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CL-2017-000421

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

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

Date: 23rd November 2018

Before:

MR JUSTICE PHILLIPS

- -

BETWEEN:

CRS GT LIMITED

Claimant

and

(1) MCLAREN AUTOMOTIVE LIMITED
(2) MCLAREN TECHNOLOGY GROUP LIMITED
(3) MCALLICO LIMITED

Defendants

- -
- -

Graham Chapman QC and **Simon Hale** (instructed by **Shoosmiths LLP**) for the **Claimant**
Zoe O'Sullivan QC and **Abra Bompas** (instructed by **Ashurst LLP**) for the **Defendants**

Hearing dates: 11, 12, 16, 17, 18, 19 and 24 April 2018

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Approved Judgment

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MR JUSTICE PHILLIPS:

1. The claimant ("CRS") is a company in the business of designing, engineering and manufacturing *Gran Turismo* (or "GT") series racing cars.

2. The defendants ("MAL", "MGL" and "McAllico" respectively) are members of the McLaren group of companies, a leading automotive design, engineering and assembly specialist, producing and selling high performance road-legal vehicles and also GT racing cars. I will refer to the defendants collectively as "McLaren".

3. These proceedings concern joint projects between CRS and McLaren for the design, construction and sale of two types of GT racing car, namely, the "GT3 car" and the "GT4 car", each based upon McLaren road cars. The vehicles contain "carry over" parts from those cars, modified McLaren road car parts and a number of entirely unique parts (the modified and unique parts together being referred to as "non-standard" parts).

4. There are distinct disputes in respect of the GT3 car and the GT4 car. In relation to the GT3 car, the issue is whether, pursuant to the terms of a formal written contract dated 29 October 2010 ("the GT3 Agreement") between CRS, McAllico[1], MGL and Cobra Group Limited (the latter two guaranteeing McAllico's and CRS's obligations respectively), CRS has the exclusive right to provide aftersales services to GT3 customers (including the exclusive right to sell non-standard parts) following the expiry of the GT3 Agreement[2]. If so, CRS seeks an order for specific performance or alternatively damages in lieu of specific performance.

5. The dispute in relation to the GT4 car is whether CRS has the exclusive right to supply car sets for assembly and to provide aftersales services to GT4 customers, including the exclusive right to sell non-standard parts. However, the parties did not execute a formal contract for the design and production of the GT4 car. A Heads of Agreement ("the HoA") was signed by CRS and MAL on 3 February 2016, which envisaged that a more detailed, formal contract would be agreed in relatively short order. No such formal contract was in the event agreed, but the project commenced nonetheless. Some sixteen months later, McLaren decided to bring CRS's involvement in the GT4 project to an end.

6. CRS' position is that the HoA was a binding contract in its own right, alternatively that a binding agreement was concluded at some point thereafter by conduct, providing that CRS has an exclusive right to provide non-standard parts for the GT4 car[3]. CRS seeks

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[1] Another company in the McLaren group, Trysome Limited, was originally party to the GT3 Agreement (and defined therein as "McLaren") and McAllico was not a party. Trysome Limited assumed the primary rights and obligations of the McLaren group under the GT3 Agreement and, for that reason, was originally named as the third defendant in these proceedings. However, by a deed of novation between all relevant parties dated 20 June 2011, those rights and obligations were transferred to McAllico with retrospective effect from the outset of the GT3 Agreement. When that was appreciated by the parties, McAllico was substituted as third defendant in these proceedings.

[2] In its written Closing Submissions (at §147) CRS abandoned an alternative case that McLaren is estopped from denying that such a right exists.

[3] In oral closing argument, Mr Chapman QC confirmed that CRS' alternative case in estoppel in relation to the GT4 car was no more than another way of expressing its case that, if the HoA was subject to contract, that stipulation was waived by the parties' subsequent conduct. Mr Chapman accepted that such case added nothing to the primary case that a binding agreement can be inferred from such conduct.

specific performance of this alleged right, alternatively damages in lieu of specific performance.

7. McLaren contends that the HoA did not amount to a binding contract and has not become binding by reason of subsequent conduct. McLaren does accept the existence of a number of *ad hoc* contracts relating to the production of 44 GT4 cars and the supply of 87 sets of GT4 non-standard parts ("the Ad Hoc Contracts"). McLaren further contends that, if there was a contract concluded by conduct, then this did not grant CRS the exclusive right to supply non-standard parts. Finally, if there was a contract providing CRS the exclusive right to supply non-standard parts, specific performance is not an appropriate remedy nor should damages be granted for breach.

8. McLaren also accepts that, although not pleaded by CRS until late in the day, CRS is entitled to payment for its part in the GT4 project on a *quantum meruit* or unjust enrichment basis, such payment being in the amounts set out in a business case agreed between the parties and revised on 26 January 2017: indeed, McLaren has been making and continues to make payment to CRS on this basis. CRS applied at the end of its case to amend to add a far wider *quantum meruit* claim for benefits received by McLaren under the project (including increased value of its brand and increased sales of other cars). I refused that application, save to the extent that the proposed amendment added the claim already accepted by McLaren.

9. I note for completeness that McLaren pleaded (and pursued) a counterclaim for alleged defective performance of the Ad Hoc Contracts but abandoned it shortly before trial.

The facts

The GT3 project

10. In 2007 Chris Niarchos, the ultimate beneficial owner of the Cobra group of companies and a successful GT racing driver, and Andrew Kirkaldy, another talented racing driver with a degree in engineering, formed a sub-Formula 1 racing team based on a small existing team run by Mr Kirkaldy. In 2009 that team became known as CRS Racing. During that year CRS Racing had discussions with Chris Goodwin, the official development driver for McLaren, about a possible role in the development, design and sale of what would become the new McLaren GT3 car, based on the McLaren MP4-12C road car. In the Spring of 2010, with Mr Goodwin acting as an intermediary, CRS Racing entered into formal discussions with McLaren.

11. CRS was incorporated on 29 September 2010 as the vehicle which would contract with McLaren. Mr Niarchos holds 50% of the issued share capital of CRS through companies in the Cobra group. The other 50% is held by Mr Kirkaldy and Mr Goodwin in equal shares. All three are directors of CRS and Mr Kirkaldy is the Managing Director.

12. On 29 October 2010 the GT3 Agreement, extending to some 74 pages (including schedules), was executed as a deed. In outline:

    12.1. CRS agreed to design and develop the GT3 car according to an agreed specification, with the "Principal Objective" of CRS being profitable and the car being capable of competing in and potentially winning championships in which it competes;

12.2. CRS also agreed to manufacture GT3 cars in volumes for which it received orders from McLaren in accordance with the agreed Business Plan;

12.3. CRS would sell the cars so manufactured to McLaren at 95% of the price at which McLaren would sell to customers;

12.4. McLaren would lend to CRS 30% of the maximum cash outflow set out in the Business Plan.

13. To facilitate the above arrangement, McLaren:

13.1. (in clause 3.5.1) granted CRS an exclusive, worldwide and royalty-free licence for the Contract Period (defined in clause 10.1 as continuing until 31 December 2016 unless terminated earlier) in respect of the McLaren Licensed Rights, namely: (i) the Intellectual Property Rights in the design and make up of the MP4-12C road car necessary to design, develop and manufacture the GT3 car and sell it only to McLaren; (ii) the right to use the McLaren name and logo to be depicted on the GT3 car to the extent directed by McLaren; and (iii) the right to use the name and logo of McLaren as part of the name "McLaren GT Racing" to describe the project and CRS;

13.2. (in clause 3.5.2) agreed that it would not, in respect of the Contract Period, grant a licence in respect of the rights granted to CRS to any third party, including any which would compete with CRS's supply of Customer Services and Support (which definition included race car parts and assemblies, engine sales/leases, and spares and update packages;

13.3. (in clause 3.6) agreed that during the Contract Period it would not give support to other teams and covenanted not to compete with CRS during the Contract Period.

14. However, the above agreements and restrictions were subject to "Exclusivity Exceptions" as follows:

> "3.5.2*….Provided that McLaren shall have the right to grant such third party licence or to undertake such activities itself (but excluding racing): (i) in preparation for McLaren entering into a replacement for CRS in circumstances where McLaren reasonably believes this Agreement will terminate prior to the expiry of the Contract Period or within 12 months prior to the expiry of the Contract Period; or (ii) in circumstances where McLaren wishes to commission a new GT related project for a vehicle that is different to the GT Car and the parties are unable to agree commercial terms for such project ("Exclusivity Exceptions").*

15. The key provision in the GT3 Agreement, for present purposes, is clause 4.5.3, which reads as follows:

> "*4.* ***CRS' Obligations***
>
> …

> *4.5 Sale and Purchase of GT Car*
>
> *…*
>
> *Clause 4.5.3 All after sale service and post sales customer interface shall be the responsibility of CRS including without limitation the Customer Services and Support and the provision of such parts and services after the expiry of this Agreement for period in accordance with market norms.*"

16. CRS agreed that the GT3 project with McLaren would be their sole business:

> "*5.1 Business of CRS*
>
> *CRS agree with McLaren that the design, development, manufacture and sale of the GT Car and the delivery and sale of track support for the GT Car, spares packages for the GT Car, repairs of the GT Car and update packages for the GT Car will at all times be the sole business of CRS.*"

17. Specific provision was made for tooling during "*the continuance of this Agreement*" as follows:

> "*Tooling 7*
>
> *7.1 In order to fulfil its obligations under this Agreement, CRS shall acquire for its own account such items of capital equipment, plans, moulds, jigs, fixtures and templates that are created specifically to enable individual components to be manufactured/modified for the GT Car ("Tooling"). Tooling shall also be deemed to include such items purchased in respect of the creation of spares and update packages for the GT Car.*
>
> *7.2 CRS acknowledges that it has no property, interest or other rights in the Tooling and that full title in the Tooling vests in McLaren. CRS shall take all such acts and execute all such documents as may be required to ensure that full title in the Tooling vest in McLaren. Further, CRS shall not create any Encumbrance over any Tooling or transfer title in any Tooling to any third party whatsoever. All Tooling is in the possession or control of CRS as a bailee of McLaren on condition that:*
>
> *7.2.1 McLaren shall not interfere with CRS's possession or control of the Tooling during the continuance of this Agreement;*
>
> *…*"

18. Clause 8 provided that existing Intellectual Property Rights would remain the property of the owner at the commencement of the GT3 Agreement, but that all such rights created by or on behalf of CRS in carrying out the project would be owned by McLaren and CRS would take any steps necessary to assign such rights to McLaren.

19. By the end of the 2011 racing season, all activities of CRS Racing (including Ferrari GT and single-seater racing programmes) had ceased at McLaren's request. Mr Kirkaldy similarly gave up his career as a professional racing driver. The sole remaining business was the design, development, manufacture, sales and associated aftersales support activities carried on by CRS under the McLaren GT brand.

20. GT3 Aftersales Services were (and are) primarily made available to GT3 Car Owners through a dedicated "owner's page" website (the "Portal"). Orders for GT3 parts are placed through the Portal and it offers customers access to information at all times.

21. The GT3 Agreement duly expired at the end of the Contract Period, namely, 31 December 2016. Certain rights and obligations, however, continued beyond the Contract Period. The dispute in respect of the GT3 Agreement, as explained above, relates solely to the nature and extent of CRS's post-expiry rights.

22. By the end of the trial it was common ground that there were 14 GT3 cars still racing in 2018, down from 21 the year before.

Further CRS-McLaren projects prior to the GT4 project

23. In 2011 McLaren launched its "track experiences". Later that year, McLaren requested CRS's assistance in running these events. CRS did so by supporting the 'Pure McLaren' programme at Goodwood and continued to provide assistance throughout 2012. There was no formal agreement for this project, CRS simply invoicing MAL against purchase orders.

24. In 2012 CRS also developed a special edition of the GT3 Car, the 12C GT Can-Am Edition, this being a car to be used on private "track days" rather than being entered in races. In late 2012, at McLaren's request, CRS moved its headquarters from Coalville, Leicestershire, to Woking, Surrey, also the location of McLaren's own headquarters, known as the McLaren Technology Centre.

25. In 2013 CRS developed a new track car called the 12C GT Sprint. CRS also took greater responsibility for and expanded the Pure McLaren track day programme. CRS developed the 12C Sprint and the track day programme without any formal agreement.

26. In November 2013 CRS and MAL commenced work on the design and development of the P1 GTR car, this being a track derivative of the P1 road car and MAL's flagship project. MAL outsourced the design and development of the car to CRS, including the production of tooling and the supply of some parts, but built and sold the cars itself. Aftersales, however, were carried out by MAL. CRS's involvement in the P1 GTR project was carried out pursuant to a detailed written contract. The written contract, dated 3 June 2014, was entered into after work commenced and had taken around five months to be concluded. Described as a "Development Services Agreement", it was 42 pages long, including schedules, and was similar in structure to the GT3 Agreement. In particular, it included the same or similar provisions in relation to intellectual property rights as had been set out in the GT3 Agreement.

27. CRS later developed a 650S Sprint Car, this being a further evolution of the GT3. Again, this was done without there being any formal written contract.

The GT4 project: early development and entry into the HoA

28. In early 2015 McLaren and CRS discussed the potential development of a GT4 car with two variants: a track day version of MAL's 570S road car (known as the P13) and a racing car designed for competing in the GT4 race series. A concept paper was produced by CRS in May 2015. Further discussions about the project took place between Paul Mackenzie, an Executive Director of MAL, and Mr Kirkaldy and Daryl Cozens, Commercial Director of CRS.

29. In September 2015 CRS began work on designing a concept test car (referred to as a "mule" car) and, on 27 October 2015, produced an outline of that programme for Mr MacKenzie, quoting a total price of £164,459 plus VAT. It is common ground that MAL agreed that price and in due course paid it. The mule car was thereafter developed, built and tested, leading to a successful "Exec Test" by MAL on 27 November 2015.

30. On 6 January 2016 Mr Kirkaldy sent an email to Mr Flewitt, the CEO of MAL, following a telephone call between them two days earlier. Under the heading P13 GT4/One Make, Mr Kirkaldy stated:

> "*We are now at the stage with the P13 track car of having a solid design base and understanding to move forward and create a very impressive product aimed at the right price bracket. CRS have offered to share in the development costs with this project in order to share in the profit and ongoing business generated by the P13 track car and its variants. Following various discussions I believe the highlight[s] of the partnership are:*
>
> 1. *[MAL] and [CRS] share the development costs of 2.1 million as set out previously*
>
> 2. *[MAL] guarantee a return to [CRS] [of] the investment plus interest (previous discussion was around 1.3M) over the three years via car sales*
>
> 3. *The profit of the car is shared 50/50 between [CRS] and [MAL]*
>
> 4. *The aim is to receive a profit of £25k per car to both [CRS] and [MAL] with a [Bill of Materials] of 80k and a sale price of 150k plus taxes…..*"

31. Mr Kirkaldy further set out some ideas, which had not yet been discussed, including that:

> "*CRS GT would like to supply all non-standard parts of the build of the cars as sole supplier as well as being the supplier of all non-standard parts to the aftermarket*".

32. The email went on to state:

> "*It was discussed at our meeting in December that the goal would be to try and get to a commercial agreement based on the above in our Thursday meeting. We can then have an email*

> *confirming basic terms and continue with the project straight away in order to meet the timings required to achieve the above ideas and goals. The lawyers can then work on a contract to cover all elements to cover the terms of the project.*"

33. A meeting was held on 7 January 2016 between MAL (Mr Flewitt and Mr Mackenzie and others) and CRS (Mr Kirkaldy and Mr Cozens) at which the GT4 project was discussed. Mr Kirkaldy reported back on this meeting to Mr Niarchos (and others) by email on 11 January 2016 as follows:

> "*2. P13 GT4/One Make*
>
> *This is the most urgent of all the projects as it is started. There was a lot of talk but I will just give you the basic points or I will be here all day.*
>
> *a) It is agreed that we will fund the development 50/50 and share the profit 50/50 …*
>
> *….*
>
> *c) It is agreed we should have all profit from parts sales that are not standard parts (ie wheels, hubs, front bumper etc…)*
>
> *…*
>
> *g) It is proposed that all parts sales go through [CRS]. This is a more difficult one and probably the one that will take the most time to agree.*
>
> *h) Mike made it clear that a document that we can both sign needs to be agreed within two weeks of the meeting.*
>
> *i) I made it clear that the project need [sic] to continue during this period. It was agreed that a figure would be given to MAL so that in the event that the project cannot be agreed that amount would be paid to [CRS].*
>
> *j) Mike believes the contract period needs to be 4 years with ongoing parts supply beyond this period.*"

34. Mr Kirkaldy insisted, when cross-examined, that his proposal in point g), that all part sales go through CRS, was that even McLaren's dealers would have to source unique and modified parts from CRS. He insisted that he was not suggesting that it would be difficult to persuade McLaren that CRS should otherwise be the exclusive supplier of those parts to customers.

35. The next day, 8 January 2016, Mr Mackenzie provided a first draft heads of agreement, based on a presentation CRS had made on 3 December 2015, under cover of an email to Mr Cozens stating "It's started!".

36. Three further drafts were then produced as a result of negotiations between the parties. On 26 January 2016 Mr McKenzie circulated the last of these drafts for "final comment", including to MAL's head of Legal, Ruth Nic Aoidh, and others in the legal department.

37. In his fourth witness statement (§72), Mr Kirkaldy stated that:

> "*It was agreed between myself, Daryl Cozens and Paul Mackenzie that we needed a robust short agreement (i.e. the HoA) that could later be expanded. CRS needed the short form, binding agreement in place before we could commit to any further development work.*"

38. Mr Kirkaldy went further when cross-examined, stating that he had expressly agreed with Mr Mackenzie (who is no longer employed by McLaren and was not called to give evidence) that the HoA would be binding and further confirming that CRS was holding back on doing any further work until the HoA was signed.

39. However, Mr Kirkaldy did not mention any such express oral agreement with Mr Mackenzie in his witness statement in support of CRS's application for a without notice injunction, and no such agreement was pleaded at any time. It is not referred to in any contemporaneous document, and is inconsistent with the content and tenor of Mr Kirkaldy's email to Mr Flewitt of 6 January 2016 (above), his email to Mr Niarchos and others of 11 January 2016 (above) and his subsequent communications set out below. Whilst Mr Cozens gave evidence that he believed the HoA would be binding, he did not suggest that that had been specifically agreed with Mr Mackenzie. It is no doubt for those reasons that Mr Kirkaldy evidence in that regard was not relied upon by CRS in closing argument in support of its contention that the HoA was binding. I reject that evidence, considering it to be a belated attempt to bolster CRS' position, perhaps encouraged by the fact that Mr Mackenzie was not giving evidence and so would not be able to rebut the suggestion.

40. Mr Kirkaldy's evidence that CRS was waiting for the HoA to be signed before continuing development work is also difficult to accept given that he himself told Mr Niarchos on 11 January 2016 that the GT4 project was most urgent because it had started. It is also evident from his email of 6 January 2016 to Mr Flewitt that Mr Kirkaldy was keen to continue with the project as soon as possible, requiring no more than an email confirming "basic terms", whilst the lawyers negotiated a "contract".

41. The final version of the HoA was dated 3 February 2016 and signed by Paul Mackenzie on behalf of MAL and Mr Kirkaldy of CRS. The document, in the form of 25 presentation slides, was headed "*Sports Series SPRINT Development Programme, Heads of Agreement*". P13 SPRINT was the original name of the GT4 car, and a SPRINT version (more powerful than the basic GT4) was developed as the project progressed.

42. The "*Project Summary*" (slides 3 and 4) included the following:

> "*The aim is to produce a track only Sport Series vehicle running on slick tyres.*
>
> *Through a single program three variants will be developed and signed off:*

- *Base Vehicle (non-aero)*
- *GT4*
- *Single Make*

The Base vehicle will be the introduction model aimed at the track day market and have a target sales price of <£150k + taxes (ex-works). The 'GT4' and 'Single Make' will be the base model optioned up. The table overleaf provides an overview of the content of the three variants. To achieve the sales price of the base vehicle, £80k bill of materials is necessary and therefore is the target.

CRS will develop the vehicles under the engineering supervision and sign off of MAL. The production vehicles will be built in MPC [the McLaren Production Centre] by MAL and the vehicles will be marketed and sold through the MAL dealer network by MAL.

CRS will support the customers in the aftermarket with parts supply, manuals and operating instructions using its online portal.

The aim is to get a vehicle running at Pure and P1 GTR events in early summer and the team to be running a GT4 variant this season supported by McLaren GT.

The project has been calculated on an assumed volume of 100 vehicles over 3 years. (however our target should be to sell >150 vehicles over the 3 years spread across the track day, GT4 and single market variants).

It is assumed that 30 vehicles will be built and sold in 2016.

……

CRS will operate under the 'McLaren GT' banner for all operations in relation to this programme... "

43. The "*Timing*" of the project was stated to be as follows (slide 6):

"*A development mule demonstrator vehicle was built in 2015. An MAL Exec drive assessment was successfully held in December.*

Following the signoff of these heads of agreement, the full development programme will kick-off. The engineering and development programme will be approximately 6 months, with engineering signoff planned for early August.

The first batch of production vehicles will commence build in late September.

> *The high-level plan, including gateways and the major development activities is shown overleaf.*"

44. Under the heading "*Manufacturing Overview*", slide 11 provided:

> "*All prototype build activity will be carried out by CRS at Unit 22.*
>
> *The production vehicles will be built by MAL in MPC, however some elements of the build such as the addition of the roll cage may need to be carried out by CRS.*
>
> *Total project volume assumption is 100 cars over 3 years.*
>
> *Yearly projected volume:*
>
> *2016 – 30*
>
> *2017 – 40*
>
> *2018 – 30*
>
> *SOP – Late September 2016*
>
> *Build rate – 1 per day, with vehicles built in batches of 10.*
>
> *CRS will be the Tier 1 supplier for the unique parts*."

45. Under the heading "*Customer and Aftersales Support*", slides 15 and 16 included the following:

> "*All customer service and support will be provided by CRS, with support of MAL when necessary.*
>
> *The service will be run on CRS's 'Customer Support Website'.*
>
> *The site will be refreshed in 2016 to complying with MAL latest corporate & brand guidelines and will be branded 'McLaren GT'. The site will cater for all CRS's McLaren models (GT3/Sprint/SS Sprint).*
>
> *…*
>
> *Parts support:*
>
> *• Spare parts available from CRS:*
>
> *Standard MAL production parts supplied by CRS, however sourced from MAL aftersales Unipart (pricing structure to be agreed):*
>
> *Unique Sprint parts sourced by CRS (pricing structure to be agreed).*

> ……
>
> *CRS will continue to provide customer support (including parts availability) for a minimum of 3 years after the last Sports Series SPRINT has been built.*"

46. The "*Financial Model*", more often referred to by the parties as the Business Case, was described in slide 18 as follows:

> "*The financial model has been based on a pre tax price of £150k (the price includes a 14% dealer margin), however the aim should be to reduce the sales price to less than £150k.*
>
> *Both CRS and MAL will contribute to the Development and Engineering phase of the project as set out in the financial model.*
>
> *MAL supplier costs are contained within the MAL D&D [Design and Development] budget.*
>
> *The CRS element of the D&D is fixed.*
>
> *It is agreed that CRS will made a return of £300k on its upfront investment.*
>
> *The investment (including CRS's additional £300k) for both parties will be paid back on the sales of the first 75 vehicles.*
>
> *Vehicle sales beyond 75, the profit will be split 50/50 between MAL and CRS.*
>
> *CRS will supply for production the unique parts at cost, an indirect production support provision has been included in the model.*
>
> *MAL will endeavour to return £22k per car to CRS from job 1 to support their cash flow requirements.*
>
> *The model overleaf is the working assumption, it will be refined and finalised as part of the final contract.*"

47. Slide 19 set out details of the Financial Model (sometimes referred to as the Business Case) as summarised above.

48. Slides 22 and 23 set out a "RASIC" schedule, identifying which party was responsible (being defined as "*those who do the work to achieve the task*") or accountable for a particular task and whether the other party was "supporting", or was to be "informed" or "consulted". CRS was to be "responsible" for parts supply for both standard production parts and unique parts, whilst McLaren was to support supply of the former and be informed of the latter.

49. The final slides (24 and 25) were headed "*Commercial*" and provided as follows:

> "*This Heads of Agreement covers all known project requirements at this point in time, the aim is for both parties to sign the document by the end of January to enable the development and engineering programme to start.*
>
> *Following the signing of the heads of agreement by both parties and the starting of the development and engineering programme a formal contract will be prepared for signature, the aim will be to have this complete by the end of March 2016.*"

50. On 22 February 2016 Mr Niarchos wrote to the Cobra relationship manager at Lloyds Bank to inform him of some good news, namely, that MAL was:

> "*…ready to sign 4 new contracts with us for the coming years. This includes the following:"*
>
> *…*
>
> *3. A new contract to produce a GT4 version of the 570S. This will include a minimum of 50 units and potentially up to 150 units! Although they will be built on the line we will be splitting the profit on the car 50/50 and we will make all the profit on parts supply. This car is to be sold via the dealer network and will be part of their inventory so the sales of the car will be assisted by us but not entirely our responsibility as was before.*"

51. As that letter was written nearly three weeks after the HoA was executed, the reference to McLaren being ready to sign a new contract in relation to the GT4 project appears, on the face of it, to be to the signing of a formal contract, anticipated in the HoA to be finalised by the end of March 2016. When cross-examined, however, Mr Niarchos insisted that he did not know on 22 February 2016 that the HoA had been signed nearly three weeks before. Mr Kirkaldy supported that position when he was cross-examined, asserting that, although he could not remember when he told Mr Niarchos that the HoA had been signed, it was about three weeks after the event. If it is true that Mr Niarchos had not been told about the HoA, that suggests that Mr Kirkaldy did not consider the signing of the HoA to be the "champagne moment" it would undoubtedly have been if it had been a binding agreement. That conclusion is not relevant to an objective assessment of the parties' intentions in relation to the HoA, but it further undermines Mr Kirkaldy's evidence of an earlier oral agreement with Mr Mackenzie that the HoA was binding.

Negotiation of a formal contract

52. Following the signing of the HoA, the parties engaged in negotiation of the formal contract. Ansar Ali, who had joined MAL shortly after the HoA was signed as Motorsports Director, took charge of the process on behalf of MAL.

53. By 11 April 2016 Mr Ali had sent draft appendices for the formal contract to CRS and, on 27 April 2016, following discussions with Mr Cozens, sent to him and Mr Kirkaldy version 4 of those appendices. Mr Cozens confirmed the same day that, subject to two minor points, they were acceptable to CRS.

54. On 3 May 2016 Mr Ali sent two draft agreements to Mr Kirkaldy and Mr Cozens; a draft Services Agreement and a draft Development Services Agreement. These had been prepared by MAL's legal department. The former was marked "*Subject to Contract/Contract Denied*", but the latter was not. It is plain, however, that the status of each of them was the same, both being drafts for negotiations purposes only. The drafts included provisions, absent from the HoA, as to intellectual property rights (in similar terms to those in the GT3 Agreement, providing for new rights to vest in McLaren), rights of termination, confidentiality and dispute resolution. The drafts, however, still had some gaps. The duration of the agreements, limitations upon liability and the price payable by MAL to CRS for components were all blank.

55. On 20 May 2016 Mr Cozens informed Mr Ali by email that it was necessary to change the structure, so that there would be three separate contracts. He also provided some general comments, in particular that the draft agreements did not recognise that CRS had invested in the project and that it was a joint programme/collaboration. He also indicated that there was "*quite a lot to finalise surrounding production parts supply…"*.

56. Mr Cozen's evidence was that Mr Ali accepted his suggestion of a three-contract structure in July 2016. On 4 August Mr Cozens sent three drafts to Mr Ali: a re-draft of the Development Services Agreement, an Agreement for the Provision of Services (Supply of Components) and an Agreement for the Provision of Services (Sales & Support). The latter two drafts retained the "Subject to Contract/Contract Denied" marking used by McLaren. All three drafts had been produced with the support of CRS's solicitors and there were significant changes compared to the earlier drafts. In particular, paragraph 3.5 of Schedule 1 (Statement of Work) to the draft Agreement for the Provision of Services (Supply of Components) provided:

> "*3.5 CRS shall be the exclusive supplier of Components to McLaren. McLaren shall have no obligation to purchase any Components from CRS pursuant to this Agreement except as expressly set out in Clause 2.1. McLaren shall also have the right during the term hereof to acquire any products or services from any third party. CRS shall not supply the Components to any person other than McLaren and McLaren's approved agents except it is agreed that Components that are shared with other vehicles manufactured, sold and/or supported by CRS can continue to be sold/supplied to third parties.*"

57. Schedule 4 of the draft Development Services Agreement stated that "*All customer service and support for all variants will be provided by CRS with the support of MAL when necessary.*"

58. Mr Cozens chased Mr Ali and others at McLaren for a response during October and November 2016. He chased again on 14 December 2016, this time addressing his email to Dan Walmsley, the new Head of Motorsport at MAL. Mr Ali had been promoted to Managing Director of McLaren Special Operations (MSO) in September 2016.

59. On 7 May 2017 Mr Cozens sent Mr Walmsley updated versions of the three draft agreements, and sent revised versions on 9 May following a meeting that morning. In the revised versions, Mr Cozens added the word "exclusively" to the obligation of CRS to provide customer service in respect of the GT4 cars.

60. Thereafter no further progress was made in the negotiations.

Implementation of the GT4 Project

61. In the meantime, the parties proceeded to design and develop the GT4 car. It was common ground that CRS carried out work, using the McLaren GT name, as contemplated by the HoA, namely:

    a. The design of the modified and unique parts of the GT4 Car, and the design and purchase of tooling for the manufacture of those parts;

    b. Specialist suppliers were selected, following negotiations, for the manufacture of the modified and unique parts;

    c. Various technical analyses, calculations and reports were produced, with two prototype cars constructed and a development programme carried out (that programme included 13,000 kilometres of track running and a full season of British GT racing);

    d. The construction of two marketing cars;

    e. The supply of car sets of GT4 Car parts/assemblies to MAL;

    f. The creation of a customer support programme including a new portal, detailed literature, the stocking of unique parts and providing customer support at track tests and races;

    g. The creation of systems and procedures addressing, *inter alia*, the building of the GT4 Cars, quality control, assembly control plans and the purchase of stock to support customers;

    h. Processing goodwill warranty claims made by customers;

    i. The sale of parts and spares to customers and the provision of aftersales services to customers.

62. CRS also purchased, at cost price, a GT4 car. The HoA provided that CRS was entitled to purchase up to five GT4 cars at cost price.

63. The notes of an internal MAL meeting on 11 April 2016 record that there was a question as to whether, as anticipated in the HoA, the GT4 cars could in fact be assembled on McLaren's production line, the main issue being roll-cage fitting. The contingency plan was for CRS to assemble the cars and CRS had been asked to investigate the commercial implications of that plan.

64. On 19 April 2016 Mr Niarchos emailed Mr Flewitt, expressing concern that McLaren had not paid sums due to CRS for the development of the GT4, pointing out that "*we are 100% beholden to McLaren and have no other sources of income*". Mr Flewitt responded on 3 May 2016, stating that MAL understood that there was an agreement that the balance of money due to CRS from MAL would be paid out of deposits for GT4 cars and that MAL had already contributed 4 cars and £300,000. Mr Flewitt also expressed surprise at the tone of Mr Niarchos' email, pointing out that MAL was "*actively working to support*

with the P13 GT4 agreement, the proposed extension of the P11 GT3 agreement ...". When cross-examined, Mr Flewitt denied that he was thereby acknowledging that the HoA was a legally binding contract, but his subjective understanding is not the issue. An objective reading is that Mr Flewitt understood that there was some form of GT4 agreement in place.

65. In due course McLaren did pay £785,000 to CRS following an internal recommendation by Mr Oliver Jones of MAL's finance department. The relevant email, dated 12 May 2016, stated:

> "*The original plan was as per the HoA as attached but this was deviated from and CRS GT have funded the 1st 50% of the D&D spend. We are now past the halfway mark and so we will need to start paying them for our share.*"

66. By 19 April 2016 it had also been agreed that CRS would assist with selling the GT4 cars, contrary to what was envisaged in the HoA.

67. In about May 2016, the first orders for GT4 cars were accepted from customers. Mr Ali had agreed with Mr Kirkaldy in March 2016 that the Recommended Retail Price for the GT4 would be £159,900 and had discussed a set of sales terms with Mr Cozens in March and April 2016 and subsequently agreed them.

68. In the summer of 2016 the project encountered difficulties and delays. There were problems releasing CRS's designs of parts onto MAL's system and the Bill of Materials (BOM) was incomplete, in part due to MAL's migration to SAP management software. On 13 June 2016 MAL decided to move the Start of Production (SOP) date from 26 September to 31 October 2016.

69. It is common ground that at some point (not specifically identified in the evidence) CRS agreed that it would build the first 21 GT4 cars at its premises, in addition to the two prototypes.

70. In September 2016, however, CRS indicated it would not place orders with its suppliers for unique parts absent a commitment from McLaren to a minimum of 100 parts. CRS stated that, without such a bulk commitment, their supply chain would not honour the prices then quoted. McLaren, however, was providing order cover for lower quantities, consistent with the build plan.

71. In mid-September 2016, when it became apparent that only between 9 and 20 GT4 cars would be produced in 2016 (as opposed to the planned 50), there was a difference of views between Mr Niarchos and Mr Flewitt as to where the blame lay for that deficiency. On 22 September 2016 Mr Flewitt emailed Mr Niarchos, stating:

> "*The key issue is unique parts availability and we contracted and paid CRS to develop the car, design, release and source unique parts; this is considerably behind plan and I am now having to support with considerable MAL resource to recover any volume this year. This disappointing position is part of why I mentioned to you we need to evolve to a place where we do what we do best; frankly we should not have contracted CRS to do this, we should*

> *have done it ourselves and will progressively need to take it in-house to protect the program.*"

72. Mr Flewitt stated in his witness statement that he was not referring to having contracted with CRS in the sense that there was a legally binding contract, a position he maintained when cross-examined. It was suggested by Mr Chapman QC, on behalf of CRS, that Mr Niarchos, in his witness statement, had given evidence that he understood Mr Flewitt to be confirming the existence of a contract (and that he had not been challenged in that regard when cross-examined). I do not, however, read paragraph 83 of his statement in that way: Mr Niarchos asserts his current view that Mr Flewitt accepted that there was a binding contract, but says nothing as to his understanding at the time he received the email, let alone that he placed any reliance on that understanding.

73. Mr Niarchos replied to Mr Flewitt later on 22 September 2016, asserting that the problem was MAL's fault:

> "*Clearly there are serious communication problems as I am told it is the other way around! I have been told it is the lack of order processing by MAL which is why we can not process the orders…'*""

74. On 28 September 2016, Mark Darby of McLaren sent an email to, amongst others, Mr Ali, referring to a project meeting with CRS. That email stated:

> "*In the project meeting today GT have stated that they are not accepting any blanket orders until we have a contract in place that states we are committing to a minimum of 100 parts, apparently this is a conversation had between Ansar and Daryl,*
>
> *Ansar*
>
> *Please could you confirm this is your understanding and where we are at with the contract please.*"

75. A series of purchase orders was issued by MAL in respect of 100 brake discs, brake pads, wheel safety parts, fuel cell assemblies and 40 wheel nuts. The order date on the face of all of these but the fuel cell assemblies order is 07/11/2016, although the due date for the components was 9/9/2016. It is not necessary to resolve the reason for the apparent discrepancies in these dates.

76. It appears that CRS may have started production of the first 21 cars as early as 24 October 2016. Subsequently (again on a date which is not recorded), CRS agreed to build more GT4 Cars in the first quarter of 2017. The number of vehicles to be manufactured by CRS was increased to a total of 44. Manufacture was completed on 27 November 2017.

77. On 28 October 2016, Mr Cozens sent an email to Mr Ali (with Mr Kirkaldy copied in). This stated:

> "*Hi Ansar*

> *As requested I have listed out the action points that I noted/recall from our meeting yesterday, all P13 GT4/Sprint related unless specified.*
>
> *Ansar/MAL Actions*
>
> *…*
>
> *Push legal to get all three agreements completed in November – now critical.*"

78. On 31 October 2016, Mr Cozens emailed Dave Eden of McLaren (copying in Mr Kirkaldy and Mr Ali):

> "*I appreciate you are busy with dealers right now but I would appreciate some indication of when/how we can progress the P13 agreements. I met with Ansar last Thursday to stress how super critical this is, no doubt you will be aware.*"

79. On 3 November 2016 Mr Cozens emailed Mr Jones, seeking urgent confirmation that MAL would cover invoices for various parts and would pay car assembly fees and logistics fees sought by CRS. The next day Mr Cozens informed Mr Ali that he had sought that confirmation.

80. On 7 November 2016 Mr Ali responded to Mr Cozens as follows:

> "*As discussed I know CRS is now building the GT4s and that we have not formally agreed commercial terms between us.*
>
> *In the meantime, let me respond to your points below...*"

81. Mr Ali proceeded to agree that MAL would pay for 5 car sets of CRS unique parts at £58,750/unit plus VAT and, in relation to the CRS's work in building cars, would pay fees of £4,944 per unit for direct labour costs (refusing to cover the production overhead of £930 per unit) and £2,596 per unit by way of a logistics fee. Both sums were payable upon "Final OK" by McLaren.

82. When cross-examined, Mr Ali accepted that his reference in his email of 7 November 2016 to not having agreed "commercial terms" was only referring to not having agreed CRS's compensation for assembling the GT4 cars, and was not referring to commercial terms more generally.

83. It is common ground that, at some point during the Autumn of 2016, MAL placed an order for CRS to provide 47 "car sets" of GT4 parts/assemblies to MAL, although there is no record of the order.

84. As of December 2016 the parties had not agreed the price at which CRS would purchase the GT4 standard parts from MAL (through MAL's supplier, Unipart). Mr Kirkaldy's position was that it had been agreed that CRS would pay cost plus 10% to MAL. CRS was actually paying wholesale price with a 30% discount to Unipart, Unipart purchasing the parts from MAL at cost plus 5%.

85. On 26 January 2017 McLaren and CRS agreed to revise the financial model set out in the HoA so as to reflect the fact CRS had built, and continued to build, the GT4 cars and the overrun on design and development costs (the "Revised Business Case"). CRS immediately issued an invoice for £177,409.21 plus VAT based on the Revised Business Case and thereafter were paid in accordance with the Revised Business Case.

86. On 7 March 2017 Mr Kirkaldy emailed Mr Ali, referring to a meeting the previous week with Mr Flewitt and Mr Ali:

> "*I asked about how we could get the contract for the GT4 moved forward quickly as it is becoming a problem for my shareholders. You stated that the legal team have been very busy with the legal side of the motorsport dealers and I understand that. Mike then asked if there was a way to create even a simple contract to help in the interim. My view here is that the original contract we negotiated is well on the way towards being agreed and should be able to be sign [sic] pretty quickly. Can I ask that this is moved forward as a fairly urgent step from our side.*"

87. That email appears, on its face, to have been a clear recognition by Mr Kirkaldy that the HoA was not a binding agreement and that no such agreement was yet in place, but was "*well on the way to being agreed*". When cross-examined about this email, Mr Kirkaldy gave, for the first time, a different explanation of why he did think it necessary to sign an interim contract, stating:

> "*…I said to Mike Flewitt that we already have an HOA and there was a contract that was agreed – there didn't seem any point in coming up with another agreement where we were already, as far as we were concerned, in agreeance on the more detailed contract that we had just spoken about.*"

88. I do not accept that that was the nature of Mr Kirkaldy's conversation with Mr Flewitt, nor that that was what Mr Kirkaldy had in mind when he wrote the above email. As Ms O'Sullivan QC put to him on behalf of McLaren (and I accept), Mr Kirkaldy was simply moving the goalposts because he could not explain his email consistently with a contemporaneous belief that CRS and MAL had already reached a concluded contract.

89. Mr Walmsley's evidence, in paragraph 46 of his witness statement, was that he remembers at least two distinct occasions in March of April 2017 when Mr Kirkaldy explicitly acknowledged that there was no contract in place between MAL and CRS in relation to the GT4 project. He stated:

> "*At that time, I was typically meeting with Mr Kirkaldy on a weekly basis to discuss various aspects of the GT4 project requiring attention. At one of those meetings, he noted that it would be unwise for CRS to renew its lease of the premises it was occupying at Unit 22 Woking Business Park at a time when it did not have a contract in place with MAL. At another of those meetings, Mr Kirkaldy referred to certain challenges CRS was facing with its bank due to the fact that it did not have a contract in place with MAL for the GT4 project. I do not recall Mr*

> *Kirkaldy's exact words, but I believe that he mentioned an overdraft facility that CRS was attempting to increase with some difficulty.*"

90. Mr Walmsley maintained that evidence when cross-examined and I accept that his recollection was accurate. His account of Mr Kirkaldy's concerns is also consistent with what Mr Kirkaldy's stated in his email of 7 March 2017 (and further contradicts Mr Kirkaldy's oral evidence in that regard) and with concerns expressed by Mr Niarchos as set out below.

91. On 28 March 2017, Mr Niarchos and Mr Flewitt met for lunch at MAL's offices. The future relationship between CRS and McLaren was discussed, and Mr Flewitt was introduced at the end of the lunch to Mr McIntosh, the new CFO of CRS, and to Mr Hogg of Cobra. Mr Niarchos emailed Mr Flewitt the next day, purporting to record the issues discussed. So far as is material, the email provides:

> "*1. 570S GT4*
>
> *Anticipated total volume of production now expected to be in the range of 300-400 cars during total production run over 4 years.*
>
> *150 cars this year and the rest in the following 24 months. Obviously the volumes will trail off in years three and four.*
>
> *You felt there were issues that MGT did not necessarily provide the level of build spec required by MAL so the car could be line built successfully.*
>
> *2. 650S GT3*
>
> *This project is ongoing and the contract is still in place.*
>
> *…*
>
> *4. Contracts*
>
> *1. As we discussed the lack of contracts is having a very negative effect on MGT. The fact is we can not get any bank support without them and that has a dramatic effect on cash flow.*
>
> *2. Additionally the issue then has a domino effect elsewhere.*
>
> *1. The lease. It is difficult for me to commit to a new lease and its commitment level without having security of future business. I know we can not always estimate exactly the level but the lack of any contracts leaves us in a very difficult situation.*
>
> *3. We will both make sure that the contracts get resolved quickly. I will ensure that there are no outstanding issues on our side that are holding them up.*

> …
>
> *6. Future Business*
>
> *I am obviously really happy to hear that we are looking at the future from the same perspective. That MGT will continue to provide project development to MAL for future projects and that we will strengthen the relationship through better communication of both companies.*"

92. On the face of that email, the reference in paragraph 4 to a lack of contracts and there being no security of future business plainly includes (and relates primarily to) the GT4 project. In paragraph 89.6 of his witness statement Mr Niarchos stated that this was a reference to the fact that, as the HoA provided that it would be followed by a more detailed agreement, CRS's bank had asked for that further agreement. However, subsequent correspondence between CRS and Lloyds Bank in August 2017 strongly indicates that the bank had not seen the HoA at that date and was unaware of its terms, Mr Kirkaldy and Mr McIntosh being concerned about showing it to the bank as it would not be understood. Mr Niarchos accepted in cross-examination that he had not considered that correspondence when making his statement.

93. In fact, during his cross-examination Mr Niarchos suggested that the reference to lack of contracts causing a problem did not include the GT4 project (in respect of which he insisted that there was a binding contract in place in the form of the HoA), but related only to "future contracts" for other projects. But he did also suggest, somewhat confusingly, that the reference did include the absence of a formal signed contract for the GT4.

94. I have no hesitation in rejecting Mr Niarchos's attempts, both in writing and orally, to finesse the plain meaning of his email. He was undoubtedly recording his statement to Mr Flewitt that the absence of binding contracts between CRS and McLaren in relation to projects, including the GT4 project, meant that CRS did not have any security of future business, causing CRS financial difficulty.

95. Mr Flewitt responded on 4 April 2017 as follows:

> "*We discussed a number of items but the most important is to clarify the services MAL will require going forwards, to give you visibility of our plans and enable the best decisions to be made by you on behalf of CRS.*
>
> *To do this I suggest we schedule a meeting and I will present our proposals for the continuation of P11 GT3, P13 GT4 and Sprint and P14 GT3…. It is also important to clarify that all future business will be put to tender and all options considered by MAL*".

96. On 20 April 2017 Mr Walmsley wrote to Mr Cozens, placing an order with CRS for a further 40 car sets (making 87 in all). That letter was in fact drafted by Mr Cozens and emailed on 19 April 2017 to Mr Walmsley to be signed and returned. Mr Walmsley did so, changing only his title at the foot of the letter. The document stated as follows:

> "*The MAL purchasing team will issue standard SAP system purchase orders for 40 car sets of parts of/assemblies however for the avoidance of doubt this letter confirms MAL's full commitment to purchase/take delivery of the full 40 car set parts/assemblies in 2017. As agreed in the P13 Agreement CRS will supply the parts/assemblies to MAL at cost price.*"

97. CRS places great emphasis on Mr Walmsley's reference to "*As agreed in the P13 Agreement*", suggesting that this was an acknowledgement that the HoA was or had become a binding contract, upon which it relied by accepting the order. In my judgment, however, the letter was drafted by Mr Cozens in the terms set out in order to make it entirely clear that the order for a further 40 car sets was a binding legal commitment by MAL, precisely because of the difficulties CRS was experiencing due to the lack of a binding contract in relation to the project more generally.

Deterioration of the Relationship

98. The parties arranged a major meeting for 18 May 2017 to discuss their future relationship, setting aside half-a-day and involving numerous executives on either side.

99. On 13 May 2017, in anticipation of the meeting Mr Flewitt sent an email to Mr Walmsley in which he stated that:

> "*[I] do not want to extend our relationship with CRS, i will honour our financial commitments for P11 and P13 and we have a contract and precedent for P11 that i will honour. I want us to move to the new operating relationship with our dealers, customers and CRS as soon as we can.*"

100. The day before the planned meeting, 17 May 2017, Mr Ali and Mr Walmsley met Mr Kirkaldy and Mr Cozens. That meeting was recorded in separate internal emails by Mr Cozens and Mr Walmsley, both of which are accepted as accurate accounts. Mr Cozens email to Mr Kirkaldy and Mr Niarchos recorded the following:

> "*2. P13 GT4*
>
> *a. All sales leads passed to MAL or dealers with immediate effect*
>
> *b. MAL would like to take over Tier 1 supply from Jan 1st 2018*
>
> *c. MAL would like to take over all customer support including parts supply from Jan 1st 2018*
>
> *d. MAL would continue to pay profit share on all cars sold until end of production.*
>
> *……*
>
> *5. McLaren GT Brand*
>
> *a. CRS would be allowed to use the MGT brand until year end 2017*

> *b. The MGT brand would be discontinued at the end of 2017 and MAL would undertake all motorsport activities under the 'McLaren GT Motorsport' brand…*"

101. Mr Walmsley's email to Mr Flewitt, Ms Nic Aoidh, Mr Ali and others recorded the following:

> "*Ansar and I have just met with Andrew Kirkaldy at CRS GT who also invited Daryl Cozens to join us. Andrew was informed of our intentions around the four key headlines of P11 GT3, P13 GT4, future motorsports projects and the McLaren GT brand.*
>
> *The meeting was in the main business like and relatively unemotional. In the main two key resistances were voiced by Andrew.*
>
> *The first was on ownership of IP relating to the P11 GT3 car. Andrew's claim is that the IP is owned by McLaren Group and that the IP for the 12C GT3 is owned by CRS. We offered no comment or argument to his assertion.*
>
> *The second resistance was around the Heads of Agreement on P13 GT4, most notably on the rights to the aftersales and customer support elements. In Andrew's view he sees the document as a legally binding contract. Again we made no comment.*
>
> *Future motorsport projects and McLaren GT branding intentions were also conveyed and nothing material was raised by Andrew in the meeting itself.*
>
> *He has now spoken to Chris Niarchos and advises that they only require one hour for a meeting, with Andrew Kirkaldy and Chris Niarchos representing CRS. He has requested that the meeting commences at 12:00. I will ask Susie to make the necessary arrangements.*
>
> *I have attached the latest version of the document we have been working on; please advise of amends to the content based on these positions.*"

102. On 18 May 2017 CRS informed McLaren that Mr Kirkaldy and Mr Niarchos would not attend the meeting planned for that date.

103. On 26 May 2017, Mr Flewitt wrote to Mr Niarchos, stating that "*the agreement relating to the P11 GT3 expired on 31 December 2016 and there is no agreement in place for the current P13 GT4 project*." The letter went on inform CRS that McLaren would produce the GT4 Cars and would provide technical and aftersales support to GT4 customers going forward. CRS was requested not to build any further cars without informing McLaren and to advise McLaren of the numbers, status and expected delivery dates of any cars in

build. Further, Mr Flewitt demanded delivery to McLaren of all McLaren owned tooling, parts and designs, drawing and documentation relating to, or used for, the production of vehicles for McLaren by 30 June 2017. He stated that, on that date, McLaren IT systems would no longer be available to CRS and CRS would no longer be permitted to use the McLaren GT brand.

104. Mr Niarchos responded on 2 June 2017, explaining that CRS had not attended the meeting on 18 May 2017 due to the fact that McLaren had, without warning, proposed fundamental changes and that CRS wished to consider these with the benefit of a written record from McLaren of what had been discussed. Mr Niarchos further stated that CRS was uncomfortable that McLaren felt it necessary to have legal counsel (Ms Nic Aoidh, who was also a Commercial Director of MAL) at the meeting. Mr Niarchos also defended CRS's performance in relation to both the GT3 cars and the GT4 cars and gave details of 14 cars in production, stating that it was neither reasonable nor practical that they should be completed by 30 June 2017.

105. Ms Nic Aoidh replied on 9 June 2017 on behalf of MAL, stating:

> "*The agreement between McLaren and CRS relating to the P11 GT3 expired on 31 December 2016 and there is no agreement in place for the current P13 GT4 project. The Heads of Agreement dated 3 February 2016 in relation to the P13 GT4 project are not binding and merely set out the working assumptions and an outline of the commercial terms that were to be included in a binding contract, which was never entered into by CRS.*"

106. The letter continued by demanding the completion of production of the seven cars due to be completed by 22 June 2017 and that production of all other vehicles ceased. A further letter, dated 27 June 2017, made the same demand and also indicated that CRS should make alternative arrangements for the hosting of its website and other systems.

107. It was subsequently accepted by McLaren that its demands of CRS to cease production of the 44 cars and the 87 car part sets amounted to anticipatory repudiations of the Ad Hoc Contracts. These were not, however, accepted by CRS. McLaren duly gave undertakings to the court to honour its commitments to take delivery of cars and part sets.

108. CRS applied to this court for interim relief on a without notice basis on 30 June 2017. Picken J granted the injunction sought pending a return date. The first return date was 7 July 2017, also before Picken J, who accepted undertakings from McLaren (those undertakings being in a more limited form than the relief granted following the ex parte hearing). The matter came before HHJ Waksman QC (as he then was) on 31 July 2017, the parties agreeing a consent order on 2 August 2017, providing that McLaren would, until judgment or further order, permit CRS to provide aftersales services and support to customers in respect of GT3 and GT4 cars and would not permit anyone other than CRS to use the McLaren GT brand or banner.

The claim in respect of the GT3 Agreement

109. CRS's claim in respect of the GT3 Agreement is based entirely on its proposed interpretation of clause 4.5.3 of that agreement, contending that the true meaning and effect of that provision (that "*all after sales services … shall be the responsibility of*

CRS…") is that CRS has an exclusive right (as opposed to merely an obligation) to provide aftersales services to GT3 customers and was entitled to do so using the McLaren GT brand and the website portal. McLaren disputes that interpretation, contending that clause 4.5.3 confers no right on CRS at all, let alone an exclusive right.

110. The relevant principles of contractual interpretation have been considered by the Supreme Court on a number of occasions in recent years, most recently in *Wood v Capita Insurance Services Ltd* [2017] AC 1177. Lord Hodge JSC summarised the proper "unitary" approach as follows:

> "*10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.*
>
> *11…. Interpretation is… a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense…*
>
> *12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated… To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*
>
> *13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements…*"

The textual analysis

111. The GT3 Agreement is a long, detailed and legally sophisticated contract under seal and is clearly the product of careful drafting by (or at least with substantial input and guidance

from) lawyers. It is plainly designed to make comprehensive provision in relation to its subject-matter, containing standard terms intended to limit as far as possible the scope for reference to extraneous material in determining the rights and obligations of the parties. In those circumstances it is appropriate to start with a close consideration of the relevant language and to give considerable weight to the outcome of that exercise.

112. Mr Chapman submitted that the clear and natural meaning of clause 4.5.3, in the context of the GT3 Agreement as a whole, is that the CRS has an exclusive right to provide aftersales services to customers, both during and after the expiry of the Contract Period. He submits that the term "responsibility" encompasses both the right and the obligation. Such right is exclusive as it expressly extends to "all" such services

113. In my judgment, however, there is no basis for reading clause 4.5.3 in that way:

113.1. Although the headings used in the GT3 Agreement must be ignored for the purposes of construing it (see clause 1.9), it is evident that clause 4 is accurately labelled as setting out CRS's obligations;

113.2. Clause 4.5.3 is not an exception: the word "responsibility" plainly connotes an obligation as a matter of ordinary usage: dictionary definitions include "the state of having a duty" and "the state of being accountable". The fact that such an obligation is stated to be in relation to "all" aftersales services does not turn it into an exclusive right to provide those services. The clause could easily have provided that CRS had the exclusive right to provide the relevant services, but no such language is present. The clause very clearly (and, it seems, deliberately) creates an obligation but not a right;

113.3. The relevant exclusive rights granted to CRS (and corresponding obligations of McLaren) are, in contrast, comprehensively set out in clause 3, and are expressly limited to the Contract Period. Even those rights do not give CRS an exclusive right to provide aftersales services: the rights granted are exclusive rights to all relevant Intellectual Property Rights, including the use of the name McLaren GT, and the benefit of McLaren's covenant not to compete with CRS in providing Customer Services and Support;

113.4. In other words, the clear structure of the GT3 Agreement in relation to aftersales services is that CRS has the obligation to provide aftersales services (under clause 4.5.3) and, during the Contract Period, has the benefit of exclusive rights to enable it to do so;

113.5. However, even the exclusive rights granted during the Contract Period were subject to the express exception that McLaren was entitled to grant the same rights to third parties (or itself compete with CRS) within 12 months prior to the expiry of the Contract Period in preparation for replacing CRS. Given that CRS was not necessarily entitled to exclusive rights in those final 12 months of the Contract period, it is not remotely arguable that clause 4.5.3 can be read as granting exclusivity to CRS after the Contract Period was over.

114. Mr Chapman further argued that clause 4.5.3 should be read in the light of clause 7, which provides for CRS to have possession and control of Tooling required to fulfil its obligations under the GT3 Agreement "*during the continuance of the Agreement*". He

contended that the use of that phrase (rather than the use of the defined term "*the Contract Period*") indicated that CRS's rights to retain the Tooling continued after the expiry of the Contract Period in so far as CRS continued to have obligations under the GT3 Agreement (such as providing aftersales service). This, he submitted, demonstrated that CRS's responsibility in clause 4.5.3 comprised both an obligation and corresponding exclusive rights to the Tooling and Intellectual Property Rights necessary to perform the obligation.

115. In my judgment, however, it is plain that the phrase "during the continuance of this Agreement" in clause 7 has the same meaning as "the Contract Period". The period of "the Agreement" is set out in clause 10.1 (being until 31 December 2016 unless terminated earlier) and the Contract Period is defined as the period so described. It is impossible to construe provisions dealing with the continuance of the Agreement and its termination in clause 7 other than in accordance with the provisions in that regard in clause 10.

The contextual analysis

116. As far as the context of clause 4.5.3 is concerned, Mr Chapman first submits that it makes no commercial sense for CRS to be under a continuing obligation to provide the full range of aftersales services to GT3 customers, but to have no right to use McLaren Licensed Rights, no right to retain the Tooling needed to manufacture the parts and no right to require MAL to supply CRS with the necessary parts at all or at a cost allowing for CRS to make a profit.

117. The answer, in my judgment, is that CRS's obligation is a provision for McLaren's benefit, to ensure that its customers receive appropriate aftersales support even after the Contract Period has ended. If McLaren requires CRS to perform that obligation, McLaren would plainly then be under a duty to cooperate by providing the necessary Tooling and Intellectual Property rights so as to facilitate such performance: *Chitty on Contracts* 33rd Ed at 24-033. But McLaren is equally entitled to waive the obligation or forbear to insist on its performance: it is plainly McLaren's intention to effect such a waiver if and when released from the injunction currently in place.

118. Mr Chapman further submits that clause 4.5.3 should be read in the light of clause 5.1, which provides that CRS's sole business shall be the GT3 project (including aftersales services), contending that it would be absurd if CRS had no right to carry on its sole business. However, clause 5.1 is not one of the provisions of the GT3 Agreement which survives the termination of the GT3 Agreement (as per clause 11.1.1), with the result that CRS was free from its restrictions on 31 December 2016. Whilst that does not entirely remove the force of Mr Chapman's contention, as CRS would on the face of matters be left with no business as at the date of termination of the GT3 Agreement, it does demonstrate that the parties provided for a clear change in CRS's role and its relationship with McLaren as at the end of the Contract Period. From that point it was free to conduct its business as it wished.

Conclusion

119. I conclude that the language of clause 4.5.3, considered in the context of the GT3 Agreement as a whole, is flatly inconsistent with CRS's claim that it has an exclusive right to provide aftersales services to GT3 customers after the Contract Period. It would,

in my judgment, require a most powerful countervailing consideration arising from the factual or commercial background to justify reading clause 4.5.3 contrary to its express language. There is, however, nothing in that background which seriously suggests that something has gone wrong with the language of the clause.

120. It follows that I find that CRS does not have the rights to provide aftersales services in respect of GT3 cars for which it contends. CRS's claim in that respect therefore fails.

The claim in respect of the GT4 project

121. CRS's claim is that it has a binding contract with McLaren in relation to the GT4 project, pursuant to which CRS has the exclusive right (until at least 3 years after the completion of the last GT4 car) to provide GT4 aftersales services and to be the exclusive supplier of unique and modified GT4 parts.

122. CRS's case as to precisely when and how such a contract came into force is, however, far from clear and, to some extent, a moving target. In its written closing argument (§80), CRS's primary case was stated as follows:

> "*[T]he HoA, the GT4 Order, GT4 Further Order and the actions that CRS and MAL took in performance of the HoA all evidence that there was a binding agreement in place between the CRS and MAL for the GT4 Project ("the* ***GT4 Agreement****") and the terms of that agreement... It is not strictly necessary…to identify a particular moment when the binding agreement was reached, but it was certainly no later than when substantial performance began to be rendered including by agreement to supply the 47 car sets of parts in October 2016 or alternatively on the conclusion of the Revised Business Case in January 2017.*"

123. CRS also presented a range of alternative cases as follows (§81):

> "*Alternatively…, CRS contends that a binding agreement in relation to GT4 Cars is either: (i) contained in the HoA plus the GT4 Order and GT4 Further Order; or (ii) contained in the HoA alone; or (iii) a simple contract for the development, production and assembly of GT4 cars together with the supply by CRS of aftersales support equivalent to the GT4 Aftersales Services, limited to those GT4 Cars that have in fact been produced to date or are currently in production. A further alternative or gloss on these positions is that a binding contract existed on any of the bases contended for by CRS at least unless and until it was replaced by an executed detailed contract as was envisaged by the HoA.*"

124. Notwithstanding CRS's approach, I consider it is necessary first and foremost to determine whether the HoA was, in itself, a binding contract when signed on 3 February 2016. That issue is an essential starting point, not least because, if the HoA was not a binding contract, the reason for that finding may be an important factor in assessing the subsequent dealings of the parties and whether those dealings resulted in a binding agreement coming into force.

Was the HoA a legally binding agreement when signed?

The relevant legal principles

125. In *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)* [2010] 1 WLR 753 SC the Supreme Court, at §45, set out the general principle as follows:

> "*Whether there is a binding contract between the parties and, if so, on what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.*"

126. As appears from that summary of the approach, there is a distinction, which will often be easier to state than to apply in practice, between (i) an agreement in principle, which remains incomplete and not binding because important terms have not been agreed, and (ii) a complete binding agreement, notwithstanding that points of detail remain to be settled. *Chitty on Contracts* 33rd ed. explains the distinction as follows:

> "*2-120* ***Agreement in principle only.*** *Parties may reach agreement on essential matters of principle, but leave important points unsettled so that their agreement is incomplete. It has, for example been held that there was no contract where an agreement for a lease failed to specify the date on which the term was to commence; that an agreement 'in principle' for the redevelopment and disposal of residential property, which specified core terms but left important matters, such as the timing of the project, for future discussion was an 'incomplete agreement and so did not amount to a binding contract… That an oral contract for an estate agent to find a buyer was incomplete where the parties had failed to specify the event which would trigger the agent's entitlement to commission since such contracts do not follow a single pattern… In such cases, moreover, '[i]t is not legitimate under the guise of implying terms, to make a contract for the parties' since the court can only imply a term into an otherwise concluded contract….*
>
> *2-121* ***Agreement complete despite lack of detail.*** *On the other hand, an oral agreement may be complete though it is not worked out in meticulous detail. Thus an agreement for the sale of goods may be complete as soon as the parties have agreed to buy and sell, where the remaining details can be determined by the standard of reasonableness or by law… An even more*

> *striking illustration of this approach is provided by a case [*Bear Stearns Bank Plc v Forum Global Equity Ltd *[2007] EWHC 1576] in which parties had reached an all agreement by telephone for the sale of notes … The agreement identified the subject matter and specified the price; and it was held to be contractually binding even though it did not specify the settlement date and left many other important points to be resolved by further agreement. In all these cases, the courts took the view that the parties intended to be bound at once in spite of the fact that further significant terms were to be agreed later and that even their failure to reach such an agreement would not invalidate the contract unless without such further agreement it was unworkable or too uncertain to be enforced.*"

127. CRS placed particular reliance on *Pagnan v Feed Products* [1987] 2 Lloyd's Rep 601, in which Lloyd LJ, at 619, explained the distinction as follows:

> "*(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole…*
>
> *(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. This is the ordinary 'subject to contract' case.*
>
> *(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed;…*
>
> *(4) Conversely, the parties may intend to be bound forthwith even though there are further term still to be agreed or some further formalities to be fulfilled…*
>
> *(5) If the parties failed to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.*
>
> *(6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regarded as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether*

> *they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by [Bingham J]. 'The Masters of their contractual fate', Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'....*"

128. Whilst the question of whether a contract is binding must be assessed as at the date on which it is alleged to have been made, it is established that the subsequent conduct of the parties is admissible as objective evidence of the existence of a contract and its terms as at that date, but not as an aid to its interpretation: *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443 at §41.

129. In *RTS*, the Supreme Court (at §50) summarised with approval the reasoning of Steyn LJ in *Percy Trentham* [1993] 1 Lloyd's Rep 25, at p.27, including the following analysis of the relevance of the fact that an agreement has been performed in considering whether it was intended to be binding and was sufficiently certain:

> "*The fact that the transaction is executed rather than executory can be very relevant. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter legal relations and difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. This may be so in both fully executed and partly executed transactions.*"

130. It is also recognised that reference in a preliminary agreement to the terms being embodied in a formal contact in due course may or may not determine whether the preliminary agreement is binding, depending on its purpose. The distinction between different situations is again helpfully summarised in *Chitty* as follows:

> "2.124 **Stipulation for the execution of a formal document.** *The effect of a stipulation that an agreement is to be embodied in a formal written document depends on its purpose. One possibility is that the agreement is regarded by the parties as incomplete, or as not intended to be legally binding, until the terms of the formal document are agreed and the document is duly executed in accordance with the terms of the preliminary agreement (e.g. by signature). This is generally the position where "solicitors are involved on both sides, formal written agreements are to be produced and arrangements are made for their execution". Moreover:*
>
> *"... [t]he more complicated the subject matter, the more likely the parties are to want to enshrine their contract in a written*

> *document, thereby enabling them to review all the terms before being committed to any of them."*
>
> *The normal inference will then be that "the parties are not bound unless and until both of them sign the agreement". A second possibility is that such a document is intended only as a solemn record of an already complete binding agreement. This was the conclusion in* Edge Tools and Equipment Ltd v Greatstar Europe Ltd *where the terms of the agreement strongly indicated an intention by the parties to become legally bound; the terms set out were not vague or uncertain and included terms on which law would govern the agreement and which courts would have jurisdiction; there was nothing on the face of those provisions to indicate that any further agreement was required before they became enforceable; and the parties' conduct and email correspondence before and after the date originally set for the execution of the contractual document showed that they did not regard it as determining the bindingness of their agreement. Yet a third possibility is that the main agreement lacks contractual force for want of execution of the formal document but that, nevertheless, a separate preliminary contract comes into existence at an earlier stage, e.g. when one party begins to render services requested by the other, so that under this contract the former party will be entitled to a reasonable or agreed remuneration for those services. This may even take the form of a letter of intent, so long as the words "subject to contract" are absent….*

Analysis of the HoA and its effect

131. CRS contends that the HoA was capable of being, and was intended by the parties to be, a legally binding agreement. In relation to the document itself, CRS points to the following:

131.1. that the HoA was formally executed (by signature) after negotiation and finalisation of its terms;

131.2. that drafts of document, including a final draft, were sent to McLaren's legal department, yet the signed version was not expressly marked "*subject to contract*";

131.3. that it was recognised in the HoA that "*Following the signoff….the full development programme will kick-off*", demonstrating that the parties intended to commence performance following and based on the terms of the HoA once it was signed;

131.4. that the HoA made detailed provision for the parties' respective roles and responsibilities throughout the remainder of the project;

131.5. that financial terms were agreed, including how much each would invest (McLaren being due to make its first payment of £300,000 to CRS on 15 February

2016, only 12 days later) and a financial model as how the proceeds of sale would be divided between them.

132. CRS further relies on the fact that the terms set out in the HoA were thereafter substantially performed by both parties, including completion of the design and development of the GT4 car, engineering sign-off of the car, finalisation of the specification, commencement of production, provision of parts (by both CRS and MAL) at cost price for assembly, sale of the car, provision of aftersales services (including parts) by CRS and payments by McLaren in accordance with the HoA.

133. CRS further points to the fact that agreement was subsequently reached as to other aspects of the project, including significant agreements that CRS would build 44 cars and 87 car sets of parts.

134. Finally, CRS contends that the parties' mutual communications in the period after the signature of the HoA indicate that it was regarded by them as a binding agreement, in particular Mr Walmsley's letter of 20 April 2017 placing a firm order for further 40 car sets. CRS further argues that at no point did either party deny the existence of a binding contract and that, when McLaren suggested at the meeting on 17 May 2017 that McLaren would take over supply of parts and aftersales services from January 2018, Mr Kirkaldy immediately asserted that the HoA was a binding contract.

135. In my judgment, however, and despite the fact that the parties carried many of its provisions into effect, the HoA was a fundamentally incomplete agreement and was not, in any event, intended to create legal relations between the parties for the following reasons:

    135.1. The parties well understood what a binding contract between them would look like and the type of provisions it would contain, having executed such contracts in 2010 and 2014. They knew that there would need to be carefully defined terms, clearly defined rights and obligations, warranties and protections and that provision would have to be made for the duration of the contract, termination and dispute resolution;

    135.2. In stark contrast, the language of the HoA was casual and vague and "non-legal", referring at various points to the "aim" of the project, to the development programme "kicking-off", and recognising that important matters remained to be agreed (in particular, the pricing structure for parts for aftersales support);

    135.3. The HoA did not deal with numerous matters of considerable commercial significance to the parties: the pricing of standard part was crucial to the viability of the project for CRS, as Mr Kirkaldy accepted. No provision was made as to the ownership and use of tooling (in contrast to the previous formal agreements and the draft formal contracts) and there was no cap on CRS's liability (a provision Mr Cozens inserted in the draft formal contracts, without a figure specified, but which was not agreed). Neither the vehicle specification nor the BOM were agreed (although both were subsequently finalised);

    135.4. Most significantly, although the subject-matter of the HoA was a project for the design and development of a new vehicle (and new parts for it), no provision was made for the ownership of intellectual property rights in the designs so produced.

Such provisions are plainly central to any such agreement and in their absence the agreement between the parties was incomplete. There was no mechanism for determining in which party such crucial rights would vest. It cannot be said that the parties were assuming that ownership of such rights would remain with the actual designer (CRS), as previous contracts had provided, perhaps not surprisingly, that they would vest in McLaren. Nor can it be said that the parties assumed that the structure in the previous contracts would apply: CRS is now maintaining a claim to ownership of rights in its designs (although not in these proceedings), a claim hotly disputed by McLaren. In my judgment the existence of that dispute demonstrates the fundamentally incomplete nature of the agreement recorded in the HoA;

135.5. The HoA expressly provided for the preparation and signature of a formal contract, expecting it to be complete within a relatively short time. In the context of the factors set out above, I consider it is clear that such a provision, in this case, was a recognition that it was only upon the execution of a formal contract that a binding agreement would come into force. The HoA was therefore, in my judgment, effectively subject to contract;

135.6. Communications passing between the parties after the HoA further demonstrate that the HoA was not understood or intended to be legally binding. It is true that Mr Flewitt and Mr Walmsley made occasional references in correspondence to an agreement or even a contract being in place in respect of the GT4 project, but these are readily understood as imprecise language. The tenor of what was understood by the parties is far more accurately represented by the actions and words of Mr Kirkaldy and Mr Niarchos. It is plain from what passed between the parties that, from the outset and throughout the relevant period, neither of them understood or suggested that the HoA was binding nor that there a contract in place, and that each was pressing MAL to enter such a contract to provide CRS with future business stability. Their respective emails to MAL of 7 March and 24 March 2017 cannot be understood in any other way. Little weight can be put on Mr Kirkaldy's assertion on 17 May 2017, when MAL was proposing to wind down CRS's involvement, that the HoA was binding.

136. As for the parties' performance of the terms of the HoA, it is clear that the parties were keen to proceed quickly with the GT4 project (so that a racing team would be running a GT4 variant "this season"), including each making significant investments of labour, materials and money. The parties knew that it would take some time to agree and finalise a full binding contract, so set out the agreed outline of the project and their respective roles in the HoA. The purpose of so doing was not to pre-empt the process of negotiating a binding contract, but to ensure that the parties were agreed on sufficient aspects of the project to be satisfied that a binding agreement would ultimately be reached and that the parties understood their roles in the meantime.

137. In that context, the fact that the parties proceeded with the GT4 project does not evidence that the HoA was intended to be a binding contract, but that the parties were prepared to proceed without such a contract on the assumption that one would be agreed or that the risk was worth taking.

138. Proceeding on that basis was not unusual or particularly surprising in the context of the relationship between CRS and McLaren. CRS's sole business was working with

McLaren, so it was in CRS's interests to push for projects to commence, even without a binding commitment. That was all the more so as the GT3 Agreement was entering its final year. The parties had worked on numerous projects together, including several with no contract or where a contract was agreed after work had commenced. Indeed, work on the GT4 project itself had commenced prior to the finalisation of the HoA. CRS knew that in the absence of an overall agreement, it could demand that purchase orders were issued for specific items of work, a process adopted previously and, indeed, utilised in the GT4 project in September 2016 (in relation to parts) and April 2017 (in relation to car sets of parts).

Conclusion on the HoA

139. In the light of the above analysis, I conclude that the HoA was not intended to be a legally binding contract, being no more than an outline agreement in principle. Further, any agreement which was recorded was conditional on the execution of a formal contact.

Is a binding contract to be inferred from conduct after the HoA?

The relevant legal principles

140. In view of my conclusion above, CRS faces two obstacles in establishing that the parties' conduct in working on the project after the HoA gave rise to a binding contract (on any of the various permutations pleaded). The first is that there was an understanding that no contract would arise until a formal contract had been executed, an understanding that continued during the negotiation of that formal contract, which was plainly on a "subject to contract" basis. The second is that, in any event, the parties never agreed the objectively essential terms as to intellectual property rights.

141. These type of problems, recognised as being "not uncommon", were considered in *RTS*. The Supreme Court, at §47, first rejected the contention that, where a contract was being negotiated on a subject to contract basis, and work begins before the formal contract is executed, that there will always or even usually be a contract on the terms that were agreed subject to contract, stating:

> "*That would be too simplistic and dogmatic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend on the circumstances. This can be seen from a contrast between the approach of Steyn LJ in the* Percy Trentham *case … and that of Robert Goff J in* British Steel Corpn v Cleveland Bridge and Engineering Co Ltd *…"*

142. The two approaches in question were as follows:

142.1. Steyn LJ explained that the test was one of the reasonable expectations of honest sensible businessmen, that contracts may come into existence during and as a result of performance, and explained (in the passage cited above) that performance may make it unrealistic to deny that a contract exists. Further, if a contract comes into force as a result of performance it will frequently be possible to hold that it impliedly and retrospectively covers pre-contract performance;

142.2. Robert Goff J recognised that, where parties to a large supply contract were negotiating (and therefore had not agreed) which of their standard terms as to liability would apply, it was difficult to infer that performance in the meantime was on either basis: the inference was that the parties were only accepting liability on the basis of a contract they (wrongly) anticipated would shortly be agreed.

143. The Supreme Court, at §54, did not accept that there was any conflict between those approaches:

> "*Each case depends upon its own facts. We do not understand Steyn LJ to be saying that it follows from the fact that the work was performed the parties must have entered into a contract. On the other hand, it is plainly a very relevant factor pointing in that direction. Whether the court will hold that a binding contract was made depends upon all the circumstances of the case, of which that is but one. The decision in the* British Steel *case was similarly one on the other side of the line. Robert Goff J was struck by the likelihood that parties would agree detailed provisions from matters such as liability for defects and concluded on the facts that no binding agreement had reached….*"

144. The Supreme Court noted at §55, however, that the *Percy Trentham* case was not a "subject to contract" or a "subject to written contract" type of case, whereas part of the reasoning in the *British Steel* case was that the negotiations were throughout conducted on the basis that, when reached, the agreement would be incorporated in a formal contract. The Court stated:

> *"55…..In our judgment, in such a case, the question is whether the parties have nevertheless agreed to enter into contractual relations on particular terms notwithstanding their earlier understanding or agreement. Thus … It is possible for an agreement "subject to contract" or "subject to written contract" to become legally binding if the parties later agreed to waive that condition, for they are in effect making a firm contract by reference to terms of the earlier agreement. Put another way, they are waving the "subject to [written] contract" term or understanding.*
>
> *56. Whether in such a case the parties agreed to enter into a binding contract, waving reliance on the "subject to [written] contract" term or understanding will again depend upon all the circumstances of the case, though the cases show that the court will not likely so hold….* "

Analysis of the GT4 project after the HoA

145. CRS's case is that a contract between CRS and McLaren must have come into force when CRS commenced manufacturing cars in October 2017, or at least when the parties agreed the Revised Business Case in January 2017. At that point, it is argued, any stipulation requiring a formal contract must have been waived.

146. In my judgment, however, and despite the significant continuing work on the GT4 project, no binding contract ever came into force for the following reasons:

146.1. Throughout the period that the work was carried out, the parties knew that contractual negotiations had not been completed and that such negotiations were on a subject to contract basis. Mr Cozens was chasing MAL for its responses to his "subject to contract/contract denied" drafts right up to May 2017, when he provided yet further revised drafts with the same marking;

146.2. At no time did the parties agree the crucial issue as to intellectual property rights: CRS has ultimately claimed those rights, but McLaren cannot have intended, in dealing with CRS, that it would not own the rights to the design of some or all of its GT4 car. The fact that it is difficult to determine the rights in that regard, and that CRS believes, in good faith, that it has rights which it would not have obtained had a formal contract been agreed, strongly indicates that the parties cannot be considered to have reached an agreement;

146.3. The case therefore appears to be firmly on the same side of the line as the *British Steel* case;

146.4. That is further confirmed, rather than undermined, by the fact that CRS insisted on binding purchase orders for parts and car sets. In my judgment it is clear that CRS, through Mr Cozens, demanded legally binding orders precisely because CRS was unable to obtain a contract from McLaren in respect of the project as a whole;

146.5. The communications between the parties, referred to above in relation to the HoA, also make it plain that neither Mr Kirkaldy nor Mr Niarchos understood that a contract had come into force by March 2017. The very gist of their complaint was that they were having to conduct their business without the security of a contract. Mr Kirkaldy did not assert that there was a contract until the relationship had effectively run its course.

Conclusion as to a contract by conduct

147. In the light of the above I conclude that the parties at no time reached agreement on a formal contract and at no time waived the requirement that such a written contract be entered. It is certainly the case that CRS performed significant work on the GT4 project and did not do so gratuitously, but CRS's entitlement to remuneration is limited to payments due in respect of formal purchase orders (upon which CRS insisted) and otherwise for a reasonable sum on a quantum meruit basis.

The nature of any right to provide aftersales services

148. If I am wrong in finding that there was no binding agreement between CRS and McLaren which encompassed the provision of aftersales services (including the supply of non-standard parts) to GT4 customers, the further question arises as to whether CRS was granted exclusive rights to provide such services.

149. CRS's case in this regard is based on the provisions of the HoA that:

149.1. CRS will be the Tier 1 supplier for the unique parts;

149.2. All customer service and support will be provided by CRS, with support of MAL when necessary;

149.3. CRS will continue to provide customer support (including parts availability) for a minimum of 3 years after the last GT4 car has been built;

149.4. CRS is (according to the RASIC schedule) "Responsible" for Parts Supply, noting that "parts sold by CRS".

150. In my judgment the reference to CRS being a Tier 1 supplier plainly relates to supply to McLaren, the ultimate manufacturer of the GT4 car, not to third party customers. The term indicates that CRS would supply directly to McLaren, and that other suppliers (Tier 2) would supply through CRS. In other words, the term simply does not relate to aftersales support, let alone the issue of whether or not CRS has the exclusive right to provide such support.

151. The RASIC provisions also do not assist CRS for the reasons set out in relation to the GT3 Agreement claim: references to "responsibility" do not amount to the grant of an exclusive right.

152. The more difficult question is whether terms that CRS "will" provide all customer support should be read as granting it an exclusive right. The provisions do not expressly contain such wording, and on a strict reading might suggest an obligation rather than a right, but the language is plainly imprecise and "non-legal". There is some force in CRS's contention that the parties are providing what they intend "will" happen, indicating the CRS has both an exclusive right and an obligation.

153. The analysis is made more difficult because the HoA does not contain any provisions as to (i) the duration of the agreement; (ii) tooling; or (iii) the nature of the rights CRS is to have in relation to McLaren's brand and Licensed Rights either during or after the term of the agreement (other than the broad provision that CRS will operate under the McLaren GT brand).

154. In my judgment, against the background of the parties continued engagement in relation to the GT3 cars, the proper interpretation of these provisions is that they were intended to replicate the aftersales provisions in the GT3 Agreement. As explained above, those provisions imposed an obligation on CRS in relation to providing aftersales services, but no right in that regard (exclusive or otherwise). CRS's rights arose by virtue of its exclusive right to use McLaren's Licensed Rights and McLaren's covenant not to compete, at least until 12 months before termination.

155. It follows that I do not consider that the HoA (if a legal binding agreement) granted CRS rights, exclusive or otherwise, to provide aftersales services. CRS's rights and protections would no doubt have been set out in a detailed contract, if concluded, but the HoA does not contain any such provisions and they cannot be implied (and CRS has not invited me to do so). I would add that this conclusion, that CRS had accepted obligations without any corresponding rights, demonstrates further why the HoA was an incomplete agreement, not intended to constitute a binding agreement.

Remedies

156. In view of my findings above, issues relating to specific performance or damages in lieu do not arise for decision.

157. As set out above, McLaren has at all relevant times accepted that CRS is entitled, on a restitutionary basis, to be paid sums in accordance with the Revised Business Case on the sale of each GT4 car: CRS has now claimed a quantum meruit on that basis. It is common ground that the sums accepted to be due have been paid in relation to the 62 cars sold at the time the trial ended.

158. The sole remaining issue relates to the sums due in relation to the further sale of GT4 cars. The parties disagree as to how many GT4 cars are likely to be produced in total by McLaren (bearing in mind that a new version is due to be produced in 2020). CRS's Chief Financial Officer, John Mcintosh, gave evidence that it was likely to be 350 (the middle of a range of 300-400 suggested by MAL in 2017), although in closing argument CRS accepted that is likely to be too high. MAL's current estimate is in the range 114 to 162.

159. Notwithstanding that uncertainty, CRS invites an immediate assessment of how much will be due to it under the Revised Business Case and an order for payment of that sum (no doubt suitably discounted for early receipt). However, on a proper analysis CRS's entitlement to payment only arises on sale of each car, subject to receiving a minimum of £300,000 by way of return on its investment on its return (which will be reached when payment for a total of 75 cars has been made). Both for that reason and because of the uncertainty as the number of cars which will be produced, I consider that the appropriate course is to grant a declaration as to CRS's future entitlement. McLaren has also offered to provide an undertaking to make the payments to which CRS is entitled as and when cars are sold.

Conclusion

160. Save for the grant of a declaration as to CRS's right to payment on the sale of each GT4 car (subject to a minimum return of £300,000), CRS's claims in relation to both the GT3 Agreement and the GT4 project are dismissed.