Neutral Citation Number: [2019] EWHC 516 (Comm)

Case No: CL-2018-000792

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 7 March 2019

Before:
STEPHEN HOFMEYR QC
(Sitting as a Judge of the High Court)

- -

Between:

MEDENTA FINANCE LIMITED	**Claimant**
- and -	
HITACHI CAPITAL (UK) PLC	**Defendant**

- -

Peter De Verneuil Smith and **William Day** (instructed by **Pinsent Masons LLP**) for the **Claimant**
Mark Cannon QC (instructed by **Eversheds Sutherland (International) LLP**) for the **Defendant**

Hearing dates: 19, 25 and 26 February and 7 March 2019

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down ma be treated as authentic.

STEPHEN HOFMEYR QC (Sitting as a Judge of the High Court):

A. INTRODUCTION

The parties and the background facts

1. Hitachi Capital (UK) PLC ("**Hitachi**") is a financial services company which provides a range of financial products across a number of different retail and business markets in the United Kingdom, including the dental and medical consumer finance market.

2. Medenta Finance Limited ("**Medenta**") is a company which carries on business as a broker of financial products in the dental and medical consumer market in the United Kingdom. It began trading in 2006 and has always worked exclusively on behalf of Hitachi, earning its revenue from commission on the placement of Hitachi's consumer financial products.

3. The relationship between Medenta and Hitachi began in late 2005. On 25 October 2005, Medenta and Hitachi entered into an agreement which is recorded in an "*Approved Supplier Agreement*" dated 1 November 2005 ("**the ASA**"). By the ASA, Medenta agreed to act as Hitachi's agent in setting up and administering a series of schemes operated through dental and medical practices for the provision of finance to dental patients to cover the cost of dental treatments. In return for its services, Medenta was paid a commission generated when patients signed up to Hitachi's financial products. In respect of each prospective customer, the provision of finance was dependent upon a credit application being approved by Hitachi.

4. When it entered into the ASA, Medenta had no pre-existing relationships with dental or medical practices. In 2006, when it commenced trading, Medenta set about establishing the schemes and building relationships with dental practices pursuant to the ASA. Setting up a scheme involved Medenta persuading dental and medical practices to enter into a standard form "*Supplier Agreement*" with Hitachi and thereafter administering concluded Supplier Agreements on behalf of Hitachi.

5. If a dental or medical practice was willing to join the scheme, a Supplier Agreement was made between Hitachi, for the one part, and the dental or medical practice operating under the scheme, for the other part. The dental or medical practice is referred to in the Supplier Agreement as "*the Supplier*". Under a Supplier Agreement, the dental or medical practice ("**the Supplier**") was appointed as Hitachi's agent to introduce a variety of retail finance products to patients wishing to purchase dental services from the practice. The purpose of the scheme was to enable patients to pay for dental services provided by the Supplier using credit finance provided by Hitachi. Applications for credit finance were made and processed through a website called "*CreditMaster*", to which the Supplier was given direct access, and approved credit agreements were filled in and signed by the Supplier on behalf of Hitachi and gave rise to direct contractual relations between patients and Hitachi. The manner in which applications were made and processed was specified in the Supplier Agreement and in "*supplier operating instructions*". In return for administering the procurement of credit finance, the Supplier received full payment for its services less what is referred to in the Supplier Agreement as a "*subsidy*". Hitachi reserved the right to review the level of subsidy from time to time but was obliged to give the practice 30 days prior notice before implementing any change to the level of subsidy.

6. Medenta did not deal with patients. It dealt only with Suppliers.

7. In 2010 the ASA was replaced by an agreement for the supply of credit facilities which was recorded in a letter dated 15 September 2010 signed by both parties ("**the 2010 Agreement**"). By the 2010 Agreement, Hitachi agreed to provide finance for the sale by dental and medical practices to patients of goods and services, and Medenta agreed to act as Hitachi's agent in setting up and administering the scheme. Medenta's responsibilities included the collation of dealer registration forms and accompanying documentation, staff training, handling on-going queries, complaint resolution, distribution of sales data, ensuring compliance with statutory provisions and renewal of Consumer Credit licences and professional indemnity insurance. For performing these responsibilities, Medanta received a commission dependent upon the value of all concluded finance contracts.

8. The contractual relationships between Hitachi and Suppliers and between Hitachi and patients did not change significantly following the conclusion of the 2010 Agreement, although the terms of Supplier Agreements were amended from time to time.

9. On 3 October 2011 Medenta was acquired by Practice Plan Limited ("**Practice Plan**"). The business of Practice Plan is (and was) to help dental practices introduce and maintain successful private patient membership plans. Practice Plan had identified Medenta as a potential target because the two businesses provided complementary services to the dental industry. The potential to cross-sell consumer finance and membership plan products would create a valuable synergy. The consideration paid by Practice Plan for the acquisition of Medenta was about £1 million, with the possibility of additional consideration becoming payable. There is no evidence to suggest that the purchase price was known to Hitachi.

10. On the same day, 3 October 2011, the day on which Medenta was acquired by Practice Plan, Medenta and Hitachi entered into a new agreement to replace the 2010 Agreement. The new agreement was made in the context of the acquisition of Medenta by Practice Plan and both parties knew at the time that Practice Plan would wish to promote its products to Suppliers and patients. The new agreement was recorded in a letter dated 27 September 2011, signed by both parties on 3 October 2011 ("**the 2011 Agreement**").

11. Both parties hoped to make money under the 2011 Agreement and both have done so. They shared a common interest in maximising the purchase by patients of credit finance products.

12. The 2011 Agreement is in most respects identical to the 2010 Agreement. A comparison between the agreements was produced during the trial. The most significant differences between the 2010 Agreement and the 2011 Agreement are to be found in clauses 15 and 17. Clauses 15 and 17 of the 2011 Agreement contain additional sub-paragraphs, the meanings of two of which are disputed. The disputed provisions are the following:

"**15. Responsibilities**

….

Hitachi acknowledges that the Supplier and any customers introduced to Hitachi by [Medenta] shall remain the customers and clients of [Medenta] and Hitachi will not actively market any third party products to these customers.

…

17. Termination

…

Hitachi undertakes that it shall not for 24 months after the termination of the agreement become engaged directly or indirectly in the solicitation of or any marketing to the Supplier or any customers introduced to Hitachi by [Medenta]."

13. A further difference between the 2010 Agreement and the 2011 Agreement is that the former was for an initial term of 3 years whereas the latter is for an initial term of 5 years. Both agreements were terminable after the initial term on 6 months' notice in writing. Both agreements also provide that, except as otherwise agreed, Medenta is obliged to ensure that dental and medical practices operating under a scheme provide Hitachi with first right of refusal on all credit business covered by the scheme.

14. The contractual relationships between Hitachi and Suppliers, and between Hitachi and patients, did not change significantly following the conclusion of the 2011 Agreement, although the terms of Supplier Agreements were amended subsequently, in 2014 and again in 2017.

15. In 2013 Practice Plan was acquired by Wesleyan Assurance Society ("**Wesleyan**"). Wesleyan is a financial services mutual which provides financial advice and products to professionals, including dentists. Another subsidiary of Wesleyan is Wesleyan Bank Limited ("**Wesleyan Bank**").

16. The 2011 Agreement was amended in writing on 11 March 2014 and 1 December 2015 but not in respects which are material to this dispute.

17. The initial term of the 2011 Agreement was 5 years and expired on 2 October 2016. Since before the expiry of the initial period under the 2011 Agreement representatives of Medenta and Hitachi have been in discussions to explore a new relationship, but these discussions have come to nothing.

18. An indication of the value of the business to Medenta is that in 2018 Medenta brokered in excess of £28 million in dental consumer financial products, about 28% of the entire consumer finance market for dental treatment, earning gross commission of over £900,000.

19. At a meeting on 15 November 2018 between representatives of Medenta and Hitachi, Medenta informed Hitachi that it intended to terminate the 2011 Agreement and thereafter broker financial products for Wesleyan Bank instead. Medenta proposed that an exit agreement be concluded. At a further meeting between representatives of Medenta and Hitachi on 26 November 2018, Hitachi informed Medenta that, if Medenta continued with its planned tie-up with Wesleyan Bank, Hitachi would terminate the 2011 Agreement and contact the entities suppling dental services under the scheme to offer them direct funding arrangements. On 10 December 2018, during a conference call between representatives of Medenta and Hitachi, Hitachi informed Medenta that, unless a new commercial arrangement was agreed between the parties in the next few days, Hitachi would give notice to terminate the 2011 Agreement and would begin to contact the entities supplying dental services under the scheme. The following day, in a further conference call between representatives of Medenta and Hitachi, Hitachi informed Medenta that it intended to serve notice to terminate the 2011 Agreement on 12 December 2018 and that it would begin to contact the entities supplying dental services under the scheme from 17 December 2018. In an email timed at 22h57 on 11 December 2018, sent by Mr Flesk on behalf of Hitachi to representatives of Medenta, Mr Flesk explained what steps Hitachi proposed to take:

> *"… We therefore intend to offer the Dental Practices a direct to funder option from Monday. We will allow the Practices to continue with the current*

Hitachi/Medenta offer for a period of time if Medenta wish us to do so, however, if Medenta would prefer us not to offer a joint option then we will inform the Practices of this. …"

20. In a letter dated 12 December 2018 sent under cover of an email timed at 11h33 on 12 December 2018, Hitachi gave notice to terminate the 2011 Agreement. It follows (and is common ground) that the 2011 Agreement will terminate on 12 June 2019.

21. The termination of the 2011 Agreement on 12 June 2019 will have various consequences. First, the relationship between Medenta and Hitachi, which began in late 2005, will come to an end on the termination date. Second, Medenta's entitlement to commission will cease with effect from the termination date. This second consequence is common ground between the parties, although I find it surprising in the light of the payment provisions in the 2011 Agreement.

22. The termination of the 2011 Agreement will not, however, bring existing Supplier Agreements to an end. Existing Supplier Agreements will remain in place. Each Supplier Agreement has an indefinite term. Accordingly, although Supplier Agreements are terminable by either party on no less than 30 days written notice, there is a real prospect that some or all of these agreements will continue in place for many years. Further, because the Supplier Agreements will remain in place, the contractual relationship between Hitachi and each of its existing Suppliers at the date of termination will continue. Hitachi will continue to have the right of first refusal in respect of any applications by patients for consumer finance products; and Suppliers will continue to have authority to introduce Hitachi's consumer finance products to patients and, as agent, to complete and sign consumer credit agreements on behalf of Hitachi, giving rise to new contractual relationships between Hitachi and patients. The continuing contractual relationship between Hitachi and Suppliers and the continuing existence of the schemes will inevitably result in Hitachi and the Suppliers having to be in regular contact.

Injunction

23. As a direct response to Mr Flesk's email dated 11 December 2018, on 14 December 2018 Medenta made an urgent without notice application to this Court for an interim prohibitory injunction. Medenta contended that Hitachi's proposed conduct, unless restrained, would be a breach of an undertaking in the 2011 Agreement "*not to market/solicit client or customer dental practices introduced to* [Hitachi] *by* [Medenta] *during and for 24 months after the termination of* [the 2011 Agreement]*",* alternatively an implied term to similar effect, and sought an order that Hitachi "*must not whether by itself, its employees or its agents or by instructing, encouraging or permitting any other person, solicit or market to any clients and customers introduced to* [Hitachi] *by* [Medenta]." The wording of the undertaking relied upon by Medenta is nowhere to be found in the 2011 Agreement.

24. The application was heard by Moulder J on 14 December 2018 and an interim prohibitory injunction was made in the terms sought by Medenta:

> "Hitachi … must not, up to and including the Return Date … solicit any of the persons set out in Schedule 3 to this Order (the Injunction)".

25. A return date of 18 January 2019 was stipulated in the Order.

26. The injunction and accompanying documents were served on Hitachi on 15 December 2018. On 20 December 2018 Hitachi's solicitors sent a letter to Medenta's solicitors in which they alleged, *inter alia*, that Medenta had not discharged its duty of full and frank disclosure and that the injunction prohibited Hitachi from carrying on work which the parties had previously agreed it could perform. On 21 December 2018 Medenta consented to a variation of the injunction to make an exception in relation to the previously agreed work. It also gave certain undertakings requested by Hitachi. On 4 January 2019, Hitachi's solicitors proposed that the return date hearing be listed for 2 hours and be used to resolve as preliminary issues (i) the proper interpretation of clause 15 of the 2011 Agreement and (ii) the existence and scope of the implied term in the 2011 Agreement asserted by Medenta. On 7 January 2019 Medenta's solicitors confirmed their agreement to a 2-hour hearing but declined to agree to the determination of the proposed preliminary issues. On 15 January 2019 Hitachi also raised issues in relation to the question whether the injunction should have been

granted. They asserted that the injunction should not have been granted because damages would be an adequate remedy for Medenta and because the balance of convenience militated against the grant of the injunction.

Return Date

27. The matter was listed for a ½ day hearing on 18 January 2019, the return date stipulated in the injunction made on 14 December 2018. At the hearing Medenta sought the continuation of the injunction and Hitachi sought to have it set aside. Despite the fact that, by the time of hearing, Medenta had accepted that it had not made full and frank disclosure when it applied for the injunctive relief, Hitachi nevertheless chose not to pursue its application to have the injunction set aside on the ground of a failure to make full and frank disclosure. Instead it sought the summary determination of two issues which Hitachi contended were dispositive of the case, namely:

    (1) whether the part of clause 15 of the 2011 Agreement on which Medenta relies bears the construction for which Medenta contends; and, in the alternative,

    (2) whether there is to be implied into the 2011 Agreement the term for which Medenta contends.

28. Whilst this suggested course had a superficial attraction and would certainly have been a robust approach, I formed the view at the hearing that, given the potential scope of the two issues, it was not a course which the court could properly entertain. It seemed to me that it was conceivable that there would be questions of fact which would have a bearing on the construction of clause 15; and further that there would probably be issues of fact which would bear upon the question of whether the term for which Medenta contended should be implied into the 2011 Agreement. I was also not persuaded by Hitachi's contention that damages would be an adequate remedy or that the balance of convenience favoured Hitachi as I explained in a short *ex tempore* judgment: [2019] EWHC 536 (Comm).

29. Accordingly, exercising the case management powers available to me, I ordered that there be an expedited trial of issues of liability and that the injunction be continued until

trial. In order to ensure orderly preparation for the expedited trial, I also made case management directions for the service of statements of case and the exchange of evidence and documents. I reserved all issues as to costs.

Pre-trial events

30. In accordance with the directions made on 18 January 2019:

    (1) Particulars of Claim were served by Medenta on 25 January 2019. The Particulars of Claim were amended on 5 February 2019 by consent.

    (2) On 1 February 2019, Medenta served witness statements of Mr Nathan Beckett, Ms Zoe Denison and Mr Nick Dilworth.

    (3) A Defence and Counterclaim was served by Hitachi on 7 February 2019.

    (4) On 12 February 2019 Medenta served a Reply and Defence to Counterclaim.

    (5) Hitachi served a witness statement of Mr Brian Flesk on 13 February 2019.

31. In the meantime, on 11 February 2019, Medenta made a request for further information pursuant to CPR 18. Hitachi served a response to the request for further information on 14 February 2019.

32. On 15 February 2019, Medenta served a further witness statement of Mr Nathan Beckett and, on 18 February 2019, Hitachi served a further witness statement of Mr Brian Flesk. Both witness statements were served out of time. However, by consent, both statements were admitted in evidence at the trial.

33. In its counterclaim Hitachi seeks declarations in relation to both clause 15 and clause 17 of the 2011 Agreement. The declaration sought in relation to clause 15, which concerns the period pre-termination, is the mirror image of Medenta's claim and does not raise any issues not previously identified by the parties or the court. In contrast, the declaration sought in relation to clause 17, which concerns the period post-termination, does raise a new issue. The raising of this new claim for declaratory relief

in relation to clause 17 caused Medenta, on 13 February 2019, to issue an application for an order that Hitachi's counterclaim for a declaration in respect of clause 17 of the 2011 Agreement be reserved for determination to a half day hearing not before 30 April 2019 and not after 12 June 2019. By consent, the application was heard as a matter of housekeeping at the start of the trial. Having heard submissions from the parties, I directed that the issue of construction raised by the declaration at paragraph 42 of the Counterclaim should be determined in the trial but that the restraint of trade issue raised by the declaration at paragraph 43 of the Counterclaim should be adjourned, with liberty to apply. I made these directions because I formed the view that it would be more appropriate for the court to deal with all issues of construction at one time; but that, given the constraints on time, the restraint of trade question in relation to clause 17 could and should be adjourned to another day. In the event, this allocation of time and issues was not seriously resisted by Medenta.

B. THE TRIAL

Issues

34. At the expedited trial, it was common ground that there were six issues of liability to be tried:

(1) Interpretation: the true meaning and effect of the final paragraph of clause 15 of the 2011 Agreement.

(2) Interpretation: the true meaning and effect of the final paragraph of clause 17 of the 2011 Agreement.

(3) Rectification: whether clause 15 of the 2011 Agreement should be rectified in the manner for which Medenta contends.

(4) Implication: whether there is an implied term of the 2011 Agreement in the terms alleged by Medenta.

(5) Restraint of trade: whether clause 15 (or, if rectified, the rectified clause 15, or, the implied term for which Medenta contends) is an unreasonable restraint of trade.

(6) Confidentiality: whether the list of Suppliers is Medenta's confidential information.

35. Medenta only seeks rectification of the 2011 Agreement if the interpretation of clause 15(8) for which it contends is rejected. Medenta only contends for an implied term if the interpretation of the final paragraph of clause 15 for which it contends is rejected and its application for rectification fails. The issue of reasonableness only arises if Medenta fails on each of issues (1), (3) and (4). Issues (2) and (6) arise in any event.

36. It was also common ground at the trial that the question of what relief, if any, is appropriate, should be adjourned and only determined by the court after it has made its findings on the above list of issues.

Evidence

37. The trial took place over 3 days in February 2019. For Medenta, oral evidence was given by Ms Zoe Denison, Mr Nathan Beckett and Mr Nicholas Dilworth. For Hitachi, oral evidence was given by Mr Brian Flesk. In their witness statements, each of the witnesses referred to a significant number of documents. These documents formed part of the evidence before the court and their authenticity was not challenged.

38. Ms Denison was the Operations Director of Practice Plan when it acquired Medenta. On behalf of Medenta, she led the negotiations with Mr Jackson, who represented Hitachi. In her evidence she explained that the negotiation of the 2011 Agreement was part of a wider negotiation in which Practice Plan acquired Medenta; that a key objective of that negotiation was to protect Medenta's relationships with Suppliers; and that Practice Plan was only willing to acquire Medenta if adequate protections were in place.

39. Mr Dilworth was the Managing Director of Practice Plan when it acquired Medenta. Ms Denison reported to him. Mr Dilworth was involved in an initial meeting with Mr Jackson in July 2011 but, apart from instructing Addleshaw Godddard LLP, did not play a central part in the negotiations thereafter.

40. Mr Beckett is a current director of Medenta. He gave evidence about Medenta's relationship with the Suppliers. His evidence also related to the circumstances in which Hitachi terminated the 2011 Agreement and the statements made on behalf of Hitachi at the time.

41. Mr Flesk is the current Head of Retail at Hitachi. He was not employed by Hitachi when the 2011 Agreement was negotiated and concluded. He gave evidence about the parties' respective existing relationships with Suppliers and the circumstances in which the 2011 Agreement was terminated. He also gave evidence about Hitachi's proposed future dealings with Suppliers. He said that Hitachi intends both pre- and post-termination to honour existing Supplier Agreements and to accept new applications for consumer finance; and for applications received prior to 12 June 2019, to continue to pay Medenta commission as required by the 2011 Agreement. As regards the period prior to termination, Mr Flesk said that Hitachi intends to contact existing Suppliers to inform them that Hitachi's relationship with Medenta will terminate on 12 June 2019, that they (i.e. the Suppliers) may continue to deal with Hitachi after termination and that they (i.e. the Suppliers) are not obliged to transfer their business to Medenta and Wesleyan Bank. He said that Hitachi has no intention of providing Suppliers with services which they are not already receiving under the Supplier Agreements; and that Hitachi has no intention of marketing any products of third parties. Mr Flesk said that, as Hitachi will no longer be paying commission after termination, it would like to review its pricing structure – in particular the Supplier subsidies – to reflect its reduced costs and to contact Suppliers before termination to inform them of the proposed revised pricing structure.

42. There was no conflict between the oral evidence of the witnesses, although some aspects of the evidence of Medenta's witnesses were tested by reference to the objective facts proved independently of their evidence, in particular by reference to the documents in the case, and by reference to the overall probabilities. I formed the view

that each of the witnesses was trying to assist the court as best they could; but that the contemporaneous documentary evidence provided the clearest and most accurate account of events.

43. In so far as oral and documentary evidence is relevant to a particular issue and has not been recorded above, I deal with it further below.

44. Hitachi did not call any witnesses of fact to give evidence about the negotiation and conclusion of the 2011 Agreement. Two explanations are given by Hitachi for why it adopted this course. First, the negotiations in the summer of 2011 were conducted by Mr Jackson who is no longer an employee of Hitachi. He is currently employed by a competitor. Second, there was no need to call Mr Jackson to give evidence because all he could usefully say in evidence is reflected in the contemporaneous correspondence upon which Medenta's case is in any event based. Medenta criticises Hitachi's decision not to call Mr Jackson to give evidence. It contends that the fact that Mr Jackson is no longer employed by Hitachi is not a good reason for not calling him. Further, it invites the court to draw adverse inferences from Hitachi's failure to call any witnesses able to give evidence about the negotiation and conclusion of the 2011 Agreement. I deal with the question of inferences below.

C. ISSUES (1) & (2): CONSTRUCTION

45. The first and primary issue between the parties concerns the true meaning and effect of the final paragraph of clause 15 of the 2011 Agreement. There is also an issue between the parties as to the true meaning and effect of the final paragraph of clause 17 of the 2011 Agreement.

46. Clauses 15 and 17 provide, *inter alia*, as follows (the sub-paragraph numbering does not appear in the original and is introduced for ease of reference only):

> "**15. Responsibilities**
>
> ….

(5) For the duration of this agreement the Broker shall ensure the Supplier provides Hitachi with first refusal on all credit business for the credit identified in Appendix A, except as otherwise agreed in writing.

(6) Hitachi shall provide the Broker with prior written notice of its intention to enter into a broker relationship with any third party who is a competitor to the Broker.

(7) In the event that Hitachi performs or provides any incentives or offers to any competitors of the Broker or any other brokers, which are more favourable than those applicable under this agreement, Hitachi warrants, undertakes and represents that it shall simultaneously offer to provide the same or more favourable incentives and offers to the Broker.

(8) Hitachi acknowledges that the Supplier and any customers introduced to Hitachi by the Broker shall remain the customers and clients of the Broker and Hitachi will not actively market any third party products to these customers.

…

17. Termination

…

(3) Following the termination of this agreement, Hitachi agrees to provide the Broker with comprehensive details of all Suppliers and customers introduced by the Broker to Hitachi during the term of this agreement, including but not limited to full contact details.

(4) Hitachi undertakes that it shall not for 24 months after the termination of the agreement become engaged directly or indirectly in the solicitation of or any marketing to the Supplier or any customers introduced to Hitachi by the Broker."

47. None of these sub-clauses are to be found in the 2010 Agreement, save for sub-clause 15(5) which had appeared in a slightly different form at the end of clause 17 of the

2010 Agreement. In the 2011 Agreement, the words "*for the credit identified in Appendix A*" were added to the sub-clause. The sub-clause was otherwise not amended.

Principles of construction

48. Both parties relied upon familiar passages in recent Supreme Court cases on the construction of commercial contracts, and in particular the judgments of Lord Neuberger in ***Arnold v Britton*** [2015] UKSC 36 at [14-23] and of Lord Hodge in ***Wood v Capita Insurance Services Limited*** [2017] UKSC 24 at [10-15]. Reliance was also placed upon the seminal speech of Lord Wilberforce in ***Prenn v Simmonds*** [1971] 1 W.L.R. 1381 and, in particular, his statement at page 1385 that relevant factual matrix includes the "*genesis*" and objectively the "*aim*" of the transaction; and, by inference, any prior agreement that the parties replaced by the new contract.

49. The specific question whether an earlier contract may be looked at for the purposes of construing the later contract was considered by Rix LJ in ***HIH Casualty and General Insurance v New Hampshire Insurance Co. and Others*** [2001] EWCA Civ 735 reported at [2001] 2 Lloyd's Rep. 161 at 179. He stated:

> "83. In principle, it would seem to me that it is always admissible to look at prior contracts as part of the matrix or surrounding circumstances of a later contract. I do not see how the parol evidence rule can exclude prior contracts, as distinct from mere negotiations. The difficulty of course is that, where the later contract is intended to *supersede* the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one. Ex hypothesi, the later contract replaces the earlier one and it is likely to be impossible to say that the parties have not wished to alter the terms of their earlier bargain. The earlier contract is unlikely therefore to be of much, if any, assistance. Where the later contract is identical, its construction can stand on its own feet, and in any event its construction should be undertaken primarily by reference to its own overall terms. Where the later contract differs from the earlier contract, prima facie the difference is a deliberate decision to depart from the earlier wording, which again provides no assistance. Therefore a cautious and sceptical approach to finding any assistance in the earlier contract seems to me to

be a sound principle. What I doubt, however, is that such a principle can be elevated into a conclusive rule of law."

50. So far as I can discern, there are no disputes between the parties as to the relevant principles of construction. However, although it was common ground that, in construing the 2011 Agreement, I may have regard to the terms of the 2010 Agreement which it replaced, in doing so, I have adopted a cautious and sceptical approach in line with the advice of Rix LJ in ***HIH v New Hampshire***.

51. As the exercise of interpretation, according to the leading authorities, involves checking each suggested interpretation of a contractual provision against the rest of the contract, it is appropriate for me to deal together with both issues of construction which arise in the current dispute as part of a unitary exercise of interpretation.

Clause 15(8) – rival contentions

52. The issue in relation to sub-clause 15(8) lies within a narrow compass. Medenta's case is that the phrase "*third party products*" in sub-clause 15(8) means products not brokered by Medenta. Hitachi's case is that the phrase means products of persons other than Hitachi or Medenta.

53. Medenta contends that its interpretation is to be preferred for three reasons:

    (1) It is supported by a textual analysis of clause 15;

    (2) It is the most coherent interpretation having regard to the 2011 Agreement as a whole;

    (3) It is the only interpretation that makes sense of the factual context in which the 2010 Agreement was renegotiated to become the 2011 Agreement.

54. Hitachi contends that the meaning of the sub-clause is clear and unambiguous. The clause, Hitachi argues, acknowledges that Suppliers and any customers introduced by Medenta are to remain the customers and clients of Medenta for the purposes of *marketing* so that Hitachi will not actively market to them any third party products (i.e.

the products of third parties other than Hitachi and Medenta). Like Medenta, it argues that its interpretation is consistent with the relevant factual background as known to the parties and with the other relevant terms of the 2011 Agreement.

Clause 15(8) – analysis

55. In my view Medenta's analysis is unpersuasive for five reasons:

56. First, the phrase "*third party*", when it is used as an adjective, ordinarily means another party besides the two principal parties. Medenta's interpretation involves giving the pertinent words of the sub-clause ("*third party products*") a meaning which is not their ordinary and natural meaning, namely, "*products not brokered by Medenta*".

57. Second, the first part of the sentence in which the phrase appears ("*Hitachi acknowledges that the Supplier and any customers introduced to Hitachi by the Broker shall remain the customers and clients of the Broker …*") does not require that the phrase "*third party*" be read differently, i.e. other than in its ordinary and natural meaning. The first and second parts of the sentence are to be read together. They form a single, coherent sentence. The first part of the sentence contains an acknowledgment by Hitachi and the second imposes an obligation on Hitachi. The obligation in the second part of the sentence is to be read in the light of the acknowledgement in the first part of the sentence. Hitachi's contractual obligation is that it will not actively market any third party products to the persons which, in the first part of the sentence, it has acknowledged are to remain the customers and clients of Medenta. The purpose of the provision was to allocate as between the parties the right to market the products of others and to give Medenta (and Practice Plan) free rein to market the products of others with these persons.

58. Third, Medenta's analysis involves giving the phrase "*third party*" in clause 15(8) a different meaning to the same phrase in clause 15(6). There is and can be no suggestion that the phrase in clause 15(6) is to be given a meaning other than its ordinary and natural meaning.

59. Fourth, Medenta's interpretation is founded on a confused and exaggerated understanding of the nature of its historic relationship with Suppliers. Medenta's understanding appears to be that it "owned" the Suppliers. This was illustrated by the evidence of Medenta's representatives. In their evidence, Medenta's representatives used language such as "*client ownership*", "*practice ownership*", suppliers and customers "*belong[ing] to Medenta*" and "*ownership of client relationships*", as if the Suppliers were somehow to be regarded as Medenta's property. In my view, this understanding of the nature of the relationship is confused and exaggerated. The true nature of the relationship between Medenta and Hitachi is as I have described it at paragraphs 3 - 7 above. Medenta does not have and never has had any products of its own. Nor does it act (nor has it acted) as a broker of financial products. Its function is and has been to set up and maintain a number of schemes pursuant to which Suppliers broker Hitachi's financial products to patients. On behalf of Hitachi, as Hitachi's agent, Medenta persuades Suppliers to conclude Supplier Agreements with Hitachi. Medenta works on behalf of Hitachi to place Suppliers into a contractual relationship with Hitachi. Once Hitachi and a Supplier enter into contractual relations and a scheme is established, the Supplier acts as Hitachi's agent to introduce retail finance products to patients wishing to purchase dental services from the Supplier. Medenta does not deal with patients. It only deals with Suppliers, and, when it deals with Suppliers, it does so on behalf of Hitachi. For this service, establishing and maintaining schemes, it is paid a commission by its principal, Hitachi. The commission is based on the success or otherwise of the scheme, being earned when patients sign up to Hitachi's financial products.

60. The words in the first sentence of the third paragraph of the 2011 Agreement *("Hitachi … will provide finance for the sale of goods and services through your client relationships ("Suppliers"), which have been approved by Hitachi under our Supplier Set up Criteria*") are descriptive of the nature of the relationships established under the scheme. They do not alter the nature of those relationships and the word "client" is to be read in a way which is consistent with the relationships established under the scheme.

61. Fifth, contrary to Medenta's assertion, giving the phrase "*third party*" its ordinary and natural meaning does not deprive the acknowledgement in the first part of clause 15(8)

of any real meaning. As I have already stated at paragraph 57 above, the first part of clause 15(8) defines the entities to which the obligation in the second part relates, i.e. the entities to which Hitachi may not actively market any third party products.

62. A reason forcefully advanced by Medenta in support of the construction for which it contends – and also as an explanation for why the construction for which Hitachi contends cannot be correct – is that Hitachi's construction would enable Hitachi, by offering finance directly to patients, to avoid paying commission to Medenta once a scheme had been successfully established. In Medenta's written Opening Submissions, the point was expressed in this way:

> "*… it would make no sense for the agent to go to all the trouble and expense of persuading, training and managing a Supplier into using the Hitachi product only for Hitachi to then eliminate the agent's remuneration by persuading the Supplier to enter into a direct relationship.*"

63. I do not find this argument persuasive. It is based on a false assumption. The false assumption is that Hitachi will be able to eliminate Medenta's remuneration by persuading a Supplier to enter into a direct relationship. During the period prior to termination of the 2011 Agreement, once a scheme has been successfully established by Medenta and is in operation, Hitachi and the Supplier will already be in a direct contractual relationship and Medenta will earn commission on all of the credit finance products covered by the agreement placed by the Supplier with patients. The patients will have been introduced to Hitachi by Suppliers introduced to Hitachi by Medenta. Medenta will have been the effective cause of any such transactions and will, accordingly, be entitled to receive commission in accordance with the terms of the 2011 Agreement.

64. If Medenta's concern is that, in the period prior to termination of the 2011 Agreement, Hitachi might seek directly, without the involvement of Medenta, to set up a parallel arrangement with an existing Supplier for the purpose of avoiding its obligation to pay commission to Medenta on business introduced by the Supplier, the concern is unfounded. The terms of the 2011 Agreement do not permit Hitachi to act in this way. During the existence of the 2011 Agreement, Hitachi is bound to provide the credit

finance products covered by the agreement through the Suppliers introduced by Medenta. It may not do otherwise. It may not provide the credit finance products covered by the agreement through the Suppliers other than in accordance with the 2011 Agreement. This is the effect of the third paragraph of the 2011 Agreement:

> "Hitachi … will provide finance for the sale of good or services through your client relationships ("**Suppliers**"), which have been approved by Hitachi under our Supplier Set up Criteria. The Broker agrees to act as our agent in the setting up and administration of Suppliers. The Broker's responsibilities include …. In return we agree to pay you a commission of up to 4.5% (as per the agreed pricing matrix in Appendix A) of the value of all paid out business (the "**Commission**")."

65. As regards cross-sales activity, according to the evidence of Ms Denison, Medenta was not concerned about cross-sales activity on the part of Hitachi because, by letter dated 10 September 2008, Hitachi had confirmed to Medenta that no customer would receive any marketing communication from Hitachi.

66. There is a further reason why Medenta's concern is unfounded. If, contrary to my interpretation of the 2011 Agreement, Medenta is for some reason not entitled to receive commission pursuant to the terms of the 2011 Agreement in the circumstances postulated by Medenta, there will (in any event) be implied into the 2011 Agreement a term to the effect that Hitachi shall not, of its own motion, do anything to prevent Medenta from earning its commission on transactions for which it was the effective cause.

67. Medenta also places reliance on clause 17(3) of the 2011 Agreement which it contends "*is consistent with the acknowledgement that* [the] *client base of Suppliers belonged to Medenta*". In my view, clause 17(3) is neutral. It imposes an obligation on Hitachi, following the termination of the 2011 Agreement, to provide Medenta with comprehensive details of the Suppliers and patients introduced by it to Hitachi during the term of the Agreement. The purpose of the provision is to ensure that Medenta is provided with comprehensive details of the entities introduced by it to Hitachi, so that it can market financial products to these entities. Clause 17(3) does not add weight to the construction for which either party contends.

68. Clause 17(4) of the 2011 Agreement is also relied upon by Medenta. This clause gives rise to distinct issues of construction to which I will turn in the next section. Medenta contends that the restrictive covenants in clause 15(8) and clause 17(4) should be read as a coherent whole, i.e. that clause 17 continues for 24 months after termination the restrictions imposed by clause 15 during the term of the 2011 Agreement. The problem with this contention is that it ignores the significantly different language in which the two obligations are couched. If it had been intended that clauses 15(8) and 17(4) were to achieve the same purpose, albeit during different periods, this would have been reflected in the use of identical or substantially similar language.

69. Medenta also contends that there would have been no point in bargaining for clause 17(4) in the 2011 Agreement, if the intention of the parties as reflected in clause 15(8) had been that Hitachi would be entirely free at any time pre-termination to solicit on its own account. The problem with this contention is that it is built on a false assumption. The contention is built on the false assumption that, during the operation of the 2011 Agreement, Hitachi was entirely free to solicit on its own account. It was not. Once a scheme had been successfully established under the 2011 Agreement, it was not open to Hitachi to avoid paying commission to Medenta by offering finance directly to patients in respect of whom Medenta had made the effective introduction.

70. During the trial, and as I explained to counsel, it occurred to me that the working assumption of the parties when the 2011 Agreement was concluded might have been that Hitachi would always work through a broker and never directly, and that the words "*third party products*" in clause 15(8) might therefore be interpreted as meaning products brokered by "*any third party who is a competitor to the Broker*" within the meaning of clause 15(6). Neither party warmed to the interpretation, however.

Meaning of "Supplier"

71. Before leaving clause 15(8) and its true interpretation, it is necessary to deal with a further issue of construction. The further issue concerns the word "Supplier": whether the word "Supplier" where it appears in clause 15(8) refers not only to existing Suppliers but also to former Suppliers i.e. Suppliers with whom there had been, but no longer is, a Supplier Agreement. The question is of relevance to Issue (5): Restraint of

trade, which is dealt with in section F below. The question is also related to an issue of construction arising under clause 17(4) of the 2011 Agreement to which I will return.

72. Medenta asserts that the word "Supplier" includes all Suppliers appointed by Hitachi since the conclusion of the ASA in 2005. Hitachi assert that the word refers only to those Suppliers currently in contractual relations with Hitachi.

73. For the reasons which follow, I am of the view that the word "Supplier" in clause 15(8) refers only to those Suppliers who are currently parties to existing Supplier Agreements.

74. First, this interpretation is consistent with the purpose of the 2011 Agreement reflected in its title, which is to facilitate and regulate "*the supply of credit facilities*". The 2011 Agreement is concerned with the provision by Hitachi of finance for dental goods and services pursuant to schemes set up and administered by its agent, Medenta. The primary focus of the rights and obligations, duties and responsibilities set out in the 2011 Agreement is existing schemes (see e.g. clauses 3, 4, 7, 13, 15, 16, 17 and 19) and Medenta is to earn its commission on the provision of credit under existing schemes. Where Suppliers have chosen to terminate their arrangements with Hitachi, the pertinent schemes will have come to an end and will have ceased to operate. The departing dental practices will no longer be "Suppliers" and Medenta will no longer earn commission through the placement of financial credit by them.

75. Second, this interpretation ensures that the word "Supplier" is given the same meaning wherever it appears in clause 15. The word "Supplier" in clause 15(5) can only reasonably be a reference to an existing supplier. It cannot have been the intention of the parties when the 2011 Agreement was concluded that Medenta would be under an obligation to ensure that former suppliers i.e. dental practices no longer regulated by the scheme, should provide Hitachi with first refusal on credit business for the credit identified in Appendix A.

76. Third, the 2011 Agreement uses specific language where the intention is to refer to former Suppliers as well as existing Suppliers. See clause 17(3). The obligation imposed on Hitachi following the termination of the 2011 Agreement to provide

Medenta with comprehensive details relates to "*all Suppliers … introduced by* [Medenta] *to Hitachi during the term of this agreement …*"

77. Fourth, this interpretation ensures that the word "Supplier" in clause 15(8) is given the same meaning as the word "Supplier" in clause 17(4). The purpose of clause 17(4) is to prohibit Hitachi from engaging in the solicitation of or marketing to any Supplier, which must mean any existing Supplier. If it were otherwise, clause 17(4) would impose a new restriction upon Hitachi, a restriction on Hitachi's activities which did not exist before the termination of the 2011 Agreement. It would prohibit Hitachi post-termination from conduct which was not prohibited pre-termination.

Clause 15(8) - conclusion

78. For these reasons the interpretations of Clause 15(8) for which Hitachi contends are to be preferred.

Clause 17(4) – rival contentions

79. There are two issues of construction which arise under Clause 17(4):

    (1) What do the words "*solicitation*" and "*marketing*" mean? What conduct do they encompass?

    (2) Do the words "*Supplier*" and "*customer*" include former Suppliers and customers?

80. It is Medenta's case that the words "solicitation" and "marketing" are synonymous and connote some positive initiative; but that the passive receipt of business from Suppliers in the 24 months after termination of the 2011 Agreement would not breach Clause 17(4). On the second issue, it contends that former Suppliers and customers are caught by the prohibition because they constitute part of Medenta's "goodwill" which it has a legitimate interest in protecting.

81. On the first issue, Hitachi contends that "solicitation" and "marketing" are not synonymous, but nothing seems to turn on the distinction. The primary difference

between the parties appears to relate more to the application of the principles to the facts. On the second issue, Hitachi contends that former Suppliers and customers are not caught by the prohibition. Once Suppliers and customers cease to be in a contractual relationship with Hitachi, Medenta has no legitimate interest in preventing Hitachi from marketing them.

Clause 17(4) - analysis

82. I have already dealt with the second issue in passing at paragraph 77 above. Additional reasons why this interpretation is to be preferred are (i) that this interpretation is consistent with the purpose of the 2011 Agreement reflected in its title (see paragraph 74 above); (ii) that this interpretation ensures consistency: that the word "Supplier" is given the same meaning wherever it appears in the 2011 Agreement (save where the context requires a different interpretation, as it does in clause 17(3)); and (iii) that the 2011 Agreement uses specific language where the intention is that the word "Supplier" should refer to former suppliers as well as existing suppliers – see clause 17(3) of the 2011 Agreement – but it does not do so in clause 17(4).

83. As regards the first issue, in ordinary parlance, when applied to business, the word "marketing" means offering for sale to a potential customer and the word "soliciting" means seeking the business of a potential customer. This distinction is drawn out by the language in which clause 17(4) is couched. Hitachi undertakes, on the one hand, that it will not "*become engaged ... in the solicitation <u>of</u> ... any Supplier or any customers*" and, on the other hand, that it will not "*become engaged ... in ... any marketing <u>to</u> any Supplier or any customers*" (emphasis added). The first undertaking concerns the solicitation of entities; the second undertaking concerns the marketing of products to persons. The object of the first exercise is winning (i.e. taking away) clients; the object of the second exercise is selling products. Most naturally, the exercise of soliciting will be aimed at Suppliers and the exercise of marketing will be aimed at customers.

84. Both the phrase "*solicitation of*" and the phrase "*marketing to*" connote positive action. The former involves an approach to a Supplier or customer with a view to taking away from another its business. The latter involves an approach to a Supplier or customer

with a view to selling it a product. Both must involve some direct or targeted behaviour, the taking of the initiative.

Clause 17(4) - conclusion

85. These findings have the following, *inter alia*, consequences:

(1) Following termination of the 2011 Agreement, Hitachi would not be in breach of clause 17(4) if it were to become engaged in the solicitation of or marketing to former customers (i.e. customers not parties to existing contracts with Hitachi at the date of termination).

(2) Following termination of the 2011 Agreement, Hitachi would not be in breach of clause 17(4) if it were to become engaged in the solicitation of or marketing to former Suppliers (i.e. Suppliers who had terminated their Supplier Agreements so as to bring them to an end before termination of the 2011 Agreement).

(3) Following termination of the 2011 Agreement, if Hitachi were to advertise generally, it is unlikely that such conduct would be an act of solicitation or marketing; whereas if it were to advertise to a target audience known to include a Supplier or customer, it is likely that such conduct would be an act of solicitation or marketing.

(4) Following termination of the 2011 Agreement, if Hitachi were to react favourably to an approach from a Supplier or customer, such conduct would clearly not be "*solicitation of*" the Supplier or customer. See, by analogy, ***Hanover Insurance Brokers Ltd v Shapiro*** [1994] I.R.L.R. 82, at 84 (per Dillon LJ). Nor is it likely to be "marketing to".

(5) Should Hitachi decide, whether before or after termination of the 2011 Agreement, that there is a business case to be made for increasing or reducing the level of "subsidies" due under existing Supplier Agreements post-termination, they would not be guilty of "*solicitation of*" or "*marketing to*" existing Suppliers if they brought their decision to the attention of the Suppliers.

(6) Should Hitachi approach an existing Supplier and invite it to renegotiate the terms the Supplier Agreement between them so as to increase the range of products available under the scheme, they would be guilty of "*solicitation of*" or "*marketing to*" the Supplier.

(7) If Hitachi were to communicate with existing Suppliers to inform them of the termination of the 2011 Agreement, such conduct would not be an act of solicitation or marketing. Nor would it be an act of solicitation or marketing for Hitachi to explain to existing Suppliers that the schemes will continue post-termination with the services provided pre-termination by Medenta being provided by Hitachi or its agents after termination. Put in another way, Hitachi will be entitled to explain to existing Suppliers how its contracts with them will be operated post-termination.

D. ISSUE (3): RECTIFICATION

86. The issue of rectification arises as a consequence of my conclusions on Issue (1) above.

87. Medenta contends that clause 15(8) should be rectified in the following way (the additions are underlined and the deletions struck through):

> "Hitachi acknowledges that the Supplier and any customers introduced to Hitachi by the Broker shall remain the customers and clients of the Broker and Hitachi will not become engaged directly or indirectly in the solicitation of or any marketing to any Supplier or any customers introduced to Hitachi by the Broker during the term of this agreement ~~actively market any third party products to these customers~~."

88. Hitachi contends that the claim for rectification cannot succeed on the facts.

Legal principles

89. The parties are in substantial agreement as to the relevant legal principles.

90. The requirements for rectification for common mistake were authoritatively stated by Peter Gibson LJ in ***Swainland Builders v Freehold Property Ltd*** [2002] EWCA Civ 560 at [33]:

> "The party seeking rectification must show that:
>
> (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
>
> (2) there was an outward expression of accord;
>
> (3) the intention continued at the time of the execution of the instrument sought to be rectified;
>
> (4) by mistake, the instrument did not reflect that common intention".

91. This statement of the law was cited with approval by Lord Hoffmann in ***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] UKHL 38, [2009] 1 A.C. 1101 at [48], with whose speech the other members of the House of Lords agreed.

92. As regards proof, Medenta must prove its case to a "*high standard*" and there must be "*convincing proof*", but this is not a departure from the civil standard of proof, namely, on a balance of probabilities: ***Tartsinis v Navona Management Company*** [2015] EWHC 57 at [84-86].

93. The requirement of an outward expression of accord has given rise to some disagreement. In *obiter dicta* in ***Chartbrook Ltd v Persimmon Homes Ltd***, Lord Hoffmann stated that the prior common intentions of the parties should be interpreted objectively – what a reasonable observer would have understood it to be – and this statement of the law has been followed in subsequent cases. However, a number of judges, both in judgments and speaking extra-judicially, have criticised the objective approach in favour of an approach which looks at how the parties actually understood their pre-contractual discussions.

94. Despite this disagreement, it is common ground that I am bound by ***Chartbrook Ltd v Persimmon Homes Ltd***. However, Medenta reserves the right to argue on any appeal that the correct approach is a subjective one. For this reason, I have been asked to make findings both as to the subjective common intentions of the parties (if any) and as to the objective common intention of the parties (if any).

Analysis

95. The evidence which is relevant to the issue of rectification is contained in contemporaneous documents, supplemented by the oral testimony of Ms. Denison and Mr. Dilworth.

96. Before it acquired Medenta, Practice Plan took active steps in an endeavour to protect and strengthen the position of Medenta in its contractual relationship with Hitachi. Practice Plan was unsurprisingly anxious to maximise the value of its proposed investment in Medenta. Practice Plan representatives gave evidence the effect of which was that Practice Plan would not have proceeded with the acquisition of Medenta unless it was satisfied about the value of Medenta. This was the context in which the negotiations to amend the 2010 Agreement took place.

97. The negotiations began in about July 2011 and concluded in September 2011. One of the aims of Practice Plan in the negotiations was to procure an extension of the term of the agreement; another was to procure or enhance Medenta's protection against competition from Hitachi; and a yet further aim was to procure or enhance Medenta's protection against Hitachi's use of the Suppliers. These aspirations were communicated by Ms Zoe Denison and Mr Nick Dilworth (on behalf of Practice Plan) to Mr Nigel Jackson (on behalf of Hitachi) in a meeting and subsequent telephone calls in July and early September 2011. In my view, the essential substance of the exchange is best reflected in the correspondence passing between Ms Denison and Mr Jackson during this period.

98. The pertinent parts of the correspondence are the following:

(1) At 09h56 on 25 July 2011, Mr Jackson sent Ms Denison a WORD version of the 2010 Agreement to enable Ms Denison to review the existing contract and to propose amendments for incorporation in any replacement contract.

(2) At 15h48 on the same day, Ms Denison replied (copy to Mr Dilworth) in the following terms (with Mr Jackson's responses, sent to Ms Denison alone on 16h10 on 10 August 2011, in bold italics – the delay being due to the email inadvertently having sat unsent in Mr Jackson's email account):

"Thank you for sending the contract. As we agreed on the call, in the first instance I thought it was worth revisiting the points which we original (sic) discussed in our face to face meeting about issues we would like to see covered off in our agreement with Hitachi following the acquisition of Medenta. If acceptable in principle I will revise the contract according (sic) for review by your legal team.

Firstly we would request that the provisions in respect of asset finance are removed from the current agreement, whilst this is something we may be interested in doing in the future we would want to better understand the proposal before we entered into an agreement in respect of this. We would therefore propose to remove the relevant clauses e.g. in respect of Chargeback, with a view to meeting to discuss this in more detail following the acquisition. ***This would be fine going forward, although we would expect the chargeback clause to remain for the business already written.***

We have also requested

- The contract has a five year term from the date of the acquisition with an option to extend for a specified fixed period, if the parties subsequently agree, on the same terms. ***I don't see a problem with this but would need board level approval.***

- That there is some form of enhanced payment mechanism to reflect increased volumes of business. Do you have an enhanced commission

arrangement with any existing clients which we could review or would you prefer we suggested the payment structure for you to comment on? ***The current deal Medenta have already generates the lowest margin of all our dental broker introduced business, therefore for us to increase the commission any further, there would need to be an increase in the subsidies charged to dental practices. Please note our usual broker commission is 2%, Medenta currently receive 3.5% on the majority of deals.***

- We would want comfort that Hitachi were not intending [to] change the payment methodology, therefore, we would require comfort that loans will be paid in full at the point of acceptance (i.e. not staggered across a treatment plan). We would also require an explicit term that commission will be paid upon receipt and approval of an application. We would suggest a provision that states these can only be changed upon mutual agreement by the parties may be appropriate. ***Just to be clear, we don't pay anything upon acceptance, for two reasons. Firstly there is the customer's right to withdraw period, which currently stands at 14 days from the day after the agreement is executed. The other reason is that the supplier contract states that they shouldn't request payment before the treatment has commenced, usually the first consultation. We can however contract that this will not change for the term of the contract.***

- We would want to include an exclusivity provision in the contract which would be subject to any existing arrangements you may have with our competitors. ***Hitachi do not enter into exclusivity agreements with any of our suppliers, this would be impractical anyway as we already deal with 3 of the 5 main competitors. I can confirm that there are no plans to accept any new broker relationships within the dental sector.***

- We would wish to ensure our commission was protected so whilst we would provide reasonable assistance to recoup cancellations and rescheduling fees we would at no point become liable for these or for refunding commission – I believe this is the current intention of the

agreement so we would want to make the drafting clear on this point. ***If an agreement is cancelled, then we do recoup the commission paid to Medenta, although we wouldn't expect Medenta to pay the cancellation fee payable by the practice. I would be happy for you to draft something more clear to this effect.***

- We would request that a provision is included in the agreement that, save in the circumstances described in clause 1 to react to credit risk, the rate cards can be revised from time to time as agreed by both parties. If this is not acceptable we would ask for the notice period in clause 1 to be extended to 3 months. ***The main reason we would look to change the rate card would be in reaction to our cost of borrowing. As we found out during the previous financial crisis, costs of borrowing can change by large amounts practically overnight, and as soon as this happens we are bearing the cost of the difference. Being completely honest I wouldn't expect our board to approve a 3 month notice period to change rates.***

- We would want to ensure that our customers were getting the best possible rate available from Hitachi e.g. competitors were not able to offer a better rate than us. *The main reason I can't contract this is that some of Medenta' competitors already have a better rate, as they take less commission.*

- We would wish to see a run off arrangement to ensure business introduced by Medenta continues to incur a commission even where our arrangement has been terminated. ***This is fine, as long as it was accepted during the term of the contract/arrangement.***

- We would require a provision in the agreement that following an introduction to you, the practice continues to be our client for the purposes of marketing other products and services and that your involvement should be limited to the servicing of credit finance. ***I would be happy with that.***

- We would want the current exclusivity arrangement in clause 17 limited to the types of credit specifically envisaged in the appendix as the current drafting is extremely wide. ***I would be happy for you to draft something to this effect.***

Finally, we discussed skinning up the portal as Medenta – we would want a clause to this effect in the contract if it was agreed. I am also keen to understand the timeline for implementing this. ***To skin up the portal with the Medenta branding etc, we would just need a cascading style sheet which we can upload when required.***

I would also be grateful if you could provide me copies of the documentation referred to in the Agreement, e.g. the Approved Supplier Agreement and Operating Instructions etc so we have a complete understanding of the current terms.

If any of those requests or unclear or you would like to discuss further please do not hesitate to contact me."

(3) At 21h09 on 10 August 2011, Ms Denison responded (to Mr Jackson alone):

"In order for me to do a full review, could you let me have a copy of the Credit Agreement entered into by the patient and the Operating instructions and customer arbitration process please."

(4) Mr Jackson responded by email timed at 15h25 on 11 August 2011:

"Attached are the credit agreement and our complaints handling process, the operating instructions are actually included as an annexure in the contract."

(5) Ms Denison responded in an email message timed at 15h29 on 11 August 2011 (copied to Mr Dilworth and representatives of Addleshaw Goddard):

"Due to my holiday, we have instructed Addleshaw Goddard to do the revision of the contract. In my absence Nick Stubbs (of AG) and Nick

Dilworth (of Practice Plan) will progress this matter. They are copied into this email."

(6) Nothing of relevance appears to have happened during Ms Denison's absence on holiday.

(7) Following her return from holiday, in an email to Mr Jackson (copied to Mr Dilworth) timed at 13h52 on 1 September 2011, Ms Denison stated:

"Further to our conversation earlier this week we should be in a position to send you a mark up of the current Medenta agreement at the middle of next week. Please can you advise what the review and sign off process [will be], including likely timescales, following receipt of the agreement so this can be factored in to the completion timetable.

One issue I would appreciate further information on is the application of clawback …"

(8) Mr Jackson replied to Ms Denison alone in an email timed at 12h11 on 2 September 2011:

"I have attached a spreadsheet showing how business we paid out along with how much was cancelled and therefore clawed back. I hope this makes sense however if you have any queries please don't hesitate to ask.

With regards to the sign off process, I guess it depends on the amount and significance of the changes. If they are purely commercial terms then I will be able to agree them internally however if there are significant changes to the legal terms within the document then I would need out (sic) Group Legal Counsel to review and approve, with could push the turnaround to around 2-3 weeks."

(9) In an email to Mr Jackson (copied to Mr Dilworth) timed at 11h27 on 8 September 2011, Ms Denison stated:

"Thank you for this information, based on the quantum we have decided not to contest the application of clawback.

Attached is the revised agreement (in redline and clean copies) for your consideration. I hope the revisions better reflect the commercial arrangement between the parties and reflect our conversation last week, but there are a couple of clauses which may need Group Legal approval, for example, the run of provision in clause 17.

If anything is unclear please let me know. We are keen to have this agreement in place before completion of the acquisition which is scheduled for week commencing 19 September, therefore we would be grateful for your assistance in progressing the finalisation of this agreement as soon as possible.

The one other issue I would like to address post completion is …"

(Unfortunately, the revised agreement attached to this email cannot be found.)

(10) Mr Jackson sent Ms Denison a revised draft contract with further proposed changes and comments under cover of an email timed at 11h51 on 13 September 2011.

99. There is no further relevant correspondence between the parties.

100. The oral evidence of Ms Denison and Mr Dilworth did not undermine my conclusion that the essential substance of the exchange between the parties in the period from late July to late September is best reflected in this correspondence. Their evidence served only to provide additional support for my conclusion.

101. It is therefore highly likely, based on the evidence, that the last material amendments to the draft contract were those made or suggested by Mr Jackson in the draft appended to his email of 13 September 2011. It is also highly likely that, by his email of 13 September 2011, Mr Jackson was responding to the draft contract sent to him by Ms Denison on 8 September 2011 which he was entitled to assume contained all of the terms Medenta wished to include. These facts fundamentally undermine Medenta's

case that the 2011 Agreement should be rectified. The intentions of Medenta were reflected in the contractual terms which it proposed; and Hitachi were entitled to and will have proceeded on this assumption.

102. I accept the oral evidence of Ms Denison that she told Mr Jackson during the negotiation that Medenta wanted to include a term in the new agreement to protect Medenta's relationship with Suppliers. I also accept her evidence that her email timed at 15h48 on 25 July 2011 accurately reflects what she and Medenta wanted, namely, "*a provision in the agreement that following an introduction to you, the practice continues to be our client for the purposes of marketing other products and services and that your involvement should be limited to servicing of credit finance*".

103. On 8 September 2011 Ms Denison sent to Mr Jackson a draft revised agreement. The draft revised agreement had been prepared for Medenta by Addleshaw Goddard. Before sending the draft revised agreement to Mr Jackson, Ms Denison read it and confirmed that she was happy with its contents:

"Q. … When Addleshaw Goddard produced the drafts, they must have asked you to read them and confirm you were happy with them?

A. Yes.

…

Q. Before you sent them to Mr Jackson, you would have looked at them?

A. Yes, I would have done.

Q. You were the lawyer in the team?

A. Yes.

Q. You would have checked to make sure they matched what you expected them to say?

A. Yes.

Q. By the time you sent them to Mr Jackson, you were satisfied that was the case?

A. Yes."

Her evidence was that the draft revised agreement reflected what had been agreed with Hitachi. This was her thinking at the time. And, upon receipt of the draft revised agreement, Hitachi were entitled to assume (and did assume) that it reflected the terms upon which Medenta were willing to contract.

104. Five days later, 13 September 2011, Mr Jackson sent back to Ms Denison a further revised draft agreement. Ms Denison did not take issue with the further revised draft agreement. Nor did she suggest in her evidence that the further revised draft agreement introduced any change to the term Medenta was anxious to see included in the contract in order to protect Medenta's relationship with Suppliers. Ms Denison's thinking had not changed.

105. Nothing said by Mr Dilworth in his testimony undermines the above analysis of events. Although he said he did not recall whether or not he reviewed the draft agreement prepared by Addleshaw Goddard, he said it would be unusual for him not to have done so. He also said:

"Q. What we see in the agreement is in accordance with your instructions to Addleshaw Goddard?

A. I think it could have been clearer, but yes."

106. It follows from this evidence that the 2011 Agreement reflected the common continuing intention of the parties at the time of its conclusion. It did not contain an unintended mistake. The claim for rectification therefore fails.

107. Medenta's invitation to the court to draw adverse inferences from Hitachi's failure to call any of the individuals who represented it in the negotiations with Medenta therefore does not arise. There is no evidence to support the contention that, by

mistake, the 2011 Agreement did not reflect the continuing intention of Medenta's representatives involved in its negotiation. There is, accordingly, using the language of the authority upon which Medenta relies, ***Wisniewski v Central Manchester Health Authority*** [1998] PIQR P324 (CA), no case for Hitachi to answer on this issue.

E. ISSUE (4): IMPLICATION

108. The issue whether a term is to be implied into the 2011 Agreement arises as a consequence of my conclusions on Issue (3) above.

109. Medenta contends that the following term should be implied into the 2011 Agreement:

> "*Hitachi will not become engaged directly or indirectly in the solicitation of or any marketing to any Supplier or any customers introduced to Hitachi by the Broker during the term of this agreement.*"

110. Hitachi disagrees. It contends that the proposed term should not be implied for the following two reasons:

(1) The parties have made express provision as to the limits on contact between Hitachi, on the one hand, and Suppliers and customers, on the other hand, both during the currency of the 2011 Agreement (clause 15) and after termination of the 2011 Agreement (clause 17). It is therefore impossible (alternatively very difficult) to infer a common intention that there should be some further restriction in terms wider than have been expressed.

(2) The 2011 Agreement works perfectly well without an implied term of the width for which Medenta contends. Terms are not to be implied merely because, with hindsight, one party's interests would have been better served by including them. The 2011 Agreement does not "lack commercial or practical coherence" without the term which Medenta seeks to have implied.

Legal principles

111. The implication of a term into a contract is a matter of law for the court.

112. Whether or not a term is implied is usually said to depend upon the intention of the parties as collected from the words of the agreement, the surrounding circumstances and commercial common sense. In some classes of contract, for example, sale of goods, landlord and tenant, employment, the carriage of goods by land or sea, the law imposes standardised implied terms which cannot be attributed to the unexpressed intention of the parties. The present dispute is concerned with the first type of implied term where the implication depends upon the intentions of the parties, actual or presumed.

113. The most authoritative recent guidance on the applicable legal principles is to be found in the judgment of Lord Neuberger (with whom Lords Sumption and Hodge agreed) in ***Marks & Spencer PLC v BNP Paribas Securities Services Trust Co. (Jersey) Ltd.*** [2015] UKSC 72, [2016] A.C. 742 at [16-31]:

> "16. There have, of course, been many judicial observations as to the nature of the requirements which have to be satisfied before a term can be implied into a detailed commercial contract. They include three classic statements, which have been frequently quoted in law books and judgments. In ***The Moorcock*** (1889) 14 PD 64, 68, Bowen LJ observed that in all the cases where a term had been implied, "it will be found that ... the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have". In ***Reigate v Union Manufacturing Co (Ramsbottom) Ltd*** [1918] 1 KB 592, 605, Scrutton LJ said that "[a] term can only be implied if it is necessary in the business sense to give efficacy to the contract". He added that a term would only be implied if "it is such a term that it can confidently be said that if at the time the contract was being negotiated" the parties had been asked what would happen in a certain event, they would both have replied "'Of course, so and so will happen; we did not trouble to say that; it is too clear'". And in ***Shirlaw v Southern Foundries*** (1926) Ltd [1939] 2 KB 206, 227, MacKinnon LJ observed that, "[p]rima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying". Reflecting what Scrutton LJ had said 20 years earlier, MacKinnon LJ also

famously added that a term would only be implied "if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'".

17. Support for the notion that a term will only be implied if it satisfies the test of business necessity is to be found in a number of observations made in the House of Lords. Notable examples included Lord Pearson (with whom Lord Guest and Lord Diplock agreed) in ***Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*** [1973] 1 WLR 601, 609, and Lord Wilberforce, Lord Cross, Lord Salmon and Lord Edmund-Davies in ***Liverpool City Council v Irwin*** [1977] AC 239, 254, 258, 262 and 266 respectively. More recently, the test of "necessary to give business efficacy" to the contract in issue was mentioned by Lady Hale in ***Geys*** at para 55 and by Lord Carnwath in ***Arnold v Britton*** [2015] 2 WLR 1593, para 112.

18. In the Privy Council case of ***BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*** (1977) 52 ALJR 20, [1977] UKPC 13, 26, Lord Simon (speaking for the majority, which included Viscount Dilhorne and Lord Keith) said that:

> "[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

19. In ***Philips Electronique Grand Public SA v British Sky Broadcasting Ltd*** [1995] EMLR 472, 481, Sir Thomas Bingham MR set out Lord Simon's formulation, and described it as a summary which "distil[led] the essence of much learning on implied terms" but whose "simplicity could be almost misleading". Sir Thomas then explained that it was "difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue", because "it may

well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision", or indeed the parties might suspect that "they are unlikely to agree on what is to happen in a certain ... eventuality" and "may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur". Sir Thomas went on to say this at p 482:

> "The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [He then quoted the observations of Scrutton LJ in Reigate, and continued] [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred ..."

20. Sir Thomas's approach in ***Philips*** was consistent with his reasoning, as Bingham LJ in the earlier case ***The APJ Priti*** [1987] 2 Lloyd's Rep 37, 42, where he rejected the argument that a warranty, to the effect that the port declared was prospectively safe, could be implied into a voyage charter-party. His reasons for rejecting the implication were "because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter".

21. In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in ***BP Refinery*** as extended by Sir Thomas Bingham in ***Philips*** and exemplified in ***The APJ Priti***. First, in ***Equitable Life Assurance Society v Hyman*** [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have

agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in ***Attorney General of Belize v Belize Telecom Ltd*** [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from **Lewison, The Interpretation of Contracts** 5th ed (2011), para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

22. Before leaving this issue of general principle, it is appropriate to refer a little further to ***Belize Telecom***, where Lord Hoffmann suggested that the process of implying terms into a contract was part of the exercise of the construction, or interpretation, of the contract. In summary, he said at para 21 that "[t]here is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?". There are two points to be made about that observation.

23. First, the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy. (The difference between what the reasonable reader would understand and what the parties, acting reasonably, would agree, appears to me to be a notional distinction without a practical difference.) The first proviso emphasises that the question whether a term is implied is to be judged at the date the contract is made. The second proviso is important because otherwise Lord Hoffmann's formulation may be interpreted as suggesting that reasonableness is a sufficient ground for implying a term. (For the same reason, it would be wrong to treat Lord Steyn's statement in ***Equitable Life Assurance Society v Hyman*** [2002] 1 AC 408, 459 that a term will be implied if it is "essential to give effect to the reasonable expectations of the parties" as diluting the test of necessity. That is clear from what Lord Steyn said earlier on the same page, namely that "[t]he legal test for the implication of ... a term is ... strict necessity", which he described as a "stringent test".)

24. It is necessary to emphasise that there has been no dilution of the requirements which have to be satisfied before a term will be implied, because it is apparent that ***Belize Telecom*** has been interpreted by both academic lawyers and judges as having changed the law. Examples of academic articles include **C Peters, The implication of terms in fact** [2009] CLJ 513, **P Davies, Recent developments in the Law of Implied Terms** [2010] LMCLQ 140, **J McCaughran Implied terms: the journey of the man on the Clapham Omnibus** [2011] CLJ 607, and **JW Carter and W Courtney, Belize Telecom**: a reply to **Professor McLauchlan** [2015] LMCLQ 245). And in ***Foo Jong Peng v Phua Kiah Mai*** [2012] 4 SLR 1267, paras 34-36, the Singapore Court of Appeal refused to follow the reasoning in ***Belize*** at least in so far as "it suggest[ed] that the traditional 'business efficacy' and 'officious bystander' tests are not central to the implication of terms" (reasoning which was followed in ***Sembcorp Marine Ltd v PPL Holdings Pte Ltd*** [2013] SGCA 43). The Singapore Court of Appeal were in my view right to hold that the

law governing the circumstances in which a term will be implied into a contract remains unchanged following ***Belize Telecom***.

25. The second point to be made about what was said in ***Belize Telecom*** concerns the suggestion that the process of implying a term is part of the exercise of interpretation. Although some support may arguably be found for such a view in ***Trollope*** at p 609, the first clear expression of that view to which we were referred was in ***Banque Bruxelles Lambert SA v Eagle Star Insurance Co Lt***d [1997] AC 191, 212, where Lord Hoffmann suggested that the issue of whether to imply a term into a contract was "one of construction of the agreement as a whole in its commercial setting". Lord Steyn quoted this passage with approval in ***Equitable Life*** at p 459, and, as just mentioned, Lord Hoffmann took this proposition further in ***Belize Telecom***, paras 17-27. Thus, at para 18, he said that "the implication of the term is not an addition to the instrument. It only spells out what the instrument means"; and at para 23, he referred to "The danger ... in detaching the phrase 'necessary to give business efficacy' from the basic process of construction". Whether or not one agrees with that approach as a matter of principle must depend on what precisely one understands by the word "construction".

26. I accept that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. However, Lord Hoffmann's analysis in ***Belize Telecom*** could obscure the fact that construing the words used and implying additional words are different processes governed by different rules.

27. Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed; and to speak of construing the contract as

a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.

28. In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. This appeal is just such a case. Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath's point in para 71 to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication.

29. In any event, the process of implication involves a rather different exercise from that of construction. As Sir Thomas Bingham trenchantly explained in ***Philips*** at p 481:

> "The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power."

30. It is of some interest to see how implication was dealt with in the recent case in this court of ***Aberdeen City Council v Stewart Milne Group Ltd*** 2012 SLT 205. At para 20, Lord Hope described the implication of a term into the contract in

that case as "the product of the way I would interpret this contract". And at para 33, Lord Clarke said that the point at issue should be resolved "by holding that such a term should be implied rather than by a process of interpretation". He added that "[t]he result is of course the same".

31. It is true that ***Belize Telecom*** was a unanimous decision of the Judicial Committee of the Privy Council and that the judgment was given by Lord Hoffmann, whose contributions in so many areas of law have been outstanding. However, it is apparent that Lord Hoffmann's observations in ***Belize Telecom***, paras 17-27 are open to more than one interpretation on the two points identified in paras 23-24 and 25-30 above, and that some of those interpretations are wrong in law. In those circumstances, the right course for us to take is to say that those observations should henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms."

114. Hitachi contends that the correct approach to the implication of terms is to be found in the Opinion of the Privy Council in ***Attorney General of Belize v Belize Telecom*** [2009] UKPC 10, [2009] 1 W.L.R. 1988. If the Opinion of the Privy Council in ***Belize Telecom*** is read subject to the qualifications explained by Lord Neuberger in ***Marks & Spencer PLC v BNP Paribas Securities Services Trust Co (Jersey) Ltd***, Hitachi's contention is not controversial.

115. Having identified the guiding legal principles, I turn to consider the question whether the term for which Medenta contends should be implied into the 2011 Agreement.

Analysis

116. In my view, based on the legal principles set out above, a provision in the terms for which Medenta contend cannot be implied into the 2011 Agreement. At least three of the five conditions which would need to be be satisfied before a term could be implied into the 2011 Agreement are not satisfied.

117. First, the proposed term is not necessary to give business efficacy to the 2011 Agreement. The 2011 Agreement will be effective without the implication of the

proposed term. Medenta puts forward three reasons why the 2011 Agreement would lack "*commercial or practical coherence*". None of these has any merit:

(1) Contrary to Medenta's submission that the 2011 Agreement would be incoherent if it did not prevent Hitachi from marketing or soliciting Suppliers before the termination of the 2011 Agreement, as I have found, the 2011 Agreement already prevents Hitachi from seeking to persuade an existing Supplier to enter into a different, parallel scheme pre-termination.

(2) Contrary to Medenta's submission that Medenta's revenue stream would be highly vulnerable if the term were not implied, as I have found, the 2011 Agreement already protects Medenta's existing revenue stream.

(3) Contrary to Medenta's submission that an implied restrictive covenant would be entirely consistent with the mutual trust and confidence and expectations of loyalty that would have reasonably existed between the parties in 2011, as I have found, the 2011 Agreement already provides Medenta with sufficient, reasonable protection.

118. Second, the term is not so obvious that "it goes without saying". If, whilst the 2011 Agreement was being concluded, an officious bystander had suggested the inclusion of the term, the parties would not have responded to the effect that the term is so obvious that it goes without saying. On the contrary, they would have responded to the effect that the express terms of the agreement already specified the restrictions intended by the parties.

119. Third, the term would partially override and, accordingly, implicitly contradict clause 15(8) of the 2011 Agreement. The 2011 Agreement contains express clauses which impose restrictions on Hitachi's activity during the pre- and post-termination periods. The words used in the two clauses are manifestly different. The term proposed by Medenta, if implied, would have the effect of partially overriding clause 15(8) and re-writing it to reflect the different language of clause 17(4).

120. For these reasons, the tests for implication are not satisfied and the claim fails.

F. ISSUE (5): RESTRAINT OF TRADE

121. I now turn to consider the restraint of trade issue: whether clause 15 (8) is a reasonable restraint of trade.

122. As regards Suppliers currently in contractual relations with Hitachi, Hitachi does not challenge the reasonableness of clause 15(8). Hitachi's challenge is more narrowly focussed. Its contention is that clause 15(8) is an unreasonable restraint of trade only if and to the extent that the restriction in clause 15(8) extends to Suppliers with whom Hitachi has been, but no longer is, in contractual relations.

123. As I have already found that clause 15(8) applies only to current Suppliers and does not extend to former Suppliers, the issue does not arise. I will accordingly deal with the issue shortly. The relevant assumption is that, contrary to my finding above, the word "Supplier" in clause 15(8) includes former Suppliers.

124. Medenta, on whom lies the burden of proof, contends that it has shown, on the evidence, that it has a legitimate business interest requiring protection and that clause 15(8) of the 2011 Agreement is in no wider terms than is reasonably necessary for the protection of those interests. In response, Hitachi contends that clause 15(8) is unreasonably wide, Medenta surely having no legitimate interest to protect in a Supplier who was introduced by Medenta in January 2006 but who switched to a competitor as early as January 2007.

Legal principles

125. The relevant legal principles are not in dispute.

126. At common law, all contractual covenants in restraint of trade are *prima facie* unenforceable.

127. Contractual covenants in restraint of trade are enforceable only if they are "reasonable" with reference to the interests of the parties concerned and of the public. As was said by Lord Macnaghten in ***Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co*** [1894] A.C. 535, at 565:

> "It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

The doctrine of restraint of trade is probably one of the oldest applications of the doctrine of public policy.

128. Whilst covenants in restraint of trade are enforceable only if they are reasonable with reference to the parties concerned and of the public, a court should nevertheless be slow to strike down clauses freely negotiated between parties of equal bargaining power, recognising that the parties are often the best judges of what is reasonable as between themselves. However, the court's deference to the parties is not absolute. The mere fact that parties of equal bargaining power have reached agreement does not preclude the court from holding the agreement bad where the restraints are clearly unreasonable in the interests of the parties: ***Cavendish Square Holdings BV v Makdessi*** [2012] EWHC 3582 (Comm), at [15(viii)].

129. The validity of a covenant in restraint of trade is assessed at the date when the contract is entered into, including a reasonable assessment of the future. If the restraint goes further than is reasonably necessary to protect a legitimate business interest, it is void in the sense that the courts will not enforce it; and, unless the unreasonable part can be severed by the removal of either part or the whole of the covenant in question, its inclusion renders the covenant unenforceable, and may even render the entire contract unenforceable.

Analysis

130. The question for the court, in essence, is whether the protection afforded by clause 15(8) of the 2011 Agreement (assuming it extends to former Suppliers) is no more than is reasonably necessary to protect Medenta's legitimate business interests.

131. In my view, as regards former Suppliers, Medenta has no legitimate business interest to protect. Former Suppliers are, by definition, dental practices who have chosen to move their business away from Hitachi and, *a fortiori*, from Medenta. Having chosen to move their business away from Hitachi and Medenta, and having done so in fact, former Suppliers will have reverted to the large pool of entities who are prospective customers of both Hitachi and Medenta. The investment made by Medenta to build up a network of Suppliers was made by Medenta in its capacity as agent of Hitachi and was paid for by Hitachi in the form of commission. If a Supplier terminated its relationship with Hitachi, Medenta was free thereafter to engage with the former Supplier in an effort to lure it back into a relationship with Hitachi. If Medenta succeeded, it would be paid further commission. If Medenta failed, it would not be in a relationship with the former Suppliers. Further, in the next section, I conclude that the information regarding Suppliers held by Medenta was not confidential to Medenta. For this additional reason, Medenta had no legitimate business interest to protect such information.

132. Contrary to Medenta's submissions, the present case is not analogous with ***G.W. Plowman & Son Ltd. v Ash*** [1964] 1 W.L.R. 568. In ***G.W. Plowman*** the covenant was designed to restrict the activity of the agent for a period of two years after the determination of his agency and to protect the business interests of the principal. In the present case, Clause 15(8) is designed to restrict the activity of the principal and to protect the business interests of the agent.

133. I have not addressed the dispute regarding Medenta's alleged interest in preventing Hitachi from contacting customers because it does not arise. Medenta only seeks an injunction in respect of Suppliers. It does not seek an injunction in respect of customers.

134. For these reasons, which I have stated in brief, clause 15(8) of the 2011 Agreement (on the assumption that it extends to former Suppliers) goes further than is reasonably necessary to protect Medenta's legitimate business interests and is an unreasonable restraint of trade.

G. ISSUE (6): CONFIDENTIALITY

135. I come next to the final issue, confidentiality. This is a self-standing issue.

136. To begin with, it is important to note what Medenta is not saying. Medenta is not asserting that there is an express obligation of confidence in the 2011 Agreement. Nor is Medenta asserting that there is an implied obligation of confidence.

137. What Medenta is asserting is that the information which it holds in respect of Suppliers represents its work product and is confidential for this reason; that the information was shared with Hitachi in circumstances importing on Hitachi an obligation of confidence; that Hitachi cannot use the information for its own purposes; and that any use of the information by Hitachi for its own purposes would be a breach of confidence.

138. Hitachi disagrees. It contends that the information is not and never has been confidential to Medenta. The information was acquired by Medenta in its capacity as Hitachi's agent and was shared with Hitachi as a matter of obligation. Hitachi maintains that it is permitted to use the information for its own purposes, save to the extent restricted by the 2011 Agreement.

Legal principles

139. Once again there is no dispute on the applicable legal principles.

140. In cases of contract, the primary question is that of construing the contract and any terms implied in it.

141. Where there is no contract, the question is what suffices to bring the obligation into being, a question which was answered by Megarry J in ***Coco v A.N. Clark (Engineers) Limited*** [1968] F.S.R. 415 at 419 in the following terms:

> "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself … must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly,

there must be an unauthorised use of that information to the detriment of the party communicating it."

Megarry J then went on briefly to examine each of the requirements in turn. He also examined the further question of what amounts to a breach of the obligation of confidence.

Analysis

142. The guidance provided by Megarry J in ***Coco v A.N. Clark (Engineers) Limited*** was clearly aimed at a no contract situation. He was concerned with the equitable doctrine of confidence, unaffected by contract. He did not consider the questions whether and, if so, in what circumstances the equitable doctrine of confidence arises where there is a contract governing the relationship between parties.

143. In circumstances where the relationship between two parties is spelled out in a contract between them, one would ordinarily expect the parties to have imposed a duty of confidentiality had they intended that such a duty should be owed by the one to the other. In this case, no such duty has been imposed contractually. The ASA had contained a provision for confidentiality. However, neither the 2010 Agreement nor the 2011 Agreement imposes an express obligation of confidentiality and neither party contends for an implied obligation of confidentiality.

144. Applying the guidance provided by Megarry J, I am of the view, first, that the information held by Medenta in respect of Suppliers was not of a confidential nature and, second, that, in any event, the information was not shared in circumstances importing an obligation of confidence. The information held by Medenta in respect of Suppliers was obtained by Medenta whilst it was acting in its capacity as the agent of Hitachi. The information held by Medenta was information which Medenta was obliged to pass on to Hitachi, its principal. To the extent that the information was of a confidential nature, it was confidential to Hitachi, not to Medenta. Further, Hitachi was in any event entitled to receive all of the information held by Medenta as the information concerned its contractual counterparties, the Suppliers. Hitachi requires

and is entitled to receive and use the names and details of existing Suppliers to enable it properly to service its contracts with existing Suppliers.

145. That Medenta compiled a list containing the names and details of Suppliers, a list which represents Medenta's work product, does not change the position. It does not impress the list with the necessary quality of confidence in circumstances where Hitachi was at all times and in all respects entitled to receive the information from Medenta which had acquired the information acting in its capacity as Hitachi's agent.

146. Much of the information held by Medenta in relation to Suppliers was in any event publicly available information and there can be no breach of confidence in revealing to others or making use of information which is already common knowledge.

147. For these reasons, I am of the view that the information which Medenta holds in respect of Suppliers is not confidential; that the information was shared with Hitachi because Medenta was obliged to pass it on to Hitachi; that Hitachi may use the information to service its contracts with existing Suppliers; and that any such use of the information by Hitachi would not be a breach of confidence.

H. CONCLUSIONS

148. In summary, my conclusions are as follows:

Construction

(1) The phrase "third party" where it appears in paragraph 15(8) of the 2011 Agreement means persons other than Hitachi and Medenta.

(2) The word "Supplier" where it appears in paragraph 15(8) of the 2011 Agreement means a Supplier who is currently a party to a Supplier Agreement with Hitachi.

(3) The word "Supplier" where it appears in paragraph 17(4) of the 2011 Agreement means a Supplier who is currently a party to a Supplier Agreement with Hitachi.

(4) The word "solicitation" where it appears in paragraph 17(4) of the 2011 Agreement means seeking the business of a potential customer.

(5) The word "marketing" where it appears in paragraph 17(4) of the 2011 Agreements means offering for sale to a potential customer.

Rectification

(6) The claim for rectification fails.

Implication

(7) The claim for the implication of a term fails.

Restraint of trade

(8) On the assumption, contrary to my findings set out above, that clause 15(8) of the 2011 Agreement applies to former Suppliers as well as existing Suppliers, clause 15(8) goes further than is necessary to protect Medenta's legitimate business interests and is an unreasonable restraint of trade.

Confidentiality

(9) The information which Medenta holds in respect of Suppliers is not confidential to Medenta and Hitachi may use the information to service Supplier Agreements with existing Suppliers.

149. Following the handing down of this judgment, the question of relief will need to be addressed and appropriate relief, if any, will need to be ordered. The court will also need to address the questions whether any and if so what consequential orders should be made. To these ends, it would assist the court if, by 8.30 am on Thursday 7 March 2019, each party would prepare and serve on the court and each other a short skeleton argument setting out its position on these issues. It would also assist the court if a draft order could be prepared setting out the areas of agreement and disagreement.

150. By way of preliminary observation only, it seems to me to follow from the conclusions to which I have come that Hitachi is permitted, both pre- and post-termination of the 2011 Agreement, to continue to perform existing Supplier Agreements and to provide the services to which Suppliers are entitled under existing Supplier Agreements.

151. In particular, but without prejudice to the generality of paragraph 150 above, Hitachi is entitled

(1) To continue to honour existing Supplier Agreements;

(2) To accept new applications for consumer finance under existing Supplier Agreements;

(3) To contact existing Suppliers to inform them that Hitachi's relationship with Medenta will terminate on 12 June 2019; that they (i.e. the existing Suppliers) may continue to deal with Hitachi under existing Supplier Agreements after termination; that they (i.e. the existing Suppliers) can expect to continue to receive the services to which they are entitled under existing Supplier Agreements; and that they (i.e. the Suppliers) are not obliged to transfer their business to Medenta and Wesleyan Bank;

(4) To contact existing Suppliers before termination and to review with them any revised pricing structure which it proposes to adopt post termination to reflect its reduced costs;

(5) To become engaged in the solicitation of or marketing to former customers (i.e. customers not parties to existing contracts with Hitachi).

(6) To become engaged in the solicitation of or marketing to former Suppliers (i.e. Suppliers who had terminated their Supplier Agreements so as to bring them to an end).

(7) Following termination of the 2011 Agreement, to react favourably to an approach from a Supplier or customer.

152. On the other hand, it seems to me to follow that Hitachi may not

(1) During the remaining term of the 2011 Agreement

(a) provide existing Suppliers with services which they are not already receiving under an existing Supplier Agreement;

(b) market any products of third parties to existing Suppliers;

(2) for 24 months from 12 June 2019, become engaged directly or indirectly in the solicitation of or any marketing to any existing Supplier or existing customers introduced to Hitachi by Medenta.