Neutral Citation Number: [2023] EWHC 1637 (Comm)

Case No: CL-2021-000052

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Date: 03/07/2023

Before :

MR JUSTICE FOXTON

- -

Between :

ROLLS-ROYCE HOLDINGS PLC	**Claimant**
- and -	
GOODRICH CORPORATION	**Defendant**
- and -	
ROLLS-ROYCE PLC **ROLLS-ROYCE TOTAL CARE SERVICES LIMITED** **ROLLS-ROYCE CORPORATION** **ROLLS-ROYCE DEFENSE SERVICES INC** **ROLLS-ROYCE DEUTSCHLAND LTD & CO KG** **ROLLS-ROYCE BRASIL LIMITADA** **ROLLS-ROYCE CANADA LIMITED** **ROLLS-ROYCE CONTROLS AND DATA SERVICES LTD** **(formerly Rolls-Royce Goodrich Engine Control Systems Limited)**	**Third to Tenth Parties**

Daniel Toledano KC, **David Caplan** and **Michael Kotrly** (instructed by **Slaughter and May**) for **the Claimant** and **the Third to Tenth Parties**
Simon Croall KC and **Stewart Chirnside** (instructed by **Bristows LLP**) for **the Defendant**
Hearing dates: 20, 24, 25, 27 April, 2, 11, 15 and 16 May 2023
Further written submissions: 6 and 15 June 2023.
Draft Judgment Circulated: 19 June 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 03 July 2023.

The Honourable Mr Justice Foxton:

A THE PARTIES AND THE ISSUES IN OUTLINE

1. The Claimant (**RR Holdings**) is the holding company of the Rolls-Royce group of companies (**the Rolls-Royce Group**), which group is engaged, inter alia, in the design, development, manufacture and sale of aircraft engines. The Third to Tenth Parties (**the RR Entities**) are other companies in the Rolls-Royce Group.

2. The Defendant (**Goodrich**) is part of a group of companies which supplies engine control products and aftermarket services in relation to Rolls-Royce aeroengines, and which is ultimately owned by Raytheon Technologies Corporation (**RTC**).

3. On 31 December 2008, the two groups of companies formed a joint venture company (the Tenth Party or **JVC**). Various documents were entered into in relation to the joint venture, including:

   i) A Put and Call Option Agreement dated 31 December 2008 entered into between Rolls-Royce Group plc (**RR Group**) and Goodrich (**the PCOA**) which would give RR Group the right to purchase Goodrich's aftermarket maintenance business (**the AM Package**).

   ii) Two agreements (the Aftermarket Services Agreement or **ASA** and the Agreement for the Supply of Goods and Work for Engine Repair Services or **ECSURS**) under which Goodrich was granted certain exclusivity rights in relation to the provision of engine control aftermarket services (**the Exclusivity Obligation**).

4. The issues which arise at this trial are:

   i) whether RR Holdings has validly exercised the PCOA call option by written notice of 8 October 2018 (**the PCOA Issues**);

   ii) whether the RR Entities are in breach of the Exclusivity Obligation (**the Exclusivity Obligation Issues**); and

   iii) whether the RR Entities are in breach of certain other provisions of the ECSURS (**the Other ESCURS Issues**).

5. The subject-matters of the PCOA and Exclusivity Obligation and Other ECSURS Issues are substantially different, and they are addressed separately and sequentially in this judgment.

B THE PCOA ISSUES

B1 The Relevant Background

The PCOA

6. On 31 December 2008, a number of agreements were entered into between RR Group, then the holding company of the Rolls-Royce Group, and Goodrich in connection with the formation of the JVC. These included a joint venture agreement (**JVA**) and the PCOA.

7. Clauses 6 to 9 of the JVA provided for circumstances in which Goodrich could require RR Group to buy its shares in the JVC, or RR Group could exercise a right to buy those shares. This included when there was a change of control in Goodrich (clauses 7.5 to 7.8).

8. Where RR Group exercised its right under the JVA to acquire Goodrich's shares in the JVC, it also became entitled under the PCOA to require Goodrich to sell it the AM Package – **the Call Option**. The option was only exercisable by serving a **Call Option Notice** during the **Call Option Period** which was defined, in relevant respect, as the period "commencing on the date on which [RR Group] has served on [Goodrich] a Buyout Notice" exercising its right to acquire Goodrich's shares in the JVC following a Change of Control of Goodrich, and terminating "on the earlier of: (i) the withdrawal or lapse of the Call Option in respect of such Buyout Notice; and (ii) the first anniversary of the date of such Buyout Notice".

9. If the Call Option was exercised during the Call Option Period, then Goodrich was obliged to provide a package of information known as the **Call Option Exercise Preliminary Information Documents** to RR Group, who then had 40 days from the receipt of those documents to notify Goodrich whether it wished to withdraw the Call Option Notice. If it did not do so, then the parties were obliged to effect the sale of the AM Package from Goodrich to RR Group on a pre-agreed form of contract annexed to the PCOA, known as the Combined Asset and Share Purchase Agreement, or **CASPA**, for a price to be determined in accordance with a mechanism set out in the PCOA and the CASPA.

10. Clause 15 of the PCOA provided that neither party could "assign, transfer, charge or otherwise deal with all or any of its rights or obligations … under this Agreement …. without the prior written consent of the other party", but that "if the proposed dealing is an assignment and if the proposed assignee is a party's Affiliate, such prior written consent shall not be unreasonably withheld or delayed". It also provided that "any such purported assignment, transfer, charge or other dealing without the prior written consent of the other party shall be null and void".

11. Clause 16 provided that "any release, delay or waiver by any party in favour of the other party of any … [of] its rights under this Agreement shall only be binding if it is given in writing".

12. Clause 17 provided that "a variation of this Agreement (or of any of the documents referred to in it) is valid only if it is in writing and signed on behalf of [RR Group] and [Goodrich]".

The Scheme of Arrangement

13. On 23 May 2011, a scheme of arrangement came into effect which replaced RR Group with RR Holdings as the holding company of the RR Group. The scheme was effected by a share transfer by which shareholders in RR Group received one share in RR Holdings for each share they held in RR Group, with RR Group becoming a wholly owned subsidiary of RR Holdings. The existing directors of RR Group, with the exception of Sir John Rose who retired, became directors of RR Holdings.

14. On 30 November 2011, a draft of a proposed amendment to the JVC and the PCOA was sent by Adrian Thompson of Goodrich to Gareth Hopkinson of Rolls-Royce, which was intended to address an issue which had arisen as a result of a proposed relocation of the base of operations of the AM Package, Mr Thompson stating "we look forward to receiving your comments/confirmation that it is acceptable to R-R". The draft made no reference to RR

Holdings. Mr Hopkinson responded with a mark-up on 1 December which introduced references to RR Holdings, and described the amendments as having been made under clause 26 of the JVA and clause 17 of the PCOA. The mark-up described the parties to the proposed amendments as including RR Group and RR Holdings, and included a signature block for RR Holdings as well as RR Group. Mr Thompson replied stating "the proposed edits to the 'parties' clause and 'whereas' section are all fine (assuming that [RR Holdings] is a party to the JVA by the time this amendment is signed)", and he made the same comments about the amendments to the signature block.

15. On 31 December 2011, a Deed of Adherence was signed referring to the scheme of arrangement, confirming that RR Holdings was entitled to the benefit of, and obliged to observe, covenant, and be bound by, the terms of the JVA "as if each reference to RR Group in the Agreement was a reference to RR Holdings". On the same date, "Amendment No 1" was signed on terms which included the references to RR Holdings introduced by Mr Hopkinson by both RR Group and RR Holdings (the same individual signing for both companies).

The Raytheon acquisition

16. In September 2011, United Technologies Group, now known as Raytheon Technologies Corporation or **RTC**, entered into an "Agreement and Plan of Merger" to acquire Goodrich. The proposed acquisition raised issues for the Rolls-Royce Group, both in relation to the JVC and in relation to the operation of the AM Package by Goodrich, and also competition issues in the USA because RTC owned Pratt & Whitney, a major manufacturer of aeroengines. The RR Group raised their concerns with the US Department of Justice (**DOJ**) who brought proceedings against Goodrich and RTC intended to address competition concerns. In the event, following negotiations between all interested parties, those concerns were addressed by twin-tracks of activity:

    i) contractual arrangements between the Rolls-Royce Group and Goodrich; and

    ii) the terms of a "Proposed Final Judgment" (**PFJ**) to which Goodrich and RTC consented, as a condition of the DOJ not objecting to the acquisition;

    as part of a co-ordinated course of conduct.

17. Thus, on 7 June 2012:

    i) RR Holdings and RTC entered into an agreement (**the 2012 Raytheon Letter Agreement**) which referred to the PCOA which it described as an agreement between *RR Holdings* and Goodrich, and agreed that *RR Holdings* would enter into a letter agreement with Goodrich in agreed form (**the June 2012 Letter Agreement**) and that RTC would procure that Goodrich also enter into the June 2012 Letter Agreement.

    ii) RR Holdings and Goodrich entered into the June 2012 Letter Agreement. This also referred to the PCOA as an agreement between *RR Holdings* and Goodrich. It agreed that there had been a change of control of Goodrich for the purposes of the JVA, and that the June 2012 Letter Agreement constituted a valid and effective Buyout Notice under the JVA which would take effect on the completion of the RTC acquisition of Goodrich. The definition of the Call Option Period was amended so that it would last for two years from

the acquisition, rather than 12 months as previously. Various other amendments were made to the PCOA.

18. Against that background, the PFJ was issued on 26 July 2012 which stated in its recitals that:

i) "the essence of this Final Judgment is the prompt and certain divestiture of certain rights and assets by the Defendants to assure that competition is not substantially lessened";

ii) the US "requires the Defendants to make certain divestitures and make certain commitments for the purposes of remedying the loss of competition alleged in the Complaint"; and

iii) the Defendants "have represented to the United States that the divestitures required below can and will be made".

19. Section VI of the PFJ addressed the JVC:

i) Section VI(A) ordered the defendants to divest Goodrich's shares in the JVC to Rolls-Royce (an expression defined so as to extend to the Rolls-Royce Group).

ii) Section VI(C) required the defendants to offer Rolls-Royce "a new right for a new period" to acquire the AM Package "as defined in the [PCOA] … between Rolls-Royce and Goodrich", at the price in the PCOA, that period continuing until the earlier of 31 December 2023 or the date on which RTC no longer owned or substantially controlled Goodrich's aftermarket business, but provided that "nothing in this Final Judgment shall be construed to … affect any agreements between [RTC] and/or Goodrich on the one hand, and Rolls-Royce on the other, relating to the option to purchase the Goodrich Aftermarket Business".

20. On 13 December 2012, in a letter to Rolls-Royce, Raytheon offered the Right to Purchase (**the December 2012 RTP**) provided for in the PFJ. On 29 May 2013, the terms of the PJF were made final (the **Final Judgment**).

21. A further Letter Agreement (**the February 2014 Letter Agreement**) was entered into between RR Holdings and Goodrich on 3 February 2014. This once again described the PCOA as an agreement between *RR Holdings* and Goodrich, and extended the Call Option Period to 26 July 2017. There was a further extension, in similar terms on 28 June 2017 (**the June 2017 Letter Agreement**), the Call Option Period being extended on this occasion to 31 December 2017. The June 2017 Letter Agreement required the parties (i.e., RR Holdings and Goodrich) to negotiate amendments to the PCOA and to the CASPA, so that it applied to the December 2012 RTP.

22. On 21 December 2017, RR Holdings and Goodrich entered into two further agreements:

i) a Right to Purchase Agreement (**the RTP Agreement**); and

ii) a further letter agreement (**the December 2017 Letter Agreement**),

23. The RTP Agreement stated in its recitals that RR Holdings had the right to acquire the AM Package under the PCOA (which was defined as an agreement between *RR Holdings* and Goodrich). It referred to the Call Option arising under the PCOA as the R-R Option, and provided that the parties "now wish the R-R Option to automatically expire" on the **Unconditional Date** such that:

> "following expiry … [RR Holdings] and its affiliates shall only have a single right or option to buy the AM Package, which is the RTP as set forth herein".

24. The Unconditional Date was defined as "the first Business Day immediately following the satisfaction of the Condition or determination that no Condition is required" (clause 2.5). Clause 2.2 provided:

> "The Right to Purchase [a reference to the Modified RTP (as defined below)] provided for in the Final Judgment and the subject of the December 2012 RTP Agreement] shall be conditional on either the Governmental Approval having been obtained or the parties determining that no Governmental Approval is required ('Condition')".

25. That right (**the Modified RTP**) was exercisable during a period (**the RTP Period**) which ran between 1 January 2020 and December 2023, and 12 months' notice had to be given, such that the earliest the Modified RTP could take effect was at the start of 2021. If the Modified RTP was exercised, it was to be on the terms of the modified CASPA which accompanied the RTP Agreement. Clause 2.6 provided:

> "If the Condition is not satisfied within six (6) months of the date of this Agreement, or such date as mutually agreed between the parties ('the Longstop Date'), this Agreement shall automatically expire".

26. The timing position was, therefore:

i) The Modified RTP would only become unconditional if Governmental Approval was obtained for it, or it was not needed.

ii) If that had not happened by 21 June 2021, the RTP Agreement (and with it the Modified RTP) would lapse.

iii) The rights under the PCOA would expire once the Modified RTP became unconditional, or where it expired on its own terms.

27. Turning to the December 2017 Letter Agreement:

i) The recitals referred to the PCOA as an agreement between *RR Holdings* and Goodrich.

ii) Clause 1(a) provided that the Call Option Period would automatically expire when the parties either obtained Governmental Approval or determined that it was not required "and the RTP Agreement … thereby becomes unconditional in accordance with its terms".

iii) Clause 1(b) provided that "if the parties determine that Government[al] Approval … is required but are unable to obtain the same on or before the Longstop Date … this Letter Agreement will automatically expire" and the December 2012 RTP "shall then form the

only basis upon which Rolls-Royce or its affiliates shall be entitled to purchase the AM Package".

iv) Clause 2(a) stated that the parties acknowledged that:

> "pursuant to the PCOA and [the RTP Agreement], Rolls-Royce [defined earlier in the agreement, when referring to the 2012 Raytheon Letter Agreement, as Rolls-Royce plc rather than RR Holdings or RR Group] has two separate and partially concurrent rights to purchase the AM Package from Goodrich. To provide certainty, the parties have agreed that the PCOA, as amended by paragraph (1) of this Letter Agreement, should expire in accordance with its terms so that, subject to paragraph 2(b) below, only the … Modified RTP … remains in place until 31 December 2023".

v) Clause 2(b) stated that in consideration of "Rolls-Royce" agreeing not to exercise the Modified RTP by serving a notice earlier than 1 January 2020, Goodrich would enter into the RTP Agreement and that:

> "Consequently, the parties agree, and Rolls-Royce hereby waives any claim to the contrary, that the RTP Agreement … shall form the only basis upon which Rolls-Royce or its Affiliates shall be entitled to purchase the AM Package … unless the parties agree otherwise or the provisions of clause 1(b) apply".

28. It is clear that the reference to "Rolls-Royce" in the December 2017 Letter Agreement was not intended to make Rolls-Royce plc a relevant party for the purposes of the PCOA. The December 2017 Letter Agreement clearly provides that the PCOA is an agreement between *RR Holdings* and Goodrich and, read in context, the subsequent references to "Rolls-Royce" are not intended to be read as references to Rolls-Royce plc, but to RR Holdings.

29. By further agreements dated 21 June and 19 September 2018, RR Holdings and Goodrich agreed to extend the Longstop Date, initially by 3 months and then to 21 October 2018.

30. On 9 October 2018, RR Holdings purported to serve a Call Option Notice (which it had issued the preceding day) on Goodrich. Goodrich disputes the validity of the Call Option Notice, and accordingly has not delivered the Call Option Exercise Preliminary Information Documents.

31. Goodrich challenges the validity of the Call Option Notice on three grounds.

B2 The No Novation Defence

Introduction

32. First, Goodrich contends that, under the terms of the PCOA, only RR Group was entitled to serve the Call Option Notice, and that the Call Option Notice served by RR Holdings was invalid. In particular, it is said that the contractual requirements for transfer of the right of call from RR Group to RR Holdings were not satisfied.

33. RR Holdings has advanced two responses to that argument:

i) there has been a novation by conduct such that RR Holdings has replaced RR Group as the holder of the rights under the PCOA; alternatively

ii) the various statements in the Letter Agreements to the effect that the PCOA was an agreement between RR Holdings and Goodrich give rise to a contractual estoppel, which precludes Goodrich from arguing the contrary.

Was There a Novation?

34. It is agreed that the court can conclude from the parties' conduct that there has been a novation, the test being "whether that inference is necessary … to provide a lawful explanation or basis for the parties' conduct" (*Chitty on Contracts* (34th), [22-089]; *Evans v SMG Television Limited* [2003] EWHC 1423, [181]). The test is objective, and does not depend on the subjective intention of the parties (ibid, [186]). I was also referred to the decision of the Court of Appeal in *Musst Holdings Limited v Astra Asset Management UK Limited* [2023] EWCA Civ 128, [57] to similar effect.

35. In this case, it is perfectly clear that, from at least the time of the June 2012 Letter Agreement, RR Holdings and Goodrich have conducted themselves on the basis that it is RR Holdings, not RR Group, which is the party to the PCOA, and that the basis of their dealings cannot be otherwise explained. Not only have RR Holdings and Goodrich entered into agreements which describe the PCOA as an agreement between RR Holdings and Goodrich, but they have purported, by agreements between them to which RR Group is not expressly a party, to amend the terms of the PCOA, which amendments it is agreed were valid and effective. These steps were not taken by Goodrich in ignorance of the scheme of arrangement, because this was expressly referred to in the Deed of Adherence for the JVA of 31 December 2011. Further, if there was no novation, then Goodrich had granted rights to purchase to both RR Holdings (through the December 2012 RTP) and RR Group (through the PCOA), which would have placed it in a position of some difficulty had they both been exercised.

36. Goodrich submits, nonetheless, that there is no novation.

37. First, it says that there is no evidence that RR Group consented to the novation. As to this:

i) RR Holdings is the sole shareholder of RR Group, and the directors of RR Group, with one exception, became directors of RR Holdings on its formation.

ii) RR Group had consented in writing to RR Holdings becoming the party entitled to exercise the Buy-Out Notice under the JVA (through the Deed of Adherence), the exercise of which began the Call Option Period.

iii) The right to serve the Buy-Out Notice and the right to serve the Call Option Notice are inextricably linked. The PCOA made it a condition of the exercise of the Call Option that the party purporting to serve it "has previously acquired and completed the acquisition of the [JVC] Shares under the [JVA]", and the term "Buyout Notice" in the PCOA was defined by reference to the JVA. Unless, therefore, RR Holdings became entitled to exercise the Call Option under the PCOA as well as the Buyout Notice under the JVA, the careful scheme which the parties had entered into would not function properly.

iv) RR Group made no attempt in its own name to extend the Call Option Period beyond the first anniversary of the Buy-Out Notice, notwithstanding the obvious commercial value of that right.

v) In these circumstances, I am satisfied that the only inference which can be drawn is that RR Group consented to the novation.

38. Finally, it is noteworthy that on Goodrich's own case, the various Letter Agreements between RR Holdings and Goodrich were effective to vary the terms of the PCOA. If RR Holdings never became a party to the PCOA, and RR Group remained the only party entitled to exercise the Call Option, then this must be because RR Holdings was authorised to act on RR Group's behalf. However, if RR Holdings had such authority, then its actions can be attributed to RR Group for the purposes of determining whether RR Group consented to the novation. I understood Mr Croall KC to accept this by the end of the closing submissions.

39. Second, Goodrich suggests, in reliance on *MWB Business Exchange Centres Ltd v Rock Advertising* [2019] AC 119, that there can be no novation otherwise than in writing because:

i) clause 15.1 provides that any transfer of rights and obligations under the PCOA will only be valid if Goodrich has given its *prior* written consent, and there was no consent in writing, or prior written consent, in this case;

ii) clauses 15.3(A) and (B) provide that "no assignment or novation pursuant to clause 15.1 … shall be effective until: … (B) in the case of an assignment pursuant to clause 15.1, the Assignor executes and delivers a guarantee of the performance of the Assignee's obligations under this Agreement in the form set out in Schedule 6" (which did not happen);

iii) clause 16.1 provides that any release or waiver by any party in favour of "any other party of any (or any part of) its rights under this Agreement shall only be binding if it is given in writing"; and

iv) clause 17.1 provides that "any variation of this Agreement …. is valid only if it is in writing and signed by or on behalf of [RR Holdings] and Goodrich."

40. In support of its argument, Goodrich also relies on *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48. In that case, the claimant (C) alleged a form of novation by conduct in which the contract (the FDA) with the original counterparty, H, had been terminated, and replaced by a contract between the C, H and the defendant (D). Articles 3 and 19 of the FDA required H's consent for any assignment or transfer, Article 24 provided that no termination or waiver would be valid unless signed in writing by both C and H, and Article 26 provided that the FDA could only be amended by a written document signed by both parties. The Supreme Court held that any termination of the original contract with H was ineffective because the requirement for writing signed by C and H was not satisfied ([64]), and that any new agreement between C and D would only be effective if C and H signed a document approving the variation of the FDA as required by clauses 17, 24 and 26 ([65]).

41. Some caution may be required in applying the reasoning in *MWB* as to the effect of a contractual formalities requirement as between the parties to a contract to a purported novation, because the formalities provision does not bind the proposed new party unless and until it has become a party (by which point the novation has taken place). In *Kabab-Ji*, the Supreme Court stated that D "would be entitled to assume that it could not become a party to [the FDA] with the claimant unless the requirements of the No Oral Modification clauses contained in the FDA were

satisfied" ([68]). *Kabab-Ji* was a case in which the purported transferee disputed that it had become a party to the relevant agreement by novation, and the various No Oral Modification clauses were relied upon not as a legal bar to the conclusion of a contract between C and D through conduct, but as an evidential factor weighing against the conclusion of such a contract with the alleged new party.

42. In this case, there is a written agreement between the continuing party and purported transferee, but it is said that this cannot take effect because of No Oral Modification clauses which only have contractual effect as between the transferor and the continuing party. Assuming that it is tenable, in these circumstances, for the continuing party to invoke the formality requirement against the transferor but not the transferee, it would seem to be a better reason for denying the efficacy of any discharge of the transferor from its contractual obligations, rather than the agreement which the remaining party has entered into with the transferee in writing to accord it rights under the contract, in return for assuming obligations under it. These difficulties suggest that in a tripartite context such as the present, it may be easier to establish waiver of a formality requirement than in a purely bilateral context.

43. In this case, the statements in the various Letter Agreements to the effect that the PCOA is an agreement between RR Holdings and Goodrich meet any requirement for written consent by Goodrich to the transfer of rights under the PCOA to RR Holdings. In relation to the various technical objections to that contention:

i) There is no requirement for the consent to use any particular language.

ii) To the extent that RR Group's written consent was necessary (and I do not accept that clause 15.1 requires the written consent of anyone other than the continuing party), even on Goodrich's case RR Holdings must have been acting for RR Group in relation to the June 2012 Letter Agreement, and so this requirement was met: see [38]. That is also a sufficient answer to any reliance on clause 17.1, to the extent that it is said that the novation involves, at least so far as RR Group's release is concerned, a variation (an issue on which different approaches are taken in *Kabab-Ji*, [64] and *Musst*, [82]).

iii) I do not accept that consent to the novation cannot be found in the June 2012 Agreement itself because this would not constitute "prior" written consent to the novation. An agreement for which "prior consent" is necessary, and that written consent, can appear in the same document, taking effect in the order necessary to achieve the intended effect of the transaction. The word "prior" simply has the effect that the novation will not take effect without consent having been given. In this regard, there is a parallel with the position where two or more documents are entered into on the same day, and the sequence in which they are executed will determine whether they give effect to the intended transaction (as to which see Sir Kim Lewison, *The Interpretation of Contracts* (7th) [10-005]-[10-007]).

44. Alternatively, any requirement for prior written consent has been retrospectively waived by Goodrich and RR Group. In *Musst Holdings Limited v Astra Asset Management UK Limited* [2023] EWCA Civ 128 the trial judge had found a novation by conduct notwithstanding clauses in the novated contract requiring prior written consent for any novation. At [83] and [86], Falk LJ in the Court of Appeal held that it was clearly open to the continuing party to waive the requirement for prior written consent, including retrospectively. I would note, given the focus in Goodrich's submissions as to the position of RR Group, that the factual findings which led to that conclusion in *Musst* (and a similar conclusion on estoppel by convention) all concern dealings between the continuing party and the putative transferee, rather than the "exiting party". In so far as clause 16.1 requires the consent of Goodrich and RR Group to be in writing, (a) the June 2012 Agreement provides such written consent for both (see [38] as to the position of RR Group) or (b) any requirement for the waiver to be in writing has itself been waived (*RGI International Limited v Synergy Classic* [2011] EWHC 3417 (Comm), [51(iii)]). As Mr Toledano KC put the matter:

> "If you agree in writing that your counterparty is [RR] Holdings, you must have waived or released the formalities that would have enabled you to contend that it was not your counterparty, and therefore Goodrich has waived or released any formalities requirements that might otherwise have assisted [its] argument".

45. It is also said that RR Group did not execute the Guarantee it had promised to provide under clause 15.3(B). Leaving aside the difficulty of invoking this point as an answer to the contract which Goodrich entered into with RR Holdings (the party seeking to exercise the Call Option), there was clearly a waiver of that requirement. To the extent that it is said that such a waiver is not valid because it was not in writing (a) clause 15.3(B) did not preclude RR Holdings and Goodrich entering into the June 2012 Letter Agreement, which is sufficient for RR Holdings' purposes and (b) that formalities requirement has been waived in writing as between Goodrich and RR Holdings, through the June 2012 Letter Agreement (see [44] above).

RR Holdings' Contractual Estoppel Argument

46. In these circumstances, it is not strictly necessary to address RR Holdings' alternative argument that Goodrich is contractually estopped from denying that it is entitled to serve the Call Option Notice, and I can therefore deal with the issue briefly.

47. The existence of a doctrine of "contractual estoppel" – by which one party makes a promise that the contract is to be approached on the basis that a particular state of affairs prevails, whether or not that is in fact the case – is well-established: see for example *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] 1 CLC 582 and *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 CLC 205. Notwithstanding its name, the doctrine is not a species of estoppel properly so-called, but simply a case of the court holding a party to its promise through a form of specific enforcement of the primary obligation assumed by requiring litigation to be conducted on the promised basis (rather than giving some other remedy for breach of that promise). Reflecting the fact that the doctrine is, at heart, about the enforcement of promises rather than protecting reasonable reliance, there is no requirement of unconscionability before the doctrine can be invoked (*Springwell*, [177]).

48. In this case, RR Holdings and Goodrich repeatedly contracted through the Letter Agreements on the basis that RR Holdings was a party to the PCOA and entitled to exercise the Call Option arising thereunder. Goodrich contends that the doctrine of contractual estoppel does not apply to statements made in recitals, which engage a different set of rules including the following:

    i) where a recital is properly construed as a statement by one party only, it has no contractual force and does not create an estoppel;

    ii) an estoppel based on a recital will only arise from its express terms and not by implication; and

    iii) a recital will not create an estoppel where it is based on a common mistake of fact or where one party induced it by misrepresentation.

49. Ultimately, the application of the doctrine of *contractual* estoppel will turn on whether the provision in issue is intended to constitute a promise by the parties that the particular state of affairs addressed by the provision is to be taken as established, whether that promise appears in a recital or some other provision. In *Richards v Wood* [2014] EWCA Civ 327, [15], Lewison LJ applied the doctrine to a statement in a declaration of trust as to the contributions made by the parties, stating "[a]ll parties are bound by [the] agreed statement, whether it represented the truth or not. This is the traditional function of recitals which in this respect are part of a sub-species of estoppel known as contractual estoppel". In this case, the provisions relied upon by RR Holdings are essentially promissory, appearing in a contract whose operative provisions proceed on an assumed state of affairs which is the subject of the contractual estoppel.

50. However, assuming that the law is as Goodrich contends it to be:

    i) RR Holdings relies not simply on provisions in the nature of recitals, but operative provisions extending and amending the terms of the PCOA on the basis that the parties to the PCOA, with the ability to amend its terms, are RR Holdings and Goodrich.

    ii) On no view are the provisions in the Letter Agreements statements by RR Holdings only. They involve agreements between RR Holdings and Goodrich as to the status and terms of the PCOA.

    iii) RR Holdings can rely on the express terms of the Letter Agreements as well as the inevitable implication that if parties A and B agree to amend the terms of the contract, they are doing so on the basis that they are parties to it.

    iv) There is no pleaded case of misrepresentation or mistake, and given the parties' exchanges regarding Amendment No 1 and the Deed of Adherence, the suggestion that the parties were mistaken, or that Goodrich was misled, rather than both parties agreeing, given the amendment to the JVA following the scheme of arrangement and the scheme itself, that they would proceed on the basis that RR Holdings was entitled to exercise the Call Option, is highly improbable.

51. That leads to the complication that the doctrine of contractual estoppel primarily operates in a bilateral context, as between the parties to the relevant contract, whereas the issue of whether an agreement originally entered into between A and B should be treated as an agreement between C

and B has implications for all three parties. If Goodrich is contractually estopped as against RR Holdings from denying that RR Holdings rather than RR Group is the party entitled to exercise the Call Option, that might raise the issue of whether RR Group could continue to assert such a right, and, if so, how the conflict between the competing rights is to be resolved. On the facts of this case, that difficulty does not arise because RR Group has not obtained any extension of time for the exercise of any option it might have had. In any event, if Goodrich had placed itself in a position in which it might face conflicting claims to the same assets because it has made competing promises about them, that is its lookout, as would be the case if Goodrich had entered into two separate call options. No doubt, there might be circumstances in which Goodrich could invoke a "standing by" estoppel against RR Group under the principle recognised in *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225.

52. Mr Croall KC alleged that there was some policy limit to the scope of the doctrine of contractual estoppel where it was capable of impacting on the rights of third parties (e.g., A and B contracting on the basis of a promise that A was the party with a call right in relation to certain property when it was in fact C). However, there is no such limit. As Lord Toulson noted in *Prime Sight Limited v Lavarello* [2013] UKPC 22, [47]:

> "Parties are ordinarily free to contract on whatever terms they choose and the court's role is to enforce them. There are exceptions and qualifications, but these too are part of the general law of contract. In *Greer v Kettle* Lord Maugham referred to fraud, illegality, mistake and misrepresentation. Similarly, just as a court may refuse in some circumstances to enforce a contract on grounds of public policy (a topic closely related to illegality), the same will apply to a contractual convention. … In short, contractual estoppels are subject to the same limits as other contractual provisions, but there is nothing inherently contrary to public policy in parties agreeing to contract on the basis that certain facts are to be treated as established for the purposes of their transaction, although they know the facts to be otherwise."

53. Finally, Goodrich said that invoking contractual estoppel in this case involved using the doctrine as a sword rather than a shield. However, the language of estoppel in this context is apt to mislead. Goodrich and RR Holdings are parties to a legally binding contract in which a promise has been made as to the basis on which they are contracting. Enforcing the promise in that contract as between the contracting parties raises no difficulties – contractual promises, by their nature, forge swords (cf. Keiry CF Loi, "Contractual Estoppel and Non-reliance Clauses" [2015] LMCLQ 346, 349). Even if the sword/shield debate had been relevant, it is clear from *Musst* that a conventional estoppel – in that case estoppel by convention – can prevent a party from denying it owes obligations to the transferee in the context of a disputed novation, this being a context in which identifying consideration for the legal obligations asserted presents little difficulty (c.f. *Tinkler v Revenue and Customs Commissioners* [2022] AC 886, [76]).

B3 The No Extension Defence

54. Goodrich's second defence concerns the effect of the December 2017 Letter Agreement, and whether it extended the period during which the Call Option could be exercised to the Unconditional Date or the Longstop Date, or whether it simply extended the Call Option Period, so as to continue obligations which only operated during that period, but on the basis that RR Holdings could not in fact exercise the Call Option.

55. There are points to be made on both sides of this argument, but I have concluded that the December 2017 Letter Agreement extended the period within which the Call Option could be exercised:

i) Clause 3.1 of the PCOA permits RR Holdings (on the conclusions I have reached) to exercise the Call Option *during the Call Option Period*. If an extension of the Call Option Period was not to entail an extension of the time within which the Call Option could be exercised, clear language to that effect would be required (by application of the general contractual principle to that effect, as summarised in Sir Kim Lewison, *The Interpretation of Contracts* (7th), [7.173]).

ii) Not only is there no such language, but clauses 1(b) and 2(a) of the December 2017 Letter Agreement proceed on the basis that until the December 2017 Letter Agreement expires "in accordance with its terms" or (subject to the No Governmental Approval Defence) on the Longstop Date, RR Holdings has *two* rights to purchase the AM Package (one under the PCOA and one under the RTP Agreement). On Goodrich's argument, it would only have one such right from 31 December 2017 onwards, some 10 days after the December 2017 Letter Agreement was signed. The essence of the December 2017 Letter Agreement was that it was only if the Modified RTP became unconditional that RR Holdings would forgo its rights under the PCOA, for so long as those subsisted on their own terms and up to the Longstop Date.

iii) The argument is also inconsistent with the terms of the RTP Agreement, entered into at the same time as the December 2017 Letter Agreement as part of a package. Recital (F) to the RTP Agreement refers to the Call Option expiring on the Unconditional Date, *from which point* RR Holdings would only have a single right to acquire the AM Package. The irresistible inference is that, prior to that date, RR Holdings has two such rights.

56. So far as the points made the other way are concerned:

i) Goodrich points to the language of clauses 1(a) and 1(b) of the December 2017 Letter Agreement to the effect that the Call Option Period "shall automatically expire" following the Unconditional Date or if the parties determine that Governmental Approval is required but it is not obtained by the Longstop Date. However, the premise of those paragraphs is that the Call Option has not been exercised. In this respect, the position is no different to the definition of the Call Option Period in the PCOA, which refers to the Call Option Period "expiring" or "ending" on a particular date, but clearly contemplates it may be exercised in advance of that date.

ii) Goodrich highlights clause 2(b) of the December 2017 Letter Agreement, which provides "the RTP Agreement … shall form the only basis on which Rolls-Royce … shall be entitled to purchase the AM Package". I accept these words lend some support to Goodrich's argument. However, the better reading of the two December 2017 agreements together is that those words are addressing the position where the December 2017 Letter Agreement has expired because the Modified RTP has become unconditional. It is only if the Modified RTP has become unconditional that it will provide RR Holdings with an entitlement to purchase the AM Package. This is reflected in the qualification at the end of clause 2(b) referring back to clause 1(b), and in the words of clause 2(a). Any alternative interpretation would cut across the express recognition in clauses 1(b) and 2(a) that, until

the December 2017 Letter Agreement has expired, RR Holdings has two rights to acquire the AM Package, and would also be inconsistent with Goodrich's acceptance that clause 2(b) did not prevent RR Holdings exercising the December 2012 RTP.

iii) Goodrich contends that if it was open to RR Holdings to exercise the Call Option, this would place it in breach of the RTP Agreement, clause 2.3 of which required the parties to take "necessary steps and co-operate with each other to ensure the satisfaction of the condition". However, for the reasons set out above, the RTP Agreement (see [23] above) and the contemporaneously effected December 2017 Letter Agreement (see [27(iii)] above) both contemplated that, until the RTP Agreement became unconditional or the December 2017 Letter Agreement expired, RR Holdings would have two rights to acquire the AM Package. Clause 2.3 addresses the obligations of the parties so long as the Call Option had not been served. Indeed, on Goodrich's own case (confirmed, after some equivocation, in closing), RR Holdings was entitled from December throughout to exercise the December 2012 RTP (even though the existence of this legal right was not expressly addressed in the RTP Agreement or the December 2017 Letter Agreement) and would not be in breach of contract in doing so. If clause 2.3 does not preclude RR Holdings from exercising a right derived under the December 2012 RTP, it is difficult to see why it precludes RR Holdings from exercising the separate right expressly acknowledged in the RTP Agreement and the December 2017 Letter Agreement arising under the PCOA. Further, the co-operation clause constituted by clause 2.3 is a clause of a kind which it would be natural to include in any agreement which required a condition to be satisfied for certain provisions to come into effect, capable of operation in a wide variety of circumstances. A broadly aimed provision of that kind should not be read as cutting down the explicit (and specific) provisions elsewhere in the December 2017 Letter Agreement and the RTP Agreement that RR Holdings had two rights to acquire the AM Package, until such time as the Modified RTP became unconditional.

iv) I would note that even if I had been willing to read clause 2.3 so that it precluded the exercise of the Call Option in some way, I would not read that limitation as applying in circumstances in which the parties had determined that DOJ consent was required but could not be obtained before the Longstop Date, such that it was clear that the relevant condition towards which the necessary steps were to be aimed could not be satisfied. As I explain below, it was in exactly those circumstances that the Call Option was exercised.

v) Goodrich argues that the parties extended the Call Option Period, but on the basis that the Call Option could not be exercised, to ensure that RR Holdings continued to benefit from the protection provided by clause 12.4 of the PCOA (which prevented Goodrich from disposing of the AM Package during the Call Option Period). However, RR Holdings enjoyed similar protections under the December 2012 RTP and the Final Judgment, and under clause 11 of the RTP Agreement (which gave RR Holdings a right of pre-emption if Goodrich sought to sell the AM Package). I do not accept Goodrich's contention that this latter provision only came into effect once the Modified RTP Agreement became unconditional: there is nothing in the RTP Agreement which suggests that that is the position (contrast clause 2.2 where the conditional nature of the Modified RTP is expressly stated). Otherwise, clause 2.6 makes it clear that the provisions of the RTP Agreement have effect until it expires, with accrued rights surviving. The limited differences between these regimes do not come close to providing a reason for overriding the clear effect of the

provisions of the December 2017 Letter Agreement and the Modified RTP as set out above.

vi) Finally, Goodrich argues that if it remained open to RR Holdings to exercise the Call Option, then the result would be that it would not secure the benefit of retaining the AM Package until the end of 2021 which clause 2(b) of the December 2017 Letter Agreement was intended to secure. However, the reality was that the parties had conflicting goals which exposed them to particular risks, and the agreements entered on 21 December 2017 compromised their positions. Goodrich wished to retain the AM Package until the end of 2021, and the RTP Agreement offered a means of doing that, but there was no guarantee the RTP Agreement (and with it, the Modified RTP) would become unconditional. For RR Holdings, if the Modified RTP became unconditional, it would have the benefit of the detailed provisions for the exercise of the RTP which it set out, and in the meantime, it would have the benefits of the December 2017 Letter Agreement, which gave RR Holdings various "economic concessions" which were "significant" for RR Holdings (as it was put in RR Holdings' letter to the DOJ of 13 June 2018) in return for its agreement not to exercise the Modified RTP for a certain period. However, if it was determined that the RTP Agreement would not become unconditional, with the result that the December 2017 Letter Agreement would expire, RR Holdings faced the risk – if the right to serve the Call Option was not preserved – that it would have to fall back on the December 2012 RTP, which lacked the detailed supporting terms of the PCOA and the RTP Agreement.

B4 The No Governmental Approval Defence

Introduction

57. Goodrich also argues that it and RR Holdings had determined prior to the date of the Call Option Notice that Governmental approval was required but could not be obtained before the Longstop Date so that the Call Option Period had expired at the date of that determination by virtue of clause 1(b) of the December 2017 Letter Agreement. By way of "recap", this provided:

> "If the parties determine that Government Approval … is required but are unable to obtain the same on or before the Longstop Date … this Letter Agreement will automatically expire and the [December 2012 RTP] shall then form the only basis upon which [Rolls-Royce] shall be entitled to purchase the AM Package".

The Threshold Issue

58. A threshold requirement for this argument to succeed is that clause 1(b) should be interpreted to have the effect that the December 2017 Letter Agreement will immediately lapse once (a) the parties determine that Governmental Approval is required and (b) the parties determine that Governmental Approval *will not be obtained* before the Longstop Date. On this construction, the December 2017 Letter Agreement and the Call Option might lapse significantly in advance of the Longstop Date.

59. I am satisfied that Goodrich is unable to overcome this threshold:

i) The language of clause 1(b) suggests that the parties' *determination* only concerns the requirement for Governmental Approval, with the issue of approval turning on the

occurrence or non-occurrence of an event by a certain date (approval or no approval) rather than a predictive assessment.

ii) While the requirement for Governmental Approval would largely reflect a legal determination of the status and effect of the Final Judgment (something which would not be expected to change significantly over time), the issue of whether – and if so when – Governmental Approval would be obtained is one on which views might well change. It would be surprising if the December 2017 Letter Agreement was to expire immediately after a pessimistic assessment had been formed, even if very shortly thereafter the outlook became distinctly more favourable.

iii) Goodrich's construction does not sit well with clause 2.2 of the RTP Agreement, which provides that "the Right to Purchase shall be conditional on either the Governmental Approval having been obtained or the parties determining that Governmental Approval is not required", that condition to be satisfied by the Longstop Date (clause 2.6). There is nothing in the RTP Agreement which would have the effect that it would lapse before the Longstop Date based on a prediction that Governmental Approval would not be obtained in time. There is no obvious reason why the parties should have dealt with the same issue (the effect of Governmental Approval being required which cannot be obtained) in different ways in two documents entered into as part of a package, and which are to be read together (*Cherry Tree Investments Ltd v Landmain* [2013] Ch 305, [80]-[81]).

iv) On Goodrich's construction, it is difficult to see how the parties could agree to extend the Longstop Date if they have formed the view that Governmental Approval would not be obtained by the prevailing deadline, because that view would terminate the December 2017 Letter Agreement. However, clause 2.6 of the RTP Agreement, which definition is picked up in clause 1(b) of the December 2017 Letter Agreement, expressly contemplates that it might be extended.

v) RR Holdings' construction provides greater commercial certainty as to the date when the December 2017 Letter Agreement expires, whereas Goodrich's construction requires the court to reach an assessment of what predictions RR Holdings and Goodrich had made at any particular point in time, and whether their predictions coincided and/or were mutually manifested (whichever is the test) at any particular point in time.

vi) Finally, in circumstances in which (as I have concluded), the parties' agreement was intended to maintain RR Holdings' rights under the PCOA until such time as the Modified RTP became unconditional, the effect of Goodrich's construction would be that RR Holdings' rights under the PCOA would be extinguished at the very point when it determined that the Modified RTP would not become unconditional.

60. As to the points made the other way, Goodrich submits that the reference to the parties being unable to obtain Governmental Approval "on or before the Longstop Date" reflects the fact that the December 2017 Agreement could expire before the Longstop Date. However, those words simply reflect the fact that Governmental Approval could be obtained up to and including the Longstop Date. I would note that the expression "on or before" is one used very frequently in the parties' contracts when imposing a deadline of some kind, and I am not persuaded that a "drafting tic" of this kind can bear the weight which Goodrich's argument seeks to place on it.

What constitutes a "determination" for the purpose of clause 1(b) of the December 2017 Letter Agreement?

61. If this issue had been resolved in Goodrich's favour, then a further issue of construction would have arisen: what must happen for the parties to have "determine[d]" that Governmental Approval would not be obtained before the Longstop Date, and is it sufficient for each to have independently reached that view without the shared view "crossing the line", in the sense that the parties manifest (coinciding) views to each other?

62. On the hypothesis under consideration, the parties must determine two things: that Governmental Approval is required, and that it will not be obtained by the Longstop Date. The question of what constitutes a determination must have the same answer in both contexts, and also for the purposes of clause 1(a) when the parties "determine no Governmental Approval is required" such that the Modified RTP becomes unconditional. In this last context, I am satisfied that much the more likely construction is that a determination requires a *mutually* shared position: given that the product of such a determination is that the Modified RTP immediately becomes unconditional, it is necessary that the parties know this is the case. Were matters otherwise, the Modified RTP might have in fact become unconditional without either party appreciating the position. In relation to clause 1(b), the effect of the two determinations will be that the December 2017 Letter Agreement expires automatically. Once again, it seems to me obvious that the parties must have contemplated that this would only happen when there was a mutual manifestation by the parties of the relevant determinations.

63. Further, clauses 2.3 and 2.4 of the RTP Agreement envisage that obtaining satisfaction of the condition will be a joint exercise, with an obligation on each party to share information with the other (clauses 2.4 and 2.5). That envisages a process in which the parties will make their positions known to each other.

64. That conclusion is also fatal to the No Governmental Approval Defence. Goodrich does not contend that any communication of its determination in relation to the issue of whether Governmental Approval would be obtained before the Longstop Date "crossed the line" prior to the exercise of the Call Option. Goodrich does suggest that RR Holdings' position was manifest after the Call Option had been sent by RR Holdings on 8 October 2018, but before it had become effective through receipt at Goodrich on 10 October 2018 (the terms of the PCOA requiring service at Goodrich's UK address, with the notice only being effective on receipt). While that would not be enough on my analysis, it is, in any event, a thoroughly unattractive argument, and one which is not consistent with the admission in Goodrich's defence that the Call Option Notice was served on 9 October. In those circumstances, I make no apologies for looking at the terms and circumstances of the email of 9 October with some care. The email was not sent to Goodrich, but to Tim White of RTC, whose authority to receive communications on Goodrich's part was not addressed at trial. It records the fact that Governmental Approval had not been obtained when the email was sent, and that RR Holdings had decided to call the business, but no more. It expresses no view on whether Governmental Approval will be obtained on or before 21 October 2018. Had a unilateral communication of its determination by RR Holdings been sufficient, I am not persuaded the 9 October email was sufficient to this end.

Had RR Holdings and Goodrich in fact determined that Governmental Approval would not be obtained prior to the Longstop Date before exercising the Call Option?

65. In relation to this issue, I am satisfied that each of RR Holdings and Goodrich had formed the view, with a sufficient level of confidence to constitute a determination for the purposes of clause 1(b), that Governmental Approval was required and that it would not be obtained before the Longstop Date prior to exercising the Call Option. This argument must be approached on the basis that Goodrich has succeeded in the two preceding construction arguments.

66. In my assessment, a decision by both parties that they would not proceed without Governmental Approval amounts, as a matter of practicality, to a determination that Governmental Approval was required for the RTP Agreement. I do not understand there to be any dispute that both parties had reached that view. In any event:

i) It is common ground on the statements of case that on 20 March 2018, the DOJ informed the parties that Governmental Approval was required.

ii) The evidence of Mr Hudson of Goodrich was that he had so concluded.

iii) The parties' co-ordinated letters to the DOJ of late June 2018 reflected the fact that they had been told by the DOJ that its approval was required (e.g. RR Holdings' letter stated "after considering the matter, DOJ determined that the FJ would have to be modified to permit the non-exercise of the RTP", as did Goodrich's letter, both letters being the product of prior exchanges between the parties).

67. The evidence also establishes a decision by both parties that they should act on the basis that approval would not be forthcoming in time, because this was the likely outcome. I am satisfied that this amounts to a determination that Governmental Approval would not be obtained in time. That is how commercial parties would be expected to reach a determination as to future events.

68. As to the evidence:

i) Mr Hudson, Goodrich's Vice President of Aftermarket Services, gave unchallenged evidence that prior to the exercise of the Call Option, the Goodrich team were "basically certain … that the DOJ was not going to grant its approval before the Longstop Date".

ii) Mr Andrews (who was the Rolls-Royce Group's competition counsel) gave evidence for RR Holdings on this issue. I did not hear evidence from a member of the steering committee at RR Holdings who were the "decision-makers" so far as this issue was concerned (and who took the decision to serve the Call Notice).

iii) Mr Andrews was an honest and careful witness. He said that it was his view that the likelihood of the DOJ either not believing approval was required or of granting it before the Longstop Date was "below 50%". Mr Andrews accepted that Mr Quin of the DOJ had informed the Rolls-Royce Group in June 2018 that Governmental Approval was going to be necessary, and that Goodrich and RR Holdings had sent letters to the DOJ seeking approval on that premise. He also accepted that, as at July 2018, RR Holdings had been told by Goodrich's US counsel that Mr Quin was sceptical about the reasons why RR Holdings and Goodrich were contending that Governmental Approval should be given.

iv) While RR Holdings sought, in a letter sent in August 2018, to persuade the DOJ to grant approval, there had been no response by mid-September, leading RR Holdings, through its

US lawyers, to arrange a telephone call with Mr Quin on 28 September. I am satisfied that the purpose of this call was for RR Holdings to find out whether approval would be forthcoming in time. Mr Andrews' evidence was that, during the call, Mr Quin indicated that he was leaning against granting approval, but that he had not yet reached a decision. Mr Byowitz, Goodrich's US lawyer, gave evidence that after that call, RR Holdings' US lawyers told him that Mr Quin had expressed a "fundamental objection" to the RTP Agreement.

v) Whether matters were as stark as that or not, I am satisfied that RR Holdings drew the conclusion from that telephone call that the DOJ was not going to grant Governmental Approval before the Longstop Date. A message from Mr Hopkinson sent to the Steering Committee shortly after the call stated that it was likely that the DOJ would not approve the RTP Agreement in the terms in which it had been agreed by RR Holdings and Goodrich, and later in the same message Mr Hopkinson stated, "it has become apparent that the DOJ will … either not consent to the … Deal or consent … to the … Deal being modified so that it doesn't prevent us exercising the RTP in 2018 and 2019". Another RR Holdings' employee, Mostyn Lewis, sent an email around the same time referring to Mr Hopkinson's news "that we won't be getting approval from the DOJ". Further, RR Holdings did not send the further letter attempting to persuade Mr Quin which it had offered during the call, which I am satisfied reflected a perception on its part that Mr Quin would not change his mind, either at all or in time.

vi) I am also satisfied that the Steering Committee meeting on 5 October was convened because of the assessment which RR Holdings had made following the 28 September call, and that the Steering Committee's decision on 5 October to exercise the Call Option reflected its view (reached with sufficient confidence for it to act upon that view) that consent would not be forthcoming in time. Mr Hopkinson's email sent after the Steering Committee meeting stated "it became apparent last week that the DOJ are unlikely to" consent to the RTP Agreement. When communicating the decision to exercise the Call Option to RTC on 9 October 2018, Mr Carlisle stated "you are probably aware we have not been able to get DoJ approval". A script prepared for a conversation between Mr Carlisle and Mr Cholerton of RR Holdings, for Mr Cholerton's call with Mr White stated "following the recent round of discussions with the DOJ we believed the chances of DOJ approving the 2017 deal by 21 October were increasingly slim".

69. I am satisfied, therefore, that prior to the exercise of the Call Option, RR Holdings had concluded that DOJ approval would not be forthcoming by the Longstop Date, and exercised the Call Option for that reason. However, that illustrates the lack of commercial sense in Goodrich's construction – a determination to exercise the Call Option because DOJ approval was unlikely to be forthcoming before the Longstop Date would, on its case, extinguish the Call Option. As I suggested to Mr Croall KC in the course of argument, this was akin to a parachute which would self-destruct on pulling the ripcord.

B5 Relief

70. It follows that RR Holdings are entitled to the declarations they seek, and an order requiring Goodrich to deliver the Call Option Exercise Preliminary Information Documents to RR Holdings.

C GOODRICH'S CLAIM FOR BREACH OF THE EXCLUSIVITY OBLIGATION

C1 The Contractual Context

71. This part of the case concerns alleged breaches of the ASA and ESCURS.

72. Taking the ASA first, by clause 2.1 (in combination with clauses 2.2, 2.3, 2.6 and 2.7) the RR Entities appointed Goodrich as "its Exclusive supplier of Aftermarket Services".

73. Clause 2.2 of the ECSURS provided:

> "R-R shall be entitled to offer Aftermarket Services to Customers provided always that R-R shall utilise GR as its Exclusive Supplier (on a subcontract basis or otherwise) for such Aftermarket Services in accordance with the ASA".

74. "Aftermarket Services" were defined for this purpose as:

> "Rework for Applicable Parts, and Rework and the supply of Spare Parts for Applicable Engine Control System Units or any other service in relation to Applicable Engine Control System Units including (without limitation) Initial Provisioning".

75. As to the meta-definitions:

i) "Rework" is defined as "Overhaul, Repair, salvage, rig test and certification, reconditioning, Modifications, investigation or replacement or any combination thereof as the context may require to restore the Product to the standards specified on the Repair Order".

ii) "Applicable Parts" is defined as "any individual part contained within an Applicable Engine Control System Unit or, where applicable, an item of ground equipment".

iii) "Spare Parts" means "any Engine Control System Units or Parts that do not constitute Original Equipment excluding flight certification equipment, development equipment or Pre-sourced Engine Control Components".

iv) "Applicable Engine Control Systems Units" means "Engine Control System Units for R-R Engines … excluding Pre-sourced Engine Control Components for R-R Engines".

v) "Initial Provisioning" means "Spares ordered by R-R or Operators in support of the operation of a particular Operator's fleet".

76. The ECSURS contained further relevant terms:

i) It requires Goodrich to offer two Aftermarket Services, a Rework Service (which requires Goodrich to repair Applicable Engine Control Systems Units (**AECSUs**) within a specified period or provide an exchange AECSU in default of doing so) and an Exchange Service, under which Goodrich is obliged to provide an exchange AECSU within a 24-hour period.

ii) Clauses 4.2 and 4.3 address Rolls-Royce requests for Aftermarket Services which fell outside the pricing provisions in the ESCURS, providing that "Goodrich shall endeavour to provide [a] written quotation" within a specified period.

iii) Clause 9.2 provided that "subject to Clause 11 below … the price for Spare Parts for [AECSUs] shall be consistent with the 'World List Price' (**WLP**) as set out in [Goodrich's] Spare Parts price catalogue, as published from time to time".

iv) Clause 11 addressed the price which Rolls-Royce must pay Goodrich for supplies made by way of Initial Provisioning, which depended on the basis on which Rolls-Royce supported the AECSUs. Clause 11.10(c) provided that, for certain engine-types, where the relevant AECSU "is supported on a $/EFH" basis, the RR Entities are entitled to acquire Initial Provisioning at "cost" (**IPC**) up to a specified threshold, and at a 4.3x mark-up (**Mark-Up**) thereafter. Clause 11.10(d) stipulated that Initial Provisioning acquired "under this clause 11.10(c) shall only be transferred to the Customers by R-R as part of an EFH deal; otherwise, R-R shall not offer Initial Provision for sale acquired under Clause 11.10(c)".

v) Clause 11.10(e) provided that where the AECSUs "for such R-R Engine Programme is not supported on an EFH basis … the Customer may acquire Initial Provisioning from R-R or [Goodrich]". It continues:

> "If R-R acquires Initial Provisioning it shall purchase it from [Goodrich] at a price equal to IPC multiplied by Mark-Up. The price of [AECSU] referred to in this Clause 11.10(e) shall be reduced by a royalty of 30% …".

C2 The RR Entities' Aftermarket Services Offering when the ASA and ECSURS were agreed

77. As the name suggests, Aftermarket Services are, broadly, services provided to customers in the period after the aircraft engine has been delivered to the customer.

78. Customers who acquire Rolls-Royce engines are not obliged to enter into aftermarket service contracts with Rolls-Royce, although many of them do, subscribing to one of the various levels of Rolls-Royce's TotalCare aftermarket services offering. Those who do not contract to receive Aftermarket Services from the RR Entities may not enter into such contract at all, or they may do so with another service-provider, and both categories are referred to as "time and materials customers".

79. The basic TotalCare package only covers repair and maintenance which is carried out after the engine has been removed to a workshop, and not repair and maintenance carried out "on wing". It is possible to purchase additions to the package to cover "on wing" repairs, in the form of line replacement unit maintenance services (**LRU Management Services)** and maintenance of line replacement parts (**LRP Management Services**). There are two LRU Management Services options within the TotalCare offering. The first involves repair, or a replacement unit, within a specified turnaround time (**Service Level 1**) and the second an exchange service, under which an exchange unit is provided for the existing LRU within a shorter specified turnaround time (**Service Level 2**). Rolls-Royce in turn contracts with third parties to enable it to deliver LRP and LRU Management Services. The engine control system units supplied by Goodrich were line replacement units, and in return for supporting its LRU Management Services offerings, Rolls-Royce paid Goodrich a vendor support payment or **VSP**. Both the amount paid by the

customer for LRU Management Services to Rolls-Royce, and the amount paid by Rolls-Royce to Goodrich by way of VSPs, were calculated by reference to the number of engine flying hours, referred to as an **EFH basis**.

80. It was a condition of acquiring LRU and LRP Management Services from Rolls-Royce that customers had access to spare units and parts, which could be used to repair or replace units or parts "on wing". The recommended level of such units and parts was known as "Initial Provisioning". The recommended level appears in a Recommended Spare Parts List. The recommended levels reflect various parameters, including customer-specific factors. However, on the evidence before me, it was not made a legal requirement of the provision of LRU and LRP Management Services that customers carried the recommended levels of Initial Provisioning. Customers can acquire their Initial Provisioning from Rolls-Royce or another supplier, although the effect of the evidence was that many customers chose, for commercial reasons, to acquire their Initial Provisioning from Rolls-Royce.

C3 The PAS

81. Customers proved increasingly resistant to carrying the level of Initial Provisioning recommended by Rolls-Royce, which could involve a significant upfront commitment. However, LRU and LRP Maintenance Services were an important revenue stream for Rolls-Royce. To avoid the costs of Initial Provisioning deterring customers from signing up to Rolls-Royce's LRU and LRP Management Services packages, Rolls-Royce sales personnel offered significant discounts off the price of Initial Provisioning supplies as part of the TotalCare package negotiations.

82. In addition, a number of Rolls-Royce's competitors in the aftermarket services market had introduced offerings which involved giving customers access to pooled LRUs but without requiring the same level of upfront purchases, including AJ Walters, Air France-KLM, SR Technics and Lufthansa Technik. These pooling services represented a significant commercial threat to Rolls-Royce's aftermarket services business.

83. Against that background, Rolls-Royce had been considering the possibility of launching a parts availability service for some time. It is possible to find references to customer requests for a service of this kind in 2013 and 2014. In 2015, a limited number of customers – it would appear three operators – obtained access to such a pooling scheme. In 2016, plans to offer that scheme more widely came to fruition, Roll-Royce deciding to launch a new service offering known as the "Parts Availability Service" or **PAS**, with the service becoming generally available in 2017.

84. A number of internal presentations were delivered in 2016 which explained the rationale, and aspirations, for the PAS:

i) In a presentation of 23 June 2016, it was noted that customers were less willing or able to make the investment necessary to acquire Initial Provisioning, and had an "ever-increasing expectation for cost certainty and risk transfer". Reference was made to competition from various providers (Lufthansa Technik, Delta TechOps and Air France/KLM) which "threatens our repair business as well as provisioning". The presentation recommended developing an availability service "to meet the demands of our Customers" and "protect our Services Revenues".

ii) A later presentation of 6 October 2016 referred to "the market … shifting in the direction of Availability based services for parts provisioning for a number of years and it is now expected by most customers that we should be able to offer these types of service". It described "the development of Parts Availability services" as "vital in order to defend our market share of aftermarket services which is under threat from out competitors". In particular, as Mr Loret (a Senior Supply Chain Manager in the Rolls-Royce Group) acknowledged, there was a concern that if customers signed up for a competitor's availability service, that might lead to a loss of LRU Management Services as well.

iii) The roll-out of the PAS was approved in October 2016 based on a Generic Business Case, and around the same time, a Commercial Design Document and a Service Design Document setting out the proposed terms and logistics for the new offering were prepared.

iv) In December 2016, a Services Policy Document was produced.

85. The PAS was made available to customers operating Trent 1000, Trent XWB or Trent 7000 engines and selected Service Level 2 customers paid for access to a pool of LRUs maintained for PAS customers. Rolls-Royce acquired the LRUs which were to be used within the PAS package, which were initially held in a Rolls-Royce storage location known as "1203". From there, they could be drawn down to one of a network of Materials Service Centres (**MSCs**) which are operated on Rolls-Royce's behalf by a third-party logistics service provider. Legal title in the LRUs in the MSCs is held by Rolls-Royce. There is no contractual or other legal limitation as to the uses to which LRUs held in MSCs can be put. I was pointed to one occasion in which LRUs from an MSC were used for two test flight engines, although it is not possible to determine whether this was in isolated example, or whether the use of LRUs in MSCs for purposes other than supporting the PAS was more widespread.

86. In addition to MSCs, PAS customers were required to have a certain quantity of LRUs stored in the customer's onsite storage site (**OSS**), typically located at the customer's main base. The customer managed its OSS and had legal title to the LRUs stored at its OSS. A proposal to retain title within a Rolls-Royce entity was rejected because of potential tax implications. However, the contractual terms relating to an operator's use of the PAS were regarded by the RR Entities as having the effect that "in substance, Rolls-Royce is deemed to have economic control of the OSS and so should financially account for the OSS parts as inventory" (albeit the transfer of title was recognised to leave the RR Entities exposed in the event of the operator's insolvency). As necessary, LRUs could be drawn down from the relevant MSC to "back-fill" an OSS when LRUs from the OSS had been deployed. I accept the evidence of Mr Loret that the initial stocking of OSS could come from Rolls-Royce directly rather than from an MSC, and, on the basis of the information assembled in Mr Bezant's report, that 91% of the 128 AECSUs shipped to customers' OSSs came from Rolls-Royce directly. In any event, the setting up of the PAS would inevitably have required the RR Entities to order AECSUs for the purpose of meeting the OSS requirement, whether delivered there directly (as appears to have been the case in the vast majority of instances) or via an MSC.

87. When an LRU on a PAS customer's aircraft needed to be replaced, the customer used an equivalent unit in the OSS (which would then be "backfilled" by drawing an equivalent unit from an MSC), or if there was no such unit available, drawn directly from the MSC, with title in the replaced LRU passing to Rolls-Royce. Rolls-Royce then returned that unit to the relevant

vendor – in the case of AECSUs, to Goodrich - who provided an exchange unit which was used to "back-fill" the MSC. Where it was economic to do so, the vendor repaired the returned unit.

88. Customers who subscribe to the PAS package pay an additional monthly fee, in addition to their EFH TotalCare rate and, in most cases, a commitment fee in respect of LRUs held at their OSS. The monthly fee is calculated at 0.95% of WLP/month for OSS units and 0.67% per month for MSC units, with discounts of up to 20% payable for some customers. The commitment fee appears to have been $250,000 in 2016 (representing 10% of the average value at WLP of the material at the OSS), to be escalated in accordance with an escalation formula in the TotalCare agreement. If the TotalCare package came to an end without the LRUs held at the OSS being used, those LRUs were returned to Rolls-Royce and the commitment fee returned.

C4 Does the PAS fall within the definition of Aftermarket Services?

Goodrich's primary case

89. By way of a reminder, the definition of Aftermarket Services is:

> "Rework for Applicable Parts, and Rework and the supply of Spare Parts for Applicable Engine Control System Units or any other service in relation to Applicable Engine Control System Units including (without limitation) Initial Provisioning".

90. In what it confirmed in closing was its primary case, Goodrich contends that the PAS falls within the contractual definition of "Rework" and/or "the supply of Spare Parts for AECSUs". As it was put in Goodrich's written closing, "on any view the PAS *involves* 'the supply of spare parts and initial provisioning'" (emphasis added). However, the effect of the definition cannot mean that any aftermarket service of which the supply of AECSU spare parts or rework on AECSUs *forms part* is exclusive to Goodrich. The PAS involved the supply of a range of spare part and rework services for the entire Rolls-Royce engine, albeit the evidence suggests that, by value, 47% of the parts in the OSSs and MSCs were sourced from Goodrich.

91. In considering this argument, it is important to note the following:

i) Before the ASA and the ECSURS were entered into, Goodrich was aware that the RR Entities offered aftermarket services to their customers under the umbrella term "TotalCare", which included the supply of rework and spare part services in relation to AECSUs which services were in turn sub-contracted to Goodrich. In broad terms, that is not disputed, although Goodrich says that it was not aware of the specific terms on which the RR Entities contracted with their customers. Nonetheless, the fact that the RR Entities were known to be offering some kind of aftermarket services which included, as an element, the rework of and support for AECSUs, at the time the ASA and ECSURS were entered into is important.

ii) I have seen nothing to suggest that the ASA and ECSURS were intended to prevent the RR Entities from offering this commercially significant service going forward, or that they now required Goodrich's consent to do so. On the contrary, the Heads of Terms of June 2008 which preceded the ASA and ECSURS provided at clause 3.8.19 that "Goodrich will use its best endeavours to support the sale of aftermarket care on a TotalCare basis from Rolls-Royce in respect of both (i) the sale of new engines and (ii) engines in service with a

particular customer". This makes it unlikely that the rights of exclusivity afforded to Goodrich under the ASA and ECSURS precluded the RR Entities from offering any kind of aftermarket service which included within it (or "involved") rework and spare parts for AECSUs, provided those particular elements were sub-contracted to Goodrich. Under the PAS the Rework services required *are* performed by Goodrich and the Spare Parts supplied *are* sourced from Goodrich.

iii) Clause 2.9 of the ASA provides that Goodrich "shall use its best endeavours if requested (but such obligation shall not extend to requiring [Goodrich] to alter the pricing or terms it offers to Operators) to support [Rolls-Royce's] sale of Aftermarket Services on an $/EFH basis in respect of both (i) new R-R Engines and (ii) R-R Engines in service with any such operators". This was an obligation to support TotalCare.

92. Further:

i) Recital (C) of the ECSURS provided that Goodrich had been appointed as "the Exclusive supplier and provider of Aftermarket Services pursuant to the terms and conditions of this Agreement and Goodrich has agreed to provide such Aftermarket Services pursuant to the same".

ii) That suggests the exclusivity which Goodrich has is co-extensive with the scope of services it is obliged to provide under the ECSURS. That conclusion is reinforced by clause 2.1, which obliges the RR Entities to use Goodrich as its Exclusive supplier of Aftermarket Services, clause 2.5 provides that Goodrich "shall provide to [the RR Entities], Customers and any other party requiring Aftermarket Services, all applicable Aftermarket Services" and clauses 3.1 which places a contractual obligation on Goodrich to "accept all Orders and Instructions for Aftermarket Services placed by Rolls-Royce". Indeed, Mr Croall KC rightly accepted that the perimeter of Goodrich's exclusivity under the ASA and ECSURS was co-extensive with the services it was obliged to provide.

iii) If the definition of Aftermarket Services had the broad and generalised scope which Goodrich asserts, that would not only involve the RR Entities being prohibited from undertaking a wide range of activities, but it would also involve Goodrich assuming a contractual obligation to provide that broad-ranging category of services.

iv) Goodrich's argument that it could simply stop the RR Entities from offering a contractual relationship of that kind to their customers, and then sub-contracting any Rework or sourcing any Spare Parts from Goodrich to the extent that it formed part of the service, but that Goodrich was itself obliged to provide that wider service, is not a commercially-likely construction.

93. If it is not enough that the PAS "involved the supply of spare parts and initial provisioning", then clause 2.1 provides an answer to this aspect of Goodrich's exclusivity case. It provides:

> "[The RR Entities] shall be entitled to offer Aftermarket Services to Customers provided always that [the RR Entities] shall utilise [Goodrich] as its Exclusive supplier (on a subcontract basis or otherwise) for such Aftermarket Services in accordance with the ASA".

94. I do not accept that Goodrich needs to supply the AECSUs direct to the customer, rather than to the RR Entities who supplies them to the customer, for this provision to apply. Provided that all Rework is done by Goodrich, or all AECSUs and Spare Parts supplied are sourced from Goodrich, the requirements of clause 2.1 are satisfied (the words "or otherwise" reflecting the fact that Goodrich need not assume the status of a sub-contractor for the clause to apply). In this regard, clauses 5.3, 5.5, 5.6 and 5.7 of the ECSURS envisage provision of Spare Parts "provided to R-R or a Customer" or collected "by R-R or the Customer", with "R-R or the Customer" (as appropriate) acknowledging receipt.

Goodrich's secondary case

95. In the alternative, Goodrich contends that the definition of Aftermarket Services should be interpreted as comprising three elements:

i) Rework for Applicable Parts.

ii) Rework and supply of Spare Parts for AECSUs.

iii) Any other services in relation to AECSUs including, without limitation, Initial Provisioning.

96. The R-R Entities, by contrast, argue that the definition has only two elements:

i) Rework for Applicable Parts.

ii) Rework and supply of Spare Parts, both for (a) AECSUs and (b) any other service in relation to AECSUs, including (without limitation) Initial Provisioning.

97. The considerations I have referred to at [91]-[92] above strongly support the RR Entities' construction:

i) Once again, the effect of Goodrich's construction (given the broad effect of the words "in relation to" which it entails) would be to prevent the RR Entities from offering TotalCare without an agreement with Goodrich as to a price for doing so.

ii) It would also oblige Goodrich itself to provide "any other service in relation to Applicable Engine Control System Units", a very broad and imprecise obligation which it is unlikely Goodrich would have been willing to assume.

98. Further, the language of the definition lends some support to the R-R Entities' construction:

i) The comma after "Applicable Parts", followed by the word "and", indicates a natural break between what precedes the comma and what follows it, but there is no similar break in the remainder of the sentence, which suggests that the clause has are two (rather than three) distinct elements.

ii) The concluding part of the definition – "including (without limitation) Initial Provisioning" – can readily be read as extending the second element of Goodrich's construction (making it clear that the supply of Spare Parts for AECSUs included such supplies by way of Initial Provisioning, even though they are initially to be held just as

inventory). On Goodrich's construction, however, those words create a standalone third element, with the result that the "tail-end" of the clause massively expands its scope.

99. The RR Entities' construction also derives support from other terms of the ASA and the ECSURS:

i) The ASA contains numerous provisions which address Rework, and the supply of Spare Parts, but not the alleged residual third category of Aftermarket Services:

a) Clauses 2.10 to 2.16 deal with approvals (and loss of approvals) for Goodrich facilities offering Rework and the supply of Spare Parts, but no other Aftermarket Services.

b) Clause 2.17 deals with the position where the Exclusivity Obligation lapses due to the absence of such approval under clause 2.15 (Rework) and clause 2.16 (supply of Spare Parts), but the relevant approval is regained or the supply of Rework or Spare Parts can be done from an alternative facility, providing that, in these circumstances, the Exclusivity Obligation will apply once again. There is no provision for other Aftermarket Services. This strongly suggests that the activities of Rework and supply of Spare Parts exhaust the entire scope of the Exclusivity Obligation.

c) Clause 18.1 by which Goodrich gives warranties for Rework and the supply of Spare Parts, but nothing else (with clause 18.14, also addressing warranties, proceeding on the same basis).

ii) Clause 4.5 of the ECSURS addresses orders for Rework and clause 4.9 orders for Spares, but makes no provisions for a third category of Aftermarket Services.

100. Finally, the RR Entities' construction is more consistent with the definition of Aftermarket Services in the PCOA, entered into as part of the same suite of agreements, which refers to:

> "the provision of services comprising the maintenance, repair and overhaul of units, equipment and parts assembled, manufactured, supported or procured by JVC and the sale and supply of spare parts and initial provisioning …."

101. This definition:

i) picks up key language used in the definition of Rework in the ASA and ESCURS (overhaul and repair);

ii) uses the compendious phrase "sale and supply of spare parts and initial provisioning", running these concepts together; but

iii) envisages no other Aftermarket Services.

102. Goodrich's arguments the other way largely assume what they seek to prove, in so far as they rely on the use of the term Aftermarket Services. As to the remaining points:

i) Goodrich contends that the words "in relation to Applicable Engine Control System Units" are redundant on the RR Entities' construction. However, the words avoid any argument

that the provision of Spare Parts is limited to those which are fitted onto an AECSU, and in any event, redundancy arguments can only bear so much weight, as Goodrich accepts (Lewison, *The Interpretation of Contracts* (7th), chapter 7, section 3).

ii) Goodrich relies on clause 46.12. This appears in section 2 of the ECSURS ("Generic Rework Services $/EFH"), in clause 46 ("Customer Information") and is one of a number of provisions dealing with aircraft on ground (**AOG**) situations. The precise purpose of the clause is obscure, but it appears to permit the RR Entities or the Customer to source an AECSU from another supplier (e.g., on the second-hand market), with the RR Entities compensating Goodrich for any costs it incurs as a result or handing over any revenue obtained by the RR Entities which they would not otherwise have received. This construction is supported by the fact that the clause applies where there is "unavailability of AECSUs". I am not persuaded that the purpose of this provision is to allow what would otherwise be forbidden – the RR Entities supplying an AECSU sourced from Goodrich to the Customer – both because of the matters at [91]-[101] above, and because the clause also applies where the customer sources the unit.

iii) Goodrich refers to clause 2.2 of Schedule 24 to the ECSURS which provides "the parties agree that Goodrich shall be the exclusive source of Spares" save in certain circumstances. However, Goodrich *is* the exclusive source of Spares provided under the PAS.

iv) Finally, Goodrich refers to Schedule 25 of the ECSURS, which provides for "Consignment Stores", being "a strategically placed stock of [AECSUs] of the appropriate size to support Operators of future R-R Engine Programmes" which are to be used "for urgent operational requirements and not for general use to support either the Rework Service or Exchange Service as applicable". The RR Entities were entitled to acquire AECSUs for the Consignment Stores at IPC. These provisions were introduced by way of a subsequent amendment to the ESCURS, but I shall assume in Goodrich's favour (but with considerable doubt) that it is admissible for the purposes of interpreting original terms of the ECSURS (cf. the discussion in Lewison, *The Interpretation of Contracts* (7th), [3.11]). However, the new Schedule 25 addresses a self-contained issue ("Consignment Stores"), concerning AECSUs which could only be used for that purpose (clause 1.1) and which were to be supplied at IPC (clause 1.2), with any revenue obtained by the RR Entities from the operation of the Consignment Stores being paid to UTAS (i.e., Goodrich). Schedule 25 was introduced as part of a package of amendments by Amendment Agreement No 6 of 2 June 2015. The circumstance and terms of Schedule 25 are sufficiently self-contained and singular that, even ignoring the chronological difficulty, they shed no light on the construction of the ASA and ECSURS.

C5 If the PAS does constitute the provision of Aftermarket Services, is it permitted by the ASA and ECSURS?

103. If the PAS (or at least those aspects of it relating to AECSUs) falls within the definition of Aftermarket Services, then the RR Entities contend that it is nonetheless permitted by clauses 11.10(c) and/or (d) of the ECSURS, the terms of which have been quoted at [76] above. The RR Entities say that this is the case because those supplies constituted Initial Provisioning. This argument is also crucial to the issue of what price was payable for those supplies under the

ESCURS, and whether they attracted the pricing terms applicable to Initial Provisioning in clauses 11.10(c) and/or (d).

The meaning of the term Initial Provisioning

104. The contractual definition of Initial Provisioning is "Spares ordered by R-R or Operators in support of the operation of a particular Operator's fleet". The RR Entities' primary argument is that it is enough that Spares are ordered which will "in certain circumstances" be transferred to an Operator as part of an EFH deal, such that all AECSUs acquired for the PAS constitute Initial Provisioning.

An alleged market understanding

105. Both sides sought to support their interpretations of the concept of Initial Provisioning by reference to the evidence as to a particular witness's understanding of the term – Mr Loret of the RR Entities and Mr Smith (a Business Development Director of Goodrich Control Systems) of Goodrich:

i) Mr Smith gave evidence that "Initial Provisioning is a collection of Spare Units that an operator should own or have access to in support of that particular operator's fleet, first acquired at the time the operator's fleet first enters into service (or shortly prior to that time) and ordinarily held at the operator's premises 'line-side', such that they have immediate access to those Spare Units to maintain the operation of their fleet (without having to pass through customs). That is the generally accepted meaning of Initial Provisioning within the aviation industry".

ii) In cross-examination, Mr Smith was asked "when you say that's the generally accepted meaning within the industry, do you mean your precise wording or just the general concept of spare parts to which an operator has access to maintain the operation of their fleet?" to which he answered, "It's the general concept of initial provisioning." That answer, if read as the RR Entities seek to read it, is scarcely supportive of an industry understanding as to the scope of the concept of initial provisioning (although in my view Mr Smith was saying that it was the concept as described in his statement, rather than his precise wording, which was the industry understanding).

iii) The RR Entities rely upon the following answers given by Mr Smith as evidence of a generally accepted meaning:

> "Q. And you accept as well, don't you, that there are examples in the industry of pools of spare parts being offered by entities other than Rolls-Royce?
>
> A. Yes, yes, that's correct.
>
> Q. And we know, for example, that Lufthansa Technik have for a long time been offering a component pooling service to their customers. Are you aware of that?
>
> A. Yes, that's right.

> Q. So, their customers can access spare parts that way rather than buying them outright; yes?
>
> A. Yes, that's correct. Some of the pooling requires the operator to also hold the units. Lufthansa being an example of that, where Lufthansa Technik require the operator to also hold line side, but they support it with their own pool of units.
>
> Q. And you would accept that that arrangement would meet the definition of initial provisioning that you've set out in your witness statement?
>
> A. Yes, yes, it would."

iv) If the last part of that answer was intended to refer to the pooled units, as well as those held "line side", it would not be at all consistent with the definition put forward in Mr Smith's witness statement, and I do not think Mr Smith could have thought it was. The answer makes more sense if the answer is referring to the units the operator is required to hold, which is how I understood it at the time.

v) Mr Loret did not claim to have direct knowledge of an industry meaning of the term, but gave evidence of his own understanding "based on discussions I have had over the years both with customers and [unidentified] Rolls-Royce colleagues who sold aftermarket services to customers", which understanding he said he believed "was shared within Rolls-Royce and by customers". His understanding was that Initial Provisioning was "spare units and parts which are removable on-wing and which a customer can use in order to replace any units or parts on their engines that need to be repaired or removed for maintenance".

106. This material provides an unpromising basis for the suggestion that the term has a settled industry meaning, and I was not taken to any material other than the witness evidence in support of the suggestion that it did. I did not find the evidence of either Mr Loret or Mr Smith helpful when interpreting a defined term in a complex suite of legal agreements, and in answering the question of whether the PAS which RR Holdings introduced in 2016/2017 fell within the particular arrangements made for Initial Provisioning in the ASA and ECSURS in December 2008. In any event, the material relied upon by the RR Entities does not come close to establishing a generally understood meaning of the term initial provisioning to the effect contended for.

107. Further, documents internal to the RR Entities are not consistent with the alleged market understanding. While there are a few which refer to the pooled assets in the PAS as a form of initial provisioning, there are many more documents which contrast the PAS and initial provisioning:

i) A February 2016 presentation uses the expression initial provisioning to refer to "parts stored at airline main base for line maintenance activities", noting "parts typically purchased by airline" and "parts managed by airline (logistics and re-ordering/repairing)" and contrasts "Initial Sale (Initial Provisioning)" and "Initial Provisioning Leasing" with "Parts Availability Pooling".

ii) A 23 June 2016 document referred to the PAS as an alternative to the purchase of initial provisioning.

iii) An internal Rolls-Royce document of 3 October 2016 referred to initial provisioning as "the sale of line replaceable components" and described PAS an alternative to "needing to purchase initial provisioning".

iv) The December 2016 Services Policy Document provided that the PAS "provides customers with an alternative to purchasing spare LRU and LRP parts (as Initial Provisioning for new engine types entering customer's fleet and on-going spares increases during operation of the engine type)" and refers to "the Parts Availability Service provid[ing] access to shared pools of parts instead of needing to purchase initial provisioning".

108. Indeed, one of the documents I was taken to by the RR Entities which was said to be consistent with the alleged industry understanding (an email string of November 2016) referred to the fact that the PAS was being set-up, that "the plan is for R-R to build up various pools of parts to serve as Initial Provisioning" but presciently observed that:

> "Their business case assumed that they can get these parts at OE [original equipment] price – as some of you would notice straight away, this can cause issues because … depends on how the contract is worded, if RR is to use these parts for building our own pool, it may not fall into the strict definition of IP, supplier may use it to argue a different (higher) pricing should apply".

109. The RR Entities' response that "subjective understandings expressed [in] documents post-dating the contracts in issue are neither relevant or admissible" does not sit happily with its "industry understanding" case.

110. Further, the internal documents suggest that, at least as used within the Rolls-Royce Group, the concept of Initial Provisioning refers to Spare Parts acquisitions by customers at or around the time of entry into service (**EIS**) of an engine. That explains the term "initial" and is consistent with other material before me:

i) There were contemporary statements within the RR Entities that Initial Provisioning recommendations involved "a level of spares to support a new fleet from EIS ~6-12 months" (The "Parts Availability Storyboard" of 10 February 2016).

ii) As I noted at [107(iv)] above, the December 2016 Services Policy Document distinguished between "Initial Provisioning for new engine types entering customer's fleet and on-going spares increases during operation of the engine type".

iii) An email exchange within the Rolls-Royce Group which took place from late 2019 to August 2020 refers to a standardised proforma for customer Initial Provisioning spare requirements which had been "in existence for some time now". It is apparent from those exchanges that the Material Management Services (**MMS**) team "per the IP process … keep it open for a maximum of 6 months post EIS to avoid any trailing orders" and that "any forecasts after this point are considered replenishment orders …" (the clear

assumption being the orders for initial provisioning will have come during the 6-month period, with replenishment orders being something different).

iv) One email continued (emphasis in original):

> "MMS team is only responsible for the initial provisioning SORB forecast. This means the initial a/c [aircraft] phasing of the operator in the first 6 months post EIS. Any IP top ups post EIS is considered to be replenishment orders …."

v) A Rolls-Royce email of 23 November 2020 refers to the RR Entities having historically used the Skyline system to estimate the amount of Initial Provisioning "so that we would have parts in stock when the customer will be placing orders as part of their preparation to EIS".

111. Mr Loret's evidence was, in the main, to similar effect. He referred to the concept of initial provisioning when discussing the customer's decision to purchase aftermarket services from the RR Entities, which are offered by the RR Entities "as part of its sale of new aircraft engines", and he explained that the RR Entities calculate the amount of initial provisioning which the operator is recommended to carry "prior to entry into service of the fleet". By way of a limited exception which acknowledges the general rule, he noted in footnote 16 that "customers may also be provided with an initial provisioning recommendation by Rolls-Royce, and customers may acquire further initial provisioning *if they increase the number of engines within their fleet"* (emphasis added), but he did not suggest that further spares acquired for the same engine over the life of the engine constituted initial provisioning. That also accords with that part of Mr Smith's evidence, not the subject of cross-examination, which stated that initial provisioning is "first acquired at the time the operator's fleet enters into service (or shortly prior to that time)". It is also consistent with the definition of "Initial Provisioning" used in a different (and prior) agreement between the parties, the Product Support Package Agreement of October 2004, which defines "Initial Provisioning" as "the initial quantity of spare units that an Operator … requires in support of its fleet of engines".

112. Consistent with that evidence as to timing, it is clear that there is a commercial link between the sale of aircraft engines or particular aftermarket service offerings by the RR Entities (and in particular LRU Management Services) and the sale of initial provisioning:

i) That was the effect of Mr Loret's evidence, as set out at [111] above. In cross-examination, he confirmed that:

> "[T]he IP credits are bundled into the TotalCare when the engine is selected, so that includes the TotalCare baseline, the purchase of engine and all the other options, so the sales director just present a deal which is suitable to the customer and can use IP credit if it's something the customer really wants as long as the total return of the TotalCare is within the approved level".

ii) The "Parts Availability Generic Business Case" of 3 October 2016 stated "on almost every [sales] campaign we are being challenged to provide a service which removes the need for buying IP … Without credits customers will buy LRUs direct from OEM" (original equipment manufacturer).

iii) A later presentation quoted a customer as stating, "large operators can negotiate large discounts *at time of engine buy*, are not capital constrained and can achieve scale on their own" (emphasis added).

The definition in the ECSURS

113. Against that background, I turn to the definition in the ESCURS:

i) The definition focuses on the reason why the Spares are *ordered*: Spares must be *ordered* in support of *a particular* Operator's fleet (emphasis added). As a matter of language, orders made to stock a pool from which one of a number of operators might, in due course, access them, are not "ordered in support of a particular Operator's fleet", but for a pool. The word "particular" clearly requires a direct link between the order and a particular Operator.

ii) The RR Entities seek to answer this point by pointing to the fact that in the Master Definitions and hence (as I accept) in the ECSURS itself, the singular includes the plural and the plural the singular (clause (b) of Schedule (b) to the Master Definitions Agreement). However, that merely has the effect that the definition extends to "Spares ordered by [the RR Entities] for Operators in support of the operation[s] of particular Operator*s'* fleet*s*": i.e. a series of individual Initial Provisionings for a series of Operators. That is no doubt the meaning which the expression bears in clause 11.10(c), when applying the 25% threshold to the total suppliers of relevant AECSUs made to particular operators (see [168] below).

iii) The logic of the RR Entities' "particular Operators" argument would be that the RR Entities could supply a parts pooling service for all its customers (assuming they all signed up to it), with the result that all supplies would constitute Spares orders in support of particular Operators' fleets (as Mr Toledano KC accepted). That appears to be the very state-of-affairs which the word "particular" was intended to preclude.

iv) Clause 8.1 obliges Goodrich to "provide a world class Initial Provisioning …. service". It is not, I think, seriously arguable that this obliged Goodrich to operate a pooled service for the supply of AECSUs with AECSUs held in various "holding tanks". However, if the concept of Initial Provisioning does not bear this extended meaning in clause 8.1, it is difficult to see why it has a broader meaning in clause 11.10.

114. Further, there are a number of places in the ASA and ECSURS which suggest that the term Initial Provisioning in the relevant transaction documentation contemplates something which *has been* or *is being* supplied to a particular Operator:

i) The Exchange Service is a service whereby "the stock of Initial Provisioning used by a Customer shall be replenished by [Goodrich]".

ii) Clause 8.5 of the ASA refers to a Customer who "purchases Initial Provisioning".

iii) Clause 8.7 refers to an Operator who has "provisioned Initial Provisioning in such quantities as are agreed between [the RR Entities] and [Goodrich]" and clause 8.9(a) provides that it is a condition of certain Aftermarket Services to be provided by Goodrich

that "the Operator has provisioned the relevant [AECSU] in accordance with the agreed Initial Provisioning recommendation agreed between [Goodrich] and [the RR Entities]".

iv) Clause 8.7 imposes an obligation on Goodrich to maintain adequate inventory stocks for Spares, and to ship them within specified time limits, where "a civil Operator, having provisioned Initial Provisioning in such quantities as are agreed between [the RR Entities] and [Goodrich] has a requirement for Spares". It is difficult to see how this provision can apply if and to the extent that Initial Provisioning embraces AECSUs ordered by the RR Entities to be held in a pool, rather than to meet the particular operator's requirement for Spares.

v) Clause 11.10(e) refers to R-R Engine Programmes not supported on an EFH basis, and provides "the Customer may acquire Initial Provisioning". Significantly, the ECSURS contemplates that the amount of Initial Provisioning will be agreed with a particular Operator. Thus clause 11.10(a) provides "the quantities of Initial Provisioning and the appropriate support arrangements relating to such Initial Provisioning shall be agreed on *a case-by-case basis* between [Goodrich], [the RR Entities] and *a Customer*".

vi) Clause 46.1(d) of the ECSURS requires the RR Entities to inform Goodrich of "Initial Provisioning requirements for [AECSUs] *for such Customer*" and clause 51.1(h), addressing the Exchange Service, also contemplates Initial Provisioning being determined for a particular Customer.

vii) Clause 50.2 requires the RR Entities "to hold or procure that a Customer holds a level of Initial Provisioning as agreed between [the RR Entities] and [Goodrich]".

115. On RR Holdings' construction, almost any Spare Parts supply will meet the definition of Initial Provisioning, because it will almost always be the case that it will be "transfer[red] in certain circumstances" to a particular Operator. However:

i) Clauses 9.2 and 11.10 contemplate that not all Spare Parts supplies will constitute Initial Provisioning.

ii) As I noted at [85] above, there does not appear to be any legal restriction on the use which the RR Entities may make of AECSUs in MSCs.

116. In response, the RR Entities point to clauses 8.5 of the ASA and 50.2 of the ECSURS.

117. Clause 8.5 of the ASA provides:

> "On any R-R Engine Programme, if at the time when a Customer purchases Initial Provisioning any such Customer is granted the right to sell back surplus Initial Provisioning to either [the RR Entities] or [Goodrich], then the Party which granted such right shall purchase back such surplus Initial Provisioning …"

118. I am unable to see how this provision assists in the interpretation of the term Initial Provisioning, save that it is (yet) another provision recognising that Initial Provisioning "belongs" to a particular customer, who may (or may not) have been granted a contractual right to "put" surplus Initial Provisioning only back to its supplier, who may then re-sell it (by way of Initial

Provisioning to someone else, or otherwise). Assuming in the RR Entities' favour that AECSUs ordered to support a particular Operator's fleet remain "Initial Provisioning" if re-supplied to another "particular Operator" for the purposes of supporting its fleet, that does not answer the question of whether AECSUs which are not ordered for that purpose can nonetheless constitute Initial Provisioning.

119. Clause 50.2 of the ESCURS provides:

> "[The RR Entities] shall hold, or shall procure that a Customer holds, a level of Initial Provisioning as agreed between [the RR Entities] and [Goodrich]. [Goodrich] shall ensure that such Initial Provisioning Stock shall be replenished through an Exchange Service operated by [Goodrich]".

120. I accept that clause 50.2 contemplates that Initial Provisioning might be held by the RR Entities, or the Customer, and I can see nothing in the definition of Initial Provisioning, or the concept of initial provisioning, which would be inconsistent with that state of affairs. However, that does not remove the requirement that Initial Provisioning has been ordered in support of a particular Operator's fleet. Indeed, the definition of Exchange Service is "the service outlined in Section 3 of the ECSURS pursuant to which the stock of Initial Provisioning *used by any Customer* shall be replenished by [Goodrich] in accordance with the Programme Service Level". These terms contemplate Goodrich replenishing a particular Operator's Initial Provisioning following the Operator's use of such Initial Provisioning.

121. I would also note that clause 50.2 (the only place in the ASA and ECSURS where language of this kind appears) would be an unlikely place to find a provision which had a significant impact on the scope of the concept of Initial Provisioning. It appears in Section 3 of the ECSURS which only applies "where R-R issues an instruction to [Goodrich] requiring Exchange Services".

122. Further, clause 50.2 only applies to an Exchange Service operated by Goodrich, and would not apply to the PAS for that reason:

i) As I have stated, Section 3 of the ECSURS only applies "where R-R issues an Instruction to [Goodrich] requiring Exchange Services", and clause 50.1 provides "[Goodrich] shall supply an Exchange Service only if specified in a Schedule to this Agreement". Clause 50.3 refers to "the Exchange Engine Control Service to be provided by [Goodrich] pursuant to clause 50.1".

ii) The remainder of Section 3 is clearly addressing the Exchange Service which Goodrich has been instructed to and is obliged to supply.

123. As to the suggestion that AECSUs exchanged under the PAS involve an Exchange Service operated by Goodrich:

i) The supply of units by Goodrich in issue in this part of the case (viz units supplied to the MSCs) did not replenish Initial Provisioning used by a Customer, nor "a level of Initial Provisioning as agreed between [the RR Entities] and [Goodrich]" for that customer.

ii) Clause 52.1 contemplates the RR Entities informing Goodrich that it has removed an unserviceable AECSU (which must mean removed it from the Customer's aircraft). It is

that unit which is to be replaced by the Exchange AECSU provided by Goodrich: clauses 50.4 and 52.2.

iii) Under the PAS, the unserviceable AECSU removed from the customer is replaced by the RR Entities from a "1203" location, which is in turn replaced by an AECSU from an MSC (assuming the RR Entities do not form the view that there are sufficient AECSUs in the 1203 location already), with the RR Entities exchanging the unserviceable AECSU with Goodrich in return for an Exchange Unit, which could go into the MSC, or be put to some other use, but will not (or need not) be dedicated to the particular Operator whose unserviceable AECSU was removed.

124. Goodrich also argues that clause 50.2 can have no application because there has been no agreement between the RR Entities and Goodrich as to the level of Initial Provisioning which each PAS customer should hold. As to this:

i) There is an element of artificiality in dealing with this issue. The RR Entities never approached the PAS on the basis that it constituted an Exchange Service for the purposes of Section 3 of the ECSURS, and in my analysis, they were right not to do so. For example, the RR Entities did not notify or instruct Goodrich to supply an Exchange Service to PAS Customers (as required by the introductory words of Section 3) nor comply with clause 51.1 to provide the relevant details of the particular PAS Customer in that context.

ii) The purpose of clause 50.2 is to limit the scope of Goodrich's exchange obligations, and consequently the level of stock it had to carry under clause 51.2. In the absence of agreement between the RR Entities and Goodrich (which might be because none was sought, or because agreement could not be reached), Goodrich's obligations would be assessed by reference to a reasonable level of Initial Provisioning for the relevant Customer. I am not persuaded that the absence of such agreement would of itself preclude the operation of Section 3 (not least because Section 3 is clearly intended to impose an obligation on Goodrich, and it would not be a commercially sensible construction if Goodrich could avoid that obligation by refusing to agree a level of Initial Provisioning for a particular Customer).

iii) Equally, if Goodrich proceeded to operate the Exchange Service in circumstances in which there had been no agreement as to the level of Initial Provisioning which any particular customer was required to hold (or have held), I do not think the absence of such agreement would preclude the operation of Section 3, including the particular charging regime which applied to this service.

125. Finally, the RR Entities argue that:

> "It is impossible to see why the parties would have intended that, for example: (i) Spares ordered separately by British Airways and Iberia in support of the operation of their respective fleets would count as [Initial Provisioning]; but (ii) those same Spares ordered on a consolidated basis by International Airlines Group (which owns both airlines) to support their fleets would not …."

126. It is not clear to me whether this is an issue which actually arises. If it does, it is not a reason to interpret the term Initial Provisioning so that it extends to AECSUs acquired by the RR Entities for a pool from which they could be supplied to a number of competing airlines, but a reason to interpret the term Initial Provisioning so that it is satisfied when an order is placed by one economic unit which operates more than one airline for Initial Provisioning for both airlines. In that regard, I note that the definition of Operators is "any *organisation* or person operating an aircraft powered by a R-R Engines", which might well be thought susceptible to an interpretation which accommodated the RR Entities IAG example. However, it is not necessary finally to resolve that question, because it does not assist in answering the issue which does arise in this case.

127. In these circumstances, it is not strictly necessary to consider whether the temporal limitation which I have found the concept of Initial Provisioning would ordinarily have (see [110]-[112]) applies under the ESCURS, an issue of construction on which both parties have forceful points to make. The definition does not include a temporal requirement, but the word "initial" in the defined term would suggest it is there, otherwise it would be a strange term to use. That interpretation derives some support from the following:

i) Clause 7.1 of the ECSURS requires Goodrich to supply the RR Entities with an EIS plan (a plan prepared "at least 12 months before the EIS of a R-R Engine or the EIS of an [AECSU] supplied to an individual Customer that identifies appropriate product and support deliverables". That plan is to identify "logistics – AOG, Initial Provisioning and repair inventory". This reinforces both the link between Initial Provisioning and an "individual Customer" but also the temporal link with EIS and the temporal distinction between Initial Provisioning and other inventory.

ii) Clause 46.1 also envisages that the introduction of a customer will require the RR Entities to provide information about that customer, including "aircraft delivery schedules" and "Initial Provisioning requirements".

iii) Clause 50.2, and the definition of Exchange Services, contemplate stocks of Initial Provisioning being "replenished". I do not accept the use of the word "replenish" entails that the further stocks so supplied constitute Initial Provisioning – rather they are in the nature of subsequent provisioning when the Initial Provisioning has been "used by any customer".

iv) There are provisions of the ASA and ECSURS which contemplate that not all spare part provisioning constitutes Initial Provisioning. The definition of Aftermarket Services itself contemplates that there will be supplies of Spare Parts which do not constitute Initial Provisioning; clause 8.1 of the ASA requires Goodrich to offer both "Initial Provisioning and Spares Support"; the definition of stock used in both agreements is "any or all of the [AECSUs] used as Initial Provisioning or as Spare Parts", clause 11.1 of the ECSURS refers to "R-R's requirements for Spare Parts for [AECSUs] and Initial Provisioning", and the pricing provisions of clauses 9.2 and 11.10 also support such a distinction. The temporal distinction I have referred to best explains these provisions.

v) The RR Entities' response to this point in closing was to refer to supplies for Consignment Stores which they said was an example of Spare Parts supply which was not by way of Initial Provisioning. However, this was only added to the ECSURS by later amendment

(raising against the RR Entities the point they take in response to Goodrich's reliance on that Schedule in support of their Exclusivity case: [102]).

vi) Further, it might be thought that the fact that an amendment was needed to operate this rather limited pooling service reflects the fact that it do not constitute Initial Provisioning. Further, while the RR Entities' case is that deliveries to Consignment Stores does not constitute Initial Provisioning, this is not consistent with its approach to the PAS. The Consignment Stores schedule to the ECSURS was time-limited, initially intended to address a particular engineering issue only; placed an express contractual limitation on the use to which the units could be put; was confined to operators who had subscribed to the RR Entities' LRU offering and permitted the RR Entities to acquire AECSUs at IPC for that limited period and limited purpose, on terms whereby the revenue derived by the RR Entities from operating the service were to be paid to Goodrich. The RR Entities appeared to suggest that access to AECSUs in Consignment Stores was not limited to "particular Operators", but there appear to have been conditions on accessing those AECSUs, which was initially confined to users of the Trent 1000 engine in relation to which the engineering issue had arisen. For what it is worth, the exchanges in which it was agreed distinguished between Initial Provisioning and "'normal' aftermarket support", and the entire tone was that the RR Entities were seeking a contractual indulgence rather than exercising a contractual right.

128. In the final analysis, I have concluded that the concept of Initial Provisioning as used in the ECSURS shares the same temporal limitation seen in uses of the term "initial provisioning" by the RR Entities in their documents, and which the evidence of both Mr Smith and Mr Loret seemed to acknowledge.

AECSUs supplied to an OSS

129. The RR Entities' alternative argument is that AECSUs ordered for supply to the Operator's OSS under the PAS constitutes Initial Provisioning. I accept that AECSUs ordered for the purpose of establishing a specific Operator's initial OSS under the PAS have the requisite link with a particular Operator so as to constitute "Spares ordered by R-R or Operators in support of the operation of a particular Operator's fleet". Functionally, the OSS held by Operators who subscribe to the PAS serves the same purpose as Initial Provisioning ordered by Operators who do not, save that (presumably) the effect of the PAS is that PAS-subscribing Operators will be able to hold less stock, *ceteris paribus*, than a non-subscriber.

130. Goodrich has advanced a number of objections to this argument:

i) First, it suggests that the PAS was designed "so that all [AECSUs] go first into one of the MSCs and only then are they transferred to an OSS". However, this was not the position on the facts, and in any event, whatever the route they followed, the PAS envisaged a supply of units being made by reference to the specific position of one operator, following discussion and agreement with the operator as to the quantity of AECSUs which were to go into its OSS, to be held by that operator for its exclusive use, and, as implemented, with legal title passing to that operator.

ii) Second, it is suggested that the operator's legal title to AECSUs in the OSS was not matched by economic control. However, leased Initial Provisioning would not involve the

transfer of legal title to the Operator, yet I did not understand Goodrich to contend that it would not constitute Initial Provisioning as a result. In any event, there is nothing in the definition of Initial Provisioning (nor, to the extent it matters, the pre-ESCSURS use of the term "initial provisioning") which requires economic control for accounting purposes to pass to the operator.

iii) Third, it is suggested that AECSUs ordered for the purpose of filling the OSSs may subsequently be put to other uses, including being returned to an MSC, either because it has been removed from the wing and sent back for repair or because the customer exits the PAS. However, that is equally true of any AECSUs supplied by way of Initial Provisioning (both in the repair scenario, or where it is sold back to the RR Entities as surplus inventory). The definition of Initial Provisioning used in the ECSURS looks at the purpose for which the AECSU is *ordered*.

iv) Finally, I note that Goodrich's submissions seek to achieve a position in which there are no supplies of Initial Provisioning to PAS customers, even though, in the form of OSS, there is something which is functionally and commercially very similar to Initial Provisioning. That is not an attractive argument.

131. What, however, of the position when an AECSU sourced to form part of a pool is then used to "backfill" a PAS Operator's OSS? I do not see how such an AECSU, which the RR Entities will have acquired from Goodrich at some anterior point in time when its eventual use would not be known or fixed, can subsequently become Initial Provisioning because the RR Entities later supply it to an Operator. Such AECSUs were not "ordered … in support of the operations of a particular Operator's Fleet" and do not satisfy the requirement for Initial Provisioning at the point of acquisition from Goodrich, which is what clause 11.10(c) addresses.

132. On the evidence, I am satisfied that the 116 AECSUs which were supplied directly to the OSSs constitute Initial Provisioning. It seems to me more likely than not that the other 12 AECSUs were ordered for general pooling usage, and only subsequently shipped from an MSC to an OSS.

AECSUs supplied to the Hong Kong MSC

133. Finally, a separate issue arises as to AECSUs acquired for the Hong Kong MSC, on the basis that, at least initially, the only PAS subscriber supported from that MSC was Cathay Pacific. The RR Entities argue that all AECSUs acquired for the Hong Kong MSC constitute Initial Provisioning. As to this:

i) I am not persuaded that the fact that the facility was managed by Airbus, pursuant to contractual arrangements with the RR Entities, is relevant to this particular issue (as Goodrich suggested). It was common ground that Initial Provisioning need not be held at the customer's premises, but could be held at a facility managed by the RR Entities (or, I would add, on its behalf).

ii) While Cathay Pacific was the only operator signed up to the PAS who could be supplied from the Hong Kong MSC, it was the RR Entities' aspiration that other operators would be signed up to the PAS who could also be supported from the Hong Kong MSC. A 2015 document refers to a plan that 50% of Airbus 350 customers would be serviced from that base.

iii) The key issue is whether the AECSUs ordered for the Hong Kong MSC were only ordered for the purpose of supporting Cathay Pacific. There is no clear evidence on that issue. The evidence of Mr Loret was that the RR Entities were required to pay an activation fee to Airbus for accessing the Hong Kong MSC, which gave them an incentive to use other regional MSCs where possible. That evidence is supported by the fact that the Hong Kong MSC was not identified as an MSC in a pitch to Hong Kong Airlines nor in a brief for Delta Air Lines. However, that does not explain the purpose for which those AECSUs were ordered, and whether they included AECSUs ordered in anticipation of further operators subscribing to the PAS.

iv) Further, in contrast to the OSS, the level of inventory held in the Hong Kong MSC was not in any sense agreed with Cathay Pacific, who appear to have held an agreed number of AECSUs by way of OSS (see the Cathay Pacific Parts Availability Proposal and the Term Sheet). It remained open to the RR Entities to use AECSUs in the Hong Kong MSC for other purposes (c.f. [85] above). Nor is there evidence to confirm that the temporal limit I have concluded forms part of the concept of Initial Provisioning was satisfied by AECSUs in the Hong Kong MSC.

v) For these reasons, I have concluded that the AECSUs ordered for the Hong Kong MSC rather than to meet Cathay Pacific's OSS requirement did not constitute Initial Provisioning.

D GOODRICH'S CLAIMS FOR BREACH OF THE EXCLUSIVITY OBLIGATION

134. On the conclusions I have reached, the damages claim does not arise. However, having heard evidence and argument on these issues, and because in certain respects these issues are relevant to the quantification of the debt claim, I have set out my findings on most of the issues raised.

D1 The general approach

135. Goodrich understandably relied on a number of authorities which have stressed that, when the court is satisfied that a significant loss has been suffered, it must do its best on the material available to assess that loss. In particular:

i) It has been observed that, in some circumstances, the assessment of damages will require "the exercise of a sound imagination and the practice of the broad axe" (*One-Step (Support) Ltd v Morris-Garner* [2019] AC 649, [37]).

ii) Where the court is required to assess loss on the basis that events would have followed a different course but for the breach (i.e., a counterfactual basis), it has been noted that "the law does not require a claimant to do the impossible, nor does it apply the balance of probability test to the measurement of the loss". Rather in quantifying a loss which has been found to have occurred on the balance of probabilities, the court makes "the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account" (*Parabola Investments Ltd v Browallia Cal Ltd* [2011] Q B 477, [22]-[23]).

iii) The court can resolve uncertainties by applying reasonable assumptions, erring "if anything on the side of the generosity to the claimant where it is the defendant's

wrongdoing which has created those uncertainties": *Yam Sang Pte Ltd v International Trade Corp Ltd* [2013] 1 Lloyd's Rep 526, [189].

136. It is also right to record the limits to the appeals of that kind, and their limited role when evidence as to the relevant matters is available or could have been produced (*Marathon Asset Management Ltd v Seddon* [2017] 2 CLC 182, [165]).

137. Goodrich also asked the court to grant it the benefit of any uncertainty as to the factual position on the basis that the RR Entities must have access to relevant evidence but have failed to disclose it. I am not persuaded that there has been any wrongful withholding of evidence by the RR Entities in this case, and the suggestions to that effect in Goodrich's written closing was (rightly) not pressed orally. Model B disclosure was adopted by the RR Entities for quantum issues. Some 1.82 million documents were collected, 32,000 reviewed by Slaughter and May and 16,000 disclosed. In circumstances in which Practice Direction 57AD was introduced to streamline the disclosure process, and disclosure is now frequently conducted by reference to proportionate searches, often limited to particular custodians and which seek to locate documents which contain particular words, there will not be a complete documentary record at the trial. Where the course of proceedings suggest that documents of particular significance may not have been picked up, an application for supplemental disclosure can be brought, and, in some cases, the court may even ask for a further search at trial, or further searches may be undertaken by consent. That last course was adopted here, and it led to further material emerging, as summarised in Slaughter and May's letter of 12 May 2023. That letter also convincingly answered the criticisms made of the RR Entities' disclosure exercise in Goodrich's written closing.

138. It is axiomatic that the benefits which Practice Direction 57AD is intended to bring will be largely neutralised if the absence, without more, of a document at trial which must once have existed is sufficient to justify an adverse inference. In this case, there is nothing to suggest that the RR Entities have not adopted an appropriate approach to record-keeping or complied with their obligations as litigating parties, and I am not willing to draw adverse inferences in relation to what other documents might have shown.

139. The ritual, respective, citations having been duly acknowledged, I turn to the principal legal issue on the quantum aspect of the case.

D2 The appropriate counterfactual

140. Goodrich's case alleges the following:

i) If the RR Entities had not breached the Exclusivity Provisions, they would not have operated the PAS at all (the so-called **no-PAS Counterfactual**).

ii) Alternatively, if the RR Entities had complied with the Exclusivity Provisions, they would have reached an agreement with Goodrich as to the terms on which AECSUs would have been supplied by Goodrich for the purposes of the PAS (the so-called **PAS Counterfactual**).

141. While Goodrich's Particulars of Claim plead the no-PAS Counterfactual as its primary case, at trial it was PAS Counterfactual which was in pole position. However, I am satisfied that the

appropriate counterfactual is the no-PAS Counterfactual. Goodrich suggests that the relevant scenario is "what would in fact have happened if the RR Entities had complied *with their contractual obligations and approached Goodrich under clause 4.2 of the ECSURS for a written quotation*".

142. As was made clear in *Morris-Garner v One Step (Support) Ltd* [2019] AC 649, [31]-[32], on the usual measure contractual damages "are intended to place the claimant in the same position as he would have been if the contract had been performed", and, at [76], that "damages are based on the difference between the outcome of performance and non-performance", and not the economic value of (or a substitute for) the right infringed. This is not necessarily the same position as if there had been no breach of contract. The position is put particularly clearly by Lord Reed at [91]:

> "Damages for breach of contract depend on considering the outcome if the contract had been performed, whereas an award based on a hypothetical release fee depends on considering the outcome if the contract had not been performed but had been replaced by a different contract".

While there are particular cases in which "the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset" ([91]-[92]), Mr Croall KC confirmed in his oral closing that Goodrich does not contend that this is one of them.

143. In *British Gas Trading Limited v Shell UK Limited* [2020] EWCA Civ 2349, the seller of gas was contractually obliged to maintain a certain level of delivery capacity, which it was in fact impossible to maintain. It argued that damages should be assessed on the basis that, in order to avoid being in breach of contract, it would have served variation notices reducing the quantity of gas it was obliged to deliver. Males LJ rejected that contention, noting at [77]:

> "Damages must therefore be assessed on the basis that the party in breach had performed its obligation. That is not, or at least is not necessarily, the same as saying that damages should be assessed as if the party in breach had taken steps to avoid being in breach of contract in the first place".

144. He continued:

> "78. It is therefore of critical importance to construe the contract in order to identify the obligation of which the defendant is in breach. In the present case the obligation in clause 6.4(1) was to maintain a Delivery Capacity of 130% of the TRDQ in circumstances where it was known that the TRDQ would change over the period of the Agreements and, in particular, that the Sellers had a right in some circumstances (but never a duty) to serve a Variation Notice to reduce the TRDQ after the expiry of the Minimum Plateau Period. On any given day it is a straightforward matter to ascertain what capacity the Sellers are obliged to maintain. All that is necessary is to ask what is the current TRDQ and to multiply that by 130%. To construe the contract in this way promotes certainty and clarity. In contrast, to construe the contract as requiring the Sellers to predict the maximum capacity they will be able to maintain in 2 ½ to 3 years' time, and to serve Variation Notices to adjust the TRDQ accordingly, is far from straightforward, as well as having the effect of converting a right into a duty.

> 79. In those circumstances the Sellers' obligation, in my judgment, was to maintain a Delivery Capacity of 130% of whatever the TRDQ was from time to time. They were under no obligation to serve a Variation Notice with a view to reducing the TRDQ in the event that they foresaw a future inability to comply with that obligation. Damages cannot be assessed as if they were under an obligation to serve such a notice: to do so would be contrary to the terms of the parties' contract. Nor can damages be assessed on the basis that the Sellers would in fact have served a Variation Notice when in fact they did not.
>
> 80. Accordingly, the relevant counterfactual for the purpose of assessing damages is that the Sellers would have maintained a Delivery Capacity of 108.43 TJ/day. This is in accordance with the fundamental principle that damages must be assessed on the basis that the party in breach had performed its obligation. On this basis, British Gas has suffered no loss. In contrast, British Gas seeks to assess damages on a different (and in my judgment wrong) principle, namely that the party in breach would have taken steps to avoid being in breach of contract in the first place."

145. In circumstances in which the breach of contract under consideration on the current hypothesis is undertaking activities in breach of a negative covenant not to do so (that being the essence of an exclusivity obligation), it is axiomatic that damages fall to be assessed by reference to the position as if that negative covenant had been performed, and the RR Entities had not undertaken those activities which breached Goodrich's exclusivity right. The suggestion that damages should be assessed by reference to the price which the RR Entities would have paid had agreement been sought for a limited variation to those obligations involves an error of principle, because "damages for breach of contract depend on considering the outcome if the contract had been performed" not "the outcome if the contract had not been performed but had been replaced by a different contract" (Lord Reed, [142]), or on the basis that "that the party in breach would have taken steps to avoid being in breach of contract in the first place" (per Males LJ, [144]).

146. Goodrich seek to distinguish these authorities by relying on clause 4.2 of the ECSURS, which permitted the RR Entities (but did not oblige them) to seek a price from Goodrich *for Goodrich* to provide an Aftermarket Service for which the ECSURS did not provide a price. It is not clear, on Goodrich's case, what Goodrich would have been asked or offered to do if such a request had been made – Goodrich's argument was not really run on the basis that a price would have been provided for Goodrich to perform the service which the RR Entities wanted to offer their customers, but on the basis that the RR Entities would have agreed to pay Goodrich a premium for permitting the RR Entities do something they were not contractually entitled to do. While Goodrich did put forward a proposed amendment that it would have maintained the pools itself, and it has sought to keep this alive in a footnote in its opening, that amendment was objected to, and not pursued, nor were any of the practicalities of such a suggestion explored at trial. I am therefore satisfied that the only case open to Goodrich before me is one in which the PAS proceeded as implemented, save with a higher price being paid to Goodrich in return for Goodrich not objecting. I am not persuaded that, so formulated, Goodrich's case involves a counterfactual in which clause 4.2 could have been invoked.

147. In any event, I do not accept that the RR Entities' option to ask for a price displaces the orthodox contractual principles I have summarised at [142]-[145] above. No doubt it might be said in any case in which a party undertakes an activity (or fails to so) in breach of contract that it could

have approached the claimant and agreed a variation to the contract to allow it to undertake the same or similar conduct, or which relieved it from its obligations, and that the claimant would have agreed to accept an adjustment to the contractual consideration as the price of not standing on its rights. That does not have the effect that damages for the breach are to be assessed on the basis of what release fee would have paid had such a negotiation been undertaken.

148. Goodrich advanced two further arguments in response to the suggestion that the PAS Counterfactual was inappropriate as a matter of principle.

149. First, it suggests that the ECSURS gave the RR Entities a discretion as to how to perform their obligation not to undertake activities falling within the scope of Goodrich's exclusivity right, and that in those circumstances the court must carry out a factual enquiry as to what the RR Entities would have done by way of performance (relying on *Durham Tees Valley Airport Ltd v bmibaby Ltd* [2011] 1 Lloyd's Rep 68, [95]-[96], it being said that this was a category four case for the purposes of Toulson LJ's categorisation). However, reaching an agreement with Goodrich which would relieve the RR Entities of the relevant contractual obligation to the extent necessary to undertake the PAS without breaching the ESCURS is, self-evidently, not a means of performing the RR Entities' (assumed) obligation not to undertake the PAS. Adapting Males LJ's observation in *British Gas Trading*, [81] to the negative covenant in this case, "this is not a category 4 case as described by Toulson LJ in *Durham Tees Valley Airport*. Rather, it is a single obligation case in which the defendants' obligation is simply [not] to do X".

150. Second, reliance is placed on the recent decision of the Court of Appeal in *Unicredit Bank AG v Euronav AV (The Sienna)* [2023] EWCA Civ 471. That was a claim in contract by the holder of a bill of lading for breach of the contract of carriage evidenced by the bill, the breach arising from the owner delivering the cargo without production of the bill of lading. The owner argued that the breach had not caused the claimant (a bank which held the bill of lading by way of security) any loss, because, if the owner had refused to discharge the cargo without production of the bill, the bank would have consented to its discharge. At first instance ([2022] EWHC 975 (Comm)), Moulder J found that the bank had permitted discharge without production of the bill of lading, and alternatively that it would have done so if it had been asked. It appears that the case was argued at first instance on the basis that the issues of causation and loss depended on what the bank would have done if the owner had refused to discharge the cargo without production of the bill ([60]). The bank's appeal on the quantum issue was premised on the factual assertion that, but for the breach, the cargo would have remained on the vessel, and the bank's security interest retained and "that was as far as the counterfactual enquiry needed to go" ([101(2))].

151. At [103], Popplewell LJ held as follows:

> "[The Judge] was correct to proceed on the basis that it was not sufficient to conclude, without more, that in the absence of breach the Cargo would initially have remained on board the Vessel. It was necessary to ask what would have happened next. The loss claimed by the Bank was that discharge without production of the Bill prevented the Bank from being able to enforce its security interest against the Cargo in Owners' hands so as to recoup the lending which Gulf did not repay. This can, in my view, properly give rise to a claim where, as is usual, the financing bank expects discharge without presentation of the bill against an LOI as part of the financing arrangements (c.f *Fimbank Plc v Discover*

> *Investment Corp (The Nika)* [2020] EWHC 254 (Comm) [2021] 1 Lloyd's Rep 109 at [34]). Nevertheless, to establish causation, it was for the Bank to show, on the balance of probabilities, that in the event of performance by Owners, it would have enforced its security against the Cargo so as to recoup its lending. Otherwise, the breach was not an effective cause of any loss: the failure to recoup the lending to Gulf would have occurred in any event, irrespective of the breach by Owners in delivering without Judgment Approved by the court for handing down. Double-click to enter the short title production of the Bill. The causation defence required an assessment of what would have happened to the Bank's security interest had Owners initially refused to discharge without production of the Bill. That was indeed the inquiry which both parties invited the Judge to undertake, and which she undertook."

152. At [108], he concluded:

> "As Mr Russell was inclined to accept, the obligation to deliver against a bill of lading is a contractual one which can be varied by express consent to the contrary. On the Judge's findings, had Owners initially complied with the obligation not to discharge without production of the Bill, what would have happened in practice is that they would have sought and obtained express consent to do so from both the holder and intended indorsee, who brings the present claim. In those circumstances delivery without production of the Bill would no longer have been a breach of the Bill contract. The initial breach would therefore have caused no loss."

153. The dispute in *Unicredit* has a number of interesting features. It arose in the context in which the breach of contract in question – delivery against a letter of indemnity rather than against a bill of lading – was the anticipated manner in which the contract would play out, both on the part of the original contracting parties who had provided for delivery without production of bills against an indemnity in their charterparty (the relevant contract) and on the part of the bank so far as the financing transaction was concerned. This reflected the difficulty of moving the bill through the sale and banking chain in time to meet the vessel's arrival, exacerbated in that case by the effects of the Covid 19 pandemic, and the adverse financial consequences which would follow if the ship had to await the bill's arrival at the discharge port. The effect of delivery against a letter of indemnity is that, in the usual course, the party entitled to enforce the contractual obligation to deliver only against the bill can look to the credit of the carrier, by a claim on the bill, who in turn will look to the credit of the party from whom it chose to accept the letter of indemnity in return for its agreement to deliver cargo otherwise than against the production of the bill. What, however, of the position where the party looking to enforce the contractual promise of the carrier only to deliver against the bill was party to the request that the carrier deliver without production of bills in the first place? Should they retain the right to look to the credit of the carrier, who would in turn be dependent on the credit of the party whose letter of indemnity they agreed to accept? Or should their conduct disable them in same way from setting up the breach they assented to and, on one analysis, were instrumental in bringing about? The answers to those questions are not obvious.

154. There is the further difficulty that answering that question posed by that scenario in what might be thought to be its more natural home – was there a breach at all? – is difficult if, as in *The Sienna*, (i) the bank has yet to become the holder of the bill at the time delivery is made without production of the bill, and therefore has no formal legal status to vary the carrier's obligations

under the contract, (ii) when there is a legal principle, at least when the alleged waiver takes place at a point when the bill of lading has the status of a mere receipt, that a prior waiver will not bind a subsequent holder of the bill (see [98]-[99] of *The Sienna*) and (iii) when, on the facts, the carrier was unaware of the dealings between shipper/seller, buyer and bank and so could not set up some species of estoppel ([39]).

155. It may also be important to note the manner in which the issues were pleaded and argued in that case. This was on the basis that, to establish loss, the bank had to show that it would have exercised its security in the goods ([39] and [103], and c.f. *McGregor on Damages* (21st), [32-025] and, in relation to claims in conversion at least, *The Jag Shakti* [1986] AC 337), and, on the bank's own case, it was necessary to show that but for the breach the owner would have contacted the bank who would not have permitted the ship-to-ship discharge of the cargo, something the bank described as "a necessary element" in its causation case ([104]).

156. Moving away from its specific commercial context, the decision might be said to raise the "clock-stopping" issue frequently encountered in private law damages assessments, and how far any counterfactual analysis should have regard to what would have happened subsequent to the date of breach in the "but for" world. English law offers different answers to that question in different contexts – e.g., the various debates about the "breach date" rule in contract, the debate in tort summarised in *McGregor on Damages* (21st), [8-007]-[8-013] and the consideration of when the "clock stops" in cases of an alleged breach of trust, commercial and otherwise. What *Unicredit* emphatically does not support is the use of a counterfactual to measure damages in which the obligation not performed would never have arisen for performance. Rather, it is a case in which, on the facts, if the obligation had been performed as it should have been, that would have led to a further event "downstream" of the point when the breach occurred. For that reason, it provides no assistance to Goodrich in this case.

D3 The Relevant Evidence

157. I heard factual evidence relating to this part of the case from:

i) Mr Gary Smith for Goodrich.

ii) Mr Benjamin Loret for the RR Entities.

158. I am satisfied that both witnesses were doing their best to assist the court, within the limits of their recollections, and the inherent difficulties in addressing counterfactual issues in a litigation context. I was grateful for Mr Kotrly's well-judged submissions on the criticisms made of Mr Loret's evidence.

159. I also heard expert evidence from:

i) Mr Andrew Flower of Alvarez & Marsal Disputes & Investigations LLP for Goodrich; and

ii) Mark Bezant of FTI Consulting for the RR Entities.

160. Both experts sought to assist the court, and to narrow the issues, and I was materially assisted by their evidence. To a significant extent, the differences between them reflected different factual assumptions they had been asked to adopt, or their assessment of the factual evidence. I am

satisfied, however, that certain of the assumptions which Mr Flower was asked to adopt were unrealistic, notwithstanding Mr Flower's attempts to suggest otherwise.

D4 Findings Relevant to the Assessment of Damages for Breach of The Exclusivity Provisions on the no-PAS Counterfactual

161. The quantification of damages on this basis requires the court to determine a series of issues. Having determined those issues, the experts were able to arrive at an agreed damages figure.

How many AECSUs would have been acquired in the no-PAS Counterfactual?

162. The evidence on this question suffers from the difficulty that it is not clear what definition of Initial Provisioning the experts were using for the purposes of their calculations, and in particular whether it involved any chronological limitation or not.

163. Turning to the expert evidence:

i) Mr Flower's evidence was that 215 AECSUs would have been recommended to PAS operators of which 193 would have been acquired. Given the reference to recommendations by the RR Entities, this figure would seem to be Initial Provisioning properly so-called, because the RR Entities' recommendations are made at or around the time of EIS. Further, the manner in which Goodrich advanced its case in closing proceeded on the basis that the figure of 193 units constituted Initial Provisioning on its interpretation, with replenishment of Initial Provisioning falling outside that definition.

ii) Mr Bezant estimates that 191 AECSUs would have been purchased by PAS Operators in the no-PAS Counterfactual by way of Initial Provisioning. He used "IP Purchase Data" to perform that calculation. However, that data appears to cover all shipments regardless of date, having been taken from the RR Entities' Shipping Lists for the period between 1 June 2014 and 29 September 2022 and Goodrich's Direct IP Sales Data for the period from 26 August to 8 September 2022. That figure would not, therefore, appear to be subject to any chronological limitation, something which would be consistent with the RR Entities' case that there is no such limitation in the definition of Initial Provisioning.

iii) The evidence so far as non-PAS operators are concerned is that the RR Entities recommended Initial Provisioning of 594 AECSUs (once again, the fact that this is a recommendation by the RR Entities suggests that it is concerned with Initial Provisioning which is to be acquired at or around the point of EIS, and hence Initial Provisioning properly so-called). However, the evidence establishes that only 354 AECSUs were acquired. Once again, that figure appears to be derived from the RR Entities' shipping lists, and not to be subject to any chronological limit, and this was confirmed by Mr Caplan, in his very helpful submissions on the quantum aspects of the dispute, who described the figure as "the total purchases that operators make".

164. I can deal with the first issue – whether I should have regard to recommended or actual levels of Initial Provisioning purchases – briefly. The evidence establishes that operators tended to acquire less by way of Initial Provisioning than the RR Entities had recommended. That was the evidence of Mr Loret. It was supported by the work of the experts which, looking at non-PAS operators during the relevant period, suggested 594 AECSUs were recommended, but only 354

units acquired. Mr Flower accepted that he had seen evidence that PAS Operators, on occasion bought less by way of Initial Provisioning than was recommended. The desire of Operators to minimise their outlay on Initial Provisioning was one of the commercial drivers of the PAS project. Accordingly, it is the figure for actual, rather than recommended, acquisitions which should be used.

165. The second issue is more complex: how many AECSUs, if any, would the PAS Operators have acquired above and beyond the level of Initial Provisioning (i.e., by way of replenishing Spare Parts) in the no-PAS counterfactual?

i) Goodrich's quantum calculation assumes that PAS Operators would have purchased the same number of AECSUs in the no-PAS Counterfactual as the RR Entities acquired from Goodrich for the purposes of "stocking" the PAS (535 on the RR Entities' case and 572 on Goodrich's case – as I explain at [195]-[196] below, I am satisfied that the correct number is 538).

ii) I am not persuaded that 538 AECSUs would have been acquired by PAS Operators in the no-PAS counterfactual. The stocking assumptions made by the RR Entities for the purpose of initiating a significant new business service (a context in which optimism and fear of insufficiency might well have influenced ordering behaviour) cannot be taken as a reliable proxy for the orders which operators would have placed had that new service never been launched. While, when fully operational and in "steady state", it was no doubt hoped the PAS would reduce the level of AECSUs acquired by operators, that does not provide a basis for assuming that, in the events which have happened, the AECSUs acquired by the RR Entities would have been acquired by the operators absent the PAS (particularly when it is not clear to me how many of those 538 AECSUs actually made it to operators in the PAS). The decision to invest a significant amount in PAS inventory in 2018 (over a three-year period) does not mean that the level of stock in the PAS did not exceed the level which operators would have acquired. The document referring to the investment makes it clear that the acquisition was anticipatory in nature, looking to prepare for the take-up of the PAS by second-tier operators, and that one of its objects was to "enable growth of the PAS in line with our aftermarket strategy by securing new customers". It also noted "we need to sell more of this service to achieve against both strategy and the original business case" and took into account upcoming sales campaign activity in the PAS over 2018 and 2019.

iii) The evidence of Mr Loret was that the PAS was overstocked as a result of over-optimistic assessments being produced using the Opus 10 forecasting software, and that he had been involved in a project to assess the number of LRUs in store in around 2020 and the project team determined that more AECSUs were being held in the MSCs than were required to serve the PAS Operators, and a number were moved to cheaper storage options. While I was surprised at the lack of any documents relating to this project, I was shown material consistent with an overstocking in the early years of the PAS. In any event, Mr Loret's evidence was not challenged, and there is no material which would allow me to reject it. However, the evidence did not identify the degree of overstocking found.

iv) That leaves the question of whether, in the no-PAS counterfactual, PAS Operators would have ordered further AECSUs over and above the level of Initial Provisioning provided,

and, if so, in what quantities. Beyond its suggestion that I should assume the full 538 AECSUs used to stock the PAS would have been so-ordered, Goodrich advanced no alternative case on this issue. The RR Entities point to the fact that the total volume of AECSUs acquired by non-PAS Operators, derived from shipping lists, was substantially lower than the level of Initial Provisioning recommended by the RR Entities. They also relied on the fact that customers who subscribe to repair or exchange services would not have purchased Spare Parts. The terms of the Exchange Service operated by Goodrich were not the subject of submissions, although the ECSURS appears to have envisaged that it would be subject to a separate renumeration regime. No claim has been advanced for any increased Exchange Service revenue which Goodrich would have acquired in the no-PAS Counterfactual, assuming that was a viable claim.

v) Further, to the extent that this question is concerned with PAS Operator behaviour over a period of time, it would need to reflect any impact on flying hours caused by the Covid 19 pandemic or other factors.

166. I do not believe I have got to the bottom of this point. However, on the material before me, I am unable to conclude that the PAS Operators would have acquired more than the range of 191 to 193 AECSUs put forward by the experts. I understand that, notwithstanding the proximity of these figures, complications would arise if I simply split the difference. Applying the broad axe in Goodrich's favour, therefore, I find that 193 is the appropriate figure to use for AECSUs acquired by PAS Operators in the no-PAS Counterfactual, and that these would all have been acquired by way of Initial Provisioning.

To what extent would these AECSUs have constituted Initial Provisioning?

167. The answer, on the evidence before me, is 193 units, for the reasons given at [165] to [166].

Would the 25% Threshold for Initial Provisioning in clause 11.10(c) of the ECSURS have been exceeded, and by how much?

168. This issue raises two threshold questions of the construction of clause 11.10(c). This provides, in relevant respect:

> "For new RR Engine Programmes … (including the Trent 1000, Trent XWB and RB82 but excluding BR725) where the Applicable Engine Control System for such R-R Engine Programme is supported on an $/EFH basis by R-R, R-R shall purchase the Initial Provisioning at IPC. The purchase of Initial Provisioning by R-R for each individual [AECSU] included in a R-R Engine Programme shall not exceed a quantity greater than that which is equal to 25% in aggregate of the number of R-R Engines for such R-R Engine Programme which are contracted to be supported on a EFH basis".

169. The first question arises from the fact that there are different types of AECSU – the six principal types are engine electronic controllers, fuel pumps, hydromechanical metering units, fuel driven activators, data entry plugs and dedicated generators. The ECSURS defines an Engine Control System Unit as comprising 10 items, Appendix 4 sets out a non-exhaustive list of AECSUs

170. Goodrich argues that it is sufficient for the cumulative number of all AECSUs of whatever kind amount to more than 25% of the number of R-R Engines in the relevant engine programme

contracted to be supported on an EFH basis. The RR Entities argue that the 25% threshold applies per type of AECSU.

171. The terms of the ECSURS do not offer a clear answer to this question, and a worked example in the agreement would have been helpful. In my view, the RR Entities' construction is to be preferred:

i) AECSUs are "Engine Control System units … a non-exhaustive list of which is provided in Appendix 4", a definition which clearly contemplates that there are many different types of AECSUs. That refence to a list does not lose its contractual significance merely because the parties did not get around to agreeing Appendix 4.

ii) I accept Mr Loret's evidence that these different types of AECSU have different prices, and different level of reliability. Thus, data entry plugs have a WLP of $15,000-20,000 and engine electronic controls a WLP of $1,000,000.

iii) The words "each individual [AECSU]" suggest that the 25% threshold applies to the relevant type of AECSU. It is not clear what role, if any, the words "each individual" have on Goodrich's construction.

iv) Further, on Goodrich's construction it would be in the RR Entities' interest to "front-load" their purchase of high value AECSUs. Whether or not they did so, the economic effect of the clause would turn on the accident of which AECSUs were acquired in what order – so that where various units at different costs were acquired over a short period, the precise sequence of orders might determine whether, for the same set of AECSUs, the 25% threshold was exceeded. If a single order of multiple AECSUs was placed, the price payable could depend on which order the AECSUs were considered. That, on its face, seems a commercially surprising outcome.

172. Goodrich argues that, on the RR Entities' construction, there is no prospect of the 25% Threshold ever being exceeded (inferentially for any type of AECSU). However, I do not have material before me which establishes that the parties would have held that view when the ASA and ECSURS were entered into, and in any event the threshold may, for all I know, have been included as a safety net to protect against an unanticipated event. Certainly, there is no sufficient material to persuade me that the outcome would have been sufficiently commercially absurd that the parties could not have intended it. I would note in this regard that, while I have not taken this into account, Mr Smith, from Goodrich, describes the threshold in his witness statement in the following terms:

> "Rolls-Royce must pay a price equal to IPC multiplied by the mark-up rate of 4.3 for any Initial Provisioning Spare Units that they acquire above a limit *for each Unit* type equal to 25% …" (emphasis added).

173. Second, Goodrich argues that the 25% threshold should only be calculated by reference to R-R Engines which are contracted to be supported on an EFH basis for which Goodrich receives VSPs. This issue arises as follows:

i) The expression "$/EFH" refers to payments from the RR Entities to Goodrich (the term having been defined as "the prices paid per Engine Flying Hour paid by R-R to

[Goodrich])". The use of this definition in the context of the first sentence makes commercial sense – where Goodrich is receiving remuneration on a $/EFH basis in respect of a particular engine, the Initial Provisioning is supplied at IPC.

ii) The expression "EFH basis" (i.e. without a $-sign) is not defined, leaving open the possibility that the words "which are contracted to be supported on an EFH basis" could mean contracted by the RR Entities with the operators, or by Goodrich with the RR Entities.

iii) On this issue, I prefer Goodrich's construction. Clause 11.10(e) addresses the position where the "[AECSU] for such R-R Engine Programme is not supported on an EFH basis", in which case IPC x Mark-Up is chargeable. This appears to be the mirror provision of clause 11.10(c), with a higher price charged because Goodrich is not being remunerated in some other way. However, it does not use the expression $/EFH, suggesting that the absence of "$/" does not have the significance for which the RR Entities contend.

iv) This construction also fits better with clause 11.10(d) which restricts the use of AECSUs acquired by the RR Entities at the lower price applicable where Goodrich is remunerated on a $/EFH basis, by providing that they can only be transferred to customers as "part of an EFH deal". The expression "EFH deal" is much more likely to mean a deal of a kind which attracted the lower price in the first place (i.e., one for which Goodrich is remunerated on a $/EFH basis").

v) It also makes more sense for a threshold applicable to the price paid to Goodrich in respect of AECSUs for engines for which it is remunerated on a $/EFH basis to itself be expressed as a percentage of that universe of engines, rather than some other universe.

174. On the basis of the first issue of construction alone, the 25% threshold was not exceeded.

175. If I had accepted Goodrich's construction, then the calculation should have been performed by reference to the actual number of AECSUs that would have been acquired by PAS and non-PAS Operators (Mr Flower's different treatment of those groups of Operators being unjustified, as he accepted in cross-examination).

How many PAS Customers (in the actual world) would have moved from being $/EFH to Time and Materials Customers in the no-PAS Counterfactual?

176. It is accepted by the RR Entities that there is a real and substantial chance that up to 30% of PAS Operators would have become Time and Materials (**T&M**) Customers in the no-PAS Counterfactual. The issue which arises is whether calculations of loss based on that figure should be discounted on "loss of a chance" principles, and, if so, by what percentage.

177. I shall assume in the RR Entities' favour that this issue (which arises at the stage of quantifying Goodrich's assumed loss) is subject to loss of a chance principles (although cf. *Chitty on Contracts* (34th) [29-089]). The evidence of both Goodrich and the RR Entities supported the figure of 30%. The actual figure might have been higher or lower than 30% (there are references in some documents to 35% or one-third), in contrast to the issue more frequently encountered in "loss of a chance" cases when the chance in question would play out in a binary fashion (would litigation have succeeded; would a contract have been concluded with a third party). Further, the

evidence tends to suggest the figure of 30% may be conservative, with the result that a higher percentage is at least or more likely than a lower one. In those circumstances, I am satisfied that no discount is appropriate.

What proportion of those PAS Customers who would have become T&M Customers in the no-PAS Counterfactual would have purchased their Initial Provisioning through the RR Entities and what proportion would have purchased their Initial Provisioning direct from Goodrich?

178. T&M Customers can acquire their Initial Provisioning from the RR Entities, or directly from Goodrich. Analysis performed by Mr Bezant showed that T&M Customers purchased a X% of their Initial Provisioning directly from Goodrich (the figure has been redacted for reasons of confidentiality). That figure reflected a calculation for (a) two T&M Customers who did not subscribe to any aftermarket services, who acquired Y% of their Initial Provisioning directly from Goodrich, and (b) a larger group of Operators, who did subscribe to TotalCare, who acquired Z% of their Initial Provisioning direct from Goodrich. There is a significant difference between the figures, and I would expect the conduct of operators who subscribed to TotalCare to be more representative of that of operators who subscribed to the PAS in the no-PAS counterfactual. Accordingly, I am satisfied that Z% is the appropriate percentage to use.

179. The issue which then arises is whether PAS Customers are, by virtue of their decision to subscribe to the PAS, operators who are likely to buy less Initial Provisioning directly from Goodrich than the whole pool of Operators. I am not persuaded that PAS Customers had a set of characteristics such that they were inherently less likely to purchase their Initial Provisioning directly from Goodrich in a no-PAS Counterfactual. In their opening, the RR Entities suggested that the particular characteristics of PAS Customers were such that not even 30% of them would have become T&M Customers and/or that they would not have purchased any Initial Provisioning directly from Goodrich. Both of these assertions had to be abandoned in closing in the face of the data, and they illustrate the difficulties of trying to attribute some special set of characteristics to the PAS Customers without a sufficient evidential base. The difficulty with the RR Entities' submissions is that they can be equally applied to customers who never subscribed to the PAS, and, if they told the full picture, would mean that no T&M Customers would acquire Initial Provisioning directly from Goodrich, and yet we know that X% of them did, and must have had rational commercial reasons for doing so. Nor am I persuaded that it is appropriate to discount the Z% on loss of a chance principles, not least because, once again, on the material before me, it is as likely that the figure would have been higher as lower.

Would those PAS Customers who would have become T&M Customers and purchased Initial Provisioning directly from Goodrich in the no-PAS Counterfactual have paid WLP or something less (and if so, how much)?

180. The experts are agreed that any direct purchases of Initial Provisioning from Goodrich need to factor in an agreed level of discount of D% from WLP (figure redacted for reasons of confidentiality).

What adjustment has to be made for Goodrich's loss of Vendor Support Payments in respect of PAS Customers who became T&M Customers in the no-PAS Counterfactual?

181. PAS Operators were $/EFH customers who had opted for LRU Management Services and Service Level 2. Goodrich was receiving a VSP in respect of those customers. The 30% of these

customers who would have become T&M Customers in the no-PAS Counterfactual would not have been $/EFH customers, and no VSP would have been payable. It follows that a credit must be given for the loss of the VSP.

182. However, it is common ground that Goodrich may have made additional revenue from those customers in the form of direct maintenance, repair and overhaul (**MR&O**) revenue which it would not have received from PAS Customers.

183. The total VSP received by Goodrich was $Am (figure redacted confidentiality), 30% of which is $Bm. As to MR&O services, assuming that Goodrich had provided the same level of services at the same cost, it would have been able to charge an additional $Cm from those services if provided to T&M Customers. Goodrich has suggested that, in due course over the life of the engine, the "lost" VSPs and the "gained" MR&O revenue would have balanced out. However, there was no expert evidence supporting this equivalence, and it might reasonably be thought that the VSPs would involve greater revenue than average MR&O revenue because Goodrich was assuming the risk of greater than expected levels of work.

184. Mr Flower suggested that the equivalence was inherent in the pricing model in the ECSURS, clause 47.3 of which, he contended, demonstrated that it was anticipated Goodrich would earn a mark-up of 4.3 over the life of an engine programme from Rework services. However, that provision did not apply to the Trent XWB and Trent 1000 engines, and it is not possible to determine whether clause 47.3 reflects a fair working hypothesis as to the link between VSPs and the value of MR&O work done, or simply a bespoke provision constituting one of a number of trade-offs in a very complex set of interlocking provisions. Indeed, when regard is had to the actual position, Goodrich's profit margin on MR&O services provided to PAS Operators is much higher than in respect of MR&O services provided to T&M Customers. That might reflect the fact that MR&O work will become predominant in the later life of an engine. However, it might also reflect the fact that the VSP is not simply an attempt to capture the revenue payable in the T&M context, but reflects a significant risk premium or some other form of trade-off. I do not have the information to determine which, and in those circumstances the only "counter set-off" which has been established to be set against the $Bm loss of VSPs is $C.

185. Finally, it is common ground that the royalty provided for in clause 11.12 of the ECSURS would need to be factored in, which is a straightforward task which I will ask the parties to undertake.

The Overall Position

186. On the basis of these findings, and in case this part of the claim becomes relevant, the experts are asked to agree the level of damages which would have been recoverable on this part of the claim had the relevant breach of contract been established in the no-PAS Counterfactual.

D5 Findings Relevant to the Assessment of Damages for Breach of The Exclusivity Provisions on the PAS Counterfactual

What agreement, if any, would have been reached between the RR Entities and Goodrich?

187. In contrast to a claim for negotiating damages under the principle recognised in *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20 (in particular at [1], [59] and [75]), this part of the Goodrich's case does not involve the court assessing an objectively reasonable release fee. If the

reality is that these parties would not in fact have arrived at an agreed outcome so as to permit the RR Entities to do what, on the current hypothesis, they were not permitted to do, then on Goodrich's case, this damages claim must fail.

188. In this case, the parties' pleaded positions as to what an acceptable price would have been are very far apart – the RR Entities say that they would not have been willing to pay much above IPC (which Goodrich says it would not have accepted), and Goodrich that it would not have been willing to accept much less than WLP (which the RR Entities say would have rendered the PAS uneconomic). Goodrich's case at trial was rather more flexible.

189. I have found the process of making the findings of fact relevant to this issue difficult, because of the artificiality of the "jumping off" point. If the RR Entities had been under a primary contractual obligation to seek Goodrich's consent to launch the PAS (as opposed to a primary contractual obligation not to operate the PAS, a breach of which could have been avoided by a variation), then it would be possible to determine when the obligation fell to be performed.

190. Goodrich's case as to the point in time at which I should determine whether a negotiation would have been successful, and on what terms, remains obscure. If the operation of the PAS in breach of the exclusivity obligation is regarded as a continuing breach (which appears to me to be the correct characterisation), then I accept that it is open to Goodrich to advance a complaint in relation to the operation of the PAS when launched as a general offering in late 2016, even though there had been an earlier scheme which was also operated in breach of the ECSURS.

191. How negotiations would have proceeded, if they had been commenced, is very difficult to determine, because there were any number of ways of approaching the issue, including some form of profit/risk-sharing agreement, an increased price but reduced VSPs, a tiered approach depending on how successful the arrangement proved and so forth. However, the only variable explored at trial was a change to the price. If approached on the assumption that the request is to be made under clause 4.2 of the ECSURS (that being the only basis on which Goodrich suggested that this was the correct counterfactual) then I agree that Goodrich would initially have come back with a price, but of course that would not have precluded subsequent negotiation between the parties as to other terms in an attempt to arrive at a mutually acceptable deal.

192. When reaching its conclusion as to what the outcome of the assumed negotiation would have been, Goodrich asks the court to draw adverse inferences from the absence of a Rolls-Royce witness who would have been a decision-maker in any such discussion. However, Goodrich did not call someone in an equivalent position, and if it is suggested that Mr Smith met that requirement, he offered very little insight into Goodrich's negotiating position. Further, the issue to be addressed is a hypothetical one, where the weight to be accorded to witness evidence is significantly less than in cases of direct observation of historical facts. Finally, Goodrich's pleaded case as to the course of the hypothetical negotiation was sparse indeed, and in those circumstances I am not willing to draw an adverse inference from the RR Entities' failure to call a witness simply to deny what is now accepted by Goodrich – that the RR Entities would not have paid WLP.

193. I accept that the RR Entities were strongly attracted to a parts availability service – that much is clear from the various internal business plans and proposals, identifying both the opportunities a parts availability service would bring in terms of revenue, and the threats presented by a failure

to introduce such an offering to the RR Entities' LRU Management Services business. However, I also accept Mr Loret's evidence that the PAS needed to be able to "wash its own face", and it is noteworthy that the internal assessments all appraise it on this basis, rather than quantifying benefits to the LRU business, and that the process of developing the offering and bringing it to market took a number of years. It is also clear that a parts availability service would only have been a viable offering if the AECSUs formed part of it, and the RR Entities did not suggest otherwise.

194. The following matters are also clear:

i) The RR Entities would have assessed any proposed deal by reference to the same four criteria used to assess the PAS – the NPV of anticipated cash flows, Return on Sales, the maximum negative cashflow and the year the scheme was anticipated to become cash positive.

ii) The longer the period of negative cashflow before the PAS was expected to become profitable, the less attractive the project would have been for the RR Entities, who were already enduring a lengthy period of negative cash-flow from the development of new engines which had to be recovered over the life of an engine-type.

iii) The Return on Sales would have had significantly to exceed the 15% being obtained on the existing Initial Provisioning business to be attractive to the RR Entities, not least because the current system did not involve a long period of negative cashflow, nor the risks inherent in a new venture of lower-than-expected market-share or per-operator revenue.

iv) The RR Entities would have been conscious that they were running the risks of such a venture, whilst Goodrich would merely be receiving an enhanced price for AECSUs acquired from the JVC at cost. The costs of paying higher amounts to Goodrich would, therefore, have been a certain liability, particularly in relation to the AECSUs necessary to get the PAS up and running, whereas the prospects of recovering those back and more would have been speculative. It was not simply a case of trading anticipated profit against a particular level of cost.

v) Acquisition at 50% of WLP in 2016 would have deferred pay-back for 2 years beyond that assumed for the PAS as implemented, even assuming everything worked out as hoped, with a maximum negative cash-flow more than double that projected in the PAS as implemented, for an NPV of less than half.

vi) If the risks of the venture were to remain as they were, then I am satisfied that the RR Entities would have required the price to be significantly less than 50% of WLP for the PAS, in its existing structure, to be viable. However, I accept that a price of 35% of WLP would have been accepted by the RR Entities.

vii) There was no evidence from Goodrich that it would have been willing to sell at that price. However, beyond the (on my calculations) relatively small benefits to be gained from customers making T&M purchases from Goodrich if there was no PAS (see [183]) Goodrich was essentially in the position of leveraging its ability to prevent the RR Entities from doing something they wanted to do, rather than acting with a view to protect a clear economic interest of its own.

viii) Further, in 2016, both parties were co-operating. They had extended the PCOA in 2014 and did so again in 2017. They had reached agreement on Consignment Stores (in 2011 and again in 2015). They had reached an agreement on the treatment of Serviceable Used Material (in 2017). Against that background, I am not persuaded that this would have been a bridge too far.

ix) In those circumstances, and doing the best I can on the limited material before me, I am satisfied that if there had been a negotiation between the RR Entities and Goodrich in relation to the PAS in the second-half of 2016, a price of 35% of WLP for AECSUs for the PAS would have been agreed for "pool" units, with the AECSUs used initially to stock the OSSs being treated as Initial Provisioning, and acquired at IPC.

How many PAS AECSUs were there?

195. The question of how many AECSUs the RR Entities acquired for the PAS is a question of fact. The RR Entities say the correct number is 535 units, Goodrich that it is 572. As the party claiming that a debt is due or damages payable, the burden of proof lies on Goodrich, but, in determining whether that burden has been discharged, the court can have regard to the fact that the evidence relating to the supply of these AECSUs was exclusively within the control of the RR Entities.

196. The court has access to so-called "shipto" codes obtained from the RR Entities' business information systems showing the shipment destination of various AECSUs, and evidence from Mr Loret (who I accept was involved in the design of those codes and therefore able to give evidence as to their significance) as to what they mean. The shipping codes cannot be conclusive, because there are occasions when it is clear from other evidence that the eventual destination of an AECSU is otherwise than as suggested by the "shipto" code. Nonetheless, as the primary business record of the RR Entities, I am satisfied that the "shipto" codes provide a prima facie basis for determining where AECSUs were shipped.

197. The first set of disputed AECSUs comprises 24 units:

i) 10 of these have a "shipto" code of "RRAOGSM41A". Mr Loret's evidence was that a "shipto" code which included "AOG" (Aircraft on the Ground) was not a shipment to an MSC, and I accept that, prima facie, that is the case, not least because the code suggests a link with a particular operator and a particular aircraft. The fact that the shipping lists contain the words "Rolls-Royce Material Services" is not, on its own, enough, in my assessment, to displace that prima facie assessment, because it is clear that Rolls-Royce's Material Services division was not limited to PAS-related work: Mr Loret was employed in that business unit, and it is clear that its sphere of activity extended significantly beyond the PAS.

ii) In relation to 3 of these ten units, the spares payback spreadsheets do suggest that they were shipped to the PAS, and that is sufficient to outweigh the prima facie inference to be drawn from the "shipto" codes. I am not willing to draw the inference that this was also true of the other 7 units with the same "shipto" code, which do not refer to the PAS and have a different "sold to" code than the 3 PAS units.

iii) 7 have a "shipto" code of "CTXWBSHHCDG". Mr Loret's evidence was that a "shipto" code which included "CT" (Consignment Store) was not a shipment to an MSC, and I accept that, prima facie, that is the case. On the evidence, the Consignment Stores are something different to the PAS – they are not a revenue-generating service but a time-limited response to "infant mortality" issues which initially emerged with the Trent 1000 engine which was specifically agreed with Goodrich in an email exchange in February 2011. There is nothing to rebut the prima facie inference that these are not PAS units.

iv) 7 were shipped to RR North America with a "shipto" code of "AZZ21SHDTO". There is no MSC on the North American Continent and no evidence that these were PAS units.

198. There are then 85 units shipped to Rolls-Royce entities or joint venture companies:

i) 47 units were shipped to HAESL (24 units), SAESL (15 units) and N3 Engine Overhaul Services (8 units). Mr Loret's evidence was that these were not PAS units but were shipped to Rolls-Royce entities to provide MRO services which are "whole engine" services. There is no basis for going behind that evidence.

ii) 33 units were shipped to "RR plc – A R & O". On the Rolls-Royce SAP system, this entry is linked to an address in Derby, and with "new engine/non modular replacement". Another document suggests that A R & O means "Aero Repair and Overhaul" and is concerned with whole engines rather than merely the provision of parts.

iii) 5 were shipped to Rolls-Royce entities and sold to RR Leasing. Mr Loret gave evidence that these were not PAS units. There is no basis for going behind that evidence.

199. Accordingly, I am satisfied that the number of PAS units was 538.

200. There is then a further issue as to the number of units which would have been supplied to the PAS in circumstances in which it is said the higher price payable by the RR Entities may have reduced demand. On the terms which I have determined would have been arrived at on the present counterfactual, I am not persuaded that the level of demand would have been meaningfully different to that which it was. I therefore find:

i) 116 AECSUs would have been acquired at IPC (see [132] above).

ii) 422 further AECSUs would have been acquired at 35% of WLP (being 538 less 116). For this purpose, it is the total number of AECSUs supplied to the PAS which matters, rather than the number initially ordered for the PAS and which on my findings give rise to claims in debt and/or damages for breach of clause 11.1.

201. On the basis of these findings, the experts agree that the damages recoverable on the basis of the PAS Counterfactual would have been US$41,474,483.

E GOODRICH'S OTHER CLAIMS

E1 Introduction

202. Paragraph 36 of Goodrich's Reamended Particulars of Claim provides:

> "In breach of clauses 46.1, 46.2 and/or 51.1 of the ECSURS, the RR Entities have consistently failed to notify the Defendant of Customers' Initial Provisioning requirements and consequently the Defendant has been unable to provide input on and/or agree those requirements or the quantities of Initial Provisioning required for Customers".

203. Paragraph 36A provides:

> "Further or alternatively, the RR Entities have breached clause 11.1 of the ECSURS. In all Spares Orders for [AECSUs] acquired for use in the PAS, the RR Entities have asserted (and continue to assert) that all such orders are for Initial Provisioning and that IPC is payable under clause 11.10(c) of the ECSURS:
>
> (1) All such Applicable Engine Control System Units were Spare Parts for [AECSUs] and not Initial Provisioning … Accordingly, the correct price payable in respect of such units was World List Price pursuant to clause 9.2 of the ECSURS.
>
> (2) Alternatively, only those [AECSUs] supplied to Customers up to the level of Initial Provisioning recommended by the RR Entities were Initial Provisioning, and the remainder were Spare Parts for AECSUs, in respect of which the correct price payable as World List Price pursuant to clause 9.2 of the ECSURS.
>
> (3) Alternatively, all such AECSUs were Initial Provisioning under clause 11.10(c) of the ECSURS. However, the RR Entities ordered units in excess of the 25% Threshold in respect of which the correct price payable was IPC x Mark Up and not IPC".

204. Claims are asserted, therefore, by reference to clauses 46.1 and 46.2, 51.1 and 11.1 of the ECSURS.

E2 Clauses 46.1 and 46.2

205. Clause 46.1 appears in Section 2 of the ECSURS, entitled "Generic Rework Services $/EFH" and applies to all instructions placed with Goodrich. It provides:

> "Subject to confidentiality provisions with Customers, R-R shall, as soon as practicable, notify [Goodrich] of the following information relating to each Customer …
>
> (d) Initial Provisioning requirements for [AECSUs] for such Customer".

206. Clause 46.2 provides:

> "A document which summarises the above information shall be provided as soon as practicable following the date hereof and updated on a regular basis to incorporate new Customers and updates to the above data".

207. No such information or summary was provided in respect of Initial Provisioning. The RR Entities say that this was not the subject of any complaint at the time, and that this gives rise to some species of estoppel, or perhaps waiver by conduct. Mr Smith, giving evidence for Goodrich, accepted that:

i) Notifications of new operators sent by RR Holdings to Goodrich did not always set out the level of the new operator's Initial Provisioning requirements.

ii) Goodrich never objected to the absence of such information, nor used that absence as a reason to refuse to provide aftermarket services.

iii) One reason for Goodrich's stance was that, following its acquisition by RTC, it had closed the particular aftermarket services division which would have assisted in providing such recommendations.

208. Against that background, I am persuaded that the parties, by their conduct, agreed to vary the requirement that RR Entities provide such information when placing orders, albeit it would have been open to Goodrich to request the information again had it wished to do so.

209. Further, no relief is claimed in respect of these breaches. Goodrich's damages claim in the prayer is limited to "damages in respect of the RR Entities' breaches of clause 11.1 of the ECSURS and the Exclusivity Provisions in the ASA and ECSURS". Nor has there been any counterfactual evidence as to how the provision of this information would have placed Goodrich in a better position.

210. In these circumstances, this allegation takes Goodrich nowhere.

E3 Clause 51.1

211. I have referred to clause 51.1 of the ECSURS above, I have already found that the PAS did not constitute the operation of an Exchange Service for the purpose of section 3 of the ECSURS. In these circumstances, I do not believe any issue as to clause 51.1 arises. If I am wrong, the position is as per clauses 46.1 and 46.2 above.

E4 Clause 11.1

Introduction

212. This aspect of Goodrich's claim requires close attention, and undoubtedly loomed much larger by the end of the case than it had at any prior stage. By way of a summary, the pricing provisions in the ECSURS were as follows:

i) "Subject to clause 11 below", the price payable for Spare Parts is "World List Price" (clause 9.2).

ii) For AECSUs supported on a $/EFH basis, the price for Initial Provisioning purchased by the RR Entities is IPC up to a threshold, and IPC x Mark Up above that threshold (clauses 11.10(c) and (d)).

iii) Goodrich has not sought to argue that AECSUs acquired for the PAS do not concern an R-R Engine Programme "supported on an $EFH/basis" but has argued that AECSUs acquired for the PAS do not constitute Initial Provisioning. I have rejected that submission in part, and accepted it in part (see [12] and [132] above).

iv) In those circumstances, it might have been thought that one claim available to Goodrich was a claim in debt, on the basis that it had not been paid the price due under clause 9.2 of the ECSURS.

v) In its Part 20 Claim Form, Goodrich claimed "an account of all amounts owed in respect of Initial Provisioning …. pursuant to clause 11.10(c) of the ECSURS", but that appears to have been concerned with the issue of whether the 25% threshold in clause 11.10(c) had been exceeded. In any event, the equivalent paragraphs in the Particulars of Claim (paragraph 41) and Reply (paragraph 27) have been deleted, although a claim remains in the prayer.

213. What is asserted is that the RR Entities breached clause 11.1 which provides:

> "R-R's requirements for Spare Parts for [AECSUs] and Initial Provisioning shall be in the form of Spare Orders. Spare Orders shall be completed within the agreed lead time".

214. It is alleged that clause 11.1 required the RR Entities "to specify in all Spares Orders the applicable price" (paragraph 22C), and that this obligation was breached by asserting that the Spare Orders placed asserted that the relevant orders "are for Initial Provisioning and that [IPC] is payable" (paragraph 36A). It is said that those assertions were wrong because "the correct price payable in respect of such units was World List Price pursuant to clause 9.2 of ECSURS" (paragraph 36A(1)). It is then said that if the RR Entities had complied with clause 11.1, "the RR Entities would have acquired the same number of [AECSUs] but would have specified in the relevant Spares Orders, and paid, the correct price for them" (paragraph 41D), it being alleged that the "correct price for all such units was [WLP]" (paragraph 41D(1)).

215. In opening, Goodrich defined its case under clause 11.1 as follows:

> "In breach of clause 11.1 of the ECSURS, the RR Entities failed to specify and pay the correct price for the Units acquired".

It described its damages claim as follows:

> "Goodrich's case is that the RR Entities should pay damages reflecting the difference between the amounts paid for the Units used in the PAS (i.e., IPC) and the amount which should have been paid".

216. The alleged breach in failing to pay the correct price – as opposed to failing to specify it, even though it was payable – does not appear clearly in Goodrich's Particulars of Additional Claim. However, paragraph 36A relies not simply on the initial failure to specify the correct price, but the subsequent conduct in asserting that the correct price is IPC when "the correct price payable in respect of such units was [WLP]", and a generalised allegation of loss and damage was pleaded (paragraph 38). On that basis, I am satisfied that Goodrich's case embraced a claim for damages for failure to pay "the correct price payable in respect of such units", albeit no debt claim.

217. Reverting to clause 11.1:

i) The definition of "Spares Order" requires the order to include the "price to be paid by RR". Clearly the price specified will be premised upon whether clause 9.2, clause 11.10(c) below-threshold, clause 11.10(c) above-threshold or clause 11.10(e) applies.

ii) The issue of whether the RR Entities were obliged by the ECSURS to include the legally correct price when submitting a "Spares Order" is considered at [246] below.

iii) The obligation to pay the price does not arise under clause 11.1 of the ECSURS. However, the legal basis for the obligation to pay the price is pleaded: paragraph 13.3 pleads that the ECSURS provided "the specific purchase … arrangements for Aftermarket Services", which included the supply of Spare Parts (paragraph 17.2) and paragraphs 22B and 23 pleaded the price payable.

218. In this regard, the agreed Case Memorandum describes Goodrich's case as being "that in breach of clause 11.1 of the ECSURS, the RR Entities acquired the [AECSUs] for use in the PAS at a much lower cost than that to which they were entitled", although it continues "the Defendant alleges that, had the RR Entities complied with clause 11.1 … the RR Entities would have acquired the same number of [AECSUs] but would have paid [WLP] … and claims the difference in price as damages".

Should Goodrich be permitted to amend its Particulars of Claim to advance a debt claim?

219. Before the exchange of written closing submissions, I raised the issue of whether Goodrich had advanced, or should be permitted to advance, a claim in debt with the parties before the service of the parties' written closing submissions. Goodrich did not seek to advance such a claim in their written closing, albeit they did contend that their claim was "in substance for the failure of the RR Entities to pay the correct price". Goodrich continued:

> "It is recognised that typically a seller might in such circumstances make a claim for the price pursuant to s.49 of the Sale of Goods Act 1979. That would be available because the property in the goods …. will in every case have passed to the RR Entities and they have wrongfully neglected to pay the (full) price under the terms of the ECSURS.
>
> … A traditional claim of this kind has not been pleaded because it would not have been possible until very recently to identify the details of each and every transaction (i.e., the identity of each and every buyer, the precise units involved etc)".

220. That might be thought to have suggested that a deliberate decision had been made not to plead a debt claim. The reason offered – the need to specify the details of each individual transaction – did not appear convincing, not least because it would seem to be equally true of the claim, which was brought, which involved an assertion that the correct price had not been paid. In the course of oral closings, Mr Croall KC confirmed that the issue of whether the claim could be advanced in debt had not come into focus for Goodrich until the close of the trial, as a result of the exchanges with the court.

221. The proposed amendments were not put forward until 5.30pm on Saturday 13 May (albeit I suspect the RR Entities were aware it could be coming from exchanges in court at the end of 11 May), with oral closing submissions in respect of this aspect of the case taking place on 15 and 16 May. The proposed amendments comprise:

i) A clearer plea for damages for failing to pay the correct price, which was now said to be a breach of clauses 11.1, 9.2 and/or 11.10(c) (albeit the references to the last two clauses do not appear, as they should, in paragraph 36A).

ii) A claim in debt.

222. On any view, this was, chronologically, a very late amendment indeed, and it comes against a background in which Goodrich had made a number of amendments to its statement of case, one set as recently as February 2023. The principles to be applied when considering whether to permit a very late amendment have been summarised by Carr J in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) and more recently, the Court of Appeal in *ABP Technology Ltd v Voyetra Turtle Beach Inc* [2022] EWCA Civ 594, [23]. In *ABP*, the Court of Appeal approved the following summary of the principles given by Coulson J in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC), [19]:

> "(a) The lateness by which an amendment is produced is a relative concept … An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.
>
> (b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date … even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason …
>
> (c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise … In essence, there must be a good reason for the delay ...
>
> (d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly drawn or focused ….
>
> (e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' … to the disruption of and additional pressure on their lawyers in the run-up to trial …. , and the duplication of cost and effort … at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments …
>
> (f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered … Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise".

223. In this case, it was not in dispute that permission to amend should not be granted if it would occasion the adjournment of the trial or require the RR Entities to re-visit earlier steps such as disclosure, witness evidence or expert evidence. To the extent that it is viable at all, therefore, it

will not be a "very late" amendment in the strict sense of that term. I accept that there is no good reason for the delay in bringing the amendment forward, and that it reflects the further analysis and clarity which the trial dialectic will sometimes bring.

224. The RR Entities identified certain reasons why it was said that the proposed debt claim was not realistically arguable. I am satisfied, however, that the issue met the (relatively low) threshold for arguability, and that these objections are better considered when addressing the amendments on their merits, rather than at the permission to amend stage.

225. As to the particularity and/or clarity of the proposed amendment, Mr Toledano KC criticised the amendment for not identifying the date each debt had accrued, and the specific debtor. However, that depends on the court's findings as to which units constituted Initial Provisioning and which did not, and the issue which is raised by the debt claim in this regard is no different to that which arises on the clause 11.1 damages claim (which asserts a loss by reference to the difference between the amount paid and the amount which was the correct price, for each relevant order). The reality is that both parties have been content to argue the case on a basis which treated the RR Entities as a collective, a pragmatic decision, and one which may have reflected the fact that Rolls-Royce Plc undertook to procure the performance of the obligations of any Rolls-Royce affiliates (clause 41.1).

226. That leaves the key issue of prejudice. So far as the claim for damages to pay the correct price is concerned, I am satisfied that, albeit with much less clarity and insufficiency of focus, that is embraced within the existing pleading: see [216] above. So far as the debt claim is concerned (and also the damages for failure to pay the correct price, if I am wrong in my conclusion that this is already embraced within Goodrich's Particulars of Claim), a key factor is that it was already a necessary ingredient of Goodrich's case that the price payable for AECSUs provided for the PAS was WLP, and that this was the price which the RR Entities were obliged to pay:

i) Paragraph 36A asserted that "the correct price payable in respect of such units was [WLP]".

ii) Paragraph 41D alleged that "the correct price for all such units was [WLP]".

iii) Against that background, I am not persuaded that a debt claim seeking to recover that "correct price payable" raised any additional factual issues beyond those already in play, as opposed to legal arguments.

iv) In so far as it might be open to the RR Entities to deduct particular amounts, it was of course open to them to deduct those amounts from the invoices actually rendered and paid and/or open to them to claim to raise those amounts in answer to Goodrich's pleaded case that WLP was payable. Indeed, Mr Toledano KC observed in many of his responses to a debt claim that "all of those points apply just as much to a claim for damages to pay as they do to a debt claim as such because you can't have a claim for damages for failure to pay if there isn't something you are obliged to pay in the first place". However, equally you cannot have a claim for failure to pay "the correct price" if nothing was payable, and yet Goodrich expressly pleaded such a claim.

v) At the very end of the trial, on 16 May, Mr Toledano KC raised the possibility that the parties might have operated the spares payback reconciliation process in such a way as to

alter the point in time at which any debt became payable. While sceptical of that possibility, I gave the RR Entities until 6 June 2023 to file material intended to show that there was a real issue here. In the event, the RR Entities' submissions filed on 6 June did not seek to raise such an argument, but an alternative argument as to the legal merits of the claim, which I address below.

227. In these circumstances, I have decided to permit Goodrich to amend their Particulars of Claim in the terms of the draft submitted on 13 May 2023. I am conscious of the risk that allowing the amendment at this late stage may leave the RR Entities with a feeling of dissatisfaction, particularly if the point succeeds, a sense of dissatisfaction which can only be enhanced by the fact that the point surfaced following exchanges with the court, and when Goodrich served amendments to its case as recently as December 2022, for which it wrongly initially asserted it did not need permission. However, in circumstances in which I am persuaded that the essentials of the point were already pleaded, and it raises only issues of construction which I am satisfied the RR Entities were able to deal with in closing, I do not accept the disappointed expectations as to the outcome of a case constitute a relevant head of prejudice, or being "mucked about" for the purposes of the application to amend. What significance these points may have when it comes to decisions about costs will have to be addressed in due course.

228. By contrast, not allowing Goodrich to advance the amendment might, depending on how the clause 11.1 damages issue is finally resolved, lead to the loss of the ability to advance a claim of considerable value. While that would not take Goodrich very far if there was credible evidence of prejudice the other way if the amendment was allowed, I am not persuaded that there is any such prejudice. It might also involve approaching the determination of the case on a very artificial basis.

The RR Entities' responses to the debt claim

229. I understood the RR Entities to advance three responses to the debt claim, which inevitably overlap or interrelate to some degree:

i) That the Orders were placed on terms that the price specified in the Sales Order was payable.

ii) That no debt claim accrued to the extent that Goodrich did not submit an invoice at the correct price.

iii) That Goodrich's failure to submit an invoice at the correct price provides a defence to any debt claim.

Were the Orders placed on terms that the price specified in the Sales Order was payable?

230. By clause 2.3, there was "incorporated into each Order … provided to [Goodrich] by the [RR Entities] in accordance with Clause 4 … the terms of this Agreement". By clause 3.1 of the ECSURS:

i) Goodrich binds itself to accept any Orders "placed in accordance with this agreement".

ii) Where the RR Entities are permitted or required to provide information with an order, Goodrich is "not obliged to accept such Orders … containing such information unless such information is provided in accordance with, and complies with the provisions of, this Agreement, unless otherwise agreed between the parties in accordance with clause 4.1".

231. Clause 3.3 provides that "Orders … (and any terms incorporated therein, in accordance with this Agreement), this Agreement …. and any other relevant provisions of the ASA shall be the only express terms which shall govern the provision of Aftermarket Services" and "any other terms that [the RR Entities] or [Goodrich] attempt to impose on any Orders shall be of no effect".

232. Clause 4.1 provides that "neither Party shall be bound by and shall have no liability in respect of Orders …. which are not (b) consistent with the terms of this Agreement … unless the Parties expressly agree that a written term of such Order … shall prevail over the terms of this Agreement."

233. Clause 5.7 provides that "title and risk of loss or damage to Spare Parts provided to [the RR Entities] or a Customer (as appropriate) by [Goodrich] shall pass on the delivery of the Spare Parts for the [AECSU] to the address specified on the Order ….".

234. Finally, Clause 9.5 provides:

> "[Goodrich] shall post invoices to [the RR Entities'] purchase accounts department at the address on the Order on the day on which the Aftermarket Services are despatched or completed. Providing the invoice is accurate, [the RR Entities] shall make payment to [Goodrich] on the fifteenth (15^{th}) day of the second (2^{nd}) month following the month in which the relevant Aftermarket Services are despatched, or completed in accordance with the lead times in the Contract. For the avoidance of doubt, an accurate invoice must include, amongst other things, the Order which relates to the invoice".

235. Against this background, I am satisfied that the specifying of the incorrect price in a Spares Order does not affect the price payable under the ECSURS. The effect of clauses 2.3 and 3.3 is to incorporate the pricing provisions of the ECSURS into any Spares Order, and only those provisions. I am not persuaded that Goodrich's entitlement to refuse to accept Orders where the required information has not been provided (clauses 3.1 and 4.1) has the effect that the price payable for an Order accepted by Goodrich in respect of an Aftermarket Service can differ from the price which the ECSURS provides merely because the RR Entities have specified the wrong price on the Spares Order. Further, clause 4.1 does not, in my view, have the effect that the RR Entities' failure to specify the correct price in the Spares Order relieves them of the obligation to pay the correct price. Rather, clause 4.1 is intended to ensure that the parties' obligations in respect of an Order for which the ECSURS defines the relevant terms are as set out in the ECSURS, and not otherwise.

Did any debt claim accrue to the extent that Goodrich did not submit an invoice at the correct price?

236. In oral closings, the RR Entities submitted that clause 9.5 of the ECSURS had the effect that unless Goodrich had invoiced the RR Entities for those AECSUs at the correct price, no debt in that amount accrued. As to this:

i) As I have noted, title to the Spare Parts passed to the RR Entities or the customers on delivery (clause 5.7).

ii) Section 49 of the Sale of Goods Act 1979 provides:

> "(1) Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.
>
> (2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract".

iii) I accept that contracting parties can agree that the right to the price should not accrue even when property in the goods has passed to the buyer and the goods have been delivered to the buyer, unless some further event occurs (just as the better view appears to be that s.49 does not prevent the parties from agreeing that the price should fall due before property in the goods has passed: *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd* [2016] UKSC 23, [58]).

iv) However, if a contract of sale is to have the effect that the passing of property and delivery are not themselves sufficient for the price to become due, a clear provision to that effect would be required. Payment and delivery are ordinarily concurrent conditions (s.28 of the 1979 Act), and the passing of property is the condition of the right to payment (*Fibrosa Spoika Akcyina v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 and *Benjamin's Sale of Goods* (11th), [15-112]). If the right to payment of the price did not accrue until some significant period after the transfer of property and delivery, a termination of the contract in the intervening period would have the effect that the buyer would acquire the goods but without having come under an obligation to pay for them. A court will not readily be persuaded that this is what the parties to a commercial contract intended.

v) Support for this view can be found in authorities dealing with the issue of when a right to payment for services accrues, in circumstances in which the contract requires the party rendering the services to provide an invoice, and gives the recipient of the services a set period from receipt of the invoice to pay the amount invoiced. It is clear that very clear words are required before such a provision would prevent the debt accruing until the invoice had been issued and the credit period expired. In *Coburn v Colledge* [1897] 1 QB 702, 705, Lord Esher MR noted that "unless there is some special term of the agreement to the contrary, [the] right to payment arises as soon as the work is done", albeit the defendant may be able to set up a defence based on the failure to submit the invoice. There are a number of statements to the effect that "clear words" would be required to move from that starting position: *Legal Services Commission v Henshaw* [2011] EWCA Civ 1415, [31]; *ICE Architects Ltd v Empowering People Inspiring Communities* [2018] EWHC 281 (QB), [24] and *Consulting Concepts International Inc v Consumer Protection Association* [2022] EWCA Civ 1699, [36]. It seems to me that a similar approach is

appropriate when looking at contracts for the sale of goods (particularly where a clause addresses payment for both services and goods, as clause 9.5 does).

vi) This also consistent with the distinction drawn between parties agreeing that the price will only accrue after a certain event has occurred, and parties agreeing that an accrued debt will only become payable after a certain event has occurred: *Fragano v Long* (1825) 4 B&C 219, 222 and *Alexander v. Gardner* (1835) 1 Bingham NC 671.

237. In my view, the better interpretation of clause 9.5 is that it does not affect the point in time at which the debt arises. The clause links the payment obligation not to the provision of the invoice as such, but to the time when the goods are despatched or the services completed. I understand the RR Entities to have accepted that this was the correct analysis in their supplemental closing submissions, but whether or not they did, that is the conclusion I have reached.

Does Goodrich's failure to submit an invoice at the correct price provide a defence to any debt claim?

238. The *Colledge* line of cases is principally concerned with the issue of whether the submission of an invoice is necessary to start time running for limitation purposes, and a strong factor underlying the principle of law which evolved is avoiding the inherently unattractive position in which, by dint of choosing not to serve an invoice, a party with a claim can indefinitely postpone the running of the limitation period (c.f. Lord Esher MR in *Colledge*, 705). The question of what happens when a case reaches trial, and no invoice has been served in the appropriate amount, has received rather less attention. For example, it is not clear how far the making of the itemised claim in the litigation can itself be sufficient to render the debt payable so as to obtain judgment upon it.

239. Nor do the cases explore the legal consequences where, as is often the case and is the case here, an invoice has been submitted, but in the wrong amount. If an invoice has been submitted in too high an amount, it seems unlikely that the effect is to prevent any debt at all becoming payable, certainly to the extent that the party receiving the invoice is able to work out the amount due (see *Lombard North Central Plc v European Skyjets Ltd* [2022] EWHC 728 (QB), [137]-[138]). I would not regard clause 9.5 as having such an effect – the words "provided the invoice is accurate" – in my view are intended to do no more than make it clear that the RR Entities' payment obligation only arises to the extent that the invoice is accurate.

240. If the invoice is lower than the figure actually due, what is the position?

i) In another context – the question of when a claim to interest under the Late Payment of Commercial Debts (Interest) Act 1998 arises – the Court of Appeal in *Ruttle Plant Hire Limited v Secretary of State for Environment, Food & Rural Affairs* [2009] EWCA Civ 97, [41] rejected the suggestion that only a correct invoice created an obligation to pay, Jacob LJ describing an invoice as "a two-fold statement by the supplier 'this is what I think you owe' and 'pay me now'", and observing "getting the former wrong does not mean that nothing is owing".

ii) Ultimately, the effect of an error in the invoice must be a question of construction of the relevant term, and the answer might, in some contexts, depend on whether or not the failure to include the correct figure in the invoice was the creditor's responsibility. Although concerned with the different position in which a certificate by a third-party was

necessary before the debt became payable, it is noteworthy that in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814, the Court of Appeal found that the debt became payable when a certificate in the correct amount was *or should have been* issued ([23], [50]).

iii) If (as in this case) there is a dispute between the parties as to amount due which turns on disclosure and disputed issues of construction which can only be resolved at trial, and where there are a number of competing candidates for the correct amount, is the result that the claimant must serve invoices covering "all the bases" if it is to get judgment? Or does the court allow an opportunity to an invoice to be served before finalising its order? I am not aware of any clear answer to these questions (see *Macquarie Bank Ltd v Phelan Energy Group Ltd* [2022] EWHC 2616 (Comm), [54]). The difficulties suggest a degree of caution is required before accepting the argument that the failure to invoice the debt in the correct amount provides a defence to the claim.

241. I have observed that, clause 9.5 does not expressly link the payment obligation to the rendering of an accurate invoice, but to delivery or completion of the services, and I have concluded that the words "provided the invoice is accurate" are intended to do no more than make it clear that an inaccurate invoice does not itself create a payment obligation which does not otherwise exist. I am satisfied that is also the position where the invoice understates the amount of the debt. In these circumstances, I am satisfied that WLP was due and payable for Spares Orders under the ECSURS which did not constitute Initial Provisioning, even though these AECSUs were invoiced at IPC.

242. In any event, and as an alternative basis for my conclusion, I am satisfied that the parties to the ECSURS cannot have intended that the amount due for the supply of Spare Parts would not become payable unless invoiced in full if the reason for the inaccurate invoice was the RR Entities' breach of contract in specifying the wrong price in the Spares Order. That is an unlikely construction, which would permit the RR Entities to take advantage of their (assumed) own wrong, contrary to the interpretative principle recognised in *Alghussein Establishment v Eton College* [1988] 1 WLR 587.

243. In the present context, in which the distinction between a claim in debt and damages is seen as highly significant because of the counterfactual arguments advanced in the latter context (see [259] below), it might be argued that any assumed breach of clause 11.1 should take effect only as an independent damages claim, rather than having the result that an invoice in an incorrect amount should be capable of triggering the obligation to pay. However, I am not persuaded that that is a reason for giving clause 9.5 a construction which I am not persuaded that sensible commercial parties would have attributed to it.

244. Further, there is a substantial body of authority to the effect that where one party is in breach of an obligation to satisfy a condition to the other party's right of action, "the court will proceed as if the condition was satisfied (rather than engage in an assessment on conventional principles of the loss suffered by reason of the breach)" (*Nautica Marine Ltd v Trafigura Trading LLC (The Leonidas)* [2021] 1 CL 362, [95]). That doctrine is particularly likely to be engaged in relation to a condition to an obligation of payment (and, I would add, even more so to a condition to the obligation to pay an accrued debt). In *Compagnie Noga d'Importation et d'Exportation SA v*

Abacha (No 3) [2002] EWCA Civ 1142, Rix LJ reviewed the relevant authorities at [95]-[108] and concluded at [106]-[107]:

> "In these circumstances, there is the rather odd situation where *Mackay v Dick* is regarded as authority for a well-founded and general principle of English law, but there is a certain divergence of opinion as to how that principle can best be expressed. It is at any rate clear that there must be a relevant breach of contract on the part of the defendant: by relevant, I mean causatively relevant. The breach must bear on the condition which otherwise needs to be fulfilled. A doctrine of waiver perhaps sounds more like the common law than a doctrine of deemed fulfilment taken from the civil law: but they are both fictions designed to achieve the right result to which common sense and fairness seem to point.
>
> In the present case, it seems to me that *Mackay v Dick* is not only authority for the implication of the implied term of co-operation, but also authority for the potential waiver or deemed fulfilment of the condition precedent …
>
> Thus there is no necessary dichotomy between damages and debt. On suitable facts, a claimant … may be entitled to relief in both. Where the subject matter of the dispute is a payment, it seems to me that the primary relief should be in debt, if that is possible, unless an element of damages is necessary to ensure that the value of that debt at a later time matches the value of its earlier payment, in a case where earlier payment has been delayed by the defendant's breach".

245. This principle is criticised in *Chitty on Contracts* (34th), [4-204], in terms unchanged from the 33rd edition, and its scope may be a matter of debate (cf. *The Leonidas*, [107]-[110]). However, in its core field of application, where the breach prevents the satisfaction of a condition to the accrual of a debt, the principle has the approval of Lord Sumption in *Société Générale (London Branch) v Geys* [2012] UKSC 63, [131] as well as Rix LJ in *Abacha*. Its application in this case, to a procedural or pro forma pre-condition to the creditor's ability to recover an accrued debt, presents an *a fortiori* case.

246. In order to determine whether a debt claim is due on that alternative basis identified at [242], it is therefore necessary to consider whether the RR Entities were in breach of clause 11.1, an issue to which I now turn.

Does clause 11.1 place an obligation on the RR Entities to specify the correct price in an order?

247. Clause 11.1 is expressed in normative language ("shall be in the form of Spares Orders"), as is the definition of "Spares Order" ("an instruction … comprising the following *requirements*", emphasis added). That does suggest it imposes an obligation, and does so as a matter of express language rather than implication.

248. Mr Toledano KC submitted that clauses 3.1 and 4.1 provide that Goodrich was not obliged to accept an order which contained inaccurate information, and that was its only remedy. If rejecting the order was Goodrich's sole remedy, then it is not clear to me what the RR Entities say the consequence of accepting an Order which had used the wrong price would be. If it were to be suggested that, unless it chose to reject the Order, Goodrich was obliged to complete it for the price on the Spares Order, then I am unable to accept that contention, which is inconsistent with the terms of the ECSURS summarised at [230] to [235] above. Nor is there any language

which suggests that clauses 3.1 and 4.1 contain an exclusive remedy for inaccurate information on a Spares Order.

249. Mr Toledano KC also pointed to the fact that, as originally drafted, it was envisaged that the RR Entities and Goodrich would reach agreement as to the level of Initial Provisioning which was to be recommended (clause 50.2) and that the RR Entities would provide Goodrich with information as to the level of Initial Provisioning being provided to each operator (clause 46.1), such that Goodrich would be able to work out for itself what the correct price was. As to this:

i) Clause 50.2 only applies if Goodrich was obliged to provide an Exchange Service, and for the purpose of such a service. No such Exchange Service was required when the ECSURS was signed, and, to the extent that the provision had been brought into effect, the obligation would only apply to those operators who were parties to the Exchange Service. I am not persuaded, therefore, that this provision provides a basis for reading down clause 11.1.

ii) Clause 46.1 appears in Section 2 of the ECSURS, dealing with "Generic Rework Services $/EFH", and the section only applies to "Instructions" placed with Goodrich, which is defined as "a written instruction from R-R or Customer for the performance of Aftermarket Services on a $/EFH basis". On its face, this would not extend (or, at least, always apply) to orders of Spare Parts.

iii) Clause 46.1 is "subject to confidentiality provisions" and imposes an obligation to provide the information "as soon as practicable". It would appear to be concerned with the provision of information for a new customer on a one-off basis, such information to include the overall "Initial Provisioning requirement". I am not persuaded that this would, or would necessarily, enable Goodrich to determine the price applicable to a particular Spares Order made at some subsequent point in time.

iv) The definition of Spares Order "requires" categories of information which do not fall within clause 46.1. Clause 46.1 could not render an obligation to state that information accurately otiose, which is a further reason why clause 46.1 does not answer Goodrich's clause 11.1 argument.

250. In circumstances in which the price specified by the RR Entities in the Spares Order was highly likely to be the price invoiced by Goodrich, and assuming that specification of the correct price in the invoice is necessary for that price to be recoverable as a debt, the argument for interpreting clause 11.1 as imposing an obligation to specify the correct price are particularly strong. As between the RR Entities and Goodrich, the RR Entities were far better placed to determine whether or not AECSUs were being ordered by way of Initial Provisioning, for Consignment Stores or otherwise.

251. Mr Toledano KC relied, in support of the contrary argument, on the decision in *Verizon UK Limited v Swiftnet Limited* [2008] EWHC 551 (Comm). In that case Gavin Kealey KC, sitting as a Deputy High Court Judge, held that a term that one party would render accurate invoices to the other was not to be implied into a contract, stating:

> "[54] …. It is, I would have thought, highly improbable that MCI would ever have agreed such a term. It would mean that, even if MCI innocently made an error, it could be

exposed to a claim for breach of contract. It could even be subjected to liabilities of uncertain but potentially significant size, depending on how Swiftnet went about recalculating any inaccurate invoice, (subject to the principles of mitigation) for up to 6 years after the rendering of each invoice.

55. Moreover, it seems to me that the implication of the term contended for by Swiftnet would be inconsistent with the principle, established in *Concord Trust v Law Debenture Corporation* [2005] 1 WLR 1591. A demand made without any basis for making it is not in reality a demand at all. It is a request for payment that can be acceded to or refused as the person to whom it is made may choose: *Borealis AB v Stargas Ltd*. [2002] A.C. 205. If this is the case for a wholly invalid demand for payment, then in my view, it is equally true for an invoice for an excessive amount to the extent of the invalid excess. It was open to Swiftnet to pay the amount admitted as due and to refuse to pay that part of the invoice which it claimed to be inaccurate. There is, in my view, no legal justification for the alleged implied term".

252. As Mr Kealey KC noted, there is authority establishing that demanding performance under a contract which is not due is not (or at least is not necessarily) a breach of contract. Many of these cases involve a party asserting a contractual right to more than is due (*Lombard North Central Plc v European Skyjets Ltd* [2022] EWHC 728 (QB), [170]). It might be said that asserting a contractual entitlement to a service or goods at a different price to that which the contract provides is no different.

253. In the *Verizon* case, there was no suggestion that the misstatement of the price by the invoicing party would impact on the other party's ability to assert its contractual rights. Further, Mr Kealey KC was concerned with an attempt to imply a term whereas, as I have stated, Goodrich's case is supported by the express terms of the ECSURS. Finally, the facts of *Verizon* were very different from those here. Swiftnet was exercising a contractual right to use MCI's services. It was in a position to work out the amounts actually due, and its claim was, essentially, for the administrative costs of correcting MCI's errors. In the present case, by contrast, the RR Entities were asserting a contractual right under the ECSURS to receive AECSUs at the price it had specified in the Spares Order, in circumstances in which it was highly likely that it would be invoiced by Goodrich at the price it had included in its Order. There are contexts in which a contractual demand for something which the other party is not in fact obliged to provide will constitute a breach of contract. This is the case of so-called "non-contractual orders" in both time charterparties (*Temple Shipping Co Ltd v V/O Sovfracht* (1945) 79 Ll L Rep 1) and voyage charterparties (*Batis Maritime Corporation v Petroleos del Mediterraneo SA (The Batis)* [1990] 1 Lloyd's Rep 345, 349-50). In *GW Grace & Co Ltd v General Steam Navigation Co Ltd* [1950] 2 KB 383, 396, Devlin J noted:

> "I think that it is necessary first to determine whether the giving of the order constitutes a breach of contract. Ex hypothesi, the order has no contractual force and is therefore of no greater validity than an order given to the ship by a stranger. The charterers in this case do not expressly warrant that their orders will be within their powers, and it might be argued that it is for the recipient to determine for himself whether they are binding on him or not. In some types of contract, that may be so; but in this case counsel for the charterers concedes that the charterparty, either on its true construction or by implication, forbids the giving by the chatterers of orders outside their powers, and accordingly that the giving of

> an order to sail to an unsafe port is a breach of the charterparty. If this concession had not been made, counsel would plainly have found it difficult to explain *Hall Brothers Steamship Co., Ld. v. R. & W. Paul Ld*, *Axel Brostrom and Son v Louis Dreyfus and Co* and the judgments of Bailhache J in *Limerick Steamship Co Ld v WH Stott and Co Ld* and of Mackinnon J in *Lensen Steamship Company v Anglo-Soviet Steamship Company Ld*, which all proceeded on the basis that the order to go to an unsafe port or berth was a breach of the charterparty".

254. A key feature of those cases, which is present here, is that the contract in question is one in which one party is permitted to give orders on a regular basis requiring the other party to take particular steps, and in which there is a high likelihood that any "orders" so delivered, given their peremptory character, will be complied with as a matter of course, without extensive consideration or discussion at senior management level, and where the person giving the order is in general best-placed to determine its legitimacy.

255. For these reasons, I am satisfied that clause 11.1 of the ECSURS obliged the RR Entities to specify the correct price in the Spares Order. I am also satisfied that if the Spares Orders had specified the correct price, Goodrich would have rendered invoices at that price (and I did not understand the contrary to be contended).

The estoppel argument

256. The RR Entities pleaded a limited estoppel case to address one aspect of Goodrich's pleaded case – that in the absence of agreement between the RR Entities and Goodrich as to the recommended levels of Initial Provisioning for operators, the provisions of the ECSURS dealing with Initial Provisioning were not engaged and/or that the RR Entities were in breach of its obligation to notify Goodrich of Initial Provisioning requirements (paragraph 36 of the Particulars of Additional Claim). The RR Entities' estoppel plea pointed to the fact that Goodrich had never complained about the absence of such information, but had supplied Initial Provisioning nonetheless and that:

> "In those circumstances the Defendant is estopped from contending that there has been a breach of contract for want of notification under clauses 46.1, 46.2 and/or 51.1 of the ECSURS, whether in relation to Initial Provisioning or otherwise".

257. Neither the type of estoppel nor its ingredients were set out. In the event, I have found that these provisions were varied by conduct (see [207]-[208]).

258. In the RR Entities' oral closing, it was suggested that a similar estoppel argument arose in relation to the clause 11 breach. The argument was not further developed. However, I cannot see any basis on which Goodrich's acquiescence in the RR Entities not providing information under clause 46.1 and/or (if relevant) the absence of attempts to agree recommended levels of provisioning in clause 50.2 could preclude Goodrich from complaining that the RR Entities had included an incorrect price in the Spares Orders and failed to pay the correct price.

F GOODRICH'S DAMAGES CLAIM FOR BREACH OF CLAUSE 11.1

F1 What is the correct counterfactual?

259. Goodrich's counterfactual case for the alleged breach of clause 11.1 is that "the RR Entities would have acquired the same number of [AECSUs] but would have specified in the relevant Spares Order and paid the correct price for them" (paragraph 41D of the Amended Particulars of Claim). The RR Entities' response to that claim (pleaded at paragraph 28C(3) of the Amended Defence) is:

> "The causal link asserted by the Defendant, and the proposition that the RR Entities would have acquired the same number of [AECSUs] are denied. If the RR Entities had specified World List Price or IPC x Mark UP on the relevant Spares Orders, the RR Entities would never have placed the Orders".

260. That paragraph is denied by Goodrich (paragraph 25C of the Amended Reply), and at paragraph 25B.3, Goodrich advances a positive case that RR Entities would have proceeded with the PAS.

261. A similar issue as to the correct counterfactual arose in *Medsted Associates Ltd v Canccord Genuity Wealth (International) Ltd* [2020] EWHC 2952 (Comm). In that case the claimant introduced clients to the defendant on terms that, if the defendant did business with them, the claimant would be paid commission. The defendant did business with those introduced clients without disclosing that to the claimant, and without making the promised payments. The defendant argued that damages should be assessed by reference to whatever level of trading would have taken place had it not concealed its activities from the claimant, on the basis that less trading would have taken place had it been necessary for the fees charged to take account of the payments due to the claimant. Mr Nicholas Vineall KC, sitting as a Deputy High Court judge, rejected that argument, stating at [39]:

> "The relevant breach in my view is therefore the failure to disclose the hidden trading, and the obvious concomitant of that is the resulting failure to pay the agreed remuneration to Medsted. Once the introductions are made the Medsted-Collins Stewart contract is akin to a unilateral contract: there is nothing more for Medsted to do, but if Collins Stewart does then trade with the Introduced Clients, Collins Stewart must pay the agreed remuneration to Medsted. On this analysis there is no need to ask whether the Introduced Clients would have continued to trade if Collins Stewart had insisted on maintaining the same terms as between Collins Stewart and its clients. That is simply not a relevant part of the "had the contract been performed" counterfactual, because Collins Stewart was not obliged to (and in the event did not) insist on maintaining the same terms as between it and the Introduced Clients".

262. I raised the *Medsted* and *British Gas* decisions ([143] above) with the parties prior to closing submissions. The RR Entities made a number of points in response.

263. First, they said that it was clear from Goodrich's pleading that it was making a factual claim about what the RR Entities would have done. As to this:

i) Paragraph 36A clearly pleaded "the correct price payable in respect of such units was World List Price pursuant to clause 9.2 of the ECSURS" That plea was not premised on Goodrich needing to prove a counterfactual that the RR Entities would have placed the same orders had they realised the price actually payable.

ii) It is correct that at paragraph 41D of its Particulars of Claim, Goodrich pleads that "further or alternatively" that if the RR Entities had complied with clause 11 of the ECSURS, the RR Entities would have acquired the same number of [AECSUs] but would have specified … and paid the correct price for them". However, if, as a matter of law, it is not necessary for Goodrich to prove a particular state of affairs to make good its claim in paragraph 36A, the fact that it may have asserted such a state of affairs "further or alternatively" in another paragraph of its pleading does not create a requirement for its case to succeed which would not otherwise exist. Superfluous pleading does not narrow the scope of the matters which have been pleaded.

264. Second, it is said that Goodrich's case that, if the RR Entities had breached clause 11.1 of the ECSURS by stipulating the wrong price, it follows that the RR Entities would have purchased the same number of AECSUs at the same price is a *non sequitur*. However, the points made in the previous paragraph apply equally here.

265. Third, it was suggested in written closing submissions that the "least burdensome obligations" rule applied here, and required the court to assess damages on the basis that the relevant orders had not been placed. The argument was put as follows:

> "If one were to ask what would have happened if the particular breach that is alleged – the 'assertion' of allegedly incorrect prices in Spares Orders – had not occurred, there are two possibilities: either (i) the 'assertions' in the Spares Orders would have been different (i.e. a different price would have been specified; or (ii) the 'assertions' would not have been made at all (i.e. the Spares Orders would not have been sent)."

266. I am not persuaded that the clause 11.1 breach is susceptible to a "least burdensome obligations" analysis. As pleaded by Goodrich, the breach of contract alleged is a failure to identify the price payable "for the Spare Parts identified in (a)", i.e., those which have been the subject of the Orders, which the RR Entities required Goodrich to deliver, and which Goodrich did in fact deliver. I am not persuaded that the obligation to specify the correct price for the AECSUs being ordered can be performed by not ordering AECSUs at all (in which scenario there would have been no delivery obligation at all). That is to confuse the position where there is more than one way of performing a contractual obligation to do a certain thing which obligation has fallen due for performance, and the position where different conduct by the Defendant would have prevented the obligation arising in the first place. In short, the argument directly cuts across the principle of law identified by Males LJ in *British Gas Trading*, [80]:

> "… Damages must be assessed on the basis that the party in breach had performed its obligations … In contrast British Gas seeks to assess damages on a different (and in my judgment wrong) principle, namely that the party in breach would have taken steps to avoid being in breach of contract in the first place".

In oral closing submissions, I understood Mr Toledano KC to accept that the "least burdensome obligations" rule was not applicable here.

267. Fourth, it is suggested that the decision in *Medsted* is either distinguishable or wrong. The attempt to distinguish the decision on the facts because "what seems to have exercised the Judge in *Medsted* was the fact that [the defendant] had taken a deliberate decision to breach its contract", whereas "in the present case … there is no suggestion that the RR Entities have

deliberately breached clause 11.1 of the ESCURS" was rightly not pursued in oral closing. There is no relevant legal principle which was in play in that case which turned on the question of whether the breach in question was deliberate or not.

268. As to the suggestion that the decision is wrong:

i) First, there is criticism of the Judge's statement "contractual damages are not intended to put the Claimant in the position had there been no breach of contract", a statement which Adam Kramer KC, in *The Law of Contract Damages* 3rd (2023), [13-34] note 82 describes as "somewhat bizarre".

ii) With respect to that submission, and Mr Kramer KC's observation, I do not believe it is a fair characterisation of Mr Vineall KC's judgment, although I accept that the language used involves somewhat of a shorthand. The point was made in response to the defendant's suggestion that it could have avoided the breach of contract by not entering into the relevant trades, and damages should be assessed on that basis. The Judge's point was that damages were intended to put the claimant in the position as if the relevant contractual obligation had been performed (and hence no breach) rather than in the position in which the relevant contractual obligation had never arisen for performance (and hence no breach). To that extent, I am not persuaded that the decision involves any different reasoning from that in *One-Step* (from which Mr Vineall KC quoted extensively at [29]) and which the RR Entities themselves pray in aid – damages are ordinarily to be assessed so as to put the claimant in the position as if the relevant obligation had been performed (and hence no breach) rather than in the position as if the relevant obligation had been varied (and hence no breach): see [91]. Essentially the same point was made by Males LJ in *British Gas Trading*, [77] ("damages must … be assessed on the basis that the party in breach had performed his contractual obligations. That is not, or at least not necessarily, the same as saying that damages should be assessed if the party had taken steps to avoid being in breach of contract in the first place").

iii) In *Medsted* there appear to have been two sets of breaches of contract in play: failing to provide information to the claimant as to the trades carried out with introduced clients, and failing to pay the commission the defendant had promised to pay on such trades ([1]). The various judgments are not always clear as to what breach had been established by the liability trial, but before Mr Vineall KC, it appears to have been common ground that the breach was the failure to disclose the trading in fact being conducted "so that Medsted could calculate the commissions and rebates due to it" ([26]), and the Judge concluded that "the relevant breach is … the failure to disclose the hidden trading, *and the obvious concomitant of that is the resulting failure to pay the agreed remuneration to Medsted*" ([39]) (emphasis added).

iv) On that basis, the Judge concluded that he "should assess damages on the basis that the trading which in fact happened did happen, but that (unlike what in fact happened) Collins Stewart would have paid Medsted what it had promised to pay in relation to such trading" ([41]).

269. Turning to Mr Kramer KC's criticism of the decision:

i) He suggests that the claimant should not be able to "cherry pick" one breach (failure to pay commission), and recover damages, the level of which depends on a level of business which would not have been achieved but for another breach, in a case in which breaches of both obligations had been established.

ii) Had the claimant only pursued an allegation for breach of the obligation to pay, he suggests that it should still only have been possible to recover damages by reference to the lower level of commission because "the claimant probably cannot cherry-pick defendant obligations in this way". That is a contentious assertion, which no doubt explains the qualified terms in which the conclusion is expressed. It does not sit easily with the Court of Appeal judgment in *Brown v KMR Services Ltd* [1995] 4 All ER 598 (as Mr Kramer KC acknowledges at [16-78]) or with cases addressing breaches of trust (see *Hotel Portfolio II UK Ltd v Ruhan* [2022] EWHC 383 (Comm), [278]-[293]).

iii) It is also suggested that "cherry-picking" would not work "except perhaps for the first commission payment, because as soon as the defendant had paid the first instalment, it would have adjusted its commission charges to the investors". If, however, there is a separate accrued obligation to pay commission on each of the transactions which was done, the claimant would be in the same position for later instalments as for the first.

iv) Finally, it is noted that "merely claiming in actions for debt for the historical payments may have bypassed this problem". I agree that a debt claim leads to a much simpler analysis.

270. In this case, I have concluded that, on its existing pleading, Goodrich can point to two types of breach – specifying the wrong amount in each Spares Orders, and not paying the amount payable on each Order. If the only breach pleaded had been the latter, then I can see no basis on which the RR Entities could argue that damages should be assessed on the basis that the later breaches would not have taken place had the correct price been paid on the first relevant Spares Order.

271. I am not persuaded that the existence of a breach of contract in relation to the specification of the price leads to a fundamentally different outcome, in which the RR Entities get to revisit their decision to order the AECSUs:

i) This would have the surprising effect that the RR Entities would be in a better position by reason of having committed two breaches of contract than if they had only committed one.

ii) In this case, and unlike *Medsted*, the RR Entities' complaint is not that, but for their breach of contract in failing to include the correct price on the first order, further orders would not have been placed. Their case is that, had they realised what the correct price, they would never have placed any orders at all (paragraphs 90 and 94(2) of the RR Entities' written closing). The substance of the case is indistinguishable from *British Gas Trading*.

iii) In *Medsted*, the Judge's concern (albeit it did not prove decisive) was that Medsted would be better off than if there had been no breach of contract ([42]). That is not the case here. Had the RR Entities done what they had promised to do, such that there was no breach of the ECSURS, they would have included the right price in the Spares Orders and paid that price. Performance of both of those obligations would not have left Goodrich better off.

iv) An important feature of this case is that the RR Entities obtained and used the AECSUs which they ordered, but failed to pay the agreed price for them. An assessment of damages by reference to a counterfactual world in which those AECSUs had not been ordered and paid for would involve a significant re-writing of history. I accept that, it is the nature of damages counterfactual analysis that they involve some revisionism. However, where the counterfactual requires the court to posit a world in which the obligations which were not performed never arose, that is frequently a sign that the wrong counterfactual is being used. That, to my mind, is the point which Andrews LJ was making in *British Gas Trading*, [89] when she said

> "It would not be open to a party who has breached a contractual obligation over a period of, say, one year to contend that, had it appreciated that it was in breach of contract, after two months it would have exercised a contractual option which enabled it to perform the contract in another way, which would have put an end to the breach, and therefore the injured party is only entitled to recover two months of its losses. It is not possible to re-write history in that way for the purposes of assessing damages for a breach that has already occurred. The converse must also be true. The injured party can only claim such recoverable loss, if any, as flowed from the proven breach. Since the option to change what had to be done in order to fulfil the contractual obligation was never exercised, the approach to the assessment of damages is no different from the approach that would be taken if the option did not exist."

v) In this case, the continued placing of orders gave rise to continued obligations to pay the amount due for those orders. Goodrich is entitled to bring proceedings on each of those claims, in respect of loss caused by the failure to pay what should have been paid.

272. Mr Toledano KC submitted that this result was "entirely unfair and uncommercial" and "sits very uneasily with the overall aim of compensatory damages" because "Goodrich would get an enormous windfall". I accept that, particularly through the judgments of Lord Sumption, English contract law has moved towards greater consistency between the rules which apply to the assessment of damages, and the compensatory rationale of those rules (see William Day and Sarah Worthington (Eds), *Challenging Private Law: Lord Sumption on the Supreme Court* (2020), xv-xvi and Adam Kramer, "Contract Damages", chapter 5 of the same volume). However, the assessment of compensation is not undertaken on a holistic basis, but by reference to the breaches of contract pleaded, and what the consequences of performance of those obligations would have been.

273. Nor am I persuaded that arguments about windfalls are helpful in the current context, particularly when the "windfall" in question is the payment of the contractual price for the AECSUs ordered and used by the RR Entities. If the court is to have regard to windfalls, then it is instructive to consider the position of the parties if the PAS had been the success which the RR Entities had expected it to be. The RR Entities would have made a large profit, and developed a highly competitive service to the detriment of market competitors, and all because it had been acquiring AECSUs from Goodrich at IPC. As the RR Entities' service design document of 6 October 2016 observed of the PAS:

> "The cost of all parts … is on average in the region of 20% of our advertised world list price … The cost base provides Rolls-Royce with a significant competitive advantage as it is unlikely that our competitors will be able to secure such cost-effective sourcing within our supply chain".

274. Yet on the RR Entities' case, their liability to Goodrich in damages would be assessed on the basis that, had the amount actually due been paid, the RR Entities would not have proceeded with the PAS, allowing them to retain the competitive benefits of their breaches of contract, but with damages being assessed by reference to a counterfactual in which those benefits would not have been obtained.

275. It should also be noted that this issue would only arise if the RR Entities had succeeded in their argument that the incorrect prices included in Goodrich's invoices (which reflected the incorrect prices in the RR Entities' Spares Orders) precluded what would otherwise be debt claims, to which counterfactual arguments of the type which I have just considered would be irrelevant. The wholly technical basis on which, on this assumption, no debt claims had arisen provide support for the approach to assessing damages which I have concluded is legally correct.

276. If I had proceeded on the basis that only one type of breach of contract was pleaded – the failure to include the correct price in each of the orders – then I do not believe this affects the analysis. Had each order included the appropriate price, Goodrich would have supplied the relevant goods and invoice and been paid the contractual price. A counterfactual which does not involve the RR Entities performing the relevant obligation (including the correct price in the orders placed), but the RR Entities never coming under such an obligation (because it did not place the orders) is, in my assessment, unsound and contrary to the decision of the Court of Appeal in *British Gas Trading*.

F2 FINDINGS IN RELATION TO THE QUANTUM OF THE DEBT/CLAUSE 11.1 DAMAGES CLAIM?

How many relevant PAS AECSUs were there?

277. I have set out above my reasons for concluding that 538 AECSUs were supplied to the PAS at [196] to [198] above.

278. Of those 538 AECSUs, 101 were originally shipped to AOG stores and later re-purposed to the PAS. I accept that any debt claim in relation to these 101 AECSUs must fail – at the date of acquisition, the RR Entities were permitted to acquire AECSUs for AOG or consignment stores at IPC (Schedule 25C paragraph 1.2 of the ECSURS). While clause 4 imposed certain restrictions on the use of Consignment Stores, Goodrich has advanced no claim for damages in relation to any repurposed AECSUs, and the factual issues which such a claim might have raised were not explored. Indeed, paragraph 36A of the Particulars of Claim was limited to AECSUs "acquired for use in the PAS". Goodrich's attempt to secure the factual findings to support that unpleaded claim in their written closing submissions must be rejected.

279. That reduces the number of AECSUs for the purposes of the clause 11.1/debt claim to 437.

How many of these constituted Initial Provisioning?

280. Of these 437, I am satisfied that 116 are supplies to OSSs and therefore did fall within the definition of Initial Provisioning (see [132]).

281. The result is that under clause 9.2 of the ECSURS, WLP was payable for 321 AECSUs, and the RR Entities are liable in debt for the difference between that figure, and the amount they have actually paid. That amount has been agreed by the experts at US$112,285,440.

Would the RR Entities have placed orders for the AECSUs which did not constitute Initial Provisioning had they appreciated that WLP would be payable?

282. While I have concluded that this is not a relevant enquiry, in case the matter should go further I have concluded that the RR Entities would not have placed the orders they placed to stock the PAS, to the extent that they did not constitute Initial Provisioning, had they appreciated that they would have to pay WLP for those units.

283. There was no argument at trial as to what, if anything, further would have happened in that scenario – e.g., as to whether there would then have been a negotiation of some kind and, if so, with what outcome – and therefore it is not necessary for me to make any further findings. Once again, Goodrich's attempts to obtain the factual findings for such a claim (in this case in post-hearing correspondence) must be rejected.

G GOODRICH'S CLAIM FOR AN INJUNCTION AND/OR SPECIFIC PERFORMANCE

284. This relief was claimed in support of Goodrich's claim for breaches of the Exclusivity Provisions. As that part of Goodrich's claim has failed, no orders are required.

H CONCLUSION

285. For those reasons:

i) RR Holdings is entitled to declarations that (a) the Call Option was validly and effectively exercised by the Call Option Notice; and (b) Goodrich was obliged to deliver the Call Option Exercise Preliminary Information Documents to RR Holdings on or before 6 December 2018.

ii) Goodrich must deliver the Call Option Exercise Preliminary Information to RR Holdings forthwith.

iii) Goodrich's claims for damages for breach of the Exclusivity Provisions and for an injunction and/or specific performance in relation to those obligations fail.

iv) Goodrich is entitled to recover as a debt, or alternatively as damages for breach of the ECSURS, an amount representing the difference between WLP for 321 AECSUs and the amounts which the RR Entities have actually paid, namely US$112,285,440.