Neutral Citation Number: [2022] EWHC 2037 (TCC)

Case No: HT-2021-000154

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

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

Date: 29/07/2022

Before :

MR JUSTICE KERR

- -

Between :

CONSULTANT CONNECT LIMITED	**Claimant**
- and -	
(1) NHS BATH AND NORTH EAST SOMERSET, SWINDON AND WILTSHIRE INTEGRATED CARE BOARD **(2) NHS GLOUCESTERSHIRE INTEGRATED CARE BOARD** **(3) NHS BRISTOL, NORTH SOMERSET AND SOUTH GLOUCESTERSHIRE INTEGRATED CARE BOARD**	**Defendants**
- and -	
MONMEDICAL LIMITED (t/a Cinapsis)	**Interested Party**

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Joseph Barrett and **Raphael Hogarth** (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
Sarah Hannaford QC and **Ewan West** (instructed by **DAC Beachcroft Claims Ltd**) for the **Defendants**
The **Interested Party** did not appear and was not represented

Hearing dates: 8, 9, 13, 14, 15 June 2022

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Approved Judgment

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MR JUSTICE KERR

This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is 10am on 29 July 2022. I direct that no official shorthand note shall be taken of this Judgment and that copies of this handed down version may be treated as authentic.

Mr Justice Kerr :

Introduction and Summary

1. This is a broad challenge to a procurement in 2020 and 2021 for the supply of communications services for use within the National Health Service (**NHS**). The claimant (**CC**) already had a contract to supply services relevant to the procurement at three hospitals in the area. The defendants, formerly NHS clinical commissioning groups (**CCGs**)[1], asked CC and two other companies to make a presentation in November 2020. All three defendants (**NHS Bath**, **NHS Gloucestershire** and **NHS Bristol**) were present at the demonstration.

2. NHS Bath scored the claimant's presentation against that of the two other companies. CC was unaware that its offering was being marked, or what the criteria and scoring system were. CC scored second highest; the highest score went to the interested party (**Cinapsis**). Unlike CC, Cinapsis was one of 24 suppliers of communications services appointed to a previously tendered NHS-wide framework agreement (**the framework**).

3. NHS Gloucestershire consulted three other framework suppliers and decided that only Cinapsis was suitable. The defendants decided to hold what was called a "mini-competition" under the framework, but with Cinapsis as the only competitor. The invitation to tender was sent to Cinapsis only. The claimant, as a non-framework supplier, was not invited to compete. The defendants then negotiated directly with Cinapsis, eventually agreed terms and awarded the contract to Cinapsis.

[1] From 1 July 2022, between the trial and the draft judgment, the relevant rights and liabilities of the CCGs were transferred to Integrated Care Boards (ICBs) covering the same geographical areas as the CCGs. pursuant to the Integrated Care Boards (Establishment) Order 2022 and the National Health Service Clinical Commissioning Groups (Transfer of Staff, Property, Rights and Liabilities to Integrated Care Boards) Scheme 2022. Before handing down the judgment, I granted an application made on 22 July (the date the draft judgment was sent to the parties) to substitute the ICBs for the CCGs. For convenience, I refer to them in the judgment as the CCGs, as they were at the relevant times.

4. CC then brought the present challenge, arguing that the process was non-transparent, skewed in favour of Cinapsis and in unlawful breach of various provisions in the Public Contracts Regulations 2015 (**the PCR 2015** or **the PCR** or **the Regulations**). CC asserts that this was an unlawful direct contract award without competition. The issues for the court's decision were agreed in a detailed list, which I address below.

5. The main broad questions are whether the CCGs owed the claimant any duties under the PCR; whether the claimant has "standing" to bring the challenge; whether the defendants' use of the framework was unlawful; whether the defendants breached the duties of transparency and equal treatment; whether they provided adequate reasons for their decision; whether there were conflicts of interest and bias in favour of Cinapsis; what remedies, if any, the court should grant; and in particular whether the claimant can establish a right to damages.

The Facts

6. The three CCGs acted as commissioners of goods and services for the NHS in their respective areas. They operated under the overall guidance of NHS England (**NHSE**). The latter had at the relevant time an arm which dealt specifically with electronic communications and technology, known as **NHSX**. The CCGs were contracting authorities under the PCR 2015.

7. CC is a provider of electronic communications services to NHS bodies. It provides what is called telemedicine, via its "CC platform", as its co-founder and CEO, Mr Jonathan Patrick, explained. The CC platform enables messages comprising medical "advice and guidance" (**A&G**) to pass between professional staff. The communications may be by telephone (**synchronous**) or by written message, where an immediate response is not required (**asynchronous**).

8. Since 2015, CC has acquired contracts with various NHS bodies including contracts for service provision to three NHS trusts in NHS Bath's area: the Royal United Hospitals Bath NHS Foundation Trust (**RUH)**, the Great Western Hospitals NHS Foundation Trust (**GWH**) and the Salisbury NHS Foundation Trust (**Salisbury**). The services provided were mainly telephony, with photo messaging in the field of dermatology (skin conditions) and, more rarely, in diabetic podiatry (which concerns the feet of persons with diabetes).

9. From July 2018, NHS Gloucestershire had a contract with Cinapsis for the provision of A&G services. That contract was entered into under a call-off arrangement in accordance with a "G-Cloud" framework agreement, to which Cinapsis was a party. After an extension, it was due to expire at the end of April 2021. CC's contracts to provide services at RUH, GWH and Salisbury, following some extensions, were due to end a month earlier, on 31 March 2021.

10. Until fairly recently, NHS organisations made frequent use of pagers. These devices are also known as bleepers or bleeps. There is a quaint old fashioned air about them because they only receive messages and cannot transmit any. A bleep activated by telephone would sound on the device in a clinician's pocket. The clinician would read the message displayed or call the telephone number indicated.

11. The NHS has a computer patient record system known as the "NHS Spine". It provides access to basic patient details, such as their name, NHS number, date of birth and registered general practitioner (**GP**). An A&G system may or may not have what is called NHS Spine integration. A system which has it may tap into that information. A system that does not must rely on other means to identify the patient concerned, such as typing (or cutting and pasting) the patient's NHS number into an electronic message.

12. In mid-2020 (when the Covid pandemic was putting huge pressure on the NHS nationally), CC's A&G platform did not have the benefit of NHS Spine integration. CC first obtained it considerably later, in December 2021, just short of three months after starting the process of seeking approval and performing the technical tasks needed to link its platform to the NHS Spine.

13. Another issue in A&G provision is post event messages (**PEMs**). A PEM is a written electronic message generated automatically. The content of the PEM can be determined by a clinician in consultation with the provider. In the middle of 2020, CC's A&G platform was not configured to send a PEM after each telephone call. It was configured to send a PEM after a written communication. In its service provision at the hospitals in NHS Bath's area, CC took advice from GPs in the area on when PEMs were required and their content.

14. On 23 February 2019, the Secretary of State for Health and Social Care announced that "to bring the NHS into the 21st century … we're banning pagers right across the NHS". An accompanying press release said the ban would take effect for non-emergency communications and would need to be implemented by the end of 2021. Pagers would be "phased out", except for emergency use. Staff would use "modern alternatives, such as mobile phones and apps".

15. Dr Chris Dyer was at the time an associate medical director at RUH, where CC was providing A&G services. He was aware that CC's contracts were due to end in the first quarter of 2021. He regarded CC's services as satisfactory but was also thinking about the longer term. He says he and a colleague (a Dr William Hubbard) spoke in about early 2020 to Mr Roger Tweedale of CC and a colleague (Ms Celia Enderby); and that his, Dr Dyer's, impression was that CC had no particular appetite to extend its offering to asynchronous services in other services as well as teledermatology.

16. Mr Tweedale disputes this evidence. He says he met Drs Dyer and Hubbard in person on 7 January 2020 and remotely on 31 March 2020, both times with Ms Enderby, the account manager for RUH. He produced Ms Enderby's notes of a post meeting discussion they had the next day. He says he could not possibly have shown a lack of appetite for extending asynchronous messaging beyond teledermatology and diabetic podiatry. It would have been inconsistent with CC's approach of developing its offering and tailoring it to client requirements.

17. I prefer Mr Tweedale's evidence on this issue. I think Dr Dyer's recollection is mistaken. CC's supposed lack of ambition is out of tune with Mr Tweedale's enthusiasm for salesmanship, even extending to the giving of his evidence in court. Mr Tweedale is not one to put off a client. I do not know the full context of the discussions in early 2020. Dr Dyer mentioned them in his second witness statement, not his first. He first mentioned the point in a litigation context, in response to Mr Patrick's evidence

that RUH appeared satisfied with CC's service. He produced no written record of the conversation.

18. On 1 May 2020, NHSX issued a prior information notice (**PIN**) for "IT services: consulting, software development, Internet and support". It was published in the Official Journal of the European Union (**OJEU**) on 5 May. The title given to the procurement was "Clinical Communication Tools for NHS Trusts" (**CCTs**). In the PIN, they were said to be "for NHS Trusts" but it also referred more widely to "NHS organisations" needing "dedicated communications and task management systems". These would reduce reliance on bleeps and emails.

19. A wide range of Common Procurement Vocabulary (**CPV**) codes was cited. The estimated total value was £3 million, excluding VAT. The PIN also referred to the possibility of a framework to be established by NHSX as procuring authority, "for NHS Trusts to procure communications services on a national basis". Reference was made to the Secretary of State's announcement and the need for "suitably qualified and experienced suppliers who can deliver against the requirement, whilst promoting innovation and delivering against a digital maturity model".

20. The "contract value for the framework" was again put at "GBP 3 m" and the "provisional intention" was that the framework would remain open for two years, with an option to extend for a further year. The "[m]andatory functionality" was set out in very broad terms. There were also added elements of "[o]ptional functionality, including "ERP integration" an error later corrected to EPR which stands for electronic patient records. The formal contract notice was to be published on about 31 May 2020.

21. CC discussed the PIN internally. Mr Patrick thought it "doesn't affect us" but Mr Roger Ahn thought it "feels pretty kitchen-sinky", which I take to mean comprehensive and broad. Mr Patrick's response indicates that he thought there would be no likely loss of business from not being on the framework and no guaranteed business from being a member of it. "It doesn't really change anything …". His logic appears to be that NHS bodies would be able to select a supplier from on or off the framework.

22. On 12 May 2020, NHS England published a document setting out the technical standards and overarching specification for the CCT Framework. It was not just replacing pagers with more modern pagers. It was much more than that; there had to be web browser access and apps accessible without payment; a user had to be able to make calls, instantly message, share images or other information; and data had to be reported and transmitted securely.

23. Non-essential functionality included secure video calls, "[a]ccess provided to patient lists" and "inclusion of ERP [sic] integration feature…". There were detailed technical and security requirements, including compliance with data protection law, protection against unauthorised access (i.e. hacking), encryption of messages in transit and automatic deletion after set time periods. There had to be "24/7 customer support" online or by telephone or app; an online knowledge centre; and one to one remote training and support for users.

24. Mr Brian Stratford, a project manager and one of those dealing with the procurement at NHS England, explained that the pandemic, then having severe effects, was a major driver of moving towards more sophisticated electronic communications systems. The

technical specification was deliberately kept brief and expressed broadly, so that it would capture as many suitable products, and suitable suppliers of those products, as possible.

25. On 19 June 2020, NHS despatched the formal contract notice for the procurement (**the contract notice**). It was published in the OJEU on 24 June. The title referred to a framework agreement for NHS organisations, i.e. not just NHS trusts. The framework could also be used by CCGs or other NHS bodies. The details were, otherwise, the same as in the PIN, except that the duration was now 36 months rather than two years with a one year extension option. The estimated value, £3 million excluding VAT, remained the same.

26. Also on 19 June 2020, NHSX and NHS England issued a lengthy "Dear bidder" invitation to tender document (**the Framework ITT**). It included the same technical standards and overarching specification as the contract notice. It also contained, in the normal way, detailed information about the framework terms, including call-off and mini-competition procedures; detailed instructions on how to bid for a place on the framework; and a full explanation of the scoring system. Annex 1 was a set of evaluation questions. Annex 2 provided a link to the draft standard form contract.

27. I need to say a word about the estimated value of £3 million. Mr Stratford gave evidence on this issue, but his evidence was vague. He described himself as "not a procurement expert", although his job includes dealing with procurements. In oral evidence, he said he thought there had been "market engagement" for the purpose of estimating the likely value of the framework. But he was unable to say with whom in the market the engagement occurred. In his second witness statement he said the £3 million was "the amount of money … made available by NHSE/NHSX".

28. Ms Sue Fankhauser of NHS England joined one of its commissioning support units in the south west in June 2020. She too stated that the £3 million figure was the amount of money available from NHS England or NHSX "to pay suppliers who, having been appointed to [the framework], were also awarded call-off contracts under that framework". She later calculated that just over £734,000 worth of call-off contracts had been entered into by the time the contract at issue in this case was concluded in 2021, with a value of £2.7 million.

29. The framework ceased to be used after the Cinapsis contract at issue in this case was concluded. The prior information notice for the successor version, which has not yet been tendered, has a more realistic estimated value of £125 million. It is obvious that the £3 million estimated value was completely unrealistic if the framework were to remain available for three years nationally for use by any NHS body, throughout England. Had it remained available, the likely true value of the work to be called off would be much higher.

30. The framework terms were published on NHSX's website on 30 July 2020. On 6 August, NHSX held a webinar for bodies interested in using it. The document provided for the webinar referred to available funding, without saying how much, to be paid by the NHS centrally, directly to the supplier. The money had to be spent in the financial year 2020-21, i.e. by 31 March 2021. The identities of the likely 24 or 25 suppliers on the framework were provided, Cinapsis and 24 others. Cinapsis was formally admitted to the framework on 17 August 2020.

31. Cinapsis was the incumbent service provider to NHS Gloucestershire. Mr John Turp later became its digital transformation programme manager, but at the time was employed by the local NHS commissioning group. With Cinapsis on the framework, Mr Turp emailed two colleagues at NHS Gloucestershire on 17 August, Ms Helen Brock and Dr Malcolm Gerald, with "initial requirements" and "additional requirements". The initial requirements were a description of what Cinapsis provided to NHS Gloucestershire in 2018-19. The additional requirements were additional features introduced during 2019 and 2020.

32. Ms Brock in her response two days later described these as Mr Turp's "[s]tarter for 10". She referred to the need to add other providers but effectively using the incumbent's existing service provision as the specification: "I can put it in a table and tick all for Cinapsis". Mr Turp responded with a refined set of requirements and suggested, based on the view of "Tim" (i.e. Tim Clarke, a senior manager) a comparison with two or three other products.

33. Mr Turp suggested contacting three other framework suppliers, CarePlus (System C), Hospify and Pando; as well as Microsoft Teams. He suggested that the evaluation should be done by clinicians who could provide a "balanced view" and were not "champions for Cinapsis (or have quotes on the Cinapsis website!)". I am satisfied (from other evidence I am coming to) that this referred to Dr Gerald, one of the addressees of the email; even though, implausibly, Dr Gerald did not accept in oral evidence that it referred to him.

34. These email exchanges, following on directly from appointment of the framework suppliers, show that Mr Turp and NHS Gloucestershire staff were content with its incumbent provider of electronic communications services and envisaged reappointing Cinapsis, but had some idea of the need for a process to be gone through which would give other providers either a real chance or at least the appearance of a real chance of being appointed instead of Cinapsis.

35. On 25 August 2020, Dr Gerald spoke to Mr Carl Woodroffe, the business development manager at Cinapsis. Mr Woodroffe emailed Mr Turp the next day referring to the conversation and to written information from NHSE in Mr Turp's hands, to which Dr Gerald had drawn his attention and which, he understood, would be relevant to Cinapsis's forthcoming bid. He asked Mr Turp for "a copy of what's been passed to you".

36. On 3 September 2020, in an emailed response to a request for information, Ms Brock of NHS Gloucestershire stated that she was working on an "options appraisal, comparing and contrasting Cinapsis with other products on the market". She commented that it was "important that we do this for due diligence purposes, so that we can confidently move our preferred product to business as usual and off pilot". This was a reference to the current Cinapsis contract technically still being part of a pilot scheme.

37. Before turning to completion of the options appraisal, in advance of a leadership meeting on 22 September 2020, Ms Brock prepared a paper for its "Core Group" leaders recommending an extension of Cinapsis's contract for a further three years, subject to pricing issues and "[s]ubject to the options appraisal showing that Cinapsis is the

preferred service". Ms Brock and Dr Gerald were due to meet NHS Gloucestershire's director of finance and head of contracting on 30 September.

38. Dr Gerald was keen for the options appraisal to be completed. However, no such appraisal appeared at that stage. On 2 October 2020, Mr Turp and representatives of NHS Gloucestershire and various other NHS bodies in its area, undertook what Mr Turp described as "a selection process", using the NHS's "Comms Framework Selection Tool" (**the selection tool**). Mr David Porter, NHS Gloucestershire's head of procurement, was among those present. The selection tool is a spreadsheet into which entries are made. The entries are taken from a dropdown menu list.

39. The requirements are grouped under the headings "functionality" and "interoperability". Keywords are selected for each requirement. The keywords correspond to descriptions of and notes about the particular attribute. For example, the functionality requirement "video calls" means "ability to hold a video call [optional due to the teams contract but some people might still want this]". The interoperability requirement "PHR/EPR" denotes "the basic ability of the product to provide or readily connect and exchange information with Personal health records (PHR), Electronic Patient record (EPR) in either implementation or access, without restriction".

40. There were nine functionality requirements and ten interoperability requirements. When entered on the selection tool spreadsheet, these are linked by the selection tool software to the qualities and attributes possessed by the various framework members. The selection tool electronically produces a list of those suppliers on the framework who are considered by the computer to be capable of meeting the functionality and interoperability requirements.

41. On 5 October, Mr Turp reported by email to Mr Stratford at NHS England, acting as project manager at the local NHS commissioning group (the NHS South, Central and West Commissioning Support Unit) (**the CSU**), that the exercise had produced three potential suppliers, BT plc, Dictate IT Ltd and Cinapsis. Separately, Mr Turp explained, NHS Gloucestershire and he were considering the possibility of using Microsoft Teams to see if it afforded the same functionality without additional cost, as MS Teams was already in use.

42. Mr Stratford was asked by Mr Turp in the same email to send NHS Gloucestershire's requirement to those three suppliers for their response, with a proposed contract to run for either two or three years from April 2021. However, Mr Stratford responded on 7 October that an "equation error" had prevented the selection tool recognising a fourth eligible supplier, called Alcidion. He copied in the procurement team "that will run the further competition on your behalf", as he put it.

43. After a video meeting on 14 October attended by representatives of NHS Gloucestershire and the CSU, Ms Ellen Critchley of the CSU sent to Mr Turp the next day the "Further Competition Document" discussed at the meeting, with timelines added to "show the stages of the procurement process". There was to be a "Further Competition and Bid Process", overseen by the CSU.

44. Meanwhile Ms Anna Field, NHS Bath's deputy director of commissioning, was discussing with Mr Patrick CC's existing service provision. They had periodically discussed contract extensions before; the current services to RUH, GWH and Salsibury

were then due to end in the first quarter of 2021. Ms Field emailed Mr Patrick on 15 October 2020 saying discussions were now starting "around planning for [A&G] platforms for 21/22 and beyond".

45. In October 2020, the project team at NHS Bath chaired by Dr Dyer and including Ms Field, produced a draft document called *Urgent & Planned Care Advice & Guidance*, with a list of requirements similar to NHS Gloucestershire's; and the aim of agreeing "the system requirements" by 3 November. The document included thanks to NHS Gloucestershire "for sharing their requirements documentation upon which this is based". Comments in the margin in the draft document indicate that NHS Bath was interested in collaborating with NHS Gloucestershire in the latter's procurement exercise.

46. Mr Turp replied to Ms Critchley at the CSU on 19 October 2020, referring to an alternative funding source and the complication of needing to use the "Spark" framework in order to access a certain source of regional funding. That complication did not materialise. Mr Turp was urged to work on the "Bid Template", ahead of a meeting he was to have with Mr Stratford on 21 October.

47. The idea of a joint procurement involving all three CCGs continued to mature. Mr Dominic Fox, a digital project manager acting on behalf of NHS Bath, spoke to the NHS Gloucestershire team on 9 November about using the framework. Mr Fox learned of NHS Gloucestershire's preference for Cinapsis over CC; two years earlier "they … discovered Cinapsis was more sophisticated", he reported in an email to Ms Field the same day, copied to the NHS Gloucestershire team, including Dr Gerald; and copied to Mr Turp.

48. Mr Fox reported "the expectation" that of the framework suppliers, only Cinapsis could meet the requirements. His email shows he was in no doubt that "[t]hey will be using the Clinical Comms framework". He was keen to put Ms Field in touch with Dr Gerald. He referred to the idea of a session on 20 November which had clearly already been thought of: "Malcolm has kindly said he can do a demonstration of Cinapsis: I have forwarded on the invite to the session on the 20th. … Would a sooner one be useful?" Mr Fox asked. As we shall see, that idea bore fruit. At the end, he referred to possible "savings to be made from a 'bulk' purchase from Cinapsis?"

49. On 11 November, Mr Turp reported to Mr Clarke at NHS Gloucestershire that the other two CCGs were "now interested in jumping in on our Further Competition". Mr Turp explained that NHS Bath had an "incumbent supplier", CC, so "they may have to give that supplier .... the option to respond even though they [are] not on framework!" In those unusual circumstances, arrangements were made for two framework suppliers (Cinapsis and Alcidion, apparently linked to "System C") and CC from outside the framework, to display their wares. The manner in which that occurred was unorthodox.

50. First, on Friday 13 November 2020, Ms Amber House of NHS Bath emailed Mr Owain Hughes of Cinapsis asking for a 15 minute presentation. NHS Bath, the email explained, was "investigating the market to consider a simple, reliable, monitorable and consistent urgent and planned care advice and guidance services [sic] across part of the outpatient pathway…". Cinapsis was asked to concentrate on GP interface, "e.g. telephone, photo, video or written"; administrative interface, "e.g. update of rotas"; and "[r]eference site that is using your system". Indicative costing was also requested.

51. However, the same day Mr Turp was investigating "doing the Options Appraisal of the 4 listed framework suppliers from the Selection Tool without having to proceed to the Further Competition process"; so he emailed to Ms Critchley. He enquired of her or Ms Fankhauser whether it was acceptable to ask the four selected framework providers for further particulars, "i.e. could I ask Alcidion if they have NHS Spine connectivity". He hoped such a request "might negate need for a Further Completion [sic – competition] process".

52. Mr Turp explained in oral evidence that the purpose of the demonstration day was so that NHS Bath could decide on what approach to take and whether to join in with the procurement. He explained that NHS Gloucestershire "had already decided", albeit not yet in a formal sense. He was himself an "enthusiastic supporter" of Cinapsis. Mr Turp denied the suggestion that he had "a closed mind", but was at the time investigating awarding the contract to Cinapsis without formally assessing its product against anyone else's.

53. On the Monday, 16 November 2020, Ms House sent the wording of the presentation invitation for 20 November to various people at hospitals in NHS Bath's area, with a copy to CC's staff, Mr Patrick, Mr Tweedale and Ms Enderby. That day and over the following two days, she sent the same wording to System C (and Alcidion if it was a different entity) and another invitation to Cinapsis over and above the advance one from the Friday, 13 November.

54. Mr Hughes of Cinapsis accepted (on the Monday, 16 November), the invitation to do a demonstration on Friday 20 November. He and Mr Woodroffe would attend, he said. On 17 or 18 November, Dr Gerald appeared at an event sponsored by Cinapsis. He was reluctant to accept that he was, in general, a champion of Cinapsis but I find that he was, given the evidence of his support for Cinapsis' position and his subsequent contacts (to which I am coming) with Cinapsis during the process.

55. Mr Patrick sent a screenshot about the event to Ms Ruth Grabham, a senior medical director at NHS Bath, to support his concern that Dr Gerald was too close to Cinapsis. His caption was "Malcolm Gerald – the Insid [sic] Man". Ms Grabham was concerned – Dr Gerald's position needed "clarifying". She shared her concern in an email to Ms Field. Mr Patrick said CC would not attend the presentation if Dr Gerald was present. At one stage on 16 November Mr Patrick withdrew CC from the demo session. He feared leakage of CC's confidential information via Dr Gerald. CC's request was granted and Dr Gerald would not attend, though Mr Turp would.

56. Mr Turp, meanwhile, was on a different tack that day, 17 November. He emailed Ms Fankhauser asking her to check with the four framework suppliers their answers to two questions, one related to NHS Spine connectivity and the other to data analysis and reporting. The CSU, then Mr Turp's employer, convened a "Clinical Comms Workshop" to take place on the Thursday, 19 November. The three CCGs were to attend. The aim was to "explore the appetite for a system-wide approach" as the invitation stated.

57. Dr Gerald was to make a presentation to the workshop on 19 November about Cinapsis. Mr Turp expressed concern that Dr Gerald might go on too long. He should be reminded that he only has "10 minutes", Mr Turp emailed a colleague. The agenda stated that Dr Dyer would speak about NHS Bath's current situation and plans; while

Dr Gerald would speak on the "[e]volution of the [A&G] service with Cinapsis". The discussion would be on whether there was an "appetite for a system-wide A&G solution".

58. On 18 November, Ms House sent to the suppliers that were to make presentations on Friday 20 November a blank indicative pricing schedule to be completed by the suppliers. The next day, Alcidion informed that they would not be attending to present their product as according to Ms House, Alcidion had advised that they "do not support telephone or video calling and their system doesn't have an administrative interface for the updating of rotas etc."

59. On 19 November, Ms House emailed various people due to attend the demonstrations the next day, attaching a list of six questions, one allocated to each of those named against each question in the attachments. Mr Leroy Prince, then a senior purchasing specialist at RUH, in NHS Bath's area, would prompt the questions. The plan was that those questions would be asked of each supplier during the question and answer session, after each demonstration. Among the questioners were to be "Chris" (Dr Dyer); "Anna" (Ms Field) and "Andrew/Leroy" (Mr Prince, and Mr Andrew Quinn of NHS Bath).

60. Ms House did not stop there. She also sent a scoring sheet and a "Q and A MUST Requirements sheet" to (among others) Dr Dyer and Ms Field, with copies to Mr Prince, Mr Quinn and Mr Fox. Her message was that it would be "great if you could use the sheets tomorrow during the sessions". The answers to the six questions were, unbeknown to the presenting suppliers, to be scored from zero to five. There were about 28 "MUST Requirements", not disclosed to the presenting suppliers. NHS Spine integration was not among them. The ability to send PEMs was among the requirements:

> "[c]alls must generate a Post Event Message (PEM) an interoperable message that can additionally be rendered as a PDF / HTML or similar capability."

61. Mr Prince said in evidence that he suspected he and Mr Quinn devised the questions and requirements for what he called "a pre-market testing of suppliers". However, Dr Dyer, as a clinician, was also a major contributor to them. Dr Dyer too, in his evidence, sought to draw a distinction between a procurement process and pre-market testing, opining that the demonstration day was the latter, not the former.

62. The same afternoon, Dr Gerald who was to be excluded from CC's demonstration the next day, gave a presentation on Cinapsis to the other two CCGs, that lasted a good deal longer than the 10 or 12 minutes allocated. His evidence was that his presentation was objective, fair and balanced and that he had never sought to compare Cinapsis' product to other products when addressing potential customers of Cinapsis.

63. I do not accept that evidence; it is not consistent with Dr Gerald's appearance on Cinapsis's website, his speaking at a Cinapsis sponsored event, his giving the presentation he gave that day and his conversations with Cinapsis subsequently, to which I am coming. I find that Dr Gerald was strongly partisan in favour of Cinapsis. I do not accept that he presented Cinapsis's product that day with "warts and all"; my phrase which he unconvincingly adopted.

64. In emails afterwards, the same day, a Dr Shanil Mantri of NHS Bath, who was to be one of the scorers the next day, praised the session and Dr Gerald's presentation: "[f]ingers crossed [NHS Bath] choose Cinapsis tomorrow." Ms Jo Bangoura of the CSU commented that "we achieved the outcome we wanted. A step in the system-wide direction." Another attendee referred to the appearance of "an informal agreement to collaborate between [the three CCGs] and SWASFT [a foundation trust]".

65. Ms Deborah El-Sayed, Bristol's director of transformation and its only witness at the trial, accepted in oral evidence that NHS Bristol representatives who had attended the workshop on 19 November (she was not one of them) had made an informal agreement at the workshop that NHS Bristol would participate in a joint procurement exercise.

66. Ms Fankhauser, meanwhile, discussed Mr Turp's question about data analysis and reporting with a Ms Hannah Trott of BT plc the same day. The discussion included NHS Spine integration (the subject of Mr Turp's other question), as Ms Fankhauser's email to BT plc the next day shows. Ms Fankhauser emailed Ms Trott on 20 November setting out her understanding of the discussion and asking for BT's response.

67. Ms Trott said "we don't currently have the API [application programme interface] but it can be achieved". Ms Fankhauser then relayed the response to Mr Turp, with the comment: "I take it they are out as achieving API is a long process or not?" The exclusion of BT was a step towards achieving Mr Turp's goal of avoiding a competition between Cinapsis and other framework suppliers.

68. The demonstrations then took place on 20 November 2020 at a remote meeting. Mr Patrick presented on behalf of CC. Cinapsis and System C also presented, though I do not have direct evidence of the content of their presentations. Mr Patrick produced slides, which I have seen, and spoke to them. He kept his cards fairly close to his chest. It was not suggested to him in cross-examination that the six questions were asked of him by the allocated questioners at the end of his session.

69. I find that, on the balance of probabilities, the six questions were not asked in a structured way by each allocated questioner of each presenting supplier. Of the three witnesses who gave evidence and were allocated a question (Dr Dyer, Ms Field and Mr Prince), only Ms Field stated that the questions were asked in a structured way. I did not find her evidence on the point convincing and it was not supported by the evidence of Dr Dyer or Mr Prince, nor put to Mr Patrick.

70. If the questions had been asked of him in a structured manner, I am confident that his witness statement would have addressed the point in detail, such is his indignation at the process that was used. There is no record of the questions having been asked or having been provided in writing to Mr Patrick or the other presenting suppliers. The evidence shows that the six people concerned were asked to put the questions but the comments recorded against the scores suggest that, at the most, only some were put, haphazardly and not in a structured way.

71. Dr Gerald, as agreed, did not attend CC's presentation. He attended the other two presentations on 20 November. In his oral evidence he explained, sarcastically, that he "didn't want to be present to listen to the benefits of their product". However, during CC's presentation Mr Turp sent three screenshots of CC's presentation to Dr Gerald. Mr Turp conceded in oral evidence that "I maybe shouldn't have done" and apologised

for having done it. It was a plain breach of confidence. He knew Mr Patrick had objected to Dr Gerald attending.

72. Dr Gerald admitted in oral evidence that he looked at the screenshots, but then sought, evasively, to backtrack from that admission, saying that when the screenshots turned up in evidence in this case, "I didn't recollect having ever seen them, but maybe I did". He had "not necessarily" seen them. I am satisfied that he looked at them and that he and Mr Turp were aware that supplying them was a breach of confidence.

73. After the presentations, a scoring exercise of some kind was undertaken by the persons whom Ms House had identified as scorers. The evidence about how the exercise was undertaken was vague and imprecise. Dr Dyer's evidence was that there were six scorers, namely six recipients of Ms House's email: Tim King, Ms Field (Ms House's manager at NHS Bath), Chloe Stokes, Dr Shanil Mantri, Raman Sharma and himself.

74. Dr Dyer could not recall much about how the scoring was done, save that a collective score was agreed upon and recorded in the scoring spreadsheet. There was, indeed, only one score against each of the six questions in the case of each presenting supplier. He suggested that Mr Prince might be able to help with how the scoring was done. But Mr Prince's evidence on the point was unclear; he believed he and Mr Quinn had scored the sixth question, although he and Mr Quinn had been merely copied into Ms House's email.

75. Mr Prince accepted that certain comments made against the scores for some, not all, the questions, were his words which, he said, were his attempt to distil comments made by others. Dr Dyer did not know who wrote the comments save that he did not. Ms Field's evidence about the scoring exercise was given in a defensive manner, though with more confidence. She accepted that individual scores were not prepared; an agreed score was agreed in each case.

76. Ms Field did not recall the detail of the post-presentation scoring exercise. Her evidence did not convince me that any rigorous scoring process was followed. If it had been, the comments written or recorded by Mr Prince would not have had the amateurish, haphazard, improvisatory air they have, using phrases such as "didn't really answer the question"; "no[t] c[l]ear what they are providing"; and "[n]o record, no post event message" (the latter referring to CC).

77. Mr Prince referred to Mr Quinn's prominent role in the exercise. He appears in many of the most important emails at the time. Mr Quinn was not called; yet his role was important. Mr Prince candidly accepted in his evidence that the purpose of the scoring exercise was to enable NHS Bath to compare suppliers and identify a preferred supplier. The scores favoured Cinapsis as that supplier; it achieved 26 points out of a possible 30; CC achieved a score of 21 points; System C achieved 17 points.

78. At some point, it is not clear when, someone, probably Mr Quinn according to Dr Dyer in oral evidence, typed in circles against the "must requirements" spreadsheet for each of the three suppliers who presented on 20 November. Cinapsis were judged to meet 17 of the requirements; CC, 11 of them; and System C, seven of them. Mr Patrick made it clear in his evidence that he does not agree with those scores. For example, CC was not awarded a circle against the requirement:

> "Calls must generate a Post Event Message (PEM) an interoperable message that can additionally be rendered as a PDF / HTML or similar capability."

79. After the demonstrations, Dr Gerald wrote an email and attached document, which he sent to Mr Hughes at Cinapsis, at 5.55pm. He explained to Mr Hughes that "they", i.e. the CCGs, have a "specific requirement" but "a longer term vision is also needed". He had "penned a few ideas on the back of the attached envelope". The attachment set out seven "key issues". It included details of Dr Gerald's idea of that vision and included draft text for Cinapsis's "vision".

80. In cross-examination, before being shown the email and attachment, Dr Gerald denied that he had used information obtained from the presentations to coach Cinapsis and help it win the contract. However, when shown the email and attachment, he accepted that he wrote and sent them during the early evening of 20 November 2020.

81. Mr Joseph Barrett, for CC, put to him that this was "cheating". Dr Gerald said he was certainly advising on how to develop the product over time. He did not accept that he did so directly for the purpose of Cinapsis winning the contract, but I am satisfied, given the timing and content of the email and attachment and his prior links to Cinapsis, that he hoped Cinapsis would win the contract and that he hoped the advice he offered would make that more likely.

82. On Sunday 22 November 2020, Mr Prince emailed Mr Quinn attaching the scores and "a framework timetable" in spreadsheet form which he described as "tight". The framework route was depicted as lasting until, at least, late January 2021. The spreadsheet also depicted the "full OJEU" procurement route; the timetable for that route would last until, at least, 31 March 2021 and there would have to be "scoring criteria" before the contract notice was published.

83. On the Monday, 23 November, Mr Hughes produced a contract proposal called *Cinapsis Smart Referrals*. The introductory text owed much to Dr Gerald's advice three days earlier; parts of it quoted his words verbatim, unattributed. Dr Gerald accepted that his role "could" have been improper if the process had been "an open procurement". The document included indicative costs for an "enterprise license" for a contract with a duration of either two years or (at a discount) three years. Full integration with "eRS" (the NHS's own e-Referral Service) was to be complete in January 2021, at an additional annual cost.

84. Mr Fox at NHS Bath emailed Ms Brock of NHS Gloucestershire the same day, confirming that the NHS Bath group considered that "Cinapsis meets their needs" and "they would like to join you in a procurement exercise". Also on 23 November, confirmation of Alcidion's withdrawal reached Ms Critchley at the CSU because of its answers (not set out here as they are confidential) to Mr Turp's two questions. Of the four framework suppliers identified via the selection tool, only Dictate IT Ltd and Cinapsis remained in the running. Dictate IT Limited did not reply to Mr Turp's questions.

85. Cinapsis presented its indicative costs (in the *Cinapsis Smart Referrals* document) to the CCGs on 25 November 2020. On 30 November, Mr Quinn sent the "must" requirements spreadsheet to Ms Field at NHS Bath. His covering email suggests that he filled in the spreadsheet based only on what he had heard during the presentations

on 20 November: "gaps with certainly [sic] appear between what each supplier can offer vs. what the presented [sic] as part of the demo, particularly in the case of CC who basically gave a sales pitch".

86. That same day, Ms Field at NHS Bath prepared a paper for its senior leadership team which was to meet the next day, on 1 December. Ms Field explained that the three demonstrations on 20 November had shown that only two suppliers were suitable. They were not named but she must have referred to CC and Cinapsis. She went on to explain: "we have identified the procurement framework that best meets our requirements". She did not explain in her paper that Cinapsis was a member of that framework while CC was not.

87. She referred to indicative costings from the three suppliers that had presented on 20 November. She advocated a "[r]egional approach" across the three CCGs. The "[p]roposed procurement approach would be to utilise a framework", with a transition period of about four months "if we do not remain with the existing supplier", i.e. CC. The latter's contract would need extending to cover the transition period.

88. On 3 December 2020, the three CCGs each issued a formal statement committing to a joint procurement exercise to commission an A&G service. On 7 December, NHS Gloucestershire's digital executive steering group agreed to carry out "an options appraisal for Cinapsis". A further NHS Gloucestershire document for its executive group meeting on 8 December stated that "a review of clinical communications products has highlighted that the Cinapsis software would be the preferred solution …"; whereas CC "whilst focusing on voice calls currently offers no data, patient tracking or Post Message Event capability".

89. On 9 December 2020, Ms Field, Dr Dyer and others presented what appears to be an updated version of Ms Field's paper to NHS Bath's population health and care board. That board approved the proposals and decided to progress with a "preferred supplier". The paper referred to "pre-market testing and supplier demonstrations" and that the "route to market" lay in the framework "which this indicatively preferred supplier is available under".

90. The paper also stated that the preferred supplier's "indicative costings acquired through the pre-market testing" indicated that awarding the contract to the preferred supplier would produce "a neutral cost position". The availability of NHS funding was "tbc", i.e. to be confirmed.

91. Dr Dyer explained in evidence that Cinapsis's name was deliberately omitted because it was not certain that it would be awarded the contract; though he was not clear on why that point required omission of its name from the paper. Ms Field also said in evidence that Cinapsis's name was deliberately omitted. Her explanation was that "we hadn't even started the procurement."

92. Ms Field confirmed in an email to colleagues afterwards "[i]t's a yes"; the proposals had been well received and were approved. One member, named as "Ruth Graham" (probably Ms Grabham, a senior medical director at NHS Bath, referred to above), had "noted that preferred suppliers offer is significantly different to CC" and that it would be "[i]nteresting to see where the procurement goes". The group, according to Ms

Field, also supported the proposition that "[a]ppropriate engagement has taken place in this work".

93. On 10 December 2020, Mr Turp, Dr Gerald and two others produced an evaluation report for NHS Gloucestershire. Three options were evaluated; the first was to do nothing; the second, to remain with the then current pilot contract with Cinapsis; and the third which was recommended, to negotiate a fresh contract with Cinapsis for provision of A&G services for either two or three years.

94. On 14 December, Cinapsis's indicative prices were discussed within NHS Gloucestershire. The pricing was regarded as attractive by NHS Gloucestershire. Mr Turp described the prices as "[h]ot news!!!]. He produced a short email evaluation of the pricing the next day, 15 December. He discussed it with Dr Gerald and with Mr Quinn at NHS Bath. Mr Porter at NHS Gloucestershire was also impressed. He was keen to secure the favourable pricing apparently offered by Cinapsis.

95. However the charging basis was different from that set out in the framework terms. The charge was to be based on an "enterprise licence" for a set number of "specialties", i.e. NHS services. The framework standard terms, in schedule 6 (the commercial schedule) to the CCT framework, and Cinapsis's response to the framework tender exercise, provided for prices to be quoted on the basis of bands of numbers of users of the A&G platform. Cinapsis's proposal was therefore a departure from its framework pricing.

96. On 15 December, NHS Gloucestershire's "Core Group" of senior managers met and approved the third option, which was supported by a briefing paper amounting to a shortened version of the options evaluation paper of 10 December. The approval was subject to final confirmation and subject to a successful negotiation with Cinapsis.

97. On 17 December, a procurement meeting to discuss the forthcoming negotiation was held, with representatives of NHS Gloucestershire and NHS Bath present. Cinapsis was to be encouraged to perceive that the contract was not a done deal and that there would be "competition". That did not mean there would be another bidder in the running. The evidence at trial was that Cinapsis was not told it was the only bidder. There was no evidence from Cinapsis and none that Cinapsis believed there was any other bidder.

98. At some point in December 2020, NHS Bristol joined in the discussions about negotiating the service provision and other contract terms with Cinapsis. The project manager there was Mr James Dunn. He set out some sophisticated general thoughts about the requirements of a good A&G service in an email of 16 December, following a meeting with various interested persons from NHS Bristol and outside it.

99. Mr Dunn also began work on technical requirements that NHS Bristol wanted. These evolved from December 2020 to March 2021 (as Ms El-Sayed explained in oral evidence). NHS Bristol clinicians later named further technical requirements. Cinapsis's comments were obtained for information and negotiation purposes, showing among other things that integration with "eRS" was to be complete by 15 July 2021, later than had previously been anticipated.

100. On or about 8 January 2021, NHS Bristol's finance department approved the joint procurement in principle. There was an outstanding question as to whether and when central NHS funding to the tune of some £3 million would become available. I was not shown any formal document confirming when this happened, but Ms Field explained in oral evidence that NHSX confirmed the availability of that funding in "the early part of 2021".

101. NHS Bath's list of "must" requirements was being developed in early January 2021. On 12 January, Ms House emailed Mr Prince and Mr Quinn, attaching the latest version of the service specification and asking whether there was "a way you can compare our agreed list of musts against cinapsis capability to ensure we haven't asked for something they can't provide". Ms House emailed Mr Turp on 21 January to the same effect, asking that the specification be reviewed, "just to ensure that nothing in there is beyond Cinapsis capability".

102. A few days earlier on 18 January 2021, Mr Quinn had emailed Ms Enderby at CC, asking CC to extend its service provision to NHS Bath until 31 July. He did not mention the decision to undertake a negotiation with Cinapsis on a joint basis, with the other two CCGs. He did not inform CC that Cinapsis was the preferred supplier. On 19 January, he emailed Ms Enderby again asking CC to extend its provision and stating, disingenuously:

> "[j]ust to keep you updated, we are still very much in the review stage of the A&G provision, but due to mass vac[cination] rollout and resource becoming a little scarce, we need some more time to plot our way forward".

103. Ms Enderby referred the contract extension issue to Mr Patrick. The latter was unaware that CC had been scored and found wanting compared to Cinapsis. His response to Mr Quinn indicates he hoped or believed there would be a competitive procurement and that CC would be able to compete. On 26 January, Mr Quinn responded, not disabusing Mr Patrick of his belief:

> "… we are still refining a specification for A&G services across [NHS Bath], so our procurement route and plans are not yet fully understood / defined and commitment beyond July is all we can / are willing to commit to at present."

104. On 27 and 28 January, Mr Quinn checked with Ms House that Mr Turp had confirmed that the whole of the technical specification for a forthcoming Cinapsis contract was within Cinapsis's capability. Ms House assured him that Mr Turp had provided that confirmation.

105. On 2 February 2021, the three CCGs (or one on behalf of all) sent to Cinapsis a document entitled *Mini-competition via Clinical Communication Tool Framework*. The competition (if that is the right word) was for provision of A&G services to the three CCGs. A "Dear bidder" letter dated 2 February invited the bidder to submit its tender by the closing date, 17 February 2021. A detailed invitation to tender was enclosed. These documents were not sent to any other supplier, whether on or off the framework.

106. Cinapsis performed a demonstration for Mr Quinn and others on 10 February 2021. Mr Hughes emailed afterwards claiming an "advanced level of progress in achieving eRS integration". Cinapsis already had "an integration with eRS and are working on

the user interfaces". They aimed to complete these in the next three to four weeks and prior to the contract award. Ms Field was impressed; Cinapsis were "professional and adaptable" and very "customer focussed".

107. A scoring exercise was carried out – perhaps at the time, perhaps later - and the results recorded in a spreadsheet which was dated later, 3 March 2021. Cinapsis's overall score was 72.9 per cent, though some of the scorers' comments were to the effect that they lacked technical expertise and were accepting assurances from the bidder that it could meet a particular requirement. There was no other bid against which to compare the figure of 72.9 per cent.

108. Cinapsis submitted its response to the invitation to tender on or about 18 February 2021. If it was unaware it had no rival bidders, the pricing did not reflect that. Its prices per contract year were substantially increased, by about 2 per cent for NHS Bath, 1.3 per cent for NHS Gloucestershire and 10.9 per cent for NHS Bristol. The total price over the three years was now above the estimated value of the services to be derived from the framework.

109. Mr Porter, of NHS Gloucestershire, accepted that these prices were much higher than Mr Turp had envisaged; he had been hoping Gloucestershire would pay in the region of £140k per contract year. Concerns about these price increases were aired at a joint meeting of the CCGs on 23 February, attended by Mr Turp, Ms Field, Mr Porter, Mr Quinn and Mr Prince among others. The concerns were "significant" according to a note of the meeting followed by a table comparing budgeted to proposed actual prices.

110. Ms Field was asked about this meeting. The note records her contributing the observation that "CC development needs to be emphasised and Cinapsis are not the only option needs to be emphasised." She accepted in oral evidence "that would be me". It was put to her that she was emphasising that if Cinapsis's pricing was not lowered, CC was the realistic alternative. She answered: "I can't recall making the comment and because it is in shorthand, it is quite hard to interpret exactly what is meant by it".

111. Ms Field would not accept in cross-examination that the point she had been making at the meeting was clear. However, I am satisfied that it is clear and that what she meant was what the note says: that Cinapsis are not the only option; that CC was an alternative option; and that Cinapsis needed to be made aware of that. CC was, after all, still the incumbent service provider to NHS Bath, Ms Field's employer.

112. The next day Ms Field emailed to herself an aide-memoire: "[m]y brainstorm re what next with procurement for A & G". She set out four options that would arise "if procurement doesn't end in a contract". Of the four options set out, the second and third involved extending CC's contract; either "pending a full procurement process for 1/4/22" (supplemented by something she did not define); or accompanied by purchase and installation of some other software "outside of a procurement process".

113. During 24 and 25 February, negotiations took place and Cinapsis was urged to lower its price. Mr Hughes was willing to do so. On 25 February, the CCGs responded to Cinapsis's latest offer with a significantly lower counter-offer, well below the estimated value of the CCT framework. Mr Hughes was asked to attend a meeting on 26 February to discuss what Ms Brock called his '"best and final" offer'. Cinapsis sent a revised

offer that day; the total price for the three CCGs over three contract years was now £2.234 million, between the two extremes and below the estimated total value of services under the framework.

114. Dr Gerald was in contact with Cinapsis on 25 February 2021, as he accepted in oral evidence and as is clear from an email he sent the next day. He was concerned that, in his words taken from his email, the deal "could be going pear shaped (for whatever reason) and may need urgent focus if it is to be saved". He was told by Cinapsis that it would not be willing to drop its price any further: "they are unable to drop their process [sic – price] any further"; a stance he regarded as "not unreasonable".

115. He urged the two NHS Gloucestershire senior managers (one being Mr Clarke) whom he emailed, that Cinapsis's offer should be accepted; he understood there was to be a "final meeting" on 26 February and "I hope that we have had indicated to the negotiators that we will accept the offer". He argued that the service Cinapsis was offering represented value for money. Mr Clarke obtained urgent authorisation from NHS Gloucestershire's chief financial officer, Ms Catherine Leech, for NHS Gloucestershire to accept Cinapsis's price.

116. I accept Mr Porter's evidence that he was unaware of Dr Gerald's discussion with Cinapsis on 25 February and that Dr Gerald had intervened on the subject of the price. Mr Porter accepted that Dr Gerald appeared to have influenced the financial negotiation in Cinapsis's favour and that he regarded Dr Gerald's role as inappropriate. I agree with that view. I do not doubt that Dr Gerald was well intentioned, but he is a clinician; it was wrong for him to intervene in financial negotiations, especially in favour of a company with which he had close ties.

117. Mr Dunn at NHS Bristol carried out some analysis of the current pricing model; he was concerned that it was unclear what was included in each enterprise licence. He put his points to Mr Hughes at Cinapsis. Among other points (as he also explained to Messrs Quinn and Prince), charging "per organisation" rather than "per service module" meant that bringing new specialties within the scope of the service would substantially increase the cost to NHS Bristol.

118. On 2 March 2021, two Bristol consultant dermatologists, Dr Beth Wright and Dr David de Berker, wrote to Mr Dunn, also on behalf of three other named doctors (Drs Adam Bray, Amrit Darvay and Jane Sansom) complaining that the process had been rushed; more trialling time should have been allowed; and "we would like to have seen a proper local procurement exercise and been given time to assess the options being put by those tendering". They were "not comfortable that there is only one company in the procurement process…".

119. Dr Wright wrote directly to Mr Hughes and Mr Woodroffe at Cinapsis, asking for clarification of certain specific points about functionality aspects, for the purpose of the scoring exercise. Dr Wright sent a numbered list of questions for Messrs Hughes and Woodroffe. Dr de Berker, also one of the evaluators of Cinapsis's initial tender, commented in an email on 2 March 2021: "I haven't bothered with scores as I think it means nothing".

120. Mr Dunn convened a meeting of various clinicians and others on 9 March 2021, including the doctors who had objected to the method of procurement. The agenda was

to explain the procurement exercise and next steps and to finalise the "pathway". Dr de Berker sent to Mr Dunn Cinapsis's responses to the questions asked, with some additional enquiries.

121. Over the next week or so, the negotiations continued. Cinapsis sought to address the queries Mr Dunn had raised. There were variations to the proposed pricing structure. Eventually, the difficulties were overcome and the final terms were put to the boards of the three CCGs. The contract terms were formally approved by the three CCGs in the period from 18 to 23 March 2021. Ms Brock, in particular, was unhappy with the terms NHS Gloucestershire had agreed: "we have come out of this significantly worse off than our regional colleagues."

122. On 25 March 2021, Ms Field sent to Ms Grabham a proposed script for a meeting to deliver the bad news to CC that its contract would not be extended beyond July 2021. The script included a defence of what was called a "robust process" which had included "[r]eview the market providers and review the services available". The script included the point that use of the CCT framework "allowed us the time to either direct award or mini competition". It was then said that a mini-competition had taken place.

123. On 30 March 2021, CC was told that its contracts would not be extended and that a contract award had been made to Cinapsis. Mr Patrick emailed Ms Field, Mr Prince, Mr Quinn and others expressing his shock and surprise and seeking an explanation and answers to questions: "[w]e can live with losing a contract … but we have never had a situation … where a procurement was held in secret … to prevent a legitimate bidder from bidding … frankly, it smells bad".

124. Cinapsis's services to NHS Gloucestershire continued into the new contract, which is still running and due to expire at the end of March 2024. Services to NHS Bath also began from April 2021 and are due to continue up to 31 March 2024. The present claim was brought on 28 April 2021. Interim relief was not sought. Expedition was, but unsuccessfully. CC's contract to provide services to hospitals in NHS Bath's area was set to terminate on 31 July 2021, pursuant to notices of termination; but services to individual hospital trusts continued up to the end of October 2021.

125. The fresh CCT framework with an estimated value of £125 million, mentioned above, was the subject of a PIN issued on or about 24 August 2021, as this claim progressed towards trial. The term envisaged remains the same: two years with an option to extend to a third year, though call-off contract awards are envisaged which could outlast that three year period. No contract notice has yet been published to follow up that PIN.

126. In September 2021, CC began the process of obtaining NHS Spine integration. This has now been obtained. The process took about three months, up to December 2021. Cinapsis's services to NHS Bristol did not begin until 1 November 2021, much later than intended. The relationship did not thrive and Cinapsis's services to NHS Bristol were not continued after the first year. They ended on 31 March 2022.

127. The above is an outline of the facts, as far as possible in the order in which the events occurred. In the next part of this judgment, I will address each of the eleven agreed issues. As the list of issues is agreed, I will do so in the order chosen by the parties, i.e. the order in which the issues appear in the agreed list.

The First Issue

Was CC at the relevant time an economic operator in relation to the award of the A&G contract to Cinapsis?

128. An economic operator is a legal person including a company "which offers the execution of works or a work, the supply of products or the provision of services on the market" (PCR regulation 2(1)). The obligation of a contracting authority to comply with Parts 2 and 3 of the Regulations "is a duty owed to an economic operator …" (regulation 89(2)). Breach of the regulation 89 duty is "actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage" (regulation 91(1)).

129. The above account of what an economic operator is according to the Regulations, suffices for this case. Regulation 88(1), enacting a narrower meaning of "economic operator" for the purposes of "other provisions of this Chapter" apart from regulations 89 and 90, need not trouble us further. The other provisions in question are regulations 90A to 104; but nothing relevant to this case turns on the narrower meaning of economic operator (one to which a duty is owed in accordance with regulation 89 or 90) in those provisions.

130. CC submits that it is self-evidently an economic operator; it is active in the relevant "market", for it provides A&G services to many NHS bodies and does so under contracts procured in accordance with the PCR 2015. The defendants' attempt to deny CC this status required resort to heretical and unfounded novel assertions, not supported by authority. So Mr Barrett contended.

131. The defendant CCGs initially denied in their pleaded amended defence that CC was an economic operator in respect of the A&G contract awarded to Cinapsis (**the A&G contract**); it did not offer services on the relevant market and had no interest in the A&G contract; nor did it offer NHS Spine connectivity and thus could not offer PEMs or data reporting services satisfactorily.

132. The duty under regulation 89(2) was therefore, the CCGs submitted, not owed to CC; nor was any breach of that duty actionable at the suit of CC under regulation 91(1) because CC did not risk suffering any loss or damage in consequence of any breach of the CCGs' obligations (owed to others, not CC) under Parts 2 and 3 of the Regulations.

133. That stance was maintained in the CCGs' opening written submissions: CC was not a supplier of services "on the market" because "the market" was for the services comprising the service specification for the A&G contract. In particular, NHS Spine integration was a precondition of entry; its absence, and consequent inability to provide a satisfactory PEMs and data reporting service, would be "a barrier to entry", as the CCGs put it in opening.

134. In closing, that stance was modified. Ms Sarah Hannaford QC, for the CCGs, explained that they did not contend that CC was not an economic operator at all; the CCGs now accepted that CC provided services on the relevant market. The question whether the CCGs owed the relevant duties to CC therefore turned only on whether the latter had "standing" to challenge the legality of the procurement, which is the subject of the second issue (below).

135. I agree with that reasoning. Clearly, CC is an economic operator in the sense that it is in the market for the provision of A&G services to NHS bodies. It does so and did so at the time of this procurement. The question whether CC had an interest in this particular A&G contract and whether it had standing to challenge the legality of its procurement arise under the second issue, to which I turn next. The first issue, as it turns out, raises no issue separate from the second issue.

The Second Issue

Did CC at the relevant time offer services on the relevant market and/or have an interest in the A&G contract and/or have standing to bring a claim under the PCR 2015?

136. The CCGs denied, in their amended defence, that CC had "standing" to bring the claim: it had suffered no loss and did not risk suffering any, for it did not have NHS Spine connectivity and could not offer adequate PEM or data reporting functionality. Cinapsis was the only supplier on the CCT framework which could provide the required functionality; and there was nothing unlawful about using the framework to award the A&G contract and to do so by a mini-competition, in which Cinapsis was not told that it was the only bidder.

137. These arguments were repeated and developed in the CCGs' opening. CC could not show loss or the risk thereof, for the simple reason that it was not a member of the framework. CC would have to show, therefore, that the CCGs were "not entitled" to use the framework. It could not, and thus "lacks standing to bring any claim under the Regulations" (in Ms Hannaford's phrase).

138. Framework agreements, she pointed out, were a useful and established part of the edifice of procurement legislation; recognised as such in recital (11) to Directive 2004/18, preserved and maintained in its successor, Directive 2014/24, and recognised and underpinned in this country by a suite of obligations under their domestic equivalents, the Public Contracts Regulations 2006 and its successor, the PCR 2015.

139. The obligations of a contracting authority operating a framework are different from those that arise when an open procurement process is carried out, Ms Hannaford submitted. The process of appointing the framework members is one of open competition. Thereafter, the contracting authority is spared the full rigour of that process as it has already taken place. Its obligation is limited to holding a mini-competition where that is required; if it is not, the authority can simply call off goods or services from a member, without further competition.

140. The first question was "entitlement" to use the framework; only if the CCGs were not entitled to use it does it matter whether it was lawfully operated, Ms Hannaford submitted. The CCGs were entitled to use the framework, she contended. The required competition occurred at the stage of appointing the framework members, following a fair and open procurement process. CC chose not to bid. It could therefore not show loss or a risk thereof resulting from operation of the framework, even if it was operated unlawfully.

141. However, if it mattered, use of the mini-competition process (with only one competitor) was lawful, said the CCGs; it was a continuation of the competitive process leading to appointment of the framework members. Those not on the framework were lawfully

excluded from bidding. They have no interest in the operation of the framework. Indeed, it would have been a breach of the duties owed to framework members to entertain a bid from and appoint a non-member.

142. Finally, the CCGs argued that even if CC could establish that the framework was operated unlawfully, it could not have won the A&G contract because it could not provide NHS Spine connectivity and adequate PEM and data reporting functionality. This was a question of evidence. CC accepts that it did not have NHS Spine integration when the A&G contract was awarded. CC did not seek it until September 2021 and did not obtain it till December 2021.

143. CC's arguments were very different. The concept of "entitlement" to use the framework was legally misconceived, Mr Barrett submitted. There is no test of entitlement in the Regulations or the EU directives on which they (and their 2006 predecessor regulations) are based. No authority was cited by the CCGs to support a prior test of "entitlement" to determine "standing" apart from the solitary recital (recital (11)) from the superseded 2004 EU directive.

144. CC relies on breaches of the duties owed to it under the Regulations, considered in more detail below under the third to seventh issues. The breaches alleged can be broadly characterised as manipulating the process to ensure the appointment of Cinapsis. They include, first, the conduct of the scoring exercise on 20 November 2020; second, inviting only one framework member to bid; third, departing from the pricing mechanism in the framework; and fourth, using the framework beyond its limits and in excess of its maximum value.

145. Mr Barrett went on to submit that if any breach is established, the court then applies the causation test in regulation 91(1), i.e. whether any breach proved caused loss or a risk of suffering loss. That is a question of evidence, to be considered in more detail under issues eight through to eleven. It requires the court to consider relevant "counterfactuals", in the normal way.

146. There could be no legal bar or lack of "standing" to claim merely because the claimant is not a member of the relevant framework, CC submitted. If the contracting authority unlawfully awarded a contract to a framework member, the class of persons entitled to sue is delineated by the language of regulation 91(1) and on the facts included CC. Otherwise, a contracting authority could pit two members of different frameworks against each other in a biased, unfair and skewed competition; and neither would have standing to bring a claim.

147. I come to my reasoning and conclusions on this issue. As I have explained, the CCGs no longer contend that CC falls outside the definition of an "economic operator" in regulation 2(1) on the basis that it does not offer provision of the relevant services "on the market". We are now all agreed that it does. CC is therefore not excluded from the class of economic operators to which the regulation 89(2) duty is owed, that duty being the obligation to comply with Parts 2 and 3 of the PCR.

148. The question I am asked to decide is whether CC has "an interest in the A&G contract" and "standing" to bring the claim. The word "standing" in the formulation of this issue is a creation of the parties; it is not a word found in the Regulations. The way the Regulations work is that the court must decide whether an economic operator who does

offer goods or services on the relevant "market" – to which the relevant regulation 89(2) duty is therefore owed – has a claim for "breach of duty" which is "actionable" by that economic operator.

149. That, in turn, depends on whether the economic operator to which the duty is owed can show a breach in consequence of which it suffers or risks suffering loss or damage; see regulation 91(1). Once it is conceded, as it now is, that CC does supply services on the relevant market, the questions become first, whether it can show a relevant breach of the duty owed and, second, if so whether it can show loss and damage, or a risk therefore, in consequence of any proved breach.

150. I agree with Mr Barrett that determination of those two questions does not raise a separate and prior question of whether a contracting authority is "entitled" to proceed by way of a framework agreement. The structure of the Regulations does not rule out claims by a non-member of the relevant framework, if the facts show that the contract award breached a relevant duty owed to the non-member and that the non-member suffered or risked suffering loss in consequence.

151. Usually, a non-member will not be able to satisfy the causation of loss test in regulation 91(1). If the entire exercise is carried out within the four corners of a framework agreement, the parties most likely to be prejudiced and in a position to claim are disappointed framework members. Non-membership of the framework will often be a complete answer to the claim on the evidence, but it is not a legal bar creating a lack of "standing" to bring the claim.

152. It is therefore necessary to examine the manner in which the procurement was carried out to determine whether CC's non-membership of the framework is fatal to the claim on the facts. This requires the court to consider breach of duty and causation or risk of loss. These are the subject of the remaining issues before the court. There is much overlap between these remaining issues, but I will address them separately as far as possible, since the list of issues is agreed.

The Third Issue

Did the defendants' decisions breach the Regulations, including but not limited to regulations 18, 26 and/or 33 and the duties of transparency and equal treatment because of some or all of the matters pleaded in paragraphs 24 and 25 of the amended particulars of claim?

153. Regulation 18 requires contracting authorities to treat economic operators equally; to act in a transparent and proportionate manner (regulation 18(1)); and not to design the procurement with the intention of excluding it from the scope of Part 2 or of artificially narrowing competition (regulation 18(2)). Competition is considered artificially narrowed where the design is "made with the intention of unduly favouring or disadvantaging certain economic operators" (regulation 18(3)).

154. Regulation 26 deals with the contracting authority's choice of procedure when awarding public contracts. When doing so, by regulation 26(1) they must "apply procedures that conform to this Part" (Part 2 of the Regulations). As is well known, they may use the types of procedure set out in the following regulations (open, restricted, competitive with negotiation, competitive dialogue, and so forth).

155. By regulation 33(1), contracting authorities may enter into framework agreements, provided they apply the procedures provided for in Part 2. The detailed provisions about framework agreements are set out in regulations 33(2)-(11). Regulation 33(8) provides for subsequent purchases of framework services or goods to be made directly, by a "call-off" under the framework agreement; or after "reopening competition", i.e. holding what is colloquially called a mini-competition between some or all of the framework members.

156. I should also mention regulation 40, within chapter 5 which is headed "Conduct of the Procedure". I will set it out since it is quite brief:

> "(1) Before commencing a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.
>
> (2) For this purpose, contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants.
>
> (3) Such advice may be used in the planning and conduct of the procurement procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency."

157. The principles of equal treatment and transparency are well known and require no elaboration. They have developed in domestic and EU case law; see, for example, the account of Lord PFieldips MR, giving the judgment of the court in *R (Law Society) v. Legal Services Commission* [2008] QB 737, at [62] ff, explaining the decision of the Court of First Instance and (on appeal) the Court of Justice in *Commission v. CAS Succhi de Frutta SpA* (Case C-496/99 P) [2004] ECR I-3801; and *Costa and Cifone* (Joined Cases C-72/10 and C-77/10), judgment of the court at [55], [57] and [73].

158. At [73], the Court of Justice (citing *Succhi di Frutta SpA*) observed that the principle of transparency is "a corollary of the principle of equality" and:

> "implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner, to make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way, and to circumscribe the contracting authority's discretion and enable it to ascertain effectively whether the tenders submitted satisfy the criteria applying to the relevant procedure … ."

159. CC's main submissions can be summarised in the following way. First, the CCGs did not apply the pricing provisions in the framework and the terms and conditions in respect of price. Instead, they engaged in direct financial negotiations with the sole bidder. The pricing bore no resemblance to the mechanism set out in the framework tender documents.

160. Second, the CCGs departed materially from the terms and conditions of the framework, adding an entirely new technical specification at the behest of NHS Bristol, and new commercial conditions including "KPIs" (key performance indicators). The shape of the A&G services to be provided was nothing like that envisaged in the framework tender documents.

161. Third, the CCGs followed neither the call-off procedure in regulation 33, nor the mini-competition procedure in that regulation. The former required that the terms and conditions of the framework set out all the terms governing provision of the services (regulation 33(8)(a)); the latter (where that is not the case) requires a real mini-competition (see regulation 33(8)(c)). You cannot have a lawful mini-competition with only one "competitor". At least two framework members must be invited to compete and sent a formal invitation to tender.

162. Here, that did not happen; only Cinapsis was sent the invitation to tender for the A&G contract. That meant the other framework members would not receive notification of the contract award and would have no way of knowing that the so-called mini-competition had taken place. They would therefore be in no position to challenge the outcome, contrary to the CCGs' submission that the framework was operated fairly and lawfully.

163. Next, the operation of the framework was not conducted transparently and did not respect the principle of equal treatment because the specification was deliberately drafted in a manner intended to ensure that Cinapsis alone could satisfy it. No proper evaluation was carried out; the scoring exercise in which evaluators purported to score Cinapsis's tender was not objective; Cinapsis's performance was not measured against anyone else's.

164. Furthermore, CC submitted, the principles of equal treatment and transparency were breached by use of the framework to award a contract which, manifestly and necessarily, exceeded the maximum estimated value of the contract. The PIN and contract notice stated a value of £3 million, indicating the level of commercial opportunity for potential bidders, personified by the "RWIND" (reasonably well informed and normally diligent) tenderer.

165. The A&G services thus indicated would be relatively simple ones, to replace pagers with a simple and inexpensive substitute. The RWIND tenderer would so interpret the PIN and contract notice, as Mr Patrick did when deciding CC should not bid for a place on the framework; cf. C-216/17, the *Autorità Garante* case, at [63]; and C-23/20, *Simonsen & Weel A/S*, at [61]-[63]; and (non-statutory) Cabinet Office guidance issued in 2006, at paragraph 5.6: "[s]ubstantive modifications to the terms set out in the framework agreement itself are not permitted."

166. Furthermore, CC was excluded from bidding following a secret, undisclosed evaluation process at the product demonstration day. The demonstration day was "a material part of the process" (as Mr Barrett said in his written opening). It was conducted without any attempt to observe the most basic requirements of equal treatment and transparency. There were no published award criteria and the scoring system was undisclosed. The evidence did not support consistent treatment of the three suppliers that took part. The very fact that scoring was being undertaken was not disclosed.

167. The process that was followed was compromised by the unfairness of having held a previous "workshop" with Cinapsis alone, the previous day. The process was, overall, at each stage designed to narrow competition and artificially favour Cinapsis and disadvantage CC and other economic operators. Gloucestershire, through Mr Turp, accepted that it had already made up its mind to appoint Cinapsis; his agenda was to persuade the other two CCGs to follow suit, an objective he succeeded in achieving.

168. The CCGs' main points can be summarised as follows. Ms Hannaford characterised this issue as the "Entitlement Question". Her opening submissions began by characterising CC's case as a contention that the CCGs were "not entitled to use the CCT Framework" because, by reference to CC's pleaded case, the wording of the PIN and contract notice did not permit it, the mini-competition documents went further than the framework and its value was exceeded. Those were the points pleaded at paragraphs 24 and 25 of the amended particulars of claim, but the contentions were wrong.

169. The wording of the framework agreement, the CCGs submitted, extended to the services procured by the A&G contract. The procurement was to be of "clinical communication tools", obviously not just to replace bleepers. The PIN and contract notice were widely drawn by reference to the appropriate "CPV" codes. It was immaterial that Mr Patrick had (unlike Mr Ahn, who thought the PIN looked "kitchen-sinky") interpreted it too narrowly, more narrowly than the RWIND tenderer would have done.

170. The specification for the A&G contract could lawfully provide for functionality going beyond the terms of the framework. Regulation 33(11) permits the use of "more precisely formulated terms" when making a call-off or holding a mini-competition under a framework agreement, where "not all the terms governing the provision of the works, services and supplies … are laid down in the framework agreement" (regulation 33(8)(c)). The Framework ITT required bidders to promote innovation and deal with changing needs.

171. As for the estimated value of the framework of £3 million, Ms Hannaford submitted first that it was only an estimate, not a binding maximum figure; and second, that the estimate had not been exceeded at the time the A&G contract was awarded to Cinapsis. The latter feature differentiated the present case from *Simonsen & Weel A/S*, where the framework limit had already been exceeded at the time of the contract award in question.

172. The CCGs argued that the court should, in any case, not follow *Simonsen & Weel A/S*, which is no longer binding because it was decided on 17 June 2021, after the end of the implementation period under the Withdrawal Agreement. The reasoning should not be applied because the Regulations refer to an estimated maximum value, while the Court of Justice wrongly treated an estimate of maximum value or quantity as mandatory and wrongly held that a framework agreement ceased to have effect once the limit was reached.

173. As for the events of 20 November 2020, Ms Hannaford submitted (implicitly, relying on regulation 40 of the PCR) that the demonstrations and discussions about them were no more than a "market-testing exercise", undertaken by NHS Bath. It was wrong to treat that exercise as though it were itself a procurement process and evaluation. NHS Bath was merely, the CCGs argued, establishing what might be available on the market, whether the needs of the CCGs could be fulfilled and how best to procure the services required.

174. The market-testing exercise on 20 November 2020 showed that Cinapsis had a product which could meet the needs of the CCGs; that Cinapsis's product was better than CC's; and that CC's product could not meet the needs of the CCGs. Even if that conclusion was wrong, that does not render unlawful the decision to proceed using the framework

rather than an open tender procurement process. Further, there is no pleaded breach of duty in relation to the conduct of the market-testing exercise and it is too late now to rely on it as a breach of duty.

175. The CCGs were not obliged to abjure the framework as the route to market, Ms Hannaford submitted. It was rational to use it. It was faster and more efficient and it unlocked access to NHS funding not otherwise available. The award of places on the framework itself has not been challenged by CC or anyone else. CC's opportunity to secure the A&G contract lay in obtaining a place on the framework, which it decided not to seek. It now has no entitlement to compete for a call-off contract under the framework.

176. I come to my reasoning and conclusions on this issue. I must first state the factual conclusions I draw from the findings of fact I have made, set out above. I will do so in the chronological order of the narrative. Those conclusions of fact go beyond what is necessary to address just this third issue; they will also be relevant when I come to consider the other issues, particularly the fifth, sixth and seventh. My principal conclusions of fact are as follows.

177. First, CC was ambitious to extend its reach within the NHS sector. It was already a major player. Its contract with NHS Bath had caused no particular dissatisfaction on either side. Dr Dyer, indeed, commented that he had no axe to grind in relation to CC, having experienced its service provision as a clinician. As I have said, I reject the suggestion that it lacked ambition to go beyond providing voice calls.

178. Next, I consider the scope of the PIN and the contract notice for the framework, dating from May and June 2020. I reject CC's suggestion that it was confined to providing services to NHS trusts. That was clearly a minor slip; elsewhere in the documents, reference was made more widely to NHS bodies, generically. The way services are commissioned meant that CCGs would clearly be included within the array of potential customers of those appointed to the framework.

179. I accept the CCGs' submission that the wording of the PIN and contract notice was broad enough to embrace the specification in the Framework ITT. It would be unrealistic to interpret them narrowly as a blueprint to replace bleepers with something not dissimilar. There would be little point in that. The Secretary of State's announcement heralded a new dawn. Clinical communication tools are multifarious, versatile and innovative. The wording was broad. So were the CPV codes used. Mr Ahn was right to describe the PIN as "kitchen-sinky".

180. On the other hand, the estimated value of the framework was very low, at £3 million for contracts to be called off within two or three years. Mr Patrick's narrow interpretation of the PIN was not in line with the wording but was, I accept and infer, informed by the low value. You cannot buy much modern sophisticated A&G service provision for £3 million over three years, across the NHS nationally. His commercial instinct was that the opportunity for CC was too limited to make it worthwhile to bid for a place on the framework.

181. I accept that NHSX probably selected £3 million because this was the amount of NHS money allocated to the project. That was an error but the reason for the undervalue is of little relevance. The RWIND tenderer is entitled to take the £3 million at face value.

It was a gross undervalue, as shown by the fact that nearly all the value was swallowed up by this one A&G contract; that this contract caused the total value to be exceeded; and the NHS then decided to jettison that framework in favour of one with a more realistic value of £125 million. I will return later to the consequences of undervaluing the framework.

182. Subject to that point, once the framework members, including Cinapsis, were appointed in mid-August 2020, it was legitimate to investigate an appointment from the framework and for Mr Turp to base NHS Gloucestershire's initial requirements on the existing service then being provided to it by Cinapsis under the 18 month "pilot" contract. The natural advantage of incumbency is not the same thing as unfair bias in favour of the incumbent.

183. Mr Turp's intention, in August 2020, to test Cinapsis against other framework members, was sensible. At that stage there was no breach of the duty of transparency, or unequal treatment. His wish to exclude Dr Gerald and bring in others instead who were not "champions of Cinapsis" with "quotes on the Cinapsis website" was sensible, to avoid the risk of bias. Mr Turp was aware that others are normally entitled to have a chance of displacing the incumbent.

184. Ms Brock's idea, in early September 2020, of an options appraisal was similarly motivated; she knew that "due diligence" (i.e. procurement law principles) required an objective process before they could move the contract "off pilot". The selection tool was used to identify potential competitors for Cinapsis from among the framework members. Thus far, this was a normal and legitimate way of proceeding.

185. However, from about early November 2020, the process began to tilt in the direction of favouring Cinapsis over other framework members and over NHS Bath's incumbent provider, CC, as the idea of a joint procurement developed. First, Mr Fox of NHS Bath was told on 9 November that Cinapsis were to be preferred to CC. The latter preference would have raised no legal issue if the framework were lawfully to be used, since CC was not on the framework.

186. At NHS Bath, Mr Fox then wanted Ms Field to make contact with Dr Gerald. That was a bad idea because as Mr Turp had rightly pointed out, Dr Gerald was too close to Cinapsis. The risk of unlawfully favouring Cinapsis at the expense of other potential framework members arose, if the framework were used. The conclusion had not yet been reached that no other framework provider could meet the A&G requirements of the CCGs.

187. If the framework were not used, the risk was increasing of the CCGs favouring Cinapsis at the expense of CC (or other non-framework suppliers). The framework members were not the only potential suppliers of the relevant services. CC was not yet out of the running. Mr Turp recognised (on 11 November) that because CC was NHS Bath's incumbent supplier, it could need "an option to respond even though they [are] not on the framework!"

188. It was in that context that Mr Fox on behalf of NHS Bath proposed that at a session on 20 November, Dr Gerald should do a demonstration of Cinapsis's product. He also suggested that an earlier demonstration of Cinapsis's wares could be useful. The invitation for 20 November referred to NHS Bath "investigating the market… ." Market

consultations are permitted by regulation 40 provided "advice" resulting advice from experts of market participants:

> "does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency".

189. However, the demonstration exercise on 20 November was not all it appeared to be. To assess whether it was a permitted market consultation under regulation 40, the court must ascertain objectively its true character. The label put on it by the organisers is not conclusive. If it is, objectively viewed in context, an integral part of the procurement process itself, calling it a market testing exercise will not absolve the contracting authorities from their obligations of transparency and equal treatment.

190. Such an objective assessment includes consideration of the context. The following features in my judgment, taken cumulatively, deprived it of the true character of a permitted market consultation. First, Mr Turp was at the same time investigating eliminating any competition at all, even among the framework members, limiting the process to an options appraisal of certain framework members, without a competition and without formally or openly assessing Cinapsis' product against any other product.

191. Second, NHS Gloucestershire had, unofficially, already decided to appoint Cinapsis when the demonstration took place, as Mr Turp accepted. Third, although CC was asking for Dr Gerald to be excluded and Mr Turp also wanted him distanced from the process, he appeared at a Cinapsis sponsored event two or three days before the demonstration. Fourth, Mr Turp's attempt to exclude other framework suppliers focussed on NHS Spine connectivity, which was not on the list of "must" requirements.

192. Fifth, on 18 November Ms House not only sent a blank indicative pricing schedule to the participants; she also (unbeknown to CC) sent out other documents that would be used to measure their performance against each other, applying specific criteria. She did not send the six questions to the participants, nor the scoring system document, nor the list of "must" requirements. Nonetheless, those documents were to be used to assess the relative qualities of the candidates' products. That went beyond market testing.

193. Sixth, a presentation at a "workshop" with Dr Gerald presenting on Cinapsis, was held the day before the demonstration day. CC was not told about this. Dr Gerald was, I have found, partisan in advocating the appointment of Cinapsis and not assessing its performance in a balanced and objective way. Seventh, Dr Shanil Mantri, one of the scorers the next day, wrote on 19 November "fingers crossed [NHS Bath] choose Cinapsis tomorrow".

194. Eighth, Mr Turp and Dr Gerald colluded to breach CC's confidence by the former sending the latter screenshots from the meeting from which Dr Gerald was excluded. Ninth, Dr Gerald, though excluded from the presentations, sought to strengthen Cinapsis's position further by sending advice and draft text to Mr Hughes during the evening of 20 November; information and advice Cinapsis subsequently used.

195. Cinapsis was positioned as front runner before the start of the supposed testing of the market. The true nature of the exercise was that NHS Gloucestershire and Mr Turp sought to persuade NHS Bath and NHS Bristol to join in a joint procurement of the services of Cinapsis. The presence of CC and System C would enable NHS Bath, in

particular, and also NHS Bristol to decide whether to accept the proposal to appoint Cinapsis, preferably without any competition.

196. That was not, in my judgment, a market testing exercise permitted by regulation 40. It was the first stage in what was, objectively viewed, a procurement process. I reject Dr Dyer's attempt to distinguish between an informal unofficial pre-procurement scoring process and an official, formal, open procurement process. The former may bear the objective character of a procurement exercise, however reluctant the contracting authorities are to call it by its name.

197. Alternatively, if the exercise carried out on 20 November 2020 was a market testing exercise at all, it was one that had the effect of distorting competition and resulted in a breach of the principles of non-discrimination and transparency, contrary to regulation 40(3) of the Regulations. The effect was to promote the cause of Cinapsis in preference to that of CC or any other potential competitor.

198. NHS Bath and NHS Bristol were persuaded to agree to the proposal, provided Cinapsis's price was not too high, the pricing method was satisfactory and the specification for the A&G contract was satisfactory. That would mean NHS Bath dispensing with CC's services once the new Cinapsis contract was in place, which would require an extension of CC's contract.

199. It was not inevitable that Cinapsis would be appointed; both NHS Bristol and NHS Bath raised serious questions about the specification and pricing. Ms Field in her "brainstorm" aide-memoire email of 24 February 2021 considered the possibility of continuing with CC, if Cinapsis should prove too expensive. But on the merits, Cinapsis was the only candidate after agreement in principle was reached to undertake a joint procurement. Mr Turp and Dr Gerald succeeded in their objective of securing the award of the A&G contract to Cinapsis.

200. The framework provided a shield for the CCGs which, they believed, avoided the need for an open and formal procurement process, once the other potential framework member providers had been, as they were, eliminated. The reluctance to name Cinapsis in documents that could be disclosed pursuant to a freedom of information request betrays an unease about the process among some of those involved. Drs de Berker and Wright (and others they spoke for) were more forthright in their condemnation of it.

201. I return to the parties' submissions. The CCGs are correct that in paragraphs 24 and 25 there is no pleaded breach of duty relating to the supposed market testing exercise on 20 November 2020. I have found that the procurement process as a whole included the events of that day and, in particular, the undisclosed criteria and scoring. CC was not aware of the full facts when the amended particulars of claim were settled.

202. Hence, the pleading includes reservation of the right to develop the case further after full disclosure. The particulars of claim could have been further amended after full disclosure, but I do not think it matters that they were not. Breaches of duty in relation to the events of 20 November 2020 are clearly raised under subsequent issues, three to seven inclusive in the agreed list of issues. I will therefore address that aspect further when I consider those issues.

203. I confine myself for the moment to what is pleaded at paragraphs 24 and 25 of the amended particulars. The averments concern the use of the framework, but viewed in isolation from the scoring exercise on 20 November 2020, of which I infer CC was ignorant when the pleading was settled. I return, first, to the value of £3 million attributed to the services to be contracted for under the framework.

204. Regulation 6(8) of the PCR states in the case of framework agreements that "the value to be taken into consideration shall be the maximum estimated value, net of VAT, of all the contracts envisaged for the total term of the framework agreement…". I have already said why I consider that £3 million was far too low. However, I do not think CC can rely on this point as a free standing ground of challenge to the award of the A&G contract to Cinapsis.

205. The value of the contract as finally negotiated came close to exceeding the estimate of £3 million for the value of all contracts under the framework, over up to three years, but did not itself exceed that value. *Simonsen & Weel A/S* seems to be, in general, properly reasoned; though I would not necessarily agree that a contract to deliver value above a stated estimated total framework value is *ipso facto* void. Here, *Simonsen & Weel A/S* is distinguishable because in that case no estimated maximum value was stated at all.

206. CC's ground of complaint in respect of the undervaluation arose at the point when the PIN and contract notice were published in May and June 2020. CC could have challenged the framework tendering process as non-transparent on the ground that it stated an unrealistically low value for the services to be contracted for under the framework. No such challenge to the framework tender documents and arrangements was brought, by CC or anyone else.

207. If Mr Patrick had correctly interpreted the broad wording of the PIN, contract notice and Framework ITT, he may have questioned the low value attributed to the framework. Instead, he took the view that the words used must be interpreted narrowly because of the low value attributed to the framework. I have explained that this approach was, in my judgment, mistaken. The meaning of the words used informs the correct value, not vice versa.

208. Next, I agree with the CCGs that the technical specification for what became the Cinapsis contract did not go beyond the PIN, contract notice and Framework ITT terms. The formulation of the services to be provided under the framework was broad, and deliberately so; it referred to concepts such as innovation and refinement. The eventual specification does not enter the forbidden territory of "substantial modifications" to the terms of the framework (regulation 33(6)). Rather, it comprised "more precisely formulated terms" (regulation 33(11)).

209. However, the evolution of the A&G contract specification was, in my judgment, not carried out transparently. The original draft specification was written by Mr Turp, without impropriety, on the basis of Cinapsis' existing provision to NHS Gloucestershire. But the subsequent evolution of the specification was designed with a view to ensuring that Cinapsis could meet it, rather than from an objective assessment of the CCGs' needs irrespective of who would be the supplier. The CCGs were concerned not to ask for a service Cinapsis could not provide.

210. Furthermore, other members of the framework were not given an adequate opportunity to compete with Cinapsis. This point may have little or no impact on CC's challenge, not being a framework member. But Mr Turp's quest to exclude the other framework providers clearly treated those others unequally, compared with the treatment of Cinapsis. The basis for excluding other members was an absence of NHS Spine integration, which was not on NHS Bath's list of "must" requirements.

211. The framework was not, in my judgment, transparently operated. The so-called mini-competition involved only one "competitor". I reject the submission that a mini-competition can proceed with one competitor "competing" against the requirements of the contracting authority. It does not assist to point out that Cinapsis may have been unaware it was the only bidder.

212. The competition here was unreal because the CCGs' requirements were (as I have explained) tailored to those of the competitor, not the other way round. The scoring was unreal because the sole bidder's performance was not being measured against anybody else's performance. Dr de Berker's comment was apt: "I haven't bothered with scores as I think it means nothing".

213. I also accept Mr Barrett's submission that it is inherent in the notion of a mini-competition under regulation 33 that there is more than one competitor. The language of the regulation uses the plural "economic operators" in regulation 33(8)(c) to refer to those competing. The same use of the plural features in the procedural requirements for a mini-competition between "economic operators" set out in regulation 33(11)(a).

214. That language implies that more than one economic operator must be capable of performing the contract. It is true that (a) refers to those economic operators that are "capable of performing the contract". In principle, there could be only one framework member with that capability. If that is established after sending out the tender documents to at least two framework members and there is only one bid, there is no difficulty. On that scenario, there is a competition but the sole bidder wins it by default.

215. But if, as here, the tender documents are sent to the only bidder considered suitable, the others are not given the chance to compete, are not notified of the outcome or the reasons for selecting the successful bidder and are in practice disabled from exercising their rights of challenge under the PCR 2015. The contracting authority must, in those circumstances, either enter into a call-off contract with the only framework member in the running (under regulation 33(8)(a)) or conduct an open procurement process outside the framework.

216. Finally, I accept CC's submission that the pricing agreed upon bore very little resemblance to the method of pricing provided for in the blank price matrix filled in by Cinapsis and the other framework bidders. The pricing which the framework bidders had to put forward in their tenders was for the cost to be measured by bands of numbers of users of devices. The pricing agreed with Cinapsis, by contrast, was for an "enterprise licence" per NHS service.

217. That change, in my judgment, fell on the wrong side of the dividing line between forbidden "substantial modifications" to framework terms (regulation 33(6)) and permitted "more precisely formulated terms" (regulation 33(11)). In that respect also, the framework was not operated transparently and even-handedly as required under

regulation 18 of the PCR, nor in accordance with the CCGs' obligations under regulation 33.

218. I will consider later in this judgment the extent to which CC can obtain any remedy or remedies from the court in consequence of those breaches of duty.

The Fourth Issue

Was the statement of reasons provided by the defendants (i) erroneous, non-transparent and unlawful, and/or (ii) did the defendants fail to provide any lawful, transparent statement of reasons in respect of the relevant decisions?

219. In its amended particulars of claim, CC complains that the CCGs cited as the reason for awarding the A&G contract to Cinapsis that the CCT Framework had been "a strategic procurement choice which allowed us to progress to an award, in the timeline required by the CCG's involved in the procurement". That is criticised on the basis that there was time for an open procurement, NHS Bath having extended CC's contract until 31 July 2021.

220. CC also complains of another statement published on an academic health network website, to the effect that NHS Gloucestershire's pilot contract with Cinapsis had proved successful and that "as a result" all three CCGs had procured Cinapsis's services under the CCT Framework. That is criticised on the basis that the true reason for using the framework was to maximise Cinapsis's prospects of securing the A&G contract. CC also contends that there should have been a formal record of the reasons for the contract award.

221. In opening written submissions, CC submitted that the duty of transparency imposes a duty to give reasons and that a true account of the real reasons for Cinapsis's appointment was not given. CC relied on the analysis of Fraser J in *Energy Solutions EU Ltd v. Nuclear Decommissioning Authority* [2016] BLR 625, at [278]-[296] leading to his conclusion at [296] that the legality of a decision "will be considered by reference to the reasons made available from the contracting authority to the claimant prior to the issuing of the proceedings".

222. That should be the approach, said Fraser J, where at trial the contracting authority "seeks to rely upon different explanations or reasons for its decision … to those communicated to the claimant prior to the issue of proceedings" ([296]). CC also relied on the observation of Stuart Smith J (as he then was) in *Lancashire Care NHS Foundation Trust v. Lancashire CC* [2018] BLR 532, at [54]: "a procurement in which the contracting authority cannot explain why it awarded the scores which it did fails the most basic standard of transparency".

223. In closing, CC criticised NHS Bath's wish (expressed in an email from Ms Field on 13 January 2021 to Ms House and Messrs Quinn and Prince) that extending CC's contract then "will disclose to CC that we may be looking to move away from them"; and Mr Quinn's disingenuous email to Ms Enderby at CC of 19 January 2021, saying that NHS Bath was "still very much in the review stage of the A&G provision".

224. On that basis, CC submits that "the statement of reasons provided by the Defendants" was erroneous, non-transparent and unlawful; or alternatively that the CCGs failed to

provide any lawful transparent statement of reasons. CC's case in relation to the giving of reasons, or not giving reasons, or giving reasons that were misleading, therefore appears to be founded on breach of transparency, i.e. of the duty owed to CC as an economic operator, enshrined in regulation 18 of the PCR.

225. The CCGs submitted that the reasons claim was unclear. They had given ample reasons and explanations, said Ms Hannaford. In closing, she said the *Energy Solutions* and *Lancashire Care* cases concerned giving reasons to tenderers and candidates. Here, CC was neither. Further, there is no requirement to give reasons even to candidates or tenderers, let alone more widely, where a contracting authority awards a contract pursuant to a framework, with or without a mini-competition: see regulation 86(5)(c) of the PCR 2015.

226. Fraser J in *Energy Solutions* gave his decision in the context of an open competition to procure magnox reactors, to which the then Public Contracts Regulations 2006 applied. In his analysis, he mentioned regulation 32(2)(b) of the then 2006 Regulations, imposing an express duty to give reasons. There are similar duties under regulation 55(2)(b) and 86(2)(b) of the PCR 2015. However, Ms Hannaford is right to observe that where a framework is used, even unsuccessful framework members have no entitlement to reasons.

227. The essence of this issue is a complaint that the CCGs, in particular NHS Bath, communicated with CC in a misleading manner, in the context of the contract extension discussions and by indicating (through Mr Quinn) that progress towards procuring a fresh A&G contract was less advanced than in truth it was. There is substance in the complaint; Mr Quinn's emails of 18 and 19 January 2021 to Ms Enderby and of 26 January 2021 to Mr Patrick were indeed disingenuous and economical with the truth.

228. NHS Bath wanted to retain the CC's good will and did not want it to know that it would shortly be replaced. NHS Bath did not reveal to CC the full truth about the reasons for the procurement of Cinapsis at the time. However, in the absence of reliance on an express statutory duty to give reasons, I do not think that formulating that complaint as a reasons challenge adds anything of substance to the more general complaint that the procurement was conducted on a non-transparent, biased and unlawful basis, contrary to the various Regulations cited and in particular regulation 18. That is the next complaint, to which I now turn.

The Fifth Issue

Did the defendants' decision to use the CCT framework to effect the direct award of the A&G contract to Cinapsis breach regulations 18(2) and (3) of the Regulations and/or the duties of transparency and equal treatment, in that the design of the procurement was made with the intention of artificially narrowing competition and/or the intention of unduly favouring or disadvantaging certain economic operators?

229. This complaint lies at the heart of the case. It is said that the CCGs manipulated the process to ensure that Cinapsis was the successful party. Regulation 18(2) forbids making "the design of the procurement … with the intention of excluding it from the scope of this Part or of artificially narrowing competition". Regulation 18(3) states that "[f]or that purpose, competition shall be considered to be artificially narrowed where

the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators".

230. CC's submissions on this issue were detailed, but can be summarised shortly. They broadly fall into two categories. First, CC says in effect that the CCGs misused the framework, departed from its terms and used up nearly all its value on one contract, in order to create a smokescreen for the unlawful direct award of a public contract, without competition; "the most serious breach of Community law in the field of public procurement on the part of a contracting authority…" (Case C-26/03, *Stadt Halle RPL Recycling Park GmbH* [2005] ECR I-00001, at [37]). The so-called mini-competition was a "sham".

231. Secondly, CC submits that the contract award was vitiated by the secret evaluation and scoring process used by NHS Bath. CC's demonstration was a material part of the process. There was discussion internally within the CCGs of how CC had performed at the demonstration, compared to Cinapsis. CC submitted that the process was contrary to the most basic requirements of transparency and equal treatment; there were no published award criteria and the performances were not discussed on the same basis or any coherent basis.

232. The scoring and recording of scores and comments was done after Cinapsis had already been given a head start following the "workshop" the previous day, when an informal plan to proceed with a joint procurement was made; which in substance meant a joint procurement with a contract award to Cinapsis. CC also complains of various manifest errors of assessment; for example, not including in the "must" requirements list a circle to indicate that CC could provide PEMs.

233. In closing, Mr Barrett reminded me that a "procurement" is defined in regulation 2(1) of the PCR as:

> "… the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose".

234. The A&G contract was a "public contract" within regulation 2(1). The "procurement" therefore included the activities of Mr Turp and Dr Gerald from August 2020 to promote Cinapsis's appointment without a formal process. The use of a selection tool to identify competitors within the framework was, CC said, intended to produce a negative answer to the question whether any of the other suppliers on the framework could meet the CCGs' needs. Thus, other suppliers were excluded for want of NHS Spine integration; while Cinapsis's statement that it "fully integrates with … eRS" was, CC submitted, not true.

235. Ms Hannaford, for the CCGs, submitted (as recorded above) that the demonstrations on 20 November 2020 were not part of the procurement, but merely testing of the market. The activities of Mr Turp and Dr Gerald before the demonstration day were not part of the design of the procurement, she submitted. Dr Gerald's role had, in any case, been overstated.

236. Ms Hannaford reiterated her submission that the CCGs were entitled to use the framework; that there was no anti-competitive behaviour in doing so; its use had followed an open competitive process before framework members were appointed. CC had for its own commercial reasons opted not to take part in that process, and therefore could not now complain about the manner in which the framework was operated.

237. Further, the CCGs contended, the process was not designed to favour Cinapsis. Other candidates were identified using the selection tool but subsequent enquiries of them failed to produce any other viable candidates. It was then lawful to proceed with a competition and assessment process pitting Cinapsis against the requirements of the CCGs, not informing Cinapsis that it was the only bidder.

238. Ms Hannaford submitted in closing that regulations 18(2) and (3) do not apply to a decision to call off (i.e. award) a contract using a framework. That is not the "design" decision. The call off decision here was simply a decision the contracting authority is entitled to make if the supplier is a member of the framework and the proposed contract falls within its scope. The "design" decision in such a case is to design the competition to become a member of the framework in the first place.

239. I have already stated above, when addressing the third issue, my principal factual conclusions about the procurement and the process that was followed. It is unnecessary to repeat them; they are clearly relevant to this fifth issue as well. In short, the process was lawful in the period from August to early November 2020, when Mr Turp and others were considering what the specification should be and whether any framework members other than Cinapsis could meet it.

240. The process moved towards unlawfully favouring Cinapsis from early November 2020. The demonstration day was not market testing but part of the procurement process. Cinapsis was favoured. The specification was crafted to ensure Cinapsis could meet it. The framework was used as a shield to justify the exclusion of CC and others.

241. The specification was within the scope of the PIN and contract notice, though the value attributed to the framework was far too low. The mini-competition was not a genuine competition. Cinapsis was sure to be appointed unless it sought to charge too much. The pricing terms and negotiations bore little resemblance to the terms of the framework and represented an impermissible substantial departure from them. The price negotiations were at large, contrary to the framework terms.

242. In those circumstances, I accept the submission of CC that the CCGs decided to use the CCT framework to effect the direct award of the A&G contract to Cinapsis in breach of regulations 18(2) and (3) of the Regulations in that the design of the procurement was made with the intention of artificially narrowing competition and/or the intention of unduly favouring or disadvantaging certain economic operators.

243. For completeness, I reject the submission of the CCGs that regulation 18(2) and (3) have no application to a decision to call off goods or services from a framework. It is a question of fact whether they are breached or not vis-à-vis a particular economic operator, as explained above. In a normal case where a framework is used, there would be no breach of regulation 18, provided the framework members were treated equally.

244. But where, as in this case, the winner is picked, first by means of a covertly competitive process outside the framework, and then using the framework without genuine competition, there is plenty of scope for the proposition that regulation 18(2) and (3) (and indeed regulation 18(1)) are not complied with.

The Sixth Issue

Was the process by which the defendants awarded the A&G contract to Cinapsis under the CCT framework unlawful and in breach of the requirements of regulation 33 and/or the duties of transparency and equal treatment?

245. I have largely already addressed these questions. CC submits that the answer is a resounding yes because of all the points already discussed. The CCGs' attempt to defend the manner of the A&G contract award has also been discussed above. It is unnecessary to repeat the submissions. I have already found that there was a breach of the requirements of transparency and equal treatment, and explained why.

246. Nor it is necessary to repeat my findings in any detail. The specification for the A&G contract was legitimate in the sense that it was within the four corners of the PIN and contract notice; but unlawful in that, in the later stages, it was drafted so as to benefit Cinapsis. The framework value was much too low. The agreed pricing terms substantially departed from the framework pricing terms, in breach of regulation 33(6). The mini-competition featured only one competitor and was not genuine, in breach of regulation 33(8)(c) and 33(11)(a).

247. In closing submissions, Ms Hannaford valiantly sought to defend the mini-competition having only one competitor, and the pricing negotiations. She observed that a framework may have only two members at a minimum (reduced from three to two in the 2014 Directive). Often, a bidder may withdraw, leaving only one candidate. I do not accept that argument. It is one thing for a single bidder to be left in the competition after another or others drop out. It is another matter only to invite one bid.

248. Ms Hannaford also pointed out that the price negotiations led to an outcome not in excess of the overall estimated framework value. That is true, but not determinative of whether there was a substantial departure from the framework pricing terms, as there was. She noted also that the detailed provisions of the Framework ITT on pricing left much room for flexibility and contended that the actual amounts paid were not far from what would have been chargeable if the ITT Framework pricing terms had been used.

249. I do not accept that the changes to pricing that occurred were merely an exercise in being flexible. The charging basis was altered completely. It was a substantial departure from the framework terms on pricing. That conclusion is not altered by comparing what, as it happens, became payable in fact with what would, as it happens, have been payable applying the framework terms.

The Seventh Issue

Was the award and/or the defendants' decisions relating to the A&G contract award made in breach of the requirements of regulation 24 and/or vitiated by apparent bias and/or in breach of the duties of transparency and equal treatment?

250. Regulation 24(1) requires "appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators". Conflicts of interest arise where "relevant staff members" have, directly or indirectly, a "financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure" (24(2)).

251. Mr Barrett submitted that regulation 24 overlaps to some extent with the common law doctrine of apparent bias embodied in the speech of Lord Hope in *Porter v. Magill* [2002] 2 AC 357, at [102]-[103], holding that a decision will be unlawful if all the circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the decision maker was biased.

252. In its written opening, CC submitted that the interventions of Dr Gerald in favour of Cinapsis, in particular, gave rise to breaches of regulation 24 by reason of apparent bias; and that this would be explored further in evidence. Having cross-examined Dr Gerald and others, Mr Barrett relied in closing on the entire course of events during November 2020 as showing bias in favour of Cinapsis; including not just Dr Gerald's role but that of Mr Turp and others.

253. Mr Turp, said Mr Barrett, admitted in oral evidence having helped Cinapsis to prepare for its presentation, telling it on 19 November "what to focus on". Dr Gerald's presentation on 19 November was biased in favour of Cinapsis, he submitted. Mr Turp and Dr Gerald continued their eulogy of Cinapsis in the witness box, the former observing that "we had done something fantastic in Gloucestershire", of which he was very proud.

254. Mr Barrett relied on what could be called organisational bias in that many of those judging CC's performance on 20 November had also been present when Dr Gerald had presented in favour of Cinapsis the previous day. In the case of Dr Gerald, he had a clear "personal interest" in Cinapsis winning the contract which "might by perceived to comprise their [i.e. his] impartiality and independence in the context of the procurement procedure". His multiple interventions in favour of Cinapsis demonstrated this. No steps were taken to exclude Dr Gerald from the process.

255. CC also relied on, as evidence of bias in favour of Cinapsis, unfairness towards CC arising from the evidence about the six questions, the contradictory evidence about whether or by whom they were asked; and the absence of a properly recorded rationale for the secretly recorded scores. The list of "must" requirements was, he submitted, defective and unfair to CC; it wrongly described what CC could and could not provide by way of service.

256. By Ms Hannaford's opening skeleton argument the CCGs complained that, while alleged bias was pleaded in the amended particulars, the scope of the allegation remained unclear. The CCGs reserved their rights in their amended defence, saying the plea was insufficiently particularised, but they did not apply to strike it out.

257. In closing, Ms Hannaford repeated the submissions concerning the entitlement of the CCGs to use the framework agreement. She submitted that it was CC's choice to confine itself on the demonstration day to a high level general presentation amounting

merely to a "sales pitch". Dr Gerald's role was overstated, she argued. He had good reason to be enthusiastic about Cinapsis' product and the CCGs were entitled to reach an objectively supported view that its product (and procuring it via the framework) was better than CC's product.

258. In my judgment, CC has succeeded in making good its claim that regulation 24 and the duties of equal treatment and transparency were breached in the course of the procurement. I have largely stated above my reasons for finding breaches of the duties of equal treatment and transparency. As for the specific allegations of bias under regulation 24, I find that Dr Gerald and Mr Turp were both "relevant staff members" within regulation 24(3).

259. The definition of "relevant staff members" is either "staff members of the contracting authority" or "staff members …. Of a procurement service provider acting on behalf of the contracting authority…". Dr Gerald falls within the first limb of that definition, for he is employed by NHS Gloucestershire; Mr Turp, within the second limb, having at the time been employed by the CSU and acting on behalf of NHS Gloucestershire (his later employer) in the procurement.

260. Both Mr Turp and Dr Gerald had "conflicts of interest arising in the conduct of" this procurement procedure, from about early to mid-November 2020 onwards. I do not find any such conflict of interest arising earlier, merely because they had experience of Cinapsis's service provision and admired it; that is normal where there is an incumbent provider performing satisfactorily.

261. The conflict of interest did not arise from any financial or economic interest, direct or indirect (see regulation 24(2)). Their interest fell within the words "other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure" (*ibid*).

262. In the case of Mr Turp, the line was crossed when he started planning the appointment of Cinapsis without any competition, from about 9 November 2020 onwards. He did so with some subtlety, recognising that Dr Gerald should be distanced from the process, unlike Mr Turp himself. Thereafter, Mr Turp lobbied tirelessly in favour of a joint procurement of Cinapsis, seeking to persuade NHS Bath and NHS Bristol to come on board. He more or less admitted as much in oral evidence.

263. In the case of Dr Gerald, his prior connection with Cinapsis was recognised by Mr Turp who issued his warning on the subject, as I have said. It was obvious to Mr Turp that Dr Gerald should have no part in the procurement process. The same point is obvious to this court, having regard to regulation 24 and the common law doctrine of apparent bias.

264. Dr Gerald's knowledge of and admiration of Cinapsis's work was not enough to create a conflict of interest. But his conduct from mid-November 2020 onwards clearly crossed the line. Despite being warned by Mr Turp not to become involved, he (i) accepted a speaking platform at an event organised by Cinapsis on 17 and 18 November 2020 (ii) made an enthusiastic presentation in favour of Cinapsis on 19 November (iii) although not permitted to attend on 20 November, received that day from Mr Turp and considered information about a rival bidder, CC, in breach of confidence (iv) advised Cinapsis in writing on the evening of 20 November how to pitch for the A&G contract

and (v) met Cinapsis on 25 February 2021 to discuss the contract and in particular pricing and (vi) lobbied in favour of Cinapsis's financial terms in an email on 26 February 2021, in an effort to prevent the deal going "pear shaped".

265. The CCGs took no "appropriate measures" under regulation 24(1) to "prevent, identify and remedy" these conflicts of interest. NHS Bath, through Mr Fox acting on its behalf, on the contrary was keen to put Ms Field in touch with Dr Gerald. The wiser voices of those concerned about the process, such as Ms Brock, Ms Grabham, Dr Wright and Dr de Berker, went unheeded.

266. I accept that there was considerable organisational bias in that those present at the demonstration on 20 November who had also been present at Dr Gerald's presentation the previous day, were likely to have been predisposed in favour of Cinapsis by 20 November. I prefer to regard that organisational bias as part of the breach of the duties of transparency and equal treatment by the CCGs as organisations, rather than as a specific breach of regulation 24, which is concerned with individuals who have a conflict of interest.

267. Such a person was Dr Shanil Mantri, who had expressed the hope in an email on 19 November that "fingers crossed", the CCGs would prefer Cinapsis the next day, on 20 November. Dr Mantri was then one of the scorers on 20 November. His predisposition to prefer Cinapsis expressed in the "fingers crossed" email evinced, in my judgment, a "personal interest" compromising impartiality within regulation 24(2). He should have been disqualified from taking part in the scoring exercise.

268. I should add that I do not find that the motivation of Mr Turp and Dr Gerald was dishonourable. They believed what they were doing was best for the NHS in their area. Mr Turp, and to a lesser extent Dr Gerald, were aware in a vague way that fair and lawful procurement required an objectively defensible process.

269. I infer that Mr Turp, in particular, regarded that as a bureaucratic nuisance. He knew where the public interest lay; if the law required more, it was getting in the way of the public interest, of which he considered himself the best judge. Dr Gerald was more insouciant about his own role. He too considered that he knew best. His disdain for a process of objective comparison between suppliers displayed arrogance but his motives were as high minded as Mr Turp's.

270. I accept that the other participants such as Ms Field, Mr Dunn and Mr Prince, likewise all wanted what was best for the NHS. With the possible exception of Ms Field (who realised, too late, the need to persuade Cinapsis that it faced competition) it does not appear to have occurred to them that they could have got a better deal if they had followed the letter and spirit of the Regulations.

The Eighth Issue

Insofar as any breaches of duty are established, did those breaches (whether individually or together) cause CC to suffer or risk suffering loss or damage?

271. I paraphrase Mr Barrett's main submissions as follows. First, CC was already active in the provision of A&G services to NHS bodies; to a greater extent, indeed, than Cinapsis. If the competition had been open and fair, CC would have known what specification it

had to meet and would, in the normal way, have adapted and developed its services to meet that specification, as it had done for its other NHS customers.

272. That would include development of NHS Spine integration and other functionality and interoperability requirements such as electronic patient record (EPR) integration, which is different from NHS Spine integration. All the "must" requirements in the list not shown to CC could readily have been fulfilled by it. The requirement for asynchronous A&G and PEMs are a good example.

273. If the procurement had been lawful, CC would probably have been the successful bidder. The court should "err if anything on the side of generosity to the claimant …", as it is the defendants' wrongdoing that has created uncertainty about what would have happened (*Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] 1 All ER Comm 1321, per Leggatt J, as he then was, at [188]). CC would have started as front runner and market leader, with a track record superior to that of Cinapsis.

274. The suggestions in evidence that the CCGs would have undertaken the procurement using a different framework agreement called the "G-Cloud" framework is flawed. The court should accept Mr Patrick's evidence that it is a framework intended for purchase of "off the shelf" products rather than products such as A&G services, which require development.

275. Further, use of the G-Cloud would have been too expensive. Cinapsis's pricing on the G-Cloud framework is set at £5,000 per service per month, plus £850 per day extra costs for integration and project management. Further documents disclosed within the confidentiality ring show the actual number of services purchased from Cinapsis by each of the CCGs. Those documents show that for the total number of services purchased, applying Cinapsis's pricing under the G-Cloud framework, the cost would have run into tens of millions of pounds.

276. If any framework would have been used other than the CCT Framework, the likely candidate was the "HSS" (Health Systems Support) Framework, of which CC and Cinapsis are both members. However, the most likely counterfactual is that there would have been an open competition. Ms Field recognised this in her "brainstorm" email of 24 February 2021, when contemplating the possibility that Cinapsis might seek to charge too much.

277. In closing, Mr Barrett developed these submissions in some detail, by reference to the written and oral evidence. However, for the purpose of this issue, it is only necessary to show, at the lowest end of the spectrum, a "risk" of suffering loss and damage caused by the proved breaches of duty. As already noted above, this is a necessary condition for qualifying as an economic operator to whom the obligation to comply with Part 2 of the PCR is a duty owed.

278. For the CCGs, Ms Hannaford submitted that NHS Bath would have had to make a business case for funding whose outcome was uncertain. The funding from NHSX might not have materialised. NHS Bath may have conducted a different procurement but Ms Hannaford points to the evidence of Dr Dyer, who had experience of CC's services and submits that CC would not have been successful.

279. Ms Hannaford further submitted, relying on the written evidence of Mr Turp and Dr Gerald, that NHS Gloucestershire would not have abandoned A&G services altogether but would have preferred Cinapsis's product to that of CC, even if the latter had been considerably cheaper than the former. Alternatively, it may have considered using the G-Cloud framework to which CC is not a party, while Cinapsis is.

280. As for NHS Bristol, she submitted that it would not have sought to procure A&G services at all. She relied on the written and oral evidence of Ms El-Sayed. NHS Bristol had not previously contracted for such services, although Ms El-Sayed does anticipate in her written statement that NHS Bristol may well enter into such a contract in due course.

281. Ms Hannaford described Mr Patrick's evidence as self-serving; Mr Patrick cannot escape the strength of the CCGs' preference for Cinapsis's product even on the footing that the procurement was not lawfully carried out. The most that CC could have lost was a chance of winning the contract which, the court should find, was so negligible as to be no loss or risk of loss at all.

282. Alternatively, Ms Hannaford submitted that if the relevant counterfactual were that the CCT Framework could have been used, then CC has necessarily suffered no loss because it could not have been a bidder for the A&G contract, not being a member of that framework.

283. Turning to my reasoning and conclusions, I start with the observation that both parties' evidence is self-serving. It is always easy when considering what would have happened to convince oneself that what would have happened would have been favourable to the interests of the person musing on the subject, with the luxury of not being susceptible to correction. It is therefore useful to measure the views of the various witnesses against objective facts.

284. Next, there were elements of unfairness to other framework members in the course of this procurement. Mr Turp asked two questions about NHS Spine integration and about data reporting to three suppliers discovered through the use of the selection tool. He used the responses of those that answered to rule them out, rather than to help them fulfil the specification, as he did in the case of Cinapsis. No other framework supplier was invited to tender despite the procedure being described as a mini-competition rather than a call off.

285. That unfairness to other framework members cannot have caused CC to suffer loss, or the risk thereof. If the procurement exercise had comprised a genuine use of the framework alone, and nothing else, then unfairness to others among the members of the framework would not have assisted CC. The unfairness to the other framework members would not have caused CC to suffer loss, or the risk thereof.

286. However, I have found that the procurement process, objectively viewed, included the non-transparent competitive process conducted on 20 November 2020. This shows that the CCGs had some interest in the services of CC. So does Ms Field's email to herself setting out the options that involved continuing with CC's services. That is not surprising because CC was the incumbent provider to NHS Bath.

287. Dr Dyer had experience of CC's services and said in evidence (in the context of the scoring exercise on 20 November, in which he took part) that he had no "axe to grind" with regard to CC. The fact that Mr Turp and Dr Gerald sought to persuade NHS Bath not to continue with CC indicates that a fair competition would have been one involving CC as well as others, even though CC was not on the CCT Framework.

288. I find little objective support for the proposition that a different framework would have been used. I accept Mr Barrett's submission that the G-Cloud framework was unsuitable and that Cinapsis's pricing under it was too high. The obvious framework to use was the CCT Framework, but its drawback is that it could not be used in a competition between CC and Cinapsis.

289. Yet, CC was a major player in the market and already had a contract for services to hospitals in NHS Bath's area, and elsewhere. I therefore find that the most likely counterfactual is a fair competition of some kind between, among others, CC and Cinapsis. It makes little odds whether that competition would have taken place under the HSS Framework, or as an open procurement. On the evidence I have, the main competitors would have been CC and Cinapsis, though other suppliers might well have taken part too.

290. I do not accept that I can be satisfied on the balance of probabilities that CC would have had a nil or negligible chance of winning the A&G contract, had a fair competition been conducted. The threshold for present purposes is low; there only has to be a risk of loss caused by the breaches of duty. The evidence of a strong preference for Cinapsis proceeds from a comparison which is the same as the one that was carried out unlawfully.

291. If the unlawful element is stripped out to produce the relevant counterfactual, the contest becomes much more even. For those brief reasons, which are similar to those in Mr Barrett's submissions, I accept that a risk of loss and damage caused by the CCGs' breaches of duty is made out.

The Ninth Issue

If so, what remedy or remedies should be granted by the court?

292. Regulation 98 states that (apart from certain ancillary orders mentioned in regulation 98(3)) where the court finds a relevant breach of duty and the contract has already been entered into, the court must follow regulation 98(2). It must, if satisfied that any of the "grounds for ineffectiveness" applies, make a declaration of ineffectiveness (**DOI**) in respect of the contract unless regulation 100 requires it not to do so (regulation 98(2)(a)). It must, where required by regulation 102, impose penalties in accordance with that regulation (98(2)(b)); and it may award damages (98(2)(c)).

293. The "grounds of effectiveness" are threefold and are set out in regulation 99. CC submits that the first and third grounds apply here. The first ground is that the contract has been awarded without prior publication of a contract notice where "Part 2 required the prior publication of a contract notice" (99(2)). There are exceptions where the conditions in regulation 99(3) are met, but CC says the exceptions do not apply and that the CCGs have not pleaded reliance on them.

294. The third ground of effectiveness (99(6)) includes circumstances in which the contract is based on a framework agreement; is awarded in breach of any requirement imposed by regulation 33(11); and the estimated value is equal to or greater than the relevant threshold in regulation 5. The threshold under regulation 5(1)(c) is currently £213,477. CC says the contract was not awarded in accordance with the requirements of regulation 33(11).

295. The requirements under regulation 33(11) are those applying where a mini-competition is held. The competition must be based on the same terms as applied for the award of the framework and where necessary, more precisely formulated terms and where appropriate other terms referred to in the procurement documents for the framework agreement; and the procedure ordained in regulation 33(11)(a) to (d) must be followed.

296. By regulation 100, where any of the grounds of ineffectiveness applies, the court must not make a DOI if the contracting authority or another party to the proceedings raises an issue under regulation 100 and the court is satisfied that "overriding reasons relating to a general interest require that the effects of the contract should be maintained" (100(1)(b)). Further provisions restrict the extent to which "economic interests" can constitute such overriding reasons.

297. If the court makes a DOI, it must also (see regulation 102) order that the contracting authority concerned must pay a "civil penalty" and decide upon the amount (regulation 102(1)). If any of the grounds of ineffectiveness applies but the court does not make a DOI because it is required by regulation 100 not to do so for "overriding reasons relating to a general interest", the court must make either an order shortening the duration of the contract (a contract shortening order, or **CSO**); or it must order that the contracting authority must pay a civil penalty; or both (regulation 102(3)).

298. Regulation 102(4) and (5) set out various considerations to help the court decide upon the appropriate penalty or penalties. There are then provisions in regulation 102(7) setting out the required administrative mechanisms for payment of civil penalties and their destination, which is ultimately the Consolidated Fund; and for enforcement of the penalty as a judgment debt where the paying authority is not a Crown body.

299. CC submits that the court should make a DOI. It argued that the CCGs had attempted to withhold information about the A&G contract, including the identity of the contracting parties, the duration of the contract and its value. CC deprecates the suggestion of the CCGs that the court should make a CSO only, rather than a DOI.

300. CC submits that the "overriding reasons" relating to a "general interest" are not made out. There is a mere undeveloped assertion of likely adverse impact on patient care and hospital admissions. At NHS Bristol, the services of Cinapsis have already ceased, so there is no possible adverse impact on patient care or hospital admissions. A&G, while important, is not a "life-and-death service".

301. CC further submits that the court should consider civil penalties but primarily seeks a CSO, if the court is persuaded that there are "overriding reasons" not to make a DOI. The CSO should be such as to enable CC to compete as soon as practicable in a lawful procurement exercise, with a lawful contract award to follow thereafter in place of the present A&G contract, not due to end until 31 March 2024.

302. Ms Hannaford, for the CCGs, submitted that the first ground of ineffectiveness is not made out because even if the operation of the CCT Framework was unlawful, a contract notice was not required. The CCGs could have proceeded under, for instance, the HSS framework, of which CC is a member. That would not have required a contract notice. Or, the CCGs could have proceeded using the restricted or negotiated procedure, likewise not requiring a contract notice.

303. The CCGs also submit that the third ground of ineffectiveness does not apply because they operated the CCT Framework in accordance with the requirements of regulation 33(11). The duty under regulation 33(11) is owed only to the members of the framework, which excludes CC. The regulation 33(11) duties cannot be held to apply more widely to economic operators not on the framework; otherwise, the exception (in regulation 99(7)) where a contracting authority refrains from entering into the contract until the "standstill" period has ended, would be illusory.

304. Ms Hannaford submits, further, that the court must not make a DOI because there are overriding reasons relating to a general interest requiring that the effects of the A&G contract should be maintained. She submits that a cessation of the A&G contract would lead to an adverse effect on the quality of patient care, an increase in hospital attendances and admissions and continuity issues in relation to current working practices.

305. She points to evidence in the CCGs' witness statements supporting that view. She submitted that for the same reasons, a CSO would be inappropriate and that any civil penalties should be no more than nominal; any higher penalties would deplete resources available for patient care.

306. Turning to my reasoning and conclusions: first, I agree with Ms Hannaford that the first ground of ineffectiveness is not made out. There was no necessary obligation under Part 2 to publish a contract notice prior to awarding the A&G contract. The first ground must relate to cases, of which this is not one, where a contracting authority decides to use a procedure such as the open procedure, requiring prior publication of a contract notice, and then fails to publish one.

307. Here, I accept that the CCGs could have used the restricted or negotiated procedure, or indeed a framework such as the HSS Framework or – in different circumstances – the CCT Framework; neither of which requires prior publication of a contract notice.

308. However, the third ground of ineffectiveness is made out. I am satisfied that the A&G contract was based on a framework agreement, namely the CCT Framework; that it was awarded in breach of requirements of regulation 33(11); and that its value exceeded the threshold of £213,477.

309. The breaches of regulation 33(11) were, firstly, that there was only one economic operator in the mini-competition; and secondly, that the pricing terms in the CCT Framework were substantially departed from. The "competition" was therefore not "based on the same terms as applied for the award of the framework agreement"; nor were the differences merely "more precisely formulated terms" or "other terms referred to in the procurement documents for the framework agreement", within regulation 33(11).

310. I reject the submission that the third ground of effectiveness can only be made out where the complainant is on the framework in question. The remedy of ineffectiveness presupposes that a breach of duty under Part 2 has been proved with resulting loss and damage, or risk thereof, to the complainant. I have already found that those preconditions of the remedy of ineffectiveness are met here. It follows that CC is able to attain access to the remedy of ineffectiveness even though it is not on the CCT Framework.

311. Next, I accept the submission of the CCGs that "overriding reasons relating to a general interest require that the effects of the contract should be maintained", at least for the moment. It seems to me self-evident that abruptly stopping the A&G service currently available to two of the three CCGs will (in a manner similar to industrial action) adversely affect patient care and cause disruption to hospital admission decisions and probably unnecessary admissions or at least confusion about what medical advice is or is not being given. To facilitate communications about such matters is the very purpose of the A&G service.

312. I must therefore either make a CSO or impose a civil penalty, or both. I consider first whether to make a CSO in respect of the A&G contract. It is due to run until 31 March 2024, except in the case of NHS Bristol, where it has already terminated. In determining the appropriate order, I must take account of all relevant factors including those stated in regulation 102(5)(a) to (c): the seriousness of the relevant breach of duty; the behaviour of the contracting authority concerned; and the extent to which the contract remains in force.

313. These considerations appear to apply both to any CSO and to the amount of any civil penalty. I must also apply the "overriding consideration", when considering what order to make under regulation 102(1) or (3), "that the penalties must be effective, proportionate and dissuasive" (regulation 102(4)). That provision appears to have more immediate relevance to deciding on the amount of a civil penalty, rather than the extent of a CSO.

314. In my judgment, it is appropriate to make a CSO, for the reasons advanced by CC. It is entitled to have an equal opportunity, alongside Cinapsis and other suppliers, to tender for any fresh and lawfully awarded A&G contract. It should not have to wait until April 2024 for that opportunity. Unless I shorten the current unlawfully awarded A&G contract, it will have to wait until then, except possibly in the case of NHS Bristol which has no current provider.

315. The behaviour of the contracting authorities has been, in varying degrees, poor. The obligations of objectivity and fairness owed by the CCGs has, in varying degrees, been treated with disdain and cynicism. CC was misled into thinking that it would be and was being treated on an equal footing with Cinapsis, as the law requires. I will return to this shortly when considering the question of civil penalties.

316. I must leave enough time for a fresh procurement exercise to be carried out. It is not for the court to determine how that should be done; that is for the CCGs. I think the appropriate period is about six months. I will make a CSO and will order that the A&G contract will be shortened by 14 months, so that it will expire at the end of 31 January 2023, instead of 31 March 2024.

317. In all the circumstances, I consider that civil penalties are appropriate in this case. I disagree with the suggestion that they should be merely nominal because they will deplete resources available for the performance of NHS functions. Contracting authorities are nearly always public bodies with scarce and precious budgets, urgently required to perform important public functions. Yet, the legislature has ordained that they must face civil penalties in appropriate cases.

318. It is not unfamiliar in our law that such a public body is visited with a financial penalty. An example is the heavy fines imposed on public bodies such as water providers for polluting rivers, or on public sector employers for breaching health and safety laws. Their public nature, the importance of their role and the scarcity of their budgets does not absolve them from financial penalties (whether civil or criminal) that are more than nominal.

319. On the other hand, the penalties must be proportionate. Indeed, they must be "effective, proportionate and dissuasive" (regulation 102(4)). That is the overriding consideration. I turn to consider, in the light of those observations, what the amount of the civil penalty should be in the case of each of the CCGs.

320. In NHS Gloucestershire's case, the conduct in breach of relevant Part 2 duties was at its worst. It was NHS Gloucestershire which led the project to favour Cinapsis unlawfully and avoid competition. I will not repeat every action taken in that regard. The conduct of Mr Turp and Dr Gerald was the most serious. Mr Porter, NHS Gloucestershire's head of contracts and procurement, did nothing to rein them in. On the other hand, I bear in mind that their intentions were good. There was no question of corruption or financial advantage, but there was improper contact between them and the favoured contractor.

321. Balancing the factors I have set out above, I must decide upon an amount that is effective, proportionate and dissuasive. I bear in mind that there is a potential liability in damages to CC, a point I have considered. My reasoning and conclusions on that issue are set out below. In the case of NHS Gloucestershire, I find the appropriate amount is a civil penalty of £10,000. I will make an order that NHS Gloucestershire must pay that amount by way of civil penalty.

322. Turning to NHS Bath, I observe the following features of its conduct. It did not have a pre-existing relationship with Cinapsis or any improper contacts with Cinapsis before 19 November, although Mr Fox wanted to put Ms Field in contact with Cinapsis. On the other hand, it was NHS Bath that decided to engage in the covert scoring and selection exercise on 20 November, asking its scorers to use a system not disclosed to CC or anyone else; and to use the list of "must" requirements unfairly marking CC down without giving it any chance to make representations.

323. Ms House and Mr Quinn arranged the exercise, with the support of Mr Prince and Ms Field. Ms House and Mr Quinn were not called as witnesses. I am prepared to accept that they, as well as Ms Field and Mr Prince, were motivated by a desire to achieve the best outcome for the NHS and therefore the public interest. There was no question of corruption; nor did they, unlike NHS Gloucestershire, improperly communicate with or favour Cinapsis directly, beyond attending Dr Gerald's presentation on 19 November 2020.

324. Mr Quinn treated CC disingenuously, in emails to Mr Patrick not disabusing the latter of his hope and belief that CC would be permitted to bid in a fair and lawful competition. Mr Quinn did not come to court to explain that and his other conduct. Nor did Ms House. I bear in mind that there were voices within NHS Bath urging a more responsible course of conduct and that they were not heeded. Taking account of all the above, I think the effective, proportionate and dissuasive level of civil penalty is £8,000 and I will so order.

325. The conduct of NHS Bristol was less serious. It was a willing participant in a procurement exercise it should have known (if it did not know) was unlawful. It did not object to the process and should have had nothing to do with it. On the other hand, Mr Dunn's enquiries were intelligent and cogent; he was clearly concerned to obtain value for money, but he did not go as far as to insist on lawful and fair competition as the proper way of achieving that. I think the right amount to impose as a civil penalty in its case is £4,000 and I will so order.

The Tenth Issue

If and in so far as CC lost the chance of participating in a procurement for the provision of the services obtained under the A&G contract, what was the extent of that loss of chance?

326. Both parties repeat the submissions recorded above addressing the eighth issue (whether the established breaches of duty caused CC to suffer or risk suffering loss or damage). CC says it would have been the likely winner. The CCGs say CC was in no position to win any competition; some or all the CCGs might not or (in the case of NHS Bristol) would not have procured A&G services at all; or the CCT Framework may permissibly have been used, ruling out CC.

327. In relation to loss of a chance, Ms Hannaford put the chance at 25 per cent, at the highest. She repeated the point that CC lacked NHS Spine integration. The spectrum of required services is broad. Others apart from CC and Cinapsis could have tendered, she pointed out. For example, companies called Medefer and Kinesis both provide A&G services; so does System C, which took part in the demonstration day. They would be in as good a position to bid as CC.

328. In my judgment, CC would have had a good chance of winning the A&G contract if a lawful procurement had been carried out. I think the contracting authorities would have been the same three CCGs. I see no reason to accept the proposition that NHS Bristol or NHS Bath would have dropped out of the joint procurement merely because the competition was to be fairly conducted. There is no evidence that funding was dependent on the absence of a competition.

329. I have already found that the relevant counterfactual is a competition between Cinapsis and CC, with others able to bid as well; perhaps Kinesis, perhaps Medefer, perhaps System C. The latter three and any others in a similar position, if they had bid at all, would not have the advantage of incumbency, unlike CC (at NHS Bath) and Cinapsis (at NHS Gloucestershire). I infer that the two front runners would have been Cinapsis and CC.

330. I reject the well worn submission that CC could not have obtained the contract because it lacked NHS Spine connectivity. In my judgment, CC would have been well able to

meet the specification for the A&G contract, if the specification had been published. If an open and objective scoring system had been used, CC would have brought to bear its considerable experience, greater than that of Cinapsis, of winning other A&G contracts within the NHS.

331. The extent of the lost chance is a matter of evaluative judgment, taking account of the appropriate counterfactual and weighing the considerations favouring one hypothetical bidder or another. Applying that approach, I would put CC's loss of a chance of winning the A&G contract at 50 per cent. I assess Cinapsis's chance of winning at 30 per cent and other potential bidders (bearing in mind that some may not have bid at all) at 20 per cent between them.

The Eleventh Issue

Was any breach (if established) sufficiently serious to give rise to an entitlement to damages?

332. It is common ground that the answer to the question depends on a consideration of the eight factors mentioned by Lord Clyde in *R v. Secretary of State for Transport, ex p. Factortame (No. 5)* [2000] 1 AC 524, at 554E-556A (see *Energy Solutions EU Ltd v. Nuclear Decommissioning Authority* [2017] 1 WLR 1373, SC, per Lord Mance at [39]; and *Energy Solutions EU Ltd v. Nuclear Decommissioning Authority* [2017] BLR 92 per Fraser J at [33]-[34]).

333. Briefly, those eight factors may be summarised as (i) the importance of the principle which has been breached; (ii) the clarity and precision of the rule breached; (iii) the degree of excusability of an error of law; (iv) the existence of any relevant judgment on the point; (v) the state of the mind of the infringer, and in particular whether the breaches were deliberate or inadvertent; (vi) the behaviour of the infringer after it has become evident that an infringement has occurred; (vii) the persons affected by the breach, including whether there has been a complete failure to take account of the specific situation of a defined economic group; and (viii) the position taken by one of the Community institutions in the matter.

334. CC submitted that the breaches of duty were of the utmost seriousness: a direct award without competition, made following a non-transparent process and unequal treatment expressly and deliberately intended to favour the incumbent, using the framework to mask the absence of any competition. CC submitted that the CCGs knew they were conducting an improper process. To the extent that they did not, they ought to have done. The seriousness of the breaches of duty were compounded by an unsatisfactory response to the challenge.

335. Mr Barrett submitted that Fraser J had in the second *Energy Solutions* case, at [57], treated a failure to award the contract to the most economically advantageous tender as going to the heart of the principle of fair competition; and that such a failure alone was sufficient to justify a finding that the breach was sufficiently serious. He submitted that since CC would have won the A&G contract, had there been a fair competition, the necessary degree of seriousness was established.

336. CC further relied on witness evidence at trial in which the CCGs' witnesses sought to distance themselves from the decisions made; yet, the evidence showed that a number of witnesses knew that what the CCGs were doing were improper. Some of the

witnesses (notably, Mr Porter and Mr Turp) admitted that there had been impropriety in the process. Mr Barrett submitted that deliberate steps to conceal known wrongdoing were taken, bearing in mind the possibility of a challenge.

337. Ms Hannaford submitted that the breaches of duty were not sufficiently serious to justify an award of damages. She said that if the use of the framework was wrong, that was far from clear at the time; in no previous case had a non-framework member shown an entitlement to challenge a decision taken under the framework. The error was excusable. The CCGs thought they were able to use the framework, that CC's brief involvement was pre-procurement market testing and that use of the framework would be a complete answer to any claim.

338. This was not, Ms Hannaford submitted, a case of an illegal direct award. The use of the selection tool represented a genuine attempt to engage in a competitive process as between those considered entitled to compete, namely the framework members. There was no basis for asserting that CC's bid would have been the most economically advantageous, as the claimant's bid was in *Energy Solutions*. Other providers such as Kinesis could have prevailed.

339. I come to my reasoning and conclusions on this last issue. I have already addressed some of the qualities of the CCGs' conduct when addressing the previous issues, in particular the breaches of duty and the issue of civil penalties. I will not repeat those observations but now revisit the factual findings for the purpose of applying to them Lord Clyde's eight factors derived from his speech in *Factorame (No. 5)*.

340. The first is the importance of the principle that has been breached. Here, the main principle is, as CC submits, the principle that there should be fair competition. Whereas in *Energy Solutions* the contracting authority through manifest error awarded the highest score to the wrong bidder, here the contracting authorities entertained only one formal bid, having informally eliminated all potential opposition. The principle breached was nothing less than that of fair competition. It could not be more important.

341. The second factor is the clarity and precision of the rule breached. In my judgment, the rules breached – principally rules 18, 24 and 33 are clear and precise; they are those that embody the principles of fair play and value for money that underlie the procurement legislation. They are well known and the breaches of them were obvious to any reasonable observer.

342. Rule 33 governing framework agreements is, I accept, less clear because it requires questions of fact and degree to be determined: namely, whether negotiated terms depart substantially and impermissibly from framework terms, or merely refine and expand on them.

343. However, the main wrong in this case did not lie in the way in which the framework was operated in the context of regulation 33. The main wrong lay in the decision to use the framework at all, as an instrument for excluding CC. That wrong engaged regulations 18 and 24 rather than regulation 33. I therefore find that applying the second factor points in the direction of the breaches being very serious and sufficient to justify an award of damages.

344. As to the third factor, I accept only up to a point that there may have been an excusable error of law on the part of the CCGs. Privilege has not been waived, but I accept that there may have been a genuine belief on the part of some involved that use of the framework would be a guarantee of legality and proof against any challenge.

345. That said, there were clear expressions of misgivings by unheeded voices. No one involved could sensibly have condoned the worst of the excesses, in particular Dr Gerald's role which was known or partly known to several of those involved, including Mr Porter, who knew in part of Dr Gerald's role and did nothing to stop it.

346. As to Lord Clyde's fourth factor, the existence of any judgment on the point, the reasoning is similar. It is true that there is no case on all fours with this one, but there are plenty of cases in which non-transparent behaviour and unequal treatment have been condemned in court.

347. The fifth factor is the state of mind of the infringer and in particular whether the breaches of duty were deliberate or inadvertent. The first answer is that the conduct amounting to the breaches was deliberate. The breaches of duty were only "inadvertent" in the sense that some of those involved probably believed, naively (Dr Dyer for one) that their deliberate conduct was not unlawful.

348. I refer in particular to the scoring exercise on 20 November, which Ms Field and Dr Dyer, among others, regarded as innocent market testing. I do not think that form of "inadvertent" breach affords much mitigation when viewed alongside the deliberate decision to undertake a secret selection exercise.

349. The sixth factor is the behaviour of the infringer after it has become evident that an infringement has occurred. That is difficult to assess because privilege attaching to any legal advice received has not been waived. It may not become evident to some of those involved that an infringement has occurred until they read this judgment, or any judgment on appeal from it.

350. The CCGs have, in my view, sought to defend the indefensible, but that may not have been their view, despite awareness of their conduct relied on in the claim. What I can say is that they have persisted in defending the conduct I have criticised even though some of their colleagues trenchantly criticised it at the time. And in some of the documents, they were concerned enough to avoid naming Cinapsis, lest use of the name should provoke further such criticism.

351. The seventh factor is fairly straightforward, in that the main person affected by the breaches is CC. There has not been a failure to take account of the specific situation of a defined economic group. There may also have been some adverse impact on the taxpaying general public, in that Cinapsis was not held to the pricing structure it had put forward in its response to the Framework ITT.

352. The eighth factor relates to the institutions of what is now the European Union and is not now relevant. There has been no adverse comment by any equivalent domestic institution.

353. In the light of those observations, I conclude without difficulty that the breaches are sufficiently serious to justify an award of damages, as was the breach in *Energy*

Solutions, though for very different reasons. I return to the broad character of what happened: a manipulation of the process to ensure that Cinapsis won the contract unless it should seek to charge too much. That description is not unfair and clearly points to damages being justifiable.

Concluding Observations

354. For those reasons, the claim largely succeeds and I will make an order reflecting the decisions explained above. I will hear the parties in relation to consequential matters and thank counsel for their detailed and cogent submissions.