignificant revenue stream, albeit with a delayed start, to cover at least some of the operational overhead, and the Canon Contribution could be viewed as a quasi-equity contribution of at most c.£11 million (and, if the venture was successful, quite possibly a lot less), payable over 10 years, for a stake in what it was thought should be capable of being grown into a major business. Such effort as Mr Hitchman may have made to sell that vision to his CFO in Holland was not successful, with the results summarised in paragraph above.

64. How successful TICM would have been, if CMS had not adopted the stance it did, is a separate point, which might have to be considered, to the extent it can be, as an element of assessing damages if there has been a substantial breach by CMS of the Master Agreement in relation to First Fleet growth; and whether there was any such breach is also a separate point, which is not answered by the existence of a shared vision at the outset between the two main men in this country as to how, they hoped, things would develop, but by the language of the Master Agreement, properly construed.

The Litigation Claims

65. That basic story having now been set out, it will be meaningful to explain a bit further than I did at the outset the claims that I have to determine.

The Hire Claim

The 2021 price list claim

66. The Master Agreement included an obligation on CMS to prepare a price list from time to time, in consultation with TIC, for the rent to be charged to third parties renting First Fleet Units. In March 2021, TIC sent CMS an updated price list, plainly intended as a request that CMS adopt it for the First Fleet, in which prices in the then current version had been increased by 10%, with effect from 1 March 2021. CMS

ignored it, both within the joint venture, not responding at all to TIC's correspondence, and externally, not adopting it or making any other use of it in dealings with prospective or actual First Fleet customers.

67. TIC says CMS acted in breach by doing that. It claimed damages for breach. However, the only claim pressed at trial was not that CMS rented out First Fleet Units at rates below levels allegedly required by the parties' contract, or that would have become required by that contract if CMS had responded differently to TIC's price increase request. Rather, the claim was that CMS should have responded to that request by agreeing an increase in the monthly rates by reference to which the Canon Contribution was calculated. The amount (if any) by which TIC had been underpaid Canon Contributions should then be calculated, it was said, whether on the Last Six or First Six basis (as the court will have determined to be correct), by reference to such increased Canon Contribution rates per Unit as should have been agreed.

68. That claim has no foundation and must be rejected. TIC's request to increase the price list for renting First Fleet Units out neither was nor implied a request to change the long-standing agreed rate for calculating the Canon Contribution per Unit unrented. The claim also suffers from the disabling defect that the pleaded case is founded upon an allegation that TIC's proposed price list increase was agreed by CMS in February 2021, although (a) it cannot have been, since it was only put forward the following month, and (b) there is neither documentary evidence nor witness evidence (as it came out at trial) to support the proposition that it was ever agreed.

The rental income claims

69. In respect of Units hired out by CMS, TIC claims that CMS is obliged to pass on 100% of the rental income earned, whereas CMS says it has no obligation at all of that kind, but rather that it is obliged to pay TIC 50% of the "*usual prevailing rate*" referred to in Clause 8 of the Master Agreement for the whole First Fleet. CMS pleaded that that rate is, per Unit, the rate the Unit is earning, if it is rented, or the Canon Contribution rate if it is not. In closing argument, however, Mr Goldberg KC conceded that he could not get to that pleaded case from the language of the Master Agreement. His argument was, instead, that "*its [i.e. TIC's] usual prevailing rate*" must refer to the price list rate for each First Fleet Unit set in accordance with the Master Agreement (which, as I said above, provides for CMS to prepare the price list for renting Units out, in consultation with TIC).

70. Since CMS has not in fact withheld any rental income on the basis of its position on this '100% vs. 50%' issue, it does not give rise directly to a money claim by TIC. However, CMS has purported to set off sums it has sought to charge for warranty/servicing. TIC says that has resulted in underpayment by CMS because (a) CMS has calculated the warranty/servicing charges incorrectly and (b) CMS has included warranty/servicing charges on the two CT units that were transferred from the First Fleet to the Second Fleet after which any such charges were for Mobile's account, not TIC's.

71. The 'Last Six vs. First Six' issue, as it has played out in the past, creates a further complication in the figures presented to the court. It means that the two amounts to which I am about to refer include CMS's Canon Contribution, as calculated and paid

by it since September 2021, which TIC says understates the Golden Six liability. The resulting Canon Contribution underpayment, on TIC's case, is claimed separately.

72. On that (disputed) basis concerning the Canon Contribution, and if the rented Unit obligation is to pass on 100% of the rental, CMS's monthly spreadsheets for the period from March 2021 to July 2023 evidence a total due to TIC for that period, prior to setting off warranty/servicing charges, of £5,717,306.76. CMS in fact paid £4,750,811.20. The Canon Contribution amounts recognised by CMS are the same in both of those figures. Therefore, the difference, which is £966,495.56, can be taken as the amount by which rental income (if due at 100%) has not been passed on to TIC by reason of the claim to set off warranty/servicing charges.

73. As Mr Penny KC for TIC acknowledged, there is nothing wrong with setting off warranty/servicing charges properly due from TIC (not Mobile). However, he submitted, and I agree, that it is important that the rental income claim and the warranty/servicing charges are first calculated accurately, independently of each other. The result, prior to any underpayment of Canon Contribution to which TIC might be entitled, is that if TIC is right that 100% of the rental income earned by rented First Fleet Units is to be passed on by CMS, then CMS has underpaid by £966,495.56 less any difference between (a) CMS's proper entitlement to warranty/servicing charges under the Master Agreement and (b) the amount paid to CMS by TIC in respect of such charges otherwise than by (purported) set-off.

74. At the date of this judgment, it may be there is a further such difference on the August to October 2023 monthly spreadsheets. If so, the same approach ought in principle to apply.

75. Conversely, if CMS is right that it was never obliged to pay over rental income amounts earned by rented First Fleet Units, but instead its obligation was to pay 50% of TIC's "*usual prevailing rate*" for renting the Units, keeping any rental income for itself, then CMS may have paid substantially more to date than it was liable to pay pursuant to the Master Agreement. It limited any monetary claim, however, to what it paid TIC by reference to the May and June 2021 monthly spreadsheets:

    (1) the May 2021 spreadsheet evidences rent earned by rented First Fleet Units of £287,423.25, which CMS paid TICM, together with a Canon Contribution of £21,421.76;

    (2) the June 2021 spreadsheet evidences rent earned by rented First Fleet Units of £246,213.46, which CMS paid TICM together with a Canon Contribution of £17,333.

76. The context for CMS's monetary claim was a two-month stay of proceedings. Those two payments were made during the stay. The basis for the claim, then, was an allegation that the solicitors' correspondence amounted to or included an agreement that CMS would continue to pass on rental income earned by the First Fleet in full, during the stay, and TIC would reimburse any overpayment found by the court to have been made as a result.

77. In his written closing submissions, Mr Goldberg KC said that the claim was for 50% of the sums paid, which is £266,818.36. That was premised, however, on CMS's

pleaded case that for rented Units, TIC's "*usual prevailing rate*" payable by CMS (but at a 50% discount) was the amount being earned from time to time. But that is not a case that can be supported on the language of the Master Agreement (see paragraph above).

Golden Six claims

78. The trial was opened, on both sides, on the basis that CMS's obligation to pay for unrented First Fleet Units was subject to a Golden Six rule, with a dispute as to whether that rule was Last Six or First Six. However, that did not allow for the implications of the rival constructions of the Master Agreement:

(1) CMS's reading of the Master Agreement, whereby its obligation in respect of all Units, rented and unrented, is governed by Clauses 8 and 9, does not limit its obligation in respect of unrented Units by reference to *any* rule of six. Rather, it says that Clause 8 obliges it to pay at the 50% rate to which it refers, on all First Fleet Units at all times; and Clause 9 creates a floor on the size of the First Fleet, not a ceiling on the number of unrented Units in that Fleet for which CMS has to pay.

(2) TIC's reading of the Master Agreement, in which Clauses 8 and 9 refer only to unrented First Fleet Units, creates a rule of six, but it is definitely a Last Six rule, not a First Six rule. Under that reading, Clauses 8 and 9 together *prima facie* promise that CMS will *always* keep (and pay at the Clause 8 rate for) six First Fleet Units, but that must yield where fewer than six First Fleet Units are unrented so as to be available (i.e. CMS is then *excused* from the apparent obligation to pay for as many as six Units).

(3) As a result, while CMS is entitled as a matter of procedure to advance as an alternative case that if it is wrong on 100% vs. 50%, then any Golden Six rule was a First Six rule, as a matter of substance that case cannot work. If it has lost on 100% vs. 50%, it will be because I have preferred TIC's reading of the Master Agreement; and if I have done that, I will have found that, properly construed, it creates a Golden Six rule on the Last Six basis.

79. If TIC's construction of the Master Agreement prevails, it claims an alleged aggregate underpayment of Canon Contribution since September 2021 of £840,588.86 (up to and including July 2023 – again, there would be a question of whether August to October 2023 have resulted in further underpayments). But there are difficulties with that claim:

(1) It starts with the total due to TIC as shown in the monthly spreadsheets for March 2021 to July 2023 inclusive, namely £5,717,306.76. That is the same figure as in paragraph above.

(2) It is said that if CMS had not changed how the monthly spreadsheets calculated the Canon Contribution, that total would have been £6,557,895.32, which produces the claimed difference of £840,588.86.

(3) That difference, however, includes differences for May and June 2021 of £23,571.75 and -£12,174.32, respectively, that would need to be stripped out, as the claim only concerns September 2021 onwards.

(4) More importantly, as will become apparent below when I go through their history, the monthly spreadsheets prior to September 2021 did *not* calculate the Canon Contribution on a Golden Six (Last Six) rule, but on a basis more generous to TIC than that.

(5) The difference of £840,588.86 is therefore likely to overstate the proper claim. There is also a complication if TIC succeeds in the claim that it makes in the Competition Claim for damages to compensate it for CMS having used an MRI Unit of its own rather than an unrented First Fleet MRI Unit for an eight month rental contract in Sheffield. Any Golden Six underpayment calculation would then need to ensure that that First Fleet MRI Unit was treated as rented, not unrented as it was in fact, for the duration of that contract.

80. CMS did not pursue in closing argument any claim in respect of any Golden Six overpayment in the past. It sought only clarity by way of declaratory relief as to what, if any, Golden Six obligation exists under the Master Agreement.

The Warranty/Servicing Claim

81. The parties ask the court to grant declaratory relief stating the meaning and effect of the phrase "*its [i.e. CMS's] Equipment list price from time to time*", as it appears in Clause 4 of the Master Agreement. The warranty/servicing charge, from a First Fleet Unit's third birthday, is 6.5% per annum of whatever that means on the proper construction of Clause 4. The Master Agreement does not in fact state 'per annum', but it is common ground that is how Clause 4 is to be read.

82. In practice, CMS has charged or sought to charge TIC at a rate that neither side contends is correct, namely at 6.5% per annum of the price TIC paid for the Unit in question. Whatever is meant by CMS's 'list price from time to time', Clause 4 refers to that price for "*Equipment*" only, i.e. the "*CT Scanners and MRI Scanners and any other diagnostic equipment purchased by [Assets] from [CMS] from time to time*", whereas Units are Equipment integrated into transportable housings and, as one might expect, a complete, integrated Unit, including the Equipment, costs some hundreds of thousands of pounds more to buy than just the Equipment inside.

83. TIC claims that its obligation is to pay per annum 6.5% of the price it paid CMS for the Equipment inside the Unit in question. CMS claims that the obligation operates by reference to amounts that appear in a column labelled 'List Price' in the Salesforce software package. It is difficult to explain that any further without descending into a bit of detail in relation to Salesforce, so I shall leave the description of CMS's position there for now.

84. As with the Canon Contribution, CMS did not pursue in closing a claim for any difference between what, on its case, it has been entitled to charge to date for warranty/servicing and what it has in fact charged. (It had effectively pleaded such a claim by claiming an account of sums due to it pursuant to the Master Agreement and

making clear, by amendment to its Reply, that in the taking of that account, if ordered, it would claim the amount by which it said it had undercharged under Clause 4.)

85. It is common ground that, since CMS has been charging TIC on the basis of 6.5% of the prices TIC paid for the First Fleet Units, if TIC is correct that it should have been paying only 6.5% of the prices it paid for the Equipment inside the Units, then CMS has been overcharging. TIC claims relief in respect of any such overcharging. Up to a point, the relevant figures for the purpose of any such claim were agreed (up to and including July 2023 – the question may arise yet again whether an update is needed to include August-October 2023, if any warranty/servicing charges fell due during that period).

86. Thus, up to and including July 2023:

(1) TIC 'paid' CMS £2,433,836 in respect of warranty/servicing charges, comprising: (a) payments by TIC of £1,506,664; and (b) sums set off by CMS against payments being made by it to TIC totalling £927,173.

(2) Warranty/servicing charges at 6.5% of the prices paid by TIC for the Equipment within the First Fleet Units would have been £1,256,413.

(3) On TIC's case as to these charges, therefore, it has 'overpaid' CMS by £1,177,423.

87. There is some complexity to that, however. Firstly, it is only true to say that TIC paid CMS the £927,173 referred to in paragraph above if, which is TIC's case but not CMS's, rental income had to be passed on to TIC in full. Secondly, the analysis of CMS's liability is different as between (a) an amount wrongly set off by it when making a monthly payment to TIC and (b) an amount overcharged by it and paid by TIC separately. In the former situation: *ex hypothesi* TIC will have established some entitlement, independently of this warranty/servicing issue; it would therefore be CMS's burden to justify the deduction it made. In the latter situation: TIC will have paid more than it was obliged to pay, presumably against an invoice or other communication from CMS claiming the amount in fact paid as being due; it would be TIC's burden to identify and establish the necessary ingredients of a cause of action to be reimbursed the overpayment.

88. If TIC is correct both that rental income is to be passed on in full by CMS and that the 6.5% warranty/servicing charge is on the price paid to CMS for Equipment, it follows that although the arithmetic is simple, the legal analysis may not be as simple as saying that TIC has overpaid by £1,177,423, it will get £966,495.56 of that back under the rental income claim (paragraphs 72. to above), and therefore there should be judgment for £210,927.44 on top. If TIC is correct about the warranty/servicing charge, but wrong about rental income, the position may be more complex still.

<u>The Unit Sale Claim</u>

89. TIC seeks a declaration stating the content of CMS's obligation (if any) to sell additional First Fleet Units under and on the terms of the Master Agreement.

90. TIC also says that there have been breaches of CMS's obligation to sell, and claims damages for breach accordingly.

91. The pleaded claim for damages alleges that but for what is said to have been a failure by CMS, in breach of contract, to sell TIC more Units for the First Fleet, it would have expanded as follows:

By 30/6/YYYY	New Units	Fleet Size*	Actual**	Missing***
2020	12	23	11	12
2021	12	35	9	26
2022	12	47	9	38
2023	16	63	9	54
2024	21	84	9	75
2025	29	113	9	104
2026	38	151	9	142

* Counterfactual size of First Fleet after adding stated number of new Units

** Actual size of First Fleet in the event.

*** Number of Units by which First Fleet should have been larger than it has been and will be.

92. A gross loss of profit (i.e. before allowing for what TIC was in a position to do by way of reasonable mitigation) was calculated on the entire counterfactual First Fleet size, rather than only on the 'missing' Units. That was put at £206.7 million (including £29.3 million of profit it was said would come from the staffing element of securing staffed rather than unstaffed contracts). That was prior to applying whatever might be an appropriate discount for accelerated receipt to reflect the extent to which any damages would compensate by a lump sum today for future losses.

93. That was set against a 'Mitigation Calculation', by which TIC conceded and asserted that a reasonable mitigation effort to catch up and make good lost sales would have enabled it to operate and grow a fleet outside the Master Agreement, as follows:

By 30/6/YYYY	New Units	Fleet Size*
2020	0	11
2021	12	23
2022	8	31
2023	16	43
2024	21	62

2025	30	92
2026	50	142

* For Fleet Size as at 1 July 2020 and 1 July 2021, this was said to be based on the actual size of the First and Second Fleets combined. The logic of including the actual Second Fleet, which I endorse so far as it goes, is that anything Mobile has done or might do, TIC could reasonably have done instead. There was in truth no reason why the Second Fleet could not be owned by TICM. Any convenience for accounting or other reasons of the Second Fleet being built up instead by Mobile should not enable TIC to limit what the court would say it was reasonably in a position to do to mitigate its alleged losses.

94. A calculation was presented, by reference to those fleet sizes supposedly already achieved, or to be achieved, of the profit that could reasonably have been made in mitigation. That was put at £130.2 million (including £9 million of profit on the staffing element of staffed contracts).

95. The damages claim was therefore put in the pleading at £76.5 million, prior to any discounting for accelerated receipt.

96. On the factual and expert evidence prepared for trial, it was apparent that the pleaded claim was unrealistic. Mr Penny KC in closing put forward a revised damages calculation, asking informally for permission to amend to do so (i.e. putting that request forward as part of his submissions, but without any draft amended pleading or Application Notice). The revised claim, as proposed, would assert that TIC would have expanded the First Fleet by a steady 12 Units a year, taking delivery of a new Unit a month, from July 2020. Instead of the table at paragraph above, the proposed new counterfactual is this:

By 30/6/YYYY	New Units	Fleet Size	Actual	Missing
2020	0	11	11	0
2021	12	23	9	14
2022	12	35	9	26
2023	12	47	9	38
2024	12	59	9	50
2025	12	71	9	62
2026	12	83	9	74
2027*	8	91	9	82

* Unlike the pleaded case, in the new counterfactual the First Fleet continues to grow by one new Unit per month during the period 1 July 2026 to mid-March 2027.

97. A revised calculation of the loss of gross profit (i.e. before giving credit for reasonably available mitigation of loss) is now put forward, using an asserted lost

turnover of £443,000, alternatively £303,000, per Unit per annum. The resulting lost profit is put at £112.1 million, alternatively £63.6 million, again that is prior to discounting for accelerated receipt.

98. Set against that, it is proposed, should be a completely revised mitigation calculation, in which it is now asserted, in effect, that TIC was not and will not be able reasonably to achieve better than:

(1) the actual expansion represented by the growth of the Second Fleet to date and its planned growth by three more Units by 30 June 2024 (as to which the evidence suggested that the new Units will probably not all arrive by then, but Mr Penny KC asked me to assess any damages on the basis that they would, an assumption, so far as it goes, favouring CMS);

(2) the addition, following the delivery of this judgment if it has found in favour of TIC as regards the nature and extent of CMS's obligation to allow the First Fleet to grow, of 32 new Units between 1 July 2024 and mid-March 2027 as posited in the new counterfactual for loss of profit (i.e. the last three rows in the table at paragraph above).

99. That would look like this if tabulated:

By 30/6/YYYY	New Units	Fleet Size
2020	0	11
2021	5	16
2022	9	25
2023	0	25
2024	3	28
2025	12	40
2026	12	52
2027	8	60

100. Calculations of the value of available mitigation supposedly on that basis are presented, on the basis of which it is proposed that credit should be given of £60.1 million, alternatively £30.7 million, depending on which figure for available annual turnover per Unit is used. Thus, the damages now sought are £52 million, alternatively £32.9 million, prior to discounting for accelerated receipt. Those calculations, evidently prepared by Mr Weaver, the expert accountant called by TIC, were only provided with Mr Penny KC's written closing submissions. They do not appear to match the table I have just set out (although that table in turn does match Mr Penny KC's written closing as a summary of the new case that he wishes me to consider). Mr Weaver appears to have erred in (a) taking the First Fleet as only 9 Units in the year to 30 June 2021, when it was still then 11 Units, and (b) adding only

7 Units to the Second Fleet in the year to 30 June 2022, when in fact 9 Units were added in that year. Those errors were not identified or (therefore) addressed by counsel in closing argument, no doubt because (on both sides) they had not had the calculations for long enough by then to have checked them anything like fully.

The Competition Claim

101. TIC alleged that CMS has rented out Units other than First Fleet Units even when First Fleet Units were available. By the end of the trial, that allegation had shrunk to a single live complaint that one particular rental, in Sheffield, had been satisfied by CMS from an MRI Unit of its own when (so TIC said) one of the First Fleet MRI Units was available and should have been used. There was no dispute as to the availability of the First Fleet MRI Unit at the material time. The issue was whether it could have been used for the contract in question, CMS's case being that it could not have been. TIC seeks by way of damages the rental income that could have been earned for TIC from the contract in question. The rent earned by CMS was £354,383.85 (plus VAT).

102. TIC further alleged, and alleges, that CMS has assisted, is assisting, or is threatening and intending to assist CMSE to establish and operate a fleet of Units competing with the First Fleet. It says that CMS has acted thereby in breach of contract, and seeks primarily injunctive relief.

The Monthly Spreadsheets

103. An important element of the practical operation of the First Fleet pursuant to the Master Agreement has been a system of monthly spreadsheets to which I have already referred when outlining the *quantum* of some of the claims. The spreadsheets are provided by CMS to TIC and state for each month, for each First Fleet Unit, rental income received and the utilisation rate of the Unit (as a percentage, so for example 80% for a Unit that was on hire for 24 days in a 30-day month), and calculating from those figures the amount payable to TIC for that month, according to CMS. TIC was expected to invoice CMS on that basis, and did so, with any query about the figures or the calculated sum payable to be raised separately.

104. TIC's invoices matching the monthly spreadsheets were paid by CMS, or on some occasions set off against monies CMS said were owed by TIC. Where TIC took the view that the monthly spreadsheets understated what was due to it, a separate invoice for the underpayment might be paid by CMS if the error was accepted.

105. How the monthly spreadsheets calculated the monthly amount payable to TIC was visible to TIC, since the spreadsheets were provided as native files so TIC could have checked the formulae used. Their evolution over time is part of the history of what ultimately became this litigation, as are some of the exchanges between the parties when TIC disagreed with Canon's figures; and the parties' use of the monthly spreadsheets is the principal element of the conduct relied on by TIC as creating the alleged Hire Agreement.

106. Before turning to a chronological summary of that history, I mention one anomaly. For a period of quite a few months, MRI#2, a First Fleet Unit, was unrented but positioned at The Hive in Barnet rather than at the Bence storage facility ordinarily

used by CMS for First Fleet Units. In the Master Agreement monthly spreadsheets for April to October 2017, inclusive, 100% utilisation was stated for MRI#2, rather than 0%; but a full month Canon Contribution of £17,333 was entered for it, matching utilisation of 0%. I ignore that anomaly in the reported utilisation percentage for those months, since it had no effect on the accuracy or otherwise of the monthly totals due to TIC calculated by the spreadsheets for those months because of the manual Canon Contribution entries. For November and December 2017, the utilisation percentage anomaly was repeated, but now the spreadsheet had a manually entered nil value for Canon Contribution for that Unit. I refer to that further when I deal with those months, below.

107. I also ignore below individual entry errors that have nothing to do with what became the disputes between the parties that I must now resolve. For example, in the July 2017 monthly spreadsheet, the utilisation rate of CT#4 was shown as 32.2% (10 days out of 31), but the Canon Contribution for that Unit was entered manually as nil rather than at a level reflecting 67.8% unrented.

108. At all times, the monthly total due to TIC calculated by and stated in the spreadsheets has comprised (a) a monthly amount in respect of rental income earned by Units that were rented out for at least part of the month, plus (b) a monthly Canon Contribution amount, referred to in the spreadsheets as the 'CMSUK Commitment' or, prior to January 2018, the 'Toshiba commitment'.

109. In the first monthly spreadsheets under the Master Agreement, from April to October 2017 inclusive:

(1) the monthly Canon Contribution was calculated as the sum of a set of individual Canon Contribution amounts, one for each Unit;

(2) subject to (3) below, the Canon Contribution per Unit was calculated as:

(a) nil, if the Unit had been on hire for at least 50% of the month;

(b) the difference between (i) the agreed monthly rate per Unit for the Canon Contribution of £17,333 (MRI) or £14,083.50 (CT) and (ii) the rent in fact earned by that Unit, if it had been on hire for less than 50% of the month;

(3) inconsistently, in some months, the Canon Contribution for one or more of the CT Units was instead set at the difference between the monthly Canon Contribution rate of £14,083.50 and 92% of any rent earned by the Unit in question;

(4) the total due to TIC was calculated as the sum of (a) 92% of the total rent earned in the month from Units rented out for at least part of the month, and (b) the Canon Contribution amount for the month.

110. Leaving aside the complication of paragraph above, those first seven monthly spreadsheets therefore effectively assumed: firstly, that Canon was entitled to keep 8% of rental income and was obliged to pass 92% to TIC, as had been the case under the Heads of Terms; secondly, that Canon was obliged to top up the rent passed to

TIC for any Unit hired out for less than 50% of the month, to £17,333 (MRI) or £14,083.50 (CT). Neither of those has ever been, or is now, the effect of the parties' contract under or pursuant to the Master Agreement as contended for on either side.

111. The standardised monthly rate of £17,333 (MRI) or £14,083.50 (CT), for use in calculating any Canon Contribution, was carried through from the Heads of Terms (see paragraph above for the calculation). There is no suggestion, or evidence, that any different rate was ever agreed for the purpose of the Canon Contribution pursuant to the Master Agreement, and on both sides the case was presented at trial on the basis that the continued use of that rate was, at the time, a matter of agreement (whether or not binding) between the parties.

112. In error, however, the formulae used to calculate the Canon Contribution (see paragraph 109.(1)-above, with the effect described in paragraph above) were carried over from equivalent spreadsheets that had been generated for the purpose of the Heads of Terms, even though on any view the parties' contract for the Canon Contribution had changed.

113. The monthly spreadsheet for November 2017 was different. The First Fleet then contained eight Units, MRI#1-MRI#4 and CT#2-CT#5. The spreadsheet reported 100% utilisation for MRI#1-MRI#3 (but erroneously in the case of MRI#2, see paragraph above), 100% utilisation for CT#2 and CT#4, 90% for MRI#4, 10% for CT#3, and 70% for CT#5. Then:

(1) the Canon Contribution was entered manually as nil, as was the per Unit Canon Contribution for each Unit;

(2) the total due to TIC was set at 92% of the total rental income earned in the month.

114. Again, passing on 92% of rent earned has never been either side's case as to the effect of the parties' contract pursuant to the Master Agreement. The nil Canon Contribution would have been the effect of a Golden Six rule on a First Six basis (see paragraph above) if both (a) the utilisation rates were accurate and also (b) at least one of MRI#4, CT#3 and CT#5 was on hire every day that month, since there would then have been at least six Units on hire throughout. The utilisation rates were not accurate, however, because of the error relating to MRI#2. If MRI#2 utilisation had been set correctly at 0%, a Canon Contribution should have resulted even on a First Six basis.

115. On any view, the November 2017 spreadsheet was inconsistent with a Golden Six rule on the Last Six basis, because on the Last Six basis there should only be a nil Canon Contribution if all First Fleet Units have 100% utilisation. This led to a conversation between Mr Vincent (and Ken Kelly) of CMS and Mr Kleanthous during a regular CMS-TIC business meeting in Barnet on 7 December 2017. Mr Kleanthous raised the possibility of Clause 9 of the Master Agreement being open to misinterpretation. As Mr Vincent reported it the next day, by email to Mr Hitchman, copying Mr Watson and Mr Kelly, Mr Kleanthous had intimated a belief that "*Rather than 6 units, … it was our intention to cover the cost of 50% of the fleet unrented at any one time*".

116. I do not believe Mr Kleanthous ever thought, or expressed the view, that under the Master Agreement the Canon Contribution was not (in one way or another) limited to

a maximum of six Units. The gist of his written and oral evidence, which I accept, was that his belief throughout has been that a Golden Six rule (Last Six basis) was agreed and given effect by the Master Agreement as signed. I do not believe that Mr Kleanthous will have said anything different at the meeting, so if Mr Vincent intended his email to report something different, I consider that must have been a misunderstanding on his part of whatever Mr Kleanthous said.

117. Mr Hitchman replied to Mr Vincent's email later the same day (8 December 2017), saying that Clause 9 "*was for six as it says. We undertake to fill the gap on any number out of rent under six. It was 50% of the fleet once but not now. Hence the new agreement. Remember it well.*" Evidently, Mr Hitchman had understood Mr Kleanthous' view, as reported by Mr Vincent, to be that there was some CMS obligation on a 50% rate across the whole First Fleet, not limited to a Golden Six, so he was responding to correct that, confirming that (so he believed) any CMS obligation was limited to six Units, and articulating his understanding of the content of that obligation.

118. As Mr Hitchman said he understood it, it was an undertaking "*to fill the gap on any number out of rent under six*". Although it is a slightly curious turn of phrase, in context Mr Hitchman's reference to a number of Units "*out of rent*" must, I think, have been a reference to unrented Units. On that basis, his email stated his understanding that CMS's obligation was a Last Six obligation, and that was Mr Hitchman's evidence on this email:

> "*Q: And your response [to Mr Vincent's email] is at the top of the page:*
>
> *" ..." [email read]*
>
> *That is all about the – again I am going to use the words "the golden six" because it's a neutral way of describing the dispute, but it's about the units in storage, isn't it?*
>
> *A: It's the – anything under six not used it is topping up to six, yes.*
>
> *Q: So put it another way, it has nothing to do with the amount of revenues from end users that need to be passed by Canon UK on to TIC, does it?*
>
> *A: No, it's just mentioning the 50 per cent number which is – which I feel is the number that's been brought alive.*
>
> *Q: What you meant by "we undertake to fill the gap on any number out of rent under six" is: we undertake to pay 50 per cent of any units in storage up to six units?*
>
> *A: Yes.*"

119. Mr Hitchman's first and last answers confirmed that he meant "*out of rent*" to refer to unrented Units; as to what Golden Six rule applied, the first answer was ambiguous, but the final answer accepted unequivocally that in his email he intended to convey that it was a Last Six rule.

120. On 21 December 2017, Ms Drummond passed to Mr Vincent a revised invoice received from TIC asking to be paid the 8% of rented Unit earnings that the April to November 2017 spreadsheets had deducted. She noted that "*From the invoice it looks as though we have relinquished our 8% ...*", mentioned a point on interest charges that does not concern me, and asked Mr Vincent to clarify the position. Mr Vincent does not appear to have responded.

121. On 3 January 2018 Ms Drummond forwarded TIC's invoice to Mr Hitchman instead, saying that he would "*see from the invoice, there is a charge for the 8% deduction we applied from March through November 2017 for the rental fleet.*" She asked: "*May you kindly confirm if this is correct and if we have agreed to pay this back?*". Mr Hitchman replied, confirming that "*I did follow this through with TIC and the new contract does leave out the 8%. From what date I'm not sure so perhaps Ian [Watson] could check that please.*" Mr Hitchman copied Mr Watson and various others into that response.

122. Returning to my chronological summary of the monthly spreadsheets, in the spreadsheet for December 2017: five Units had 100% utilisation; CT#3 and CT#4 had 0% and 58% respectively; and MRI#2 had 0% utilisation wrongly stated as 100%. The Canon Contribution was again manually zeroed (per Unit and in aggregate), and the total due to TIC was set at 92% of the rental income earned. On the utilisation figures stated in the spreadsheet, a First Six rule for a Golden Six would have justified the nil Canon Contribution. As with the previous month, if the MRI#2 anomaly were removed, there should have been a Canon Contribution even on the First Six rule. On any view, there should have been a Canon Contribution on the Last Six rule.

123. The question of how the Canon Contribution was supposed to be calculated was raised by TIC again in late March 2018, now with reference to (at least) the November and December 2017 calculations. I refer to that further below, in its chronological place.

124. The monthly spreadsheets were re-set by Mr Watson from January 2018:

(1) Firstly, he added a calculation box showing that a full month's Canon Contribution for six Units, three MRI and three CT, would be £94,249.50 = £(17,333 x 3) + (14,083.50 x 3). The calculation box stated that the average monthly rate in that calculation (the midpoint between the MRI and CT rates, given that the calculation assumed a 50:50 split of Units) was £15,708.25; but the spreadsheet did not use that figure for any purpose.

(2) Secondly, he set the Canon Contribution to equal the lesser of (a) the sum of the per Unit Canon Contributions and (b) that £94,249.50. The formula was "=IF(SUM(B22:I22)>=C35,C35,(SUM(B22:I22)))"; B22 to I22 were the spreadsheet cells for the per Unit Canon Contributions; C35 was the cell for the total of the new calculation box I described in (1) above.

(3) Thirdly, the Canon Contribution per Unit was set at (100-U)% of the standard monthly rate, where U was the utilisation rate for that Unit for the month. The formula was in fact more complicated – unnecessarily so – but that was its effect. It was calculated for every Unit, however few or many may have been unrented at any one time.

(4) Fourthly, the total due to TIC was set as the sum of the rental income from Units rented for at least some of the month (i.e. 100% of the rent earned) and the Canon Contribution.

125. As thus re-set by Mr Watson, the monthly spreadsheets from January 2018 in substance proceeded on the basis that:

(1) firstly, Canon was obliged to pass to TIC 100% of rental income earned by the First Fleet;

(2) secondly, a Canon Contribution per Unit was *prima facie* payable on all Units not achieving 100% utilisation, calculated by reference to the standard monthly rate of £17,333 (MRI) or £14,083.50 (CT);

(3) thirdly, the monthly Canon Contribution was capped at £94,249.50, in aggregate.

126. As regards rented Units, the re-set spreadsheets matched the understanding at the time, on both sides, of the parties' contract. That remained their joint view until early 2021 when CMS first raised the possibility that it might be wrong. As regards unrented Units, the re-set spreadsheets were wholly inconsistent with the First Six rule; but they also did not give effect to the Last Six rule contended for by TIC. That rule, as I noted above, is that CMS pays a 50% charge for unrented First Fleet Units, up to a maximum of six at any one time. Mr Watson's re-set monthly spreadsheets reduced any 'Golden Six' effect to being just a monthly maximum for the Canon Contribution of £94,249.50.

127. For example, suppose three MRI Units were not rented out at all, five CT Units were rented out for the first half (only) of the month, and any other First Fleet Units were fully rented. Then:

(1) A definitive calculation of the Canon Contribution, on the Last Six basis contended for by TIC, would depend on how one dealt with the question I identified in paragraph above. The least it might be would be £((17,333 x 2) + (14,083.50 x 2.5)) = £69,874.75, in which, for the half month when eight Units are unrented, the Golden Six is taken as five CTs plus one MRI. The most it might be would be £((17,333 x 3) + (14,083.5 x 1.5)) = £73,124.25, in which the Golden Six for that half month is taken to be three MRIs plus three CTs.

(2) The monthly spreadsheet as re-set by Mr Watson from January 2018, however, would calculate the Canon Contribution as £((17,333 x 3) + (14,083.50 x 2.5)), which is £87,207.75, and that would have been recognised by the spreadsheet as payable to TIC in full since it is less than £94,249.50.

128. There was no evidence at trial that the parties ever identified to each other that the re-set spreadsheets were by nature, in that way, generous to TIC. In their ongoing dealings together through 2018, and thereafter, they treated them or referred to them as having calculated the Canon Contribution on the Last Six basis. This will have had a practical impact. For example:

(1) In August 2019, two MRI Units and four CT Units had 0% utilisation. On a Last Six basis, the maximum Canon Contribution was £((17,333 x 2) + (14,083.50 x 4)) = £91,000. However, there was also a CT Unit with 39% utilisation. That is why, at this stage, I say £91,000 was the *maximum* Canon Contribution – as with my illustration in the previous paragraph, a final calculation would require an answer to the question at paragraph above. The point for present purposes, though, is that the monthly spreadsheet as redesigned by Mr Watson added a per Unit contribution of £8,631.82 for the part-utilised CT Unit, bringing the monthly cap into play, so that the Canon Contribution was stated as £94,249.50, which will have been paid to TIC.

(2) In September 2019, one MRI Unit and four CT Units had 0% utilisation, and there was also an MRI Unit with 63% utilisation, a CT Unit with 47% utilisation, and a CT Unit with 20% utilisation. For a definitive calculation, one would need detail as to the overlap of the unrented periods among those three *and* an answer to the question at paragraph above, but it can be said that on a Last Six basis the most the Canon Contribution could have been was £88,952.82 = £((17,333 x 1.37) + (14,083.50 x 4.63)). However, the monthly spreadsheet built in a per Unit contribution for all three of the part-rented Units, so that, again, the monthly cap came into play and the Canon Contribution was in fact stated at £94,249.50.

(3) From October 2019, there was a run of four months during which one of the MRI Units was un-rented (0% utilisation throughout), the other MRI Units in the First Fleet were fully rented (100% utilisation), and the utilisation of the CT Units in the First Fleet was low. The maximal value for the Canon Contribution in those circumstances, on a Last Six basis, should have been £87,750.50 = £(17,333 + (14,083.50 x 5)); but again, by calculating a per Unit contribution for each un-rented or part-rented Unit, then aggregating them all, the Canon Contribution stated by each monthly spreadsheet was higher (£88,204.81 for January 2020, capped at £94,249.50 for each of October to December 2019).

129. Returning to the general chronological account, the monthly spreadsheets ran, as thus re-set by Mr Watson, from January 2018 to August 2021, inclusive.

130. On 29 March 2018, Mr Bartlett forwarded to Mr Vincent the then latest iteration of the monthly spreadsheets (complete up to and including March 2018), and asked him to look over the tabs "*from November [2017] to present date*", because "*there are several units with no cost against them [i.e. no per Unit Canon Contribution] whilst the units have not been utilised and have been parked up and as per our brief discussion yesterday I was under the impression that 50% of the normal rental cost would be paid by Canon as per previous months but it suddenly stopped.*" In context, but now to use the labels I have been using, Mr Bartlett was clearly conveying his understanding that the Golden Six rule was a Last Six rule.

131. Mr Vincent, copying Ms Drummond and Mr Watson, replied that "*The reason behind this is that since November 2017 we have had six or more units rented out to customers which satisfies Clause 9 of the Agreement with TIC*". He quoted the Clause, then continued: "*Hence we are not liable for the 50% rental charges until such time as we have less than six units are [sic.] rented out.*" In the terminology I have been

using, this asserted in terms a First Six reading of the parties' contract, said to be founded on the language of Clause 9 of the Master Agreement.

132. That same morning, 29 March 2018, there was an email exchange internal to CMS relating to the treatment of MRI#2 while it was parked up at The Hive, which is what gave rise to the anomaly to which I referred in paragraph above. Within that exchange, Ms Drummond in one email noted that "*What does need clarifying is how the golden six is calculated and at what point a unit can count towards it. For instance what about a unit that has been under rental for 80% of the month – does this count?*". The obvious answer to that question is that such a Unit was an unrented Unit for the 20% of the month when it was not rented. Whether there would be a Canon Contribution for that Unit for that 20% of the month might turn on Last Six vs. First Six, depending on the facts obtaining for the rest of the First Fleet for the month, and, if it arose, the question I identified in paragraph above; but that is a separate point.

133. In an email dated 6 April 2018, from Mr Vincent to Mr Watson, copied to Ms Drummond, by reference to a highlighted copy of the Master Agreement he attached to the email, Mr Vincent noted "*areas where I think we either need to re-negotiate or clarify with TIC*". One of those was "*The "Golden Six" (Clauses 8 & 9) – needs explicit clarification.*"

134. On 30 April 2018, in an email from Mr Bartlett to Mr Vincent referring *inter alia* to Mr Kleanthous' belief that Canon Contribution amounts were owed in respect of MRI#2 from its time parked up at The Hive, Mr Bartlett chased for confirmation "*as I know there was a bit of a debate about what was agreed in relation to idle units*".

135. By an invoice dated 1 May 2018, but only sent to CMS on 16 May 2018, TIC invoiced CMS for £133,241 plus VAT for "*Scanners – Under invoiced for relocatable units in the following months: [November 2017 to March 2018, with monthly figures]. As discussed with Joe Vincent.*" Leaving aside the accuracy or otherwise of TIC's calculations, this was TIC invoicing for under-payment of the Canon Contributions for the months identified, on the basis, in substance, that First Six had been applied by CMS but Last Six should have been. Ms Drummond passed the invoice by email to Mr Hitchman and Mr Little, copied to Mr Watson and Mr Vincent.

136. The following morning, 17 May 2018, ahead of a planned meeting the next day, Mr Hitchman sent an email to Mr Kleanthous, "*Subject: confidential*", claiming that "*the amount of money we have been pouring into TIC ventures has become so big that it has been setting off alarms with my Japanese executive superiors (please see below).*" He referred *inter alia* to the "*'out of the blue' invoice for about £130K for some 'undercharging' for the fleet …*", and claimed that "*this has become a severely career threatening situation for me now*". I do not believe Mr Hitchman's job security was threatened, let alone severely. This was hyperbole by way of posturing. The reference to the views of his Japanese superiors was to an email Mr Hitchman forwarded with his email, from Hirofumi Sato, then CFO of CMSE, to Mr Little, copied *inter alia* to Mr Hitchman, "*Subject: Barnet*", stating:

> "*I noticed that CMSUK made a loss from the rental business.*
> *Please tell me why CMSUK made a loss.*

What is the condition between Barnet as the payment is huge.

I know that Barnet is an important customer for CMSUK.
However, we need to understand the total picture of business with Barnet."

137. Last Six vs. First Six, now identified as an issue between the parties thought to affect the Canon Contribution calculation for a few months from November 2017, was not resolved between Mr Kleanthous and Mr Hitchman in May 2018. They spoke about it by telephone on 21 June 2018, following which Mr Kleanthous emailed Mr Hitchman, copying others at CMS and TIC, stating that having "*reviewed the figures and our agreement*":

> "*Put simply, the original entitlement was for an unlimited number of mobiles to be made available to Canon underwritten at 50% which was subsequently reduced to a maximum of six mobiles. The 50% charge applied should therefore never exceed six vehicles and I cannot see any instances of this within the supplied schedules.*
>
> *Please confirm that all is now in order to proceed with the payments.*"

138. To an outsider, that might not be as clear as it will have been to Mr Hitchman. The familiarity I now have with the CMS-TIC venture means I realise, as Mr Hitchman will have realised on reading the email, that Mr Kleanthous was saying this:

- unrented Units were to be paid for by CMS at the agreed monthly rate (the "*50% charge*");
- under the Master Agreement, that commitment had become limited to six unrented Units;
- the back payments TIC had calculated would not result in CMS paying for more than six unrented Units;
- CMS should therefore be paying as invoiced.

139. In anticipation of a conference call to discuss the issue, suggested by Mr Hitchman in an immediate response, Mr Watson, one of those to whom Mr Kleanthous had copied his email, replied to all by email later that day. He referred to the example of August 2017, saying that there were "*3 units on site [i.e. rented], 4 units in storage at Bence [i.e. unrented] and 1 unit at Barnet [i.e. MRI#2, also unrented]*". More accurately in relation to rented Units that month, two Units were rented for the whole month and a third was rented for 24 days (77.4% utilisation). Mr Watson stated that payments had been made for all eight Units. That was right, in the sense that the rent earned on the three Units with earnings was passed to TIC (albeit, in error, CMS had retained 8%, but that is a separate point), and a Canon Contribution of £80,166 had been paid, being the sum of five per Unit contributions for the five fully unrented Units, each at the full monthly Canon Contribution rate.

140. Mr Watson's email then said that: "*There should have only been payment for six units*". In context, this was a claim that since three Units had been rented during the month, a Canon Contribution should have been paid only for three of the five fully

unrented Units. That, I note, was not Mr Watson's view of the Canon Contribution obligation when he re-set the monthly spreadsheets in January 2018 (see paragraphs 124. and above). But it was the position CMS was now adopting, and Mr Watson continued in his email that: "*We are now therefore looking at the payments made from July 2017 when the fleet exceeded 6 units and also the formula/calculation used to determine the monthly charges which we will share and discuss with TIC when completed.*"

141. Mr Kleanthous replied to all by email within the hour, stating as follows:

> "*Hi Ian*
>
> *You are including the units out at customers in your calculation.*
>
> *The six units relates to the ones for which you are paying the 50% discounted rate otherwise the Agreement would not make sense.*
>
> *I did discuss this matter a few months ago with Joe so surprised this has come up again several months later …*
>
> *Will discuss when you call.*"

142. Mr Vincent, another of the Cc. addressees on this email exchange, replied to that response, but only to Mr Watson. He said that he and Mr Kleanthous had discussed the point "*a month or so ago – but my recollection was him describing how he thought the Golden Six should be calculated and me saying I did not believe we had the same view. Nothing was agreed and I asked Tony to raise it with Mark and clarify the wording of the Agreement. Once we have that, the actual calculations ought to be reasonably straightforward.*" A few minutes later, Mr Kleanthous chased by email as to whether the proposed conference call was going ahead, to which Mr Watson responded almost immediately, saying, "*Now I am confused. Why would you not include the units that we have rented out to customers? Our agreement is to get the fleet rented to customers but if we can't, we commit to covering 50% of 6 units.*" That description – a commitment to get the fleet rented and to pay at a 50% rate for six Units if it was not – seems to describe the Last Six rule. Given the question it purported to answer, and the general tenor of these exchanges, that may not have been Mr Watson's intention, however.

143. The contemporaneous documents do not evidence a resolution of that dialogue between the parties as clearly as one might have anticipated they would. The January 2018 version of the spreadsheets, with the effects I described in paragraphs 124. to above, continued to be used. TIC invoiced and CMS paid on the basis of them, until September 2021; and CMS paid the back payment invoice to which I referred in paragraph above. Mr Kleanthous' evidence in chief through his trial witness statements was that he recalled "*having to explain to Canon on numerous occasions that all the golden six meant was that for any units that are not sub-rented, up to a maximum of six, Canon would pay 50% of the normal rental cost. I seem to recall this resulting in Canon making a back payment of around £130,000.*"

144. Mr Watson's evidence in chief through his trial witness statements was that he remembered how CMS taking the position that no Canon Contribution was payable

for November 2017 brought the Last Six vs. First Six issue into life, as Mr Kleanthous "*claimed he was entitled to 50% for the Last Six [and] insisted that our interpretation of our minimum rental obligation was wrong, and that we needed to pay for the units in the car park, even though we had rented out … six.*" Mr Watson failed to mention that the resolution of that discussion was that, until September 2021, CMS continued to use, and pay on the basis of, the monthly spreadsheets as re-set by him in January 2018, using a Last Six rule, and did so until March 2021 without any protest or reservation of rights. He referred to tracking the financial impact of Last Six vs. First Six on a spreadsheet setting out rival calculations, and said that Mr Kleanthous "*receives a copy of the Spreadsheet every month, approves it and sends an invoice*". That evidence was misleading because:

(1) it refers to something Mr Watson has only been doing since September 2021, that is to say from several months into this litigation;

(2) in the ongoing course of ordinary business between the parties, as Mr Watson knows, TIC has been receiving from CMS only the First Six part of that new version of the monthly spreadsheets. The full version, with a Last Six part for comparison, came to TIC only through the process of Extended Disclosure in the proceedings; and

(3) as Mr Watson also knows, TIC invoiced on the basis of the purported First Six calculation sent to it by CMS not because TIC accepts that it is the correct basis, that being one of the main disputed issues in the litigation, but because CMS has made it clear that it will not now pay on any other basis (at all events prior to what is now this judgment after trial, if it determines for the parties that the true obligation is not First Six).

145. Mr Hitchman gave no specific evidence in chief about the discussions in mid-2018, or their resolution. I consider that is because he has no recollection of them, as is illustrated by his evidence that he has no idea what Mr Kleanthous is talking about in recalling the 2018 back payment of £130,000 odd. Mr Hitchman gave evidence in more general terms that he explained CMS's interpretation of the Golden Six to Mr Kleanthous repeatedly, and never agreed with his (Mr Kleanthous') interpretation of it, and that CMS has reduced payments to TIC in line with its interpretation. In that evidence, I find, Mr Hitchman was recalling only what has happened since March 2021 (as regards not agreeing that Last Six was correct) and since September 2021 (as regards reducing payments to TIC so that (as he has understood it) they are in line with a First Six interpretation).

146. On the whole of the evidence, I am satisfied, and find, that in mid-2018, when CMS sought to justify the nil Canon Contribution in the spreadsheet for November 2017, and the parties discussed the position, as partly evidenced in the email exchanges described above, the conclusion, which must have been reached over the telephone, was to agree Mr Kleanthous' view as correct. That is why the back payment invoice was paid. That is why the January 2018 version of the spreadsheets continued in use for the rest of 2018 and for all of 2019 and all of 2020, without protest or reservation of rights. I do not consider it credible to suppose that any of that would have happened if CMS had not been persuaded to accept, when the point arose in 2018, that Mr Kleanthous was right about it. That does not mean Mr Kleanthous was right about it, of course, because that is an objective question of the meaning and effect of

the parties' contract, and it is now squarely in issue again between the parties. But at this stage I am just setting out the factual history.

147. As 2020 came to a close and 2021 began, the First Fleet experienced its most successful run of months for utilisation levels and, in consequence, its highest rental earnings to be passed to TIC, and lowest Canon Contribution amounts. The First Fleet then comprised 11 Units, MRI#1 to MR#4 and CT#1 to CT#7. For October 2020 to March 2021, all but three of the Units (MRI#2, MRI#4 and CT#5) were rented (100% utilisation) throughout, with the peak being in February 2021 and March 2021 when all Units were rented throughout (100% utilisation) except for unrented MRI#2 (0% utilisation).

148. The First Fleet rental earnings for February 2021 of £295,750 were a fraction shy of the then record of £298,098 seen in October 2020. That record was then beaten in March 2021 (£327,438). That made the timing of the email from Mr Watson to Mr Kleanthous on 2 March 2021 which sparked this litigation (see paragraph above) most unfortunate. The email was in the following terms, with commentary added giving my assessment of what was said:

> "*Over the preceding months, we have discussed whether there was a need for both parties to be released from exclusivity to allow the respective businesses to expand the fleet in a way they see fit. The ultimate goal of these discussions was not to frustrate the relationship, but to achieve an agreement which worked in practice for both parties. I trust you will agree. From our last meeting, I now understand that you do not want to be released from exclusivity and, instead, wish to continue working with Canon going forward.*
>
> [This was a provocative start. Mr Kleanthous had never indicated any wish not to work exclusively with CMS. It is fair to say that the large-scale expansion Mr Kleanthous had proposed was outside the purview of the Master Agreement (I shall return to that when dealing with the Unit Sale Claim). But it was Mr Watson who, in August 2020, had emailed Mr Kleanthous stating that CMS would not accept <u>any</u> expansion of the First Fleet; and formalising a release from exclusivity, when CMS refused to sell TIC two new CT Units for the First Fleet, was raised by Mr Kleanthous <u>defensively, in response</u>, to protect his companies from any possible breach of contract complaint by CMS if they therefore began what became the Second Fleet.]
>
> *As you will be aware, however, we have been discussing this agreement with corporate as well as our legal team and have come to the commercial decision to continue to operate under the terms of the agreement. Therefore, Canon will continue to operate as follows …:*
>
> - *Clause 8 – [quoted]. In accordance with this clause, [TIC] will receive 50% of the usual prevailing rate of each unit rented. However, thereafter, Canon are at liberty to retain any rental income received over and above 50% of the usual prevailing rate. The apportionment of the rental income is required to ensure that the agreement is profitable, or at least sustainable, for Canon;*

[The suggestion that treating CMS as obliged to pay TIC only 50%, not 100%, of rental income earned by First Fleet Units would be a continuation of some kind of what had gone before was astonishing. If it was now thought at CMS, legal advice having been taken, that that was the parties' agreement, it was a brand new thought, and a straight-talking approach would have been to say so, not to pretend that it was what CMS had thought all along, let alone to pretend that it was how the business had been operated hitherto.]

- *Clause 9 – [quoted]. In accordance with this clause 9, Canon is only obliged to have on hire a mixture of six units, only. Accordingly, , Canon shall have no further liability to [TIC] once there is on hire six units ("the First Six"). …* [This reasserted that the Golden Six rule was a First Six rule, a debate that had seemingly been resolved in the summer of 2018. It was not such a bombshell as the previous point, since it had been raised those years before, but again it was not right to claim that it would be a continuation of how CMS had been operating.]

- *Clause 12 – [quoted]. In accordance with this clause 12, Canon remain entitled to the 8% shareholding in [TICM]. Please provide a duly executed stock transfer form.* [It has never been in dispute that CMS is entitled to an 8% shareholding in TICM. I was not satisfied by Mr Kleanthous' evidence that there has been any good reason why the necessary steps to give CMS that shareholding have not been taken; but equally CMS has not pressed very actively for those steps to be taken and made no associated claim in the proceedings.]

…"

149. Despite what Mr Watson's email said about rental income, CMS has in fact continued throughout to pass to TIC in full all rental earnings of the First Fleet Units (except when claiming to set off sums it says are due from TIC). As regards the Golden Six, notwithstanding the email, CMS continued to pay TIC on the January 2018 spreadsheet version of the Last Six basis, until September 2021. As I noted above, although CMS raised more wide-ranging claims in its pleadings, the only monetary claim it pressed in closing argument was to revisit its passing on of First Fleet rental earnings in full for May and June 2021, in respect of which CMS says there was an agreement that it would be entitled to recoup any overpayment determined by the court.

150. In September 2021, the monthly spreadsheets were changed by Mr Watson again. By then, this Claim was under way, and Last Six vs. First Six was for determination by the court if the parties did not resolve their differences, or at all events that issue, prior to trial. The monthly spreadsheets as maintained by CMS now set out alternative calculations, one for "Last 6", the other for "First 6", but in the ordinary operational correspondence between the parties, CMS sent TIC only the latter. The full version, with both calculations included, only came to TIC in CMS's Extended Disclosure in October 2022.

151. In this further iteration of the spreadsheets, a calculation is included of the average number of First Fleet Units rented across the month ("**total number of days rented**

out / number of days in that month”). In the “First 6” spreadsheets sent to TIC for invoicing and payment purposes, the Canon Contribution formula has been rewritten as: “=IF(L61>=6,0,((6-L61)*C74))”, where L61 was that average, and C74 was the £15,708.25 to which I referred in paragraph above. The effect is to set the Canon Contribution at nil if, across the month, there were on average at least six rented Units. If that average is below six, the formula corresponds to an obligation to pay at the blended monthly rate (£15,708.25 per Unit) for any ‘shortfall’ below an average utilisation rate of six. So, for example, if the average daily number of rented First Fleet Units is 4.5 (which is 75% of 6), the Canon Contribution would be calculated as 1.5 x £15,708.25 (which is 25% of the monthly cap).

152. That now makes use, for the first time, of the average per Unit Golden Six rate of £15,708.25 stated in the calculation box in the spreadsheets (see paragraph above), but that is not a necessary use. The formula could equally have been “=IF(L61>=6,0, ((6-L61)*C75/6))”, C75 being the monthly cap.

153. That revised approach represents a method Mr Watson devised for himself, but it was never agreed and it does not represent any version of the effect of the parties’ contract that has ever been claimed on either side. To illustrate that, there being now nine Units in the First Fleet, if all nine were rented for the same 20 days in a 30-day month, unrented for the other 10 days, then on either a First Six basis or a Last Six basis, the Canon Contribution would be a payment for six Units for 10 days, with the question at paragraph above to resolve over which six, but Mr Watson’s method would return a nil result, because the average daily number of rented First Fleet Units would be six (9 x 20 ÷ 30 = 6).

154. Whether that would matter, if there were a Golden Six rule on the First Six basis, would depend on a full review of the monthly facts. For example, in a month where the average daily number of First Fleet Units rented was at least six, it may be that at least six First Fleet Units were rented throughout the month, in which case both First Six and Mr Watson’s “First 6” would set the Canon Contribution at nil.

155. Finally, in July 2022, Mr Watson amended the “Last 6” version of the current design of the monthly spreadsheets so that the Canon Contribution per Unit is calculated for every Unit by reference to the blended Golden Six rate per Unit (£15,708.25), rather than by reference to the agreed Golden Six rate by Unit type (£17,333 for MRI Units, £14,083.50 for CT Units). I understand that to have had no practical effect to date, because since September 2021 CMS has been paying TIC by reference to the “First 6” version of the spreadsheets.

The Terms of the Master Agreement

156. The title page of the Master Agreement gives its date as 17 March 2017 and identifies the “PARTIES” as CMS (at the time still named Toshiba Medical Systems Ltd and according to the title page “*Hereinafter called “TM”*”), and:

> “*THE IMAGING CENTRE HOLDINGS LIMITED*
>
> *(A company incorporated under the laws England … . Hereinafter called “TICH”)*”

It should be remembered that I am referring to The Imaging Centre Holdings Ltd as 'Assets', reflecting its current name of The Imaging Centre Assets Ltd.

157. Clause 1 is a definitions clause. One of its definitions is that "*Parties shall mean TM and TICH as described on page 1 [i.e. the title page]*". However, it also gives this definition of "*TICH*", namely "*TICH shall mean The Imaging Centre Holdings Ltd [i.e. Assets] and any of its subsidiaries, including TICL and TICM, to whom it wishes to assign or sub-licence the rights granted under this Agreement*". (**NB** Where I have just used "*TICL*", the Master Agreement in fact uses "*TIC*", defined to mean The Imaging Centre Ltd, i.e. the company I am referring to as 'TICL'. In what follows, including in the Appendix to this judgment, I have made that change throughout, because I am using 'TIC' as a neutral term enabling me to avoid specifying whether it means 'Assets' or 'TICM' (or both). "*TICM*" is defined in the Master Agreement to mean The Imaging Centre Mobile Ltd, i.e. the company I am also calling 'TICM'.)

158. After Clause 1, the Master Agreement sets out recitals giving context for the substantive terms, as follows:

> "*WHEREAS*
>
> *(A) TM has an exclusive partnership with TICL to create, develop and open Imaging Centres.*
>
> *(B) TM has an exclusive partnership agreement with TICM for the purchase and rental of the Units.*
>
> *(C) TICH is the holding company for both TICL and TICM.*
>
> *(D) The Parties have agreed to enter into this Agreement to replace the existing agreement between TM and TICL dated xxx and the existing agreement between TM and TICM dated xxx.*"

159. Clauses follow that are evidently designed to describe and regulate the ongoing joint venture. In the Appendix to this judgment, I have set out most of those Clauses, in some cases adding the Clause 1 definitions of defined terms when they first appear.

160. The Master Agreement was signed at the end, "*AS WITNESS the hands of the authorised signatures on behalf of the parties …*", by Mr Hitchman "*For and on behalf of Toshiba Medical Systems Limited [i.e. CMS]*" and by Mr Kleanthous "*For and on behalf of The Imaging Centre Holdings Limited [i.e. Assets]*".

Construing the Master Agreement

Approach

161. The court's task in construing a written contract is one of interpreting the meaning of the contractual language used. As Lord Neuberger PSC explained in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, at [15], under English law the meaning and effect of the language of a written contract is that which that language would have conveyed, when the contract was entered into, to a reasonable person having the background knowledge common to the contracting parties. The question is what the language of the contract means, in its documentary, factual and commercial context.

162. The Hive Contract and the Heads of Terms, and also how the First Fleet had been established and was operating under the latter, are part of the background facts known to both sides in mid-March 2017 when the Master Agreement was entered into. That does not mean, though, that the provisions of the Heads of Terms assist when construing differently worded provisions of the Master Agreement. As Rix LJ expressed that point in *HIH Casualty v New Hampshire Insurance* [2001] 2 Lloyd's Rep 161, at [83]:

"*The difficulty of course is that, where the later contract is intended to supersede the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one. Ex hypothesi, the later contract replaces the earlier one and it is likely to be impossible to say that the parties have not wished to alter the terms of their earlier bargain. … Where the later contract is identical, its construction can stand on its own feet, and in any event its construction should be undertaken primarily by reference to its own overall terms. Where the later contract differs from the earlier contract, prima facie the difference is a deliberate decision to depart from the earlier wording, which again provides no assistance. Therefore a cautious and sceptical approach to finding any assistance in the earlier contract seems to me to be a sound principle.*"

163. In *Matchbet Ltd v Openbet Retail* [2013] EWHC 3067 (Ch), Henderson J (as he was then) held at [132] that the effect of an entire agreement clause similar to Clause 43.1 of the Master Agreement was to preclude the possibility of having recourse to the terms of a prior agreement as a guide to the proper construction of the later contract including the clause. TIC submitted that this takes the point too far, and that Henderson J's decision is inconsistent with *HIH Casualty* and should not be followed. It will not be necessary to decide whether TIC is right about that.

164. Though the existence of the prior arrangements and their operation in fact are part of the admissible background common to the parties, the negotiations leading to the Master Agreement, including the process by which the written contract was drafted, are not admissible for the purpose of construing the contract as signed. The rule in that regard is stated sufficiently for my purposes at Section 9 of Chapter 3 of *Lewison*, "*The Interpretation of Contracts*" (7th Ed., 2021) in the following terms:

"*Evidence of pre-contractual negotiations is not generally admissible to interpret the concluded written agreement. But evidence of pre-contractual negotiations is admissible to establish that a fact was known to both parties; to decide (in a consumer contract) whether a term has been individually negotiated; to determine which party put forward a particular term; and to elucidate the general object of the contract. Evidence that parties negotiated on the basis of an agreed meaning is only admissible in support of a claim of estoppel or rectification.*"

165. A feature of the Master Agreement that cannot be avoided when one seeks to construe it, is that it is not a well drafted document. That would immediately strike even a casual reader of the document. Therefore, the process of construing the document must be more alive than might be appropriate if the drafting were more tightly constructed and polished to the very real possibility that the language may not have been well chosen, and a meaning conveyed at first sight by some turn of phrase, read in isolation, might have to yield to a different meaning that offers itself only to the reader who takes a bit of time and care to try to read and make sense of the document

as a whole. It is fair to observe, I think, that the root cause of what eventually became this litigation is probably fault on both sides, in human terms the equal fault of Mr Kleanthous and Mr Hitchman, in signing an obviously poorly drafted contract rather than putting in the additional time and effort that would have been required to express their bargain more clearly.

166. A further complication in determining the content of the parties' contract in respect of the First Fleet is that the Master Agreement does not set out the whole of that contract, notwithstanding the entire agreement clause at Clause 43.1. Rather, supplemental terms of some kind are expressly to be agreed, since Clause 7 provides that CMS will "*hire any CT Mobile Scanners and MRI Mobile Scanners that it requires exclusively from TICH pursuant to a hire agreement to be reasonably agreed between the parties subject to availability*". The scope of Clause 7 is in issue between the parties in their competing constructions of the Master Agreement. It will be seen, below, that I find myself in agreement with TIC that it concerns rented Units, not unrented Units, but I do not agree with TIC that the 'hire agreement to be reasonably agreed' was to determine the parties' obligations *inter se* in respect of the rental income that would be earned by rented Units.

TICM's Status

167. I find it convenient to take first the question of TICM's status, if any, under or pursuant to the Master Agreement. In short, for the reasons given below, my conclusion is that TICM is privy to the Master Agreement. It is not a third party for the purpose of Clause 43.5 of the Master Agreement so as to be precluded from having rights under, or rights to enforce, the terms of the Master Agreement. Its rights do not derive from the Contracts (Rights of Third Parties) Act 1999, rather they derive from the fact that, properly construed, the Master Agreement is a contract between Assets, contracting for itself *and also for and on behalf of (at least) TICL and TICM*, and CMS.

168. In alleging that TICM is privy directly to a contract with CMS, TIC's pleading refers to a "*direct (collateral) contractual relationship on the terms of the Master Agreement*". However, the basis pleaded and pursued at trial for that conclusion is simply that on the proper construction of the terms of the Master Agreement, there is direct privity. I would not label that a collateral contract; but what matters is the substance rather than the label.

169. The provisions of the Master Agreement that bear on the point are the following:

(1) the definition of 'Parties' as CMS and "*TICH as described on page 1*", which could be taken to mean that 'Parties' as a defined term means CMS and Assets (only);

(2) the definition of 'TICH' as including "*any of its subsidiaries, including TICL and TICM, to whom it wishes to assign or sub-licence the rights granted under this Agreement*";

(3) the recital of the Heads of Terms as being an agreement between CMS and TICM, and as having created an "*exclusive partnership agreement*" between CMS and TICM "*for the purchase and rental of Units*", when it was a contract

entered into between CMS and TICL providing for a joint venture company to be incorporated (in the event, TICM) that would acquire Units to be rented out by CMS on its behalf, and the reference to the Heads of Terms in Clause 43.1 (the entire agreement clause) likewise as being and having been between CMS and TICM;

(4) Clause 2, which provides that "*TICM will be appointed by [CMS] as the Official Distributor of the Units upon the terms hereinafter contained*" and which, it is common ground on the pleadings, effected that appointment without more ado. In that regard, CMS pleads in the Particulars of Claim that by Clause 2 TICM was appointed Official Distributor of the Units, upon the terms of the Master Agreement. That is also pleaded in the Defence, making it common ground, and I do not consider that to be affected by CMS's odd plea in the Reply that, as thus stated, the plea is embarrassing for want of particularity as to when, how, by whom and on what terms TICM was appointed;

(5) Clause 3, providing *inter alia* that Units sold and Services provided by CMS pursuant to the Master Agreement are to be sold and provided "*to TICH*", in respect of which (a) it was common knowledge between the parties that the purchaser whose Units CMS would be managing and renting out had been and would be TICM, not Assets, and (b) the joint venture provided for by the Master Agreement only makes sense if TICM, the joint venture vehicle, is to undertake the hopefully profit-making joint venture business;

(6) Clause 23, by which CMS promised to support TICM "*with all documentation in relation to the leasing and/or rental of the Units …*", which could only reasonably be understood to relate to the rental out of Units by CMS for TICM;

(7) Clause 28, by which "*TICH*" promised, in general, only to buy Canon scanning equipment for the life of the Master Agreement;

(8) Clause 29, which required any waiver or modification to be in writing "*signed by both of the Parties and TICH*", in which "*TICH*" appears to be a drafting error, given the definition of 'Parties' (see (1) above), the sensible possibilities being either that "*TICH*" should there be "*TICM*" or that the words "*and TICH*" should not be there;

(9) Clause 31, providing that "*TICH confirms that notwithstanding that neither TICL nor TICM are direct Parties to this agreement and that it has power to contract on their behalf as its subsidiaries*"

(10) Clause 39, by which "*TICH*" was at liberty to assign or sub-licence its rights and obligations "*to any third party*", provided that it remained primarily liable;

(11) the signature page, making clear that the Master Agreement is, by the signatures, being entered into by Mr Hitchman and Mr Kleanthous as authorised signatories for CMS and Assets, respectively.

170. Reading all of those provisions sensibly together, in my judgment their sense is as follows.

171. Firstly, as the title page, the definition of 'Parties', the reference to 'direct Parties' in Clause 31, and the signature page suggest, the Master Agreement is a contract entered into by CMS, on one side, and Assets, on the other side; but in itself, that merely begs the question whether Assets (or for that matter CMS), in so contracting, acted only for itself or also for and on behalf of another company or companies.

172. Secondly, then, Clause 31 seems to deal with that question, albeit the wording is clumsy because of the bad grammar, and to indicate that TICL and TICM are parties to the Master Agreement, though they are not either of the 'Parties' making the contract, because Assets, one of those 'Parties', is acting for them in doing so.

173. Thirdly, therefore, like the Heads of Terms before it (according to the Parties, given how they have described it in the recitals and the entire agreement clause), the Master Agreement is intended to be a contract to which TICM is party although it is concluded (*ex hypothesi*, for TICM) by another (Assets this time, TICL in the case of the Heads of Terms).

174. Fourthly, that is why "*TICH*" has an expanded definition that includes *inter alia* TICM, even though in some specific places it may have a more limited meaning, for example in the definition of 'Parties', or in Clause 31 where it appears in contradistinction to TICL and TICM.

175. That scheme, distinguishing between CMS and Assets as the (only) Parties by whom the contract is made, on the one hand, and TICL and TICM as parties who are also privy to the contract thus made, Assets contracting for them and on their behalf, may not be carried through the drafting completely coherently or accurately. But the Master Agreement is not a well drafted document; and that scheme makes sense of the key business provisions in Clauses 2, 3 and 28. CMS's rival construction, by which (for example) only Assets, which has no Units and will be buying no Units, has promised not to buy non-Canon equipment, and TICM, the joint venture vehicle that has Units and will be buying further Units, has made no such promise, makes no real sense.

176. I acknowledge that, at first sight, the reference to assignment or sub-licensing in the extended definition of "*TICH*", read in isolation, might suggest that something more than the conclusion of the Master Agreement itself was envisaged to be necessary to bring TICL or TICM into privity. Reading the Master Agreement as a whole, in my view that possible contra-indication is heavily outweighed by the number and nature of indications on the language used by the parties that TICM was considered and intended to be privy there and then.

177. That makes it unnecessary to consider the alternatives advanced by TIC that if TICM is not privy to the Master Agreement, it has rights under the 1999 Act or Assets can recover for losses suffered by TICM. For completeness only, and therefore taking this quite briefly:

    (1) There could be no claim under the 1999 Act. My construction of the Master Agreement is that TICM is not a Party, but is a party, and that means it is not a

third party. If that were wrong, then Clause 43.5 rules out a claim by TICM under the 1999 Act just as much as it does a claim by any other non-party.

(2) Assets could not claim on any principle of transferred loss. For that purpose, closer attention needs to be paid than in the parties' submissions to the nature of the different causes of action arising:

(a) To the extent that, properly analysed, TIC is claiming debts due from CMS, on a correct application of the contract, no difficulty as to the incidence of loss arises. If the only contract is between Assets and CMS, then the relevant debt obligation, to pay an amount equal to the rental income of rented Units or to pay a Canon Contribution, is an obligation to pay Assets, and Assets simply sues on that obligation. The fact that the parties have in practice dealt with such payments by accounting between CMS and TICM, payment to TICM being treated as discharging the relevant obligation, would not disentitle Assets from claiming debts due to it. TIC does not now say, and CMS has never said, that Assets has assigned away any entitlement to be paid by CMS.

(b) To the extent that, properly analysed, TIC is claiming damages in respect of alleged breaches of contract by CMS the effect of which was to reduce the amount payable by CMS in respect of rental income from rented Units and/or Canon Contributions, again no difficulty arises. If the only contract is with Assets, then Assets has suffered the relevant loss of income and can sue for it (again, there being now no suggestion of any assignment).

(c) To the extent, however, that, properly analysed, TIC is claiming damages in respect of a loss of income only suffered by TICM, by reason of a breach of contract by CMS, then there would be a difficulty, but it would be a difficulty created by the way TIC has pleaded and pursued its claim, not a reason to allow Assets to recover for TICM's loss.

178. To explain that last point, the only relevant claim, I think, would be a claim that the alleged failure by CMS, in breach of contract, to sell more Units to add to the First Fleet, led to the loss of staffed rental contracts, since those would have been entered into by TICM, not by CMS, but using First Fleet Units provided to TICM by CMS for those contracts. There would then be, firstly, a question whether the Master Agreement (as a contract between Assets and CMS only), properly construed, required CMS to account to Assets for the full (staffed Unit) rental earned by TICM, and secondly, if that was not the case, a question whether that full rental income could and should be split into (i) an (unstaffed) basic Unit rental, payable by the client to TICM, by TICM to CMS, *and therefore* by CMS to Assets, and (ii) an additional rental amount, payable only by the client to TICM, for staffing the Unit.

179. As with the previous categories of claim, if the income amounts not generated would have been payable by CMS to Assets, then Assets would have suffered the loss and could claim damages accordingly. It would only be where the unachieved income would have been income for TICM alone that the claim as presented would be a claim by Assets for damages for loss suffered by TICM. But in a claim for damages

between joint venture partners (Assets and CMS) for the failure by one of them (CMS) to take steps the joint venture contract obliged it to take to grow the business of the joint venture vehicle (TICM), the proper claim is surely for the consequent reduction, if any, in the value of the claimant joint venturer's share of the vehicle. That would require a valuation exercise (counterfactual vs. actual) relating to Assets' 92% share of TICM, something TIC has not attempted or suggested should be attempted.

Main Obligations

180. I turn now to analyse the content of the parties' contract under and pursuant to the Master Agreement, with a view to determining the nature and extent of the main obligations upon which the Hire Claim, the Warranty/Servicing Claim and the Unit Sale Claim will turn, that is to say:

(1) CMS's obligation (if any) to pay TIC amounts referable to the rental income earned by rented First Fleet Units;

(2) CMS's obligation (if any) to pay TIC a 50% rental charge in respect of unrented First Fleet Units;

(3) TIC's obligation to pay for continued warranty/servicing of First Fleet Units after three years; and

(4) CMS's obligation (if any) to grow the First Fleet by selling additional Units to TIC.

181. No great analysis is required of CMS's express obligations engaged by the Competition Claim. Thus:

(1) CMS appointed TICM as Official Distributor of transportable units fitted with Canon scanners (Clause 2, and see paragraph above for my use there of 'Canon' rather than 'CMS');

(2) CMS promised, except as provided in the Master Agreement, not to enter into any agreements competitive with its terms (Clause 17);

(3) CMS reserved to itself its "*existing rights to continue its normal trading business*" (Clause 18), that is to say the sale of Canon scanners for permanent installation in hospitals or other fixed locations;

(4) CMS warranted that it would not enter into any agreement inconsistent with the terms of the Master Agreement (Clause 34.4); and

(5) CMS promised not to enter into any agreement, directly or indirectly, with third parties of a competitive nature to the Project and not to utilise any concepts developed within the Project for its own beneficial use (Clause 41).

182. TIC also alleges, if required, that the Master Agreement contains a general implied term of good faith. More fully, the contention is that by an implied term of the Master Agreement, CMS (and TIC) promised to act "*in good faith, with fidelity to the bargain, not to undermine the bargain or the substance of the contractual benefit*

bargained for, and ... reasonably and with fair dealing having regard to the purpose of the Master Agreement". It may seem a disservice to the efforts of counsel in reviewing the authorities in relation to this fashionable contention, and providing in their written submissions their arguments on how the principles might be applied in the present case, but this point need not detain me:

(1) The Master Agreement includes express terms prohibiting or limiting competitive behaviour. If the proposed term requiring good faith would prohibit behaviour those express terms do not, it would be inconsistent with the express bargain and could not be implied. If it would go no further than the express terms in limiting CMS's freedom to act as it saw fit (which is the material aspect for TIC's claims), then it would not be implied since it would merely duplicate, and anyway TIC would not need to rely on it.

(2) For the claims other than the Competition Claim, the parties' relevant obligations depend upon an analysis of the content of the bargain, on the proper construction of the express terms of the Master Agreement and taking account of the Hire Agreement (if concluded). All of TIC's claims assert a failure to honour that bargain in the straightforward sense of not performing, or mis-performing, an obligation created by those express terms, properly construed. None of them requires an allegation of failure to act in good faith or with fidelity to the bargain, or of acting unreasonably or so as to undermine the bargain; and no allegation of that kind, as made, adds anything if the claim of non-performance or mis-performance is made out. I therefore agree with Mr Goldberg KC's primary response, which was that any such formulation for a complaint, at least in this case, only begs the question of the bargain. Some of the factors that might be considered if examining the claim of an implied general duty of good faith might be factors bearing upon how properly the express terms of the Master Agreement should be construed, so as to find and define the bargain. But that does not mean that there is any call, in this case, for additional scrutiny of the matter through the lens of the developing case law on implied general duties of good faith.

183. The immediate business context of and created by the Master Agreement is important. The parties were about two years into a five-year joint venture relationship for a business together, with TICM as their joint venture vehicle, in the transportable medical scanner market. A fleet of Units for hire, owned by TICM but kept, maintained, marketed and rented out by CMS for it, had been started and was in operation as part of developing that business.

184. By the Master Agreement, the parties chose to terminate those joint venture terms early, replacing the remaining three years of doing business together on those terms with a much longer joint venture commitment of at least ten years, at the end of which CMS would be obliged to give back its 8% shareholding in TICM for no consideration unless the Master Agreement was renewed for a further term of at least ten years. CMS was entitled, during the term of the Master Agreement, to realise any marketable value there might be in its 8% shareholding by operating the machinery of Clause 25(b), which provided as follows:

"*In the event of TM wishing to dispose of the Shareholding it shall first offer it in writing to TICH stating the required price. TICH shall have 90days either to accept*

or reject the offer. If it accepts is shall complete the purchase within a further 180 days. If it rejects then TM may only dispose of the Shareholding to a third party with the approval of TICH but at no less a price than offered to TICH."

185. For the duration of that long, potentially very long, collaboration, TICM was to be the Official Distributor of transportable units fitted with Canon scanners. From the definition of that term in the Master Agreement, and given that the appointment was effected there and then, TICM was (and to date remains) the entity appointed by CMS "*for the purpose of exclusively implementing the Distribution Model Concept in the Territory*".

186. That is to say, TICM, the joint venture vehicle, was and is the exclusive party appointed to implement the business of "*sale, hire and use of purpose built diagnostic centres of, relocatable or mobile nature within Mobile Relocatable Units for providing diagnostic services to the sporting and health care industries*" (that being the definition of the Distribution Model). That drafting is awkward, speaking as it does of purpose built diagnostic centres *within* Mobile Relocatable Units, when a 'Unit' will be, at least primarily, a single transportable (mobile or relocatable) unit fitted with a Canon scanner. It is not necessary to resolve definitively the puzzle that creates of what else, if anything, might fall within the definition. On any view, the sense of it is that it extends to "*the sale, hire and use*" of Units for providing diagnostic services to the sports and health care markets.

187. That accords with the "*joint venture business … for the sale, leasing and marketing of the Units*" being defined by the Master Agreement as the Project, to implement and further which *inter alia*:

(1) CMS must allocate reasonable marketing resources "*to establish the Units as a product in the medical field as agreed from time to time*" (Clause 16), with allied specific undertakings as to marketing activities and support with a view, evidently, to making the Project a success (Clauses 32.4, 32.5, 32.6 and 32.7), and the general undertaking to provide the Services as and when reasonably required, being *inter alia* "*marketing, surveying, sales and project management of the Units*" (Clause 3 and the definition of Services).

(2) There were to be quarterly strategy (etc) meetings, extending to matters of investment to develop the business model and the Project (Clause 32.10);

(3) The parties agreed to accounting on a monthly, open book basis, in relation to all income arising (Clause 20).

(4) There was mutual exclusivity – TIC was to be the sole supplier to CMS of Units for hire (Clause 7), CMS was to be the sole seller of scanning equipment to TIC (Clause 28), subject (in each direction) to availability – and there were provisions designed to ensure that neither side of the joint venture collaboration engaged in activity that would compete with TICM's business (Clauses 17, 18, 34.4 and 41).

188. As one might expect given the basic joint venture parameters thus described by it, the Master Agreement contained terms that on any view contemplated and related to the sale of Units, necessarily that is Units additional to those already in the First Fleet

when the Master Agreement was signed, by CMS to TIC. To be specific, inevitably in practice, and contractually in line with my conclusion that TICM is privy, the sales would be to TICM, the joint venture vehicle by which the Units business was to be conducted.

189. It is common ground on the pleadings that the Master Agreement provides for any Unit sold to TIC to be taken back immediately by CMS (a sale/leaseback), and that as a result, again by the terms of the Master Agreement (and also, in fact, as events have unfolded) any new Unit sold to TIC pursuant to the Master Agreement was not to be (and was not) delivered to TIC when built, but rather was to be (and was) delivered (constructively) to CMS.

190. That means that TICM's appointment by the Master Agreement as *inter alia* the official distributor for the sale of Units cannot be read as meaning that TICM is to act as intermediate seller for sales of Units to others. The sense, in relation to sales to others, must be that the sale is by CMS to the third party buyer, but through TICM as distributor. On any view, one cannot ignore the agreement expressed through the contractual language that TICM is to be the exclusive vehicle through which CMS is to engage in the rental out of Units. That has the consequence that the terms providing for CMS to market, document, and account for, the rental out of TIC's Units (i.e., as I have held, TICM's Units) require CMS to do all of that on behalf of TICM so far as the joint venture arrangement is concerned (even if CMS is identified to the rental client as the lessor), and that is to my mind how those provisions read, on their own terms.

191. That is the positive reason why, I have concluded, it cannot be right to read Clause 8 as CMS now suggests it should be read, that is to say as providing that CMS leases the whole First Fleet at all times at the 50% rental charge to which Clause 8 refers. The same reasoning can also be expressed in this more negative, but equally powerful, form: if the contract is for CMS to take at the 50% rate all First Fleet Units at all times, then the generation of rental income is a matter for CMS in which TIC has no interest; but that would make it a nonsense that cannot be explained by poor drafting that the Master Agreement devotes so much attention to CMS's obligations, owed to TIC, in respect of that rental business; in truth, CMS is trying to read the Master Agreement as if it does not provide for a joint venture Unit rental business at all.

192. What, then, read sensibly, do the key provisions of the Master Agreement, convey? In my view, they convey, firstly, by the provisions defining the joint venture business generally, read with Clause 2, that a business of renting out Units is to be established, pursued and grown by TICM, through the purchase of Units by it from CMS and the provision by CMS of the Services. The activity of renting out TICM's Units, conducted by CMS as part of the Services, is to be conducted on TICM's behalf, CMS accounting to TICM for the income generated.

193. By Clause 3, CMS promises to sell Units to TICM (on a 'best price' basis), and to provide the Services in respect of all such Units. It is not the natural reading of Clause 3 to say that in relation to sale it is only an agreement about price if a sale happens to occur. In my view, it naturally reads, in the joint venture context of the Master Agreement, as a promise to sell when TICM wants to buy, with a consequent promise to provide the agreed Services in respect of any Units thus sold. That sense is

reinforced by the fact that the commitment to 'best price' is separately contained anyway in Clause 19. To be clear, the promise to sell is, obviously, to sell Units pursuant to and on the terms of the Master Agreement, to be added to the First Fleet owned by TICM but in the possession of, and managed for TICM by, CMS under the Master Agreement as part of the Unit rental aspect of the Project, developing and growing the joint venture business.

194. That being then, in substance, an option in TICM to call for more Units to be sold to it for the First Fleet, it goes without the need to say it expressly that the parties mean TICM will supply from CMS to match TICM's *reasonable* demand for more Units. I agree with Mr Penny KC that that sense of Clause 3 is reinforced by the terms in which TICM promises loyalty to Canon in Clause 28, *viz.* that if it has a *reasonable* demand for more Units, it may not satisfy that demand except by buying from CMS, unless CMS *is unable* to satisfy it. That seems to me to take it as read that if CMS *is able* to meet a *reasonable* demand by TICM for more Units, it must do so, and the source of that obligation can only be Clause 3 (read in the context of the general provisions about making a success of the Project as a joint venture).

195. It will be clear, then, that I do not agree with Mr Goldberg KC's submission that the reference in Clause 3 to CMS having agreed to sell concerns only a price if CMS agrees to sell. I also reject his submission that it assists CMS to compare Clause 3 with Clause 7 of the October 2015 agreement under the Heads of Terms referred to in paragraph above. The Clauses are drafted differently, the 2015 Clause 7 having said that "*additional units will be based on business growth and reasonably agreed between both Parties*", so the principle referred to in paragraph above applies. It cannot be said, as Mr Goldberg suggested, that the absence from the Master Agreement of the 2015 Clause 17 words calling for further agreement between the parties before additional units were added means that further agreement between the parties was required under the Master Agreement before CMS might be bound to sell additional Units for the First Fleet.

196. Mr Goldberg KC also contended that it made no business sense to move from an arrangement where fleet growth, if any, required additional joint consent from time to time, to an arrangement where it was a matter for the reasonable business judgment of the joint venture company buying the Units. I do not agree that there is anything odd or lacking in business sense about the latter, so I do not agree with Mr Goldberg's conclusion that business common sense required CMS to have a veto on fleet growth. (Nor, to be clear, could I say that business common sense required CMS not to have a veto, and that is not the reason why I read Clause 3 as I do, in the context of the Master Agreement.)

197. I therefore conclude as a matter of construction, which means reading sensibly the language of the Master Agreement as a whole, in its business context, that by Clause 3 CMS promised to sell Units to TICM if TICM makes a reasonable demand to buy under the Master Agreement to grow the First Fleet. It is not necessary to look for an implied term or consider authorities on implied terms; but for completeness I note that the result is in line with the approach taken by the Supreme Court in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661.

198. In the context of the Distribution Model and Project, as defined in the Master Agreement, and TICM's status as Official Distributor under Clause 2, with its

implications, any *requirement* CMS will have "*to hire any CT Mobile Scanners and MRI Mobile Scanners*", as mentioned in Clause 7, will be to satisfy demand to rent Units out; and where it meets that demand, which it must do with First Fleet Units if available, i.e. TICM's Units, it will be renting them out for TICM. The sense of "*to hire*" in Clause 7 is 'to rent out', not 'to rent from TICM'. (In Clauses 14 and 23, I acknowledge, 'leasing' and 'rental' are used, not 'hire', in relation to renting Units out; but 'hire' is used in the primary definition of the Distribution Model setting the scope of the joint venture business to be conducted through TICM.)

199. That makes sense of the reference in Clause 7 to the hiring of which it speaks being pursuant to a "*hire agreement to be reasonably agreed between the parties*". Without reference to Clause 7, the Master Agreement provides that CMS will have possession, as well as operational and commercial control (for TICM), of all First Fleet Units. But it does not set out the contractual terms upon which First Fleet rentals are to be rented out (by CMS, but for the account of TICM). Those terms are to be reasonably agreed (Clause 7).

200. Devoid of context, stating that CMS will "*hire … from TICH*" might convey a rental by TICH to CMS. However, for the reasons I have identified, that is not how in my judgment the language of Clause 7 reads in the context of the Master Agreement. I note also that reading Clause 7 as referring to rental by TICH to CMS would fail to give content to the clear statement that the terms of the hiring to which Clause 7 refers are not to be found within the Master Agreement.

201. Clauses 8 and 9, then, do indeed go together, and they do deal with CMS renting *from* TIC, rather than with First Fleet Units being rented out by CMS *for* TIC. That is, in my view, *in contrast to* Clause 7, not alongside it (in terms of subject matter, I mean). The language is different, and I think the sense is different. The sense is that CMS undertakes *itself* to "*have on hire*", at any one time, six Units (Clause 9). That is the only term requiring provision of First Fleet Units to (i.e. at least notionally for the use of) CMS, rather than to and for the use of rental customers, so as then to be the subject matter of the 50% rental charge under Clause 8. I do not think it right, in this case, to pay too much attention to the fact that Clause 8 appears before Clause 9 rather than that they appear the other way round in the document.

202. Clause 9 thus creates the Golden Six, and operates on a Last Six basis: CMS's commitment is that it will take six Units, no more – it does not say or imply 'at least six' – for which it will pay, at the Clause 8 rate; if TIC does not provide as many as six Units under Clause 9, because fewer than six First Fleet Units are unrented, then TIC can only say it has earned from CMS under Clause 8 on fewer than six Units; the effect is, as TIC has contended, an obligation to pay under Clause 8 for unrented Units up to (but not beyond) the six Unit commitment under Clause 9.

203. That leaves two points of construction of the Master Agreement to consider at this stage:

(1) The meaning and content of CMS's 'best price' promise under Clause 19 (and referred to in Clause 3).

(2) The meaning and effect of "*its usual prevailing rate*", as used in Clause 8, the rate at 50% of which CMS is obliged to pay for the Golden Six.

204. The terms in which CMS's 'best price' commitment are mentioned in Clause 3 are rather muddled and unclear in meaning. It is there said to be a commitment to sell "*at [CMS] cost representing the lowest market price*". The cost to CMS of selling one Unit would be its Equipment acquisition cost (to be paid to CMSE), plus the cost to be paid to the housing manufacturer, plus (perhaps) some measure of the marginal overhead cost for CMS per Unit of arranging the sale of the Unit. As regards the housing cost, CMS has the added commitment at Clause 10 to procure housings initially from Bence "*upon the best terms obtainable*". A market price, and (therefore) "*lowest market price*", is conceptually different. No doubt any seller hopes that any price achievable in the market (and therefore any lowest market price) will always at least cover its cost, and normal market economics will say that, stated very broadly, one can expect some correlation between changes in a seller's costs and changes in at all events their offered pricing. That does not change the fact that a lowest market price and a seller's costs are, ultimately, quite different things.

205. As I have construed the Master Agreement, however, and thankfully, the primary provision containing CMS's 'best price' promise is not Clause 3, but Clause 19. Reading Clause 3, as regards price, as a clumsy paraphrase of Clause 19 makes better sense of the two provisions, construed together, than imagining that Clause 3 is the substantive provision on price. That in turn, I think, reinforces the view that, read sensibly, Clause 3 in material respect *does* articulate a promise to sell (on request), not merely a promise as to price if a sale is later agreed.

206. Clause 19 promises that all Units sold to TIC pursuant to the Master Agreement will be sold at "*the best price supplied to any other customer of [CMS] to date or in the future*". The sense of that last phrase, as I read it, is that CMS commits that any sale made immediately following the Master Agreement will be priced to match the best price given up to that point to any other customer, and any sale thereafter ("*in the future*") will be priced to match the lowest price given, by then, to any other customer. Subject to that clarification, I consider the language of Clause 19 to be simple and clear. It might be a more involved task, which I suppose could reveal subtleties of meaning that would have to be resolved, to ascertain whether CMS did always give TIC a Clause 19 price. However, there was no claim of failure by CMS to honour Clause 19 (aside from an isolated, and important, point that is raised by the Unit Sale Claim, so I deal with it below).

207. In the circumstances, I do not think it necessary to go further than saying that CMS's material obligation was to sell to TIC always at the best price at which up to the time of the sale in question it had sold to any other customer.

208. It is less straightforward to identify the true meaning of the unrented Unit rate to be paid by CMS under Clause 8. The language used is "*at a 50% discount off its usual prevailing rate*". Both sides read "*its*" as referring to TIC; but of course under the Master Agreement the business of renting out First Fleet Units (on behalf of TICM, as I have held) is given over to CMS. Tempting though it might be to think that, as Mr Goldberg KC suggested, on reflection, by his closing submissions, perhaps Clause 8 has in mind the Price List called for by Clause 14, I do not think that works. Even allowing for the generally poor drafting of the Master Agreement, it seems doubtful that Clause 8 had in mind to refer to that defined term by not using it; and on the evidence, it was always appreciated by the parties that Price List pricing might or

might not be achieved, either at all or as any kind of norm. I do not think therefore that Price List prices fit the bill of 'usual prevailing rates'.

209. The choice, I think, must be between (a) the rate currently being achieved by CMS for TIC on rented Units, and (b) the possibility that Clause 8 is another example of referring to something known to the parties that may or may not be paraphrased as well as it might have been by the language used. The first of those does justice to the idea of a 'prevailing' rate, but it ignores 'usual'. Even, again, allowing for the fact that the Master Agreement is not a tightly drafted document, the full turn of phrase, TIC's 'usual prevailing rate', surely conveys that the parties had in mind something standardised rather than the variability of the individual rentals placed by CMS from time to time.

210. Now, by the time the Master Agreement was concluded, the parties had effectively established between them, and were operating by reference to, a rate of that kind, namely the rate guaranteed by CMS under the Heads of Terms. On balance, I think it does better service to the language used to propose that Clause 8 harks back to that established rate. That also fits well the business case for the Golden Six commitment explained by Mr Kleanthous in his evidence, namely that it was a means by which CMS was, in substance, investing in TICM, the joint venture vehicle, rather than providing, as such, consideration for its shareholding, on terms that allowed CMS to know when concluding the Master Agreement the maximum size of that commitment.

211. I conclude therefore, on balance, that upon its proper construction, Clause 8 of the Master Agreement, the purpose and effect of which, read with Clause 9, was to establish the Golden Six commitment on a Last Six basis, requires payment by CMS at the monthly rate per Unit of £17,333 (MRI) or £14,083.50 (CT). Where more than six Units are unrented, that gives rise to the question identified, and answered, at paragraph above.

The Hire Agreement

212. TIC's case was that the Master Agreement does not provide for the proportion of the rental income earned by rented First Fleet Units that CMS is to pay over. TIC submitted that Clause 7 contains an agreement to agree in relation to that, and that there was then, so as to supplement or complete Clause 7, an agreement (singular), evidenced in writing prior to the Master Agreement and by the parties' conduct for 4 years in operating the Master Agreement, to the effect that all rental income earned by rented First Fleet Units was to be paid by CMS to TICM.

213. CMS's case was that there is no relevant supplementary contract, because "*its obligations to pay sums to TIC in respect of hire of Units are limited to the provisions of clause 8 of the [Master] Agreement and it is entitled to keep any revenue it receives from sub-hiring the Units.*"

214. I have set out how in my view Clauses 7 to 9 of the Master Agreement are to be read, and how that means they operate. In consequence, I reject CMS's case on the ground that Clause 8 only concerns unrented First Fleet Units, creating, when read with Clause 9, a Golden Six obligation on a Last Six basis in relation to such Units.

215. However, that does not mean TIC's case analyses the Master Agreement and the parties' subsequent conduct correctly, although a correct analysis does get to the conclusion for which TIC contends, namely that CMS must pay TICM the full amount of the rental income earned by rented First Fleet Units.

216. TIC relied on the following matters of fact:

(1) It was agreed between Mr Kleanthous and Mr Watson in August 2016, early in the commercial discussions that culminated eventually in the Master Agreement in March 2017, that CMS would give up the 8% revenue share on the First Fleet under the Heads of Terms, so that all First Fleet rental income would go to TIC. That was also evidenced in writing, prior to the Master Agreement, in emails from Mr Watson to Mr Kleanthous in September and December 2016, in which bullet point summaries of what, according to Mr Watson, had then been agreed included, *inter alia*, "*TIC Agreement [viz., in the event, the Master Agreement] to reflect the TICM Agreement [viz., the Heads of Terms]*", "*Toshiba [i.e. CMS] to have an 8% shareholding of TIC and take 8% profits*", and "*TIC to be official UK distributor for Toshiba rentals/ service customers*", without reserving to CMS any share of rental revenue.

(2) After the Master Agreement was concluded, the monthly spreadsheets treated CMS as obliged to pay rental revenue to TIC after deducting an 8% revenue share, as under the Heads of Terms. In December 2017, TICM invoiced CMS for the 8% deductions. That invoice was paid by CMS without protest, and from January 2018 the monthly spreadsheets were re-set so as to treat CMS as obliged to pay rental revenue to TIC in full, without any CMS revenue share.

(3) The parties operated under the Master Agreement on that basis, without any suggestion that it was not what had been agreed, until Mr Watson's provocative email in March 2021.

(4) The terms upon which, in December 2019, CMS offered to supply TIC with 36 additional Units over three years conveyed *inter alia* that CMS continued to understand that under the Master Agreement, First Fleet rental revenue went to TIC in full. I deal with that offer below, in the context of the Unit Sale Claim. TIC is correct to say that it made evident CMS's understanding at the time that it had no share of First Fleet rental revenue.

(5) There were other discussions between the parties over the years, prior to March 2021, in which the possibility was mooted of CMS giving up its right to 8% of TICM *in return for taking an 8% share of First Fleet rental income*. That made no sense unless, and therefore the fact and content of the discussion conveyed that, TIC and CMS both thought that their contract as it stood (i.e. the Master Agreement) did not entitle CMS to any share of First Fleet rental income.

217. The commercial agreement in 2016 that under any new contract, rental income from rented First Fleet Units would all go to TIC (paragraph above), was superseded and replaced by the Master Agreement. That is one of the plain effects of the entire agreement clause (Clause 43.1). It is no answer to that for TIC to point to the

agreement to agree in Clause 7, if (as it contended) that extended to the question of rental income revenue share. The effect of Clause 7, even on its own terms, let alone when read with Clause 43.1, is that the parties *had not yet bound themselves to anything and were to agree terms later* for whatever falls within the scope of its language of agreeing to agree.

218. The difficulty with the subsequent conduct relied on by TIC, in the present context, is that it does not give the appearance of parties seeking and achieving agreement, to supplement the Master Agreement, on a matter not governed by the Master Agreement as signed. The monthly spreadsheets are reporting and accounting documents, by reference to which the parties simply began to operate under the Master Agreement (as it happens, continuing their basic *modus operandi* from before). The evident purpose of the spreadsheets was to give effect, on a monthly basis, to what the parties had already agreed. Their provision by CMS to TIC was thus apt, other things being equal, to convey to TIC that CMS believed the Master Agreement to require payments to TIC as thus calculated. TIC invoicing on the basis of them was apt, other things being equal, to convey to CMS that TIC shared that belief.

219. For equivalent reasons, the monthly spreadsheets were also apt to be a means through which a difference of understanding, or dispute, as to what the Master Agreement meant, or how it is supposed to operate, might emerge. The reason for that is by nature the same: the function of the spreadsheets is to give effect to the parties' contract; therefore, if they calculated amounts due to TIC in a way that either side identified as *not* how they understood the contract to operate, the spreadsheets might naturally be a focus, directly or indirectly, of a consequent discussion between the parties. The business of TIC invoicing and CMS paying the 8% revenue share initially held back by CMS illustrates the point. Likewise, the discussion about the Golden Six in late 2017, and the first half of 2018, considered in paragraphs 115. to 119., 123., and 130. to above.

220. The Master Agreement contains terms requiring formality for any variation or waiver (Clauses 29, 43.1 (second sentence), and 43.2). Subject to the impact of those terms, in the light especially of *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119, the factual matters to which I have just been referring are or might be the stuff of an estoppel by convention or by representation as to the meaning and effect of the Master Agreement. They do not reasonably convey that the parties were agreeing additional terms left by the Master Agreement to be agreed. Although it is not evidence in any event of a supplemental agreement, because it was internal to CMS, Mr Hitchman's comment to Ms Drummond about the 8%, at the start of 2018 (see paragraph above), illustrates the distinction. The gist of his comment was that the 8% should not have been retained, and should be paid to TIC as invoiced, *because* (so Mr Hitchman believed) *that was what the new contract required* (i.e. the Master Agreement, as signed in March 2017).

221. I therefore reject TIC's case that a hire agreement, called for by and so as to supplement Clause 7, was entered into by conduct and provided for CMS to pay TIC all rental income earned by rented First Fleet Units. In doing so, I am in fact doing no more than agreeing with the approach instinctively adopted by the parties themselves (until lawyers became involved), that as between TIC (in fact, TICM) and CMS, entitlement to rental income from rented Units was a function of the Master

Agreement, not a matter requiring further negotiation and agreement after the Master Agreement was signed. I noted in paragraph above what I consider Clause 7 left to be agreed; it was *not* what should happen with rental income earned by rented First Fleet Units.

222. Although that means I do not accept the route by which TIC sought to get there, nonetheless I still have reached the destination that CMS must pay rental income earned by rented Units, in full, to TICM. I have got there because, properly construed, as I have held, the Master Agreement provides that CMS is to manage and operate the renting out of the joint venture Units (i.e. the First Fleet), owned by TICM, for the joint venture business, the corporate vehicle for which is TICM, the exclusive distributor of Units. CMS is to document that rental activity as part of its support for the joint venture vehicle TICM (Clause 23), and the resulting income is to be accounted for monthly on an open book basis (Clause 20). The effect of those provisions is that the business of renting out the First Fleet is managed by CMS for the benefit of TICM, not for CMS's own account. It follows that CMS must account to TICM for all that it earns for TICM, by renting out its Units, unless the Master Agreement provides to any extent to the contrary.

223. It is therefore not a difficulty for TIC that the Master Agreement does not say, in so many words, that CMS must pay to TIC 100% of rental income earned by rented Units. Rather, CMS has the difficulty, and it is an insurmountable difficulty in this part of the case, that the Master Agreement does not grant it any share of the joint venture rental income (just as, for that matter, it does not give Assets any such revenue share). That income is earned for the joint venture vehicle, TICM; CMS and Assets, as joint venturers, benefit from it only indirectly, as shareholders, through their ownership of TICM. The fact that, to date, CMS's 8% shareholding has not been issued to it cannot affect the proper construction of the Master Agreement as concluded in March 2017.

224. CMS also benefits, again indirectly, from First Fleet Units being rented out, because each rented First Fleet Unit is a Unit that CMS does not have to maintain on standby in storage. Any Unit in storage has an operational cost for CMS come what may, and may attract a 50% rental charge for CMS as part of its Golden Six obligation.

The Claims

225. In the light of that analysis of the Master Agreement and its primary effects, I now turn to consider the various claims pursued at trial.

Hire Claim 1 – 2021 Price List

226. Early in 2021, CMS communicated to TIC that it would be increasing its prices for scanning equipment by 10%, in line (it said) with an increase in its supply cost due to price increases in Japan, adverse exchange rate movement and additional Customs costs following the UK's departure from the EU. In what was not unfairly regarded by CMS as a 'tit for tat' response, by an email dated 9 March 2021, addressed "*Dear Customer*", Mr Kleanthous sent CMS a .pdf file titled 'CMSUK Internal Mobiles and Relocatables Pricelist 2021'.

227. The covering email repeated back to CMS its stated grounds for increasing its equipment pricing, and continued: "*Please accept this email as confirmation of our Price increase on 25th February of 10% applicable on all hires from March 1st 2021. Attached is the amended Price List. NB: Any individual price changes must be agreed and approved in writing.*" The attached .pdf was a (proposed) price list for rented Units, i.e. for rentals out by CMS of First Fleet Units, to take effect from 1 March 2021. In line with Clause 14 of the Master Agreement, such price lists had been agreed between CMS and TIC in 2018, 2019 and 2020. This new version had been prepared by TIC from the 2020 price list, adding the proposed effective date of 1 March 2021 in the heading above the price list itself, which was in tabular form, and adding 10% to the 2020 prices in the price list table.

228. CMS chose to ignore Mr Kleanthous' email, and therefore failed to respond in any way, constructively or otherwise, to its proposal that the rented Unit price list be put up by 10% from 1 March 2021.

229. Clause 14 of the Master Agreement obliges CMS to prepare "*the Price List for rental of the Units to hospitals and other medical centres*" in consultation with TIC; and 'Price List' is defined to mean "*the price list for the Units to be prepared in consultation with TICH as amended from time to time for the rental of the Units to hospitals, other medical centres or other end users*". In a joint venture agreement for a term of at least ten years, I do not think Clause 14 could sensibly have been read as providing for, or limiting CMS to, a single process of consultative price list setting, at the start of the venture. The Price List definition puts the point beyond any doubt. CMS's obligation was and is a continuing one, throughout the term of the Master Agreement, to maintain a rental price list for rented First Fleet Units, updating it from time to time, always in consultation with TIC.

230. It follows that CMS's decision to ignore Mr Kleanthous' 2021 price list proposal was straightforwardly a breach of Clause 14. It was itself a wrongful failure to engage in consultation with TIC. It will have resulted in the use by CMS as from March 2021 of a rental price list for the First Fleet that, in breach of Clause 14, was not prepared in consultation with TIC.

231. No monetary claim arises, however. TIC did not attempt to prove at trial that CMS would have generated higher First Fleet rental income than it has in fact achieved, if its rental sales team had since 1 March 2021 been working from Mr Kleanthous' proposed 2021 price list. It was not suggested that the Master Agreement includes or implies any promise by CMS that the Price List prices will always, or generally, be achieved.

232. The monetary claim that was pursued, seeking to link the Canon Contribution to Mr Kleanthous' 2021 price list proposal, fails for reasons explained already (paragraphs 67. and above).

Hire Claim 2 – Rental Income

233. I concluded, above, that on the proper construction of the Master Agreement, CMS was and is obliged to account to TICM, in full, for rental income earned by rented First Fleet Units. CMS is not entitled to retain any share of that income. I should make clear that I use that language in the way I apprehend the business people involved

would, not meaning to suggest by it that TICM has a proprietary interest in payments received by CMS by way of rental income from renting out First Fleet Units. Whether there might be an argument that TICM has any such interest was no part of the litigation and I imagine it might only have practical significance in an insolvency of CMS.

234. CMS's monetary claim in relation to rental income from rented First Fleet Units therefore fails *in limine*. That is the claim, limited to the May and June 2021 spreadsheets, that it paid over 100% of such income under protest in circumstances entitling it to claim if that was an overpayment. It was not an overpayment, however.

235. For completeness only, I deal with the basis upon which CMS put the claim, if there had been an overpayment. The pleaded case, not pursued, was a bare assertion that overpayment entitled CMS to be repaid. The allegation pursued in closing argument is that in respect of the May and June 2021 spreadsheet figures, it was agreed that CMS would pay 100% of the rental income from rented Units subject to an entitlement to claw back any overpayment the court might determine that to have involved.

236. That agreement is said to have been reached by the solicitors' correspondence summarised in the following paragraphs.

237. In a letter dated 30 April 2021, CMS's solicitors stated that, without prejudice to CMS's asserted right to treat any purported termination of the Master Agreement by TIC as a wrongful repudiation, CMS was "*prepared to pay the balance of the March 2021 rental income subject to the same being agreed*", adding that "*this payment is being paid in view of the parties' agreement to seek to resolve this dispute via mediation and does not alter its primary position that its only liability is 50% of the prevailing rate. Accordingly, any additional sums paid in respect of the March 2021 rentals will form part of the overall monies our client seeks to "claw-back" in these proceedings following confirmation by the Court that [CMS's] only liability was, and continues to be, 50% of the prevailing rate*".

238. TIC's solicitors' reply dated 4 May 2021 noted what had been said about March 2021 rental income and stated, in the context of possibly staying proceedings for mediation, that they were "*concerned that no reference has been made to the other monthly rental payments which will fall due during any proposed stay and if required up to trial*" and that "*unless you confirm that your client will continue to pay … 100% of the monthly rental income throughout the proposed stay and if necessary until the outcome of the proceedings, we will proceed to serve our defence and counterclaim within 14 days of … your amended particulars of claim and to apply for a speedy trial due to the extant undertakings [i.e. that resolved the interim injunction application]*".

239. An email from TIC's solicitors' dated 6 May 2021 asked if CMS's solicitors were in a position to confirm whether CMS "*will agree to pay the 100% rental fee up to and including the end of the suggested stay in this matter or indeed until the end of the proceedings*" and, if not, whether they would agree to an extension of time for TIC's Defence and Counterclaim.

240. A letter from CMS's solicitors, also dated 6 May 2021, offered dates in June 2021 for a mediation, saying that March and April 2021 rental income would be paid in full "*entirely without prejudice to [CMS's] primary position and … with a view to the*

parties resolving their dispute amicably", that it was not reasonable for TIC to insist that CMS pay 100% until the outcome of the proceedings, and that CMS was "*entirely confident in its position*" that it had only a 50% liability, that CMS would seek to claw back the extent of (what it said would be) its overpayments, but that "*Without prejudice to our client's right of clawback and in the true spirit of conciliation, … our client is prepared to pay 100% of the rental income during a period of the stay which shall be for a period of two months initially with the parties having the liberty to mutually agree to extend the stay …*".

241. TIC's solicitors' reply dated 7 May 2021 confirmed availability for one of the dates offered for a mediation, and stated under the heading "*Stay*": "*Thank you for confirming that your client will pay 100% of the rental income during the stay and [we] enclose a draft consent order for your consideration.*" I was not shown the draft Consent Order, but I note that a Consent Order was in due course issued by the court dated 10 May 2021, providing for a stay of the Claim until 16 July 2021 "*in order that the Parties may embark upon ADR*", with liberty to the parties to agree to extend the stay without reference to the court up to 10 August 2021, but not setting out any other terms of or consequent upon the agreement to a stay.

242. In that exchange, TIC (by its solicitors) was not asked to agree and did not in fact agree that CMS had or would have a right to 'claw back' overpayments. It is not now contended that CMS had any such right as it asserted, absent such agreement. The position, then, is that there was no agreement that CMS was to be entitled to reimbursement of any overpayments. CMS had made it clear that it would assert a right to be reimbursed, and TIC could not suggest in the face of that correspondence that CMS had waived any such right, but that simply left open, and not a matter of any agreement, whether such a right existed in the first place.

243. CMS's monetary claim therefore would have failed even if it had established that its true liability in respect of rented First Fleet Units was to pay at the Clause 8 rate rather than to pass on the rental income generated.

244. Having held that indeed CMS's true liability in respect of rented First Fleet Units was and is to pay over the rental income generated, paragraphs 70. to above set out all that I am in a position to say at this stage, before I have dealt with the Warranty/Servicing Claim, about TIC's consequent money claim.

<u>Hire Claim 3 – Canon Contribution (Golden Six)</u>

245. I concluded, above, that on the proper construction of the Master Agreement, in particular, that is, properly construing Clauses 8 and 9 as applying only to unrented Units, CMS is obliged to pay TICM for all unrented First Fleet Units at the rate provided for in Clause 8, but up to a maximum of six at any one time.

246. I examined the monetary claim advanced on that basis by TIC in paragraph above. The upshot is that for the period up to and including July 2023, it could not fairly succeed in a sum greater than £840,588.86, the sum claimed, and I shall invite counsel to assist me further as to whether (a) the proper claim for that period is smaller (and, if so, whether the correct amount can be calculated from the evidence adduced at trial) and/or (b) any further amount can or should fairly be awarded in respect of August to October 2023.

Warranty/Servicing Claim

247. Clause 4 of the Master Agreement obliges CMS to provide warranties and servicing covering all First Fleet Units, "*free … for three years from the date of first commissioning and thereafter at 6.5% of its Equipment list price from time to time.*" It is common ground that that is to be read as meaning, for each Unit, 6.5% *per annum* from three years after first commissioning, not a one-off charge of 6.5%. But 6.5% (per annum) of what? That is the question.

248. The contractual meaning of "*[CMS's] Equipment list price from time to time*" is not affected by how various data series may be labelled in the Salesforce software used by CMS, about which TIC neither knew nor ought to have known anything when entering into the Master Agreement. Having construed that contractual language, to decide what it means, and having then been educated about the software and its use by CMS, it might be that some pricing data available in Salesforce amounts to list price data, or data from which list pricing could be derived, in the sense used by Clause 4. But that would be because it so happened that Salesforce contained, or enabled one to calculate, that for which the Master Agreement had made provision. It would not be because the Master Agreement fell to be construed by reference to Salesforce.

249. Turning, therefore, to the ordinary meaning of the words used by Clause 4, reading them naturally, TIC submitted that:

(1) 'list price' connotes a standard or default price, a 'rack rate', charged to buyers, even if capable of being departed from, that is produced or contained within something that can meaningfully be described as a list such as might be displayed or provided to buyers,

(2) 'its' list price (i.e. CMS's) connotes that the list price is meaningfully a price set by CMS, such that CMS controls it and can display or disclose it to its buyers,

(3) 'from time to time' connotes a price that may change over time, the relevant charge, per Unit, then being 6.5% of the relevant price that is current when the charge falls due, and

(4) most obviously (and as is now common ground), 'Equipment' means that the relevant 'list price' is that of the Canon scanning equipment housed within the Unit, not that of the entire Unit, housing and all.

250. The final two elements in that submission are, I think, plainly correct. I do not agree fully with the first two elements, however, although I think they push in the right direction. In ordinary parlance a 'list price' for manufactured goods normally conveys either a manufacturer's recommended selling price or the price at which the goods are offered for sale by a seller. My quibble with the first element in TIC's submission is that, at all events in a business setting, not consumer sales, it seems to me there could meaningfully be a recommended selling price, or normal offered price, that is never, as TIC puts it, 'charged to buyers'. The business reality could be that at least some discount is always agreed in practice, without that detracting from the uniform, or at least normal, use of a certain price as the seller's offer. My quibble with the second element of TIC's submission is its insistence that to be a CMS 'list price', a price

must necessarily have been set by CMS, rather than be set for CMS higher up within the Canon group. In relation to both of those quibbles, and generally, I consider it is relevant to the meaning naturally conveyed by the contractual phrase to bear in mind that CMS is not the Equipment manufacturer, it is (in substance) the 'retail' trader for sales in its territory of scanners manufactured by its ultimate parent, Canon Inc, in Japan.

251. Allowing for my refinements of TIC's formulation, in my judgment "*[CMS's] Equipment list price from time to time*" naturally conveys a notion of a current recommended selling price, or normal offered price, for sales by CMS, either set by CMS itself or set for it higher up in the Canon hierarchy, as the case may be depending on how such things are organised within the Canon group. There is nothing in the background to the Master Agreement common to the parties that might suggest they were using the language of Clause 4 in any different sense. Mr Penny KC relied on the following matters:

(1) The fact that by Clause 3(vii) of the Hive Contract, Equipment maintenance services were to be provided by CMS after an initial free one-year warranty period at cost, but capped at 6.5% per annum "*of the capital cost of the Equipment as amortised over The Term*". As to that, see paragraph above.

(2) The fact that CMS does not charge anyone else for warranty/servicing by reference to Salesforce pricing date of any kind. However, TIC had no reason to know that when concluding the Master Agreement, which in any event is a long-term joint venture arrangement bespoke to TIC.

(3) Some references in the early commercial negotiations to CMS charging at 6.5% of the "*purchase price*" or "*equipment price*". These were also relied on in support of the application I refused at trial to amend to plead a claim for rectification. They are not admissible for the purpose of construing Clause 4, the language of which is different.

(4) The fact that when offering terms in December 2019 to supply TIC with 36 more Units over three years, CMS proposed that service pricing would be "*as per existing contract at 6.5% of invoice price per year invoiced monthly*". That is evidence of an understanding at CMS in December 2019 that Clause 4 of the Master Agreement operated by reference to the invoice prices of the First Fleet Units. It is not an admissible aid to the construction of Clause 4, as agreed in March 2017.

(5) The fact that CMS has charged (a) for warranty/servicing of Equipment installed at The Hive, purportedly pursuant to Clause 4 of the Master Agreement, at 6.5% of the price paid by Assets for the Equipment, and (b) for warranty/servicing of First Fleet Units, again purportedly pursuant to Clause 4, at 6.5% of the invoice price paid by TICM, albeit in error (as CMS now accepts) using the Unit price rather than only the price of the Equipment inside the Unit. But again, that is not admissible on the meaning and effect of Clause 4, properly construed, in a contract concluded in March 2017.

(6) The fact that the prices quoted to and paid by TICM for the First Fleet Units may have included a hidden warranty/servicing charge, in the sense that they

may have been higher than they would otherwise have been because the Master Agreement gave a three-year free warranty and servicing period rather than just passing on Canon Inc's standard one-year warranty. The evidence on that was unclear and confusing, but it did tend to suggest that there had been some such hidden charge. However, it was indeed hidden, to TIC, and therefore not part of any common background knowledge or understanding that might bear upon the proper interpretation of Clause 4. No claim was made that, in this respect, CMS had broken its 'best price' promise under the Master Agreement. Whether any such claim might have been made – about which I express no view at all – any price loading by CMS, unknown to TIC, as a commercial *quid pro quo* for the free warranty/servicing period, has nothing to say on the content of Clause 4 for the paid period of warranty/servicing thereafter.

252. On the evidence at trial as to the nature of the data in Salesforce, it can be seen that they include, or enable one to identify, recommended selling prices for sales by CMS of Canon Inc scanning equipment. The building of a quote for the supply of a CT or MRI scanner, whether on its own in CMS's main trading business or to be incorporated into a Unit for the mobile/relocatable market, is done with an eye on those prices, and CMS will measure its sales performance and be measured on it by CMSE, by reference to those prices. That does not mean they, or any, prices are uniformly or generally offered, as the evidence is that a bespoke quote is built up for every sale enquiry.

253. The result is that, although I have broadly accepted, with some refinements, TIC's case as to what Clause 4 means, I do not accept its submission that no 'list price' exists such as is therefore referenced. TIC's positive case that CMS is entitled, per Unit, only to 6.5% per annum of the price in fact paid by TICM for the Equipment inside, was in reality, as Mr Penny KC acknowledged in closing argument, an argument for the correction of an evident drafting error or the implication of a term required to give Clause 4 business efficacy, if it be found that it provides for payment at 6.5% of a 'list price' that does not exist. That is not my finding, however. There is no lacuna that, if it is to be filled, would require the drafting of Clause 4 to be corrected or a term to be implied.

254. One data series in Salesforce is labelled 'List Price'. However, on the evidence the 'prices' in that data series bear no relation to the reality of offering equipment for sale by CMS. They do not evidence or reflect any notion of a recommended or target, or even possible, margin for CMS to seek over cost. They are numbers detached from the reality of CMS's sales business. Mr Hitchman tried to suggest otherwise, in cross-examination describing the 'List Price' in Salesforce as a "*starting point for discounting*", having claimed in his written evidence in chief that it was a price in fact charged by CMS. Mr Hitchman has never made use of the Salesforce package as part of his job and his understanding of it was evidently very limited. Even without my general reservation about the reliability of his evidence, I would have concluded that in relation to Salesforce, with respect, he did not know what he was talking about, and should not have pretended otherwise.

255. To illustrate the point, in a Salesforce record that may relate to one of the First Fleet MRI Units (and referring to capitalised terms used by Salesforce):

(1) The magnet for the scanner had a Local Landed Price of £159,811.83 and a Budget Margin for a sale by CMS of 17.4%, giving (as I find) an effective recommended selling price for a sale by CMS of £193,476.79. The quote for the Unit built in a Sales Price of only £163,053.41 for the magnet, a significant discount against that recommended selling price, generating a Local Margin of only 1.99%, which will have contributed to the low enough weighted Local Margin for the overall quote that it had to be approved by CMSE in Holland. Meanwhile, the 'List Price' stated in Salesforce, but which bore no relation to and played no part in any of that, was £396,456.26.

(2) At the other end of the value scale, a monitor stand with a Local Landed Price of £259.85 and the same Budget Margin of 17.4% (and so a recommended selling price of £314.59) was built into the quote at a Sales Price of £288.31 (Local Margin, 9.90%), but the so-called 'List Price' was stated as £701.

256. I therefore reject CMS's case that Clause 4 charges TIC for warranty and servicing at 6.5% of the numbers labelled as 'List Prices' on Salesforce. I was unable to detect in Mr Goldberg KC's submissions in support of that case any basis for the connection it proposed beyond the labelling coincidence. Those submissions therefore, in substance, fell into the error of seeking to construe Clause 4 by reference to uncommunicated information about a data series label in Salesforce that may have been known about at CMS (although not by Mr Hitchman).

257. As mentioned in the examples in paragraph above, Salesforce gives, for any item of equipment CMS might be selling, *inter alia* a 'Local Landed Price', which will be CMS's cost to acquire the item, delivered in the UK to or to the order of its buyer, and CMS's 'Budget Margin' for that item. A selling price equivalent to selling at the Budget Margin over the Local Landed Price is the benchmark by reference to which any price quote will be constructed, and the measure by reference to which Canon's systems will determine the level of corporate seniority at which a quote may need to be authorised. That is so even if those benchmark prices may not be displayed as such within Salesforce and although it may be that not all users of Salesforce at CMS (depending on their seniority) will see the Local Landed Price listed as such. Mr Little explained that "*when we set the budget, the sales people come up with what they call an average selling price, so what they think a package of a certain configuration would sell for in the market. And then that will be agreed and CMSE Holland would work their magic of the transfer pricing and come up with the local landed price. That would be set. So the budget margin is the margin that would be achieved if we had sold … at the agreed average selling price.*"

258. The sales team user putting together a possible quote has a free text field for 'Sales Price' in which to enter a contemplated selling price for an item of equipment and Salesforce will generate and display a 'Local Margin' that the proposed price would give. It is not then difficult to calculate the Local Landed Price, or the benchmark based on the Budget Margin (if the user can see or is told the Budget Margin), as long as it is known of what the stated Margins are percentages. Mr Little explained that they are margins over the local landed prices, reported as percentages of the selling price; and that can be seen to be correct (allowing for rounding off) by doing calculations using the data in the example Salesforce screenshots that were in evidence.

259. Thus, for example, Salesforce will say that a price of £100,000 for an item with a local landed price of £90,000 gives a 10% margin. If Salesforce shows that a Sales Price of £100,000 represents a Local Margin of 10%, that therefore identifies the Local Landed Price as £90,000, whether or not the Local Landed Price data series is displayed to the user in question. If the Budget Margin for the item is, say, 8%, or 12%, then the benchmark selling price, i.e. the price that would give that margin (as a percentage of the selling price) over the Local Landed Price, is readily calculated as £97,826 (£90,000 ÷ 0.92), respectively £102,272 (£90,000 ÷ 0.88).

260. My conclusion, then, on the evidence at trial, is that the current recommended selling price identifiable from Salesforce for Equipment (as defined in the Master Agreement), being the price that will generate the Salesforce Budget Margin over the Salesforce Local Landed Price, has been and is now the "*list price from time to time*" referred to in Clause 4. I have articulated that with some care, because of the ongoing need to keep separate (i) the meaning of Clause 4 (which is a matter of contractual construction, fixing an answer for the term of the Master Agreement), and (ii) the identification of a price that matches that meaning at any given time (which is a question of fact to be determined from evidence, and facts can change over time).

261. I am not deflected from that conclusion by the fact, relied on by Mr Penny KC in argument, that when CMS's Mr Siddiqui sought to use Salesforce during the trial to generate pricing information for one of the First Fleet Units, it was not possible to replicate exactly the original Equipment configuration, because what would have been a software upgrade package charged for as a separate item at the time the Unit was ordered is nowadays standard. Issues of that kind resulting from equipment evolution over time might of course arise. I see no reason why they should make it impossible to generate a recommended selling price in Salesforce for, in substance, the Equipment originally sold; and in any event, practically speaking, having contracted with TIC (it may be uniquely) to peg warranty/servicing charges to current recommended selling prices, it is for CMS to ensure that such a selling price meaningfully continues to exist for the life of that contract.

262. As regards the true meaning and effect of Clause 4 of the Master Agreement, therefore:

(1) I conclude, but this is in any event now common ground, that it operates by reference to a 'list price' for the Equipment only, which is to say in the case of any First Fleet Unit only for the Equipment inside the Unit, not for the entire Unit.

(2) As regards that 'list price', I am not persuaded by either CMS's case that Clause 4 operates by reference to Salesforce 'List Price' data, nor by TIC's case that it operates by reference to the price it in fact paid for the Equipment.

(3) To the extent that either side claims a declaration that its construction of Clause 4 is correct, that claim fails and the declaration sought is refused.

263. That leaves for determination TIC's monetary claim in relation to charges raised by CMS to date purportedly pursuant to Clause 4 and either paid by TIC or purportedly set off by CMS against what it would otherwise have passed on to TIC in respect of rental income earned by rented First Fleet Units.

264. Having held that CMS was and is obliged to pass on such rental income in full, as claimed by TIC, my conclusion in paragraph above applies, namely that CMS has underpaid by £966,495.56 less the difference, if any, between (a) CMS's proper entitlement to warranty/servicing charges under the Master Agreement and (b) the amount actually paid to CMS by TIC in respect of such charges (i.e. not including amounts purportedly set off by CMS). It is CMS's burden to prove its proper entitlement, in that context of seeking to justify setting anything off against rental income due to TIC. The amount it has been paid is agreed at £1,506,664 (see paragraph above). It is TIC's burden to establish, for any claim to recoup any part of what it has paid, that it has paid more than it was liable to pay, by mistake (that being the only factor alleged by TIC so as to justify a restitutionary claim).

265. As regards CMS's proper entitlement, then:

(1) Its only pleaded case was of an entitlement to charge 6.5% per annum of what it alleges to have been Salesforce 'List Price' amounts for the Equipment inside each First Fleet Unit at the time when an approved quote to supply that Unit was locked into Salesforce. That was the effect of CMS's pleading and accompanying schedule, taking account as I now can of the factual evidence given at trial as to how that schedule was compiled.

(2) I have rejected that case at its first stage of whether the Salesforce 'List Price' data have anything to do with the 'list price' referred to in Clause 4. They do not. I would have rejected it in any event at its second stage, where it sought to use Salesforce 'List Price' data for dates other than the dates when warranty/servicing charges fell due under Clause 4.

(3) I have rejected TIC's positive case as to the proper construction of Clause 4, for the purpose of any claim for declaratory relief to assist the parties going forward. However, that does not mean CMS cannot rely on TIC's admission, in the context of claims as to the past, that it had a liability to pay £1,256,413 by way of warranty/servicing charges (paragraph above).

(4) The upshot is that CMS has not discharged its burden to show that it had any past entitlement greater than the amount it has been paid.

(5) But nor has TIC discharged its burden to show that it did not have a liability equal at least to what it has paid. In that regard, its only pleaded case was that its liability was limited to 6.5% of the invoice price of the Equipment, but that case has failed. There is no basis for a finding in TIC's favour that its liability on the basis of the Equipment 'list price' from time to time, on the proper construction of Clause 4 that I have determined, was not at least equal to the liability it admitted; and the Salesforce evidence, such as I have it, suggests that the Clause 4 'list price' from time to time will indeed have been higher than the price in fact paid by TIC.

266. The upshot, and in my judgment the procedurally fair outcome, is that in respect of the period up to and including July 2023 (for which I have the figures – I have observed already that the parties will need to assist me after this judgment has been handed down over what should be done about August to October 2023):

(1) There will be judgment for TIC (in fact, more particularly for TICM) for £966,495.56, the amount by which CMS has underpaid against its liability to pay TICM all rental income earned by rented First Fleet Units. That is not judgment in favour of TIC on its warranty/servicing charges claim; rather it is judgment in favour of TIC on its rental income claim, with the benefit of the conclusion now reached in the warranty/servicing claim that CMS has not justified that underpayment of rental income.

(2) TIC's claim for warranty/servicing charges allegedly overpaid fails and will be dismissed. (I noted in paragraph above that CMS did not pursue in closing its pleaded claim for monetary relief in respect of what it said had been an undercharging for warranty/servicing.)

Unit Sale Claim

267. In analysing the main provisions of the Master Agreement, above, I found that on its proper construction:

(1) Clause 3 includes a promise by CMS to sell Units to TICM, if TICM makes a reasonable request to buy under the Master Agreement.

(2) Clause 19 provides that the price of any such sale is to match the best price at which CMS has sold, up to the date of the sale in question.

268. Some of Mr Goldberg KC's submissions make it necessary to consider a little further what, in context, would constitute a *reasonable* request by TICM to buy Units *under the Master Agreement*. Pursuant to the Master Agreement, TICM is the joint venture vehicle co-owned by Assets and CMS by which, exclusively, the Unit rental business is to be developed and grown over (at least) a ten-year term. To that end, CMS agreed to quarterly meetings "*to plan strategy, tactics, commercials and potential investments for development of the business model and the Project*" (Clause 32.10), and "*regular meetings to ensure individual elements of the Project are delivered on time and key milestones are achieved*" (Clause 32.11).

269. Those arrangements by nature contemplate that, all going well, any growth of the First Fleet as part of developing and growing the Unit rental business will be jointly planned and agreed. But ultimately, as the joint venture vehicle and First Fleet owner, any business decision to grow the First Fleet will be TICM's decision. The reasonableness implicitly assumed and required by Clause 3 is the reasonableness, from the perspective of TICM's business, of ordering at the time in question the number of new Units requested. TICM has no reasonable interest in owning Units for the sake of owning Units. A new Unit is an expensive luxury to buy (around £650,000 (CT) or £1,100,000 (MRI)) if there will not be demand for it within an expanded First Fleet; and of course it would not be reasonable for TICM to seek to buy Units if it could not fund the purchase by means and on terms that offered at least a reasonable prospect of a return on that investment for it.

270. No doubt the primary contemplation of the parties will have been that through the regular strategy meetings, business plans would be adopted for TICM with which all parties were content (TICM itself, also Assets and CMS as TICM's co-owners). But if in the event different views were taken, in my view the only workable benchmark is

that of reasonableness *for TICM*. That benchmark gives meaningful protection for CMS; and in relation to how TICM was being run CMS would also have the protections afforded by the law to a minority shareholder (again, the fact that the shareholding has not been issued cannot affect the proper construction of the contract). A decision by TICM, otherwise reasonable for it, that the time was right to grow the First Fleet in some given way, cannot be rendered unreasonable by CMS being unhappy with the bargain it struck in the Master Agreement as to how the First Fleet is to be managed.

271. That deals with the required reasonableness of a request by TICM to grow the First Fleet. By definition, if it is to trigger CMS's obligation to sell Units under Clause 3, it must be a request to buy under the Master Agreement. Mr Goldberg KC advanced two submissions about that, one simple and correct, the other more complicated and incorrect.

272. The first, and simple submission, which I accept, is that *ex hypothesi* there would have to be a request to purchase at the 'best price' to which TICM was entitled under the Master Agreement. A request for CMS to sell at a discount of 30% off 'best price' would not create an obligation on CMS to sell. To the contrary, other things being equal, it would by nature amount to an invitation to consider selling otherwise than under the Master Agreement; and CMS would be entitled to reject it out of hand, or counter-propose terms that would create an arrangement other than that of the Master Agreement for the requested new Units. Equally, of course, CMS would be entitled, if willing, to accept the request *and* agree to the new Units being added to the First Fleet, without any other change to the terms of the Master Agreement applicable to them.

273. That is all, as I say, 'other things being equal', because care would need to be taken on the facts over whether TICM was asking to buy only if a discount against 'best price' was available, or was asking to buy at 'best price' if no discount was available while at the same time seeing if a discount might be offered.

274. Mr Penny KC submitted that it was a common business idea that a discount might be available for a bulk order, and he had some success in getting Mr Hitchman to agree that, in general terms, in cross-examination. In closing argument, this was elevated to a submission of construction, to the effect that CMS's 'best price' obligation stated by Clause 19 "*readily takes account of a bulk discount*". I do not agree that there is room in the language of Clause 19 for the idea that CMS is obliged to sell cheaper than at the 'best price' it states. The language is that of a 'price match' promise by reference to what CMS has in fact done with others, nothing more. It does not convey an obligation to better that, for CMS to identify the lowest price at which it might conceivably be willing to sell and offer that even if it has never had to go that low with any other buyer.

275. In my view there is a clear distinction between the two that Mr Kleanthous may not have kept clear in his mind at the time (or since), although I say that just as an impartial response to the frustration I could see that he feels about how things developed, not because it has any influence on the meaning of the contract. Thus, in one passage of his cross-examination, Mr Kleanthous said of his linking a proposal to buy 36 Units to a substantial discount, "*But that's normal. That's a standard business transaction, to buy in bulk to expect a discount*", then when challenged that there is no

bulk discount entitlement in the Master Agreement, said, "*Hold on, we are conflicting items here. In my simple mind, I am just trying to buy units for the best price which they [CMS] are supposed to supply me.*" As will be seen below, in my view, those answers neatly encapsulate the problem with TIC's Unit Sale Claim. I think it is Mr Kleanthous who has his wires crossed here. His first answer was fair, but its objective effect was to acknowledge that he was opening up a new transaction negotiation, not operating an extant entitlement. His second answer claimed that what he was doing was within the 'best price' term he had in the Master Agreement, and in my view the confusion there was in his mind, not in the question put. That question was, "*There's no bulk discount in the Master Agreement, is there?*", which of course is really a question for the court, not for the witness; and my answer is, no, indeed there is not.

276. The second, more complicated, submission from Mr Goldberg KC was that Mr Kleanthous was led by cross-examination to agree (i) that any requests that were made for CMS to sell TICM more Units were "*on terms which reflected his understanding of the [Master Agreement]*" and (ii) that it followed that if his understanding of how the Master Agreement worked was wrong, as regards rental income for rented Units or as regards the Golden Six, those requests were not requests to sell under the Master Agreement. It was said that this was fatal to the Unit Sale Claim if Mr Kleanthous was wrong on either point.

277. However, the effect of any requests made is a question for the court, not for Mr Kleanthous. That does not mean witness testimony could not be relevant. If the cross-examination had elicited things said by Mr Kleanthous to CMS, those statements would fall to be considered as part of judging the effect of any requests to grow the First Fleet that were said to found an allegation of breach by CMS. But Mr Kleanthous' evidence was not that he told CMS that any requests to buy were conditional on the Master Agreement working as he thought it did as regards rental income and the Golden Six. In my judgment, all he was doing was agreeing that when he asked for more Units for the First Fleet, in his mind he was asking for more Units that would be operated on the basis that all rental income went to TICM and there would be a Golden Six rule (Last Six basis), because in his mind that is how the Master Agreement worked.

278. Furthermore, at the time of the requests said to have been rejected by CMS in breach of contract, Mr Kleanthous' understanding on First Fleet rental income and the Golden Six was shared by CMS, and the First Fleet was in fact being operated on the basis of that shared understanding. The negotiation that did occur, to which I turn below, was led by Mr Kleanthous' request for a 30% discount. It proceeded, explicitly so in the detailed proposal put together by CMS, on the agreed basis that under the Master Agreement all rental income went to TICM and there was a Golden Six rule on a Last Six basis, and CMS would seek changes to that in return for discounting the price. Yet further, Mr Kleanthous' understanding of the Master Agreement on rental income and the Golden Six was in any event correct.

279. Mr Goldberg KC also criticised the way the Unit Sale Claim was formulated in closing argument. The pleaded allegation of breach is a failure to sell Units, in breach of Clause 3. In closing, Mr Penny KC focused on the sales process that CMS insisted was required for a sale, namely (i) request to buy, (ii) quote from CMS, (iii) purchase order, (iv) acceptance of order. He therefore described the complaint by reference to the root cause, on the facts, of the failure to sell (as alleged), *viz.* the failure by CMS

to quote for supply under the Master Agreement in response to a request for such supply. I do not consider that changes the substance. If CMS's sales processes required a certain sequence, and TICM made a contractual request for supply, then CMS cannot rely on its failure to follow its own processes to deny that it came under an obligation to supply.

280. The negotiation for a substantial supply of Units that now gives rise to the main allegation of breach began with a lunch at the 2019 UKIO Conference in Liverpool on 10 and 11 June 2019 ('UKIO' is United Kingdom Imaging and Oncology). Mr Kleanthous raised the possibility of TIC purchasing 36 Units. His idea was that CMS might commit to supplying Equipment to enable one Unit per month to be completed by Bence over a three-year period. That evening, Mr Kleanthous discussed the plan with Oliver Brown of Bence, hoping that Bence might agree to work exclusively with TIC-CMS. Mr Brown was interested; he conveyed willingness in principle, and production capacity, to commit to such a plan.

281. Critically, however, Mr Kleanthous made clear to Mr Hitchman at the lunch that for a bulk order of the kind he had in mind, he would be looking for a substantial price discount. He asked CMS to offer 30%. He meant by that, and Mr Hitchman reasonably understood him to mean by that, that CMS should offer terms to supply at a price 30% below the Master Agreement 'best price'. Mr Kleanthous accepted that in cross-examination:

> *Q: You asked for a pretty substantial discount –*
>
> *A; Yes.*
>
> *Q: -- on the units, didn't you?*
>
> *A: Of course.*
>
> *Q: Was it 30 per cent?*
>
> *A: Yes.*
>
> *Q: Was that 30 per cent of the price that you had generally been paying for scanners up to this point?*
>
> *A: Yes, so at the time we were talking more about CTs than MRs and they were around about 300,000, to give you some context on pricing.*

I clarified with Mr Kleanthous, looking at an invoice from the time indicating that he would otherwise have been expecting to pay c.£320,000 for a CT scanner, that he was asking CMS to look at giving him c.£100,000 off that price; he agreed, and acknowledged to Mr Goldberg KC in consequence that what he was doing was opening a negotiation: "*I shouldn't really say [this] in front of a supplier, [but] I never expected to get 30 per cent. I'd hoped to get to maybe 20, 25. I think they offered 15 on a rebate. It was just a negotiation.*"

282. I consider that Mr Kleanthous only meant to ask CMS to offer 30% off the price of its scanning equipment supplied within new Units, and I think Mr Hitchman understood the request in that way, but I doubt that was said in terms between them. In Mr

Kleanthous' mind, they (TIC-CMS) would work together with any housing manufacturer (hopefully Bence) to get a matching three-year commitment and the best pricing they could. They had used under the Master Agreement an agreed convention that CMS added 5% to Bence's invoices when passing that cost to TICM in Unit invoices, as a measure of CMS's own marginal cost of supplying the housing (as to which, see paragraph above), and Mr Kleanthous was not looking for that to be done differently.

283. On 19 June 2019 at a meeting with Mr Vincent (and Paul Parsons) of CMS, Mr Kleanthous referred to doing a deal with CMS and Bence for one new Unit a month for up to 30 Units. A few days later, on 25 June 2019, Mr Kleanthous emailed Mr Brown saying he was ready to place an order for six Units spread over a year, subject to pricing and an exclusivity agreement.

284. Any significant price discount, below Master Agreement pricing, was not something CMS could offer TIC without approval from CMSE. On 10 September 2019, Mr Vincent reported to Mr Kleanthous that the fact that CT#1 and CT#2 in the First Fleet had not yet been paid for by TICM was causing issues with CMS's price discussions with CMSE. Mr Kleanthous saw to it that those outstanding invoices were paid, and on 24 September 2019, in an email dealing with various different topics, he asked Mr Hitchman for indicative pricing for the 36 Unit idea: "***Outstanding order for 36 units* - *Is it possible to have an update and some indicative pricing for these units, we are eager to press ahead so need to know if you are still seriously interested in progressing this?*". (There is a longer story that could be set out in relation to the delayed payment for CT#1 and CT#2, but the detail, and any right or wrong on either side, does not now matter.)

285. On 8 November 2019 Mr Kleanthous, Dr Kleanthous, Mr Hitchman and Mr Watson met. They discussed the possible purchase, at a discounted price, of 36 Units spread over three years. CMS made clear that it would seek changes against the Master Agreement terms in return. Possibilities mooted included TIC bearing a significant proportion of running costs (70% was suggested by CMS), removing the Golden Six commitment, and reducing the free period for warranty/servicing from three years to two years.

286. On 9 December 2019 CMS provided TIC with a detailed written proposal for the sale of 36 Canon scanners (not Units) over a three-year period. The effect of the proposal, if accepted, was that indeed CMS would supply only scanners that could be installed into Units, leaving it to TIC to contract, with Bence or whomever, to have them turned into Units. (It was said, in terms, that "*3rd Party items (i.e. non-CMS made) will be excluded from Purchase Order and should be provided directly by TICH or by separate negotiation*", which I envisage was intended to cover *inter alia* housing for Units.)

287. CMS's proposal offered a price discount, but not the simple 30% from the start that Mr Kleanthous had requested. CMS's offer was for a retrospective rebate of 15% of accumulated invoice value to be earned by CMS, but only upon full performance, i.e. by completion and payment of the final individual order (the 36th new Unit) with no overdue CMS receivable from TIC, to be paid 30 days thereafter. In return, CMS sought by the proposal *inter alia*:

(1) "***Removal of Clause 9 ("Golden Six") Contract dated 17/3/17***" – "*From delivery of the next new mobile or relocatable, [CMS] will not subsidise rentals and … clause 9 … is void.*"

(2) TIC to have operational management, and bear all related costs, of the new Units, and the responsibility for and costs of insuring them.

(3) Warranty/servicing to be free for two years, charged thereafter at 6.5% per annum of the invoice price.

(4) CMS to give up its right to an 8% shareholding in TICM, but take an 8% share of all invoiced rental values.

288. The proposal also stated that CMS wanted the parties to consider, as CMS put it, "*tapering [operational management] responsibility of existing fleet to TICH until 2021*", and added "*TICH will assume all responsibility for Mobiles and Relocatables storage and power for any un-utilised systems in conjunction with their logistics supplier(s) immediately*", which appears to mean CMS shedding that Master Agreement cost on unrented First Fleet Units straight away, not just in parallel with any 'tapering' of responsibility for managing the First Fleet.

289. Mr Kleanthous replied by email on 10 December 2019, stating that "*Overall, your proposal represents a significant departure from the current modus operandi*". He said there would be too much to discuss for it to be worth keeping their scheduled two-hour meeting the following day. Putting the matter more bluntly than Mr Kleanthous did, CMS was using his request for a large price discount for a bulk order as a possible hook upon which to have a full-scale renegotiation of the bargain struck by the Master Agreement, with the costs of which it had become disenchanted.

290. Opportunistic though that was, the opportunity had been given to CMS by Mr Kleanthous. He had not requested to expand the First Fleet on the terms of the Master Agreement. He had asked to improve very substantially for TIC one main element of the bargain, the price of Equipment for Units. I have a sense that what CMS counter-proposed by way of improvements for it over the Master Agreement terms was, qualitatively, more substantial than the pricing improvement for TIC that it offered. Whether that would also be true in quantitative terms was not addressed at trial. Depending on the mix of Units created, if CMS's terms had been accepted and performed, the price saving for TIC may have been £4-5 million, and it might be that (a) 15%, and (b) only after the 36th purchase, would not have been CMS's final word. I am not in a position to assess the (negative) value to TIC of the burdens CMS was seeking to shift onto it, as against the Master Agreement arrangements.

291. The point for the Unit Sale Claim, however, is that CMS was doing nothing wrong by proposing a set of non-Master-Agreement terms against an invitation to offer for a non-Master-Agreement bulk purchase. Mr Kleanthous is a very experienced, successful, canny entrepreneur. Having had his request for a 30% discount rebuffed, if as decision-maker for TICM he was willing and able to press ahead with a three-year expansion programme for the First Fleet pursuant to the Master Agreement, all he had to do was make that his response. That is to say, he needed only to thank CMS for the proposal, reject it, and make instead an unambiguous request for the supply of Units at Master Agreement pricing and on Master Agreement terms.

292. Mr Kleanthous did not do that. Furthermore, in the light of his oral evidence at trial on this topic, I am clear that he had no interest in a bulk order of anything like the 36 Units for which he had asked CMS to offer terms, *unless* he could have both a discount of at least 20% off Master Agreement pricing for the Equipment and substantially the operational and management arrangements of the Master Agreement. If CMS was there for a deal of that kind (which it was not), I consider that Mr Kleanthous might have looked at amending some of the CMS cost elements, e.g. reducing the free warranty period by a year. The allegation advanced by the Unit Sale Claim, that TICM sought, and was ready, willing and able to undertake, a large-scale expansion of the First Fleet *on the terms of the Master Agreement*, was and is, in my judgment, just wishful thinking.

293. That is my assessment of the modified allegation ultimately advanced by Mr Penny KC in closing, namely that there ought to have been a new First Fleet Unit per month from mid-2020. The pleaded case, that there ought to have been (and it was through breach by CMS that there has not been and will not be) First Fleet growth, under the Master Agreement, as tabulated in paragraph above, was, in my judgment, quite fanciful.

294. The first, and major, allegation of breach in the Unit Sale Claim, namely that CMS acted in breach of contract by failing to supply 36 Units pursuant to the Master Agreement, with monthly deliveries from mid-2020 to mid-2023, in response to Mr Kleanthous' request that CMS offer terms to supply 36 Units over three years at a discounted price, fails.

295. For completeness, had it mattered I would have held that:

(1) a view held by TICM in late 2019 that it should grow the First Fleet by 36 Units over that three-year period, under and on the terms of the Master Agreement, would have been reasonable. It was TIC's, and CMS's, assessment at the time that there was and would be demand to support such growth, a proposition now also supported by the market expert evidence (Mr Melville's views having been clarified in cross-examination);

(2) there was no plan or intention on the part of TIC to expand the First Fleet beyond that, and I would not have found it probable that there would have been any further expansion of the First Fleet even after (if it had happened) TICM had requested, and CMS had delivered, 36-Unit growth during 2020-2023; and

(3) I would have rejected the unpleaded assertion implicit in the revised damages calculation attempted by TIC in closing argument that in mitigation it could not reasonably have achieved 36-Unit growth for the First Fleet during 2020-2023, if it had been willing and able to do so on the terms of the Master Agreement but had been prevented from doing so as it claimed. One implication of the pleaded 'mitigation scenario' that TIC took to trial was an effective admission that it could reasonably have grown its Unit fleet(s) by at least (in fact more than) 36 Units over 2020 to 2023. It would not have been fair to allow TIC to resile from that admission in closing argument; and Mr Penny KC accepted that if he was held to it, he was not in a position to show that any loss had been suffered.

296. On 21 March 2020, as the Covid-19 pandemic took hold and there was an obvious, immediate and urgent demand in the system for more CT scanning capacity, Dr Kleanthous emailed Mr Siddiqui and Ms Drummond saying that TIC should be rushing through an order for two or three basic specification CT Units "*to add to the fleet*". He asked if CMS would be content for TIC to move quickly on that, i.e. to place such an order, and asked if there was any prospect of improving on the normal 22 week build time.

297. In context, that was a simple, unequivocal request to be allowed to place an order for two or three new First Fleet Units, pursuant to the Master Agreement. There were no strings attached, there was no attempt to get a discounted price. Dr Kleanthous, as medic and businessman, was doing no more than asking for a small step to be taken, within the purview of the existing bargain, such that TICM could increase its ability to help in a national emergency.

298. Mr Siddiqui replied on 23 March 2020, stating (understandably) that in terms of supply, CMS needed to prioritise its ability to meet demand from the NHS to buy Equipment. He indicated that might mean CMS was not in a position for the then foreseeable future to get Units made for TIC. He said however that if TIC was able to fix a housing contract with a specialist builder, CMS could take an order for the scanning equipment to match, but very unlikely on its normal delivery timeframe. Dr Kleanthous replied the following day, saying he understood, and asking what the revised timescale would be.

299. By 29 March 2020, however, any availability concerns at CMS over meeting Dr Kleanthous' modest request had lifted, but regrettably CMS did not simply reply to him with that as good news and commit to supplying under the Master Agreement, as it was (I am clear) then in a position to do. By an internal email of that date, Mr Hitchman set out a range of options, only one of which was to "*Carry on with TIC as before [i.e. operate under the Master Agreement] for a few more months because we have enough on our plate and therefore build 2 or 3 more CT's*". In the absence of any supply issue, and Dr Kleanthous' request being patently both urgent and reasonable, that was CMS's contractual obligation, not just a possible business option; CMS was bound by contract to work with TIC as before for seven more years, not just a few more months.

300. Mr Hitchman's first three options to consider (complying with the Master Agreement, treated by him as optional, being the fourth), were:

"*1. Keep saying we can't get the scanners.* [That is to say, lie to TIC.]

2. As NHSI have cooled down on new relocatable CT's then work with TIC on more but under new contract and 80:20 G6 [i.e. Golden Six] *rule.*

3. Stall TIC and build some ourselves anyway in case NHSI come back with urgency."

301. By email on 3 April 2020, Mr Siddiqui applied a blend of Mr Hitchman's options 1 and 2, telling Dr Kleanthous that CMS was willing to quote for two new relocatable CT Units but only if they were supplied "*outside of the current agreement and under the full management of TIC*". He offered the usual CMS-TIC 'best price' and a three-

year warranty period. The explanation given for this approach was substantially untrue, as it stated (inconsistently with the offer to supply two CT Units) that all CT equipment CMS could get its hands on was earmarked for other projects, and suggested that the reason CMS would only supply outside the Master Agreement was because "*we still do not see the market increasing long term solely in the unstaffed market*", as to which: the Master Agreement was not and had never been understood to be for Units that would operate solely in the unstaffed market; I do not believe, on the evidence, that CMS's view in fact was that the unstaffed market would not see (at least some) growth in the long term; and anyway a view about that at CMS was not the reason why CMS was refusing to match Dr Kleanthous' reasonable demand for Master Agreement supply.

302. On 6 April 2020, in a long email dealing with a range of topics, Mr Hitchman confirmed to Mr Kleanthous that Mr Siddiqui would provide a quote for two CT scanners for installation into Bence relocatables. That email also asked if Mr Kleanthous wanted to discuss the December 2019 proposal. In reply on that, Mr Kleanthous reminded Mr Hitchman that they had agreed to clear up other outstanding bits and pieces first.

303. In the light of CMS's seeming insistence that the two new CT Units would have to be outside the Master Agreement, on 7 April 2020 Mr Kleanthous emailed Mr Siddiqui asking for CMS's confirmation that it would not consider TIC to be in breach of the Master Agreement if that purchase went ahead. In more detail, he said his understanding now was that CMS was offering to supply two new CTs but not through Assets/TICM. He mentioned Mobile – set up, he said, for a breast screening unit that CMS had been unable to supply – and suggested that Mobile could be the non-Master Agreement purchaser. But, he noted, in that case "*we will effectively be running a rival company so will probably need some kind of waiver …*". He said that all TIC's rights under the Master Agreement were reserved, and that "*we would not normally run a company that would compete with our [i.e. TIC-CMS's] fleet business so would want to be assured by [CMS]'s absolute blessing and official approval.*"

304. In the event, Mr Vincent provided the quotation, on 14 April 2020, it was accepted by Mobile, the two new CT Units were supplied to Mobile, and the Second Fleet was thus born out of CMS's refusal to abide by the Master Agreement. A written waiver such that CMS cannot complain that the Second Fleet puts TIC in breach of the Master Agreement was in due course provided.

305. On 1 May 2020 Mr Watson provided Mr Kleanthous with indicative pricing for up to 30 Units to be supplied by Canon to the Second Fleet over three years, including a different price discount scheme to that proposed in December 2019. This time the offer was a discount of 7.5% on the first 6 Units, earned and paid after completing the 6th purchase, 7.5% on the next 6 Units, earned and paid after completing the 12th purchase, then, successively, discounts of 10%, 12% and 15% on each following batch of 6 Units, earned and paid after completing the batch in question.

306. Mr Kleanthous did not pick up immediately that the increasing price discount levels proposed by Mr Watson were only for the respective batches of 6 Units. He thought they would operate retrospectively so that if ultimately 30 Units were purchased, all of them would benefit from a 15% discount. He accepted at trial that in fact, read carefully, Mr Watson's email did not say that. Be that as it may, a price discount

arrangement was ultimately agreed and has been applied to the Second Fleet (the parties having resolved a difference about that which led initially to a pleaded claim in the litigation). But I understand that to mean only that it is a pricing basis agreed for whatever further Units CMS in the event sells for the Second Fleet. The possibility of a contract committing both sides (i.e. CMS and, as it might have been, either Assets/TICM or Mobile) to any particular number of new Units over any given timescale never came to fruition.

307. The final word on expanding the First Fleet, prior to the litigation, was in August 2020. In an email on 18 August 2020 to Mr Kleanthous, Mr Watson wrote that "*we will not accept any further units to be added to the "Canon" Fleet.*"; and in an email on 21 August 2020, again to Mr Kleanthous, Mr Watson wrote that "*we will only be managing the current "Canon fleet" as it is today. We are not able to manage additional units or costs.*"

308. In context, obviously Mr Watson's references to the "*Canon Fleet*" are to the First Fleet. His messages, each of them and together, were a simple, wrongful renunciation of CMS's obligations under the Master Agreement. The second message was also untrue. CMS is able to manage additional First Fleet Units and associated costs. However, it had become unwilling to do so.

309. TIC's own case is that that renunciation was never accepted. Therefore, it gives rise to no damages claim. It is, as the old cases have it, a thing writ in water; an unaccepted anticipatory breach that never became, by acceptance, a breach terminating the Master Agreement and entitling TIC to claim damages for loss of bargain. CMS's renunciation was effectively withdrawn by CMS's pleaded stance, reaffirmed at trial, that it will abide by the Master Agreement, as its meaning and effect may have been determined by the court. Specifically, I understand CMS's position now to be that if the result at trial is a decision that Clause 3 included an obligation to sell Units for First Fleet growth, then CMS intends to comply with it if a request for new First Fleet Units is made that CMS is therefore obliged to meet.

310. Reverting to Dr Kleanthous' March 2020 request to order two or three new CT Units, it will be clear from what I have said about that, above, that I find CMS to have acted in breach of the Master Agreement by failing to sell TICM new CT Units to add to the First Fleet, i.e. pursuant to and on the terms of the Master Agreement. Mr Kleanthous reserved TIC's rights under the Master Agreement as part of what then became Mobile's agreement to buy instead. On balance, I do not think the evidence allows me to find that there could at the time have been three new Units rather than the two that were in the event agreed and supplied, but to Mobile rather than to TICM. The breach, therefore, is a failure to sell TICM two new CT Units under a purchase order for the First Fleet that Dr Kleanthous' request should have generated.

311. If a relevant damages claim had been presented and evidenced, TIC might have been entitled to something other than nominal damages for that breach. No such damages claim was presented, however, and I do not consider that it is the court's function in those circumstances, or fair to CMS, to attempt some damages calculation for itself *de novo* by this judgment. The evidence and argument on damages in the Unit Sale Claim was all directed to the wholly different damages calculation that would have fallen to be considered if there had been a valid claim for breach in failing to supply a very large number of new Units spread over the term of the Master Agreement from

2020. Given the price discount on the two new CT Units, and their individual profitability as part of the Second Fleet to date, it is not self-evident that substantial loss has been suffered.

312. For completeness, I should repeat here that the choice by Mr Kleanthous, in that respect effectively acting for both TIC and Mobile, to have CMS sell the two new CT Units to Mobile rather than TICM, was just that, a choice. CMS's breach did not require the Second Fleet not to be on TICM's books (see paragraph above). That is why, in the previous paragraph, I indicated that the price agreed with Mobile, and the profitability of the Units in the Second Fleet, owned and operated by Mobile, would have been relevant to any damages claim for the limited breach I have found.

313. On the Unit Sale Claim overall, therefore, apart from any declaratory relief to be granted, with counsel's assistance as to wording, there will be judgment for TIC that CMS acted in breach of the Master Agreement, but an award of nominal damages only.

Competition Claim

314. There are three strands to what was referred to at trial as the Competition Claim. There is a degree of overlap in relation to the facts, in the sense that the existence of a strategy at CMS to involve itself in the Unit rental market in a way that would compete with the First Fleet is disputed and falls to be judged on the whole of the evidence. It will be convenient nonetheless to consider each of the strands separately, in turn, if I take them in this order:

(1) firstly, TIC's claim that CMS has rented out Units other than First Fleet Units, in breach of Clause 7 of the Master Agreement;

(2) secondly, TIC's claim that CMS has participated in or facilitated the rental of Units by CMSE in the UK, in breach of Clauses 17 and/or 41 of the Master Agreement;

(3) thirdly, TIC's claim that CMS has entered, directly or indirectly, into an agreement or agreements with CMSE and/or others, or intends to do so, that is or will be competitive by nature with the Project, in breach of Clauses 17 and/or 41 of the Master Agreement.

Competition Claim 1 – CMS Rentals

315. As the parties' cases evolved and the evidence came out at trial, this is now a very narrow claim. CMS's relevant obligation, created by Clause 7 of the Master Agreement, is not to rent out a Unit other than a First Fleet Unit if a First Fleet Unit is available for the rental. Mr Penny KC submitted that CMS is not entitled to rely on unavailability in the First Fleet Unit caused by a failure of CMS, in breach of the Master Agreement, to sell Units to TICM to enlarge the First Fleet. That may be right, but it takes TIC nowhere. The only breach I found in the Unit Sale Claim was the failure to supply two new CT Units to the First Fleet, in response to Dr Kleanthous' request in March 2020. There was no claim that CMS has rented a CT Unit into the market where there was none available from the First Fleet, but one of those CT Units would have been if they had been in the First Fleet rather than the Second Fleet.

316. The only surviving claim, then, was that one of the First Fleet MRI Units was available, and should have been used, for a contract CMS secured with Living Care for a transportable MRI scanning unit for the English Institute of Sport at the Sheffield Olympic Legacy Park, a redevelopment of part of the old Don Valley Stadium site in Sheffield. The rental ran from 1 June 2022 to 31 January 2023, earning rental income of £354,383.85 plus VAT.

317. CMS's pleaded case is that the First Fleet had no *suitable* unit available. The allegation there is that Living Care "*required a more modern scanner with a wider range of use*" than the Canon Elan model scanner installed in the First Fleet Unit which CMS admits was unrented at the time. The Unit supplied to Living Care is equipped with a current generation Canon Orian model scanner.

318. The fact that the Orian scanner is a newer model, with wider capabilities, makes it possible, in theory, that the Living Care contract might have been one that could not have been served by the First Fleet Unit. But CMS provided no documentary evidence suggesting that Living Care required, for the rental period, the enhanced scanning capabilities of the Orian; and there is no basis for a presumption that the higher quality equipment was needed.

319. No witness evidence was led by CMS either, of a requirement for the Living Care rental that the Elan scanner could not have satisfied. The particularisation of TIC's Competition Claim came very late in the case, after trial witness statements had been exchanged, so it would not be right to read anything into the absence of written witness evidence in chief on the point. It is nonetheless surprising that a suggestion that Living Care had communicated a specific need that the Elan could not have met emerged for the first time only in the cross-examination of Mr Watson on Day 9. In that evidence, Mr Watson said:

    (1) firstly, that Living Care "*were contracting with Sheffield Teaching Hospitals to do 100 patients a month and … we all knew that the NHS wanted to have a wide bore*" (meaning, for Canon MRIs, an Orian not an Elan). Mr Watson expanded on the second part of that in later answers, saying that "*it's an element of common knowledge that if the NHS need to do MR scanning and you are trying to compete with – against Siemens, that the Orian is the best machine*" and that "*all NHS customers now want a wide bore MR … [and] a long table and prostate screen*";

    (2) secondly, that Living Care only specified their requirements verbally, and any detailed discussions would have been with Mr Siddiqui;

    (3) thirdly, that nonetheless he (Mr Watson) himself had conversations with Luke Minshal of Living Care, who told him that "*they were using it on the NHS patients*";

    (4) fourthly, having been confronted with First Fleet MRI Unit rentals to NHS hospitals that contradict the claim that MRI scanning for NHS patients nowadays must mean an Elan scanner will not be suitable, Mr Watson insisted that he "*understood from Living Care that they were offering a prostate screening*", so that "*My understanding is that the Elan just wasn't capable of providing what Living Care wanted*".

320. Mr Goldberg KC supplemented that evidence in closing argument, without objection from Mr Penny KC, by producing an extract from Living Care's website captured on 2 November 2023. It evidences that today, Living Care's offering includes MRI prostate screening, in what is now a permanent, clinic installation.

321. I infer that the Living Care rental contract, for which CMS did not attempt to offer the available First Fleet MRI Unit, was a temporary solution for Living Care to enable it to begin providing MRI diagnostic scanning at the Sheffield site pending the completion of the fixed facility. I do not regard Mr Watson's evidence as any reliable basis for a finding that for that interim period, Living Care required the additional capabilities of the Orian scanner. The website extract corroborates the idea that Living Care's plans for Sheffield included prostate scanning, and the possibility therefore that they might have been in the process of contracting with an NHS hospital trust or other NHS organ to provide such services. It does not follow that the scanning to be carried out, or in fact carried out, as an interim solution, using the relocatable rented by CMS to Living Care, could not have been undertaken by the Elan scanner.

322. In my assessment, Mr Watson in truth has no idea whether the scanning undertaken by Living Care during the rental contract period could have been performed by the Elan scanner, or whether Living Care would have taken the First Fleet MRI Unit if CMS had treated its earnings as the priority over making money from the non-TIC Unit. It is surprising that there is nothing in writing to support CMS's position that the non-TIC Unit was required for the Living Care rental. All the more so since the Living Care contract was placed while these proceedings were on foot. There is no evidence on the point from those in a position to assist the court, either Mr Siddiqui or Living Care itself.

323. My conclusion is that CMS has not shown that it was within the "*subject to availability*" exception to its *prima facie* obligation under Clause 7 to satisfy rental demand for Units exclusively from First Fleet Units. My positive finding, if such a finding is required, would be that CMS chose for its own commercial reasons, to the detriment of TIC's, to offer Living Care the Orian unit, which was sitting as an unused asset on CMS's books (for reasons that do not matter for present purposes), rather than to maximise the utilisation of and income for TICM from the First Fleet. The admitted use of the Orian unit rather than the First Fleet MRI Unit that was unrented at the time, for the Living Care contract, was therefore a breach of contract by CMS.

324. The rental income earned by CMS should have been earned for TICM under the Master Agreement. But for one complication, there would be judgment for TICM in that amount in respect of this breach. The rental income earned is equivalent to £10,125.25 per week, or just under £44,300 per month. That is in line with earnings that have been achieved from First Fleet MRI Units when rented. On the expert evidence, it is also well in line with market rates – if anything, it is quite a low rate – and in my view there is no reason to suppose that any premium was paid within the rate for having an Orian scanner rather than an Elan, in the absence of proof that Living Care required the Orian's extra capability for the rental period (in which case there would have been no breach).

325. The complication is that the available First Fleet MRI Unit was in fact treated by CMS as earning a Golden Six payment, during at least some of the months of the

Living Care contract, even on the erroneous approach CMS was adopting for the Golden Six obligation at the time. The amount credited to TICM on that basis will have been paid to it, either at the time or now through the judgment that is to be entered in its favour on the rental income claim. It therefore needs to be credited against the rental income earned from Living Care in a final damages calculation for the purpose of identifying the correct judgment sum.

326. That damages judgment will then replicate, in money terms, the position TICM would have been in if the First Fleet MRI Unit in question had been rented for June 2022 to January 2023 (inclusive). It must therefore be left out of any recalculation of any judgment to be entered in TICM's favour on the Golden Six claim (as to which, see paragraphs 79. and above).

Competition Claim 2 – CMSE Rentals

327. CMS admits and avers that CMSE owns and operates a fleet of Units that CMSE has rented and is likely to continue trying to rent *inter alia* into the UK. Self-evidently, as CMS likewise admits and avers, that business is competitive with the First Fleet. That is so whether or not there have been CMSE rentals that could have been First Fleet rentals, in the sense that a suitable First Fleet Unit was available for the rental contract in question. As it happens, CMS admits that such rentals have in fact occurred.

328. The reason I say those matters are averred, as well as admitted, by CMS, is that its position at trial was that CMSE's rental activity in the UK is not welcome, an annoyance and frustration, activity CMS would like to see stop.

329. As regards CMS's knowledge of or involvement in that CMSE activity, CMS contended that TIC was advancing "*a rather far-fetched allegation of a secret agreement between [CMS], its parent company, and two builders of Units to compete against TIC in the UK market*", and argued that TIC was interpreting incorrectly "*a handful of emails concerning [CMSE's] operations*". That submission was in line with the evidence in CMS's trial witness statements:

(1) Mr Hitchman said that on the "*handful of occasions*" a CMSE Unit was rented in the UK, "*we knew nothing about these rentals until after they arrived in the UK*"; "*As we knew nothing about the rentals until afterwards, we certainly were not involved in it being placed in the UK*"; and in his reply statement, "*I can confirm that we are not and [have] never been working together with CMSE to rent units into the UK.*"

(2) Mr Watson said that "*[CMSE] are our parent company and a separate legal entity. We have no say in anything they do.*"; and in his reply statement, "*[TIC] must have completely misinterpreted snippets of information, if they think we have a European fleet which is being operated in the UK*".

(3) Mr Little said that he "*know[s] nothing about any secret Fleet, any conspiracy against [TIC] to rent units into the UK (other than the odd unit which has been rented here by [CMSE] without our prior knowledge or consent).*"

330. That evidence dealt both with the specific complaint that CMS has assisted CMSE with UK rentals of CMSE Units, and the wider allegation TIC makes that there is now

a strategy at CMS to increase its involvement in the Unit rental market by working with CMSE, rather than by developing the First Fleet (which competes with CMSE). Irrespective of any such wider strategic context, the evidence was materially untrue as regards CMS's involvement in CMSE rentals into the UK.

331. A table obtained by CMS from CMSE for the purpose of providing Further Information it had been required to provide lists some 26 rentals of CMSE Units in the UK since the Spring of 2020, and only one prior to that, which was a rental to a hospital in Rochdale in November 2018 arranged by CMS that led, when it was discovered by TIC, to the Unit in question being sold to TICM to join the First Fleet. The CMSE rental customers have included customers or former customers of the First Fleet. I do not accept CMS's allegation that TIC was aware at all material times of this activity by CMSE, or of CMS's involvement in it. There was the episode in November 2018 to which I have just referred; but I accept TIC's evidence that otherwise, its knowledge of these matters has come from what has emerged through the litigation.

332. Two of the rentals listed in that table were long-term rentals arranged by Mr Siddiqui at CMS, generating revenue of £832,395, of which CMS retained £126,780. In an email to Mr Watson on 20 October 2020 in relation to the first of them, Mr Siddiqui explained he had arranged it "*given the strategic direction of CMS fleet management in Europe*". In relation to the second of them, in a WhatsApp message to a group that included Mr Watson, Mr Siddiqui celebrated that "*all of this money will go to CMS with £73,164 for CMS UK*", to which Mr Watson responded "*another good win, well done*".

333. For the most part, the CMSE rentals disclosed by the table seem not to have generated any income for CMS. In those cases, it may be that the rental customer will have dealt primarily with CMSE rather than (if at all) with CMS in arranging for the rental. I say only that that may be the case, because I accept Dr Kleanthous' evidence that he was told by Rose Tijhaar of CMSE, at a trade convention in Vienna in March 2023, that UK enquiries to rent CMSE Units should be directed to CMS, because I do not believe that CMS has given the court through its trial evidence a complete or accurate account of its activity in relation to CMSE's Units, and because it is CMS, not CMSE, that has existing relationships with UK customers, as well as being registered on NHS frameworks, so it is inherently unikely that CMSE would or could look to expand its rentals into the UK market so substantially without help from CMS. (On that last point, I note that CMS's established presence in the UK is the very reason Ms Tijhaar gave Dr Kleanthous why CMS should be contacted for UK rentals of CMSE Units.)

334. On any view, as the evidence came out at trial, it is clear that all CMSE rentals to UK customers have been facilitated by CMS, commissioning the Unit at the start of the rental, servicing if required during the rental, and decommissioning at the end of the rental. In that regard, CMS's involvement came out, first, in Mr Bartlett's evidence. That evidence was then confirmed by Mr Hitchman and Mr Watson when they were asked about it. The upshot is that since CMSE does not have its own servicing team, CMS involvement has been essential to date for CMSE rentals to the UK to take place. On the basis of CMS's consistent conduct in facilitating CMSE rentals in that way, I would have concluded that a standing arrangement – an agreement by conduct – was in place between CMS and CMSE for CMS to assist in that way. In any event, Mr Hitchman admitted that since January 2023 there has been an agreement between

CMS and CMSE under which CMSE is to notify CMS in advance of any CMSE rentals to the UK so that CMS can organise its servicing assistance in an orderly fashion.

335. The reality, therefore, is that CMS has been working with CMSE for some years, and continues to do so, without which assistance CMSE would have been unable to effect the Unit rentals into the UK it has undertaken, although the rental of Units into the UK by CMSE is self-evidently competitive to the First Fleet and the Master Agreement Project.

336. Mr Goldberg KC submitted that no breach of contract resulted, because of Clause 18 of the Master Agreement. The argument was that undertaking warranty repairs and servicing for Canon scanners in the UK is a normal part of CMS's business, and therefore it is entitled to commission, service and decommission CMSE Units, because Clause 18 preserves its entitlement to carry on "*its normal trading business*". I do not accept that argument. Even if servicing Units that are in the UK on rental is covered by Clause 18, the point is that rentals that compete with the First Fleet should not be occurring for that service to be required, if they are rentals the existence of which has been facilitated by CMS.

337. In any event, I do not regard it as clear that servicing UK Unit rentals other than of First Fleet Units *is* covered by Clause 18. I think the better view may be that CMS's "*normal trading business*" refers to CMS's business selling scanners rather than Units, for fixed (permanent) facilities. It ensures that CMS's promises not to compete (e.g. in Clause 17) do not put it in difficulty where, say, a hospital is or might be looking at a choice between buying scanning equipment and renting a Unit. CMS is to be entitled, if it wishes, to try to turn that opportunity into an equipment sale, and need not favour the opportunity of a rental contract for the First Fleet. I do not need to reach any final view as to that, however.

338. In my judgment, therefore, there has been, and continues to be, a breach of Clauses 17 and 41 of the Master Agreement in CMS's facilitation of CMSE rentals in the UK. It is obviously a matter for CMSE whether it wishes (and is allowed, under Canon group internal policies, if there are any) to compete with the First Fleet, i.e. with TICM's Units as managed by CMS, if it would have to do so without CMS's assistance, and whether, if it does not, it wishes instead to help CMS help the First Fleet and the Project by referring demand to CMS, to be satisfied if possible by First Fleet Units and (it may be) justifying requests by TIC to add capacity to the First Fleet by calling for CMS to sell TICM more Units pursuant to Clause 3. However, what should not happen, in the absence of a written waiver from TIC of its non-competition rights under the Master Agreement, is that CMS facilitate CMSE in renting Units into the UK, increasing the competition the First Fleet faces for winning business.

339. I shall deal with what relief should be granted separately, after considering the question of breach by reference to the third way in which TIC puts its case.

Competition Claim 3 – Competitive Strategy

340. TIC alleges that it has become CMS's strategy to work with CMSE to develop and generate income for a fleet of Units owned by Canon (CMS itself and/or CMSE), *and therefore* not to allow the First Fleet to grow, but indeed to act, directly or indirectly,

in competition with the First Fleet. I am satisfied that Mr Kleanthous (and also Dr Kleanthous) is in earnest in fearing, and expressing the concern, that that is the reality. Inevitably perhaps with a concern of that kind, formed from the outside, Mr Kleanthous' view derives from a range of matters, some more, some less significant individually, for which he finds it difficult to see an innocent explanation (from the perspective of the First Fleet and the Master Agreement), leading him to infer that there is a strategic shift away from TIC by CMS. Whether he is right or wrong to be concerned, I am satisfied, as I have said already, that his concern is genuine (honestly held). If he were wrong to be concerned, it might indeed be a case, as Mr Watson argued, of Mr Kleanthous misinterpreting bits and pieces of information (see paragraph above). I have concluded, however, that Mr Kleanthous is right to be concerned.

341. As Mr Penny KC marshalled them in closing, the facts and matters from which he asked the court to find that Mr Kleanthous was indeed not only honestly concerned, but right to be concerned, because CMS has been and is now working with CMSE against the joint venture Project under the Master Agreement, were the following.

342. Firstly, from December 2018 to September 2019 or so, CMS and TIC had discussions about the possibility of expanding the Project into Europe, with a building programme for new Units that might use Smit, a Dutch coachbuilder, as well as or instead of Bence. Mr Hitchman seemed to be enthusiastic, as was Mr Kleanthous. As part of those discussions, there was a joint TIC-CMS visit to Smit in Rotterdam in August 2019.

343. Mr Hitchman reported on the meeting internally to CMSE's CFO by email on 23 August 2019, saying it had been "*a very successful visit*" such that "*we are given homework to submit attractive proposals that incentivize loyalty and accelerated roll out.*" TIC, Mr Hitchman said, wanted 36 Orian (MRI) and Prime SP (CT) Units, with a mix around 50:50 and "*[a] framework order placed as soon as we can get it all together and roll out over 2 to 3 years*". Mr Kleanthous had indeed asked CMS to quote terms for that sort of supply of Units. I dealt with that in considering the Unit Sale Claim. Mr Hitchman's email indicates that he had in mind that if a purchase order of that size were agreed, it would be part of expanding TIC-CMS operations into Europe, not just a growth of a UK rental fleet.

344. Mr Kleanthous gave evidence that this led to the first concern on his part that CMS was choosing instead to work with CMSE. As he explained it:

(1) the meeting with Smit had been a good opportunity to talk Mark Holmshaw, a senior individual at CMSE, into the TIC-CMS circle, the business model had been well explained and understood, and "*I thought fantastic, we are now going to roll out in Europe*"; however

(2) "*all of a sudden something was wrong because a few months after the meeting with SMIT suddenly I was closed down. I could see … we weren't progressing, the meetings got more difficult and all of a sudden we've escalated into this legal dispute and I couldn't get my head around why*"; and

(3) he believes that Canon (either CMS itself, or CMSE which would then have directed CMS) decided, "*hang on, this is a good business, we should be doing*

it ourselves ...".

345. The principal development a few months after the meeting with Smit, of course, was CMS's December 2019 proposal. I have already dealt with that. I do not reject Mr Kleanthous' evidence that he felt "*closed down*" by it; but I do not consider that to have been a necessary reaction. Mr Kleanthous, in my view, lacked the perspective that he had invited CMS to offer different terms than those of the Master Agreement for the bulk supply he had proposed, by asking them to quote a price to which he was not entitled under the Master Agreement. In any event, an unwillingness on CMS's part for the financial arrangements of the Master Agreement to apply to a much larger fleet than the First Fleet as it then stood does not evidence an intention to take an expanded fleet business away from TIC. After all, the December 2019 proposal, for all that Mr Kleanthous did not like its terms, was a proposal to supply TIC with the large volume of new Units Mr Kleanthous had said he had in mind. There is no basis for thinking that if Mr Kleanthous had been happy to live with the terms, or a variant of them that CMS might have agreed after a negotiation, CMS would not have honoured its December 2019 proposal.

346. Secondly, CMS understood from September 2019, if not before, that CMSE was looking to build its own fleet of Units that might be capable of competing with the First Fleet. In a messaging conversation on 11 September 2019, Ms Drummond mentioned to Mr Vincent an email she had received from a French academic leading a lung cancer screening programme who was interested in using a mobile CT scanner. Ms Drummond noted that "*if cmse start using their own mobiles i wonder if there would have to be an agreement in place as to who gets first dibs at enquiries like these*". Mr Vincent's response was "*Indeed ... could get interesting!*", rather than that no such agreement was needed, or would be appropriate, because CMS's loyalty had to be to TICM's Units.

347. Thirdly, in February 2020, Johan Vochteloo, the individual at CMSE with primary responsibility for the development of its fleet, contacted Mr Hitchman following a meeting in Amsterdam, proposing, in substance, that CMS and CMSE should be working together in relation to the Unit rental market and asking for details of CMS's activity, i.e. details of the joint venture business, with a view to CMSE benefiting from having that information. Rather than rejecting CMS-CMSE collaboration because of CMS's exclusivity with TIC, Mr Hitchman replied that CMS "*would like to keep working with [CMSE] on rentals to keep momentum going*", and that Mr Watson and Mr Siddiqui would support a mobile Unit that CMSE was showing at an upcoming conference to "*grab as many leads for mobiles and relocatables with you. We can then work together growing rental income and positioning assets around Europe.*" It will be remembered that the Master Agreement Territory includes anywhere in the world (other than India) in which CMS substantially utilises the Distribution Model.

348. Mr Siddiqui followed up Mr Hitchman's email the next day, telling Mr Vochteloo that he would pass on the French lung screening opportunity, that "*We are keen to find a way to work together with you regarding the rental systems across Europe and see the benefit to all parties in doing so*", and that at the conference Mr Hitchman had mentioned Mr Siddiqui would "*look forward to discussing a new enhanced relationship with you.*" Mr Watson joined in a few days later, promising Mr Vochteloo that he and Mr Siddiqui would be at the conference "*to fully support and*

help promote the Secondlife business [i.e. CMSE's rental Units] as well as our Commercial Solutions business in the UK which as you know is more than just mobiles and relocatables. I'm sure we can benefit from a collaborative approach." On the same day (10 February 2020), Mr Vochteloo wrote that "*it is still on my radar to explore our own European fleet under the Canon umbrella, and if I can do this together with your team than [sic.] that has my preference above the TIC construction. Jamile and Ian are very welcome and to support our mobile possibilities. Looking forward to work together to come to a mutual beneficial program.*"

349. Fourthly, Units from the CMSE fleet have been rented into the UK since July 2020 (the business to which I referred in paragraph 331.*ff* above).

350. Fifthly, internal emails and a Commercial Solutions 2021 strategy document record a strategy at CMS to distance itself from TIC and work with CMSE on a "Canon Medical Systems" fleet, so that all of the profits would remain in the Canon group:

(1) An email from Mr Siddiqui to Mr Hitchman dated 9 July 2020, the immediate context of which was how to keep business CMS might do with Mobile and the Second Fleet separate from the operation of the Master Agreement, stated that he saw "*a far greater importance of closer working with our Second Life organisation than with [TICM], indeed this is in part due to the vision of having our own fleet and weaning ourselves away from [TICM] both points you have made in the past two weeks.*" Mr Hitchman replied, stating that CMS would "*navigate TIC and whatever 'mobile Ltd' manifestation there is, and grow our own fleet*". In cross-examination, Mr Hitchman claimed that this was just "*continuity planning in case Mr Kleanthous didn't want to do it anymore*". The emails say nothing of the sort, and in my judgment Mr Hitchman's evidence on them was an attempt lacking credibility to explain away a revealing exchange damaging to CMS's case.

(2) An email from Mr Hitchman dated 6 August 2020 forwarded to a large number of CMS employees a forward planning email he had sent to his seniors at CMSE, to give the UK team "*a more detailed sense of where we are trying to get this company to in the next few years*" so that they would know what the "*desired end-game*" was in case "*some short term decision making might make less sense immediately*". One key project Mr Hitchman's email to CMSE identified was the "*Canon Medical mobile fleet*", on which he said that the arrangement by which CMS operated the First Fleet "*on behalf of an entrepreneur TIC*" had been a misstep ("*Had the permissions to on-balance sheet these [Units] been available at the time we would own this fleet of x13 assets and many of those assets would **not only** have recovered all their costs by now but be continuing to **print free money***" (original emphases)), said that the Unit rental market "*grows before our eyes*", and proposed ways of taking advantage of that market growth without TIC.

(3) The Commercial Solutions department strategic marketing plan for 2021 recorded "***The long term strategy (by 2023) for Rentals – Market Penetration***" in these terms: "*The 3 year plan is to stop selling our scanner to Tic and build our own Canon Medical fleet with the backing of CMSE which will allow CMS to keep all profits. No support from marketing during 2021*

required." That could not be clearer. It is not Commercial Solutions purporting to set policy, it is Commercial Solutions laying out its marketing strategy to support established CMS policy. There was no support from marketing needed during 2021, but CMS's corporate policy to increase its market penetration for rentals *by 2023* (when there would still be four years left of the initial Master Agreement term) was to build its own fleet, i.e. to compete with TIC, with support from CMSE, allowing CMS to keep all the profits.

351. Mr Hitchman distanced himself from the marketing strategy document, saying it "*came from middle management*", was never put before the Board and "*did not set out an approved strategy*". It may be that the document was drafted by 'middle management', but it was a working document, referred to and updated at regular Commercial Solutions department meetings at least some of which Mr Watson attended. It had his approval by that conduct whether or not he had any input into its drafting. The stated policy is in line with Mr Hitchman's exchange with Mr Siddiqui and general circular in the summer of 2020. For his part, Mr Watson initially claimed not to have seen the document and noted that "*the author of this was the marketing team*"; but pressed about its nature and some of its contents, Mr Watson had to accept that he would have seen it at the monthly meetings when he attended. In an unguarded moment, he also recognised that if the document had been drafted by his marketing team (I say 'his' since he is CMS's Director of Commercial Solutions), the understanding of CMS's rental market policy will have come from what he will have said to the team. He suggested that therefore he must have been misunderstood; but in my judgment there is no reason to think that likely, and the only reason Mr Watson suggested it is that the document is so flatly inconsistent with the case he knows CMS to be running in the litigation.

352. Sixthly, CMS has expended substantial effort on Orian projects, grappling in particular with design engineering complexities of creating a suitable housing for the Orian MRI scanner. One upshot, as things stand, is that no satisfactory Orian mobile Unit has yet been achieved, but there is a relocatable solution. Four Orian Units have been built, and they all went onto CMS's books. One was the Unit used for the Living Care contract that I found to have involved CMS in a breach of Clause 7 of the Master Agreement. Two were used to service a CMSE contract to support the Birmingham Commonwealth Games in 2022. One has been sold, but the other three remain on CMS's books, and I agree with Mr Penny KC that it is a reasonable inference that the reason they are not currently being actively marketed and rented out is probably this litigation, i.e. CMS have in mind to assess what to do with the three Units still on its books by reference to the outcome of this trial.

353. CMS alleged that the first of these Orian Units – the one used for the Living Care contract – was offered to TIC to buy. That would not be an answer to TIC's complaint: there is no exception to Clauses 17 and 41 of the Master Agreement allowing CMS to engage in competitive activity using Units if they have been offered to TIC but TIC has declined to buy. In any event, I do not accept the implication that CMS was forced to take the Unit onto its own books by a decision on TIC's part not to buy. I agree with Mr Penny KC that the evidence shows CMS had the Unit made with a view to renting it out for itself. It identified sale to TIC as another option, but one that CMS would only look at if it felt that better suited its needs than keeping it for itself:

(1) The email from Mr Hitchman to Mr Vochteloo dated 6 February 2020 to which I have already referred stated *inter alia* that "*the Orians may go to TIC or may stay on CMSUK books or several potential buyers may purchase either. However, if one goes to a buyer we will build another. We know the Orian is key to our future and interim rental of Orians will grow pan EU.*"

(2) An email from Mr Vincent dated 4 October 2020, to Wayne Goring of Smit, enquired after delivery dates for the Units, saying that "*we are looking at some queries from customers at present and are eager to include these units in our rental fleet when ready*". I think it clear that by 'our rental fleet', Mr Vincent did not mean the TICM-owned First Fleet. He emailed Mr Watson on 9 December 2020 reporting that, "*Looks like SMIT built relocatable Orian may be in UK and available by March. With this in mind, we could be in a position either to rent it out ourselves or sell it to TIC (if it works and suits our needs)*."

354. Seventhly, the correspondence does not evidence irritation or annoyance within CMS at CMSE's rental market activity, extending into the UK market as it has now done on a material scale for over three years. To the contrary, those at CMS consistently appear to share CMSE's enthusiasm for the fact that, in contrast to the Master Agreement, the relevant rental income will stay within the Canon group. Furthermore, with the exception of the Rochdale rental in October 2018, which CMS informed TIC about inadvertently in response to a request from Mr Bartlett for an updated fleet list, CMS did not inform TIC that it was renting CMSE Units into the UK market, or about CMSE doing so and CMS facilitating that activity.

355. I agree with Mr Penny KC that those matters demonstrate, in some cases individually and overwhelmingly so when they are taken together, that CMS has been, and subject to the outcome of this litigation would continue to be, an active participant, since the summer of 2020 at the latest, in the Unit rental business of CMSE, including in the UK, which is competitive with the First Fleet and the Master Agreement Project. CMS's participation has been at the invitation and encouragement of, and by agreement with, CMSE. It has been in breach of Clauses 17 and 41 of the Master Agreement accordingly.

356. It is fair to say that TIC therefore has proved only a narrower, or smaller, case than the full width or extent of what it pleaded, as a matter of inference, may have occurred. But I am satisfied that the particular complaints pursued at trial were within the scope of the wider pleaded case, and that it is procedurally fair, as well as correct on the evidence, to hold CMS in breach to the extent that has been established by reference to those complaints.

Competition Claims 2 & 3 – Injunction / Damages?

(i) Injunction?

357. The Master Agreement has not been terminated and is due to run until March 2027. There is therefore room for injunctive relief to be of value to TIC. It asks for an injunction restraining CMS from facilitating the rental of CMSE Units to customers in the UK, and in particular from:

(1) introducing Unit rental customers to CMSE;

(2) commissioning, servicing or decommissioning CMSE Units rented to customers in the UK;

(3) itself renting CMSE Units to customers in the UK, unless there is no First Fleet Unit available for the rental in question, "*after a period of time sufficient for Ds to have grown the fleet to a reasonable level*" (the meaning and effect of which I do not find easy to grasp);

(4) renting, or marketing for rent, the Orian Units currently on CMS's books, or any other Units which may be added to CMS's or CMSE's books (but I do not understand why any prohibition on renting out Units owned by CMS should not be subject to the same First Fleet availability qualification as any prohibition on renting out Units owned by CMSE.)

358. It is for TIC to persuade the court that injunctive relief is available in principle and appropriate on the facts, and to justify the precise terms proposed if an injunction is to be granted. Without losing sight of that, CMS advanced only limited objections. Mr Goldberg KC's written closing argument made a single submission, namely that to prevent the commissioning or servicing of Units for healthcare settings would not prevent someone else commissioning or servicing them but might put patients' health at risk due to the delay in, for example, a hospital having an urgent replacement scanner in operation. In closing, Mr Goldberg KC rested, rather differently, on CMS's pleaded statement that it would comply with the terms of the Master Agreement as clarified by the court, statements by Mr Watson in evidence that there is no present intention of working with CMSE, and an invitation to the court to find that CMS might be glad of the court's ruling that commissioning and servicing CMSE Units is a breach of the non-competition terms of the Master Agreement, if that be the decision, so it could "*show that to Mr Vochteloo and say we can't do it anymore*", the suggested result being that no injunction was needed.

359. There are in fact two pleas in CMS's written submission. Each asserts that an injunction would or might put patients at risk and says that is reason not to grant an injunction.

360. The first, and narrow, plea argues that to prevent CMS from servicing CMSE Units currently rented in the UK would or might put patients at risk. The practical realities of that were not explored in evidence, but I have found that currently, CMSE's Unit rentals in the UK have been placed on the basis that CMS *will* commission, service and decommission the Unit in question. I think it a reasonable concern that suddenly disrupting that, with immediate effect, could have untoward consequences. As a matter of discretion in relation to the precise form of relief to grant, I would err on the side of caution and build in a proviso entitling CMS to service current CMSE rentals in the UK for a grace period of six months, and to decommission CMSE Units currently rented in the UK.

361. In any event, there would need to be a proviso entitling CMS to commission (etc) CMSE Units, if any, rented *by it* into the UK in circumstances of First Fleet unavailability.

362. The second, wider, plea argues that preventing CMS from facilitating *further* CMSE Unit rentals could put patient health at risk. I do not accept that plea. The expert

evidence at trial was of a well-developed UK rental market served by a substantial number of lessors. If CMS's unavailability to CMSE for the facilitation of UK rentals of CMSE Units will limit CMSE's ability to win UK rental contracts – and the evidence does not enable me to judge how real, if at all, that possibility is – that is a consequence of the bargain CMS struck by the Master Agreement. (The case has been presented throughout, on both sides, on the basis that the only relevant legal regime is that of ordinary English contract law. There has been no suggestion that on TIC's construction of the Master Agreement, any part of it is unenforceable under any applicable competition law rules.)

363. The plea by Mr Goldberg KC in closing that CMS should now be trusted to abide by the Master Agreement, as its meaning and effect has been determined by this trial, is more naturally considered alongside TIC's reasons for saying that an injunction should be granted.

364. Firstly, TIC submits, there is no evidence that, if not restrained by the court from doing so, CMS will cease to facilitate CMSE Unit rentals in the UK by commissioning, servicing and decommissioning the Units under the existing arrangements. I agree. Furthermore, the points identified in paragraphs 360. and above are most conveniently addressed as part of an exercise of the court's discretion over the precise terms in which CMS is to be enjoined from acting, particularly the first point since it does involve striking a discretionary balance so as not to restrain all activity that infringes the Master Agreement.

365. Secondly, TIC says, the likelihood is that, following the conclusion of these proceedings, unless restrained from doing so, CMS would look to rent out the three Orian Units now on its books, since there is no suggestion that they are about to be sold and there was evidence that, unrented, they are an unwelcome standing overhead cost for CMS. I agree with that too. Mr Watson did not give a straight answer to the simple question whether CMS would look to rent these Units if it could not sell them, saying instead that "*it is not an intention, if Mr Kleanthous wishes to buy them, we are happy to sell them*". If TICM reasonably considers that these Orian Units would be good for the First Fleet, then under Clause 3 of the Master Agreement it can require CMS to sell them to it for them then to be managed under the Master Agreement. If TICM does not take that view, but Mobile wishes to add them to the Second Fleet, it may be the parties will agree terms for that. Certainly, I did not form the view that Mr Kleanthous is trying to saddle CMS with overhead costs just for the sake of it. But ultimately whether the Units are sold, and if so whether to one of Mr Kleanthous' companies or to a different buyer, is not relevant to whether CMS should be allowed, for so long as they are not sold, to use them to compete with the First Fleet. The short answer to that, I consider, is no.

366. Thirdly, the injunction sought goes beyond servicing (etc) support for CMSE rentals, and rentals by CMS otherwise than of First Fleet Units in breach of Clause 7. The wider aspect is whether CMS should be restrained, in more general terms, from assisting CMSE with its Unit rental business.

367. I have found that CMS's strategy from mid-2020, set from the top, was to steer CMS away from TIC, and to work with CMSE instead, and that the target (had it not been for this litigation) was to build up by 2023 a 'Canon Medical' fleet, by nature competitive with the First Fleet, with a view to earning and retaining within the

Canon group more of the Unit rental income that might be available in the market than could be achieved through the Master Agreement. At the time when that strategy was set and communicated internally, the understanding at CMS was that all rental income from renting First Fleet Units had to be passed to TICM, which I have concluded is a correct understanding. CMS has not been frank with TIC, or with the court, about that strategy. Instead, CMS sought through the unpersuasive evidence of unreliable witnesses to explain away the clear evidence of its strategy in the documentary record, and to cast Mr Kleanthous as conspiracy theorist.

368. In my view, there is a strong likelihood that, unless restrained by the court in terms that spell out with clarity what CMS is not to do, CMS will continue to work with CMSE, competitively with the First Fleet, for the remaining duration of the Master Agreement. It is just and convenient for there to be an injunction in such terms as will seek to ensure that CMS now sticks to the bargain.

369. By s37(1) of the Senior Courts Act 1981, the court has jurisdiction to grant a final injunction following trial where it is just and convenient to do so; and it has long been the law that the court will usually grant an injunction to restrain a breach of an express negative covenant, such as a contractual promise not to do something, if it is not shown affirmatively that granting such relief would operate unjustly, for example by imposing extreme harshness on the defendant out of proportion to its wrongdoing. The principle was reviewed helpfully by Teare J in *SDI Retail Services Ltd v The Rangers Football Club Lte* [2018] EWHC 2772 (Comm) at [46]-[52].

370. To the extent that an injunction to enforce a contractual prohibition aims to prevent an anticipated future breach of a prohibition (a *quia timet* injunction), rather than only to respond to and require cessation of a past or continuing breach that has already been established, the court will ask two, cumulative, questions (see, for example, *Vastint Leeds BV v Persons unknown* [2018] EWHC 2465 (Ch), [2019] 4 WLR 2, *per* Marcus Smith J at [31(3)] after reviewing some of the authorities):

(1) Is there a strong possibility that, unless restrained by injunction, the defendant will act in breach of the claimant's rights?

(2) If the defendant does act in contravention of the claimant's rights, will the resulting harm be so grave and irreparable that damages would be an inadequate remedy, even after allowing for the possible grant in response to the new actual breach of an immediate interim injunction, to restrain further occurrence of the acts complained of pending trial?

371. In this case, subject to the qualifications I identified in paragraphs 357., 360. and above, in my judgment it is appropriate to grant a final injunction.

372. CMS has acted, and is continuing to act, in breach of express negative covenants contained in the Master Agreement by facilitating the rental of CMSE Units in the UK. It also acted in breach of such a covenant by renting its own Orian Unit to Living Care, during the proceedings, and is likely to repeat that type of breach unless restrained. CMS has agreed to work with CMSE, competitively with the First Fleet, and it set a three-year business strategy for its Commercial Solutions business accordingly, in breach of its express contract not so to compete; and I have concluded

that there is a strong likelihood that, unless restrained by the court, CMS would continue to do so.

373. CMS's breaches are by nature harmful to TICM's business in such a way that it is inherently difficult to demonstrate particular quantifiable loss. Seeking to prove that CMS's competitive activity has resulted in measurable losses in TICM's business could be almost impossible; but the competitive behaviour strikes at the heart of the relationship created by the Master Agreement. It is simple justice to give TICM the security, for the remainder of the term of the joint venture, to grow the First Fleet, if (other things being equal) it formulates a reasonable plan for such growth taking advantage of CMS's sale promise under Clause 3, and to work with CMS, and have CMS work for it, to maximise the rental income generated by the First Fleet, free from the spectre of CMS working in the background against its interests.

374. Though TIC has established only a relatively limited actual breach of CMS's obligation to add to the First Fleet by selling further Units to TICM pursuant to the Master Agreement, I consider that TIC is correct to understand that CMS's wrongful declaration in August 2020 of an unequivocal unwillingness to allow the First Fleet to grow was motivated by the strategy set by Mr Hitchman of weaning CMS off the contractual relationship with TIC under the Master Agreement.

375. To the extent that the injunction proposed would operate *quia timet*, in my judgment that is justified by the fact that competitive behaviour might or might not be apparent to TIC before it may have caused harm that will be difficult or impossible to demonstrate or measure with any confidence. The possibility of an interim injunction, granted promptly upon TIC becoming aware, if it did, of infringing behaviour, does not, I think, adequately meet the threat to TIC's legitimate interests under the Master Agreement.

(ii) Damages?

376. TIC pleaded no particularised damages claim in respect of the breaches by CMS of Clauses 17 and 41 of the Master Agreement that have been committed to date, on my conclusions. In that regard, its pleaded case was:

(1) by paragraph 75 of the Counterclaim, that CMS's breaches of contract alleged in the Competition Claim have caused TICM (alternatively Assets) loss particularised in paragraphs 21-22 of the Schedule of Loss, and that "*In the premises, TICM (alternatively Assets) claims damages for breach of contract in a sum to be assessed*";

(2) by the prayer to the Counterclaim, that TICM and Assets claimed "*Damages for breach of contract*" (with a plea also for "*Such further relief as the Court deems fit*"); and

(3) by paragraphs 21-22 of the Re-Re-Amended Schedule of Loss, that TIC would claim a loss of profits resulting from breach of CMS's non-competition covenant or duty of good faith (as alleged) that it would particularise following disclosure.

377. At trial, TIC sought instead a judgment for damages to be assessed, with directions for the exchange of further pleadings and evidence, and a separate damages trial.

378. In *One Step (Support) Ltd v Morris-Garner and another* [2018] UKSC 20, [2019] AC 649, the Supreme Court reaffirmed the compensatory nature of damages for breach of contract, in the context of a claim for breach of a non-competition covenant. Neither difficulty in quantifying loss, nor the deliberate nature of the breach (if it was deliberate), nor the claimant's interest in preventing the defendant from undertaking profit-making activity in breach of the covenant, justified a different approach. The breach did not result in the loss of a valuable asset protected by the contractual right infringed; the loss for which damages could be awarded would be the claimant's loss of profits and goodwill resulting from competition by the defendant in breach of its covenant.

379. TIC's pleaded claim, therefore, was conventional, but limited to proven lost profits (it did not assert a compensable loss of goodwill). It claimed to have suffered a loss of profits that would be particularised after disclosure, and for which it would seek an award of damages at this trial. Mr Penny KC in his written closing submissions also mentioned the reference in *One Step* at [105], *per* Lord Sumption JSC, to the possibility of awarding damages for the loss of a chance to win profitable business rather than on the basis of proof (on the balance of probabilities) of profits lost. But no such claim was pleaded here.

380. The claim to be particularised, therefore, but which never was particularised, was a claim that CMS's competitive activity, in breach of contract, has had a measurable impact on TICM's First Fleet revenue (over and above the loss from CMS not having placed the Living Care contract with the First Fleet). In closing, Mr Penny KC submitted that such damages were likely to be assessed most appropriately "*by reference to [TICM's] lost profits, or alternatively by reference to [TICM's] lost chance of doing more business, especially over the past 18 months or so when utilisation rates in the First Fleet have fallen*". I do not disagree with the thought that a fall in First Fleet utilisation rates might be a phenomenon worthy of investigation as possible evidence of the impact of CMS's breaches of contract. For such an investigation to have been part of this trial, TIC should have pleaded a case by reference to that phenomenon.

381. By an application made at the second of two pre-trial review hearings, a month before trial, TIC sought permission *inter alia* to strike through the plea that the loss claimed in the Competition Claim was particularised in the Schedule of Loss, and to plead instead (so far as material) that: "*[CMS's] breaches of the Master Agreement … particularised at paragraphs 73.2-73.2F (the Competition Claim) … have caused … TICM (alternatively Assets) to suffer loss and damage … . … TICM (alternatively Assets) seeks an assessment of the damages owed to it in consequence of [CMS's] breaches of the Master Agreement concerning the Competition Claim. In the premises, TICM (alternatively Assets) claims damages for breach of contract in a sum to be assessed.*" I refused that application, considering that it was made too late and that any question of whether a claim for substantial damages should be entertained, or a judgment should be granted for damages to be assessed, ought in fairness to be considered on the basis of the pleading as it stood.

382. Mr Penny KC invited me, in his closing argument, to consider that the refused amendment did not seek to claim an assessment that was not already claimed, but only sought to remove references to specific particulars of loss and clarify that TIC sought an assessment. But given the basis on which the application to amend was refused, in my judgment, it is now simply irrelevant. It failed, on the basis that and therefore with the result that, to whatever extent the way TIC has pleaded its case might matter when it comes to the relief to be granted following the trial, the pleaded case is what it is, and TIC must live with that result.

383. The court has power under CPR 3.1(2)(i) to direct a separate trial of any issue, and in principle that power may be exercised at any stage of the proceedings. It was submitted that in exercise of that power I should now order that the *quantum* of any damages in respect of the Competition Claim, in its wider elements than the Living Care contract, should be assessed at a separate trial. Mr Penny KC contended, as to the justice of that outcome, that:

(1) CMS had resisted providing information about its role in the rental of Units other than First Fleet Units in the UK, and its involvement with the CMSE fleet, leaving TIC to try to piece that together as best it could from limited material.

(2) CMS only provided in August 2023 Further Information requested in December 2022, having been ordered to provide it at the first pre-trial review hearing. That Further Information generated a further round of primary pleading amendments on the Competition Claim, such that the pleadings on it were only finally closed very shortly before the start of the trial.

(3) It had required a disclosure application to obtain from CMS documents evidencing CMS's relevant conduct. I judged, when granting TIC its costs of the application, that "*It should not have required the RFI, by which [TIC] sought to understand and obtain particulars of a poorly pleaded case, for the relevance of [the documents sought] to be apparent to those acting for [CMS]. Furthermore, [CMS] failed to engage sufficiently with [TIC's] concerns, and then resisted the Specific Disclosure Application upon a basis (viz. that there was nothing or almost nothing more that could be done or disclosed) that was unrealistic and proved in the event to be substantially incorrect*". As a result, some of the significant documents relied on in relation to the Competition Claim at trial were disclosed by CMS for the first time only in August 2023.

(4) Some important details, such as the extent of CMS's role in facilitating CMSE rentals in the UK to date, came out, and were admitted by CMS, for the first time at trial.

384. Those factors, Mr Penny KC submitted, explained why neither party had engaged (either in pleadings, or in evidence) with the issue of the loss that TIC may have suffered as a result of CMS's competitive conduct. The justice of the case, he argued, was to order a second trial.

385. Mr Goldberg KC submitted, to the contrary, that TIC's pleaded claim was for an alleged loss of profit that would be pleaded, for this trial since no split trial had been directed. TIC had simply failed to particularise loss, and had failed at trial (indeed,

made no attempt) to prove that any loss had resulted from the matters it relied on as constituting a breach of CMS's non-competition covenant.

386. On this aspect, I prefer Mr Goldberg KC's submission. TIC's pleading did not convey the notion that it would be seeking a second trial, so that CMS knew where it stood and the court could consider any case management implications at earlier stages. The reference at the end of paragraph 75 of the pleading to claiming damages "*in a sum to be assessed*", read in the context of the plea that the loss suffered is particularised in a Schedule of Loss which promised particulars after disclosure, and case management directions ordering a single trial of all issues in the case, reads as a claim for damages to be assessed at that trial.

387. I agree with Mr Penny KC that the court does have power to order nonetheless a further damages trial. However, it is likely to be unfair to disturb in that way the claimant's, the court's, and other court users' legitimate expectations that this trial would bring this litigation to a close, and to expose the parties to unbudgeted further substantial time and cost commitments to litigate rather than allow them to get on with their business in the aftermath of this trial, unless (i) there is a powerful good reason why TIC made no attempt to plead the promised case on loss and damage, and (ii) there are reasonable grounds to believe that a case with significant prospects of success exists that a refusal to order a damages assessment would defeat.

388. Here, I do not consider there to be any good reason for the failure to plead any case. As Mr Penny KC submitted, the focus would be on the First Fleet as it has been. The Competition Claim breaches were not causative of the failure of the First Fleet to grow any more than it did. That was caused, to the tune of two CT Units, by CMS's breach of Clause 3 of the Master Agreement in 2020. It was caused more generally by TICM's decision not to call upon CMS to sell it more Units at the Master Agreement price so as to be entitled to have them added to the First Fleet and managed by CMS accordingly, or at all events TICM's failure to call for any such growth. The issue, therefore, would be whether the First Fleet has suffered, i.e. has achieved lower utilisation, lower rental rates, or both, by reason of CMS's competitive activity, such as has been established, since the summer of 2020.

389. There is force in the criticism of CMS's response to the Competition Claim within the litigation. However, the impact was to delay TIC's access to some of the evidence it was able to deploy at trial to demonstrate – to the extent it has – that CMS has been doing what TIC had claimed. None of that was reason not to consider, plead (if a viable case was available to be pleaded), and investigate as part of this trial, a case that the First Fleet has underperformed in the absence of ordinary market reasons for the underperformance. Nor has any of the evidence that came into the case only in the last few months, or at trial, enabled some such case to be pleaded that could not have been before. No draft particulars of loss have been produced; TIC, it seems, is unable to put forward anything more than a wish to start thinking properly about damages now, for the first time, to see if some claim might be pleaded.

390. The circumstances, then, are that there is no good reason for the failure to plead, if there is a serious case to plead, and the possibility that there might be a serious case to plead of substantial loss caused by the breaches alleged by TIC (to the extent they have now been established) remains speculative. By a comfortable margin, justice is

better served by insisting upon the finality for this litigation that this trial was intended and expected to bring.

391. There will be an injunction, but an award of nominal damages only, in respect of CMS's breaches of Clauses 17 and 41 of the Master Agreement. I shall ask counsel when this judgment is handed down to assist with the precise terms for the injunction, if they have not been agreed.

Conclusions and Relief

392. To conclude, I now set out the result of this interesting and multi-faceted trial.

393. On the proper construction of the Master Agreement:

(1) TICM is privy to the contract, entitled to sue and be sued upon it;

(2) CMS's obligation in relation to rented First Fleet Units is to pay to TICM the full amount of all rental income earned;

(3) CMS is obliged, in addition, to pay TICM for unrented First Fleet Units at the monthly rate of £17,333 (MRI) or £14,083.50 (CT), up to a maximum of six unrented First Fleet Units at any one time;

(4) TICM is obliged to pay for warranty/servicing of First Fleet Units, in each case from the third anniversary of first commissioning, at the rate of 6.5% per annum of the recommended selling price for a sale by CMS of the Canon Equipment installed in the Unit at the time when the annual charge falls due, which is currently the price that would generate the Budget Margin over the Local Landed Price for the Equipment, each as stated in Salesforce, in which Margins are stated as percentages of the selling price.

394. CMS acted in breach of Clause 14 of the Master Agreement by ignoring TIC's proposal to revise the Price List (as defined in the Agreement) with effect from 1 March 2021, but that breach caused no loss.

395. For the period up to and including 31 July 2023, CMS owes TICM £966,495.56 in respect of First Fleet Unit rental income, but I need further assistance from counsel to identify what, if any, sum I can find that CMS owes TICM in respect of unrented First Fleet Units. The question also arises whether debts of either type are owed in respect of August to October 2023 (inclusive), and if so whether they are to be dealt with under this judgment.

396. CMS has failed to establish that it has been underpaid for warranty/servicing charges under the Master Agreement to date; and TIC has failed to establish that there has been any overpayment to date.

397. CMS acted in breach of Clause 3 of the Master Agreement by failing to sell TICM two new CT Units to add to the First Fleet in response to Dr Kleanthous' request for new Units in March 2020; but otherwise, breach of Clause 3 was not established, and damages for the proved breach are nominal only.

398. CMS acted in breach of Clause 7 of the Master Agreement by failing to use an available First Fleet MRI Unit for its contract with Living Care for the rental of a Unit from June 2022 to January 2023 (inclusive), for which TICM's damages are £354,383.85 less the aggregate of the Canon Contributions credited against the Unit in question in CMS's 'First 6' monthly spreadsheets for those months.

399. CMS has acted, and unless restrained is likely to continue to act, in breach of Clauses 17 and 41 of the Master Agreement, in facilitating the rental in the UK of CMSE Units, and in having agreed with CMSE to work with it, competitively with the First Fleet, in the business of renting Units in the UK, with a view to revenues being retained within the Canon group. Damages will be nominal, but it is just and convenient, subject to the precise wording, for CMS to be restrained by final injunction from so acting in breach.

Canon Medical v The Imaging Centre

Appendix – the Master Agreement

2. *TICM will be appointed by TM as the Official Distributor of the Units upon the terms hereinafter contained*

   Official Distributor means the entity appointed by TM for the purpose of exclusively implementing the Distribution Model Concept in the Territory

   Distribution Model means the sale, hire and use of purpose built diagnostic centres of, relocatable or mobile nature within Mobile Relocatable Units for providing diagnostic services to the sporting and health care industries

   Mobile Relocatable Units means mobile and relocatable units suitable for the housing of the Units

   Units shall mean TM CT and MRI Scanners, and such other TM equipment as may be developed and produced from time to time in the field, integrated into Mobile Relocatable Units

   Territory shall mean the United Kingdom and such other territories where the Distribution Model is substantially utilised by TM (excludes the India territory)

3. *TM has agreed to sell the Units to TICH at TM cost representing the lowest market price and provide the Services as and when reasonably required to TICH and end users of the Units*

   Services shall mean the Services to be provided by TM to TICH by way of marketing, surveying, sales and project management of the Units and the servicing of the Units pursuant to the due performance of the Warranties

   Warranty/Warranties shall mean the standard warranty/warranties issued by TM in respect of the CT Scanners and MRI Scanners from time to time

4. *TM will provide free Warranties and free servicing for the Units and Equipment for three years from the date of first commissioning and thereafter at 6.5% of its Equipment list price from time to time*

   Equipment shall mean CT Scanners and MRI Scanners and any other diagnostic equipment purchased by TICH from TM from time to time

…

6. *The cost of performing all the Services will be borne by TM.*

7. *TM undertakes to hire any CT Mobile Scanners and MRI Mobile Scanners that it requires exclusively from TICH pursuant to a hire agreement to be reasonably agreed between the parties subject to availability.*

   CT Mobile Scanner means a TM CT scanner installed in housing Within a Mobile Relocatable Unit

['MRI Mobile Scanner' is not defined, but the interpretation must be that it has the same meaning as 'CT Mobile Scanner', with 'MRI' in place of 'CT'.]

8. *TICH will provide the CT Mobile Scanners and MRI Mobile Scanners to TM at a 50% discount off its usual prevailing rate*

9. *TM undertake to have on hire a mixture of six MRI Mobile Scanners and CT Mobile Scanners at any one time*

10. *TM will procure the housing for the Units initially from W.H.Bence upon the best terms obtainable.*

11. *TM will operate The Academy*

    The Academy shall mean the TM Imaging Academy

12. *TM shall be issued with the Shareholding solely in consideration of its obligations and commitments hereunder and for no financial payment*

    Shareholding shall mean 8% shares in TICM to be issued to TM pursuant to the terms of this Agreement

13. *TM will be entitled to appoint one member to the TIC Medical Committee Board*

14. *TM will prepare in consultation with TICH the Price List for rental of the Units to hospitals and other medical centres*

    Price List shall mean the price list for the Units to be prepared in consultation with TICH as amended from time to time for the rental of the Units to hospitals, other medical centres or other end users

15. *TICM shall at all times throughout the Term be entitled to use the name "TM" or any new successor brand or trading name of TM solely in connection with the Units and TM hereby licences the right to TICH to use TM's logos (in each case subject to TM's prior approval, such approval not to be unreasonably withheld) and the benefit of TM's marketing resources in conjunction with those of TICH. The branding and external design of the Units shall be mutually agreed.*

16. *TM will at all times allocate reasonable marketing resources to establish the Units as a product in the medical field as agreed from time to time.*

17. *Other than as provided herein TM will not enter into any agreements competitive with the terms hereof during the Term*

    Term shall mean a period of ten years whereby, in the event of the agreement not being renewed after 10 years for a minimum of a further ten years then any shares owned by TM would be transferred to TICH or as it may direct for no consideration.

18. *TM shall retain all existing rights to continue its normal trading business..*

19. *TM will at all times provide or procure all Units, Equipment and Services at the best price supplied to any other customer of TM to date or in the future*

20. *TICH and TM shall procure the creation and maintenance of a central reporting hub and will each procure the provision of monthly accounts in relation to income arising from the Project on an open book basis with a mutual right of inspection for both TM and TICH. Such inspections shall not take place more often than twice in any twelve-month period of The Term upon written notice and at times and places reasonably convenient to both parties.*

    Project shall mean the joint venture business to be established by TM and TICH for the sale, leasing and marketing of the Units pursuant to the Development [sic.] Model Concept

    [It was common ground that 'Development' is an obvious drafting error and should be read as 'Distribution'.]

21. *TM will liaise with and assist TICH in procuring suitable students from The Academy to operate the Units and Equipment. The Units themselves may sometimes be operated by radiographers contracted by or to TICH who may source the same from The Academy.*

22. *TM will provide a free portable ultra sound to every centre opened by TICH together with a Warranty and a servicing obligation as outlined in clause 4*

23. *TM will support TICM with all documentation in relation to the leasing and/or rental of the Units and arrange for the completion of the same.*

24. *TICH will have first option in respect of expanding the Project into other markets such as dental and veterinary centres*

[Clauses 25 and 26 contain provisions for termination of the Agreement and some supplementary terms relating to the 8% shareholding.]

27. *TM will at all times during the Term provide TICH access to its sales and servicing support as necessary for the performance of this Agreement*

28. *TICH agrees that during the Term it will not purchase any scanning equipment not manufactured by TM unless TM is unable to supply any equipment from time to time as reasonably required by TICH notwithstanding that the typical lead times for these Units is four months. In that event, TICH shall advise TM of its emergency purchase of alternative equipment prior to completing any purchase and will in any event not promote the manufacturer of that equipment.*

29. *This Agreement shall not be varied and none of the terms hereof shall be deemed to be waived or modified except by an express agreement in writing signed by both of the Parties and TICH.*

30. *Failure by either Party to exercise or enforce any right conferred by this Agreement shall not be deemed a waiver of any such right nor operate so as to postpone the exercise or enforcement of any other right to any other occasion.*

31. *TICH confirms that notwithstanding that neither TICL nor TICM are direct Parties to this agreement and that it has the power to contract on their behalf as its subsidiaries.*

32. TM'S RESPONSIBILITIES

At its own cost TM shall:

32.1 Invest in upgrades where needed in all of the Equipment where necessary to ensure the latest available technology; and

32.2 provide initial and ongoing clinical applications and training to appointed staff to run the Equipment; and

32.3 agree to locate and operate The Academy within The Hive for the duration of the Term, and to utilise The Hive to run at least one course per month. (

32.4 to maintain a Website link to relevant TICH Websites; and

32.5 provide marketing expertise and resource in order to raise the awareness of the collaboration, and to the wider healthcare community to increase patient referral rates, all managing and marketing to be mutually agreed by the Parties; and

32.6 provide marketing support for the Project as may be reasonably required with marketing and publicity support, utilising TM's in house expertise with website design, Google search engine optimisation and marketing material design (all material to be mutually approved before release); and

32.7 design and provide promotional branding marketing materials as may be reasonably required and

32.8 support research projects that are mutually agreed with clinician input and additional applications support; and

32.9 facilitate off-site training where needed for radiological or radiographic staff to optimise capabilities; and

32.10 agree to quarterly meetings to plan strategy, tactics, commercials and potential investments for development of the business model and Project, for the duration of the Term; and

32.11 support regular meetings to ensure individual elements of the Project are delivered on time and key milestones are achieved

32.12 work towards other projects with TICH exclusively using this business model at other sites; and

32.13 insure the items on hire pursuant to clause 8 hereof (to include product liability) for the duration of this Agreement in an amount to be agreed between the Parties based upon advice sought and received from specialist brokers (including any extensions hereof) and note the interest of TICH on the policy and provide TICH with a copy of the same; and

32.14 make available in house expertise and resource to commence the Project

33. TICH'S RESPONSIBILITIES

At its own cost TICH will:

33.1 make available facilities (at the then current hiring rate) for TM to run The Academy within the new buildings at The Hive (to include access to meeting rooms and a conferencing suite which may not necessarily be contained in the new building) on an ad-hoc basis with at least two-months' prior written notice; and

33.2 provide suitable space for approved TM branding on the outside of the new extension building at The Hive or nearby in the grounds, such branding to be supplied (and if requested by TICL installed) by TM at its own costs; and

33.3 provide buildings and imaging rooms to a finished clinical standard that comprise the Imaging Centres, staff to run the Equipment and associated IT and maintenance programmes; and

33.4 make all reasonable endeavours to recruit patients and medical expertise to consult with patients; and

33.5 achieve the required regulatory standards and authorisation from the authorities to run a patient centric medical diagnostic centre; and

33.6 ensure best practice to maximise the safety of patients; and

33.7 provide qualified staff to operate the Eqiupment; and

33.8 consider the expansion of this business model exclusively with TM in other sites; and

33.9 upon completion of installation, accept the Equipment from TM and sign an acceptance certificate to evidence the same; and

33.10 to maintain a Website link to relevant TM Websites

34. TM'S WARRANTIES

TM represents and warrants to TICH that:

…

34.4 It will not enter into any agreement inconsistent with the terms of this Agreement and will comply with all applicable laws and regulations with respect to the performance of its obligations under this Agreement

35. TICH'S WARRANTIES

TICH represents and warrants to TM that it has the right to enter into this Agreement

…

39. ASSIGNMENT

Provided it remains primarily liable TICH may assign or sub-license its rights and obligations under this Agreement to any third party

…

41. NON-COMPETITION

Neither party shall enter into any agreements directly or indirectly with third parties of a competitive nature to the Project nor utilise any concepts developed within the Project for their own beneficial use.

…

43. MISCELLANEOUS

43.1 This Agreement represents the entire agreement between the Parties at the date hereof with respect to the subject matter whether oral or written and for the avoidance of doubt save where specifically stated supersedes the agreement between TM and TICL and the existing agreement and heads of terms between TM and TICM and in particular excludes warranty, conditions or undertaking implied by law or by custom. Any amendment or variation must be in writing signed by both Parties

43.2 No waiver of any term, provision or condition of this Agreement shall be effective unless it is in writing and signed by the waiving Party. No failure to exercise nor any delay in exercising any right or remedy hereunder shall operate as a waiver thereof or of any other right or remedy hereunder, not [sic.] shall any single or partial exercise of any right or remedy prevent any further or other exercise thereof or the exercise of any other right or remedy

…

43.5 Nothing in this Agreement is intended to confer any benefit on any third praty (whether referred to herein by name, class, description or otherwise) or any right to enforce a term contained in this Agreement

43.6 This Agreement shall be governed by and interpreted in accordance with the laws of England and Wales whose courts shall have exclusive competent jurisdiction.