



Neutral Citation Number: [2019] EWHC 2892 (QB)

Case No: TLQ18/0230

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2019

Before :

The Honourable Mr Justice Cavanagh

Between :

New York Laser Clinic Limited
- and -
Naturastudios Limited

Claimant

Defendant

Juliette Levy (instructed by **Cerulean Law**) for the Claimant
No appearance or representation for the Defendant

Hearing dates: 8, 10, 11, and 15 October 2019

Approved Judgment

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

.....
MR JUSTICE CAVANAGH

INTRODUCTION

1. This is a claim by the Claimant against the Defendant for damages for breach of collateral warranty, and/or negligent misstatement, arising out of statements made on behalf of the Defendant which the Claimant alleges induced the Claimant to take delivery of six laser diode devices, known as grade IV Magma Diode Laser (“Magma Lasers”), for use in the Claimant’s aesthetic laser hair removal business. The Claimant contends that the Magma Lasers did not live up to the assertions made by the Defendant’s representatives about their performance and benefits, and, indeed, had to be withdrawn from service by the Claimant. In the alternative, if, contrary to the Claimant’s primary case, the Magma Lasers were fit for purpose, the Claimant seeks damages for negligence on the part of the Defendant in the provision of training in the use of the Magma Laser to the Claimant’s staff.
2. The Claimant company operates three clinics in London which provide non-invasive, aesthetic, procedures to the Claimant’s clients. Between February 2015 and November 2016, the Claimant also operated a fourth clinic, in Reading. The shares in the Claimant are owned by Mrs Donna Talfourd-Cook, her husband Mr James Talfourd-Cook, and Mrs Talfourd-Cook’s brother, Mr Danny Willingham. All three are directors. Mrs Talfourd-Cook and Mr Willingham founded the business and Mrs Talfourd-Cook runs the business on a day to day basis. Mr Talfourd-Cook, who is a Chartered Accountant, is in charge of financial and procurement matters for the business. At all material times, the great bulk, at least 75%, of the income received by the business was derived from the provision of laser hair removal services to clients. As its name suggests, this consists of making use of laser technology to remove unwanted hair from parts of a person’s body.
3. The Defendant company, which is incorporated in Scotland, was, at the relevant time, involved in the supply of devices, including diode lasers, to aesthetic clinics, and in the provision of training in how to use them. These lasers are used to carry out laser hair removal. The chief executive and sole shareholder of the Defendant is Mr James Anderson. The national sales manager for the UK is Mr Simon Ringer.
4. The Claimant was represented by Ms Juliette Levy. I am grateful to her for her very helpful submissions, both oral and in writing. As I will explain, the Defendant did not appear and was not represented.
5. I will set out the relevant facts in greater detail later in this judgment. In brief, however, a meeting took place on 11 September 2015 at the Claimant’s Baker Street premises, at which Mr Ringer encouraged Mr and Mrs Talfourd-Cook to consider purchasing a number of Magma Lasers for the Claimant’s business. The Magma Laser were made by an Israeli company, Formatk, and the Defendant was (at the time) the sole UK distributor. A further meeting took place on 24 September 2015 at the Reading Clinic. On this occasion, Mr Ringer and a colleague, Kevin Williams, demonstrated a Magma Laser.
6. The Claimants say that the Defendant’s representatives made a number of representations about the performance and results to be expected from Magma Lasers and that these, along with similar statements that were set out in a brochure which was

handed to Mrs Talfourd-Cook by Mr Ringer on 11 September 2015, induced them to decide to buy six Magma Lasers for the clinics. These were bought via hire purchase, and so the contracts for purchase of the Magma Lasers were between the Defendant and the hire purchase companies, not between the Defendant and the Claimant.

7. I will set out the nature of the representations in due course, but it is common ground that the Talfourd-Cooks were told that the Magma Lasers can be used on those with an active tan – as I will explain, this was something which, if it were true, would mean that Magma Lasers were a major improvement upon existing lasers. The Claimant says, but the Defendant disputes, that a number of other representations were made, including that the Magma Lasers could be used on all skin types, including type VI (the darkest skin type), that they were fast (full legs could be treated in 20 minutes), effective (up to 86% hair removal could be achieved after only three treatments), safe (it was impossible to burn a client through the use of a Magma Laser), and that the devices were affordable (as they were competitively priced with a lifetime of 3 million pulses).
8. The Claimants further contend that each of the representations was false. The six Magma Lasers were delivered to the Claimant and were used for a number of months in 2016 (and, to a very small extent, into early 2017). The Claimants say that they were not safe to use, especially on those with darker skin types or with those with active tans (and, indeed, several clients suffered burns); also, the procedures took much longer than the Defendant had claimed; the procedures were not effective; and the devices were not as cheap to run as had been promised.
9. The Claimant's primary case, therefore, is that the Magma Lasers were not fit to be used to perform laser hair removal safely. The Claimant contends that the statements by the Defendant's representatives about the benefits of using Magma Lasers were exaggerated and false (though the Claimant does not allege, and does not need to prove, that the Defendant deliberately set out to mislead the Claimant). The Defendant, on the other hand, has pleaded that the difficulties encountered by the Claimant were the result of a failure by the Claimant's clinicians to use the Magma Lasers properly. The Defendant pleads that this was principally the result of a decision by Mrs Talfourd-Cook to disregard the guidance that the Defendant had given for use of the Magma Laser, and to make use of protocols of her own devising which the Defendant said meant that the Lasers were not used properly.
10. As I have said, the Claimant arranged for the purchase of the Magma Lasers by hire purchase companies on their behalf. It is for this reason that the Claimant has not brought a standard breach of contract claim against the Defendant for delivery of sub-standard equipment. When the proceedings herein were commenced, the Claimant's primary claim was one of negligent misstatement. Subsequently, the Claim Form was amended to plead breach of collateral warranty. This new claim is now the primary cause of action that is relied upon by the Claimant. This is because the Claimant says that, if it succeeds with its breach of collateral warranty claim, the Claimant is entitled to recover damages for loss of profits, calculated by reference to the profits that would have been earned if the Magma Lasers had performed in accordance with the warranties. The sum claimed under this head, in the Claimant's skeleton argument, is £3,876,830. The Claimant acknowledges that, if it succeeds only on the basis of negligent misstatement, the measure of its loss will be significantly smaller, consisting of the losses resulting from entering into the hire purchase commitments

and the losses resulting from having to mollify unhappy clients, by offering free treatments and refunds, and other wasted expenditure. The sums claimed under these heads are £401,609.69, in total.

11. In the alternative, but very much as a subsidiary argument, the Claimant contends that, if, contrary to its primary case, the Magma Lasers were fit for their purpose, the Defendant was liable in negligence because the fault lay with the inadequate training that the Defendant's representatives had carried out. If this claim were to succeed, the measure of damages would be the same as for negligent misstatement.

The structure of this judgment

12. In this judgment, I will deal with the issues in the following order:
 - i) The procedural history;
 - ii) The law relating to a claim for collateral warranty;
 - iii) The law relating to a claim for negligent misstatement;
 - iv) The law relating to a claim for negligence;
 - v) The law relating to remedy: in particular, in a collateral warranty claim such as this, can a Claimant recover damages for loss of anticipated profit?; and
 - vi) Findings of fact and conclusions.

THE PROCEDURAL HISTORY

13. The Claim Form in these proceedings was issued on 21 December 2015. At that point, as I have said, the main claim was for negligent misstatement, with a subsidiary claim for negligence in relation to the provision of training. In late 2018, the Claimant applied for leave to amend the Claim Form so as to add the claim for breach of collateral warranty. Permission to amend was granted by Mr Jason Coppel QC, sitting as a Deputy High Court Judge, on 21 December 2018. The Defendant appealed against this decision to the Court of Appeal but, on 13 February 2019, the Court of Appeal dismissed the Defendant's appeal, although the Court granted the Defendant's request for a postponement of the trial. In the meantime, on 21 January 2019, the Defendant filed an Amended Defence.
14. A case management hearing took place on 19 July 2019 before Ms Leigh-Ann Mulcahy QC, sitting as a Deputy High Court Judge. The Defendant played a full part in this hearing. A further case management hearing took place before Ms Mulcahy QC, on 14 August 2019. The day before this further hearing, the Claimant's solicitors, Tenet Compliance and Litigation, came off the record, and a Notice of Change was served, saying that the Defendant would continue as a litigant in person, represented by its sole director, Mr Anderson. The Defendant did not attend and was not represented at the case management hearing on 14 August 2019.
15. A final case management hearing took place on 12 September 2019 before Mr Coppel QC. Once again, the Defendant did not attend and was not represented. At this hearing, various orders were made, including orders which had the effect that unless

the Defendant complied with orders made at the CMC, the Defendant would be debarred from relying at trial upon its three expert witnesses, namely Dr Simon Zokaie, who provided expert clinical evidence, Dr Robert Regola, who provided technical evidence about lasers, and Mr Martin Chapman, who provided expert accountancy evidence.

16. The Defendant did not comply with the relevant orders, and so is debarred from relying on the expert evidence.
17. This trial commenced on Tuesday, 8 October 2019. The Defendant did not attend and was not represented. Prior to that, the Claimant’s solicitors had written to and emailed Mr Anderson on a number of occasions, including to ask him who would be representing the Defendant at trial. Apart from a one-line email dated 16 September 2019 in which Mr Anderson had said “Thank you for updates and all noted”, the Claimant’s solicitors did not receive a reply. On the morning of the trial itself, at about 9 am, Mr Anderson emailed Ms Levy, counsel for the Claimant, saying, “Please pass this information to the court. We will not be attending the court case. We have applied to the sheriff court to petition for liquidation.”
18. In light of the above, I am fully satisfied that the Defendant was aware that the trial was taking place on 8 October 2019, and has chosen not to take part. The story does not end there, however. Mr Talfourd-Cook gave evidence on Friday, 11 October 2019 to the effect that he had attended a trade exhibition at Kensington Olympia the previous evening. At this exhibition, which was concerned with technologies and equipment for use in clinical and cosmetic procedures, the most prominent stand belonged to the Defendant. It was occupied by Mr Anderson and by Mr Ringer. Mr Talfourd-Cook exhibited photographs which showed a large stand with the Defendant’s branding and name on it, and which showed two individuals, whom Mr Talfourd-Cook identified as Mr Anderson and Mr Ringer, speaking to customers behind the desk at the stand. This makes it all the clearer that the Defendant could have attended the trial, at least in the person of Mr Anderson, if it had so wished. This also casts some doubt on the statement by Mr Anderson that the intention is to place the Defendant into liquidation. The obvious inference from the Defendant’s attendance at the trade fair is that it intends to carry on in business. During closing submissions, on 15 October 2019, Counsel showed me an email advertisement that had been circulated by the Defendant on 13 October 2019 and which announced the launch of a new laser diode hair removal device by the Defendant, the Lite Touch Laser system.
19. The steps that may be taken when a Defendant does not attend at trial are set out in CPR 39.3. This provides, in relevant part that:

“39.3(1) the court may proceed with a trial in the absence of a party but –

....

(c) If a Defendant does not attend, it may strike out his defence or counterclaim, or both.”

20. The Claimant did not apply for a strike out of the defence on the basis of the Defendant's non-attendance. As a result, the trial has proceeded, albeit without the presence or the participation of the Defendant, and the Claimant must therefore prove its case.
21. I have read the statements of the Claimant's witnesses of fact, and I have heard oral evidence (albeit briefly) from all of them, save for one (Cherise Roberts) in respect of whom a hearsay notice had been served. I was able to ask the witnesses questions arising from my reading of their witness statements, to the extent that I considered it necessary. The witnesses of fact whose evidence I have received in this way were: Mrs Donna Talfourd-Cook; Mr James Talfourd-Cook; Ms Roberta Botelho-Fonseca, a laser and skin consultant and clinician who was employed by the Claimant at the material time, and who underwent the training on the Magma Lasers which was provided by the Defendant in late 2015 and early 2016, and who was also able to give evidence about how the Magma Lasers worked in practice, and about the operating protocols that were introduced by Mrs Talfourd-Cook; Ms Donna Houston, a Receptionist and Customer Care Manager employed by the Claimant, who gave evidence about the complaints that were received from clients and the steps taken by the Claimant to deal with the complaints; and Dr Belinda Porter, a GP and director of an aesthetics business in Aberdeen, Beautiful Assets Limited, which has no connection with the Claimant. Dr Porter gave evidence about the problems that she experienced after purchasing a Magma Laser from the Defendant in late 2015.
22. I have also read the witness statements of, and heard oral evidence from, the Claimant's expert witnesses. These were Dr Graham Bisset, the clinical expert, Mr Simon Rondle, the technical expert, and the Claimant's director, Mr Talfourd-Cook, on accountancy matters. Leave was given to rely on Mr Talfourd-Cook as an expert witness by Freedman J on 13 February 2019. As with the witnesses of fact, I have had the opportunity to put questions to the expert witnesses, arising from my reading of their witness statements.
23. As the Defendant was debarred from relying on its expert evidence and, in any event, did not call its expert witnesses, I did not read or take account of the Defendant's expert witness statements, save to the extent necessary to make sense of passages in the Claimant's expert reports, some of which were responding to points made in the Defendant's experts' witness statements.
24. Ms Levy invited me to take account of certain passages in the witness statements of the Defendant's witnesses of fact, submitting that I have a discretion to treat them as hearsay, even though the witnesses were not called by the Defendant (or the Claimant). Having considered the matter, I decline to do so.
25. The starting point is CPR 32.5(1), which states that:
 - “(1) If –
 - (a) A party has served a witness statement; and
 - (b) He wishes to rely at trial on the evidence of a witness who made the statement,

he must call the witness to call oral evidence unless the court otherwise orders or he puts the statement in as hearsay evidence”

26. In **Williams and another v Hinton and other** [2011] EWCA Civ 1123, the Court of Appeal confirmed that if a party declines to attend trial and declines to call its witnesses, the judge is not obliged to consider the evidence in the party’s witness statements (unless the statements have been put in as hearsay statements). This is wholly consistent with the right to a fair trial in Art 6.1 of the European Convention on Human Rights, imported into UK law by the Human Rights Act 1998 (see **Williams**, para 46).
27. CPR 52.5(5)(b) states that if the party on whose behalf the statement was served does not call the witness or apply to put the statement in as hearsay evidence, the other party may put the statement in as hearsay evidence. However, this is not what I under the Claimant to be asking for. Rather, the Claimant asks only that I look at a few isolated passages in the witness statements. In my judgment, it would not be appropriate for me to cherry-pick the Defendant’s witness statements in this way, by reading selected parts of them which the Claimant wishes me to read, whilst paying no attention to other parts of the same witness statements. I should add that, in my view, the Claimant does not need to rely on parts of the Defendant’s witness statements in order to make good its pleaded case.
28. Accordingly, as the Defendant did not appear at trial, and did not proffer witnesses, I did not read or take account of the witness statements that had previously been served on behalf of the Defendant, save to the extent referred to in the next paragraph.
29. However, as Ms Levy helpfully pointed out, the Defendant served a number of witness statements under Hearsay Notices. These were the statements of Georgia Kerr, a training co-ordinator, employed by the Defendant; Donna Ash, who manages a clinic in Cambridge on behalf of the Defendant; Christopher Miller, an electronic engineer who worked with the Defendant; Conrad King, the Defendant’s Service and Account Manager, who delivered 5 of the 6 Magma Lasers to the Claimant and installed them; Gordon McDonald, the Defendant’s Despatch Manager; and John Brett Isaac, director of a company specialising in the repair and servicing of electrical equipment. The Hearsay Notices were validly served and so the statements stand as evidence, even though the Defendant did not attend trial. I have read each of these statements. It is fair to say, I think, that none of these witnesses was able to give evidence of central importance, either in relation to the alleged warranties or in relation to the difficulties which the Claimant says it encountered with the Magma Lasers, and none of this evidence deals with mitigation.
30. In the circumstances, therefore, there was little or no evidence to gainsay the evidence that was given by the Claimant’s witnesses, and I have taken this into account in making my findings of fact. I should add, however, that I found the evidence in the statements of the Claimant’s witnesses of fact to be credible and reliable and consistent with the contemporaneous documents and the circumstantial evidence. In so far as I was able to form any view based on the demeanour and oral evidence of the Claimant’s witnesses of fact – and this applies only to Mr and Mrs Talfour-Cook as I asked additional questions of them, whereas the other witnesses only verified the contents of their witness statements – I took the view that they were honest and truthful.

31. As for the experts, I took the view that all three were knowledgeable, honest and competent and were trying their best to assist the Court. Both Dr Bisset and Mr Rundle had carefully examined a Magma Laser (in Dr Bisset's case, several such lasers). A Magma Laser was brought into court and Mr Roundle described to me how it was operated.
32. So far as Mr Talfourd-Cook's evidence on quantum of loss of profits is concerned, it was clear that he genuinely believed in the estimates that he was giving, and that he had carefully researched the Claimant's records to justify and back up the figures that he provided. He gave his answers to my questions frankly and honestly.
33. There are two potentially difficult issues of law in this case, both relating to the collateral warranty claim, namely (1) the nature and scope of the contractual intention that is required for a collateral warranty to be legally binding, and (2) whether damages can be awarded in a collateral warranty claim by reference to the profits that would have been earned by the Claimant if the warranty had been true. I have had the benefit of Ms Levy's submissions on these issues, but it is unfortunate that I have not heard any submissions on behalf of the Defendant. However, this cannot be helped.

THE LAW

Collateral warranties

34. It is clear that a claim can be brought, in an appropriate case, for breach by a party of a collateral warranty. A collateral warranty is a promise or assertion, with contractual force, which leads to a contract being entered into. If the warranty that is relied upon turns out to be false, the person to whom it is made may have a cause of action against the promisor for breach of contract. It is not necessary that the warranty was made fraudulently, or even negligently.
35. The cause of action consisting of a claim for collateral warranty came into being primarily to fill a gap that existed before the enactment of the Misrepresentation Act 1967. Before that Act, a person who had been induced to enter into a contract by a false representation which was not fraudulent had no remedy against the other contracting party in tort (unless the Claimant could establish that the Defendant owed a duty of care, in which case a **Hedley Byrne**-style negligent misrepresentation claim would be available: see below). In such cases, there was no remedy at all, unless the person could establish that the representation gave rise to a collateral warranty, which had contractual force. Lord Denning MR said in **Esso Petroleum Co Ltd v Mardon** [1976] QB 801 (CA), at 817, that although Lord Moulton had said in **Heilbut Symons & Co v Buckleton** [1913] AC 30, at 47, that "such collateral contracts must by their very nature be rare", in reality courts were often willing to find that a collateral warranty had been given in order to do justice in cases in which one contracting party had been persuaded to enter into a bad bargain by the incorrect statement of the other contracting party.
36. In cases like **Esso v Mardon**, the collateral warranty was given by one of the parties to the main contract to the other, during the pre-contractual negotiations. However, a warranty given to a third party, who then causes another party to enter into the main contract, may also be enforced as a collateral warranty, in appropriate cases. In such cases, the collateral warranty becomes an additional enforceable contract, made

between the third party and the party which gave the warranty. These are sometimes called “tripartite” collateral warranties.

37. The concept of tripartite collateral warranties is familiar to law students, but there have been surprisingly few reported cases in which the cause of action has been relied upon. There have, however, been some.
38. The first cases, so far as I am aware, which recognised that a collateral warranty claim could be brought in a tripartite relationship, were **Brown v Sheen and Richmond Car Sales, Ltd** [1950] 1 All ER 1102 (Jones J), and **Shanklin Pier v Detel Products Ltd** [1951] 2 KB 854 (McNair J).
39. In the **Brown** case, a motor dealer made a representation to the Claimant that a car which was for sale was in perfect condition. In reliance upon this representation, the Claimant arranged for a finance company to buy the car and then entered into a hire purchase agreement with the finance company. The car was in far from perfect condition. The Claimant succeeded in a claim against the dealership for breach of warranty, even though the Claimant had not himself entered into a contract with the dealership in reliance upon the warranty.
40. In the **Shanklin Pier** case, which is perhaps the most well-known, the Claimant was the owner of a pier which had fallen into disrepair. The Claimant engaged contractors to repair the pier, and to paint it with two coats of paint. The Defendant, a paint manufacturer, persuaded the Claimant that its butiminous paint would be suitable to keep the pier’s surface safe from corrosion for at least seven to ten years, and, in reliance upon the Defendant’s statement about the quality of the paint, the Claimant specified to the contractor that the contractor had to use the Defendant’s paint on the pier. The contract for supply of the paint that was then entered into was between the contractor and the paint supplier: The Claimant was not a party to it. In the event, the paint turned out to be unsatisfactory, and only lasted for three months, and the Claimant was put to the cost of repainting the pier with different paint. The Claimant brought a claim for breach of contract, relying on the breach of the collateral warranty that had been given by the Defendant about the quality and suitability of the paint.
41. The claim succeeded. McNair J said,

“If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A.”
42. Applying this reasoning to the present case, the Defendant is A, the Claimant is B, and the hire purchase companies are C. The Claimant contends that the Defendant made warranties about the performance and qualities of the Magma Lasers, intending them to have contractual force, and that the Claimant relied upon these warranties, and provided consideration by paying a deposit and by procuring the hire purchase companies to enter into contracts with the Defendant to purchase the six Magma Lasers, thereby suffering losses, as the Magma Lasers turned out to be defective, at least for the purposes for which they were intended. The Claimant says that

consideration for the contractual warranties took the form of the Claimant paying a deposit and persuading the hire purchase companies to buy the Lasers from the Defendant.

43. Another example of a “tripartite” case is **Andrews v Hopkinson** [1957] 1 QB 229 (McNair J, again). In this case, the Claimant paid a deposit for a second-hand car to the Defendant, a motor dealer, and the Defendant then sold the car to a finance company. The finance company then made a hire-purchase contract with the Claimant. Upon receiving the car from the finance company, the Claimant signed a note saying he was satisfied as to its condition. However, the steering mechanism was badly at fault and caused an accident involving the Claimant a week later. Before entering into a hire-purchase agreement with the finance company, the Defendant had said to the Claimant, who had no mechanical knowledge, that "It's a good little bus, I would stake my life on it. You will have no trouble with it." The facts of **Andrews v Hopkinson** are, therefore, similar to the facts of **Brown v Sheen and Richmond Car Sales, Ltd**.
44. Following his own decision in **Shanklin Pier**, McNair J held that the Claimant could recover damages from the Defendant for breach of the undertaking that the car was in a good condition. McNair J stated, in relation to the collateral warranty claim, that:

“I am satisfied (1) applying the principle stated by Holt J. in **Crosse v. Gardner** [(1688) Carth. 90] and **Medina v. Stoughton** [(1700) 1 Salk. 210], that if the transaction between the [Claimant] and Defendant had been in law a sale, the words deposed to by the [Claimant] as being the words used by Mr. Hopkinson, junior, could properly be held to be words of warranty, i.e., an affirmation made at the time of sale intended to be a warranty; (2) that the words amounted at least to a warranty that the car was in good condition and reasonably safe and fit for use on a public highway; and (3) that the [Claimant] acted upon this warranty in the sense that without it he would not have accepted delivery of the car or entered into the hire-purchase agreement.”
45. Another “car” case is **Yeoman Credit v Odgers Vospers Motor House Plymouth (Third Party)** [1962] 1 WLR 215 (CA)
46. In **Wells (Merstham) Ltd v Buckland Sand and Silica Ltd** [1965] 2 Q.B. 170 (Davies J), the Defendant was a vendor of sand and the Claimants were growers of chrysanthemums. The Defendant, with honest intent, incorrectly warranted to the Claimants that certain sand met the necessary requirements for growing chrysanthemums. The Claimants then bought three deliveries of sand from the Defendant. Two of the deliveries were sourced through a third party supplier, which did not know that the sand was for horticultural purposes. The first delivery was sourced by the Claimant’s parent company, and this was treated as being sourced by the Claimant itself. The Claimant successfully argued that there was a breach of collateral warranty in relation to the two deliveries of sand by the third party.
47. As for the elements necessary to establish a collateral warranty, Davies J said at 180-181 that:

“As between A (a potential seller of goods) and B (a potential buyer), two ingredients, and two only, are in my judgment required in order to bring about a collateral contract containing a warranty: (1) a promise or assertion by A as to the nature, quality or quantity of the goods which B may reasonably regard as being made animo contrahendi, and (2) acquisition by B of the goods in reliance on that promise or assertion. As K. W. Wedderburn expresses it in "Collateral Contracts" in *Cambridge Law Journal*, 1959, at p. 79: "... the consideration given for the promise is no more than the act of entering into the main contract. Going ahead with that bargain is a sufficient price for the promise, without which it would not have gone ahead at all." and a warranty may be enforceable notwithstanding that no specific main contract is discussed at the time it is given, though obviously an animus contrahendi (and, therefore, a warranty) would be unlikely to be inferred unless the circumstances show that it was within the present contemplation of the parties that a contract based upon the promise would shortly be entered into. Furthermore, the operation of the warranty must have a limitation in point of time which is reasonable in all the circumstances. But none of these considerations gives rise to difficulty in the present case.”

48. In light of the authorities, the requirements for a claim for breach of a collateral warranty, in a ‘tripartite’ case, are as follows:
- i) A warranty (ie a statement) was given to a third party by one of the parties to the main contract, in advance of the main contract being entered into;
 - ii) The warranty was not a mere representation but was intended to have contractual force;
 - iii) The third party provided consideration to the party which gave the warranty;
 - iv) In reliance upon the warranty, the third party caused another party to enter into the main contract with the party who gave the warranty;
 - v) The warranty was inaccurate;
 - vi) The third party suffered financial loss as a result; and
 - vii) There are no relevant exclusion clauses.
49. It is not necessary that the party which gave the warranty knew that it was false, or was negligent, let alone that the party was deliberately acting in a fraudulent manner.
50. It is worth looking in greater detail at requirement ii), ie that the warranty was intended to have contractual force. This was emphasised by the Court of Appeal in **Oscar Chess Ltd v Williams** [1957] 1 WLR 370. In that case, the seller of a car, an

individual, represented that it had been manufactured in 1948. This was supported by the log book and it was on this basis that a car dealership agreed to take the car in part-exchange for a new model. It later transpired that the log book had been forged (unbeknownst to the seller) and the car had actually been manufactured in 1939. The dealer claimed damages for breach of warranty on the part of the seller. The judge rejected the claim, and the Court of Appeal dismissed the appeal, on the ground that the representation made by the seller had not been intended to have contractual force. The statement about the date of manufacture of the car had been no more than a statement of belief by the seller, not a contractual promise.

51. Whether a representation was intended to have contractual force is a question of fact in each case, and it may well not be an easy question to answer. Some helpful guidance may, however, be found in the authorities.

52. It is clear that the test is an objective one, to be applied in light of all of the circumstances. As Denning LJ said in the **Oscar Chess** case, at page 375, applying the guidance given by the House of Lords in the **Heilbut Symons** case:

“The question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice.”

53. Denning LJ went on to say as follows:

“It is instructive to take some recent instances to show how the Courts have approached this question. When the seller states a fact which is or should be within his own knowledge and of which the buyer is ignorant intending that the buyer should act on it, and he does so, it is easy to infer a warranty....So also if he makes a promise about something which is or should be within his own control....But if the seller, when he states a fact, makes it clear that he has no knowledge of his own but has got his information elsewhere, and is merely passing it on, it is not so easy to imply a warranty.”

54. Hodson LJ took the view that no contractual warranty had been given in the **Oscar Chess** case because the seller was stating an opinion on a matter of which he had no special knowledge or on which the buyer might also be expected to have an opinion and to exercise his judgment.

55. In **Esso v Mardon**, Ormerod LJ said, at 826:

“In my view, following Lord Moulton in the **Heilbut, Symons** case, at p. 50, the test is whether on the totality of the evidence the parties intended or must be taken to have intended that the representation was to form part of the basis of the contractual relations between them.”

56. This was ultimately a matter of “applied common sense” (page 825).

57. In my view, it is plain that it is not necessary that the person giving the warranty expressly states in terms that the warranty is intended to have contractual effect, as between the giver and the recipient. Indeed, in many ‘tripartite’ cases, the circumstances will be such that neither the giver or the recipient of the warranty will be expecting to enter into a contract with each other for the supply of goods or services. This will be the position, for example, where the giver of the warranty knows that the recipient will be obtaining the goods by means of hire purchase. However, the warranty must be given in circumstances in which it should be clear to the party giving it that the recipient will rely upon it to cause the recipient or someone else to enter into a contract with the giver of the warranty, and the warranty must be given with a view to persuading the recipient to enter into the contract or to procure the other person to enter into the contract with the giver. It must be more than a mere ‘puff’, and so, ordinarily, it will consist of a statement of something concrete and specific about the qualities or performance of the goods or services that are to be provided under the main contract.
58. In **Esso v Mardon**, at page 817, Lord Denning MR said that:
- “A representation as to the profits that had been made in the past was invariably held to be a warranty. Besides that experience, there have been many cases since I have sat in this court where we have readily held a representation – which induces a party to enter into a contract – to be a warranty sounding in damages” I summarised them in **Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd** [1965] 1 WLR 623 (CA), at 627, when I said:
- "Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it, by entering into the contract, that is prima facie ground for inferring that it was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that it was intended to be acted upon and was in fact acted on."
59. A good example of a warranty that was made in circumstances which gave it contractual force is to be found in **Cullinane v British “Rema” Manufacturing Co. Ltd** [1954] QB 292 (CA). In **Cullinane**, the Claimant purchased a clay pulverising plant from the Defendants, who told the Claimant that the plant would be able to process the Claimant’s clay at the rate of six tons per hour. In fact, the plant was only able to process the clay at a rate of two tons per hour, which meant that the machinery was “commercially useless” for the Claimant (per Jenkins LJ, at 307). The Official Referee found that the Defendant was liable to the Claimant for breach of a collateral warranty, which was intended to have contractual force. (I will return to this case when I look at the measure of damages for breach of collateral warranty.)
60. A collateral warranty with contractual force may be a statement of fact or, in some circumstances, a statement of opinion. This is illustrated by **Esso v Mardon**. In that case, Mr Mardon was persuaded to acquire the lease to a petrol station from Esso by Esso’s statement that the Company had estimated that the throughput of petrol sales at

the station would be 200,000 gallons by the end of the third year. The Court of Appeal accepted that this was not an out-and-out guarantee that the throughput would be 200,000 gallons by the end of the third year, but the Court nonetheless found that it was a statement with contractual force, because it amounted to a statement that, having carried out a careful assessment, Esso had reached the conclusion that the throughput would be 200,000 gallons by the end of the third year. This was not accurate, as, in fact, Esso had not carried out a careful assessment.

61. In my view, there is one respect in which the approach that should be taken to collateral warranties made by one party to the main contract to the other, on the one hand, and by a party to the main contract to a third party, on the other, may differ. The authorities on the first type of collateral warranties case demonstrate a concern that a collateral warranty might be used to override the detailed written terms that are subsequently agreed in a commercial contract between “arms-length” parties, and a concern that collateral warranties would be used to mean that pre-contractual discussions take on contractual force. This concern was raised, for example, by Lord Moulton in the **Heilbut, Symons** case at page 47, and cf **Fuji Seal Europe Limited v Catalytic Combustion Corporation** [2005] EWHC 1659 (TCC), at paras 149-158, per Jackson J. In particular, it does not feel right that a collateral warranty claim in such a case might be used to side-step an exclusion clause in the main contract which covers the subject-matter of the warranty. The solution to this difficulty will normally be that, if the warranty is given at a time when the giver and recipient both know that their eventual agreement will be set down in a detailed written contract, then the pre-contractual discussions will not give rise to warranties that were intended to have contractual force.
62. The position is not so straightforward in a “tripartite” collateral warranty case. It may be that, at the time that the warranty was given, the giver of the warranty expected to enter into a direct contract with the recipient. It may only be later that the supplier of the goods is told that the recipient will make use of a hire purchase arrangement. If so, at the time when the warranty was given, the giver might have expected to have negotiated and concluded a detailed written contract with the recipient at a later stage. In such a case, the warranty may not have contractual force. Alternatively, the giver of the warranty may be well aware, at the relevant time, that the recipient will use hire purchase and so will not enter into a direct contact with the giver, but the giver may also know that its contract with the hire purchase company will contain exclusions which would mean that the warranty would be unenforceable if made to the other party to the main contract. If so, should the recipient be entitled to side-step the effect of those exclusion clauses by relying on a warranty given during negotiations?
63. Fortunately, these complications do not arise on the evidence before me in the present case. There is no evidence that the agreements between the Defendant and the finance houses in relation to the purchase of the six Magma Lasers contained any term which excluded liability for the defects or failures to live up to expectations which the Claimant say they experienced in breach of the collateral warranties, or which would have excluded any claims on the warranties. Paragraph 23 of the Defence pleads a number of provisions of the Terms and Conditions between the Defendant and the purchasers of the Magma Lasers, ie the finance houses, but none of the pleaded terms

would have the effect of excluding liability for breach of the warranties that are relied upon by the Claimant.

64. In her closing submissions, Ms Levy submitted that the burden of proof in establishing that there was no intention to create legal relations, in a collateral warranty case, rests with the Defendant. She drew my attention to Chitty On Contracts, 33rd Ed, Vol 1, paragraph 2-169, in which the editors state that the onus of proving that there was no intention to create legal relations rests with the Defendant. She points out that the Defendant has not led any evidence at trial. Ms Levy further submits that the Amended Defence did not in terms assert that if the warranties were given they were not intended to have contractual force. Ms Levy submits that, in light of all this, it is not necessary even for me to examine the evidence to form a view about whether there was an intention to create legal relations. The burden of proof to show otherwise rests with the Defendant and the Defendant has failed even to attempt to discharge this burden.
65. I do not accept this submission. In my judgment, the statement in Chitty, paragraph 2-169, to the effect that the onus is on a Defendant to show that there was no intention to create legal relations refers to cases in which there was an express agreement between the parties in the context of an ordinary commercial transaction. Chitty was not dealing with cases concerning collateral warranties, and the cases cited in support of the proposition in the text are cases about ordinary business transactions (eg **Edwards v Skyways Ltd** [1964] 1 WLR 349 (Megaw J), 355). There is no suggestion in the authorities on collateral warranties, set out above, that the onus is upon the Defendant to show that there was no contractually enforceable warranty. It is true that the Amended Defence does not state in terms that it is denied that the warranties, if given, had contractual force. However, having denied that all but one of the statements relied upon by the Claimant were made, the Amended Defence goes on to deny that, even if the statements were made, they amounted to ‘warranties’. In my judgment, this can only be interpreted to mean that the Defendant was putting in issue the question whether the statements relied upon had contractual force.
66. Accordingly, I proceed on the basis that the burden rests with the Claimant to show, not only that the statements relied upon as warranties were actually made, but that, in all the circumstances, they were intended to have contractual force.

Negligent misstatement

67. The legal analysis that is required for the alternative claim of negligent misstatement is much more straightforward. The requirements of this tort are set out in the judgment of the House of Lords in **Hedley Byrne v Heller** [1964] AC 465, and are as follows:
- i) Statements must have been made by the Defendant to the Claimant, whether orally or in writing;
 - ii) The Defendant must owe the Claimant a duty of care in relation to the making of the statements;
 - iii) The statements must have been negligent. They do not need to have been fraudulent or deliberately misleading; and

- iv) The misstatements must have caused financial loss to the Claimant.

Negligence

68. The negligence claim concerns the training that was provided to the Claimant's staff by the Defendant's representatives. The Claimant only relies upon negligence if its primary case fails, ie if the Court does not accept that the under-performance and poor performance of the Magma Lasers was the result of fundamental defects and shortcomings in the devices themselves. If the problem lay with the way in which the Claimant's staff operated the devices, the Claimant says that this is because they were negligently trained by the Defendant's representatives.
69. The requirements for a claim of negligence are that:
- a) The Defendant owes a duty of care to the Claimant. The Defendant has admitted it owed a duty of care to the Claimant in respect of training;
 - b) The duty of care was breached by the Defendant;
 - c) The breach of duty caused the Claimant's loss.
70. In the event that negligence is established, it would also be necessary to consider whether there was contributory fault on the part of the Claimant.

Remedy

71. So far as negligent misstatement and negligence is concerned, the law relating to remedy is straightforward. The remedy is calculated on the tortious basis, and so, if successful, the Claimant is entitled to recover damages equivalent to the financial losses that resulted from the Defendant's breach of its obligations. In other words, the Claimant is entitled to recover its wasted expenditure. These losses will fall into two main groups: the sums expended by the Claimant on the purchase of the Magma Lasers, and the cost of making things right for the Claimant's unhappy customers.
72. There is one issue relating to remedy which is much less straightforward, however. This is whether the remedy for a claim for breach of collateral warranty can extend to a claim for the loss of the profits that would have been earned by the Claimant if the warranties relied upon had been true, as an alternative to a remedy calculated by reference to the losses caused by the breach. This is an issue of real importance to the Claimant, because the sum claimed by way of loss of profit is very substantially greater than the sum claimed on the tortious measure, for wasted expenditure.
73. At first blush, and leaving the authorities to one side, it might seem surprising that a Claimant in a case like this would be entitled to recover damages calculated by reference to profits that, realistically, the Claimant was never going to earn. The whole premise of the breach of collateral warranty claim is that the Magma Lasers, supplied by the Defendant, were not capable of producing the benefits that the Defendant claimed they would produce. According to the Claimant's case, the Magma Lasers were not able safely to treat active tans, or skin type VI, and they were not faster than other laser devices. It follows that, on the Claimant's own case, it was

never going to be possible for the Magma Lasers to grow the Claimant's business and increase profits substantially, either by freeing up clinician time which could then be used to generate additional profits, or by increasing the numbers of satisfied customers. Moreover, it is no part of the Claimant's case to contend that, if the Claimant had not been misled into purchasing Magma Lasers, the company would, instead, have bought other lasers which would have achieved the same results for the company.

74. In light of the above, it is arguable that a measure of loss that is calculated by reference to loss of profits would provide the Claimant with a windfall. Put bluntly, whilst the purchase of the Lasers was costly for the business, it did not mean that the Claimant lost out on over £3.8m worth of profits because, in the real world, those profits were never achievable by means of the purchase (via hire purchase) of new lasers.
75. For this reason, I was keen to satisfy myself that there is a good juridical basis for Ms Levy's contention that, in a case such as this, a successful Claimant is entitled to seek damages for breach of collateral warranty by reference to loss of profits.
76. I am satisfied that there is such a juridical basis.
77. In many of the reported cases on collateral warranties, the issue of loss of profits did not arise. In the **Shanklin Pier** case, for example, there was no question of the pier owners seeking damages for loss of profit as a result of the supply of the "wrong" paint. The damages claim in the **Shanklin Pier** case was not put on the basis that the paint was being obtained in order to generate profits for the pier owner's business. Similarly, in the 'car' cases, the only remedy sought by the Claimants was the difference between the price that was paid for the car in reliance upon the warranty, and the true value of the car.
78. The question of loss of profits arises in cases in which the Claimant was persuaded by a collateral warranty to obtain something, such as machinery or a device, which the Claimant would then use in its business to generate profits. The leading authority on whether loss of profits is recoverable in such cases is **Cullinane v British "Rema" Manufacturing Co Ltd**. As I have said, in this case the Defendant warranted to the Claimant that the clay pulverising plant that the Claimant was considering purchasing would process six tons of clay per hour, when in reality its capacity was two tons per hour, rendering it useless for the Claimant's commercial purposes.
79. In **Cullinane**, the Defendant accepted that the Claimant was entitled to damages for loss of profits. There was no issue about that. The issue in the Court of Appeal was whether the Claimant was entitled to the loss it had incurred by entering into the contract (the capital loss), *plus* loss of profits. The Court of Appeal, by a majority, Lord Evershed MR and Jenkins LJ, Morris LJ dissenting, held that a Claimant in a breach of collateral warranty case could recover either the losses incurred as a result of the breach (ie be put back in the position it would have been in if the contract had never been made), or loss of profits, but not both. The relevance for present purposes is that the judgments of the Court of Appeal made clear that loss of profits is available for breach of collateral warranty.

80. Lord Evershed MR referred to the well-known passage in Asquith LJ's judgment in **Victoria Laundry (Windsor) v Newman Industries** [1949] 2 KB 528 (CA), 539, and the passage from **Hadley v Baxendale** 9 Exch. 354 which is cited in that judgment. The passage from **Hadley v Baxendale** states;

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time that they made the contract, as the probable result of the breach of it.”

81. Lord Evershed MR continued in **Cullinane** (at page 301):

“In the present case it is plain that to the knowledge of the defendants this machinery was required to perform a particular function, and the warranty given shows what the function was that the machine was designed to perform. There is, therefore, no doubt at all that the plaintiff is entitled to rely on the second part of the passage I have read, and to claim as damages the business loss which must reasonably be supposed to have been, in the contemplation of both parties at the time when they made the contract, the probable result of the breach. In other words, this plaintiff is not confined to the loss which might be called the natural result of having a machine which turned out to be worth less than the purchase price he has paid for it.”

82. Crucially, for present purposes, in the next paragraph of his judgment, Lord Evershed MR said that “the general statement applicable here” was that “the plaintiff, who got a machine which in the event failed to live up to the performance warranted, should be put in the same position (so far as that can be done by money) as he would have been in if the machine had been as warranted.”

83. At page 302, Lord Evershed MR said that the plaintiff was entitled to:

“..... the loss of the profit which this machine, if it had been as warranted, would have brought him during its mechanical life.”

84. At page 303, referring to the option of claiming losses incurred, rather than loss of profit, Lord Evershed MR said:

“A claim of that kind puts the plaintiff in the same position as though he had never made the contract at all. In other words, he is back where he started; and if it were shown that the profit-earning capacity was in fact very small, the plaintiff would probably elect so to base his claim. But, alternatively, where the warranty in question relates to performance, he may, in my judgment, make his claim on the basis of the profit which he

has lost because the machine as delivered fell short in its performance of that which it was warranted to do.”

85. To like effect, Jenkins LJ said, at page 308:

“The general principle applicable to the case is, I apprehend, this: the plant having been supplied in contemplation by both parties that it should be used by the plaintiff in the commercial production of pulverized clay, the case is one in which the plaintiff can claim as damages for the breach of warranty the loss of the profit that he can show that he would have made if the plant had been as warranted.”

86. Whilst he dissented on the “double recovery” issue, Morris LJ did not dispute that the plaintiff was entitled to recover damages by reference to the profits it would have earned if the warranties had been true.

87. The **Cullinane** judgment is, of course, binding on me, and in my view it is clear authority for the proposition that a Claimant in a breach of collateral warranty is entitled to recover damages by reference to the profits it would have earned if the warranty or warranties had been true. This is also stated to be the position in *McGregor on Damages*, 19th Ed, paragraph 8-210. It is true that, as I have said, this might be thought to provide the Claimant in such cases with a windfall, but it brings the measure of damages in collateral warranty cases into alignment with the measure of damages in other breach of contract cases. A collateral warranty case is, of course a type of breach of contract claim.

88. There are two other reported breach of collateral warranty cases in the commercial context which loss of profits was not recoverable, but in my judgment these are distinguishable from **Cullinane**.

89. The first case is **Esso v Mardon**. In this case, the Claimant was not awarded damages by references to the profits that he would have earned if the throughput at the petrol station had been 200,000 gallons by the end of the third year. Rather, he was compensated for the losses that he had incurred by entering into the contracts with Esso, on the tortious basis, ie by reference to what would have been likely to have happened if he had never entered into the contract, and contrasting it with his position as it was as a result of entering into it (see 821B). Accordingly, the Claimant was awarded damages by reference to the cash that he had put into the business and lost, overdraft charges, and loss of earnings that he would have earned over the contract period if he had not entered into the agreement with Esso (822B).

90. The members of the Court of Appeal gave different reasons for the decision not to award loss of profits. Lord Denning MR, with whom Shaw LJ agreed on this issue (see 834B), focussed on the exact nature of the warranty. He held that the warranty was not that the petrol station would have a particular throughput. Rather, the warranty was that the forecast of throughput that was given by Esso to Mr Mardon was sound and had been made with reasonable care and skill. This warranty was incorrect, as the estimate had been made negligently (see 818E). In other words, the warranty was not about how much business the petrol station would do, but was simply a warranty that Esso had taken care in making its estimate.

91. Lord Denning MR held that, in those circumstances, Mr Mardon was not to be compensated for “loss of a bargain”, because he was not given a warranty to the effect that there would be a particular throughput. Rather, “He is only to be compensated for having been induced to enter into a contract which turned out to be disastrous for him” (820G).
92. Ormerod LJ, on the other hand, simply said, “The claim for loss of profits is, in my opinion, virtually incapable of proof, and I will not deal with that.” (829G). I understand this to mean that Ormerod LJ regarded the claim for loss of profits as being too speculative and so it was unnecessary for him to consider whether damages for loss of profits were recoverable in principle.
93. The conclusion reached in **Esso v Mardon** about the non-availability of damages for loss of profits is, therefore, different from the conclusion that was reached in **Cullinane**. The difference between the two cases is that in **Cullinane** the warranty was that the machinery supplied would achieve a particular performance or output, whereas in **Esso v Mardon** the warranty was that reasonable skill and care had been taken by Esso in giving an estimate of petrol sales. The majority of the Court of Appeal in **Esso v Mardon** took the view that, in the latter type of case, damages for loss of profits were not available. (**Cullinane** was not cited to the Court of Appeal in **Esso v Mardon**.)
94. The second case is **Lion Nathan and others v C-C Bottlers Ltd and others** [1996] 1 WLR 1438 (PC). In this case, the Plaintiffs purchased the entire issued share capital of a soft drinks company. The price was calculated by applying a multiple of 20 to the Defendants’ forecast of the expected profits after tax in the company’s year of accounts ending 2 September 1989. As completion was taking place before then, on 3 July 1989, the Defendants provided the Plaintiffs with a forecast of the expected revenue for the remaining two months of the year of accounts. The forecast was NZ\$2,223,000, but the actual earnings for the two-month period were just NZ\$1,233,000.
95. The Privy Council held that no warranty had been given about the actual earnings in the two months period. Rather, the warranty had been to the effect that reasonable care had been taken in the preparation of the forecast. The Privy Council further held that the measure of damages fell to be assessed by reference to the difference between price agreed on the assumption of the forecast earnings, and what the value of the company would have been had a properly prepared forecast been made (see 1441-1442).
96. I think that the **Lion Nathan** case can be distinguished on the basis that no-one was contending in that case for damages to be calculated by reference to future profits. The harm that had been done as a result of the breach was that the issued share capital had been bought at an overvalue, and so it was plain that the measure of loss should be by reference to the difference between the price that was paid and the true value of the shares, or the price that would have been paid if the estimate of earnings for the two-month period had been prepared with reasonable care.
97. It may be significant, in my view, that Lord Hoffman, who gave the judgment on behalf of the Privy Council, said, at 1442B, that the applicable general principle was that “damages for breach of contract are intended to put the plaintiff in the position in

which he would have been if the defendant had complied with the terms of the contract.” In other words, Lord Hoffman proceeded on the basis that the usual contract measure of damages applies to breach of collateral warranty cases, even where the warranty consisted of a warranty that reasonable care had been taken in the preparation of an estimate of future business or profits. It is not clear to me how this fits with the reasoning of the majority of the Court of Appeal in **Esso v Mardon**, which was not cited to the Privy Council in **Lion Nathan**. In these circumstances, especially as **Lion Nathan** was not a “loss of profits” case, I think that I am bound by the majority of the Court of Appeal in **Esso v Mardon**.

98. Drawing these strands together, I am satisfied that, in a case concerning a breach of collateral warranty about the quality, or anticipated performance, of the thing to be supplied, a successful Claimant is entitled, at its election, to damages calculated by reference to loss of profit, or to losses incurred by entering into the contract, whichever is the higher. However, if the warranty was not as to the quality or performance of the thing to be supplied, but was a warranty to the effect that reasonable care was taken in relation to an estimate that was given, the only damages available are by reference to the losses incurred by entering into the contract.
99. It follows, as Ms Levy submitted to me, that it is necessary to identify with care the exact nature of the warranties that are relied upon in the present case. Very different consequences may follow, as regards damages, depending upon whether a warranty is a warranty that reasonable care had been taken, or is a warranty that a certain level of performance or results will be achieved. It is for this reason that I have considered the law relating to remedies before making my findings of fact on the warranties.
100. I make two final observations on the damages issue. First, I should add that, for what it is worth, I do not entirely follow the logic behind having different approaches to remedy in cases depending on whether the warranty was a warranty about quality or performance, on the one hand, or a warranty that reasonable care has been taken, on the other. Whichever category the warranty falls into, the result is the same. The damage done from a Claimant’s point of view is the same whether it is persuaded to enter a bad bargain by a warranty about quality or performance, or by a warranty that the other party has taken reasonable care in what it has said about quality or performance. Nevertheless, I am, in my view, bound by the judgments in **Cullinane** and **Esso v Mardon** to proceed on the basis that different approaches to damages apply depending on the nature of the warranty.
101. Second, the fact that a claim for breach of collateral warranty can give rise to an entitlement to damages which substantially exceeds the profits that would ever, realistically, have been obtainable is a reason why Courts should be cautious about finding that there is an enforceable collateral warranty, and should examine the facts with care before doing so.

FINDINGS OF FACT AND CONCLUSIONS

102. I will first deal with the relevant background facts and I will then make findings of fact relevant to the collateral warranty claim and will set out my conclusions under that heading. I will then go on to consider negligent misstatement and, in so far as is necessary, the alternative claim for negligence.

The Claimant's business

103. The Claimant commenced business in 2004, when it opened a clinic in Mayfair. In 2005, the Claimant moved its premises to a clinic in Farm Lane SW6, which has four treatment rooms. In 2006, the Claimant opened a second clinic in Notting Hill Gate, with three treatment rooms and in July 2010, the Claimant opened a third clinic in Paddington St, W1 with seven treatment rooms. The Notting Hill clinic was closed in 2010, and a further clinic was opened in Bishopsgate EC2, which is now spread over four floors with six treatment rooms, and a skin bar for express treatments. In 2015, the Claimant opened a fourth clinic in Reading but closed this clinic in November 2016.
104. The Claimant's directors estimate that the company has undertaken in excess of 250,000 treatments over the last 14 years. The business operates on the basis that it is an aesthetic clinic which uses medical grade equipment and which regards client safety is of paramount importance. As I have already said, the great bulk of the services provided by the Claimant's clinics to its clients consisted of laser hair removal. At the material time, this represented well over 75% of all of the services that were provided to clients. This is reflected in the name of the business.

Laser hair removal

105. Laser hair removal can be done for aesthetic or medical reasons. In general, at the Claimant's clinics, laser hair removal will be carried out for aesthetic reasons.
106. There are a number of medical grade lasers on the market which are suitable for laser hair removal by aesthetics clinics such as those operated by the Claimant. This laser technology has been available for many years, and has been utilised by the Claimant company since the business opened, in 2004.
107. Laser hair removal works by means of using lasers to induce selective damage to hair follicles, thereby removing hair and making it less likely that hair will grow back. Hair grows in three cycles, and laser hair removal is only effective in one of those three cycles, known as the anagen (active growth stage) cycle. I have been shown a great deal of technical evidence to explain how laser hair removal works. Fortunately, however, it is only necessary to give a very brief summary in this judgment. Essentially, the laser targets (ie is drawn to) brown pigment, known as melanin, in the hair follicles, which are contained in the skin. This pigment is heated up by the laser and the heat is absorbed by the pigment contained in the hair follicle directly into its papilla and blood supply, which is destroyed or damaged by the heat. This has the effect that the hair is unable to grow back and preventing hair growth. The more heat/energy that is absorbed by the hair follicle, the more effective the treatment.
108. The process is complicated by the fact that melanin also appears in the epidermis, or outer skin layer, and there is a danger that the laser light will not only heat the melanin in the hair follicles but will also heat the melanin in the epidermis. Laser light cannot distinguish between melanin contained in the epidermis and melanin contained in the hair follicles. This heating of the epidermis, if it takes place, can cause blistering, pigmentary changes, and even burns and scarring. The risk of damage to the epidermis is particularly great for those clients who have darker skin

types, because they have more epidermal melanin, and so there will be less contrast between the hair and the skin.

109. This means in practice that laser hair removal is more difficult, and potentially more dangerous, for those with darker skin types. Traditionally, this has meant that clients with darker skin types, IV to VI, have to be treated with lower skin settings in order to be treated safely. This in turn means that the treatment will not be as effective. One of the key attractions of the Magma Lasers for the Claimants was that they were said to be able to treat darker skin types more effectively than lasers treatment could traditionally do, whilst remaining safe.
110. In order to avoid damage to the skin, whilst laser hair removal is taking place, steps are taken to cool the skin whilst the laser is in operation. This is done, for example, by the use of cooling gels or cryogen gas. The Magma Laser made use of a metal cooling tip on the applicator (known as the “chill tip”), which came into contact with the client’s skin whilst the laser was operated (as well as a gel). The Magma Laser, unlike the Candela Laser, did not require the use of cryogen gas, which is expensive.
111. It is essential, when carrying out laser hair removal, to be aware of the skin type of the client. This is because different settings need to be used for different skin types, by which I mean essentially different shades of skin. Also, as I have already said, it is very important that particular care is taken when conducting laser hair removal for darker skin types. The importance of determining a person’s skin type before the treatment is commenced has, in the past, meant that it was not possible to conduct laser hair removal upon clients with an “active tan”. It is extremely difficult to assess the appropriate settings for a laser when a client is tanned, and so the Claimant did not permit any treatment on tanned skin when using Candela lasers. This meant that it was not possible to provide as many laser treatments in the Summer months as in the rest of the year.
112. Aesthetic clinics, and the medical profession, use a standard scale to assess skin types, which is known as the Fitzpatrick skin scale. This divides skin into types I-VI, depending on how light or dark they are. Type I is the lightest skin shade, and Type VI is the darkest skin. The Claimant treats all skin types but the majority of its clients are Skin Types IV and V. Different laser settings have to be used for different skin types, and the higher settings are normally used for darker skin types.
113. The way in which the Claimant undertakes its treatments for laser hair removal is as follows.
114. First the client is asked to complete a consultation form to identify whether they are suitable medically to undertake the treatment. Some conditions, such as diabetes or skin cancer, would mean that a person is unsuitable. Also, the client is asked whether they have had any recent sun exposure, as, at least until the Magma Laser was introduced, it was not possible to apply laser hair removal procedures to tanned skin.
115. The next stage is to carry out a patch test on a piece of skin to determine whether the client is suitable for laser hair removal treatment. Once the patch test has been done, there is a delay of at least 48 hours before the first treatment to check that there is no adverse reaction. At the time of the patch test, the clinician will also assess the client’s skin type by reference to the Fitzpatrick Skin Scale.

116. When the time comes for the treatment to take place, the treatment area is marked up with a white pencil into equal squares to enable the clinician to identify which area is being treated (this is not always done when the face is being treated). The client and the clinician then put on goggles and the clinician prepares the machine for the laser treatment. The treatment room is air-conditioned and the door is locked. In relation to each different type of laser, Mrs Talfourd-Cook has prepared a protocol to be followed by the clinicians.
117. Each treatment session may last some time. Ordinarily, the client will attend a course consisting of a number of sessions before the treatment is complete.

The lasers that were used by the Claimant before it purchased the Magma Lasers

118. By 2015, the Claimant owned and operated 13 medical grade lasers across its clinics. These were Candela Mini GentleLase lasers (“the Candela lasers”). The Candela lasers had been purchased from new at a cost of more than £30,000 each. They had been very well maintained, and they still worked as good as new.
119. The Claimant sold Candela treatments in courses of six and eight sessions, with further top-up packages of three more sessions also available. The treatment times for the Candela lasers ranged between 15 minutes, for small areas, to 60 minutes for “full legs”, to several hours for full body treatments. In order to cool the skin, the client’s skin would be sprayed with cryogen gas at the same time as the laser shot. The cryogen gas was extremely expensive, with supplies costing the company typically £40-£50,000 per annum. The Candela lasers were effective on skin types I-V of the Fitzpatrick Skin Scale, but they were not suitable for laser hair removal for skin type VI. Treatments on skin type VI with the Candela laser were limited to hair reduction, rather than hair removal.

The Magma Lasers

120. The Magma Laser is an 808nm diode laser with an ND1064nm applicator. It consists of a main unit which contains the power supply and cooling system, and also the digital panel which provides information to the operator and which can be used to select settings. This is essentially a “box on wheels” about 3-4 feet high. An extendable tube, which looks something like a vacuum cleaner tube, is attached to the main unit. At the end of the tube is the hand-piece or applicator, which has a handle and a trigger which looks something like a gun. At the very end of the applicator is the laser head from which the laser beams are fired onto the client’s skin. The lasers are fired out of a clear square panel not much more than a centimetre wide on the end of the hand-piece. The panel is surrounded by a thin metal strip. It is this strip which is the cooling tip or chill tip.
121. When a laser treatment is being performed with the Magma Laser, there are four settings which determine the treatment. The first is the level of energy to be applied to the skin by the laser head (also known as “fluence”, and measured in joules per centimetre squared) ranging from low to high energy settings. The higher the level of energy, the more effective the treatment is likely to be. However, by the same token, the more energy is used, the more likely it is that the treatment will be uncomfortable or even painful. The second setting is the number of shots (known as pulses) fired onto the skin. The third setting is the speed of delivery of the energy to the skin per

pulse. This is known as the “pulse duration” or “pulse width”. This is a unit of time that is measured in milliseconds (ms), microseconds (us), nanoseconds (ns), and picoseconds (ps). Longer pulse durations are less aggressive to skin. The final setting is the speed at which the laser head delivered the shots to the skin. This is known as the “pulse rate” and is measured in hertz (Hz).

122. As I have said, the settings will vary depending on the skin type.
123. Magma Lasers have five pulse duration settings, namely Slow, Medium, Fast, 100ms, and 400ms (in practice Medium is never used). When these settings are selected by the clinician, a default energy setting is triggered. However, the energy settings can also be adjusted manually.
124. Finally, there are at three treatment techniques which can be used for laser hair removal treatment, using the Magma Laser. The first is known as the “pick and place” technique, in which one pulse is fired from the laser hand piece per second. The second is the “gliding” technique in which 3 pulses per second are delivered from the hand piece to the skin. The third technique is the Fast Mode technique, which involves delivering 10 pulses per second from the laser hand piece to a skin area of 10cm x 10cm.
125. Using the Fast setting, a relatively low amount of energy is delivered continuously and rapidly to the skin, over a 10cm x 10cm area, at a rate of 10 pulses per second. The Fast setting delivered 250 laser shots over a 25 second period. The Fast setting was recommended by the Magma Laser’s manufacturer as the safest setting, which could be used on tanned and darker skin, enabling deliver of lower energy shots on the skin without too much discomfort to the client. For the Slow setting, a higher amount of energy is delivered at the rate of 1 pulse per second, when the pick and place technique is used, or 3 pulses per second when the glide technique is used. Using the 100ms setting, a relatively low amount of energy is delivered at a rate of 1 pulse per second at a fixed pulse duration, using pick and place. Using the 400ms setting, a considerably higher amount of energy can be delivered at a rate of 1 pulse per second, and a higher fixed pulse duration can be delivered using pick and place. 400m was recommended by the manufacturer as the optimum setting for clients with skin type VI.
126. The manufacturer of the Magma Laser, Formatk, sold a device alongside the Magma Laser, called a melanin meter. This was part of the “kit” for the Magma Laser. This was placed on the skin of the client and provided a reading between 1-100. The reading was then entered onto the panel on the Magma Laser device by the clinician, and the device automatically identified the skin type, by reference to the Fitzpatrick scale. This enabled the clinician to set the Magma Laser at its pre-set skin type setting, which includes energy level and pulse duration. If this worked properly, it would be safer than the normal method, which involved assessing the skin type by sight.

The meetings between the Claimant and the Defendant, the purchase of the Magma Lasers, and the problems that arose

127. In 2015, the Claimant was considering acquiring new lasers from Candela which would enable the Claimant to offer hair removal for Skin Type VI clients. These

lasers would have used a different technology (known as ND-YAG) which were capable of providing laser hair removal for skin type VI. The Claimant was considering acquiring six of these new lasers. It would have been a major investment, as each laser would cost in the region of £70,000, and the aim would be that the new lasers would supply the business's requirements for 10 years.

128. When the Claimant first approached the Defendant, it was not because the Claimant was considering obtaining lasers from the Defendant. Rather, the Claimant was interested in purchasing equipment for micro-needling treatments. Micro-needling is a procedure which stimulates collagen and rejuvenates the skin to stimulate healing and reduce scars. The market leading micro-needling equipment is manufactured by Dermapen. The Defendant was the UK distributor for Dermapen.
129. Mrs Talfourd-Cook arranged with the Defendant for a demonstration to be given of the Dermapen at the Claimant's Baker Street clinic on 11 September 2015. Mr Ringer, the national sales manager for the Defendant, attended to give the demonstration, which was attended by Mr and Mrs Talfourd-Cook. At this meeting Mr Ringer started to explain the other equipment that the Defendant could supply, and Mr and Mrs Talfourd-Cook said that they were also interested in purchasing new equipment for laser hair removal. Mr Ringer said that the Defendant had just acquired the rights to distribute a revolutionary new laser which was manufactured by Formatk, an Israeli company. This was the Magma Laser. Mr Ringer spoke about the Magma Laser and handed over a brochure to Mrs Talfourd-Cook. Mrs Talfourd-Cook made some handwritten notes on the brochure.
130. I will return later to the statements that were made by Mr Ringer about the performance of the Magma Laser. However, on the basis of the description given to them by Mr Ringer, Mr and Mrs Talfourd-Cook were interested in exploring further the possibility of acquiring Magma Lasers. In particular, the benefits appeared to include more effective painless treatment on darker skin types, and the ability to perform treatments all year round, even on active tans. As stated above, Candela treatments cannot be performed on tanned skin, for the safety of the client. In addition, the treatment times for Magma Lasers were stated to be much shorter than for a Candela laser. It takes 60 minutes to treat "full legs" with a Candela laser, whereas Mr Ringer said it would only take 20 minutes to treat full legs with a Magma Laser. Also, fewer treatment sessions would be required for hair clearance with a Magma Laser, as compared to a Candela laser. As the same price could be charged for a course of Magma Laser treatment, as compared with price of a course of Candela laser treatment, this would mean that fewer hours of clinicians' time would be required to achieve the same income as before for providing laser treatment to the same number of clients. This would free up clinicians' time, which the Talfourd-Cooks anticipated could be used to sell and carry out additional treatments and so increase profitability. Mr and Mrs Talfourd-Cook were also reassured because they were told by Mr Ringer that the Magma Lasers had FDA approval pending. This was a reference to the US Food and Drug Administration.
131. At the meeting on 11 September 2015, Mr and Mrs Talfourd-Smith agreed with Mr Ringer that he would arrange for a Magma Laser to be brought to one of the Claimant's clinics for a demonstration.

132. On 14 September 2015, the Claimant paid the sum of £400 plus VAT directly to the Defendant for the purchase of a Dermapen. However, this was specifically on the basis that if the Claimant proceeded to acquire the Magma Lasers, they would be given credit for this amount towards the purchase of the lasers.
133. Subsequently, on 16 September 2015, Mr Ringer provided a quote for six Magma Lasers. Various options were suggested, the most attractive of which, from the Claimant's point of view, was for six lasers at a price of £32,500 plus VAT, including a free Dermapen or Cryopen (a device for the removal of warts and skin tags).
134. The Magma Laser demonstration took place on 24 September 2015 at the Claimant's Reading clinic. Mr Ringer attended on behalf of the Defendant, along with Mr Williams, another representative of the Defendant. Mr Williams was a well-known expert in laser hair removal who was credited with being the first person to bring laser hair removal to the UK. The Claimants were impressed and reassured by Mr Williams's participation in the Defendant's venture.
135. Mr Williams carried out the demonstration in a treatment room in front of Mrs Talfourd-Cook and two clinicians employed by the Claimant, Ms Cherise Roberts and Ms Keysha Roberts (who are sisters). Mr Talfourd-Cook was present on the day, and took part in discussions before and after the demonstration, but neither he nor Mr Ringer attended the room in which the demonstration took place because there were not enough goggles to go round. On this occasion, Mr Williams and Mr Ringer again made representations about the qualities and performance of the Magma Laser.
136. Following the demonstration, the three directors of the Claimant decided to proceed to acquire six Magma Lasers. The total price for the six lasers was £195,000 plus VAT. This was a major investment on the part of the Claimant company. Mr Ringer was informed of this decision by Mr Talfourd-Cook, who also notified him that the Claimant would need to finance the lasers and therefore needed to secure the finance before a formal commitment to purchase was made. Mr and Mrs Talfourd-Cook cannot recall whether Mr Ringer was told of the intention to use hire purchase at the time of the meetings on 11 and 24 September 2015, or later.
137. Mr Talfourd-Cook then entered into negotiations with a number of finance houses. He agreed terms on 30 October 2015 with Shawbrook Bank for the financing of 3 lasers, and with Close Brothers for 2 lasers. The terms were on the basis of a four-year hire-purchase agreement, with a 10% upfront deposit. Subsequently an agreement was made with Lombard for the financing of the sixth laser for a three-year period with no initial deposit. The Shawbrook hire purchase agreement was dated 4 November 2015 and the total costs of financing were £115,109.28, with a nominal option to purchase fee. The Close Brothers agreement was dated 7 November 2015 and the total cost was £80,752.88, again with a nominal option to purchase fee. The Lombard Agreement was dated 21/23 December 2015, and the total cost was £36,112.50, with a nominal option to purchase fee. In each case, the three directors provided personal guarantees.
138. Deposits of £9,570 and £6,500, respectively, were required by Shawbrook and Close brothers. These were paid directly to the Defendant by the Claimant. The Claimant also paid VAT totalling £39,000 in relation to the hire purchase agreements.

139. The Defendant credited £400 plus VAT in respect of the price paid by the finance houses for the lasers, as had been agreed when the deposit was paid for the Dermapen on 15 September 2015.
140. The first Magma Laser was delivered on 7 November 2015, in time for training days, conducted by Mr Williams, for the Claimant's staff on 7, 10, and 11 November 2015. The other lasers were delivered on or around 4 December 2015 and 20 December 2015.
141. The Claimant performed a "soft" launch of the Magma Lasers, beginning in December 2015 and all existing clients with skin types IV-VI were moved from Candela laser treatments to Magma Laser treatments. As will be explained, when the Magma Lasers came into operation, the Claimant was very unhappy with their performance. If the energy levels used were effective for hair removal purposes for those with darker skin, the procedures were generally found to be too painful by the clients. The expert evidence I have heard indicates that the main reason for this was that the "cooling tip" on the end of the applicator which was supposed to cool the skin whilst the laser pulses was taking place did not work properly. At least two of the Claimant's clients suffered painful and disfiguring burns as a result of the use of the Magma Lasers. If, on the other hand, the Claimant reset the energy levels for those with darker skin in order to avoid painful results, the lasers were not effective at hair removal and, indeed, in some cases, actually stimulated hair growth. The melanin meters that were provided with the Magma Lasers to assess skin type did not produce reliable results. In April 2016, Mr Williams returned to provide further training to the Claimant's clinicians, but the problems continued. In June 2016, the directors of the Defendant decided, on safety grounds, to withdraw the Magma Laser from use for the great majority of clients (apart from a few with very light skin tones) and to revert to using Candela lasers. The use of Magma Lasers was terminated completely in February 2017.

THE COLLATERAL WARRANTY CLAIM

142. I will make my findings of fact and set out my conclusions in respect of the collateral warranty claim by reference to the seven requirements set out at paragraph 48 above.

(A) What, if any, statements were made by the Defendant's representatives about the performance of, and the results that would be achieved by, the Magma Lasers?

143. I accept that the evidence which was given by Mr and Mrs Talfourd-Cook about what was said and done at the meetings on 11 and 24 September 2015 is accurate.
144. I find that the statements set out below were made by Mr Ringer and/or Mr Williams about the performance of, and the results that would be achieved by, the Magma Lasers at the meetings on 11 and 24 September 2015. Almost all of them were also set out in writing in a brochure that was handed to Mrs Talfourd-Cook by Mr Ringer at the meeting on 11 September 2015. This brochure was prepared by the Defendant and contained the Defendant's logo and branding, and was handed over in order to provide information about the Magma Lasers, and other products supplied by the Defendant, and the benefits that they could bring. Mrs Talfourd-Cook also made handwritten notes on the brochure at the meeting.

145. The brochure stated;

“Our philosophy is simple: to provide you with the best equipment our tireless research affords us, guaranteed results and full support at any time

... We rigorously test every treatment and product to ensure the correct and superior results”

146. The statements were:

(1) The Magma Lasers could treat all skin types, including skin type VI

147. This is stated in terms at page 22 of the Defendant’s brochure, under the heading “Benefits”. It was also asserted by Mr Ringer at the meeting on 11 September 2015.

(2) The Magma Lasers could be used during the Summer months and on clients with an active tan

148. Once again, this was stated in terms at page 22 of the brochure. The Defendant admitted in the Amended Defence that the Claimant was told at the meetings that the Magma Lasers could be used on active tanned skin, because of the melanin meter.

(3) The Magma Lasers were fast and could treat full legs in only 20 minutes: they were much faster than Candela lasers

149. The brochure stated. “FAST – full legs can be treated in only 20 minutes.” Mr Ringer also said this at the 11 September 2015 meeting.

(4) The Magma Lasers were effective, with an 86% clear up rate after only 3 treatments

150. The brochure stated, “Effective – hair removal clinical studies ... showed up to 86% clearance after only 3 treatments using an 808nm Diode Laser.” Mr Ringer also said this on 11 September 2015.

(5) The Magma Lasers were safe because of a unique combination of the super chilled tip, and the melanin meter, and it was impossible to burn a client

151. The brochure stated, “SAFE – a unique combination of a super chilled tip and melanin meter for setting the parameters make the magma extremely safe and easy to use.” In addition, the brochure stated, “Maximum safety and efficiency are achieved using the Melanin-Meter device. Live reading of the patient melanin levels are immediately inputted into the system using the advance touch screen, ensuring optimal results.”

152. At the demonstration on 24 September 2015, Mr Williams told Mrs Talfourd-Cook, and Cherise and Keysha Roberts, that it was impossible to burn a client with a Magma Laser.

(6) The Magma Lasers had an advanced cooling system which ensured that they had zero down time

153. The brochure said, “The advance cooling system ensures the platform has zero down time...”

(7) The Magma Lasers could be operated in an ambient temperature of up to 27.5 degrees Celsius

154. The brochure said that, “The advanced cooling system of the Magma allows treatments in an ambient temperature of up to 27.5 degrees Celsius.” This was also said by Mr Ringer at the 11 September 2015 meeting, in which he also stated that this meant that there was no need to use air conditioning whilst the treatments were taking place.

(8) Treatment with the Magma Lasers was painless

155. At the first meeting, on 11 September 2015, Mr Ringer told the Talfourd-Cooks that treatment with the Magma Lasers was painless due to the inbuilt super chilled tip.

(9) The Magma Lasers were affordable, because the laser head produced 3 million pulses, and the lifetime of the Magma Laser diode head would be 3 to 4 years and the ongoing costs were insignificant

156. The brochure said, “Affordable – The system is competitively priced and with a lifetime of 3 million pulses on the Diode Laser the ongoing costs are insignificant.” At the first meeting, Mr Ringer told the Talfourd-Cooks that the Magma Lasers were cheap to run because there was no need to use any expensive consumables, such as cryogen, and there was no need to use air conditioning, so electricity costs could be reduced. He also said that servicing was cheaper than for other lasers because there were no moving parts, and that the diode head would last 3-4 years.

157. Mrs Talfourd-Cook said in oral evidence that the most important warranty was that the Magma Lasers could be used to treat an active tan.

158. The statements referred to above were repeated by Mr Ringer and Mr Williams at the demonstration on 24 September 2015. The demonstration itself was very short and, whilst the device appeared to work, it was not realistic for the Claimant’s directors to form a view about the veracity of the statements made about the Magma Laser on the basis of a single, short, demonstration.

159. The Amended Defence does not admit that the brochure was handed over by Mr Ringer to Mrs Talfourd-Cook at the meeting on 11 September 2015, although the Defence admits that Mr Ringer brought a copy with him. I find that Mr Ringer did indeed give a copy to Mrs Talfourd-Cook on that occasion. It is overwhelmingly likely that a sales professional who is trying to persuade a potential client to buy a device would hand over the (impressive) brochure that his company had prepared. Moreover, I have seen a copy of the brochure with marginal notes made on it by Mrs Talfourd-Cook. This was plainly done at the 11 September 2015 meeting.

160. The Amended Defence denies that any of the above statements were made orally to the Claimant on 11 or 24 September 2015, apart from the statement that the Magma Lasers could treat active tanned skin. However, as I have already made clear, I accept and find that the statements were indeed made to the Claimant at these meetings. I accept also that Mr Ringer said that an application was pending for full approval from the US FDA.

(B) Were the statements intended to have contractual force?

161. With two limited exceptions, and applying the tests laid down for “contractual force” in the authorities referred to at paragraphs 51-58, above, I find that each of the statements set out above was intended to have contractual force.

162. The case law makes clear that, when assessing whether there was the necessary contractual intention, the test is an objective one, to be applied by reference to all of the circumstances. The question is not to be determined by reference to the subjective intentions of the Defendant’s representatives. Applying an objective test, and whilst bearing in mind the statement by the House of Lords in the **Heilbut, Symons** case that collateral contracts must from their very nature be rare, I am satisfied that the statements were made with the necessary contractual intention, and so were “warranties” for the purposes of a collateral warranty claim.

163. Each of the statements was a statement, given in clear and unequivocal terms, about the performance of, and results that would be achieved by, Magma Lasers. They were given in the expectation and in the hope that they would be relied upon by the Claimant and would induce the Claimant to arrange for the purchase of Magma Lasers from the Defendant. The Defendant was much better placed than the Claimant to satisfy itself that the statements were accurate, and asserted that it had satisfied itself about the qualities, performance of, and results to be achieved by, the Magma Lasers. The Defendant’s brochure stated that, “We rigorously test every treatment and product to ensure correct and superior results.” Indeed, the Claimant had no real alternative but to rely upon the statements made by the Defendant. Although there was a demonstration, it was inevitably short and it could not be expected to replicate or demonstrate the use of Magma Lasers in real situations, in which they would be used for a number of sessions on each client.

164. In the **Oscar Chess** case, Denning LJ said:

“When the seller states a fact which is or should be within his own knowledge and of which the buyer is ignorant intending that the buyer should act on it, and he does so, it is easy to infer a warranty”

165. This was the position in the present case.

166. The Amended Defence contends that the Defendant was not making representations about the performance of, and results to be obtained by, the Magma Lasers that were supplied to the Claimant, but was making statements about Magma Lasers in general. In my judgment, this is a distinction without a difference. The statements were about what Magma Lasers could do, and the benefits they could provide, and there was no reason for the Claimant, or the hypothetical bystander, to think that there would be

any difference between Magma Lasers in general and the ones that were to be supplied to the Claimant in particular. The statements were made in order to encourage the Claimant to acquire a Magma Laser, and so it is clear that it was being suggested that the Magma Lasers that the Claimant would acquire would have all the usual characteristics and strengths of a Magma Laser.

167. Each of the statements which I have found to be warranties was an unequivocal statement about the performance of, and the results to be obtained from, the Magma Lasers. They were not warranties of the type that was given in **Esso v Mardon**: they were not merely warranties that the Defendant had taken reasonable care in the estimate that it had given of the way that the Magma Lasers would perform, and the results that could be obtained.
168. The limited exceptions to my finding that the statements that were made were made with the necessary contractual intention concern, first, the statement that it was impossible to burn a client with a Magma Laser. Lasers that are used for hair removal are inherently dangerous devices, and in my view, it is clear that Mr Williams was not saying that it is never possible, under any circumstances, that a Magma Laser might burn a client. Second, when it was said that Magma Lasers were painless, this could not be taken to mean that Magma Lasers would never cause any discomfort at all to a client. An informed bystander would be aware that laser hair removal frequently causes some degree of discomfort. In my judgment, these statements were not intended to be taken at face value. Rather, they were intended to convey, and did, convey, that Magma Lasers, when properly operated, would not cause more than mild and tolerable discomfort, or, put another way, no significant pain. Again, the warranties conveyed that, when properly used, the Magma Lasers should not lead to a client being burned. To this extent, the statements in question had the necessary contractual intent.

(C) Did the Claimant provide consideration to the Defendant?

169. The answer, in my judgment, is plainly “yes”. The Claimant provided two forms of consideration. First, and principally, the Claimant arranged for the finance houses to purchase six Magma Lasers from the Defendant. Second, the Claimant paid the deposits directly to the Defendant.

(D) In reliance upon the warranties, did the Claimant cause other parties to enter into the main contracts with the Defendant?

- (E) Again, in my judgment, the answer is plainly “yes”. The Claimant caused the three finance houses to purchase the six Magma Lasers from the Defendant. In so doing, the Claimant relied on the warranties. I have seen the text of briefing papers which were drafted by Mr Talfourd-Cook in order to seek to persuade Lombard, and another finance house, Siemens, to provide financing. These briefing papers referred to the ability of the Magma Lasers to treat skin type VI, and tanned skin, and to operate 30-50% faster than existing lasers on the market. Mr Talfourd-Cook said that the Magma Lasers would also be less costly to run.

(F) Were the warranties inaccurate?

170. In my judgment, for the reasons set out below, each of the warranties was inaccurate. It is clear that, when operated by the Claimant's clinicians, the Magma Lasers did not perform as warranted, or produce the results that were warranted for them. This was because the devices did not live up to the promises that had been made for them by the Defendant's representatives. The Magma Lasers that were supplied to the Claimant were not capable of producing the results that the Defendant said that they would produce, in the Defendant's brochure and at the meetings on 11 and 24 September 2015. The failure to live up to the promises was not because the Claimant had failed to operate the devices in accordance with the instructions and training given by the Defendant, as the Defendant pleaded.
171. The feedback from the Claimant's clinicians about the experience of using Magma Lasers was very negative. They reported pain, slow procedure times, and the process resulting in hair stimulation rather than removal. The evidence put before the Court by the Claimant included a schedule of complaints made by clients who had been treated using the Magma Lasers. In a period of approximately six months, some 264 clients complained about their treatment with Magma Lasers. This compares with 1-3 complaints a month that the Claimant was previously receiving. The Claimant had to allocate Donna Houston full-time to responding to and dealing with complaints. The main complaints were that, (1) far from permanently removing hair from the affected areas, the Magma Laser treatments were having no effect or were even stimulating hair growth; and (2) the treatments were painful. Of the 78 individual complaints logged by Ms Houston by early-mid July 2016, for example, 76 (97%) complained of hair stimulation and 54 (71%) complained of pain during the treatment.
172. The examples provided in the evidence show that a number of clients found the Magma Laser procedure to be very painful. A few clients were burned. I was shown a photograph of serious and unsightly burns to the face that were suffered by a client, NSB, after a treatment on 16 May 2016. She had previously had three treatments, without an adverse reaction. This client was skin type VI, but the melanin meter had assessed her as skin type III. The clinician had ignored this result as it was plainly false. The client had, however, been treated in accordance with the operating tips that were provided by Mr Williams, on behalf of the Defendant.
173. I was also shown a photograph of burns that were experienced by a client, MV, who was treated at the Bishopsgate Clinic on 22 May 2016. The burns were on her back. Prior to this treatment, a patch test had been carried out on her, which had not showed any adverse reaction. Once again, the treatment had been in accordance with Mr Williams's operating tips.
174. Other clients suffered less severe burns as a result of the treatment.
175. As a result of the difficulties that had been encountered, Mrs Talfourd-Cook decided that the only safe setting to use on skin types IV to VI were the lower energy settings, but these were ineffective for these skin types and, indeed, could be counter-productive, stimulating hair growth, rather than removing hair. In consequence, the Claimant took a decision on 14 June 2016 to withdraw all Magma Laser treatment from the darker skin types, IV-VI, which represented the bulk of the company's clients, and to continue only with skin types I-III. The latter skin types did not have as much melanin in their epidermis as people with darker skin types and this made them easier to treat and reduced the risk of something going wrong. By February

2017, the Claimant withdrew the Magma Lasers from use with all clients, regardless of skin types.

176. I am satisfied that the evidence that has been provided by the Claimant about the problems it encountered with the Magma Lasers is true. It is supported by contemporaneous documents, including logs of client complaints and questionnaires that were filled in by clinicians about their experiences with Magma Lasers. There would be no reason why the Claimant should make up its concerns. It is clear that the experience with Magma Lasers and the steps that had to be taken to put things right with clients were costly and disruptive and will have caused damage to the Claimant's goodwill.
177. The fact that the Magma Lasers were granted FDA approval is not significant. The FDA approval, known as 510K, was only concerned with approval for use for the clinical application, ie the type of treatment that the device is designed for. The FDA does not approve any statements or assertions made by the manufacturer about performance standards or the results that will be achieved. The FDA granted its approval after a review of documents, rather than an examination of a device. Approval for the Magma Lasers was granted by the FDA on the basis that the devices were substantially equivalent to other manufacturers' diode lasers that were already approved for use in the US market.
178. The Defendant pleaded that the problems were not caused by failings with the Magma Lasers themselves, but were caused because the Claimant's clinicians did not operate the devices properly, and because the Claimant did not follow the Defendant's training and recommendations for use: rather, Mrs Talfourd-Cook drew up her own protocols which, the Defendant contended, meant that the clinicians did not operate the Magma Lasers properly.
179. I am satisfied that there is no foundation for the criticisms made in the Amended Defence of the way that the Claimant's clinicians operated the Magma Lasers. As I have said, Mr Williams, on behalf of the Defendant, provided training for the Claimant's clinicians in November and December 2015. Each clinician was provided with a certificate of satisfactory completion, signed by Mr Williams. Further training was given by Mr Williams to the Claimant's staff in January and April 2016. During the training, Mr Williams provided the Claimant with "operating tips" which were complied with by the Claimant's clinicians. Altogether, 17 clinicians employed by the Claimant conducted procedures with Magma Lasers and it is wholly unrealistic to think that none of them was capable of operating the Lasers in accordance with the training given by the Defendant.
180. It is true that Mrs Talfourd-Cook drafted her own protocols for the use of Magma Lasers, but this was because the training and written materials that had been provided by the Defendant were inadequate. So for example, the Fast mode required treatment to take place on a patch of skin 10cm x 10cm square and this meant that it would be impossible to use on smaller and more intimate areas. Mrs Talfourd-Cook drew a protocol to address this problem. Moreover, the Defendant's materials did not provide sufficient guidance about the settings to use in particular circumstances and for particular skin types. The protocols which Ms Talfourd-Cook drew up were wholly consistent with the guidance that was given by the Defendant. Again, during the training, Mr Williams advised clinicians to set the laser based on the melanin meter,

and then to adjust the settings if the staff felt necessary, ie if the settings based on melanin meter appeared to be incorrect. He did not explain, however, what criteria the clinicians should use to select the new setting. This meant that the clinicians were being given no specific and clear guidance as regards which settings to use, and the protocols issued by Mrs Talfourd-Cook were designed to address this problem.

181. Ms Talfourd-Cook revised the in-house protocol in light of experience and the problems that came to light. Each time, she consulted Mr Williams about the change and Mr Williams agreed to every change that she proposed. All the protocols were approved by Mr Williams (except the final one in July 2016, by which time Mrs Talfourd-Cook had lost confidence in Mr Williams's expertise). The energy settings that were set out in the Claimant's protocols were within the recommended range given by Mr Williams.
182. The expert evidence provided by the Claimant's clinical expert witness, Dr Bisset, and technical expert, Mr Rundle, provide strong and compelling support for the conclusion which I have reached, namely that the problem lay with the Magma Lasers, and not with the way in which they were operated by the Claimant's clinicians. Further support is provided by the witness statement of Dr Belinda Porter, who runs a clinic in Aberdeen which is not associated with the Claimant. She bought a Magma Laser in 2015 and experienced similar difficulties to the Claimant. She said in her witness statement:

“In my experience, the Magma machine I bought in 2015 does not deliver what I was told when I bought it and therefore I feel that the machine was mis-sold to me. For example, it does not reduce hair loss by 86% in 3 treatments. Some patients have found laser treatments painful and have not continued with treatments.”

183. I will now move on to look at the accuracy or otherwise of the individual warranties.

The Magma Laser is capable of treating skin type VI

184. This was one of the major attractions of the Magma Laser from the Claimant's point of view. The Candela lasers, which the Claimant had been using, were not suitable for use with skin type VI.
185. In reality, the Magma Laser was not capable of treating skin type VI either. This is the most difficult skin type to treat with laser hair removal, because of the amount of melanin in the person's epidermis. If settings were used which were effective to remove hair and destroy follicles, the risk of burning or pain was unacceptable. On the other hand, if settings were used which avoided the risk of skin burning or excessive pain, the Magma Laser was not effective to remove hair, and, indeed, was liable to stimulate hair growth in the treated area.

The Magma Laser is capable of treating those with active tans

186. This was perhaps the most attractive feature of the Magma Laser, from the Claimant's perspective, as it would enable the Claimant to make full use of its laser hair removal services during the Summer months when, previously, it was not possible to treat

anyone who had been in the sun. The reason for this was that it was extremely difficult to assess the appropriate settings for a laser when the client is tanned.

187. The key distinguishing feature of the Magma Laser was the melanin meter. Though it was a physically separate piece of equipment, it was an integral part of the Magma Laser “kit”, and Mr Ringer and Mr Williams relied on the benefits of the melanin meter when they recommended the Magma Laser to the Claimants in September 2015. The melanin meter was supposed to enable those with active tans to be treated, because, even with a tan, the melanin meter could identify the correct skin type of a client.
188. In reality, the melanin meter was useless. It was extremely unreliable and would give multiple readings on the same client on the same patch of skin. Often the results were plainly wrong, as was the case with client NSB, who was assessed by the melanin meter as having skin type III, when she was a person of African origin whose skin type was clearly type VI. Dr Bisset carried out experiments which showed that the melanin meter was completely unreliable.
189. The failure of the melanin meter could have very serious consequences. If a person’s skin type was wrongly assessed, the treatment could have been very harmful.

The Magma Laser was fast, and could treat full legs in 20 minutes

190. This was not borne out by the Claimant’s experience. Treatment for “full legs” sometimes took three or four times longer than the 20 minutes that the brochure and the Defendant’s representatives said it would take. On average, full legs took 60 minutes to complete. Treatments for the full body would take 3-4 hours.
191. Again, this conclusion is supported by the evidence of the Claimant’s expert witnesses, which I accept.
192. This meant that it was not possible for the Claimant to treat more clients in less time than before, and this meant in turn that the Magma Lasers were not capable of freeing up clinician time and generating profits, as they had been warranted to do.

The magma laser was effective, with an 86% clean up rate, after three treatments

193. The Claimant had promoted Magma Laser treatments to their clients on the basis that courses of 4 or 6 treatments would be necessary, rather than 6 or 8 treatment, which were typically required for a course of treatment with a Candela laser.
194. The problems described above with the Magma Laser, mean that there was no possibility of an 86% clean up rate, especially after only three treatments. None of the Claimant’s clients experienced an 86% clean up rate after three treatments. In my judgment, this was not achievable. As I have said, a significant number of clients found that the Magma Lasers stimulated rather than reduced hair growth.
195. There was a practical difficulty with the Magma Lasers which meant that it was not practicable to obtain almost full results after three sessions (in addition to the problems with pain which meant that the energy settings had to be reduced). This was

described by Mrs Talfourd-Cook, and was that the design of the hand piece or applicator was such that clinicians found it difficult to see exactly where the laser beam was being delivered. This had the result that some patches of hair were missed. This could result in a “waffling” effect on large areas that were being treated, or, conversely, in delays and the risk of burns when the same area was treated twice.

The Magma Laser was safe, because of the cooling tip and the melanin meter

196. As I have already described, the melanin meter was useless and, indeed, could be positively misleading. As for the cooling tip, Mr Rundle said in his witness statement that:

“In my opinion, based on the evidence of my own tests and the evidence from the clinicians who used the Magmas at NYLC and also Belinda Porter’s experience, the fundamental cause of pain, discomfort and burns to clients is very poor regulation of the cooling tip.”

197. In the course of his oral evidence, Dr Bisset said that he agreed with this view.
198. It follows that, far from rendering the Magma Laser safe, the cooling tip and the melanin meter meant that it was likely to be unsafe. The only way that the Magma Laser could be operated upon darker skin types, with confidence that it would not be dangerous, would be by using energy settings which would mean that the Laser would not be effective to remove hair.

There would be zero down time because of the cooling tip

199. This, too, was not the case. There were issues with the Magma Lasers cutting out due to overheating. This was noted, in particular, by Dr Bisset. The cooling tip heated up quickly to a point at which it was too hot to be used safely and comfortably. This meant that there had to be a delay – down time – whilst the cooling tip cooled down to an appropriate temperature.
200. This was a particular problem for the Magma Lasers when they were used in the Fast mode, which was the mode that the Defendant recommended for use with those with darker skin types. In order for treatment in the Fast mode to be effective, the laser has to be passed several times over the 10cm x 10cm area being treated, and this results in delays and longer treatment times as the clinicians had to wait for the cooling tip to cool down.
201. Even if the warranty did not literally mean “zero down time” but “hardly any down time”, it would be inaccurate.

The advanced cooling system meant that treatments could take place in an ambient temperature of up to 27.5 degrees Celsius

202. This warranty, too, was inaccurate. The tendency to overheating meant that, contrary to the impression given by the Defendant, the devices had to be used in air-conditioned rooms and could not efficiently be operated in a room with an ambient temperature of 27.5 degrees Celsius.

Treatment with the Magma Lasers was painless

203. As I have said, I have interpreted this warranty to mean “virtually painless”. However, this statement was inaccurate. In reality, treatment with the Magma Lasers, especially for those with darker skin types, frequently caused unacceptable levels of pain for clients.

The Magma Lasers were affordable, because the laser head produced 3 million pulses, the lifetime of the Magma Laser diode head would be 3 to 4 years, and the ongoing costs were insignificant

204. A general assertion that a product was affordable would be insufficient to amount to a contractual warranty, in my view. Something more specific is required. Here, the specific statements are that (1) a laser head can produce 3 million pulses and would last for 3-4 years and (2) the ongoing costs would be insignificant.
205. The Claimant provided evidence to the Court which showed that, in about six months of use, the six Magma Lasers used by the Claimant had produced nearly 6 million pulses. That is, of course, on average one million pulses per Laser. On that basis, it would take about 18 months to complete 3 million pulses, at which point the laser head would need to be replaced. This means that the life of a laser head was less than half the life that had been warranted by the Defendant.
206. Each new laser diode head would cost £11,600 plus VAT. These ongoing costs were not insignificant. Mr Talfourd-Cook calculated the cost per laser pulse for Magma Lasers as being £58, as opposed to a cost of £8.80 per pulse for Candela lasers.

(G) Did the Claimant suffer financial loss as a result of the breach of collateral warranty?

207. The answer is plainly “yes”. The Claimant paid, through hire purchase, for devices that were effectively useless, for the Claimant’s purposes, and therefore worthless. The Claimant incurred substantial cost in mollifying unhappy clients, for example by offering free treatment. The Claimant also suffered a loss of profits, in that it did not make the profits that it would have made if the warranties had been accurate.

(H) Are there any relevant exclusion clauses?

208. I have already dealt with this, to some extent, in paragraph 57, above. There were no exclusion clauses in the contracts between the Defendant and the hire purchase companies which would have excluded liability for the problems that arose or for the warranties that had been made. There was no written contract of any sort between the Claimant and the Defendant. In any event, even if there had been an exclusion clause in a written contract that had been drafted in general terms, a collateral contract can override such a term: **Hughes v Pendragon Sabre Limited, t/a Porsche Centre Bolton** [2016] EWCA Civ 18.

(I) Conclusion on collateral warranty

209. For the reasons set out above, the Claimant’s claim for breach of collateral warranty succeeds.

THE NEGLIGENT MISSTATEMENT CLAIM

210. The Claimant has also advanced a claim of negligent misstatement. Given that the claim for breach of collateral warranty has succeeded, the claim for negligent misstatement is of limited significance: the remedies available for breach of collateral warranty are more attractive to the Claimant than the remedies that are available for negligent misstatement. Damages for negligent misstatement are on the tortious basis, ie wasted expenditure, whereas, in a breach of collateral warranty claim, as I have said, the Claimant has the option of recovering wasted expenditure or loss of profits. The Claimant has indicated that it wishes to recover loss of profits, and so it seeks damages for breach of collateral warranty rather than damages for negligent misstatement.
211. In those circumstances, I will deal with the claim for negligent misstatement only briefly. The relevant factual background has already been set out in this judgment.
212. The first issue is whether statements were made by the Defendant to the Claimant about the performance and the results that can be obtained from the Magma Lasers. I have made findings about this. Such statements were made.
213. The second and more difficult question is whether the Defendant owed a duty of care to the Claimant in making those statements.
214. The leading authority on negligent misstatement is **Hedley Byrne v Heller** [1964] AC 465 (HL). The House of Lords said that a negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and care.
215. In the present case, the Defendant held itself out to have a special expertise in relation to Magma Lasers, because it was the sole UK distributor. Moreover, the Defendant's brochure said, "We rigorously test every treatment and product to ensure correct and superior results." In my judgment, this means that that the Defendant represented to the Claimant that it had rigorously tested the devices that it was hoping to sell to the Claimant, including the Magma Lasers, and therefore that its assertions about what the Magma Lasers were capable of doing were based on the Defendant's expert knowledge.
216. In these circumstances, in my view, the Defendant owed a duty of care to the Claimant.
217. This means that I do not need to address the difficult question of what the position would have been if the Defendant had simply passed on information about Magma Lasers, that had been supplied to it by Formatk, the manufacturer, without any suggestion that the Defendant had itself taken any steps to assess the performance of the Lasers. Ms Levy points out that, in **Webster v Lidington** [2015] 1 All ER (Comm) 427, the Court of Appeal found that a distributor of a skin injectate which was used for aesthetic purposes was liable because it had repeated to clients the (inaccurate) information, that had been provided to the distributor by the

manufacturer. However, the claim in **Webster v Lidington** was a claim under the Misrepresentation Act 1977, and it is not clear to me that a similar approach would be followed in a negligent misstatement claim. As I have said, I do not need to examine this issue.

218. The next requirement for a negligent misstatement claim is that the statements must have been negligent. In my view, on the basis of the evidence before me, the statements were indeed negligent. The experience of the operation of the Magma Lasers in practice suggests that if the Defendant had taken reasonable care before making the statements, by rigorously testing and researching the product, they would not have made the statements.
219. The final requirement of a negligent misstatement claim is that the misstatement must have caused financial loss to the Claimant. I have already found that the Claimant suffered substantial financial loss.

Conclusion on negligent misstatement

220. For these reasons, I find that the Claimant succeeds on the alternative ground of negligent misstatement. However, as I have said, I will assess damages by reference to the cause of action for breach of collateral warranty, rather than negligent misstatement.

THE CLAIM IN NEGLIGENCE IN RELATION TO THE TRAINING PROVIDED BY MR WILLIAMS TO THE CLAIMANT

221. This claim is in the alternative to the breach of collateral warranty/negligent misstatement claims. Having found in the Claimant's favour on those claims, it follows as a matter of causation that any negligence in relation to training did not cause the Claimant's losses. The problem lay with defects in the Magma Lasers themselves, and this is what caused the losses. It follows also that I do not need to make any findings of fact in relation to the training that was provided to the Claimant in the use of the Magma Lasers and so I will not prolong this judgment by doing so.

REMEDY

Wasted expenditure

222. Since the Claimant seeks damages on the "loss of profits" basis, I will deal with the alternative basis, the tortious basis of wasted expenditure, only very briefly and for the sake of completeness.
223. The undisputed evidence on behalf of the Claimant, given by Mr Talfourd-Cook, is that the total wasted expenditure in relation to hire purchase costs (paid or to be paid) is £232,299.01, consisting of £115,147.61 to Shawbrook Bank, £80,963.88 to Close Brothers Lease, and £36,187.52 to Lombard Lease.
224. In my judgment, it is appropriate to award the full amount under this head. Whilst the Defendant pleaded failure to mitigate, it has not led any evidence on this issue, and the burden of establishing failure to mitigate rests with the Defendant. There is

nothing to set off in respect of the residual value of the six Magma Lasers, some or all of which now belong to the Claimant, as they are effectively valueless.

225. The other head of loss under wasted expenditure consists of the losses suffered as a result of complaints, free treatments and refunds provided by the Claimant to clients who had a bad experience with the Magma Lasers.
226. The Claimant gave refunds in the amount of £4,827.98.
227. In addition, the Claimant provided 817 free treatments to clients. These were given in two circumstances. First, those who complained about the Magma Laser treatment that they received were given a free treatment as a gesture of goodwill. Second, when the Claimant stopped using the Magma Lasers, they provided clients who were part-way through a course of treatment with treatments by Candela laser instead. The Candela courses of treatment were more expensive, in terms of clinician hours, than the Magma Laser treatment would have been, because Magma Laser treatments had been planned on the basis that 4 Magma Laser treatments equated to 6 Candela treatments, and 6 Magma treatments equated to 8 Candela treatments. The Claimant's assessment of loss under this head, which I accept, is £32,550, consisting of 525 clinician's hours lost, at £62 sales per hour.
228. The third aspect of loss is the additional cost of cryogen gas, an expensive consumable (cooling product) which is required for Candela treatments but was not required for Magma Laser treatments. The additional cost was £3,748.50.
229. The Claimant is also entitled to the value of staff time lost due to Magma Laser training, which was essentially wasted, and to lost sales opportunities as a result of Magma Laser training. These sums are £7,387.66 and £35,619.00, respectively. The latter figure is calculated by reference to the fact that records (provided to the Court) show that the Claimant has historically sold treatments worth £62 per clinician hour worked.
230. The Claimant also incurred wasted expenditure in relation to website and marketing costs to promote the Magma Laser. These were in the sum of £1,417.48.
231. The Claimant incurred additional administration staff costs to deal with the complaints etc. This is essentially the time of Donna Houston, who dealt with the complaints, and the administration of free-of-charge treatments. The sum recoverable on this basis is £22,605.50.
232. The Claimant is also entitled to the sum of £61,154.56, which represents the additional financing costs that the Claimant incurred, as a result of having to absorb the costs referred to above, which resulted from the difficulties with the Magma Laser.
233. The total under these other heads of wasted expenditure is £169,310.68.
234. The total loss on the tortious, or "wasted expenditure", basis would therefore be £401,609.69.

Loss of profits

235. As I have said, earlier in this judgment, the Claimant is entitled to elect to recover damages for loss of profits, rather than for wasted expenditure, and the Claimant has chosen so to elect.
236. The approach to the assessment of damages for loss of profits is set out in **Hadley v Baxendale, Victoria Laundry v Newman** (both referred to above), and the House of Lords judgments in **Czarnikow v Koufos, The Heron II** [1968] 1 AC 350 and **The Achilleas** [2009] 1 AC 61. In essence, the Claimant is entitled to be placed in the same position as if the contract had been performed, ie if the warranties were accurate. The Claimant is entitled to the losses caused by the breach, to the extent that the losses would have been in the reasonable contemplation of the parties, when the warranties were given, as being liable to result as a likely consequence of the breach. It is necessary also to consider whether the Defendant assumed responsibility for these losses, though in practice the application of the assumption of responsibility test is unlikely to lead to a different outcome to the test referred to in the preceding sentence.
237. The evidence in relation to quantum for loss of profits has been provided by Mr Talfourd-Cook, both in his capacity as a witness of fact and in his capacity as an expert witness. The Defendant's witnesses did not give any evidence to the Court, and the Defendant was, in any event, debarred from relying on its expert witness on quantum, Mr Chapman. I have, however, looked at Mr Chapman's reports, at the invitation of the Claimant, because it is necessary to read Mr Chapman's reports in order to be able to follow Mr Talfourd-Cook's expert report of 2 September 2019, which responds to Mr Chapman's reports.
238. In these circumstances, there is nothing before the Court to gainsay the evidence of Mr Talfourd-Cook, which was supported by a great deal of data and documentary evidence. I have already said that I found him to be an honest witness.
239. Even though there has been no evidence from the Defendant to challenge Mr Talfourd-Cook's evidence on quantum in respect of loss of profits, I have examined the basis for the sums claimed, so as to apply a sense-check to them.
240. Applying the test for remoteness of damage set out above, I find that the Claimant is entitled to damages for loss of profits under a number of different headings.

Period of loss

241. The first issue to decide is the period in respect of which the losses should be recoverable. As the loss of profits that is being claimed relates to the profits that would have been recovered if the Magma Lasers had worked as warranted, the appropriate period is the working life of the six Magma Lasers that were delivered to the Claimant in late 2015, if they had lived up to the warranties. This is necessarily speculative. The Magma Lasers were a relatively new product on the market in 2015 and so there is no experience of their long-term operation to assist in predicting their working life. Mr Talfourd-Cook estimated a working life of 10 years, with

replacement of the laser diode head after about five years. This was based on the Claimant's experience with the Candela lasers. All 12 Candela lasers that were purchased by the Claimant between 2004 and 2015 are still in good working order and are still being used. This means that the oldest is 15 years old.

242. At one stage, I was concerned that the estimate of 10 years was over-optimistic. However, doing the best I can on the basis of the evidence available to me, I am persuaded that the evidence supports Mr Talfourd-Cook's estimate of 10 years. The Candela lasers have lasted substantially longer than that, though they are of course a different product manufactured by a different manufacturer. The Magma Lasers were marketed on the basis that they would need little maintenance because they had few working parts and this suggests that they should be expected to have a long working life.
243. Accordingly, I accept the Claimant's submission that the calculations of losses should, where relevant, be made by reference to a 10-year period.

Mitigation of loss

244. For the same reasons as I have given in relation the "wasted expenditure" basis of remedy, I make no reduction for the failure by the Claimant to mitigate its loss of profits. The onus to prove failure to mitigate rests with the Defendant, and the Defendant has not led any evidence on this issue. In any event, I do not think that there is any valid basis for taking the view that the Claimant had failed to mitigate. In particular, there was no failure to mitigate consisting of failing to acquire alternative lasers to do what the Magma Lasers were warranted to do, because there were no other lasers on the market which could do what the Magma Lasers were warranted to do. Also, I do not think that it would have been reasonable to expect the Claimant's clinics to diversify by moving away from laser hair removal. Laser hair removal was their speciality, and was what they were known for.

Loss of sales to new clients with active tans

245. One of the most important of the warranties was that the Magma Lasers, with the melanin meters, could be used to on clients with active tans. If this had been the case, then it would have meant that the Claimant would have been able to sell treatments to clients at the same rate during the Summer months as during the other nine months of the year.
246. The Claimant seeks damages of about £27,563 per annum, a total of £275,632.50, under this head. These figures were arrived at by comparing sales in the nine non-Summer months with the sales in the three Summer months. There was an average differential of £9,188 per month. The Claimant then reduced this figure by one-third to reflect the likelihood that the Summer period would, in any event, be quieter than the rest of the year, because of holidays.
247. I am satisfied that the Claimant is entitled to damages of £275,632.50 under this head.

Loss of sales to existing clients with active tans

248. The loss claimed under this head, for the 10-year period, is £64,790. The clients concerned are those who had to be turned away at the last moment because they had a tan. At one stage, Mr Chapman, for the Defendant, queried whether this head of loss overlapped with the preceding one. I can readily see why he asked this question. However, Mr Talfourd-Cook provided clarification in his expert report of 2 September 2019: the figures in the preceding head of loss were based on a 12-month set of sales from 1 July 2016 to 30 June 2017 which did not include any sales to clients with active tans.
249. I am satisfied that the Claimant is entitled to £64,790 under this head.

Loss of sales over a 10 year period

250. This is by far the most substantial head of loss that is claimed by the Claimant.
251. The Claimant provided the Court with historical figures which showed that the Claimant sold treatments worth £62 per clinician hour worked. The Claimant submitted that if the Magma Lasers had functioned as warranted, it would have been possible to provide a full laser hair removal treatment over fewer hours than would have been necessary to provide the same treatment with Candela lasers, and the Claimant would have been able to charge the same fee for the (quicker and shorter) Magma Laser course as for the Candela course. The effect of this would have been to free up clinician time, which could then have been used to sell and provide treatments, providing an average extra income of £62 per hour.
252. A course that would have taken 6 sessions with a Candela laser would have taken only 4 sessions with a Magma Laser, if the warranties had been correct. Similarly, a course of treatment that would have taken 8 sessions with a Candela laser would only have taken 6 sessions with the Magma laser.
253. The sessions would also have been shorter. So, for example, the treatment for “Full legs” with a Magma Laser was warranted to take 20 minutes, whilst a full legs treatment with the Candela laser takes 60 minutes. As the Claimant’s booking system works in 15 minute slots, a 30 minute period would be allocated for full legs with a Magma Laser, as compared with 60 minutes for full legs with a Candela laser.
254. The total expected time to complete a standard full course of Magma Laser treatments should therefore have been 4×30 minutes = 120 minutes, as compared with 6×60 minutes = 360 minutes. The difference for each course of treatment would therefore be 240 minutes, 4 hours. The Claimant has calculated its loss, therefore, on the basis that it has lost 4 hours worth of additional treatments, worth £62 per hour. The figures calculated by the Claimant recognise that not all treatments would have been Magma Laser treatments, and so the calculations have been done on the basis that 75% of the treatments in the clinics would have been with the Magma Lasers. I think that this is a fair estimate. The figures I was shown indicated that at least 75% of the treatments provided by the Defendant in each year were laser hair removal treatments.

255. On the above basis, the Claimant has calculated that an additional 5,774.35 hours were needed to treat clients with Candela lasers than would have been required if the Claimant had used Magma Lasers which lived up to the warranties. Using a figure of £62 per hour for lost sales, this equates to £358,009.70 per annum, and a total, over the 10 year period, of £3,580,097.00.
256. I accept the Claimant's assessment of loss under this head. I have already said that I accept that the appropriate period of loss is 10 years. When Mr Talfourd-Cook gave oral evidence, I queried whether the entirety of the £62 lost sales per hour should be treated as profit. Mr Talfourd-Cook's answer, which I accept, was that virtually all of the Claimant's costs are fixed costs, such as premises, rental and salary costs, and would be incurred in any event. The £62 was, effectively, pure profit. (His figures did not include the relatively small profits that were made from retail sales.) This also explains why the anticipated profits if the collateral warranties had been accurate are very significantly higher than the actual profits which the business earned in the last few years.
257. The figures of £62 sales per hour was based on actual sales in the year from 1 July 2016 to 1 June 2017, and is supported by data relating to approximately 3,500 transactions which were set out in the exhibits to Mr Talfourd-Cook's witness statement.
258. Mr Talfourd-Cook addressed a point that had been made by Mr Chapman, in one of his expert reports, to the basis that the losses claimed under this head were exaggerated, because the Claimant would not have been able to make sales at the same rate in an extra 5,774.35 hours per annum: the market did not have capacity to sustain such an increase. Mr Talfourd-Cook's evidence, which I accept, is that there is plenty of capacity in the market for laser hair removal in London. The difficulty is in finding suitably experienced clinicians, not in finding clients.
259. I note that the Defendant's expert did not dispute that, as a matter of principle, the Claimant was entitled to recover loss of profits damages under this head. The Defendant's expert witness's objection was only to the specific amount of loss of profits under this head.
260. Accordingly, I find that the Claimant is entitled to £3,580,097.00 under this head.

Increased cryogen gas costs

261. The next head of loss concerns the cost of cryogen gas which the Claimant must provide as part of Candela laser treatment, but which would not have been necessary for the Magma Laser treatments. Cryogen gas is by far the most expensive consumable that is used by the Claimant.
262. Having examined its records, the Claimant has calculated that the cost of cryogen gas is £7.14 per hour of treatment. On the basis that, as a result of the breach of warranty, an extra 5,774.35 hours have been spent by the Claimant's clinicians on cryogen treatments than would have otherwise been the case, the Claimant has incurred an additional annual cost of £41,228.86, which it would not have incurred if it had used the Magma Lasers. Over a 10 year period, this amounts to £412,288.50.

263. I find that the Claimant is entitled to the full amount of its claim under this head as part of its loss of profits.

Cost of extra Candela maintenance

264. If the Magma Lasers had worked as promised, the Claimant would have sold six of its Candela lasers. This would have saved an annual maintenance charge of £27,000. Accordingly, the Claimant claims £270,000 under this head.
265. I accept that the Claimant is entitled to this figure.

Deductions

Saved maintenance costs for the Magma Lasers

266. The Claimant acknowledges that it must give credit for the savings in relation to maintenance costs for the Magma Lasers which the Claimant did not have to incur. The annual maintenance costs for each device that were quoted by Mr Ringer on 11 September 2015 were between £500 and £600. Taking the mid-point, of £550, the Claimant calculates a total figure of £29,700, which I accept.

Laser head replacement costs

267. The Claimant also accepts that it must give credit for replacement of the diode laser in the head of the hand-piece from time to time. Mr Ringer had said that this would be necessary every 3-4 years, but the Claimant has calculated the credit on the footing, more favourable to the Defendant, that heads would have needed replacing every 2.5 years. This means that each of the six Magma Lasers would have needed 3 extra diode heads, at £11,600 per head.
268. The credit allowed under this head is a total £208,800. Again, I think that the Claimant is right to give credit for this.

Magma consumables

269. The Magma Lasers required the use of gel. This was very much less expensive than the cryogen gas which is used with Candela lasers. The cost of gel for 10 years would have been £5,000.

Profits made from Dermapens

270. The Claimant accepts that it must give credit for the profits earned by the Claimant as a result of the Dermapens that were provided as part of the arrangement when the Magma Lasers were purchased. I accept Mr Talfourd-Cook's calculation that the profit made from the Dermapens was £33,738.

Discount rate

271. The Claimant accepts, rightly in my view, that a discount rate must be applied to its loss of profits, calculated by reference to its weighted average cost of capital. The rate proposed by the Claimant is 5.995%, and I accept that this is the correct rate.

Total damages

272. In light of the above, the total loss of profits suffered by the Claimant was £4,324,550. Applying a discount factor of 5.6995%, this results in the figure of £3,876,830, and I award damages in that amount.

CONCLUSION

273. For the above reasons, the Claimant's claim against the Defendant for breach of collateral warranty succeeds, and I award damages in the amount of £3,876,830.
274. The claim of negligent misstatement also succeeds but I do not award any damages for this cause of action, because the Claimant's losses are subsumed within the losses for breach of collateral warranty.

POSTSCRIPT: THE EMBARGO ON THE DRAFT JUDGMENT

275. At the conclusion of her closing submissions, Ms Levy asked me to vary the normal embargo which is imposed when a draft judgment is circulated. Ordinarily, of course, when a draft judgment is circulated so that counsel can review it for typos etc, the draft is confidential to the parties and their legal representatives. The parties and their legal teams are not permitted to show the draft to anyone else, or to tell anyone else of the outcome, in advance of the formal handing down of the judgment some days later. The parties are not permitted to take any action in response to the draft judgment until it has been formally handed down. All of this is consistent with CPD PD 40E. The parties and their legal advisers are warned that, if they breach the embargo, this may be treated as contempt of Court.
276. The Court has a discretion to vary the normal embargo. This is sometimes done if there is a third party which is not a party to the proceedings but which has a direct interest in the proceedings. In my experience this has been done, for example, where a public authority that is the nominal Defendant in a test case is really acting on behalf of a Government Department, or where a trade union has brought a claim via a test case claimant. In such cases, permission might be given for the draft to be shown in advance to the Government Department or the trade union because they are, in substance if not in law, parties to the litigation, or there is a public interest in the third party being able to respond as soon as the judgment is handed down.
277. The request which Ms Levy made on behalf of the Claimant is of an entirely different character. She sought my agreement to widen the embargo group so as to enable the Claimant to supply a copy of the draft judgment to Formatk, the manufacturers of the Magma Lasers. The only reason for such a course of action would be the hope that Formatk might be prepared to pay a sum of money to the Claimant to settle the proceedings, so as to avoid the embarrassment and potential commercial disadvantages resulting from a published final judgment which has negative things to say about the performance of, and results that can be obtained from, one of Formatk's products.
278. The background to this, of course, is that there are concerns about whether the Defendant itself will be willing and able to pay the damages that have been awarded to the Claimant.

279. I am not prepared to widen the embargo group in this way. I accept that I have a general discretion to decide that the embargo group should be wider than the parties to the litigation and their legal advisers. There are sometimes good reasons why this should be done. However, for a number of connected reasons, I am not prepared to exercise such a discretion in the present case.
280. The first reason is that, in my view, this offends against the principle of open justice. I think that is wrong in principle that a party which has been successful in obtaining a ruling in its favour from the Court should be enabled to make use to the draft judgment in order to seek to persuade a third party, which is likely to be unhappy with the judgment, to offer to make a payment to the party in return for the party's co-operation in seeking to ensure that the judgment never sees the light of day.
281. As for the present case, the basis for the Claimant's claim has been that the Magma Lasers were not fit for purpose. The Claimant's case is that they were, effectively, useless. There has been a public hearing in the High Court in which the Claimant has advanced a great deal of evidence in support of its contention that the Magma Lasers were not effective and, in some circumstances, could be dangerous. The Court has agreed with the Claimant's contentions. Having put its case on that basis, and having been successful, the Claimant now asks the Court to assist the Claimant with an attempt to do a deal with Formatk which would have effect that the ruling of the Court, available in draft, would not be made public. In my judgment, it would be wrong for the Court to be complicit with a party to put pressure on a third party in this way. It would be wholly inconsistent with the spirit and purpose of CPD PD 40E, and with the purposes for which a draft judgment is supplied to the parties and their legal advisers. In **Prudential Assurance Company Limited v McBains Cooper and others** [2000] 1 WLR 2000, the Court of Appeal said that there was no indication in the practice statement that was the predecessor to CPR PD 40E that its purpose is to allow the parties to have more material available to them to help them settle their dispute. Rather, the Court said that its purpose is to introduce an orderly procedure for the delivery of reserved judgments, whereby the parties' lawyers can have time to consider and agree the terms of any consequential order they may invite the Court to make and the process of delivering judgment can be abbreviated by avoiding the need for the judge to read the judgment orally in court (see page 2008). I would add that the other purpose is to enable the legal teams to draw the court's attention to any typos or obvious errors in advance of the judgment being finalised.
282. Even where, after a draft judgment has been sent to the parties, the parties compromise an action, the judge has a discretion whether or not to publish the draft judgment (see the **Prudential Assurance** case). In that case, Brooke LJ said that this discretion arose as a matter of public policy, because otherwise, "powerful defendants like insurance companies could pick and choose which judgments they were happy to see published and which judgments they were willing to pay money to suppress."(page 2009). The same public policy consideration applies to the Claimant's application in the present case. It is wrong in principle to give a third party the opportunity to review a judgment in order to give it the opportunity to pay money to suppress the judgment. Moreover, in the **Prudential Assurance** case, the Court of Appeal recognised that it may be appropriate to proceed to hand down the final judgment, in the public interest, where the case had been compromised after the parties had been given a draft judgment, if the judgment dealt with a point of general

importance. In the present case, the consideration of the requirements for collateral warranties, and of the question as to whether loss of profits damages are available for breach in such cases, may be of general interest.

283. The position is different where cases are compromised after the hearing is over but before the draft judgment is circulated: in such cases, it is generally inappropriate for the judge to hand down the final judgment. However, that is not this case: in the present case, the Claimant wants to review the draft judgment and then consider whether to take a step which would, as the Court of Appeal put it in the **Prudential Assurance** case, “suppress” the judgment.
284. Furthermore, Formatk is not a party to the proceedings. Even if the Claimant were able to reach an accommodation with Formatk, I think that it would be necessary for a compromise to be reached with the Defendant before the possibility of avoiding a formal hand-down of the judgment would arise. I have no idea whether the Defendant has been consulted about this, or whether it would be prepared to do so.
285. In any event, however, for the reasons already given, I do not think that this is an appropriate case for the Court to exercise its discretion to broaden the group that is given access to the draft judgment, simply in the hope that the Claimant might thereby be able to extract a settlement from the manufacturer.
286. Finally, the position taken by the Claimant in closing is in stark contrast to what was said in opening. In opening, Ms Levy said that the Claimant wanted a judgment on the merits, rather than a strike-out, because the Claimant wanted other people to know the dangers that these machines pose.