Case No: HQ15X04861

Neutral Citation Number: [2018] EWHC 869 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 April 2018

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

Health & Case Management Limited	**Claimant**
- and –	
The Physiotherapy Network Limited	**Defendant**

- -

Andrew Kinnier QC and **Ian Silcock** (instructed by **Goodman Derrick LLP**) for the **Claimant**
Mark Spackman (instructed by **Douglas-Jones Mercer**) for the **Defendant**

Hearing dates: 6-8 December 2017, 15 January and 23 February 2018

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Judgment

The Honourable Mr Justice Nicklin :

1. When it was commenced on 23 November 2015, this action started life as a claim for a declaration that the Claimant had not acted in breach of contract or confidence. By dint of a counterclaim that was then brought by the Defendant alleging such breaches, it raises the conventional issues, albeit with the parties reversed. To avoid confusion, in this judgment I shall refer to the Claimant as HCML and the Defendant as TPN.

The parties

HMCL

2. HCML is a company that, amongst other things, provides services to insurance companies by managing referrals to physiotherapy clinics on behalf of the insurance companies' insured.

3. Individual patients who had suffered muscular skeletal injury would be referred to HCML by an insurance company. One company from whom HCML received referrals was Aviva Health UK Limited ("Aviva Health"). HCML would then look to place that patient with a geographically convenient clinic suitable for his/her injury. HCML used a range of providers to source clinics to whom it could refer patients for treatment. In the period between 2010 and 2014, HCML's panel of providers included TPN. The Chief Executive Officer of HCML is Keith Bushnell ("Mr Bushnell").

TPN

4. TPN is a company that has established a nationwide network of physiotherapy clinics. Dale Naylor is the sole director and 75% shareholder in TPN ("Mr Naylor"). Between 1996 to 2002, Mr Naylor recruited a network of around 900 physiotherapy practices and some 1,200 individual physiotherapists. Ultimately, this business was taken over by TPN when it was incorporated in 2002. In 2002, TPN served England, Wales, Scotland, Northern Ireland and the Channel Islands with a network of clinics that offered physiotherapy services within 5 miles of any patient (excluding some areas with low population density). TPN is the largest physiotherapy network in the country.

5. TPN used a scoring system developed by Mr Naylor designed to monitor the effectiveness of treatment. He called this the functional assessment score or "FCA score". It sought to measure the outcome of treatment by use of a two-digit indicator. The first digit was a letter from "A" to "E", denoting work status. "A" indicated that the patient was fully-functioning at work and "E" indicated that the patient was off work with hindered activities of daily living. The following digit – a number – showed the patient's level of pain, function and range of movement. Numbers from 1 to 10 indicated a range from no pain to very severe pain. When combined, A1 would indicate the best score or outcome and E10 the worst. Capturing the score at various stages of treatment enabled monitoring of effectiveness and review of a patient's progress. From the insurer's perspective, it was able to show when treatment was no longer providing any further benefit.

6. TPN derives its income from introduction fees which it generates through referrals to clinics in its network. Individual clinics would not, typically, be exclusive to TPN.

Most would receive referrals from other networks or would provide physiotherapy services directly to patients.

Contractual arrangements between HCML and TPN

7. In 2010 the parties explored a working relationship where HCML would refer patients to TPN to be placed with a local physiotherapist clinic which was part of its network. Thereafter, in return for a fee from HCML, TPN would manage the treatment of that patient by arranging initial and subsequent treatment sessions and reporting back to HCML on the progress of the treatment. A meeting took place on 22 September 2010 with a view to formalising the relationship. It was attended by Mr Naylor and Lesley Abbs, Group Manager of TPN ("Ms Abbs") for TPN, and James Deadman and Operations Manager, Scott Olsen ("Mr Olsen") for HCML. TPN indicated that, on average, it handled 400-600 referrals per month. HCML anticipated making around 200 referrals per month to TPN during a pilot period of 3 months.

The Pilot

8. In consequence, the parties entered what has been called a "pilot agreement" ("the Pilot Agreement"). The Pilot Agreement had a commencement date of 1 October 2010 and was due to run for 3 months (terminating on 31 December 2010). Consistent with discussions at the 22 September 2010 meeting, clause 2.3 the Pilot Agreement provided:

> "HCML anticipates making circa. 200 referrals per month to TPN during this three month pilot, but there are no guaranteed minimum volumes."

Clauses 3.1. and 4.1 imposed on the parties a reciprocal duty to act in good faith to one another.

9. Pursuant to the Pilot Agreement, from about the beginning of October, HCML began to refer patients to TPN. During the Pilot, on 30 November 2010, Ms Abbs wrote to Mr Bushnell confirming a 'volume discount':

> "Based on high current and predicted referral volumes we will be able to offer efficiency savings in the form of a refund of £15 per referral."

10. The Pilot Agreement proved to be successful, and so towards the end of the 3 months, the parties entered what was titled a 'Services Agreement to Supply Physiotherapy Services' ("the Services Agreement").

The Services Agreement

11. The Services Agreement is dated 11 January 2011. It was apparently drafted by HCML. The recitals recorded that HCML was a provider of healthcare services to Aviva Health and that, following the Pilot Agreement:

> "HCML and TPN have agreed that TPN will work with HCML in the provision of the Service to their customers and customers of AH having made a decision to extend and expand the TPN Service provision from 1 January 2011 onwards." ("the Recital")

"Service" was defined as:

> "… the Service that comprises early intervention and end to end case management of relevant back and spine conditions and the planning, arranging and/or provision of Services to assist in the management of the conditions including (without limitation): triage assessment, telephone based advice, physiotherapy appointment services and referrals which HCML has agreed to provide direct to the Patient pursuant to the terms of an Agreement between HCML and [Aviva Health]"

"TPN Services" were defined as:

> "… physiotherapy appointment, assessment, reporting and treatment services and referrals which TPN has agreed to provide direct to the Patient as part of the Service pursuant to the terms of this Agreement."

12. Clauses similar to ones in the Pilot Agreement were included in the Services Agreement. The relevant clauses are:

> "2.1 The Parties agree that TPN shall continue the provision of TPN Services from 31 December 2010 with the parties further agreeing to extend/expand this Agreement.
>
> 2.2 TPN shall perform the TPN Services (physiotherapy appointment, assessment, treatment and reporting) at the Clinics as requested by HCML from time to time.
>
> 2.3 HCML anticipates making circa. 700 referrals per month to TPN, and volume discounts from time to time for this level of referrals.
>
> 3.1 HCML shall act in good faith towards TPN at all times.
>
> 6.1 In consideration of TPN providing the TPN Services to HCML, HMCL shall pay to TPN… the Fees which are £60 for the Initial Assessment/Treatment Session and £45 for subsequent Physiotherapy Treatment Sessions…
>
> 14.1 HCML and TPN will keep confidential, both before and after the expiry or termination of this Agreement, all information of the other Party obtained under or in connection with this Agreement (including but not limited to any and all information obtained by TPN in respect of other HCML suppliers, HCML's supply chain and HCML's commercial arrangements with its other suppliers) (the "Confidential Information") and will not (except as provided for in Clause 15.3 below) disclose any of that information to any third party without the prior written consent of the other.
>
> 14.2 Each Party hereby undertakes to keep the terms of this Agreement confidential and will not disclose any of the terms of this Agreement to a third party without the prior written consent of the other
>
> 14.3 Each Party will be entitled, but only to the extent reasonably necessary, to disclose the Confidential Information or any part of it:

14.3.1 to its officers, employees, servants, agents, advisers, insurers or other professional advisers to the extent necessary to enable it to perform (or to cause to be performed) or to enforce any of its rights or obligations under this Agreement subject in each case to the Party making the disclosure ensuring that the person(s) in question keeps the Confidential Information confidential and does not use it except for the purposes for which the disclosure is made; or …

14.3.3 to the extent that the Confidential Information has, except because of breach of confidentiality, become publicly available or generally known to the public at the time of the disclosure; or

14.3.4 to the extent that it has obtained the Confidential Information from a third Party who is not in breach of any obligation or confidentiality to the other Party".

"*Clinic*" was defined as "*an individual or organisation who is a member of TPN's [network of physiotherapists and locations to which TPN has access and from, or by, which the TPN Services can be provided]*".

13. One of the key disputes to be resolved in this dispute is whether clause 2.3 of the Services Agreement imposed upon HCML an obligation to make "*circa. 700 referrals per month*" to TPN. I will return to this below.

The Light Touch Agreement

14. TPN contends that there was a separate oral agreement with HCML made at a meeting on 15 December 2010 attended by Ms Abbs for TPN and James Deadman and Michael Everett from HCML. The terms of this alleged agreement are rather difficult to ascertain. The pleaded case is that, at the meeting, the parties discussed, and agreed, a pilot period of 4 months for an additional 50-60 personal injury referrals per month ("the Light Touch Agreement"). There is a note of the meeting of 15 December 2010 which records, so far as material:

"1. Based on the relationship built up with Aviva… HCML have earned the opportunity to pilot as an alternative to the existing supplier for a Very Light Touch Third Party Assistance Programme…

[terms of a service level agreement are set out]

4. The pilot should start towards the end of Jan/beginning of Feb 2011 and run for four months.

5. During that time, we will be exclusively using TPN for physio provisions and we anticipate 50 to 60 referrals being sent through to TPN each month during this pilot period…"

15. TPN contends that it was agreed that the Light Touch Agreement was to be on the same terms as the Services Agreement, with the same fee being paid for each referral. TPN's case is that the Light Touch Agreement was separate from the Services Agreement not a variation of it.

16. In its submissions, TPN contends that the Light Touch Agreement was extended by agreement in July 2011 to provide for referrals of 250-300 per month. There was an email exchange between Mr Naylor and Mr Bushnell on 27 June 2011 which TPN accepts bore on the terms of the Light Touch Agreement. The exchange took place prior to a meeting between the two men the following week. Mr Naylor had asked Mr Bushnell whether he would be willing to sign a one-year contract between TPN and HCML "*based around current guaranteed/predicted referral numbers or percentage referrals*". Mr Bushnell responded:

> "I have no guarantee of volumes from Aviva Health which makes it impossible to guarantee volumes to you. I can do no more than guarantee that you will be on our panel of providers. We will have to go into these negotiations with a degree of trust. I think that I have been totally up front that the percentage of our business going to TPN in future will be highly dependent on the strength of our future strategic relationship. My expectation is a win win solution but I have to do a deal with a network provider to meet my commitments to Aviva Health, and I want that deal to be with TPN – hence you are top of the list to negotiate with and I won't be talking to others unless we fail to reach agreement."

17. The evidence as to the terms of this July 2011 oral agreement is scant. All Mr Naylor says in his witness statement is that the parties:

> "… agreed to expand the scope of the Light Touch Pilot… to include an additional 250-300 monthly referrals of personal injury cases and general insurance cases, this was to be in addition to the existing 700 referrals a month… [An] oral contract was in place for the referrals to be provided under the terms of the Services Agreement".

TPN contends that HCML is in breach of the Light Touch Agreement (or, confusingly, in breach of the Services Agreement) by failing to provide 250-300 referrals per month in the period from November 2012 to July 2014. In his witness statement, Mr Bushnell says nothing at all about the meeting at which agreement is said to have been reached. There are apparently no other documents that shed light on the issue.

Performance of the Services Agreement

18. There is a dispute between the parties as to whether HCML did make around 700 referrals to TPN each month under the Services Agreement. Mr Spackman relies upon an internal spreadsheet prepared by HCML dated 25 June 2012 as indicating that HCML had been making around 688 referrals per month between January 2011 to January 2012. Mr Kinnier QC suggests that the figure was lower than this. I do not think that it is necessary to resolve this point because, whatever the true number, it is clear that the rate of referrals was regarded by TPN at the time to be satisfactory as there were no complaints about the number being received. Certainly, at the time, there was no suggestion that the number of referrals was at a level that might be a breach of Clause 2.3 of the Services Agreement.

19. From about late 2012 until a point in 2014, the number of referrals made by HMCL to TPN reduced until they ceased completely. The reason for the decline was principally HMCL's decision to set up its own network of clinics (although see paragraph 51 below).

HCML develops its own network of physiotherapists: Innotrex

20. In around June 2011, HCML had preliminary discussions with TPN with a view to HCML acquiring TPN. The discussions were made subject of a separate confidentiality and non-disclosure agreement dated 22 June 2011 ("the CNDA"). Ultimately, nothing came of the discussions and TPN was notified of the decision not to pursue the acquisition in October 2011. TPN originally based its breach of confidence claim (in part) on terms in the CNDA, but this claim has not been pursued.

21. Whether as a result of the decision not to acquire TPN or independently (and I do not need to resolve this issue), at around this time HCML began work on building its own network of physiotherapy clinics. In his evidence, Mr Bushnell explained his reasons. First, selection by HCML of the members of its network would ensure a higher quality level. Second, it would be financially beneficial to HCML to operate its own network. Third, it would help to ensure that HCML satisfied Aviva Health's requirement that there be no interruption in treatment services in the event that any one of HCML's panel of providers ceased to trade. Fourth, Mr Bushnell considered that there was a gap in the market for a high-quality network of physiotherapists that presented an opportunity to HCML. Judged simply from a financial standpoint, formation of its own network would enable HCML to reduce its costs by cutting TPN out of the arrangement.

22. The creation of this network – called Innotrex - is a second key area of dispute in these proceedings. TPN contends that its creation, and HCML's diversion of referrals that would otherwise have gone to TPN to Innotrex, was (1) a breach of the Services Agreement (clause 2.3 and/or clause 3.1); (2) a breach of the Light Touch Agreement; and/or (3) a misuse of TPN's database of clinic information and/or TPN's confidential information.

23. Mr Bushnell said that HCML looked to recruit most of the members of Innotrex from two existing networks of physiotherapy clinics: D2physio Network ("D2") and PhysioWorld. To assist in setting up Innotrex, HCML engaged David Bingham of Opus Health Limited ("Mr Bingham") as a consultant.

24. The day-to-day responsibility for the Innotrex project was given to Mr Olsen. In his evidence, Mr Bushnell stated that HCML:

> "… undertook a well resourced and properly organised exercise to source its members. In some cases that involved visiting the premises of prospective clients, interviewing the principal players and going through a disciplined process to establish suitability on a wide range of fronts."

And later in his witness statement, Mr Bushnell was categoric:

> "As is made abundantly clear in the witness statement of Scott Olsen TPN's database was not used in the formation of Innotrex"

25. Mr Olsen gave further details in his witness statement of the process of recruiting clinics to Innotrex. The description he gave in his statement is of his, indeed, creating the Innotrex network 'from scratch'.

26. At least by the stage of February 2012, TPN had an electronic database of the clinics in its network. The database consisted of information relating to the clinics including: name, address (including postcode), the name of the lead physiotherapist, the number of referrals made to – and the number of physiotherapy sessions undertaken at – each clinic and the pricing structure ("the TPN Database").

27. On 8 February 2012, Mr Olsen had sent an email, with high importance, to Ms Abbs requesting that she provide him with information from TPN's Database:

> "We are doing some work with Aviva to look at the difference in treatment sessions geographically across the UK. Unfortunately with the information in our system we can only search… by home postcode and we know a relatively large percentage of our clients' treatment is more than likely undertaken closer to work which would not give us a fair representation. Are you able to therefore please assist in providing the following information on an excel spreadsheet –
>
> - Postcode of clinic
> - Number of cases that have been referred to that clinic
> - Number of treatment sessions that have been undertaken in total
>
> We have been wanting to do a spread of the whole UK so would include all clinics that have been used for Aviva PMI cases only.
>
> I am assuming your system is able to extract this type of information and ideally we require this ASAP if able…

28. Ms Abbs responded the same day:

> "It is something I can do, but I can only let you have this for a specific period of time, would last year be OK?"

Mr Olsen said that data for the whole of 2011 would be fine and Ms Abbs confirmed that she could provide the data, "*but it will take a couple of days as the database is so large, I have to do it by month*".

29. On 9 February 2012, Mr Olsen sent a further request to Ms Abbs for an up-to-date clinic list. The reason he gave was: "*We are building a search engine internally to make the searching of clinics more efficient so just require an up to date list to add to this.*" On 16 February 2012, Ms Abbs emailed to Mr Olsen a spreadsheet entitled "TPN physio list" ("the 16 Feb 2012 Spreadsheet"). HCML admits that the 16 Feb 2012 Spreadsheet included a list of TPN's clinics and associated postcodes. Further emails were exchanged up to 5 March 2012 regarding the information that was included in spreadsheets that Ms Abbs sent to Mr Olsen. I am satisfied that the data contained in these spreadsheets had been extracted from the TPN Database.

30. When cross-examining about these emails, Mr Spackman asked Mr Olsen whether it was a coincidence that he was asking Ms Abbs for this information while he was working on setting up Innotrex. Mr Olsen said that it "*could have been*". He claimed that Aviva had wanted to understand the geographical representation of treatment to have a geographical pricing model ("the geographical pricing model"). Pointing to the

lack of documentation, Mr Spackman asked whether the discussions with Aviva about the geographical pricing model had been conducted orally. Mr Olsen initially answered "*possibly*", before confirming that they had been entirely oral. Surprisingly, there was no mention in Mr Olsen's witness statement of either his requests to Ms Abbs in February 2012 for information from TPN's Database or work on a geographical pricing model for Aviva Health. There is no evidence of any report on the geographical pricing model actually being provided to Aviva Health.

31. Mr Olsen explained that most of the information he had requested was available on the HCML system, but it would have been a time-consuming and arduous task manually to obtain it. Some of the information – relating to actual treatment – was not available from HCML's data.

32. I found Mr Olsen's evidence in relation to the request for information that he had sent to Ms Abbs unconvincing and I do not accept it. I reject his claim that the data was requested to assist with the preparation of the geographical pricing model. There is a complete lack of any contemporaneous documentation to demonstrate that work on any geographical pricing model had been requested or was carried out at this time. The suggestion that Aviva Health would have been satisfied to receive the data from such a pricing model orally is plainly not credible. I am satisfied that this was simply a device to give a plausible reason why Mr Olsen was requesting the data and one which he hoped would not arouse suspicion at TPN. I am satisfied that Mr Olsen had requested the information to assist with the setting up of Innotrex. Indeed, later in his evidence, Mr Olsen accepted that he did actually use the information provided by TPN for this purpose.

33. On 23 February 2012, Mr Olsen also requested a list of clinics from PhysioWorld. When asked about this in cross-examination, Mr Olsen confirmed that he was assembling a database for use of HCML's case managers. He was reluctant to agree when it was put to him that these steps were being taken, and the data obtained, for the purposes of building the Innotrex network.

34. On 21 March 2012, Mr Olsen emailed Mr Bingham. I note that Mr Bingham was only engaged on the Innotrex project. Mr Olsen sent him a spreadsheet which identified individual physiotherapy clinics, by area, and showed the number of clinics and the number of referrals that each had received. When cross-examined, Mr Olsen was inclined to accept that he had obtained this information from the spreadsheet sent by Ms Abbs in February. In the email to Mr Bingham, Mr Olsen explained the attached "*geographical analysis*" (faithful to the original text):

> "I have taken the top four hotspots from the top four geographical region for referrals (Outer London and SE, SW inc Bath/Bristol, NW inclu Manchester/Liverpool and Scotland incl Edinburgh/Glasgow) and have provided a breakdown of how many referrals were referred into that region and a breakdown of the clinics that were used and number of referrals into these clinics. From this we should be able to identify what clinics to approach and if they fit onto your list."

35. When he was cross-examined about this email, Mr Olsen accepted that the data in the spreadsheet had come from TPN, but he sought to suggest that HCML would already have had the information "*in some shape or form*". It was put to him by Mr Spackman

that it would have been a very laborious process for him to have extracted the information from HCML's systems. Mr Olsen did not give a direct answer to that suggestion (perhaps thinking that he had already accepted that it would have been "*arduous*" – see paragraph 30 above), but he did accept that he had not obtained the information in this way and that he had simply used the data provided by TPN. Mr Olsen accepted that this data had enabled HCML to identify the geographical areas with the highest referral volumes in order to recruit clinics in those areas to Innotrex. Such information would have been (a) very valuable to HCML; and (b) difficult (if not impossible) to obtain without recourse to the data provided by TPN.

36. From around April 2012, HCML was actively pursuing a policy of diverting referrals away from TPN and was devising IT handling processes to ensure that this was done.

    i) On 11 April 2012, Mr Olsen raised questions internally as to why some referrals he had identified had been made to TPN when they could have been sent to PhysioWorld.

    ii) On 23 April 2012, Anthony Eeles, HCML's Head of IT & Business Analysis ("Mr Eeles") sent Mr Olsen a spreadsheet identifying 80 clinics that were on both PhysioWorld and TPN's network. Mr Eeles asked whether Mr Olsen would like him to remove TPN as an available referral route, leaving only the PhysioWorld. I have not seen an answer to that, but it is plain what the thinking was.

    iii) On 14 December 2012, Karl Turner of HCML emailed a physiotherapy clinic to introducing Innotrex and explaining its benefits. The email was plainly an attempt to recruit the clinic to Innotrex, but in message Mr Turner also stated:

> "At the moment we send the majority of our referrals through TPN but with our on-going recruitment [of clinics to Innotrex] this will change in the near future meaning a likely drop in referrals for any non Innotrex clinics and increased referrals for our preferred providers"

    Emails in similar terms were sent to other TPN clinics.

37. A business plan for Innotrex was finalised in June 2012. In a section headed "*Competitor Response*", which would have included TPN, it recorded:

> "Those companies with their own network will see this move as a threat and although HCML plans to maintain the use of existing networks whist at the same time building the Innotrex network, HCML will become less reliant on external networks over time."

This was consistent with the strategy adopted by HCML to make fewer referrals to TPN.

38. On 25 June 2012, Mr Olsen and Mr Bingham completed an "*Innotrex Update Report*". A spreadsheet prepared at this time broke the country down into regions showing the percentage of cases that had been referred by TPN in the period from January to June 2011 ("the Update Spreadsheet"). The Update Spreadsheet actually refers to "TTN", but it appears to be common ground that this is a typographical error for "TPN". The underlying data was detailed enough to identify, by region, the total

number of cases, total number of sessions and current average charge. From this, various scenarios were modelled using enhanced costs. Mr Olsen was not asked directly to confirm that the data underpinning this spreadsheet had been provided by TPN, but I am satisfied from the information itself that this must be the case. It is inconceivable that it could have come from any other source.

39. By this stage, it is clear that HCML had completed assembling its own database of information relating to the network of clinics which Mr Kinnier QC called the "Clinic Locator" ("the HCML Database"). I am satisfied that at least part of the information contained in HCML Database had come from TPN's Database using the information supplied by Ms Abbs. That is clear from the information that was presented in the Update Spreadsheet.

40. By August 2012, HCML had prepared an internal presentation. Under the heading, "*Why set up Innotrex?*", several answers were given, including:

- To date, networks have attempted to consolidate the market but with very little quality control…

- An opportunity exists to create a purpose built high quality network of therapists…

In the section, "*Progress to date*", clinics recruited to Innotrex were identified by geographical area. The presentation made it clear: "*We need to commence referring through Innotrex immediately to generate revenue*". It anticipated an IT system would be in place by November 2012 to support referrals to the clinics.

41. By mid-September 2012, HCML had recruited a total of around 30-40. Following a meeting with Aviva Health in early September, Mr Olsen identified that a key part of HCML's strategy for Innotrex was to provide easily accessible clinics to service Aviva Health's top large corporate customers. To pursue this, Mr Olsen had prepared a spreadsheet of the top 50 organisations that had private medical insurance cover provided by Aviva Health ("the Top 50 Spreadsheet"). HCML wanted to be able to provide an Innotrex clinic within 10 minutes' walking distance in central London and up to 2½ miles' drive elsewhere. After identifying the relevant corporate client and its address, the Top 50 Spreadsheet showed by column whether an Innotrex Clinic was available and its distance away from the relevant company. Two further columns showed the distance from the relevant corporate client of a clinic provided by PhysioWorld and TPN. Mr Olsen accepted in cross-examination that the information about TPN clinics had come from the information provided by TPN.

42. In his evidence, Mr Olsen suggested that this was an analysis of the availability of clinics to the key corporate clients of Aviva Health to enable referrals to all three networks. I am not convinced by this answer. The only clinics identified were those belonging to the Innotrex network. The columns relating to PhysioWorld and TPN simply identified the distance from the corporate client of a competing clinic. It seems clear to me that the ostensible purpose of this document was not to enable referrals to PhysioWorld or TPN (the relevant clinics from these networks were not identified), but to identify current gaps in the coverage of the Innotrex network. This document is consistent with the clearly understood long-term goal of HCML to eliminate referrals to networks other than Innotrex.

43. On 3 October 2012, Mr Eeles reported by email to Mr Bushnell. Although sent by Mr Eeles, it is clear from the document that Mr Olsen had also had an input. Under a heading, "*Unknowns/Risks at this stage*", the email noted that there were some areas of the country that were not presently covered by Innotrex (or PhysioWorld) clinics. Mr Eeles' proposal was to utilise clinics provided by another network – Recover – and:

> "… if a Recover clinic cannot be found, we can as a last resort use a manual handoff to TPN – however this 'unmasks' Innotrex to TPN – as we would need an Innotrex branded treatment report template to be filled out… Both of these solutions carry the issue that we lose control of the clinical quality of the report, but will be mitigated as we continue to ramp up the Innotrex recruitment. Obviously, using TPN reduces the margin on the cases…"

When cross-examined, Mr Olsen accepted that TPN had not been told about Innotrex by this stage.

44. On 10 October 2012, there was a meeting between Mr Naylor, Ms Abbs and Mr Olsen. HCML had prepared a document which was provided at the meeting. The document noted that "*referral volume has been steady and consistent to [TPN] across all HCML business streams*". Under a heading "*Future Opportunity*", it stated:

> "HCML is due to imminently start a new business opportunity within the medico-legal setting providing a case management, medical reporting and treatment services offering. As a result, HCML will be developing its own small network of physiotherapy clinics named Innotrex to cover core locations around the UK. As part of the treatment offering within this package, HCML will be offering rehabilitation to Innotrex therapists in the first instance. If there are gaps within this coverage referrals will then be channelled through to TPN. As aligned to the HCML Aviva services, service level agreements and pricing (£60/£45 including £15 referral fee) will be offered to TPN with a slight, yet efficient change in workflow."

45. In cross-examination, Mr Olsen agreed that what was being described to Mr Naylor and TPN was a new niche business venture involving medico-legal referrals from claims management companies that would not be affecting referrals to TPN. He accepted that, as a description of Innotrex, it was not full or candid.

46. In my judgment, the report given to TPN about Innotrex was not only lacking in candour, it was deliberately misleading. As Mr Bushnell accepted in his evidence, Innotrex would have been a competitor of and seen as a threat by TPN. HCML knew, and intended, that, once assembly of the Innotrex network was complete, it would dispense entirely with the services of TPN. As is clear from the chronology, the coverage of the Innotrex network was not yet large enough to enable HCML to dispense with TPN. Consequently, and as expedience dictated, HCML needed to retain TPN to service some of its referrals. But, within HCML, there was a concern that the existence of Innotrex was likely to become known to TPN. In my judgment, the limited and misleading disclosures made to TPN at the 10 October 2012 meeting were designed to provide a plausible cover for Innotrex's existence and activities. The motive for this subterfuge was not explored in evidence but I infer that it reflected a concern on HCML's part that, if TPN discovered its true intentions for Innotrex, TPN

would have terminated the Services Agreement leaving HCML possibly to struggle to service its referrals.

47. On 18 October 2012, Mark Sharpe at Aviva Health emailed Mr Olsen to seek information about the locations of Innotrex, PhysioWorld and TPN clinics in relation to particular postcodes. Mr Olsen responded the following day with an example of a table of data showing the location of the clinics on the three networks to given locations and asked whether that was what Mr Sharpe wanted. By this stage, of course, Mr Olsen had the HCML Database at his disposal and it is likely that the data shown in the table in this email was derived from that. However, it is clear that the data regarding the location of TPN clinics had been extracted from the TPN Database.

48. Meanwhile and continuing into January 2013, Mr Olsen was ensuring that HCML continued its policy of ensuring that work was placed with TPN only as a last resort. When cross-examined, Mr Bushnell denied that, by 2013, HCML had already taken a decision to divert business away from TPN. I cannot accept that answer. The contemporaneous documents demonstrate clearly such a decision had been made (see e.g. paragraph 36 above).

49. By the end of February 2013, a total of around 170 clinics had been recruited into Innotrex against a target of 190. In an email on 28 February 2013, Mr Olsen noted that a meeting with Mr Naylor was to take place on 6 March 2013 "*to discuss ongoing TPN relationship with a view to reduce referral volume to TPN and replace with Recover*".

50. On 6 March 2013, Mr Bushnell, Mr Olsen and Mike Kingsley from HCML duly met Mr Naylor. There are handwritten notes of the meeting and a subsequent email of 2 April 2013 from Mr Naylor to Ms Abbs summarises the meeting. In his evidence at trial, Mr Naylor said that, before this meeting, he had become aware that HCML had been "*tapping up*" clinics in the TPN network. In his witness statement, Mr Naylor said that he was also concerned about what was happening with Innotrex and that he was considering legal action against HCML because of what he believed had been HCML's use of the TPN Database. Mr Bushnell's recollection of the meeting was that Mr Naylor was threatening legal action against Aviva Health because of the decision to refer cases to Nuffield Health.

51. Mr Naylor's evidence was that, at the meeting, Mr Bushnell informed him that Aviva Health was "*pushing the work towards Nuffield [Health]*". In his witness statement, Mr Bushnell stated that Aviva Health had informed HCML in early 2013 that it planned to transfer all private medical insurance ("PMI") physiotherapy treatment to Nuffield Health (although this transfer was not apparently completed until January 2014). As a result, he said, the transfer of PMI cases to Nuffield Health reduced the number of referrals that went to TPN.

52. On the point about against whom TPN was contemplating legal action, I prefer the evidence of Mr Naylor on this point. A claim against Aviva Health by TPN was inherently implausible as TPN had no contractual relationship with Aviva Health and there was no other obvious basis on which to claim against Aviva Health for lost business. The meeting note contains a reference to "*IP*" and a "*barrister's advice*" and this supports Mr Naylor's evidence that he had referred to a claim against HCML for using the TPN Database.

53. When cross-examined at trial about the 6 March 2013 meeting, Mr Bushnell was asked about what his plans for Innotrex were at that stage. He said that HCML had been building Innotrex throughout 2012. The original contract with Aviva had been for neck and spine injuries. In 2011 and 2012 HCML had been running pilots with Aviva Health on other muscular skeletal areas and during 2012 Mr Bushnell said it had become clear to him that these other areas were going to be a "*runaway success*" and that he had found out from Aviva Health that they were likely to make changes that would see more work referred in that direction. He said his expectation throughout 2012 was that HCML might see a doubling of the volume of physiotherapy work. He said, against that, it came as a "*bolt out of blue*" when, in January 2013, Aviva Health said that it had decided to direct all physiotherapy work to Nuffield Health. Aviva Health indicated to HCML that the transfer to Nuffield Health would be effective immediately, the issue "*dragged on*" and it was not until the fourth quarter of 2013 that Nuffield Health began a pilot as part of the handover of the work from HCML. It appears to be common ground that the impact of Aviva Health switching to Nuffield Health was not felt until January 2014. Indeed, it was not until 8 January 2014 that Mr Olsen emailed Ms Abbs to confirm: "*we have now been instructed to send all new Aviva PMI referrals to Nuffield*".

54. It was not until May 2014, however, that Mr Naylor complained formally to HCML. On 14 May 2014 he sent an email to Philip Eley, the Finance Director of HCML ("Mr Eley"):

> "Now that all the referrals that used to come through TPN to my network are going through Innotrex, there are issues extending beyond the withheld treatment fees and referral fees. I would hope Keith or Scott may find time to discuss…"

55. Mr Eley and Mr Olsen did speak to Mr Naylor on 16 May 2014. Mr Naylor sent an email summarising the discussions after the call. Included was the following:

> "TPN have been told by practices that the referrals we were sending are now coming through the Innotrex (HCML) Network and HCML case managers have been telling TPN that the Innotrex network is the TPN database. Scott confirmed 'hand on heart that the Innotrex network was developed from HCML data and built from that'. [Mr Naylor] stated it certainly looks like it is TPN's database. [Mr Naylor] agreed to put something together to send to Scott on this matter."

56. An email from Ms Abbs to Mr Naylor on 16 May 2014 provided figures of new HCML referrals to TPN during 2013. The figures show generally decreasing referrals from 555 in January 2013 to 81 in December 2013 (i.e. before the impact of Nuffield Health).

57. Mr Olsen sent an email to Mr Naylor on 18 May 2014. It purported to be an explanation of why Mr Naylor was wrong to conclude that HCML had used the TPN Database to create the Innotrex network. Mr Olsen stated:

> "Thanks for your earlier email. I have provided a breakdown of events which we believe have contributed to the misunderstanding that HCML has used the TPN database of physiotherapy clinics to build its own Innotrex network…
>
> I mentioned during our conversation that HCML has used its own internal data, based on home postcodes, to determine where we require an Innotrex clinic…

> We also have an internal physiotherapy search tool which lists the TPN, Innotrex, d2physio and PW clinics that we use (screenshot attached). I can only assume that unfortunately, a case manager has misinterpreted this physiotherapy search tool as the Innotrex database. Obviously, this was incurred and I have clarified this understanding with all internal line managers…
>
> Dale, I hope the above provides reassurance that we have not used the TPN database to build our own network nor do we state that the TPN network falls under Innotrex…"

58. I set out my conclusions on the issue of whether HCML had used TPN's data to set up Innotrex below (paragraph 61(ii) below), but I simply note here that Mr Olsen's statement in this email to Mr Naylor that HCML had not used information from TPN's Database to build the Innotrex network was not true and, as the person who had been closely involved in the use of the data, must have been known by Mr Olsen to be untrue.

Mr Olsen's evidence

59. In setting out the chronology above, I have referred above to parts of Mr Olsen's evidence where that has a bearing on the relevant event. I should state separately my assessment of Mr Olsen's evidence.

60. Consistent with HCML's case (and Mr Bushnell's evidence – see paragraph 24 above), in his witness statement for trial, Mr Olsen stated:

> "From January 2012 I was charged by Keith Bushnell to assist him in creating HCML's own network of clinics to be known as Innotrex and to organise the recruitment of clinics into Innotrex. It was made clear to me [by Mr Bushnell] that the network was to be created 'from scratch' and in accordance with a strict recruitment process in order to distinguish the Innotrex clinics from our competitors, including the ones in the TPN network. There were at this time approximately 45,000 registered physiotherapists practising in the UK so I did not think that it would be unduly difficult to find members as there was a very large pool to choose from. The challenge was going to be to find clinics of the requisite quality."

61. The thrust of Mr Olsen's evidence in his witness statement was that HCML had invested a large amount of resources (and he personally a large amount of time) researching, identifying, checking and assessing candidate clinics for the Innotrex network. In its Defence, HCML had denied that it had made use of TPN's Database. I reject that. The true position is, I find:

    i) From 8 February 2012, Mr Olsen requested from TPN and was sent information extracted from TPN's Database (see paragraphs 27-29 above). I am satisfied that Mr Olsen was seeking that information not, as he claimed, for a geographical pricing model requested by Aviva Health, but to assist with the creation of the Innotrex network (see paragraphs 30-32 above).

    ii) Mr Olsen did use the information that he had been sent from TPN's Database to assist in the creation of the Innotrex network. The documentary evidence and answers provided by Mr Olsen in cross-examination demonstrate that

information from the TPN Database that had been sent by Ms Abbs to Mr Olsen (see paragraphs 27-29 above) was used (at least in part):

a) to create the spreadsheet sent to Mr Bingham on 21 March 2012 (see paragraphs 34-35 above);

b) to form the HCML database by incorporating (at least) data from the 16 Feb 2012 Spreadsheet (see paragraph 39 above);

c) to create the Update Spreadsheet (see paragraph 38 above); and

d) to create the Top 50 Spreadsheet (see paragraph 41 above).

I cannot establish the full extent of the use of data from TPN's Database by HCML. That would be an issue to be resolved on any assessment of damages.

62. I have made the findings above based on the evidence of Mr Olsen and evidence from the documents. I should briefly refer to the other witness evidence from HCML.

i) As I have noted above (see paragraph 24 above), Mr Bushnell stated that TPN's database was not used in the formation of Innotrex. I reject that evidence. I am not able to determine, on the evidence, whether Mr Bushnell was aware of the use that Mr Olsen had made of the information provided by TPN. I do not need to resolve that point. It is sufficient that I have made the findings about the use in paragraph 61 above.

ii) In his witness statement, Mr Bingham stated:

> "The suggestion that HCML simply 'lifted' the Defendant's network into Innotrex is very far removed from the truth. To my certain knowledge, the construction of Innotrex was achieved by a combination of the assimilation of the existing D2 and PhysioWorld networks, my input as a source of introductions and internet research to locate suitable clinics in defined geographical locations."

When cross-examined, Mr Bingham accepted that he had been a consultant "*around the edges*" and had typically spent about 1 day a week working on Innotrex. He also accepted that he did not know where the information used to target clinics had come from and he did not have access himself to the HCML Database. From these answers, I am satisfied that Mr Bingham did not have a sufficient day-to-day involvement with the Innotrex project to know whether data provided by TPN had been used. Further, his denial that HCML had 'lifted' TPN's clinic list into Innotrex is irrelevant. That (unsubtle) use is not what is alleged by TPN or what I find had happened.

Issues

63. Following the order of Master Yoxall on 6 July 2016, this trial has concerned only the issue of liability. The following issues fall to be determined:

i) The construction of clause 2.3 of the Services Agreement and whether HCML was in breach of that clause by failing make around 700 referrals per month to TPN in the period from November 2012 to July 2014.

ii) Whether HCML has breached the Light Touch Agreement by failing to make around 250-300 referrals per month in the period from November 2012 to July 2014.

iii) Whether HCML infringed the database rights of TPN under the Database Regulations.

iv) The construction of clause 14.1 of the Services Agreement and whether HCML was in breach of that term by using confidential information belonging to TPN.

v) The construction of clause 3.1 of the Services Agreement - the obligation of good faith -and whether HCML was in breach of that term.

vi) Whether HCML was guilty of passing off the FCA score as its own.

64. Issues (iii) and (iv) substantially overlap. TPN had originally pleaded its claim based on breach of confidence alone. After close of the evidence, it applied for, and was granted, permission to amend its counterclaim to add a claim for infringement of database rights.

Alleged breach of Services Agreement clause 2.3

Law

65. It is common ground that in ascertaining the meaning of a particular term, the contract must be read as a whole. The proper approach to the interpretation of contractual provisions was set out by the Supreme Court in ***Arnold -v- Britton*** **[2015] AC 1619**. Lord Neuberger (with whom Lord Sumption and Lord Hughes agreed) said this:

> [15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to '*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*', to quote Lord Hoffmann in ***Chartbrook Ltd -v- Persimmon Homes Ltd*** **[2009] AC 1101** [14]. And it does so by focussing on the meaning of the relevant words… in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see ***Prenn*** **[1971] 1 WLR 1381**, **1384-1386**; ***Reardon Smith Line Ltd -v- Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)*** **[1976] 1 WLR 989**, **995-997**, *per* Lord Wilberforce; ***Bank of Credit and Commerce International SA -v- Ali*** **[2002] 1 AC 251** [8] *per* Lord Bingham of Cornhill; and the survey of more recent authorities in ***Rainy Sky*** **[2011] 1 WLR 2900** [21]-[30] *per* Lord Clarke of Stone-cum-Ebony JSC.

[16] For present purposes, I think it is important to emphasise seven factors.

[17] First, the reliance placed *in* some cases on commercial common sense and surrounding circumstances (e.g. in ***Chartbrook*** **[2009] AC 1101** [16]-[26] should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

[18] Secondly, when it *comes* to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

[19] The third point I should *mention* is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in ***Wickman Machine Tools Sales Ltd -v- L Schuler AG*** **[1974] AC 235**, **251** and Lord Diplock in ***Antaios Cia Naviera SA -v- Salen Rederierna AB (The Antaios)*** **[1985] AC 191**, **201**, quoted by Lord Carnwath JSC at [110], have to be read and applied bearing that important point in mind.

[20] Fourthly, while *commercial* common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

[21] The fifth point concerns *the* facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances

which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

[22] Sixthly, in some cases, an *event* subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is ***Aberdeen City Council -v- Stewart Milne Group Ltd*** **2012 SC (UKSC) 240**, where the court concluded that "*any ... approach*" other than that which was adopted "*would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into*" the contract: see [21] and [22].

The seventh factor is not relevant for present purposes.

66. Lord Carnwarth (although he dissented on the ultimate conclusion) identified the following principles of contractual interpretation:

[108] In an unusual case such as this, little direct help is to be gained from authorities on other contracts in other contexts. As Tolstoy said of unhappy families, every ill-drafted contract is ill-drafted "*in its own way*". However, the authorities provide guidance as to the interpretative tools available for the task. The general principles are now authoritatively drawn together in an important passage in the judgment of Lord Clarke of Stone-cum-Ebony JSC in ***Rainy Sky SA v Kookmin Bank*** **[2011] 1 WLR 2900** [14]-[30]. As that passage shows, there is often a tension between, on the one hand, the principle that the parties' common intentions should be derived from the words they used, and on the other the need if possible to avoid a nonsensical result.

[109] The former is evident, as Lord Clarke JSC emphasised, in the rule that "*where the parties have used unambiguous language, the court must apply it*": [23]. However, in view of the importance attached by others to the so-called "*natural meaning*" of clause 3(2), it is important to note that Lord Clarke JSC (paras 20-23) specifically rejected Patten LJ's proposition that "*unless the most natural meaning of the words produces a result so extreme as to suggest that it was unintended, the court must give effect to that meaning.*" In Lord Clarke JSC's view it was only if the words used by the parties were "*unambiguous*" that the court had no choice in the matter.

[110] He illustrated the other side of the coin by quotations from Lord Reid in ***Wickman Machine Tools*** … [p.251]:

> "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

and Lord Diplock in ***Antaios Cia Naviera SA***… [p.201]:

> "if detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense."

As a rider to the last quotation, Lord Clarke JSC cited the cautionary words of Hoffmann LJ (***Co-operative Wholesale Society Ltd -v- National Westminster Bank plc*** **[1995] 1 EGLR 97**, **99**):

> "This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement."

[111] I agree … that it may be unnecessary and unhelpful to draw sharp distinctions between problems of ambiguity and of mistake, or between the different techniques available to resolve them. In ***Chartbrook Ltd -v- Persimmon Homes Ltd*** … [23], Lord Hoffmann cited with approval a passage of my own (in ***KPMG LLP -v- Network Rail Infrastructure Ltd*** **[2007] Bus LR 1336** [50]) where I discussed the role of what is sometimes called "*interpretation by construction*". I criticised the tendency to deal separately with "*correction of mistakes*" and "*construing the paragraph 'as it stands'*", as though they were distinct exercises, rather than as "*aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended*". Lord Hoffmann added, [25]:

> "What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant."

[112] Another permissible route to the same end is by the implication of terms "*necessary to give business efficacy to the contract*". I refer again to Lord Hoffmann's words, this time in ***Attorney General of Belize -v- Belize Telecom Ltd*** **[2009] 1 WLR 1988** [22], explaining the "*two important points*" underlined by that formulation:

> "The first, conveyed by the use of the word 'business', is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties … The second, conveyed by the use of the word 'necessary', is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means."

[113] ***Aberdeen City Council -v- Stewart Milne Group Ltd*** … is a useful recent illustration in this court of how these various principles may be deployed, to

enable the court to achieve a commercially sensible result in the face of apparently intractable language. A contract for the sale of development land gave the council the right to an uplift (described as "*the profit share*") in certain defined circumstances, one being the sale of the property by the purchaser. The issue was the calculation of the profit share, which the contract defined as a specified percentage of the "*estimated profit*" (defined by reference to "*open market value*") or "*the gross sale proceeds*". The issue was how the definition should be applied in the case of a sale by the purchaser to an associated party at an undervalue. The court held in agreement with the lower courts that, in that event, notwithstanding the apparently unqualified reference to gross sale proceeds, the calculation should be based on open market value.

[114] In a concurring judgment, with which all the members of the court agreed, Lord Clarke JSC, at [28], referred to his own judgment in ***Rainy Sky*** as indicating the "*ultimate aim*", that is:

> "to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant; the relevant reasonable person being one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

As he pointed out, "*on the face of it*" the reference in the contract to the gross sale proceeds was a reference to the "*actual sale proceeds*" received by the appellants. It was not easy to conclude "*as a matter of language*" that the parties meant, not the actual sale proceeds, but the amount the appellants would have received on an arm's length sale at market value of the property; nor was it easy to conclude that the parties "*must have intended*" the language to have that meaning. He referred, at [31], to the comment of Baroness Hale of Richmond JSC in the course of the argument that:

> "unlike ***Rainy Sky***, this is not a case in where there are two alternative available constructions of the language used. It is rather a case in which, notwithstanding the language used, the parties must have intended that, in the event of an on sale, the appellants would pay the respondents the appropriate share of the proceeds of sale on the assumption that the on sale was at a market price."

He thought the problem should be solved by implying a term to the effect that, in the event of a sale which was not at arm's length in the open market, an open market valuation should be used. As he explained, [33]:

> "If the officious bystander had been asked whether such a term should be implied, he or she would have said 'of course'. Put another way, such a term is necessary to make the contract work or to give it business efficacy."

He preferred the use of an implied term to "*a process of interpretation*", although "*the result is of course the same*": [30]-[33].

67. Ascertaining the "intention of the parties" is an objective exercise: ***Sirius International Insurance Co -v- FAI General Insurance Ltd*** **[2004] 1 WLR 3251**

[18] *per* Lord Steyn. In ***Dumbrell -v- The Regional Group of Companies Inc*** **(2007) DLR (4th) 201**, Doherty JA said:

> "In my view, when interpreting written contracts, at least in the context of commercial relationships, it is not helpful to frame the analysis in terms of the subjective intention of the parties at the time the contract was drawn. This is so for at least two reasons. First, emphasis on subjective intention denudes the contractual arrangement of the certainty that reducing an arrangement to writing was intended to achieve. This is particularly important where, as is often the case, strangers to the contract must rely upon its terms. They have no way of discerning the actual intention of the parties, but must rely on the intent expressed in the written words. Second, many contractual disputes involve issues on which there is no common subjective intention between the parties. Quite simply, the answer to what the parties intended at the time they entered into the contract will often be that they never gave it a moment's thought until it became a problem."

68. Mr Spackman submits that the deletion from clause 2.3 of the Services Agreement of the words "*but there are no guaranteed minimum volumes*" which had appeared in the equivalent clause in the Pilot Agreement is material and indicates that the parties had agreed that HCML would make circa 700 referrals per month to TPN. He accepts that evidence of prior negotiations or previous drafts of a written agreement would not be admissible as an aid to interpretation, but, relying upon ***Punjab National Bank -v- De Boinville*** **[1992] 1 WLR 1138, 1149b** *per* Staughton LJ, he submits that the Court can have regard to a prior *concluded* agreement when determining whether the deletion of words in a later agreement is material to the interpretation of the relevant term.

69. Mr Kinnier QC for HCML takes as his starting point that TPN contends that clause 2.3 means that, during the course of the Services Agreement, it would receive around 700 referrals per month. The inclusion of the word "around" indicates that TPN could receive more than 700 referrals per month or fewer than 700 referrals in what TPN calls a 'reasonable tolerance level'. In his witness statement, Mr Naylor described this clause as providing a "*guarantee of 700 referrals per month*". If one thing is clear from the wording of the clause, it was not offering any sort of guarantee. Once that construction is rejected, the contract is silent as to what would be a 'reasonable tolerance level'. How was compliance with this clause to be measured, asks Mr Kinnier.

70. Mr Kinnier QC disputes that it is permissible for the Court to construe clause 2.3 of the Services Agreement by having regard to the equivalent clause of the Pilot Agreement. He submits that the starting point in construing clause 2.3 of the Services Agreement is the term itself. Although the Court will construe a contract against the background circumstances, the detail of previous contracts and prior negotiations between the parties are irrelevant: ***Prenn -v- Simmonds*** **[1971] 1 WLR 1381** at **1383H-1385D** (*per* Lord Wilberforce); and ***Berkeley Community Villages Ltd -v- Pullen*** **[2007] EWHC 1330 (Ch)**; **[2007] 3 EGLR 101** [44]-[56] (*per* Morgan J).

71. On the question of whether the Pilot Agreement is admissible on the issue of the construction of clause 2.3 in the Services Agreement, in my judgment Mr Spackman is correct. There are very clear reasons why inchoate negotiations are not admissible

in the construction of the ultimate term. By definition, these earlier negotiations or drafts are not 'agreed'. An earlier contract between the parties is different. It is the product of agreement. Where, as here, the subject matter of the contract is essentially the same, changes that are made to the terms of the agreement *may* shed light on the proper construction of the disputed term.

72. However, I do accept Mr Kinnier's submissions that, even if admissible, some caution needs to be adopted in determining what assistance can really be derived from the deletion of certain words from a subsequent contract. He has referred me to ***Mineralimportexport -v- Eastern Mediterranean Maritime Ltd ("The Golden Leader")*** **[1980] 2 Lloyd's Rep 573** in which Lloyd LJ considered the relevance of deletions to a particular clause, and said (at p.575):

> "… it seems to me quite another thing to say that the deletion itself has contractual significance; or that by deleting a provision in a contract the parties must be deemed to have agreed the converse. The parties may have had all sorts of reasons for deleting the provisions; they may have thought it unnecessary; they may have thought it inconsistent with some other provision in the contract; it may even have been deleted by mistake".

73. Similarly, in ***Mopani Copper Mines plc -v- Millennium Underwriting Ltd*** **[2008] 2 All ER (Comm) 976**; **[2008] 1 CLC 992**; **[2009] Lloyd's Rep IR 158**; **[2008] Bus LR D121**, Christopher Clarke J said:

> [122] Even if recourse is had to the deleted words, care must be taken as to what inferences, if any, can properly be drawn from them. The parties may have deleted the words because they thought they added nothing to, or were inconsistent with, what was already contained in the document; or because the words that were left were the only common denominator of agreement, or for unfathomable reasons or by mistake. They may have had different ideas as to what the words meant and whether or not the words that remained achieved their respective purposes.
>
> [123] Further, as Morgan, J, pointed out in ***Berkeley Community Villages Ltd -v- Pullen*** **[2007] 3 EGLR 101** [55]:
>
> > "Even in the cases where the fact of deletion is admissible as an aid to interpretation, there is a great difference between a case where a self-contained provision is simply deleted and another [case] where the draft is amended and effectively recast. It is one thing to say that the deletion of a term which provides for 'X' is suggestive that the parties were agreeing on 'not X'; it is altogether a different thing where the structure of the draft is changed so that one provision is replaced by another provision. Further, where the first provision contains a number of ingredients, some assisting one party and some assisting the other, and that provision is removed, it by no means follows that the parties intended to agree the converse of each of the ingredients in the earlier provision."

Parties' submissions

74. In contending that clause 2.3 represents a binding commitment on the part of HCML to send and TPN to receive around 700 referrals per month for the duration of the Services Agreement, Mr Spackman relies upon the following:

i) The commercial purpose of the Services Agreement was for HCML and TPN to work together for the provision of the 'Service' to HCML's customers and customers of Aviva (see Recital in paragraph 11 above).

ii) Entering in to the (fairly complex) contract would have been pointless if HCML could have decided not to refer any cases to TPN and, in any event, the parties had agreed that TPN would continue to perform the TPN Services from 31 December 2010 (clause 2.1 – paragraph 12 above).

iii) HCML (and TPN) had expressly agreed to extend and expand the TPN Service provision previously rendered under the Pilot (Recital and clause 2.1). The reference to "*expand*" can only have been a reference to the volume of referrals to be sent.

iv) The Services Agreement had deleted the words "*but there are no guaranteed minimum volumes*" from clause 2.3. It is a permissible inference (and probably the only inference) that because the level of referrals under the Pilot Agreement had been achieved and because the parties had agreed to extend and expand the provision of the Service, HCML accepted that it would be willing and able to make around 700 referrals per month to TPN. This was particularly so because the provision had been expanded to other non-Aviva policyholders.

v) Clause 2.2 required TPN to perform the TPN Services at the Clinics as requested by HCML from time to time.

vi) On its true construction therefore, HCML was required to refer patients to TPN as part of the service which HCML was providing to policyholders otherwise the agreement would have been commercially pointless.

vii) The number of monthly referrals ("circa 700") was based upon the Pilot and the level of referrals ("circa 200") which had been achieved under the terms of the Pilot and the expectation of the parties was therefore that the number of referrals would be increased to circa 700 per month.

viii) The words replacing "*but there are no guaranteed minimum volumes*" were "*and volume discounts from time to time for this level of referrals*" plainly envisages (1) that HCML will be making referrals to TPN and (2) that if the level of 700 is achieved then HCML will be looking to apply the volume discount for referrals at that level.

ix) HCML had agreed to refer patients for physiotherapy through TPN. TPN would only get paid in the event of a referral and Mr Bushnell accepted in cross-examination that the intention on the part of HCML was to make referrals. TPN was therefore very interested in the level of referrals which would be made.

x) In relation to the Light Touch Pilot HCML agreed to use TPN exclusively and that HCML "*anticipated*" sending 50 to 60 referrals to TPN each month (see paragraph 14 above). This emphasises that HCML were intending to send

TPN referrals in the range of 50 – 60 per month but the word "*anticipate*" related solely to the precise number and not the making of any referrals at all.

xi) In the absence of a purposive interpretation, the Services Agreement is denuded of all meaning and effect: if HCML is correct, HCML did not have any contractual obligation to refer a single patient to TPN after the signing of the agreement. This is an affront to commercial common sense.

75. For HCML, Mr Kinnier QC submits that the verb "*anticipates*" means "*expects*". It does it provide an absolute assurance of a minimum level of monthly referrals. It is no more than an indication of expectation. This construction reflected the practical and commercial context in which the Services Agreements was made. In his witness statement, Mr Bushnell said:

> "The companies' contractual relationship was regulated at that time by the Services Agreement which made no provision for guaranteed referrals and there was no possibility of that situation changing. As I have said, the reason for the reference to the number of anticipated referrals at clause 2.3 of the Services Agreement was to ensure that TPN had the capacity to deal with that level of referrals in a way which would ensure that, as stated in my email of 27 June 2011, HCML would be able to "meet [its] commitments to Aviva Health".

76. Mr Kinnier says that it is telling that, during the term of the Services Agreement, there was a significant variation in the number of monthly referrals to TPN. In February, April and June 2012, the number of referrals was significantly below 700 but there is no contemporaneous evidence of concerns or complaints being raised by TPN with HCML in relation to the number of referrals in these months or any other month in which the alleged threshold of circa 700 was either not met or, alternatively, the number of referrals fell below a 'reasonable level of tolerance'.

77. On that latter point, TPN's contention that the clause guaranteed "*more or less than 700 referrals per month within a reasonable tolerance level*" is inherently contradictory. The Services Agreement made no provision for a "reasonable tolerance level". This is a concept that TPN has been driven to insert in recognition of the fact that the Services Agreement did not provide for a set level of referrals each month. If the construction urged by TPN is accepted, it is impossible to determine what number of referrals below 700 would have placed HCML in breach of the Services Agreement.

Decision

78. I reject TPN's contention that clause 2.3 imposed an obligation on HCML to make referrals to TPN at a level of around 700 per month. My reasons are:

i) Clause 2.3 cannot, in its natural and ordinary meaning, be read as imposing an *obligation* to provide circa 700 referrals each month. The word "*anticipates*" is wholly inconsistent with any sort of binding commitment. The uncertainty as to the number injected by the use of "*circa*" only strengthens that conclusion.

ii) The Services Agreement does not identify – and it would have been impossible for the parties to ascertain - the band of tolerance introduced by the

word “circa” (i.e. the figure below 700 which would have placed HCML in ‘breach’ of clause 2.3).

iii) Without an obligation to provide a specified number of referrals each month, the Services Agreement is not denuded of all meaning and effect or rendered “nonsensical”. The balance of the Services Agreement regulated the relationship between HCML and TPN (e.g. service level agreements, patient confidentiality, reporting and management information, indemnity, insurance, sub-contracting etc.), provided how the referrals were to be handled and the level of remuneration for the referrals. That was a perfectly sensible agreement to reach even if it did not provide for any guaranteed number of referrals.

iv) Although the inevitable consequence of my finding as to the true construction of clause 2.3 is that the Services Agreement did not, in fact, oblige HCML to make *any* referrals to TPN, I do not regard that as being an “*affront to commercial common sense*” as submitted by TPN. I accept that both parties were certainly working on the basis that TPN would continue to receive referrals from HCML and that the Services Agreement was premised on an expectation that the number of referrals was likely to increase substantially above the numbers during the Pilot Agreement. But TPN knew that HCML’s referrals were not being generated by them independently but were (largely) coming from Aviva Health. The Services Agreement was understood by both parties to enable HCML to service its obligations to Aviva Health.

v) The clause itself is not ambiguous. I cannot reject what I find to be its natural meaning on the basis that TPN contends that to enter an agreement that did not place an obligation upon HCML to make a single referral was commercially imprudent or not what Mr Naylor had intended the relationship with HCML to be.

vi) Although Mr Bushnell was the primary draftsman, both parties had control over the language used in clause 2.3 (and the Services Agreement more generally). The language is not complicated. Clause 2.3 could easily have provided, simply, that HCML would make 700 referrals per month with appropriate volume discounts. It could have gone on to state – if that was the bargain that was being struck - what would happen if HCML made fewer than 700 referrals.

vii) I cannot and do not attach any significance to the fact that the words “*but there are no guaranteed minimum volumes*” were deleted from Clause 2.3. Given that the words “*anticipates*” and “*circa*” remained, this is an instance where it would be plainly wrong to conclude that, by deleting the words, the parties thereby agreed that the clause was being converted into a guaranteed level of referrals (applying the principle from ***The Golden Leader*** – paragraphs 72-73 above). It is possible to speculate about the reasons why these words were deleted, but no explanation leaps forward as being obvious (and certainly not that contended by TPN). As Lloyd LJ observed, it may just have been a mistake. I do not need to make a finding about the reason. It is sufficient that I reject the contention that the deletion of the words supports the construction of the clause urged by TPN.

79. In consequence, I find that there has been no breach of clause 2.3 by HCML.

80. Mr Kinnier QC had advanced a subsidiary point on behalf of HCML that, because of Aviva Health's decision to send work to Nuffield Health (see paragraphs 51-53) the Services Agreement had been frustrated. Given that I have found that there has been no breach of clause 2.3, I need not resolve this point.

Alleged breach of the Light Touch Agreement

81. Having resolved the issue of clause 2.3 of the Services Agreement, I can deal with the alleged breach of the Light Tough Agreement very shortly.

82. I have real doubts whether the evidence demonstrates a concluded agreement (see paragraphs 14-17 above) whether in December 2010 or July 2011 or its terms. But even making every assumption in favour of TPN as to the existence and terms of the Light Touch Agreement, TPN faces an insuperable difficulty. One thing is clear: HCML (in Mr Bushnell's email of 27 June 2011 – see paragraph 16 above) made it plain that it could not guarantee any particular number of referrals. In my judgment, if there existed a concluded oral agreement, like the Services Agreement, it did not include a term obliging HCML to make any particular number of referrals to TPN. In the premises, I reject TPN's claim that there has been a breach of the Light Touch Agreement (if any such concluded agreement existed).

Infringement of Database right

Summary

83. TPN contends that it owns a database right in the TPN Database within the terms of the European Parliament and Council Directive 96/9/EC ("the Database Directive") and now recognised in s.3A(1) Copyright, Designs and Patents Act 1988 ("the CDPA") and that HCML has infringed TPN's database right.

Law

84. The Database Directive includes the following operative provisions:

"**CHAPTER I**

SCOPE

Article 1

Scope

1. This Directive concerns the legal protection of databases in any form.

2. For the purposes of this Directive, 'database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means…

CHAPTER II

COPYRIGHT

Article 3

Object of protection

1. In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.

2. The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves…

CHAPTER III

SUI GENERIS RIGHT

Article 7

Object of protection

1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this Chapter:

   (a) 'extraction' shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

   (b) 're-utilization' shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;

   Public lending is not an act of extraction or re-utilization.

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their contents.

5. The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal

exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted."

85. The CDPA was amended pursuant to s.2(2) of the European Communities Act 1972 Act by the Copyright and Rights in Databases Regulations 1997, SI 1997/3032 ("the 1997 Regulations"), to implement the Database Directive.

86. Chapter III of the Database Directive was implemented by Part III of the 1997 Regulations. This material parts of the 1997 Regulations are:

12. Interpretation

(1) In this Part—

'database' has the meaning given by section 3A(1) of the 1988 Act (as inserted by Regulation 6);

'extraction', in relation to any contents of a database, means the permanent or temporary transfer of those contents to another medium by any means or in any form;

'insubstantial', in relation to part of the contents of a database, shall be construed subject to Regulation 16(2);

'investment' includes any investment, whether of financial, human or technical resources;

're-utilisation', in relation to any contents of a database, means making those contents available to the public by any means;

'substantial', in relation to any investment, extraction or reutilisation, means substantial in terms of quantity or quality or a combination of both…

13. Database right

(1) A property right ('database right') subsists, in accordance with this Part, in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database.

(2) For the purposes of paragraph (1) it is immaterial whether or not the database or any of its contents is a copyright work, within the meaning of Part I of the 1988 Act…

14. The maker of a database

(1) Subject to paragraphs (2) to (4), the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation shall be regarded as the maker of, and as having made, the database.

(2) Where a database is made by an employee in the course of his employment, his employer shall be regarded as the maker of the database, subject to any agreement to the contrary…

15. First ownership of database right

The maker of a database is the first owner of database right in it.

16. Acts infringing database right

(1) Subject to the provisions of this Part, a person infringes database right in a database if, without the consent of the owner of the right, he extracts or re-utilises all or a substantial part of the contents of the database.

(2) For the purposes of this Part, the repeated and systematic extraction or re-utilisation of insubstantial parts of the contents of a database may amount to the extraction or re-utilisation of a substantial part of those contents…

17. Term of protection

(1) Database right in a database expires at the end of the period of fifteen years from the end of the calendar year in which the making of the database was completed…

(3) Any substantial change to the contents of a database, including a substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment shall qualify the database resulting from that investment for its own term of protection.

18. Qualification for database right

(1) Database right does not subsist in a database unless, at the material time, its maker, or if it was made jointly, one or more of its makers, was—

(a) an individual who was a national of an EEA state or habitually resident within the EEA,

(b) a body which was incorporated under the law of an EEA state and which, at that time, satisfied one of the conditions in paragraph (2)…

(2) The conditions mentioned in paragraphs (1)(b) … are—

(a) that the body has its central administration or principal place of business within the EEA, or

(b) that the body has its registered office within the EEA and the body's operations are linked on an ongoing basis with the economy of an EEA state…

(4) In this Regulation—

(a) *"EEA"* and *"EEA state"* have the meaning given by section 172A of the 1988 Act;

(b) *"the material time"* means the time when the database was made, or if the making extended over a period, a substantial part of that period…

87. Some databases will also qualify for copyright protection in addition to the *sui generis* database right (see discussion in ***Forensic Telecommunications Services Ltd -v- Chief Constable of West Yorkshire Police*** **[2012] FSR 15 [83]-[90]** *per* Arnold J). TPN does not maintain any claim that it owned a copyright in the TPN Database. Its claim is that it owns the *sui generis* database right that has been infringed by HCML.

Subsistence and ownership

88. Under Article 7(1) of the Database Directive, the database right will subsist where, qualitatively and/or quantitatively there has been substantial investment in either the obtaining, verification or presentation of the contents. That investment covers "*any investment, whether of financial, human or technical resources*" (Regulation 12(1)). Whether the investment has been "*substantial*" (as defined) is a matter of fact to be determined by the Court. In ***British Horseracing Board -v- William Hill Organisation Limited*** **[2005] RPC 13**, the CJEU concluded that the relevant investment is that used to seek out pre-existing information and collating them into a database:

> [30] … the expression 'investment in … the obtaining, verification or presentation of the contents' of a database must be understood, generally, to refer to investment in the creation of that database as such
>
> [31] … The purpose of the protection by the *sui generis* right provided for by the directive is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database.

89. Mr Silcock on behalf of HCML has raised several preliminary points:

    i) first, that TPN has failed to identify the "database" over which it claims to have a database right; and

    ii) second, that, in any event, TPN has not pleaded (or supported by evidence):

        a) the identity(ies) of the individual maker(s) of the database(s) in question;

        b) the date(s) upon which it is alleged that the database(s) were first made (or substantially completed); and

        c) whether or not TPN relies upon any subsequent new or modified version(s) of the database(s) in question as having been sufficiently modified as to give rise to any new database right(s) therein, and if so, whether any of those new versions/rights are relied upon against HCML in this action.

90. He has advanced the following further arguments:

    i) Although he accepts that in his witness statement for trial Mr Naylor has stated that he *may* have compiled a database between the period from 1996 (before the Database Directive was brought into force in the UK) to 2002, the evidence is insufficient to demonstrate the necessary elements for the relevant

database(s) to be identified and for database right to be proved to have subsisted therein.

ii) If Mr Naylor did create an original database, it is unclear whether and to what extent the relevant database right came to be owned by TPN. There is no evidence of any assignment of any database right from Mr Naylor to TPN after it was incorporated.

iii) The business operated by TPN is operated with at least one other company closely associated with TPN (namely TPN Physiotherapy Network (UK) Limited (company number 07183494)). There is no reason for presuming any database right is owned by TPN, rather than by one or more other non-parties to the present litigation. If TPN is an equitable owner, or exclusive licensee of any database right, as a rule of practice the action could not legitimately be sustained without the legal owner(s) being joined as parties to the present action (see ***Fine & Country Ltd v Okotoks Ltd*** **[2012] EWHC 2230 (Ch)** [200]-[201]).

iv) Finally, there is no evidence as to the date of the creation of the database(s) in question which is material given that the ordinary term of database right is only 15 years.

91. Mr Spackman has submitted that this is a series of technical objections that, on analysis, has no substance. The issue, he submits is straightforward. There is no doubt what the database is and what it included (see paragraph 26 above). It is clear on the evidence that Mr Naylor originally created the database. It is immaterial whether there was any formal assignment of the database right that he would have owned as, with his permission, TPN has taken over the maintenance of the database including adding, updating and verifying the information contained in it. It is unnecessary to identify the actual person who carried out this updating work as it is plain that it was done by employees of TPN which itself was a qualifying company under Regulation 18. As to the creation date, this was also immaterial given the "rolling" nature of the creation and subsistence of the right. In this respect, he referred me to ***Beechwood House Publishing Ltd (t/a Brinleys) -v- Guardian Products Ltd*** **[2010] EWPCC 12** in which HHJ Birss QC (as he then was) dealt with subsistence and ownership of a database right, including the "rolling" nature of the right.

> [61] Database right arises as a result of the UK implementation of Council Directive 96/9/EC of 14 March 1996 on the legal protection of databases. As a result the Regulations were passed which amended the Copyright Designs and Patents Act 1988 in part and themselves contain most of the important substantive provisions. A "*database*" is defined in s3A of the 1988 Act (as amended) as "*a collection of independent works, data or other materials which (a) are arranged in a systematic or methodical way, and (b) are individually accessible by electronic or other means.*" Database right is a property right which subsists in a database pursuant to Part III of the Regulations. Database right subsists if there has been a substantial investment in obtaining, verifying or presenting the contents of the database (reg. 13 of the Regulations).
>
> [62] The first owner of database right is the maker of the database (reg. 15 of the Regulations). The maker of the database is defined in reg. 14. The first material

element to the definition is reg. 1 that the "*person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation shall be regarded as the maker of, and as having made, the database.*" Reg. 14(2) then provides that, subject to an agreement to the contrary, if a database is made by an employee in the course of his employment, the maker is regarded as the employer.

[63] Mr Brinzer's evidence explains that the claimant has been publishing the database since 1994 and is now at the stage of maintaining it rather than building it up from nothing. This involves substantial resources to update the database to take account of changes and adding and removing details as practices open, close or change. The claimant has 9 people employed permanently maintaining the full primary care database (of which the database in this case forms the major part) with a further 10 staff working on an *ad hoc* basis supporting the research. Mr Brinzer sets out in some detail how the process of maintaining the database works and what it costs. His conclusion is that it currently costs £110,000 per year to maintain the database and has cost comparable sums for at least the last 6 years. There is no challenge made to Mr Brinzer's evidence and no realistic prospect, of which I am aware, of it being successfully challenged at trial.

[64] The kind of updating process carried on by the claimant was addressed by Advocate-General Stix-Hackl in ***British Horseracing Board -v- William Hill*** Case C-203/02 (section D of her opinion, paragraphs 139-156). The issue under consideration was the term of protection. In considering the matter the AG recognised that "*dynamic*" databases existed which were constantly updated by a process which includes addition, deletion and verification (see paragraphs 147-148). Her opinion was that viewed in this light the Directive provides for "*a rolling sui generis right*". It seems to me that this opinion supports the view (if support were needed) that the kind of work carried out by the claimant in keeping its database up to date is quite sufficient to mean that *sui generis* database right subsists under the Regulations. Clearly the owner of the database right is the claimant.

[65] Accordingly in my judgment the defendants in this case have no real prospect of defending the issues of subsistence and ownership. There is no doubt on the evidence presented to me that database right subsists and that the claimant owns it...

92. I accept Mr Spackman's submissions. Despite the battery of points made by HCML, I consider that this issue is quite straightforward. Although TPN have not put forward the sort of detailed evidence as to the costs of keeping the database up-to-date that was relied upon in the ***Beechwood House*** case, I am quite satisfied on the evidence that, in February 2012, the maintenance of the TPN Database was sufficient, qualitatively and/or quantitatively, to represent a substantial investment and to create a database right. The clearest evidence of quantity comes from Ms Abbs' email of 8 February 2012 when, responding to a request from Mr Olsen for information from 2011, she told him that she would have to breakdown the data by month to "*as the database is so large*" (see paragraph 28 above). As to the quality of the information, I am satisfied that the TPN contained a wealth of very detailed usage data relating to the clinics in the TPN network. Necessarily, that data had to be (and was) updated

month by month. The value of the information in the TPN Database to HCML is obvious. For example, it allowed the creation, by Mr Olsen, of a detailed spreadsheet showing TPN clinic usage by geographic region (see paragraphs 34-35 above). That data was extremely valuable, and it was extracted from the TPN database.

93. I am quite satisfied that a database right subsisted in the TPN Database in February 2012 and that it was owned by TPN. I reject the argument that the database right might have been owned by a different corporate entity. That appears to me to be entirely speculative, highly unlikely and not supported by any evidence.

Infringement

94. Regulation 16(1) of the 1997 Regulations set out what amounts to infringement of the database right: extraction or re-utilisation. The CJEU held in ***Directmedia Publishing GmbH -v- Albert-Ludwigs-Universität Freiburg*** **(Case C-304/07) [2009] Bus LR 908**; **[2009] RPC 283** that extraction was to be given a wide meaning.

95. The act of infringement alleged must represent undue use of the investment that gave rise to the database right protection. It must have extracted or re-utilised pre-existing works, data or materials the obtaining of which, verification or presentation had been the subject of the requisite investment by the maker of the database: ***British Horseracing Board -v- William Hill Organisation Limited*** [60] and ***Football Dataco Ltd -v- Sportradar GmbH*** **[2013] FSR 30** [67].

96. On the issue of infringement, HCML's position is:

    i) it denies having extracted any data at all from the TPN Database (alternatively that such data as were extracted did not constitute a "substantial part" of the database);

    ii) it admits that it uploaded the 16 Feb 2012 Spreadsheet data into the HCML Database and admits that that act constituted an act of "extraction" involving the transfer of a substantial part of the 16 Feb 2012 Spreadsheet, but contends that TPN had consented to that act of extraction and to the subsequent use of that data as part of the HCML Database; and

    iii) the use by HCML of the TPN Database was mere consultation of a database (which further subsequent use of the HCML Database would have constituted).

97. I have set out my findings about the provision of data from the TPN Database to Mr Olsen and his use of data in paragraph 61(ii) above. I am satisfied that this each represented extraction of a data from the TPN Database that represented on each occasion a substantial part of the contents of the TPN Database. Considering Mr Olsen's evidence at trial, the suggestion that there had been no extraction from the TPN Database is unsustainable.

98. I reject the contention that TPN consented to any acts of extraction by HCML. I have found above that the purported explanation for the request for the data given by Mr Olsen to Ms Abbs was not true (see paragraph 32 above). Mr Olsen had sought this data to assist HCML in setting up of the Innotrex network. Had he told TPN that

was why he wanted the information, TPN would never have provided it. Purported consent to the use of data obtained as a result of deception is no consent.

99. I am therefore satisfied therefore that HCML has infringed TPN's database right.

Breach of Confidence: clause 14.1

100. The starting point is the proper interpretation of clause 14.1 of the Services Agreement. TPN no longer relies upon the CNDA. The first thing to note is that the clause restricts *disclosure* of the confidential information; it does not purport to restrict *use* (see ***Force India Formula One Team Limited -v- 1 Malaysia Racing Team SDN BHD*** **[2012] RPC 29** [228]). Perhaps foreseeing this difficulty, Mr Spackman in his closing submissions submitted:

> "… if HCML has provided the information supplied by Ms Abbs to Mr Olsen to others (for example Mr Bingham or other employees) for the purposes of setting up Innotrex, then that would constitute a breach of clause 14.1."

101. Mr Kinnier QC has not made submissions on this particular point, but I am not persuaded by TPN's submission. TPN's pleaded case in relation to HCML's alleged breach of clause 14.1 is that HCML "*used confidential information belonging to [TPN] namely its database, to assist in its breaches of clause 3.1*" (Paragraph 51(d) Amended Defence & Counterclaim). There was no pleaded case alleging *disclosure* to third parties (identifying what was alleged to have been disclosed or to whom). The evidence during the trial does show that there was *some* disclosure of information from the TPN Database to Mr Bingham (the spreadsheet emailed to Mr Bingham on 21 March 2012 (paragraph 34 above) and the Update Spreadsheet (paragraph 38 above). However, it is unrealistic to suggest that this disclosure to Mr Bingham is anything other than technical. The real complaint – as is plain from the pleaded case – is that HCML *used* information from the TPN Database to assist in setting up Innotrex. In my judgment, that was not actually a breach of clause 14.1. I deal below with whether this *use* was a breach of clause 3.1.

102. In light of this, I do not need to resolve the issue of whether the information in the TPN Database was confidential. In case I were wrong in my interpretation of clause 14.1, I should state briefly my conclusions about the issue of confidentiality. Mr Spackman submitted that the 'classic test' of whether material is confidential in a case like the present was stated by Sir Robert Megarry VC in ***Thomas Marshall (Exports) Limited -v- Guinle*** **[1979] Ch 227, 248**:

> "It is far from easy to state in general terms what is confidential information or a trade secret. Certain authorities were cited, but they did not carry matters very far. Plainly "*something which is public property and public knowledge*" is not confidential: see ***Saltman Engineering Co. Ltd. -v- Campbell Engineering Co Ltd*** **(1948) 65 RPC 203, 215** *per* Lord Greene MR. On the other hand, "*something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts*": ***Coco -v- A. N. Clark (Engineers) Ltd*** **[1969] RPC 41, 47**, a case that was not cited, but in part draws on the ***Saltman*** case, which was. Costs and prices which are not generally known may well constitute

trade secrets or confidential information: see ***Herbert Morris Ltd -v- Saxelby*** **[1916] 1 AC 688, 705**, referring to prices.

> If one turns from the authorities and looks at the matter as a question of principle, I think (and I say this very tentatively, because the principle has not been argued out) that four elements may be discerned which may be of some assistance in identifying confidential information or trade secrets which the court will protect. I speak of such information or secrets only in an industrial or trade setting. First, I think that the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, I think the owner must believe that the information is confidential or secret, i.e., that it is not already in the public domain. It may be that some or all of his rivals already have the information: but as long as the owner believes it to be confidential I think he is entitled to try and protect it. Third, I think that the owner's belief under the two previous heads must be reasonable. Fourth, I think that the information must be judged in the light of the usage and practices of the particular industry or trade concerned. It may be that information which does not satisfy all these requirements may be entitled to protection as confidential information or trade secrets: but I think that any information which does satisfy them must be of a type which is entitled to protection."

103. Further, he submits that it does not matter that some or all of the information is publicly available. For this proposition he relied upon ***Crowson Fabrics Ltd -v- Rider & Ors*** **[2008] FSR 17**. This was a claim brought against two former employees. They had set up a new company in competition with the claimant company and it was alleged that they had taken with them confidential information from the claimant's database, namely (i) names, addresses, contact names, telephone numbers or email addresses of its customers; (ii) sales figures for its customers; (iii) profit margins for its customers; (iv) details of goods ordered by its customers or prices paid by said customers; (v) names, addresses and contact details of its suppliers; (vi) its suppliers', agents' names, addresses and contact details; (vii) its suppliers' carriage costs, lead times, types of products available, trade shows visited, or the cost negotiated with such suppliers. The defendants' case was that what they had done was not actionable. They asserted that none of the material that they had created or used or retained at the end of their employment contained any confidential information. All of the material was, they said, available in the public domain. They also contended that all of the material was part of their own gathered knowledge acquired over the course of their employment which they were free to use after termination and that the claimant could not prevent an ex-employee, in the absence of a restrictive covenant, from using that knowledge and experience.

104. Peter Smith J found for the claimant company but on the basis of (i) breaches of the defendants' duty of fidelity and of their fiduciary duty; and (ii) infringement of the claimant's database right. He rejected the claim for breach of confidence. After considering ***Seager -v- Copydex Ltd (No.1)*** **[1967] RPC 349**, the Judge concluded:

> [100] As I said absent an express restrictive covenant or the like information does not become confidential merely because the parties give it that label. If the information is in the public domain it is capable of being used even if it is derived from the claimant's documents.

[101] Another factor is that it is impossible to prevent an ex-employee from using his own gathered skills and expertise earned over the period of his employment. If using his own memory and skills he can recall materials which were confidential whilst he was an employee he can nevertheless use them post employment. That has been well established; see ***Faccenda Chicken Ltd -v- Fowler*** **[1987] 1 Ch 117**... The only information that is capable of being protected post termination is in the nature of a trade secret; confidentiality is not enough. I do not see what the information asserted by the claimant to be confidential in its voluntary information is any different from the ***Faccenda*** case. I accept the evidence of [the defendants] that all of the information alleged to be confidential was either in the public domain or was easily discoverable by them (such as addresses and telephone numbers) or was in their heads. I do not accept it was necessarily easily discoverable. The documents they took appear to me to afford a considerable saving of time. However detailed consideration of that might well be postponed to the question of damages or other financial relief that is ultimately granted. I express no view about that at this stage.

[102] The only item which I had a lingering doubt over was information about the sales figures and profit margins. The reality, however, I suspect is that the profit margins are things which they would regularly carry out in their heads and the actual prices paid to suppliers or obtained from customers would be obtained from those organisations. They are going to be in a position to negotiate business with them and in such negotiations it is almost inevitable that the suppliers or customers will reveal what deals they have with the claimant in order to obtain better terms from the would be new competitors.

[103] In other words I accept the defendants' submission that the confidential information so described by the claimant does not have the necessary indicia of the quality of confidence identified by Megarry V.C. in ***Thomas Marshall (Exports) Ltd -v- Guinle***...

105. The Judge did go on, nevertheless, and held that the use of the information was a breach of the defendant's implied obligation of good faith and fidelity. The case of ***Robb -v- Green*** **[1895] 2 QB 1** stands as authority that it is no defence to a breach of this duty to say that the information was publicly available. In ***Roger Bullivant Ltd -v- Ellis*** **[1987] FSR 172**, **181** Nourse LJ restated the principle as follows:

> "The value of the card index to the [defendants] was that it contained a ready and finite compilation of the names and addresses of those who had brought or might bring business to the plaintiffs and who might bring business to them. Most of the cards carried the name or names of particular individuals to be contacted. While I recognise that it would have been possible for the [first defendant] to contact some, perhaps many, of the people concerned without using the card index, I am far from convinced that he would have been able to contact anywhere near all of those whom he did contact between February and April 1985. Having made deliberate and unlawful use of the plaintiffs' property, he cannot complain if he finds that the eye of the law is unable to distinguish between those whom, had he so chosen, he could have contacted lawfully and those whom he could not. In my judgment it is of the highest importance that the principle of ***Robb -v- Green***… which, let it be said, is one of no more than fair and honourable dealing, should be steadfastly maintained."

106. Applying these authorities, in my judgment, the list of clinics in the TPN Database would not have had the necessary quality of confidence to maintain TPN's claim for breach of clause 14.1. However, I am satisfied that the data relating to the number of referrals made to each clinic would have had the necessary quality of confidence. I am not able to determine the extent to which HCML's formation of the Innotrex network utilised the latter rather than the former. Mr Spackman's submissions have much greater resonance – by analogy with ***Crowson Fabrics*** and the other cases set out above – in relation to the alleged breach by HCML of clause 3.1. It is to this issue that I now turn.

Good Faith: clause 3.1

107. Clause 3.1 is in very simple terms: HCML was required to "*act in good faith towards TPN at all times*".

Law

108. Mr Spackman and Mr Kinnier QC are largely agreed as to the law to be applied:

i) Good faith has been held to mean, "*playing fair*", "*coming clean*" or "*putting one's cards on the table*": ***Interfoto Picture Library Ltd -v- Stiletto Visual Programmes Ltd*** **[1999] 1 QB 433, 439** per Bingham LJ.

ii) In ***Berkeley Community Villages Ltd -v- Pullen*** **[2007] 3 EGLR 107**, Morgan J said that a contractual obligation to act in good faith means [97]:

> "… a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations of the First Claimant.

iii) Albeit construing a contractual obligation to act in the *utmost* good faith, in ***CPC Group Ltd -v- Qatari Diar Real Estate Investment Co*** **[2010] EWHC 1535 (Ch)** Vos J said [246]:

> "… the content of the obligation of utmost good faith in the [contract] was to adhere to the spirit of the contract… and to observe reasonable commercial standards of fair dealing, and to be faithful to the agreed common purpose, and to act consistently with the justified expectations of the parties."

iv) the construction of the relevant contractual term of good faith is context-sensitive: ***Mid-Essex Hospital Services NHS Trust -v- Compass Group UK & Ireland Ltd*** **[2013] EWHC Civ 200** [109] *per* Jackson LJ;

v) the words "*in good faith*" have a core meaning of honesty: ***Street -v- Derbyshire Unemployed Workers Centre*** **[2005] ICR 97** [41] *per* Auld LJ. It is an obligation to eschew bad faith: ***Overlook -v- Foxtel*** **[2002] NSWSC 17**, quoted in ***CPC Group Ltd*** [240];

vi) A party subject to a good faith clause is not required to subordinate its own interests so long as the pursuit of those interests does not entail unreasonable

interference with the enjoyment of a benefit conferred by expressed contractual terms so that such enjoyment is rendered worthless or nugatory: ***Overlook*** quoted in ***Qatari Diar*** **[2010] EWHC (Ch) 1535** [240];

109. Relying upon ***Manifest Shipping Co. -v- Uni-Polaris Shipping Co.*** **[2003] 1 AC 469** [111] (quoted and relied upon in ***CPC Group Ltd*** [239]), Mr Kinnier submitted that unless a party has acted in bad faith, he cannot be in breach of the duty of good faith, utmost or otherwise. As long as "*bad faith*" in this context is not being used as a synonym for "*dishonesty*", I would accept that submission. Dishonesty might be a sufficient basis on which to find "*bad faith*" but I do not accept that it is necessary. That would be inconsistent with the authorities above. It is possible to act in bad faith without being dishonest.

Submissions

110. On behalf of TPN, Mr Spackman submits that HCML has acted in bad faith towards TPN and has therefore breached clause 3.1. In summary, whilst taking the benefit of the Services Agreement, it acted covertly to set up Innotrex and, worse, in doing so it misused information belonging to TPN that it only had by dint of the commercial relationship under the Services Agreement. Once established, Innotrex would represent a network of clinics that would rival TPN's network of clinics. TPN submits that HCML wrongly used TPN's data as a "springboard" to launch the Innotrex Network. TPN would never have allowed HCML to use the data if HCML had been honest about its intention to set up Innotrex. Indeed, HCML first kept the existence of Innotrex (and subsequently what HCML intended for its commercial activities) secret from TPN. In so doing, TPN submits, HCML has clearly departed from commercial standards of fair dealing, playing fair and acting in the common and justified expectations of the parties.

111. Mr Spackman invites the Court to find that HCML was not acting in good faith towards TPN in the performance of the Services Agreement and was therefore in breach of clause 3.1 based on the following:

i) HCML requested information from TPN ostensibly for the purposes of the Services Agreement;

ii) HCML then used that information instead to set up a rival network to TPN;

iii) HCML concealed the existence of this rival network from TPN for as long as possible;

iv) after setting up of this rival network, HCML then diverted referrals to its own network at the expense of and to the detriment of TPN; and

v) after being confronted with the allegation that HCML had used the information supplied to it by TPN to set up Innotrex, HCML denied wholesale any such allegation.

112. For HCML, Mr Kinnier QC submits that the obligation to act in good faith imposed by clause 3.1 must be interpreted according to the contractual context:

i) The object of the Services Agreement was for TPN to assist HCML in providing "the Service" to Aviva. The Services Agreement did not provide for TPN to be the exclusive provider of such services. There was no contractual limitation which limited HCML's discretion to obtain physiotherapy services from other providers or clinics.

ii) The Services Agreement did not contain a "no compete" clause.

iii) The Services Agreement provided no guarantee to TPN regarding the volume of referrals for the simple reason that HCML did not have the benefit of a guarantee from Aviva Health so no guarantee could be provided to TPN.

113. He accepts that, even within this context, clause 3.1 required HCML to adhere to the spirit of the contract; to observe reasonable commercial standards of fair dealing and to be faithful to the agreed common purpose and to act consistently with the justified expectations of the parties.

114. HCML places reliance on the evidence of Mr Bushnell that in the first meeting he had with Mr Naylor he had explained to him that it was the long-term intention of HCML to build its own network of clinics. So, it is submitted, HCML had openly declared its intentions. Mr Kinnier QC submits that this fact presents an insurmountable obstacle for TPN: HCML was candid about its intention to establish its own network and the parties' contractual arrangements neither prohibited nor restricted HCML's discretion to obtain services from other providers. In short, he says, there is no reliable evidence of an intention to deceive TPN or any evidence of dishonesty on the part of HCML.

115. In his evidence, Mr Naylor denied that Mr Bushnell had made any such statement of HCML's long-term intentions when they first met. Mr Kinnier submits that I should accept the evidence of Mr Bushnell, largely based on an assessment of Mr Naylor's evidence as a whole and particularly the fact that Mr Bushnell was able to give a reasonably detailed account of the circumstances when he told Mr Naylor about this plan whereas Mr Naylor's evidence was simply a bare denial.

116. More broadly, HCML rely upon how Innotrex was set up. In 2011, HCML had started the groundwork to set up Innotrex and, in January 2012, Mr Olsen was appointed to assist the creation of Innotrex and the recruitment of clinics. Mr Kinnier QC relies upon Mr Olsen's evidence as to the process by which Innotrex was established and submits two broad points emerge clearly from the entirety of the evidence:

i) clinics were recruited to Innotrex following independent research (including postcode searches) and a geographical analysis of referral rates and patterns in relation to clinic locations; contacts provided by Mr Bingham; recommendations; clinic lists provided by PhysioWorld and D2 Physio; and reference to the locations of Aviva's "Top 50" large corporate clients together with other means; and

ii) the contemporaneous documents show that the creation of Innotrex was a considerable exercise, informed by a significant amount of research.

Mr Kinnier QC set out in his submissions the mass of material that he contends demonstrates the independent effort by Mr Olsen and HCML that went into setting up Innotrex.

117. HCML contends that it discharged its obligations under clause 3.1:

i) it acted consistently with the letter and spirit of the Services Agreement in all its dealings with TPN and had been candid about its aim to set up its own network of clinics in due course;

ii) a good faith clause (however broadly construed) cannot be read as requiring HCML to keep TPN informed of the detail of its commercial strategy or, on the particular facts of this case, to keep TPN updated as to the progress setting up Innotrex; and

iii) weight must be attached to the fact that the Services Agreement did not contain exclusivity or non-compete clauses; each party was free (within the constraints of clause 3.1) to pursue their own commercial objectives.

118. As to the evidence of use of information from TPN's Database elicited from Mr Olsen in cross-examination, and the suggestion that this was used as a "springboard" to set up Innotrex, Mr Kinnier submits that HCML's investment of £300,000 would have been wholly unnecessary, the engagement of Mr Bingham would have served no purpose and the substantial research work carried out by HCML would have been a complete waste of time if the creation of Innotrex was simply a matter of 'lifting' the information from the TPN Database.

119. Further, and in any event, Mr Olsen's used of TPN's data was entirely legitimate in building the HCML Database for the purposes of the Services Agreement. HCML's case-handlers used the HCML Database as part of HCML's telephone triage process upon first receiving a patient referral from Aviva, to identify and advise the patient as to the clinic that was closest to the patient's preferred home or office address. This system, Mr Kinnier submits, also had the effect of reducing TPN's administrative burden. The HCML Database was used by HCML for these legitimate purposes.

120. Nevertheless, and importantly, HCML accepts that there "*may have been indirect use of the geographic analyses derived from use of the [HCML Database]*" by HCML's employees and/or contractors between February 2012 and early 2014 to identify geographic areas in which to locate Innotrex clinics. However, Mr Kinnier submits that this use did not infringe any of TPN's rights.

121. Based upon these contentions, HCML submits that "*viewed within the particular context of the Services Agreement, there is no evidence, or at least no reliable evidence, that HCML has acted in any way dishonestly in its use of TPN's data*". Further, there is no evidence that HCML's acts have interfered (whether unreasonably or otherwise) with the enjoyment of a benefit conferred on TPN under the Services Agreement. Finally, there is no evidence that HCML has failed to adhere to the spirit of the contract, to observe reasonable commercial standards of fair dealing and to be faithful to the agreed common purpose and to act consistently with the justified expectations of the parties.

Decision

122. I do not consider, on the evidence, that HCML has established that Mr Bushnell told Mr Naylor at their first meeting of HCML's intention to set up a network of clinics. In the context of the discussions, that would have been perhaps an unusual thing to have discussed and I am doubtful that Mr Bushnell would have retained such a clear recollection of it. That is not to say that I think that Mr Bushnell in his evidence was not telling the truth. I accept that he does recall a general discussion of this nature. Nevertheless, I consider that his memory of these discussions is not reliable and is likely to have been affected by subsequent events. The most reliable indication of this – and upon which I place some weight – is the fact that when Mr Naylor complained about the setting up of Innotrex, the obvious retort was: "*What are you talking about, I told you we wanted to set up our own network*". Nothing like that was said by Mr Bushnell.

123. In my judgment and in any event, even had there been some general discussion of HCML's long-term objectives and plans at this initial meeting, it was certainly not anything more than general chat. No significance would have been intended by it by Mr Bushnell or attached to it by Mr Naylor. I am satisfied that any such general chat has no bearing on whether subsequently HCML failed to act in good faith under the Services Agreement. It is one thing to talk, in the abstract, about long-range plans. It is another to convert those plans into a definite intention (and subsequent implementation) that would have a direct impact on a TPN.

124. I have already found that Mr Olsen's request for data from TPN was not for the reason he gave to Ms Abbs, but to assist HCML in the formation of Innotrex (see paragraphs 27-32 and 61(i) above). I have rejected Mr Olsen's evidence that the data was requested from Ms Abbs to carry out some geographical pricing model. I am satisfied that, right at the start of the project to create Innotrex, HCML (a) requested TPN's data; and (b) gave a dishonest reason why it was being requested. It may well be that the data was *also* later used by HCML to create the Clinic Locator, but that is irrelevant.

125. Thereafter, I have found that HCML used TPN's data to set up Innotrex (see paragraph 61(ii) above). HCML did not tell TPN that it was forming its own network of clinics or that it was using TPN's data in part to assist in doing so.

126. From February 2012, when HCML began actively setting up Innotrex, HCML:

i) started to divert referrals that I am satisfied were likely to have gone to TPN under the Services Agreement to other clinics or networks (see paragraphs 36 and 40 above);

ii) recognised that, until Innotrex was fully set up, it would continue to need TPN (and other networks) to service referrals (see paragraph 37 above);

iii) was concerned that the existence of Innotrex should not be 'unmasked' to TPN (see paragraph 43 above);

iv) recognised that, by October 2012, there was a clear risk that the formation of Innotrex would come to the notice of TPN and so misled TPN as to the market

Innotrex would be targeting in order to protect its own commercial position pending the completion of Innotrex (see paragraph 46 above); and, finally

v) after Innotrex had been established, in May 2014, when challenged by Mr Naylor did not tell TPN the truth about whether HCML had used TPN data to assist setting up this rival network (see paragraphs 55-58 above).

127. As to paragraph 126(i), insofar as it was suggested by HCML that Aviva Health's decision to refer work to Nuffield Health rather than HCML (see paragraphs 51-53 above) was the cause of the downturn in referrals to TPN:

i) I do not accept that this factor became operative until January 2014;

ii) HCML had made the decision to divert work away from TPN before Aviva Health decided to transfer referrals to Nuffield Health; and

iii) it is a point that (even if proved) is relevant to remedy rather than liability.

128. On the basis of these findings, and in the respects I have identified, I am satisfied that HCML has failed to act in good faith towards TPN and is therefore in breach of clause 3.1. HCML failed to adhere to the spirit of the contract, to observe reasonable commercial standards of fair dealing and to be faithful to the agreed common purpose and to act consistently with the justified expectations of the parties. Although I have found that clause 2.3 of the Services Agreement did not impose an obligation on HCML to make any particular number of (or indeed any) referrals, that rather heightens the importance of the good faith provision in the contract. TPN was a commercial partner of HCML. There was no contractual *obligation* to make referrals, but there was an *expectation* by both parties that HCML would do so; that was the shared commercial objective. The nature of the arrangement, particularly HCML's dependency itself upon Aviva Health for the stream of work, meant that no firmer commitment could be provided.

129. The covert use of TPN's data in setting up Innotrex is probably sufficient itself to amount to a breach of clause 3.1. But the breach goes further than that. True it is that TPN had not sought to protect its position by including an exclusivity or non-competition clause in the Services Agreement. But that does not diminish the importance of clause 3.1 (and arguably enhances it). Setting up the rival network Innotrex (hidden from TPN, but making use of its data) when HCML knew and intended that, once established, TPN would be cut out of the picture; whilst, at the same time, continuing to benefit from a commercial relationship that (in all probability) would have been terminated had TPN known HCML's true intentions was opportunistic, underhand and exploitative. It is conduct that I am quite satisfied was a breach of clause 3.1.

The FCA Score: Passing off

130. TPN has also advanced a claim for passing off on the basis that HCML has used the FCA score (see paragraph 5) in the course of its business on forms used by Innotrex clinics. There is a rather vague claim for "*breach of intellectual property rights of [TPN]*" advanced in pleading. The only cause of action that is disclosed in TPN's counterclaim is passing off. I do not think that Mr Spackman was submitting

otherwise, but for the avoidance of any doubt it is clear in my judgment that TPN's claim discloses no other cause of action for breach of any other intellectual property right.

131. Given the length of this judgment already, I can happily deal with this claim very shortly.

132. The parties are agreed that there are three elements to the tort of passing off which must be proved:

i) a goodwill or reputation attached to, and recognised by, the public as distinctive of the claimant's goods or services;

ii) a misrepresentation, calculated to deceive, by the defendant leading the public, or a substantial number of members of the public, confusing his goods or services with those of the claimant; and

iii) damage or likely damage.

Consorzio del Proscuitto di Parma -v- Marks & Spencer PLC **[1991] RPC 351, 368-369** (*per* Nourse LJ); ***Woolley -v- Ultimate Products Ltd*** **[2012] EWCA Civ 1038** [2].

133. I do not consider that TPN has, on the evidence, demonstrated any of these elements, but the clearest failure is that TPN has produced no evidence of deception or confusion.

134. Mr Spackman has relied upon the fact that the use of the FCA score by HCML was brought to the attention of TPN by clinics themselves and that they were "*obviously confused as to the correct position*". The evidence to support this is two separate email chains from August/September 2013 and another from February 2015. On analysis these provide no evidence of confusion on the part of the clinics, only evidence of *use* of the FCA score. On that basis alone, any claim for passing off inevitably fails and so this claim must be dismissed.

Conclusion

135. For the reasons (and to the extent) set out in this judgment:

i) I dismiss TPN's claim based on an alleged breach of clause 2.3 of the Services Agreement;

ii) I dismiss TPN's claim based on an alleged breach of the Light Touch Agreement;

iii) I find that HCML has infringed TPN's database right;

iv) I find that HCML has breached clause 3.1 of the Services Agreement by failing to act in good faith towards TPN;

v) I dismiss TPN's claim that HCML has breached clause 14.1 of the Services Agreement; and

vi) I dismiss TPN's claim for passing off.