Judgment Approved by the court for handing down

Case No: KB-2024 -000009

Neutral Citation Number: [2025] EWHC 529 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2025

Before:

Malcolm Sheehan KC
Sitting as a Deputy High Court Judge

- -

Between:

JAMES DONALD BARTOLOMUCCI (a Protected Party suing by his litigation friend JAMES M BARTOLOMUCCI)	**Claimant**
- and -	
CIRCLE HEALTH GROUP LIMITED	**Defendant**

- -

Alexander Hickey KC, Sanjay Patel KC, Richard Booth KC (instructed by **Anthony Gold Solicitors LLP**) for the **Claimant**
Alexander Hutton KC, Siward Atkins KC (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing dates: 19 – 20 November 2024

JUDGMENT

Malcolm Sheehan KC, Sitting as a Deputy High Court Judge:

1. On 12 May 2015 the Claimant, Mr James Bartolomucci, underwent a hip resurfacing procedure ("the Surgery") at what was then known as BMI The Edgbaston Hospital in Birmingham ("the Hospital"). The Surgery was performed by a consultant orthopaedic surgeon Mr Derek McMinn and hypotensive epidural anaesthesia was administered by a consultant anaesthetist Dr Malligere Prasanna, (together "the Consultants").

2. As a result of complications during the Surgery the Claimant suffered a catastrophic brain injury and has very significant and continuing care needs. Although not for determination in the current proceedings, the Claimant alleges that the surgery and/or the anaesthesia were not carried out with reasonable care and skill and he intends to seek damages as a result. The Defendant accepts that, for the purposes of the current proceedings for declaratory relief only, it should be assumed that the one or both of the Consultants were negligent.

3. The Surgery was performed pursuant to a contract ("the Contract") contained in contractual documents which are dated 23 April 2015. The parties to the Contract were the Claimant and BMI Healthcare Limited. In 2020, following a corporate acquisition, BMI Healthcare Limited changed its name to Circle Health Group Limited.

4. By these CPR Part 8 proceedings, which the Claimant brings by his father and Litigation Friend, Mr James M Bartolomucci ("Mr Bartolomucci"), the Claimant seeks a declaration as to the scope of the obligations undertaken by BMI under the Contract.

5. In summary, the dispute between the parties is whether the Defendant is contractually liable for the acts and omissions of the Consultants. The Claimant's position is that the services for which the Defendant is responsible under the Contract included all inpatient surgical and anaesthetic services provided by the Consultants during and in relation to the Surgery.

6. The Defendant accepts that it is responsible for a range of services provided to the Claimant in association with the Surgery, including nursing services, along with the provision of food, accommodation and surgical facilities. The Defendant denies that its contractual liabilities extend to the provision of services by the Consultants. On the Defendant's case the Consultants provided their services direct to the Claimant and independently of BMI and thus the Claimant's remedy in respect of any negligence by the Consultants is through action against the Consultants themselves.

Pre-contractual events and correspondence

7. The facts are largely agreed or unchallenged as between the parties. The Claimant is a citizen of and resides in the United States of America, as does his litigation friend. The Claimant was 19 at the time of the Surgery. By then he already had an almost five-year history of pain in his right hip caused by a collapsing head of his right femur. By 2013 the Claimant was advised by his physician in the United States that his treatment options were either total hip replacement or hip resurfacing.

8. The Claimant was advised in the United States to undertake the Birmingham Mid-Head Resection resurfacing procedure and Mr McMinn, who is one of the devisors of the procedure, was recommended to him. Correspondence in relation to a possible

procedure commenced in 2013 with the McMinn Centre, a research centre from which Mr McMinn worked, but the Claimant's surgery did not occur until 2015.

9. On 21 April 2015 Mr Bartolomucci received an email from the McMinn Centre. The email confirmed a consultation at the Hospital between the Claimant and Mr McMinn on 7 May 2015 with a view to the surgery being carried out on 12 May 2015. This email was not stated to be sent on behalf of BMI and was not copied to BMI. It stated that:

> "BMI Edgbaston Hospital offers a '**Self Pay Options' scheme** for patients. Please note that this scheme is subject to satisfactory pre-operative assessment by BMI Hospital during the week prior to admission to hospital. The prices quoted allow for up to a seven night stay to include everything related to the in-patient stay e.g. surgeons' fees, any anaesthetic fees, accommodation fees, theatre fees, theatre consumables, ward consumables, radiology, pathology, inpatient physiotherapy etc."

10. The email went on to state that payment for the intended surgery should be made prior to admission to the Hospital and that instructions regarding payment would be provided by the Hospital. Essentially the same information was included in a letter from the McMinn Centre of the same date. The email also stated that payment for items including pre-operative and post-operative consultations and x-rays would be charged separately, with the invoices for the consultations to be sent by the McMinn Centre.

The Contractual Documents

11. The agreed contractual documents are dated 23 April 2015. They consist of a covering letter ("the Covering Letter"), a quotation for the surgery ("the Quotation") and the BMI Self-Pay Terms and Conditions ("the Terms").

The Covering Letter

12. The Covering Letter is addressed to the Claimant and has the heading "fixed price package". The relevant parts of the Covering Letter are:

> "Following your consultation with Mr McMinn please find enclosed details of our Self-Pay fixed price package for your surgery
>
> This offer is made subject to the Terms and Conditions set out in the enclosed and is subject to pre-assessment. It is valid at BMI the Edgbaston Hospital in Birmingham with Mr McMinn
>
> Please see the enclosed quote and associated terms and conditions.
>
> Fixed price packages may not be appropriate for everyone and confirmation as to whether you are eligible will be confirmed following your pre-assessment by one of our nursing team.

> If you wish to go ahead with surgery please sign one of the attached quote form pages and return to us at BMI the Edgbaston Hospital"

The Quotation

13. The Quotation is dated 23 April 2015 and is set out in a one-page document mainly featuring a text box. The price stated is £14,220 and the procedure is described as "Birmingham Hip Resurfacing".

14. The text box then lists on the left side of the page the items that *"your package includes"*. These are:

> *"**Before your admission:***
>
> - *Pre-operative assessment before admission, if necessary*
>
> ***During your hospital stay:***
>
> - *Hospital accommodation and meals*
> - *Nursing care and facilities*
> - *Theatre fees, drugs and dressings*
> - *High Dependency Unit and/or Intensive Care Unit, if required*
> - ***Consultants' operating fees***
> - *BMI Hospital approved prosthesis*
> - *Inpatient imaging, physiotherapy, pathology and histology*
> - *Walking aid, if clinically required*
>
> ***After your discharge:***
>
> - *Take-home drugs for up to 5 days after discharge and antibiotics for the prescribed period*
> - *Removal of stitches, dressings or plaster at the hospital if required"*

15. On the right side of the text box is a list of items that *"your package does NOT include"*. These are listed as follows:

> - *"Diagnostic tests or services received prior to your pre-operative assessment or admission, whichever is first*
> - *The consultant's fee for the initial outpatient consultation*

- *Convalescence and treatment provided after your consultant has advised that you are fit for discharge*

- *Personal costs such as telephone, alcoholic drinks, and visitors' meals*

- *Ambulance fees*

- *Any cost not specified as included"*

16. Below the text box in the Quotation is some further text. This includes the following:

> "NB No extra charges will be made by the hospital if you stay longer than anticipated if this is due to a clinical reason related to your operation/treatment
>
> Any additional items not included but required as part of your treatment will be charged to you by the hospital, your consultant or other third party separately. If you are in any doubt about what is included in the cost of your quotation, you are advised to seek advice from the hospital and/or your consultant."

17. At the bottom of the Quotation is the statement *"I confirm that I accept this quotation on the terms stated overleaf".* There is then a space for the Claimant to sign and date the Quotation.

The Terms

18. The Terms consist of 25 numbered clauses appearing under various subheadings. The following clauses were relied on by one or both of the parties as being relevant to the interpretation of the Contract on the issues that are the subject matter of the declaration sought.

19. Under the heading "Discharge" clause 4 of the Terms provides that *"The decision as to whether you are fit for discharge rests with your consultant. Should you wish to stay in hospital after you have been declared fit for discharge the hospital's standard charges will apply and you will be invoiced separately."* Under the same heading clause 5 provides that *"If you discharge yourself against the advice of your consultant no further services will be provided as part of the package".*

20. Under the heading "Complications" clause 7 of the Terms stipulates that *"The package covers the cost of medical or surgical complications related to your surgery that become apparent within 30 days of discharge from the hospital following the procedure."* By clause 7(b) these costs are to be provided as part of the package provided that the patient has *"followed the advice of your consultant and other medical professionals involved in your treatment. The decision as to whether a condition or complication is related to the procedure rests with your consultant".*

21. Under the heading "Written Quotation" clause 14 of the Terms states *"This package and these terms and conditions apply when quoted to you by BMI Healthcare. Your consultant and their secretarial staff do not have authority from the hospital to quote for any hospital charges."*

22. Central to the Defendant's submissions in this case are clauses 18-20 which appear under the heading "Consultants' Fees". These provide as follows:

> "18. All consultants are self-employed and provide their services direct to the patient.
>
> 19. Your quote will state whether the consultant's fees for the procedure and the follow up (but not the initial consultation fee) are included in the quoted price. If the fees are included, the hospital will usually collect the consultant's fees as agent but occasionally, you will receive a separate invoice from the consultant for his portion of the procedure cost. If this occurs, the package price will be automatically reduced by the amount of the consultant's fees.
>
> 20. The initial consultation fee with the consultant is a separate fee (outside the package price) which will be invoiced to you directly by the consultant."

23. Under the heading "General Provisions" clause 23 states that *"The services are provided by BMI Healthcare Limited"* but the term "services" is not further defined in the contract.

24. The initial consultation with Mr McMinn referred to in the 21 April 2015 email took place as scheduled on 7 May 2015. Mr McMinn raised an invoice for this initial consultation addressed to the Claimant and dated 11 May 2015 in the sum of £225. Payment was requested to be made to the McMinn Centre Ltd.

25. The sum stipulated in the Quotation was paid by Mr Bartolomucci on 4 May 2015 and BMI confirmed receipt of payment for the surgery on 8 May 2015. Although the Claimant did not sign in the indicated position on the Quotation, both parties accept that the Contract was concluded by the Claimant's acceptance of the terms as evidenced by the payment on his behalf of the contractual sum. The Contract was concluded on the terms summarised above. The Contract was initially conditional and become unconditional once the Claimant was approved for the Surgery by Mr McMinn at the pre-operative assessment.

The Surgery and following events

26. Prior to the Surgery the Claimant was separately consented for both the Surgery and the anaesthesia to be used during the Surgery. During the Surgery and while under anaesthesia the Claimant suffered a significant period of very low blood pressure and low pulse frequency. Mr Bartolomucci's understanding is that the Claimant had to be resuscitated during the procedure. While the Claimant was stabilised and the Surgery completed, he experienced hypotension and tachycardia during recovery and was moved to an intensive care unit at the BMI Priory Hospital, where he was treated until a further transfer to the intensive care unit at Queen Elizabeth Hospital on 15 May 2025. At this stage the diagnosis of a significant brain injury was confirmed.

27. The Claimant subsequently returned to the United States where Mr Bartolomucci is his primary carer. His injuries are profound and have left him nonverbal. He has extensive

care needs which are described in Mr Bartolomucci's witness statement. The Claimant requires one to one support and 24-hour care. It is anticipated that the Claimant will remain permanently in need of this level of support and will be unable to work or live independently in the future.

28. The Claimant, through Mr Bartolomucci has asserted claims against the Defendant, Mr McMinn and Dr Prasanna. As already indicated, the Defendant denies any liability to the Claimants for the reasons that form the basis of their defence to the claim for declaratory relief. Mr McMinn's position, as set out in a letter from his representatives dated 20 September 2019, is that the injuries are not the result of any breach of duty on his part. Accordingly, he denies any liability to the Claimant.

29. A letter of claim was sent to Dr Prasanna in 2017 and acknowledged on 18 May 2017. Mr Bartolomucci was then told that on 13 July 2017 Dr Prasanna had voluntarily erased himself from the General Medical Council's medical register and appeared to have left the United Kingdom to work in the United Arab Emirates. The Medical Defence Union states in a letter dated 31 January 2018 that it did not represent Dr Prasanna and that they had no interest in the claim intimated against him.

30. The Claimant's representatives sent a combined Pre-Action Protocol letter of claim to Dr Prasanna, the Defendant, Mr McMinn and another healthcare professional on 1 November 2018. Although the letter stated that "*the applicable law to this case is both that of negligence and contract"* the letter does not make any reference to the terms of the Contract or specify which of the named defendants were said to be liable pursuant to the Contract. The claim under the Contract against the Defendant was first set out in a second addendum to letter of claim dated 1 October 2021. The Claim Form in these proceedings was issued on 3 July 2023.

The Pleadings

31. By his Particulars of Claim the Claimant seeks declaratory relief including a declaration that the services provided pursuant to the Contract included *"all inpatient medical and surgical treatment and healthcare required as part of the "Birmingham Hip Resurfacing" procedure".* The Claimant also seeks a declaration that the Defendant has *"single-point liability in contract"* to the Claimant for the acts or omissions of the Consultants involved in the Surgery.

32. The Particulars of Claim set out the factual background to the claim, the relevant terms of the Contract and articulate the Claimant's position as summarised below. The Particulars of Claim include an averment that no contract was made between the Claimant and Mr McMinn or Dr Prasanna. At paragraph 21 the Claimant alleged that clauses 18 and 19 of the Terms are unenforceable pursuant to section 2(1) of the Unfair Contract Terms Act 1977, although this position was not pursued in detail.

33. The Defence sets out the basis upon which the claim for a declaration is opposed. The Defendant admits contractual responsibility for the provision of nursing care to the Claimant but not in respect of surgical care. The Defence makes no admissions as to whether there was a contract between Mr McMinn and the Claimant or between Dr Prasanna and the Claimant. Paragraph 21 of the Defence denies that Clauses 18 and 19 of the Terms are exclusion clauses for the purposes of section 2(1) of the Unfair Contract Terms Act 1977.

34. The Claimant relies on a statement in paragraph 17(2) of the Defence as an effective admission of the Claimant's entitlement to declaratory relief. By that sub-paragraph the Defendant admitted that the total price *"included all services typically required for the Surgery and immediate post-operative care, except for the items excluded from this listed on the right of the Quotation page."*

The Law

35. It is common ground that if it is determined that the provision of surgical services was within the scope of the Contract then section 13 of the Supply of Goods and Services Act 1982 implied a term into the Contract that the surgical services would be carried out with reasonable care and skill. The Contract in this case pre-dated the coming into force of the Consumer Rights Act 2015.

36. There was also effective agreement between the parties as to the proper approach to contractual interpretation. In his submissions the Claimant relies on the eight principles set out by Vos C in paragraph 18 of the Court of Appeal's judgment in *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ 821:

> "The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see Arnold v. Britton *[2015] UKSC 36* *[2015] AC 1619* per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;
>
> A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20;
>
> In arriving at the true meaning and effect of a contract or order, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract or consent order and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 17;
>
> Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v. Kookmin Bank *[2011] UKSC 50* *[2011] 1 WLR 2900* per Lord Clarke JSC at paragraph 23;

> Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 18;
>
> If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v. Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 2 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 19;
>
> In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v. Capita Insurance Services Limited *[2017] UKSC 24* per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent– see Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 13; and
>
> A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11."

37. The Claimant places particular emphasis on the principles which relate to the extent to which factual background matters are admissible when interpreting the contract. As set out above, these are limited to facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made.

38. The Defendant's preferred summary of the current statement of the law as it relates to the proper approach to the interpretation of contracts is contained in the judgment of Carr LJ (as she then was) in *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645 at paragraphs [18] and [19]:

"[18]A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:

(1) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;

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

(3) *When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;*

(4) *Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;*

(5) *While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;*

> (6) *When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties*
>
> *[19] Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."*

39. In oral submissions it was helpfully accepted by counsel for the Claimant and Defendant that, while differently expressed, both *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ 821 and *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645 contained accurate and consistent statements of the current law as to the correct approach to contractual interpretation.

40. The relevance of factual background to the interpretation of standard form contracts was considered by Lord Millett in *AIB v Martin* [2002] WLR 94 where he stated at paragraph 7:

> "A standard form is designed for use in a wide variety of different circumstances. It is not context-specific. Its value would be much diminished if it could not be relied upon as having the same meaning on all occasions. Accordingly the relevance of the factual background of a particular case to its interpretation is necessarily limited. The danger, of course, is that the standard form may be employed in circumstances for which it was not designed. Unless the context in a particular case shows that this has happened, however, the interpretation of the form ought not to be affected by the factual background."

41. As far as the method of discharge of contractual obligations is concerned, the Claimant relies on a passage in the judgment of Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848:

> "Where what is promised will be done involves the doing of a physical act, performance of the promise necessitates procuring a natural person to do it; but the legal relationship between the promisor and natural person by whom the act is done, whether it is that of master and servant, or principal and agent, or of parties to an independent subcontract, is generally irrelevant. If that person fails to do it in the manner in which the promisor has promised to procure it to be done, as, for instance,

> with reasonable care and skill, the promisor has failed to fulfil his own primary obligation."

42. A similar statement of the law relating to the discharge of contractual obligations by third parties to a contract is contained in a passage of the judgment of Lord Slynn in the Privy Council case of *Wong Mee v Kwan Kin Travel Services* [1996] 1 WLR 38 at 42. The law in this regard is also summarised in *Chitty on Contracts*, 35th edition, at 23-084 in the following terms:

> "A contracting party can in the case of many contracts enter into an arrangement by which some other person may perform for him, as far as he is concerned, the obligations of the contract, and the other contracting party will be obliged to accept that performance if it is performance in accordance with the terms of the Contract. The contracting party will, however, be liable for any breach that may happen and the other contracting party is not bound or indeed, entitled to sue the substituted person for breach of contract, although there may of course be a remedy in tort."

43. In addition to these general principles the Claimant also relies on decisions made in the specific context of medical care provided in a hospital setting before the National Health Service Act 1946 came into effect in July 1948. In *Gold v Essex County Council* [1942] 2 KB 293 the underlying facts were rather different from those that apply in this case. The principal issue concerned vicarious liability for the acts of a radiographer who was accepted to be an employee of the relevant hospital. Despite this different factual context, the Claimant relies on the judgment of Lord Greene MR which states:

> "Apart from any express term governing the relationship of the parties, the extent of the obligation which one person assumes towards another is to be inferred from the circumstances of the case. This is true whether the relationship be contractual (as in the case of a nursing home conducted for profit) or non-contractual (as in the case of a hospital which gives free treatment). In the former case there is, of course, a remedy in contract, while in the latter the only remedy is in tort, but in each case the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf, and this is equally true whether or not the obligation involves the use of skill. It is also true that, if the obligation is undertaken by a corporation, or a body of trustees or governors, they cannot escape liability for its breach, any more than can an individual, and it is no answer to say that the obligation is one which on the face of it they could never perform themselves."

44. The Claimant also relies on a passage in *Cassidy v Ministry for Health* [1951] 2 KB 34. This was also a case concerning vicarious liability in tort rather than liability in contract.

The Claimant nonetheless relies on Lord Denning MR's observations concerning the relevance of the question of who selects and employs the relevant doctor or surgeon to the incidence of vicarious liability:

> "I think it depends on this: Who employs the doctor or surgeon - is it the patient or the hospital authorities? If the patient himself selects and employs the doctor or surgeon, as in Hillyer's case, the hospital authorities are of course not liable for his negligence, because he is not employed by them. But where the doctor or surgeon, be he a consultant or not, is employed and paid, not by the patient but by the hospital authorities, I am of opinion that the hospital authorities are liable for his negligence in treating the patient. It does not depend on whether the contract under which he was employed was a contract of service or a contract for services. That is a fine distinction which is sometimes of importance; but not in cases such as the present, where the hospital authorities are themselves under a duty to use care in treating the patient.
>
> I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services."

45. At paragraph 23 of his judgment in *Woodland v Essex County Council* [2014] AC 537 Lord Sumption stated, again in the context of vicarious liability, that *"the time has come to recognise that Lord Greene in Gold and Denning LJ in Cassidy were correct in identifying the underlying principle".*

46. While the Claimant's representatives accept that the matter was not pleaded, in oral submissions they also relied on the provisions of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ("the 2014 Regulations"). By Regulation 2 "employment" is defined as including *"the grant of practising privileges by a service provider to a medical practitioner, giving permission to practice as a medical practitioner in a hospital managed by the service provider".*

47. Schedule 1 to the 2014 Regulations lists "regulated activities" as including surgical procedures carried out by "healthcare professionals", which is defined as including medical practitioners. "Service providers" of regulated activities are required to be registered and all registered persons are required to comply with fundamental standards set out in Section 2 to the 2014 Regulations.

48. Regulation 12(1) of the 2014 Regulations requires that *"care and treatment must be provided in a safe way for service users".* This requires a registered person to assess *"the risks to the health and safety of service users of receiving the care or treatment",* to do all that is reasonably practicable to mitigate such risks and to ensure that all persons providing care have *"the qualifications, competence, skills and experience to do so safely".*

The Documentary Evidence

49. The Consultants both practised at the Hospital pursuant to the grant of separate practising privileges agreements. Although Mr McMinn and Dr Prasanna each had separate practising privileges agreements, they contained some common terms. They refer to the overall relationship between BMI and the consultants who practise in its hospitals as being a "*partnership for the delivery of care to patients*".

50. Each of the practising privileges agreements included terms and conditions stating that each Consultant is *"independent contractor and not an employee, agent or servant of the Hospitals. You are therefore responsible for your own actions and those of your employees whilst on the Hospitals' premises".*

51. On 11 May 2015 the Claimant signed a consent form for the Surgery. The consent form stated that the intended benefits and the serious or frequently occurring risks of the Surgery had been explained to the Claimant.

52. Dr Prasanna completed a document entitled "anaesthetic record" on the date of the Surgery. This document records that Dr Prasanna took a past medical and anaesthetic history from the Claimant and obtained his consent to undertake the risks and benefits of the use of anaesthetics involved in the Surgery.

The Oral Evidence

53. Mr Bartolomucci provided a witness statement dated 22 June 2023. He joined the proceedings by video link but his evidence was not challenged by the Defendant and accordingly it was not necessary for him to be called to give oral evidence. Mr Bartolomucci's witness statement deals with the background to the Surgery consistent with the summary set out above and also gives details of the claims correspondence.

54. The Defendant served a witness statement of Mr Paul Manning dated 14 August 2024. Mr Manning is the Chief Medical Officer of Circle Health Holdings Ltd ("Circle"), which is the parent company of the Defendant. Mr Manning trained and practised as a consultant trauma and orthopaedic surgeon in the National Health Service and at various private hospitals including BMI. Circle acquired BMI in 2020 and Mr Manning became the Chief Medical Officer of Circle in the same year. Although Mr Manning had practised in BMI hospitals, he did not hold any management role in BMI and his managerial interest in former BMI hospitals only commenced in 2020.

55. The Claimant contended that Mr Manning's evidence should not be admitted as he had no connection with the relevant events at the time of the surgery and his only direct involvement with the matter has been a managerial responsibility in relation to the defence of the claim commencing in 2020. His witness statement was said to be objectionable because (i) it was a recitation of events based on documents (ii) contained inadmissible opinion evidence and (iii) related to matters that were not part of the factual matrix known to both parties to the contract.

56. The Defendant accepted that there was some force in the Claimant's criticisms of some parts of Mr Manning's statement but contended that significant parts of Mr Manning's witness statement were admissible. I ruled that there were some limited parts of Mr Manning's evidence that were admissible. I was then addressed by the parties and ruled

on which paragraphs or sections of the witness statement should be admitted. Mr Manning was then cross-examined about the sections of this witness statement that were admitted.

57. In cross-examination Mr Manning was challenged about the general position adopted by the Defendant in denying that its contractual arrangements included the provision of surgical services for the relevant surgery required by respective patients. Mr Manning stated that the Defendant accepted legal liability for those goods and services it supplied in its contracts with patients but, in his view, the Defendant's contractual arrangements in general did not include within their scope the provision of surgical services which were provided directly to patients by their treating surgeons.

58. Mr Manning confirmed that the Defendant had revised its standard terms and no longer used the Terms as part of its contractual arrangements. His evidence was that his understanding was that the systems operating in former BMI hospitals have, with minor changes, remained as they were in 2015.

59. Mr Manning explained that once every year medical professionals with practising privileges provide their prices for a list of surgical procedures to the Defendant so that the Defendant can include those prices in a quotation to patients where a fixed price package is to be offered. Mr Manning accepted that, in his experience, a patient would not usually negotiate a price for their surgery with either their surgeon or anaesthetist. His understanding was that both surgeons and anaesthetists are obliged to communicate their fee rates to prospective patients but he accepted that this was not always done and that most patients do not ask.

60. Mr Manning went on to describe the various steps taken by the Defendant to meet its regulatory obligations in relation to medical procedures, including ensuring proper registration, membership of appropriate professional bodies and the verification of medical indemnity insurance. The practising privileges arrangements provided the Defendant with its means of insisting that medical practitioners provided all the information required by the Defendant. He confirmed that the Defendant could suspend, restrict or terminate practising privileges under these arrangements and these powers were used as appropriate and whenever there was a statutory obligation to do so.

The Submissions

61. Oral submissions were principally made by Mr Hickey, Mr Hutton and Mr Atkins, all King's Counsel, and I am grateful to them for their clear presentation of the issues.

The Claimant's Submissions

62. The Claimant's case, in essence, is that he accepted BMI's offer to provide a fixed price package of services. There is no dispute that the fees for the provision of the services of the Consultants during the hip resurfacing procedure were included in the contractual price of the package offered by BMI. Properly interpreted, the package of services accepted by the Claimant included the performance of his surgery by the Consultants. As a result, there was an implied term that BMI would use reasonable care and skill in the provision of all services included in the package.

63. This overall submission was expanded upon as follows:

i) The language of the contract describes its subject matter as the provision of a "Birmingham Hip Resurfacing" procedure. The provision of the surgical services necessary to carry out the hip resurfacing were accordingly the most essential part of what BMI contracted to provide. The suggestion that BMI would offer a fixed price, self-pay contract for a hip resurfacing procedure that did not include the provision of the surgical services during the resurfacing procedure itself cannot be reconciled with the description contained in the contract.

ii) Further, the covering letter refers to the offer of a *"fixed price package for your surgery".* The principal subject matter of the contract is therefore described as the Surgery itself. The Contract was not a contract "in relation to" the Surgery but a contract for the Surgery itself and patients entering into a contract on these terms would be shocked to discover that it was being contended that surgical services were not part of the Contract.

iii) The covering letter also refers to the package offered as being *"valid at BMI the Edgbaston Hospital in Birmingham with Mr McMinn".* This is said to demonstrate that the offer made by BMI in the covering letter was an offer to provide a package of services that included the surgical services of Mr McMinn. A fixed price package is an easy concept for the lay person to understand but a fixed price package that excluded responsibility on BMI's part for the surgery provided would undermine the whole basis of the package.

iv) The parties to the contract are the Claimant and BMI. They are described as such and clause 23 provides that "the services" are provided by BMI. Neither of the consultants are identified as parties to the contract.

v) The Claimant particularly relies on the submission that there is no positive allegation of separate contracts entered into with either of the Consultants in respect of the separate provision of any part of the package. Indeed, there is no evidence that the Claimant had heard of or met Dr Prasanna prior to the day of the Surgery. The Consultants practised at the Hospital pursuant to the arrangements that they had made with the Defendant about which the Claimant had no knowledge. There is no documentary evidence of contracts with Mr McMinn or Dr Prasanna and this reflects the reality that there was only one contract concerning all aspects of the surgery and that was the Contract between the Claimant and BMI.

vi) The test formulated by Denning LJ in *Cassidy v Ministry for Health* [1951] 2 KB 34, as set out above, should be applied in this case. The "important question" is said to be whether the Claimant employed the Consultants. The Claimant says that, on the facts, it is plain that he did not.

vii) It is common ground that Consultants' operating fees were one of the items listed in the quotation as being included in the package of services included in the Contract.

viii) Having surgical services provided by the Consultants outside of the scope of the Contract, but nursing services provided during surgery within scope, is both confusing and may create unnecessary potential difficulties in cases where negligence is alleged against both surgeons and nurses involved in surgery.

ix) It is immaterial whether the Consultants were also separately liable to the Claimant in tort. This does not prevent BMI having undertaken a contractual liability for their actions.

x) By paragraph 17(2) of its Defence the Defendant accepted that it had agreed to provide *"all services typically required for the Surgery and immediate post-operative care"* and this admission should be taken to include the provision of the services of the Consultants. The Defendant should accordingly be taken to have admitted the Claimant's plea for a declaration.

xi) If paragraph 17(2) is not sufficient to amount to an admission, it is in any event inconsistent with the Defendant's submissions that the package was merely a fee collection mechanism.

64. The Claimant argues that his interpretation of the scope of the Contract is consistent with and supported by the regulatory framework set out in the 2014 Regulations described above. The Claimant argues that the Defendant's position in this litigation is contrary to the requirements of the 2014 Regulations which, by Regulation 12, impose safety obligations on Service Providers such as BMI in respect of Regulated Activities, including surgery.

65. In discussion during submissions, counsel for the Claimant accepted that none of the provisions of the 2014 Regulations would make it unlawful for BMI to contract with patients in such a way that the provision of surgical services was not included within the scope of their contractual obligations. Nonetheless, the Claimant argued that the regulatory framework made it more likely that BMI would have sought to contract consistently with its regulatory obligations. The Defendant was already under certain regulatory duties in respect of Regulated Activities carried out in the Hospital and it would be entirely consistent with these regulatory responsibilities that the Defendant would have undertaken contractual responsibility for the acts of the Consultants, with the Regulations making it clear that medical practitioners acting under practising privileges are deemed employees for the purposes of the Regulation.

66. While not accepting that the content of the practising privileges arrangements form part of the admissible factual nexus for the interpretation of the Contract, the Claimant argues that the references in them to the standards that BMI set for consultants practising in their hospitals are consistent with the Defendant including in the Contract the inpatient services of the Consultants as part of the goods and services offered to its patients.

67. In respect of the Defendant's reliance on clauses 18-20 of the contract as its principal basis for resisting the grant of the declarations sought by the Claimant, the Claimant's position is:

i) Clauses 18-20 of the Terms appear under the heading "Consultants' Fees" and setting out the arrangement for the payment of fees is the function of these

clauses. They do not purport to and do not have the effect of determining the scope of the services to be provided under the contract, which is something addressed by the Quotation.

ii) Separate provision in the Contract in relation to payment of consultants' fees was necessary because consultants trade separately to BMI and can raise invoices separately to BMI. Clauses 18-20 therefore explain that some fees for the services of consultants may be included in the quotation received from BMI and what happens if a consultant also issues an invoice for these services.

iii) The use of the term "fees" should not be seen as indicative of an intention to exclude from the scope of the Contract the services associated with the relevant fees. The package also refers to "theatre fees" as included within its scope but it has not been suggested that BMI would not be liable in respect of a breach arising from the condition of the operating theatre simply by reason of the use of the word "fees" to describe what was being provided.

iv) In the skeleton argument served on the Claimant's behalf clause 18 is described as *"a necessary introduction to clauses 19 and 20"* because a patient/consumer cannot be expected to know that *"consultants are self-employed people that may operate independently of the hospital".* Its function is said to be explanatory of this position rather than functioning to confer a right or exclude a liability.

v) The reference in clause 19 to BMI usually collecting fees "as agent" for the consultant where the consultant's fees are included in the fixed price is said to have the practical purpose of telling the patient who will issue relevant invoices. The Claimant states that the use of the term agent cannot be interpreted as a matter of law as indicating that BMI acts as an agent *"in a contractual relationship between the patient and the consultant"* because there is no pleaded allegation that such a relationship exists and no evidence of it. The only relevant contractual relationship was between the Claimant and BMI.

vi) Had the role of clauses 18-20 of the Contract been to define the scope of the services for which BMI and the consultants would respectively be responsible, then different language would have been used and the scope of the services would have been the focus of the clauses rather than arrangements for the payment of fees.

vii) There is no reason in principle why a party cannot undertake contractual responsibility for performance provided by a self-employed third party, as confirmed by the passages of *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, *Wong Mee v Kwan Kin Travel Services* [1996] 1 WLR 38 and *Chitty on Contracts* set out in the discussion of the relevant law above. As such, the reference to consultants being self-employed does not indicate that BMI has not accepted responsibility for services which are to be performed by the Consultants but which are otherwise within the scope of the description of services provided as part of the contractual package.

viii) The Claimant argues that clause 7, by which BMI agreed that the cost of treatment for surgical complications arising within 30 days of discharge were included in the contractual package, amounts to an express agreement by BMI

that it *"agreed to be responsible for the acts of the consultants".* The Claimant also relies on clauses 4 and 5 of the Contract to show that BMI contracted to provide services which were, as to their extent, dependent on decisions made by the consultants. This is said to be evidence that by the Contract BMI assumed responsibility for an integrated form of care.

ix) The function of the words "*direct to"* in clause 18 is to confirm that the Consultant named in the Quotation would carry out the surgery him or herself and that they would not delegate performance of the surgery to another.

68. As far as the correct approach to analysis of the Contract is concerned, the Claimant argues that the scope for taking factual matrix factors into account in this case is limited because the self-pay terms were BMI standard terms that were not the subject of individual negotiation. The Claimant relies on Lord Millet's observations at paragraph 7 of *AIB v Martin* [2002] WLR 94, as set out above, to argue that the self-pay terms should be interpreted primarily by an analysis of the language used.

The Defendant's Submissions

69. In support of its position that the scope of the Contract did not extend to the provision of the Consultant's services the Defendant principally relies on clauses 18 and 19 of the Terms, which it argues are not technical, should be read together and the "crystal clear" meaning of which can be understood by any reader of the Terms.

i) Clause 18 provides that the Consultants provide their services *"direct to the patient"*. This is said to be an unambiguous statement that the Consultants provide those services to the Claimant themselves and not through BMI. As a result, the services provided by BMI referred to in clause 23 do not include those of the Consultants.

ii) Clause 19 explains that where fees for a procedure or follow up are included in the cost of the package BMI will *"usually collect the consultant's fees as agent*" for the Consultant. If, however, the Consultant issues an invoice for *"his portion of the procedure cost"* then the package cost charged pursuant to the Contract will be reduced by the amount of the Consultant's fee.

iii) The Defendant argues that collection of fees by BMI as agent for the Consultant makes it clear that the Consultants are providing services direct to patients. Were the surgical services of the Consultant part of the goods and services included within the Contract there would be no need for any reference to collection as agent. Those services would simply form part of the cost of the goods and services included in the Contract that BMI would be able to charge for because it had undertaken the obligation to provide them under the Contract. The use of the term agent in the Contract only makes sense if there is a principal other than BMI whom BMI acts as agent for.

iv) The provision for the collection of fees by BMI as agent for the Consultant is a mechanism of convenience for the patient and the Consultant, reducing the number of payments that have to be made.

v) The heading "Consultants' Fees" above clauses 18-20 of the Terms uses the word "fees" because each of the following clauses serves to explain that only payment of the Consultants' fees rather than the provision of their services is included within the package, and even then, the included fees are limited to those described.

70. The Defendant argues that other aspects of the contractual documentation support its interpretation of clauses 18 and 19:

i) Although the Quotation states a single price for the items listed as included in the package, the Quotation overall makes it clear that there are *"a number of different fees, costs and services, not all of which are charged or provided by the Hospital"* with some of them instead provided by the Consultants or other third parties.

ii) The language used in the Quotation to describe what is included in the package is significant. The list of included items refers to the fees of the Consultants carrying out the relevant operation as being included. The Quotation could have referred to the services as being included but, instead, the use of the term "fees" makes it clear that what is included in the package is payment of the sum that the Consultants charge in respect of their services, rather than the provision of the services themselves.

iii) The use of bold type in the Quotation for the term "Consultants' operating fees" is also relied on. The Defendant notes that otherwise there are three headings in bold text, relating to the periods before admission, during the hospital stay and after the patient's discharge. While "Consultants' operating fees" relate to something that takes place in the "during your hospital stay" part of the package, it is unique in being listed in bold, which the Defendant argues distinguishes this item from the plain type items which relate to services, facilities or objects which are provided by BMI. This distinct treatment of "Consultants' operating fees" is said to be consistent with clauses 18 and 19 of the Terms.

iv) Clause 4 of the Terms states that the treating consultant shall make the decision when to discharge a patient and clauses 5 and 7 (b) make provision for the consequences that result if the advice of the treating consultant is not followed. These are said to make it clear that the Claimant is *"under the care of the consultant, not the Hospital".*

71. The Defendant also relies on what it describes as the wider circumstances of the Contract in support of its position. The Claimant sought surgical treatment from Mr McMinn rather than from BMI. It was only via the McMinn Centre that the Claimant was introduced to the Hospital and all of his initial dealings were with Mr McMinn.

72. In response to the Claimant's criticisms of its position, insofar as not already addressed by their submissions summarised above, the Defendant argues that:

i) While the Contract provided for a self-pay fixed package that included the cost of the surgery, it does not follow that the parties must have agreed to include surgical services within the scope of the Contract and there should be no presumption to that effect. It is a non sequitur to suggest that just because

Consultants fees are paid as part of the Contractual sum that the provision of the Consultants services were included within the scope of the Contract.

ii) While it accepts that the reference in clause 18 to the Consultants being "self-employed" is not determinative of which party is contracting to provide the services of the Consultants, the reference to Consultants being self-employed *and* providing their services *"direct to"* the patient puts the matter beyond doubt.

iii) There is no obligation on the Defendant to identify when and how the Claimant made a contact with either of the Consultants for the provision of their services in relation to the procedure. It is sufficient for the Defendant to demonstrate that these services were not included in the Contract that is the subject matter of the claim for a declaration and the terms of the Contract itself make this sufficiently clear.

iv) Even if that was not correct, it is likely that the Claimant entered into contracts with both Mr McMinn and Dr Prasanna. In the case of Mr McMinn, all of the Claimant and Mr Bartolomucci's initial dealings were with Mr McMinn and the McMinn Centre and an invoice was raised direct to the Claimant in respect of the initial consultation, which is determinative evidence of there being a contractual relationship between them. The contract with the Claimant for Mr McMinn to provide surgical services was therefore likely concluded at the initial consultation on 7 May or on 11 May 2015 when the Claimant signed the surgical consent form.

v) As far as Dr Prasanna is concerned, he met with the Claimant on 12 May 2015 prior to the Surgery and they discussed the matters set out in the anaesthetic record. The Defendant's position is that in these circumstances it is not difficult to infer that a contract for the provision of services during the Surgery was formed. The Defendant contends that, in the context of privately paying medical treatment, oral contracts or contracts arising by conduct are common, giving the anecdotal example of the lack of written contract commonly existing in relation to the provision of medical and dental services.

vi) Even if the existence of a contract or contracts between the Claimant and Mr McMinn and/or Dr Prasanna for the provision of services during the surgery cannot be established, the Consultants both owe a duty of care to the Claimant in the tort of negligence and so the Defendant's interpretation of the Contract does not leave the Claimant without a remedy in respect of any breach of that duty by the Consultants.

vii) Paragraph 17(3) of the Defence, when read with the rest of the Defence, is clearly not an admission of the Claimant's claim for declaratory relief.

viii) The 2014 Regulations do not provide any assistance to the contractual interpretation task. The 2014 Regulations impose separate obligations on registered service providers, such as BMI, and on healthcare professionals, such as the Consultants. The Claimant does not allege that the 2014 Regulations made it unlawful for the parties to contract in such a way that surgical services were out of the scope of the Contract.

ix) BMI complied with its obligations under the 2014 Regulations by, for instance, ensuring that medical professionals had the appropriate professional registrations and by the terms required from any medical professionals working in BMI's hospitals pursuant to the practising privileges arrangements. There was no reason related to the 2014 Regulations that would have required or made it more likely that BMI would have chosen to include surgical services within the scope of the Contract.

x) As set out in the Defence, section 2(1) of the Unfair Contract Terms Act is of no application in circumstances where the question is what was within the scope of the Contract itself.

73. The Defendant accepts that documents that were not shared with the Claimant and/or post-date the Contract cannot form part of the factual matrix against which the Contract should be interpreted. Nonetheless, while the Defendant has *"no need to resort to the factual matrix as an aid to the interpretation of the Contract"* the Defendant has referred the Court to the following:

i) The practising privileges arrangements described above and the stipulation therein that that each Consultant is an *"independent contractor and not an employee, agent or servant of the Hospitals. You are therefore responsible for your own actions and those of your employees whilst on the Hospitals' premises".* The Defendant maintains that its interpretation of the Contract is entirely consistent with the practising privileges arrangements in place with the Consultants.

ii) After the Contract was concluded, but before the Surgery, the Claimant signed a Registration Form which includes the following statement:

> "Your consultant, who may be a physician, surgeon, or anaesthetist, is an independent medical practitioner and not employed by us, and, unless we advise you otherwise, will charge you separately for his or her services. Sometimes our bill to you will include your consultants' fees as part of a package. If this happens, we are acting as the consultants' agent only in collecting those fees: they remain an independent medical practitioner."

iii) An invoice was generated by the Defendant on 27 May 2015 that included the "Consultant Procedure Fee" and "Anaesthetist fee" as separate line items from the "theatre charges" in the total invoice amount. This invoice was not sent and was only provided to the Claimant in the process of disclosure.

iv) The Claimant did not articulate any contractual claim against the Defendant until 2020, although claims had first been intimated against potential defendants in 2017.

Discussion

Scope of the judgment

74. The task for the Court is to determine the proper interpretation of the relevant clauses of the Contract in accordance with the uncontroversial canons of contractual interpretation. Before doing so it is appropriate to note what is not determined by these proceedings so that the scope of this judgment is not misunderstood. I do so because at times in submissions there seemed to be some suggestion that the Court would be undertaking a broader task.

75. This judgment does not seek to determine any general question of policy about whether private health care providers should be able to contract with patients in such a way that they do not assume contractual responsibility for services performed by surgeons who practise in their hospitals pursuant to practising privileges arrangements.

76. In addition, this judgment does not address the question of whether the Defendant is liable to the Claimant in tort. There is no such pleaded case in these proceedings. The declarations sought by the Claimant are limited to the position in contract.

77. As stated in Mr Manning's evidence, the Defendant's terms and conditions have changed since the Contract was entered into. This judgment therefore does not seek to determine the scope of contractual liability under the Defendant's current contractual arrangements.

Natural and ordinary meaning of the key contractual terms

78. As noted, there is no controversy as to the proper approach to the interpretation of the Contract. The requirement is to identify the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood the language used in the Contract to mean.

79. At paragraph 18(1) of the judgment of Carr LJ in *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645 and paragraph 18(i) of the judgment of Vos C in *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ 821 respectively, the same five considerations relevant to the proper interpretation of contractual provisions are set out.

80. The task of the Court is to interpret the language that the parties have chosen to use to express their agreement. The departure point for the contractual analysis in most cases is the consideration of the natural and ordinary meaning of the contractual terms used. As noted by Carr LJ in *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645, when it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, the more the court can properly depart from their natural meaning.

81. As the issue for determination is the scope of the services included within the Contract, it is the contractual terms that go to that issue which are the centrally relevant terms. There are several descriptions in the contractual documents of the subject matter of the Contract. The statement in the Covering Letter that the package offered was *"valid at BMI the Edgbaston Hospital in Birmingham with Mr McMinn"* can be seen as consistent with the Claimant's preferred interpretation. More specifically, the Covering Letter refers to the offer of a fixed price package *"for your surgery"*.

82. Were the Covering Letter the only relevant contractual document then the offer of a fixed price package *"for your surgery"* would indicate that the surgery itself was the subject matter of and included within the services comprised within the Contract. However, the Covering Letter is just one of the relevant contractual documents and is expressly stated to be "subject to the Terms". The Quotation also includes language relevant to an understanding of the subject matter of the Contract as a whole.

83. The Quotation describes the procedure as the "Birmingham Hip Resurfacing". While this description also describes the subject matter of the Contract as being the procedure, the inclusion in the Quotation of a text box that lists what is and is not included within "your package" demonstrates that not all matters that relate to the hip resurfacing procedure were included within the scope of the Contract. By way of example, the initial outpatient consultation is listed as not included in the package included in the Contract even though it relates to the procedure itself. Similarly, convalescence and treatment after advice from a consultant that a patient is fit for discharge is not included in the package offered by the Contract, even though such convalescence and treatment follow from the relevant procedure. The reasonable person with the background knowledge available to the parties would therefore have understood that the scope of the Contract did not include everything that related to the hip resurfacing procedure.

84. The Quotation's description of what was included in the scope of the Contract is set out in full above. The list includes "Consultants' operating fees" and it is common ground that fees charged by the Consultants were included within the total sum charged by the Defendant pursuant to the Contract. The dispute is whether the use of the term "fees" has the function of restricting what is included within the scope of the Contract to the payment of such fees rather than including the performance of the services to which those fees related.

85. The Quotation describes two kinds of fees as being included in the Contract. In addition to "Consultants' operating fees", "theatre fees" are also listed. While the use of the word "fees" could denote third party charges specifically, as BMI owned and operated the operating theatre at the Hospital, the use of the word "fees" cannot be understood in this case to mean exclusively fees charged by third parties rather than including BMI's own costs included in the Contract price.

86. The words "Consultants' operating fees" are listed in bold in the list of items included in the Contract package but they are also preceded by a bullet point indicating that they belong to the group of items listed under the heading "During your hospital stay". Bold type is used in the Quotation to convey particularly important information. For example, the price to be paid is stated in bold type as is the statement that *"payment must be made in full before admission".*

87. In the circumstances I consider that the use of bold type for the words "Consultants' operating fees" was used to draw the particular attention of the reader to those words among the list of other items included under the "During your hospital stay" heading. The Quotation read alone does not explain any further in what respect it is important for the reader of the Quotation to take particular note of the inclusion in bold of the item "Consultants' operating fees" in the list of included items. The term "Consultants' Fees" is, however, the subject matter of several clauses in the Terms and in the circumstances it seems likely that the use of bold for the words "Consultants' operating fees" is to emphasise to the reader of the Quotation that important provisions relating

to this item are set out in the Terms. Acceptance of the Quotation is stated to be *"on the terms stated overleaf"*.

88. The Terms document is the contractual document which sets out in most detail the applicable terms of the Contract and the other contractual documents are expressed to be subject to it. Within the Terms clauses 18-20 were the subject matter of the greatest debate between the parties. As part of the analysis it is necessary to determine the natural and ordinary meaning of these words and consider the extent to which they support either the Claimant's or the Defendant's case on the interpretation of these clauses. In particular, the question of whether these clauses are relevant to the scope of the services to be provided pursuant to the Contract must be addressed.

89. In my judgment clauses 18-20 of the Contract do, when properly interpreted, provide the most detailed explanation of any of the contractual documents concerning whether the provision of surgical services were included within the scope of the Contract. Clause 18 is, in part, expressly concerned with the provision of services by consultants.

90. As far as clause 18 is concerned, the Claimant is undoubtedly correct that as a matter of law a party to a contract may include within its contractual performance obligations acts to be carried out by a third party to the relevant contract. This was not disputed by the Defendant and this is clearly stated in the extracts from the judgments in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 and *Wong Mee v Kwan Kin Travel Services* [1996] 1 WLR 38 and the passage of the 35th edition of *Chitty on Contracts* that are set out above.

91. I therefore also accept the Claimant's argument that the reference in clause 18 to consultants being self-employed does not, on its own, give any indication as to whether surgical services being provided by self-employed surgeons were included or excluded from the scope of the obligations undertaken by BMI in respect of the Contract.

92. Where I consider that the Claimant's interpretation faces very significant difficulties is the statement in the second half of clause 18 that consultants *"provide their services direct to the patient"*. The use of the word *"services"* is significant. While the Claimant argues that clauses 18-19 of the Terms are concerned with providing an explanation of the payment of fees, this is not consistent with the language of clause 18 which expressly addresses how the consultant's services are to be provided rather than simply how they will be paid for. Arrangements for the payment of fees are not addressed until clause 19.

93. The *Cambridge English Dictionary* defines "direct" as *"going in a straight line towards somewhere or someone without stopping or changing direction"* with a further meaning being *"without anyone or anything else being involved or between"*. In the context of clause 18 it is the further meaning that provides the natural and ordinary meaning of the word "direct". Clause 18 therefore stipulates that the Consultants would provide their services to the patient without anyone else between them and the patient. This is consistent with the Defendant's interpretation that such services were provided by the Consultants without BMI being an intermediary or the contractual provider of the services of the Consultants. While the task of contractual interpretation is a broader one, read in isolation, I consider that the reasonable person reading clause 18 would consider that it stipulated that the Consultants, rather than BMI, would provide their services to their patients.

94. The Claimant argues that the function of this part of clause 18 is to inform the patient that the consultant named in the Quotation will be the consultant who performs the procedure. However, had this been the intention, this concept would more ordinarily and naturally be expressed by simply stating that the named surgeon would carry out the surgery. The use of the language *"provide their services direct to the patient"* to express the meaning contended for by the Claimant would be surprising and likely to create confusion.

95. Further, the words *"provide their services direct to the patient"* are, as noted, preceded by the words *"all consultants are self-employed"*. This statement is consistent with and makes sense in the context of the second half of the sentence explaining the direct basis upon which consultants would provide their services. It allows the reader to understand that the consultants do not work for BMI and provide their services independently and separately to BMI. In contrast, it is quite unclear why it would be useful or necessary to explain that consultants are self-employed in the context of explaining that the named consultant would personally carry out the relevant procedure.

96. Clause 18 is not to be interpreted on its own. It is grouped in the Terms with clauses 19 and 20. Clause 19 deals with the payment of consultant's fees and provides that these fees may or may not be included in the "quoted price" for the relevant procedure. Where, as in the case of the Contract, consultant's fees for the procedure (but not the initial consultation fee) were included in the Quotation, clause 19 provides that *"the hospital will usually collect the consultant's fees as agent".*

97. The word "agent" is not defined in the Contract. While it has a specific legal meaning in the context of the law of agency, it is also a word in general usage. The *Cambridge English Dictionary* gives the primary definition of agent as *"a person who acts for or represents another".* The primary definition of this term is the sense in which a reasonable person considering clause 19 would have been likely to understand it. I do not accept the Claimant's submission that any particular legal knowledge would have been necessary for the reasonable reader to understand the general usage meaning of this word. Thus clause 19 explains that if the consultant's fees for the procedure are included in the Quotation, they will be collected by BMI as agent on behalf of the relevant consultant.

98. The explanation in clause 19 of the Terms that BMI would collect fees on behalf of consultants (as agents for them) is consistent with the Contract not including the provision of the Consultants services for the procedure. If the Consultants services were provided as part of the Contract then BMI would be entitled to receive payment for those services in its own right as those services would have been provided by BMI under the Contract.

99. The Claimant's explanation that clause 19 merely seeks to provide practical information about who will provide invoices is unconvincing. While it is correct that an invoice received from a consultant for a service that BMI had agreed to provide under the Contract would be surprising and could require explanation, in this scenario there would be no need or purpose for explaining that BMI would be collecting fees as agent for the consultant. That statement would not be correct and would tend to confuse and potentially mislead.

100. The Claimant argues that if the purpose of clauses 18-20 was to stipulate who was providing services then different language would have been used and a different heading rather than "Consultants' fees" would have chosen. While different language could have been used, for the reasons I have explained, I consider that the ordinary and natural meaning of the words used in clauses 18 and 19 would have conveyed to the reasonable reader that there was an agreement that the surgical services of the Consultants were to be provided by them rather than by BMI. Similarly, while a different heading could have been given for these clauses, the choice of the words "Consultants' fees" is not surprising as clauses 18-20 explain the position in relation to fees charged by consultants who are providing their surgical services direct to the patient.

Other relevant contractual terms

101. It is necessary to consider the proper interpretation of all the potentially relevant clauses of the Terms and the Contract in general. The Claimant relies on BMI's agreement in clauses 4, 5 and 7 that decisions of a consultant would affect the extent of BMI's obligations under the Contract as indicative of BMI having assumed contractual responsibility for the provision of services by consultants.

102. While it is correct that each of these clauses provide that the decisions of a consultant will influence entitlements under the Contract, objectively considered, these terms are neutral as far as the subject matter of the declaration proceedings is concerned. The need for a mechanism to deal with issues such as when a patient is fit for discharge in a contract that includes hospital accommodation is plain. Such decisions are clinical in nature and the obvious person to take such a decision is the treating consultant. This would be the case regardless of whether responsibility for surgical treatment was being accepted or not.

103. While it is correct that by clause 7(b) of the Terms BMI agreed to provide the costs of medical or surgical complications which a consultant considers are the result of the relevant procedure, such complications may have a variety of causes including causes which are unconnected with the way the relevant surgical and anaesthetic services are carried out. Again, the need to make provision for what happens in the event of such complications, howsoever arising, is clear and the treating consultant is again the obvious person to make a judgment about clinical causation. To the extent that BMI may consider that a complication was partly or wholly the responsibility of a consultant and that this was the cause of unexpected expenditure on BMI's part, then BMI would be entitled to pursue whatever recourse was open to it in that respect.

104. The Claimant also relies on clause 23 of the Terms which confirms that "the services" are provided by the Defendant. However, the term "services" is not defined and so it is necessary to consider the rest of the Contract to understand what those services are. As already discussed, clause 18 makes specific reference to the position of services provided by consultants. It is clear that other services in addition to those provided by consultants are provided in connection with the relevant procedure, with nursing care being one example. The separate and unique treatment of services provided by consultants in the Contract in clause 18 tends to reinforce their difference from the other services referred to in clause 23. If anything, therefore, clause 23 read along with the rest of the Contract, provides further support for the interpretation advanced by the Defendant.

Overall purpose of the key terms and the Contract

105. All the terms of the Contract have to be considered in order to understand the purpose of the key contractual terms and of the Contract overall. The Claimant argued that the purpose of the Contract was to provide the Claimant with his desired hip resurfacing surgery and that it was inherent in that purpose that BMI must include within the Contract the provision of surgical services which it would be contractually responsible for delivering.

106. The Covering Letter refers at the outset and in bold, larger type to the Contract offering the Claimant a "Fixed Price Package". This indicates that the purpose of the Contract was to provide a combination of goods and services together for a fixed price. Were the Defendant's interpretation of the Contract to have the effect of meaning that, despite this description, the Claimant was not effectively provided with a single fixed price for the Surgery and associated goods and services then its interpretation would be vulnerable to criticism for being inconsistent with the purpose of the Contract. However, the Defendant's interpretation of the Contract accepts that the fixed price stipulated in the Contract included the fees for the Consultants.

107. In any event, the consideration of the purpose of the Contract should be undertaken by reference to all the relevant terms. In circumstances where the Quotation draws attention to "Consultants' fees" distinctly in the way already described, the Quotation is said to be subject to the Terms and the Terms make express provision in respect of the delivery of services directly by Consultants, I consider that the reasonable reader of the Contract in its entirety would not consider that the purpose of the Contract included the provision of surgical services by BMI directly to the Claimant rather than by the Consultants themselves. Reading the Contract as a whole, the purpose of the Contract was to provide a fixed price package for the Claimant's hip resurfacing procedure that included within the fixed price the fees charged by the Consultants for their services.

Facts and circumstances known or assumed

108. Both parties accept that the Court can only consider the facts or circumstances known or reasonably available to both parties that existed at the time the contract made, as set out in paragraph 18(ii) of *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ 821.

109. Further, I agree with the Claimant that the observations of Lord Millett in *AIB v Martin* [2002] WLR 9 at paragraph 7 are relevant in this case. The Terms are standard terms and accordingly the relevance of the factual background in this case is necessarily limited. There is no evidence that the Terms in this case were employed in circumstances for which they were not designed so as to make the specific factual background in this case more relevant. The Covering Letter and Quotation are specific to the transaction between BMI and the Claimant but, as stated, they are clearly stated to be subject to the Terms. It follows that limited weight should be given to those facts or circumstances which are known or were reasonably available to the parties to the Contract when it comes to the interpretation of the Terms.

110. While both parties made caveated reference to the practising privileges arrangements that existed between BMI and the Consultants, In my view they cannot be considered

as a meaningful part of the relevant facts and circumstances that can be referred to when interpreting the Contract.

111. There is no evidence that the Claimant, or indeed any patient in a similar position, would have known of the existence of the specific practising privileges arrangements, still less their terms. While it is likely that a reasonable person considering the Contract may well have assumed that there were some kind of contractual or other arrangements in existence between BMI and the Consultants (particularly given that the Contract states that consultants are self-employed), there was no information available to the Claimant about the nature of these arrangements that could have influenced the Claimant's understanding of the terms of the Contract.

112. I also consider that the need to give only limited weight to the specific facts or circumstances which were known or were reasonably available to the parties in the interpretation of the Terms gives rise to significant difficulties for the Claimant's arguments arising from his assertion that there was no contract between him and either of the Consultants. I consider the evidence as it relates to that proposition below, but even if it could be made out, it would be part of the factual background to this Contract alone and therefore of limited relevance to the proper interpretation of the Terms.

113. There are, however, further difficulties with the Claimant's arguments based on the assertion that there were no contracts between him and the Consultants. The Contract was entered into on 4 March 2015 when payment of the contractual sum was made on behalf of the Claimant. At that stage it is correct that the Claimant had not met Mr McMinn (although there had been correspondence with the McMinn Centre) and had no knowledge of Dr Prasanna. He was aware, however, from the Terms that the fixed price for the Contract included fees for "the consultants" who carried out his Surgery and that their fees would be collected by BMI as agents for those consultants. While the Claimant had not entered into contracts with Mr McMinn and Dr Prasanna at that stage, he had entered into the Contract that assumed that he had or would have an obligation to pay for his consultants for their services. This was at a time when the Claimant still had the opportunity to enter into contracts for them to do so.

114. As to the factual question of whether contracts were entered into between the Claimant and the Consultants, by its Defence the Defendant made a non-admission of the Claimant's averment that he did not contract with either of the Consultants. Accordingly, the Claimant was required to prove this averment but I do not consider that he was able to do so on the evidence.

115. There is cogent evidence that there was a contractual relationship between Mr McMinn and the Claimant. The Claimant met Mr McMinn on 7 May 2015 to discuss and be assessed for the Surgery. The Contract stipulated that Mr McMinn would provide his services directly to the Claimant. Mr McMinn then raised an invoice directly to the Claimant on 11 May in respect of the initial consultation. It is difficult to understand the basis for this invoice unless a contractual relationship had been formed. The Contract stated that the initial outpatient fee was not included in the fixed price package and so the Claimant can have had no expectation that the initial outpatient consultation was included in the scope of the Contract. Equally the Claimant can have had no expectation that there would be no fee for the initial outpatient consultation.

116. The Claimant was then consented for Surgery by Mr McMinn and agreed to undergo the surgery. There was therefore an offer to provide a service that was accepted. It is correct that there is no evidence of any negotiations between Mr McMinn and the Claimant as to the fees he would charge for the provision of his surgical services but there was no need for any such discussions given the terms of the Contract. The Claimant's agreement to undergo surgery carried out by Mr McMinn, in circumstances where Mr McMinn's services were being supplied directly to him and a mechanism for the payment for those services was already in place, supports the conclusion that there was a contract between the Claimant and Mr McMinn for value in relation to his performance of the Surgery.

117. The position is somewhat different with Dr Prassana in that there was no meeting prior to the day of the surgery. However, Dr Prasanna consented the Claimant for Surgery and as a result the Claimant was aware that he was carrying out the role of a consultant in respect of the anaesthetics to be provided during the Surgery. Under the terms of the Contract Dr Prasanna would be providing those services directly to the Claimant. The Claimant agreed for him to do so and there was similarly no need for there to be any discussion as to cost of the services or how the fees were to be paid as these matters had been dealt with by the Contract. In the circumstances I consider that a contract was concluded between the Claimant and Dr Prasanna for the provision of his services for value.

118. Even if I am wrong in reaching the conclusion that contracts were entered into between the Claimant and each of the Consultants, I do not consider that the absence of such contracts is sufficient to require a different interpretation of the effect of clauses 18 and 19 of the Contract to that which I have already described. At its highest, the absence of concluded contracts between the Claimant and the Consultants would be a factual matter arising in this particular case which is of limited relevance to the proper interpretation of the Terms given their standard nature. Further, at the time the Claimant agreed to enter into the Contract, it was unknown to the parties whether he would subsequently enter into contracts with the Consultants.

Commercial common sense

119. In considering the proper interpretation of the Contract commercial common sense is a very important factor to be taken into consideration. There was, however, limited evidence adduced that is relevant to this aspect of the contractual interpretation task. Mr Manning's evidence is summarised above but, while he describes his understanding of the Defendant's contractual arrangements with consultants and their basis, the Court has to consider the question of commercial common sense from the perspective of both parties to the Contract.

120. The Claimant's submissions were focused less on commercial common sense specifically but more on what was contended to be the shock that a reasonable person considering the Contract would have on understanding that it was being contended that the fixed price package did not include an acceptance of contractual responsibility by BMI for the provision of surgical services by the Consultants.

121. I accept that from the Claimant's perspective there would be benefits to him had the Contract made provision for BMI to assume such contractual responsibility, particularly given the particular circumstances that have transpired in his case since the Contract

was concluded. None the less, viewed objectively, I do not consider that overall considerations of commercial common sense mean that the Claimant's interpretation should be adopted.

122. From the Defendant's perspective, the commercial benefit of not assuming legal liability for the acts of third-party specialists in respect of procedures which involve a degree of inherent risk, as well as the risk that those specialists might carry out their obligations in breach of their duty, is clear. Had the effect of the Defendant adopting this position in its standard terms been to deprive the Claimant of any remedy in respect of a breach of duty by the Consultants then I consider that this would likely be contrary to commercial common sense. In this scenario the Claimant would be paying a significant amount for the provision of a complex service but would be left with no recourse if the service was performed in breach of duty.

123. The Contract does not, however, leave the Claimant without any legal remedy in respect of breach of duty in the performance of the Surgery by either of the Consultants. If my analysis is correct, the Claimant is able to pursue a claim in contract against the Consultants in respect of any such breach. In any event, the Claimant is able to pursue claims in negligence. The Claimant would therefore be able to pursue a claim directly against the persons whom the Claimant alleges carried out the alleged breach of duty.

124. It is correct that the Defendant's interpretation of the Contract means that in scenarios where the alleged breach of duty involves nursing as well as surgical services, it would likely be necessary for the Claimant to have to bring proceedings against multiple defendants rather than a claim against the Defendant. However, depending on the nature of the allegations of breach of duty, the bringing of clinical negligence proceedings against multiple defendants is not unusual. The fact that this scenario might occur in some cases on the Defendant's interpretation of the Contract does not mean that commercial common sense requires that an alternative construction of the Contract should be preferred.

125. In the circumstances I do not consider that considerations of commercial common sense require the Contract to be interpreted contrary to the approach which I consider reflects the natural and ordinary meaning of the words used.

Other Considerations

126. I do not consider that the provisions of the 2014 Regulations provide any particular assistance in interpreting the meaning of the key provisions of the Contract. As already noted, the Claimant did not put his case as highly as to suggest that the Regulations made it unlawful for the Contract not to have included the provision of the services of the Consultants within its scope.

127. I do not accept the Claimant's argument that the imposition of regulatory obligations under the 2014 Regulations made it inherently more likely that BMI would have sought by the Contract to include within its scope the services of the Consultants. I accept that BMI was under a range of Service Provider obligations imposed by the 2014 Regulations. I also accept that it is likely that BMI would have wished to organise its affairs, including its contractual arrangements, in such a way as to seek to ensure compliance with its legal obligations.

128. The significant flaw in the Claimant's argument in respect of the 2014 Regulations is that the Contract governed the relationship between the BMI and the Claimant. It did not create or impose obligations on the Consultants and BMI would not be entitled to enforce the provisions of the Contract against the Consultants. It was only by whatever arrangements were made between BMI and the Consultants that BMI would be able to seek to ensure its regulatory compliance.

129. Although I have determined that the practising privileges arrangements should not be used as an aid to construction of the Contract, they were relied on by both parties in argument and admitted in evidence. As described above, these arrangements obliged the Consultants to provide BMI with specified information and to conduct themselves at BMI's premises in the manner described. It does not follow, however, that because (i) BMI put these arrangements in place and (ii) BMI might be liable as a Service Provider under the 2014 Regulations for breaches associated with the conduct of consultants, that BMI contracted to accept legal responsibility for consultants in its dealings with patients. As discussed above in the context of commercial common sense, there were clear benefits for BMI not to do so. Further, the language of the Contract and that of post-contractual documents such as the Registration Form, demonstrate that BMI sought not to undertake such a liability in its contractual arrangements.

130. As set out above, the Claimant relies on passages in *Gold v Essex County Council* [1942] 2 KB 293, *Cassidy v Ministry for Health* [1951] 2 KB 34 and *Woodland v Essex County Council* [2014] AC 537 in support of his preferred interpretation of the relevant terms of the Contract. In particular, the Claimant relies on the focus in Lord Denning's judgment in *Cassidy v Ministry for Health* [1951] 2 KB 34 on the consideration of whether the patient employed the relevant healthcare professional or whether they were employed by the relevant hospital authority. The Claimant argues that if it is found that the Consultants were employed by BMI, whether pursuant to a contract of service or a contract for services, then the Court should conclude that BMI should have contractual responsibility for the acts of the Surgeons.

131. In my view, the Claimant's reliance on these authorities does not assist with the claim for a declaration made in these proceedings. Each of these cases are concerned with the circumstances in which it is appropriate to impose vicarious liability in tort. The Claimant has not sought a declaration as to potential tortious liability and in the circumstances the correct approach to the interpretation of the Contract is that described in the authorities relied on by both parties and adopted in this analysis. In any event, the Claimant's reliance on these authorities was predicated on his assertion that there was no contractual relationship between him and the Consultants which I have found on the facts not to be the case.

132. Further, I do not consider that by paragraph 17(2) of its Defence the Defendant admitted the Claimant's claim for the declaration sought in these proceedings. While paragraph 17(2) could, in isolation, be taken to be a plea that the Contract included within its scope the provision of the surgical services, the immediately following sub paragraph, 17(3), denies that the Defendant had agreed to provide "surgical and anaesthetic services". Substantially the same denial of contractual liability for the services provided by the Consultants is repeated in the Defence and when read in its entirety the Defence contains multiple denials of the Claimant's entitlement to the relief sought or any relief.

133. The Claimant's pleaded reliance on section 2(1) of the Unfair Contract Terms Act 1977 does not assist. Section 2(1) provides that *"a person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence".* Clauses 18 and 19 of the Terms do not exclude or restrict liability for negligence. Instead, for the reasons already given, they stipulate who will be the provider of inpatient surgical services provided by consultants and how their fees for such services would be collected.

134. Finally, no importance has been attached to the fact that the Claimant did not articulate the basis of his contractual claim against the Defendant until 2020. Had the Claimant's interpretation of the Contract been persuasive, the initial presentation of a different basis for the claim would not have affected the outcome.

Overall Analysis

135. As set out in *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645 at paragraph 19, the task of contractual interpretation is a unitary one involving an iterative process by which the competing interpretations are considered in light of the provisions and purpose of the contract and their commercial consequences.

136. Taking that approach, for the reasons stated, I consider that the natural and ordinary meaning of the provisions of the Contract that set out the scope of the services included and excluded from the Contract is reasonably clear. Although there is evidently some scope for argument, a reasonable reader with the background knowledge available to the parties would have understood from clauses 18 and 19 in particular that the services of the Consultants were being provided by them directly to the Claimant with the fees for those services being included with the fixed price package and collected by the Defendant on behalf of the Consultants. In contrast, the Claimant's interpretation of the Contract is difficult to reconcile with language used in clauses 18 and 19 of the Terms.

137. The other terms of the Contract and the overall purpose of the Contract are consistent with the Defendant's interpretation of the Contract. While background matters are of limited assistance to the interpretation of the Terms, the relevant background matters are also consistent with the provision of inpatient surgical services directly to the Claimant by the Consultants. The Defendant's interpretation of the relevant parts of the Contract are also consistent with overall commercial common sense.

Conclusion

138. While I understand that this will be a great disappointment for the Claimant and those who are providing him with such valuable care, for the reasons I have set out above the Claimant is not entitled to the declarations sought in the Particulars of Claim. It is because of the importance of this matter to the Claimant that I have set out and addressed his arguments in detail.

139. There is no counterclaim for an alternative negative declaration in favour of the Defendant and in the circumstances the claim will be dismissed. I will hear from the parties in a convenient way as to any consequential matters.