Neutral Citation Number: [2017] EWHC 2438 (QB)

Case No: HQ16C01088

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2017

Before:

MR JUSTICE JAY

- -

Between:

ARB	**Claimant**
- and –	
IVF HAMMERSMITH LTD	**Defendant**
- and –	
R	**Third Party**

- -
- -

Michael J Mylonas QC, Susanna Rickard and Jamie Mathieson (instructed by **Hughes Paddison**) for the **Claimant**
Jeremy Hyam QC and Suzanne Lambert (instructed by **Hempsons**) for the **Defendant**
Mark McDonald and Christopher Pask (instructed by **Axiom Stone**) for the **Third Party**

Hearing dates: 18th – 21st, 25th and 26th July 2017

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Approved Judgment

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

MR JUSTICE JAY:

A. INTRODUCTION

1. Court Orders have been made, for obvious good reasons which will soon become apparent, anonymising the identities of a number of individuals, including (but not limited to) the Claimant ("ARB"), the Third Party ("R") and their children.

2. ARB is the father, and R is the mother, of E who was born in the summer of 2011. E is by all accounts a lovely, healthy girl who lives for most of the time with R, with ARB discharging his parental duties in a separate household. In early 2008 ARB and R had IVF treatment at the Defendant's clinic ("the clinic"). After just one cycle D, a son, was born in the autumn of 2008. A number of embryos had been frozen with the parties' consent, and they signed agreements on an annual basis for these to remain in storage. On 5th March 2010 ARB and R returned to the clinic for advice; investigations were later undertaken; and at various stages forms were signed. R returned to the clinic on a number of subsequent occasions in April, May and October 2010 (the parties are in dispute as to whether ARB accompanied her in April). Either in March or May 2010 (or both), R (or both), was (or were) given a Consent to Thawing of Embryos form (I will often be shortening this to "Consent to Thaw form") which required signature by both of them. Much later, R handed the clinic a Consent to Thaw Form dated 20th October 2010, signed by her and purportedly signed by ARB. On the basis of this document, an embryo was thawed on 2nd November 2010 and successfully implanted in R's womb.

3. It is ARB's case, denied by R, that the Consent to Thaw form was not signed by him and must have been forged by R. He says that their relationship had irretrievably broken down in May 2010, and that in July R moved out of the home they had been sharing. ARB says that there were no circumstances in which he would or could have signed this form. It follows, says ARB, that E is an unwanted child and that the clinic must now bear the financial consequences.

4. In this remarkable situation ARB has brought these proceedings against the clinic, which in turn has brought CPR Part 20 proceedings against R for an indemnity. ARB's cause of action is in contract; the clinic's is in the tort of deceit. ARB's claim, which as pleaded runs to seven figures, is for the cost of bringing up E.

5. The parties are agreed that the claim cannot succeed unless as the first step ARB proves that R forged his signature. I am required to determine that issue on the oral evidence of ARB and R, the inferences to be drawn from all the surrounding circumstances, and expert evidence from a handwriting expert called by the clinic.

6. In the event that I should conclude that R did indeed forge ARB's signature, a number of complex issues arise under the general rubrics of (i) defining the express and implied terms of the contract, (ii) breach, (iii) contributory fault, (iv) public policy, (v) remoteness of loss, and (vi) (if appropriate) quantum. I will be specifying these issues with greater precision later in this judgment.

7. This judgment is divided into the following Chapters:

B. ESSENTIAL FACTUAL BACKGROUND

8. At this stage, I propose to set out the essential factual background to this case as neutrally as possible, principally with reference to the documents.

9. ARB and R began their relationship in 2005. There were no children from previous relationships. In 2007 R moved into ARB's London home and her house was rented out.

10. The couple were unable to conceive naturally. Having unsuccessfully undertaken IVF treatment at two clinics in London, on 15th August 2007 they visited the clinic as NHS patients. The clinic was then located in the Hammersmith hospital.

11. On 2nd January 2008 ARB and R both signed a form, "Consent to Treatment Involving Egg Retrieval and/or Embryo Replacement". This was not a statutory form but one locally produced by the clinic. For his part ARB consented to the use of his sperm in his partner's treatment including the creation of embryos *in vitro*. By signing the form ARB acknowledged that he and R were being treated together with the intention of becoming the legal father of any resulting children. Item 9 of the form provided:

> "With reference to the HFEA [Human Fertility Embryology Authority] Code of Practice…: We understand that our individual consent may be changed or withdrawn at any time up to the time of embryo transfer. We understand the implications of withdrawal of consent during the course of treatment."

12. On 3rd January 2008 R attended a co-ordination clinic without ARB. The clinic's protocols were explained to her.

13. On 12th February 2008 ARB signed a form, "Sperm Sample for IVF/ICSI/IUI". ARB declared that the semen sample he had provided was his, and that he was the partner of R. The form was checked and counter-signed by a nurse. On that day, ARB's sperm was used to fertilise two eggs obtained from R. The resulting embryos were implanted in R's womb on 14th February 2008.

14. On 13th February 2008 ARB signed a form, "Consent to the Use of Sperm and Storage of Embryos in Own Treatment or Research". This form, prescribed by HFEA, has been described by the experts as the "MT1 Form" (The first page of the same form had previously been signed by ARB on 2nd January. Further, R signed two copies of the "WT1 Form" matching the MT1, *mutatis mutandis*). ARB consented to the use of his sperm, and any resulting embryos, in R's treatment. By signing the form ARB acknowledged that he had been given the information necessary to make a decision about the available options, and that he could change or withdraw his consent at any time, except when his sperm or embryos created with his sperm had been used. Further, on the second page of the form ARB consented to the storage of embryos for a period of up to 10 years. The form provided:

> "In order to keep the embryos in storage, the law requires the consent and agreement of both the sperm and the egg provider. Please be aware that your partner, if she provided the eggs, or the donor, if applicable, can change or withdraw consent to the storage of embryos created with her eggs at any time. If she withdraws her consent, the embryos must be allowed to perish."

15. On 24th June 2008 ARB and R signed a form, "Agreement for Cryopreservation of Embryos". The parties gave their address as ARB's London address with R's home as a "previous address" (inserted in manuscript). By this form they stated that they understood that "we must both give written consent before any embryos are thawed and replaced". In the event of divorce or separation, the clinic stated that it "will only thaw and replace embryos if both partners give written consent at the time of embryo replacement". The form also made provision for what would happen in the event of death. Clauses 5 and 6 of the form provided as follows:

> "**5. Contract Conditions**
>
> (a) We review the storage contract annually. It is the responsibility of the couple once a year to confirm that you wish storage of your embryos to continue. Failure to keep in contact, or failure to pay the annual storage fee … will result in the disposal of your embryos … It is also your responsibility to inform the senior embryologist if you change your address or if there is any change in personal circumstances.
>
> (b) It is your responsibility to pay the annual fee to cover storage of your embryos and administration.

> Consent to store embryos is required by both partners. If either partner does not agree then the embryos have to be thawed and allowed to perish.
>
> **6. Declaration:**
>
> We have been given sufficient time to consider the contents of this document, and have been given the opportunity to have counselling if required or to take legal advice before signing below.
>
> We will be bound by the acknowledgements, admissions and consents that we have made and given in this letter in the event of any death, legal separation or divorce."

16. D was born in the autumn of 2008 (the imprecision as to the date is to avoid any possibility of identification).

17. On 5th March 2010 ARB and R consulted the clinic's Director, Mr Geoffrey Trew, consultant in Reproductive Medicine and Surgery. The parties are not in agreement as to the exact purpose of the consultation. His manuscript notes record:

> *"pregnant 1st cycle at HH [the clinic] 2/08*
>
> *Long D21 300 11/7*
>
> *8 eggs 7 fert[ilised] E[mbryo] T[ransfer] 5 frozen*
>
> *XFH →x1 → [baby boy] FTND/forceps*
>
> *→ forceps 3rd [degree] tear*
>
> *Under Mr Thackary @ Croydon and St Marks*
>
> *Now /28-30 WMPD2*
>
> *PMH as above nil else*
>
> *...*
>
> *For U/S HSG R[eview] → FERC [with] BT"*

18. Mr Trew has helpfully deciphered his notes in his first witness statement. Insofar as is material for present purposes, these notes state that R became pregnant following her first treatment cycle, and 5 embryos were frozen. D was born after a full-term natural delivery using forceps, and R suffered a 3rd degree vaginal tear. As at the date of the consultation, R's periods were regular. Mr Trew's evidence is that he recommended that R undergo a vaginal ultrasound and hysterosalpingogram – an x-ray examination of the uterus and fallopian tubes to check that the uterine cavity was normal. In the event that these tests were normal, the plan was to proceed to a frozen embryo replacement cycle ("FERC") with a blastocyst transfer (a blastocyst is an embryo at Day 5 of its development). On 8th March 2010 Mr Trew wrote to R's consultant who

had originally referred the parties to the clinic, stating that "she would like another baby".

19. After their consultation with Mr Trew, ARB paid the fee of £750 and the parties were given a number of documents – described by ARB as "a package of papers" – comprising the following:

(1) Counselling Information Leaflet;

(2) Consent to the Thawing of Embryos;

(3) FERC Patient Guide;

(4) Patient and Partner Questionnaire;

(5) Self-Funded Treatment Price List.

20. On 30th April 2010 R was seen again by Mr Trew following completion of the investigations he had recommended. There is a dispute as to whether ARB attended. Broadly speaking, the results of the investigations were normal, although there was an issue relating to one of R's ovaries. Mr Trew's notes record that he informed R that she could proceed to a FERC cycle with all five of the available embryos being thawed. Those which reached the blastocyst stage (Day 5) could be used for transfer, if possible.

21. On 14th May 2010 R attended the clinic, undoubtedly without ARB, for an FERC co-ordination appointment. According to the notes of senior charge nurse Carl Batilo:

> "[R] attended clinic + baby
>
> FERC LD21 protocol explained
>
> Demo of injection + patches
>
> Prescription and injection kit given
>
> D[ay] 2 x 5 frozen embryos available
>
> Suggestion from consultant to thaw all for blastocyst transfer
>
> Patient unsure about thawing all [for] blastocyst
>
> Will decide prior to E[mbryo] T[ransfer]
>
> Consent form [i.e. Consent to Thaw form] given, instructed to speak to embryologist before signing the consent form and to indicate the number of embryos they're happy to thaw initially
>
> Instructed to return the signed consent form on the day of ? suppress scan
>
> Questions answered."

I should add that on this occasion Mr Batilo filled in some information in a document entitled, "HRT FERC" form.

22. In July 2010 R moved out of ARB's home and, after a brief stay with her parents, moved into the property she had previously rented out.

23. In August 2010 a letter from the clinic arrived at ARB's London home. ARB gave the letter to R. It contained a form, "Frozen Embryo Bank Record Update and Agreement Renewal". R completed this form giving her address (not ARB's) and signed it on 7th September. ARB had signed the form as R's partner on 5th September, assuming that date is correct. By signing the form the parties gave the following declaration:

> "I understand that [the clinic] will renew the storage of our embryos for a further year. The next review will be June 2011.
>
> It is our responsibility to keep the senior embryologist informed of any change of address and circumstances. We understand that if we do not keep in contact, our embryos will be disposed of three months after the date stated above, unless I have contacted the senior embryologist at [the clinic] and organised continued storage."

ARB had signed this declaration in the same terms on 29th January 2010, being the date the previous form was completed. Although this point was not put to ARB and R, and little really turns on it, I infer that some information had been inserted on this form by the clinic before it was sent to ARB's home address: for example, the hospital number and the June 2011 review date.

24. There is an issue between the parties as to when ARB signed the sections of the Patient and Partner Questionnaire (see paragraph 19(4) above) which were applicable to him. The form required signature by both partners in three separate places. R appears to have signed the form on 13th September 2010. In relation to ARB, the form is thrice dated 14th September 2010: ARB accepts that the form bears his signatures, but his evidence is that he signed it undated on 5th March. All the information on the form, including the dates against ARB's signatures, was completed by R. One part of this form which could be relevant to the issues I have to decide is the following:

> "WELFARE OF THE CHILD – PARTNER SECTION
>
> We are required under the Human Fertility and Embryology Act to take account of the welfare of any child that might be born as a result of any assisted conception treatment and of any existing children. To help us fulfil this requirement we ask you to complete the questions below.
>
> …
>
> (3) Is there any serious violence or discord within your family environment?
>
> …

> (7) Are there any other aspects of your life or medical history which pose a risk of serious harm to any child you might have or anything which might impair your ability to care for such a child?"

ARB gave negative answers to these questions, as did R as regards the companion portion of the form under the rubric, "Female Patient Section".

25. On 19th October 2010 R attended the clinic alone for her first suppress scan. At her co-ordination appointment on 14th May 2010 she had been requested by the clinic to return the Consent to Thaw form, duly completed and signed. She did not do so on this occasion.

26. R signed the Consent to Thaw form. It bears the date, 20th October 2010. She gave details of her address (i.e. not ARB's). A signature appears in the correct place, adjacent to "male partner"; this is the form which ARB says he did not sign. The following parts of the form are, or at least may be, relevant:

> "[R] and [ARB] consent to the thawing of our embryos that were frozen following infertility treatment. We also understand that
>
> …
>
> • The decision of the number of embryos to thaw will be made after discussion with ourselves and a member of the IVF team. This will be reviewed on the day of the thaw by an embryologist and is dependent on the survival of the embryos.
>
> • Only 1 (insert number) embryos will be thawed initially* to allow 1 to be available for transfer. A maximum of three embryos will be replaced.
>
> (*Please note that embryos may not survive the thawing process, so more embryos may have to be thawed at the discretion of the Scientific team, until there are embryos suitable for transfer)
>
> (Discussed with Ben Lavender 1 good embryo to be thawed and replaced if it survives. If not 4 remaining eggs to be thawed and observed.) [in manuscript]
>
> • We understand that we are being treated as a couple and that the male partner will be the legal father of any resulting child."

The form was not signed by "Member of Centre": this has been left blank.

27. On 29th October 2010 R attended the clinic for her pre-transfer appointment. On 2nd November 2010 one embryo was thawed and transferred, the clinic's internal "Embryo Thawing Form" recording "Consents Checked". In the summer of 2011 E was born.

28. On 25th November 2012 ARB signed a form withdrawing his consent to the use and storage of any embryos fertilised by his sperm.

29. Other relevant documentation which in my view is not essential to the narrative, and in any event may require interpretation and analysis, will form part of my review of the evidence: see Chapter D below.

C. THE REGULATORY FRAMEWORK AND THE CLINIC'S STANDARD OPERATING PROCEDURES AND PROTOCOLS

The Human Fertilisation and Embryology Act 1990 (as amended)

30. Section 12(1)(c) of the Human Fertilisation and Embryology Act 1990 ("the 1990 Act"), as amended by secondary legislation and the 2008 Act, provides:

> "The following shall be conditions of every licence granted under this Act:-
>
> (c) except in relation to the use of gametes in the course of providing basic partner treatment services or non-medical fertility services, that the provisions of Schedule 3 to this Act shall be complied with."

31. Section 13 provides, in so far as is material:

> "(5) A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for supportive parenting, and of any other child who may be affected by the birth).
>
> (6) A woman shall not be provided with treatment services of a kind specified in Part 1 of Schedule 3ZA unless she and any man or woman who is to be treated together with her have been given a suitable opportunity to receive proper counselling about the implications of her being provided with treatment services of that kind, and have been provided with such relevant information as is proper."

32. Schedule 3 provides, in so far as is material:

> "**1.** (1) A consent under this Schedule … must be in writing and, subject to sub-paragraph (2) [not applicable], must be signed by the person giving it.
>
> (3) In this Schedule "effective consent" means a consent under this Schedule which has not been withdrawn.
>
> **2.** (1) A consent to the use of any embryo must specify one or more of the following purposes—
>
> (a) use in providing treatment services to the person giving consent, or that person and another specified person together, …
>
> **3.** (1) Before a person gives consent under this Schedule—

> (a) he must be given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and
>
> (b) he must be provided with such relevant information as is proper.
>
> (2) Before a person gives consent under this Schedule he must be informed of the effect of paragraph 4 and, if relevant, paragraph 4A below.
>
> …
>
> **6.** (1) A person's gametes or human cells must not be used to bring about the creation of any embryo in vitro unless there is an effective consent by that person to any embryo, the creation of which may be brought about with the use of those gametes or human cells, being used for one or more of the purposes mentioned in paragraph 2(1)(a), (b) and (c) above.
>
> (2) An embryo the creation of which was brought about in vitro must not be received by any person unless there is an effective consent by each relevant person in relation to the embryo to the use for one or more of the purposes mentioned in paragraph 2(1)(a), (b), (ba) and (c) above of the embryo.
>
> (3) An embryo the creation of which was brought about in vitro must not be used for any purpose unless there is an effective consent by each relevant person in relation to the embryo to the use for that purpose of the embryo and the embryo is used in accordance with those consents.
>
> …
>
> (3E) For the purposes of sub-paragraphs (2), (3) and (3B), each of the following is a relevant person in relation to an embryo the creation of which was brought about *in vitro* ("embryo A")—
>
> (a) each person whose gametes or human cells were used to bring about the creation of embryo A, …"

33. The 1990 Act is silent as to whether any breach of its provisions, or of the HFEA Code of Practice (made under section 25) gives rise to any civil liability. Section 25(6) provides that "a failure on the part of any person to observe any provision of the code shall not of itself render the person liable to any proceedings". Section 44 extends the Congenital Disabilities (Civil Liability) Act 1976 to infertility treatments.

General Medical Council Guidance

34. GMC Guidance, "Consent: Patients and Doctors Making Decisions Together", 2008 Edn. provided, in so far as is material:

> "51. You must use the patient's medical records or a consent form to record the key elements of your discussion with the patient. This should include the information you have discussed, any special requests by the patient, any written, visual or audio information given to the patient, and details of any decisions that were made.
>
> 52. Before beginning the treatment, you or a member of the healthcare team should check that the patient still wants to go ahead; …
>
> 53. You must make sure that patients are kept informed about the progress of their treatment, and are able to make decisions at all stages, not just in the initial stage. If the treatment is ongoing, you should make sure that there are clear arrangements in place to review decisions and, if necessary, to make new ones."

Department of Health Guidance

35. DoH Guidance, "Reference Guide to Consent for Examination or Treatment", 2nd Edn., 2009 provided, in so far as is material:

> "1. For consent to be valid, it must be given voluntarily by an appropriately informed person who has the capacity to consent to the intervention in question … Acquiescence where the person does not know what the intervention entails is not 'consent'.
>
> …
>
> 10. To be valid, consent must be given voluntarily and freely, without pressure or undue influence being exerted on the person either to accept or refuse treatment. …
>
> …
>
> 13. To give valid consent, the person needs to understand the nature and purpose of the procedure. Any misrepresentation of these elements will invalidate consent. …
>
> …
>
> 18. In considering what information to provide, the health practitioner should try to ensure that the person is able to make an informed judgment on whether to give or withhold consent. …
>
> 32. The validity of consent does not depend on the form on which it is given. Written consent merely serves as evidence of consent: if the elements of voluntariness, appropriate information and capacity have not been satisfied, a signature on a form will not make the consent valid.
>
> 33. Although completion of a consent form is in most cases not a legal requirement (exceptions include certain requirements of the Mental

Health Act 1983 and of the HFEA 1990 as amended) the use of forms is good practice where an intervention such as surgery is undertaken."

HFEA Code of Practice, 8th Edn

36. The 8th Edition of the HFEA Code of Practice was in force between April 2010 and April 2011. The following provisions are or may be relevant (it is unnecessary to set out those provisions which merely duplicate the terms of the 1990 Act):

> "Guidance Note 4
>
> Licence Conditions
>
> T58 Prior to giving consent gamete providers must be provided with information about: (a) the nature of the treatment, (b) its consequences and risks, (c) any analytical tests, if they are to be performed, (d) the recording and protection of personal data and confidentiality, (e) the right to withdraw or vary their consent, and (f) the availability of counselling.
>
> T59 The information referred to in licence condition T58 must be given by trained personnel in a manner and using terms that are easily understood by the gamete provider.
>
> …
>
> Guidance Note 5
>
> Licence conditions
>
> T57 Gametes or embryos must not be used in the provision of treatment services … unless effective consent is in place from each gamete provider in accordance with Schedule 3 …
>
> …
>
> The law requires the centre to obtain written informed consent from a person before it performs the following procedures: … (e) using embryos created with their gametes for their own treatment, treatment of a partner or treatment of others.
>
> …
>
> 5.1 The centre should obtain written informed consent from a person before it carries out the following procedures: (a) using their gametes for their own treatment or their partner's treatment.
>
> …

5.3 The centre should establish and use documented procedures to ensure that no activity involving the handling or processing of gametes or embryos is carried out without the appropriate consent having been given.

Interpretation of mandatory requirements

The law requires that before a person consents to the procedures outline in box 5A, they should be given:

(a) enough information to enable them to understand the nature, purpose and implications of their treatment or donation,

(b) a suitable opportunity to receive proper counselling about the implications of the steps which they are considering taking, and

(c) information about the procedure for varying or withdrawing any consent given, and about the implications of doing so.

…

5.6 The centre should give anyone seeking treatment or considering donation or storage enough time to reflect on their decisions before obtaining their consent. The centre should give them an opportunity to ask questions and receive further information, advice and guidance.

…

5.9 The centre should ensure that anyone giving consent declare that:

(a) they were given enough information to enable them to understand the nature, purpose and implications of the treatment or donation,

(b) they were given a suitable opportunity to receive proper counselling about the implications of the proposed procedures,

(c) they were given enough information about the procedure for varying or withdrawing consent, and

(d) the information they have been given in writing is correct and complete.

5.10 Treatment centres should take all reasonable steps to verify the identity of anyone accepted for treatment, including partners who may not visit the centre during treatment. If a patient's identity is in doubt, the centre should verify their identity, including examining photographic evidence such as a passport or a photocard driving licence. The centre should record this evidence in the patient's medical records.

5.11 To avoid the possibility of misrepresentation or mistake, the centre should check the identities of the patients (and their partners, if applicable) against identifying information in the medical records. This

should be done at each consultation, examination, treatment or donation."

The Clinic Standard Operating Procedures ("SOPs")

37. The SOPs extant at the material time were as follows:

"Embryo Thawing:

CONSENT TO THAW FROM BOTH PARTNERS MUST BE CHECKED AND CORRECT BEFORE STARTING THE PROCEDURE

Embryologist Code of Conduct:

PATIENT IDENTIFICATION

At any procedure where a patient needs to be identified e.g. semen sample production, egg collection and embryo transfer, the patient must be asked by the nurse, doctor, or embryologists to state the following:

- Name
- Date of birth
- Hospital number

This information must then be checked against all relevant hospital notes, lab sheets and consent forms. The person checking this information must then sign the appropriate paperwork for confirmation the procedures has been carried out correctly.

Frozen Embryo Replacement Cycle Clinic:

THE CLINIC

Explain the consent to thaw form – if both partners are present and they are happy to sign it – witness the form

…

If both partners do not attend clinic, give the consent form and emphasise the importance of returning it at the first scan appointment

TELEPHONE OR POSTAL CO ORDINATION FOR REPEAT FERC CYCLE

If a patient has recently had a FERC cycle and they do not wish to return to the clinic they may phone reception and ask telephone or co-ordination appointment.

> Reception will obtain patient hospital and IVF notes and give them to the nursing team; the nurse should prepare the notes and paperwork as for a clinic appointment. They should then phone the patient if so requested and post the relevant paperwork to the patient … [etc.]"

38. In 2014 the SOPs were revised as follows:

> "Frozen Embryo Replacement Cycle Clinic:
>
> When giving coordination appointments to patient Admin Staff must emphasise that both couple needs [sic] to attend the clinic to sign the consent to thaw before starting the treatment. Patients need to bring some form of ID …
>
> …
>
> Explain the Consent to Thaw Form – if both partners are present and they are happy to sign it – witness the form and scan it on IDEAS – Patients need to bring some form of ID – i.e. Passport or Driving License [sic]
>
> …
>
> If both partners do not attend clinic, give/email the consent form. Both patients need to sign Consent to Thaw Form in presence of a Nurse and their ID checked against their Passport or Driving license
>
> …
>
> **Obtaining and Checking Consent forms**
>
> …
>
> **If in case the male partner is not present during the coordination appointment (even with his signature):**
>
> * check female's signature and sign as witness with a note that male is not present during coordination and advise patient that male partner is required to attend the clinic and complete the consent form prior to the first scan appointment
>
> * male partner to bring a valid ID to the unit when completing the consent form
>
> * scan the consent form into IDEAS
>
> * original copy to be kept at FERC consent folder in the nurse's office and to be given to patients on Day of Embryo transfer.
>
> **2.3.2 Procedure when the male partner attends the unit to complete the consent forms**

> Any nurse or embryologist can assist male partner in completing the consent form:
>
> * print out the scanned consent form from IDEAS, read remarks
>
> * ask the male partner to sign the consent form and make sure it matches the one in the valid ID and the previous consent forms (if available on IDEAS)
>
> …
>
> **2.3.3 Circumstances that male partner is not available**
>
> For any circumstances that the male partner will not be available by any means such as out of the country, disability or others, discuss the issue with the consultant and senior Embryologist and document the decision on IDEAS."

D. SYNOPSIS OF THE LAY EVIDENCE

Introductory

39. I heard oral evidence from ARB (see his witness statements dated 4th July 2016, 15th September 2016 and 6th July 2017), R (see her witness statement dated 7th March 2016), Mr Geoffrey Trew (see his witness statement dated 1st July 2016) and Mr Carl Batilo (see his witness statements dated 1st July 2016 and 10th July 2017). I have read the witness statements of Dr Marta Jansa Perez (see her witness statements dated 1st July 2016 and 6th July 2017) and Ms Dima Abdo (see her witness statements dated 1st July 2016 and 6th July 2017), Mr Michael Mylonas QC for ARB having indicated that he did not require their attendance to be cross-examined.

40. Given that the evidence in this case has been transcribed, it is unnecessary for me to provide an entirely comprehensive review of the witnesses' evidence-in-chief and cross-examination. I intend to keep to the essentials. Furthermore, and for the reasons set out later, I do not propose to provide a synopsis of the quantum evidence.

The Contemporaneous Documentary Evidence: ARB/R

41. On 11th April 2008, which was 7 months before D was born, ARB emailed R as follows:

> "R, I'm very sorry you feel this way. Despite what you say, I have always been loyal (never cheated) and stuck things out at times when I've not been happy. You're a very good person (and certainly tolerant of me at times when I've been undeserving) therefore I've made a conscious effort to keep going because I know how important getting pregnant means to you.

> To have ended things and left you with reduced prospects of ever having a baby would have left me feeling very, very guilty!
>
> …
>
> Irrespective of what happens to us, never forget what getting you pregnant at a time when I'm unsure about the relationship means – its a MASSIVE commitment from me! Be honest – if having a baby and keeping me were equally important to you then you will be considering an abortion about now – but I know you're not because I know what's really important.
>
> …
>
> But sticking it out so you could have a baby is absolutely selfless! Remember that."

42. On 26th May 2010 R emailed ARB as follows:

> "You are the deluded one.
>
> The fact is this situation is nasty & 'yes' you were nasty to me before D & yes your nastiness has intensified since D was born. You can fool yourself all you want & I have spent almost 6 years doing the same.
>
> …
>
> I think it is very sad that you will not go & get help & that your family around you conspire to confirm your delusion.
>
> …
>
> This is why you have to move out. We cannot talk. The situation is nasty & by blatantly lying to me you will only make things worse. Silence is much better than lies."

43. There were emails in similar vein in July 2010. On 7th July, and just by way of example, ARB emailed R as follows:

> "R, I'm trying very hard to keep cool however you're really testing my resolve. What you say below is nonsense.
>
> …
>
> The adjectives you use to describe me are particularly unfair. Its unfortunate that things have not worked out, but that's the way it is. Now we have to get on with our lives in a cooperative manner.
>
> I suggest we go back to the counsellor who can act as a mediator for us to resolve issues and agree a plan going forward – for D's sake …"

44. On the same day, in the second of two emails R replied as follows:

> "I have a right to be angry with you … I've devoted 5½ years of my life to tolerating your anger, abuse, neglect, ups & downs … After putting so much time and effort into our relationship & being so stupidly tolerant & patient, of course I'm angry.
>
> You reduced me to tears in Florida. I then put up with 4 horrible weeks (post Southwold) of you ignoring D & I, snapping at me … I ended a 6 year relationship with [L] after buying a house in a kind & sensitive and above all respectful manner. Then, I asked you to get help for at least a month and seeing [JE] & then I said only then I'd go to counselling as a couple. You have not included me in any follow up & so your decision is made. Therefore I don't have to have anything to do with you once I've gone. Only D does. It was your choice to behave so disrespectfully & despicably towards me. Your choice is to move on. So, finally now you reap the rewards of your bad behaviour."

45. Then, on 26th October 2010 R emailed ARB as follows:

> "As you rightly said to me this morning on the phone "it's not my life anymore" … you are right … It is all yours – your life. So, that is what I want. I don't want to see you every weekend for the next 16 years. I want to move on … - just a real pity you forgot to tell me you'd moved on so long ago!!!! …
>
> However, as I cannot completely get out of this hideous situation as I would like to I want to avoid communication with you as much as possible. D will be ready for collection at 9am. Please call from the car & I'll bring him out …
>
> I don't want to know about the life you pushed me out of … I want to move on as successfully as you have."

46. On 12th December 2010 ARB wrote to R as follows:

> "I love D very much and it pains me deeply not seeing him for extended periods. He's a lovely boy and I miss him …
>
> I have previously asked permission to have him overnight, and separately, take him on holiday to Florida for a week this January, however you have steadfastly refused at each time of asking. Your attitude, simply put, is unfair to D and me!
>
> I have been very patient with you in recognition of the stress of moving, however you are now firmly settled and time has come for more time with my son.
>
> …
>
> Your reason for saying no is separation anxiety …"

47. There was a spate of text messages between 13th and 15th February 2011. It is unnecessary to cite directly from all of these. At 08:02 on 14th February 2011 R texted ARB as follows:

> "And by the way I'm pregnant. Baby due [in the summer]."

ARB replied at 14:24:

> "That's clever. Why would you do that?"

R replied four minutes later:

> "You signed the forms & so it was done in a fortnight. I want D to have a brother or sister. I don't want him to be an only child. It's not about you or me I did it for D. I won't ask you for more money than the 15% for D"

At 09:22 the following morning (15th February) ARB replied as follows:

> "I'm truly amazed at what you've done – amazed!!! I don't know what I signed however I clearly remember saying, and you agreeing, that you were not to do anything without my permission. I'm shocked!"

R replied four minutes later:

> "It was genuinely too late when u said that. I'd had all the prep when we were together, it's nothing like ivf, very quick. It takes an hour to defrost and they pop it in."

ARB replied two minutes later:

> "Maybe my math is wrong, however we had split months before you did this."

The next text message in this sequence, timed at 09:52, was as follows:

> "I had horrid womb scan, we had 2 appointments with Trew, you paid, I had co-ordination appointment the fri before hideous weekend in southwld. U threw away purple pack in aug so when you signed forms phoned, prescriptn sent to chemist, picked up hormones. Timing of break up: I found your google history typing 'jewish dating agencies' back in may, ask you to go to dr [j], then 9 weeks later end july left cos u wanted me to go. We are tied thru D so sibling is for him & does not make our situation worse than it already is."

Finally, later that morning and in answer to ARB's question as to when the implant occurred, R texted him to say that she did not know the exact date off the top of her head but it was in October.

48. On 18th March 2011, ARB wrote to R as follows:

> "It has been a month since you informed me about your pregnancy. Despite the passage of time, I've still not been able to settle my thoughts on the matter. What this will mean for me is something I cannot define because it is unchartered territory, particularly in relation to D.
>
> I do recall signing a number of forms for you at the time the hospital was asking for payment to continue freezing the embryos, however you will remember I didn't scrutinise the papers. I signed on the basis of trust (I trusted you!) and clearly telling you not to do anything without my permission. You deny I said this, however you accept I told you the same thing two weeks later.
>
> What I cannot understand is that even if your recollection of events (which I don't accept) were correct, then why did you not tell me two weeks later after you had already gone ahead with the procedure, and when it was absolutely clear this would have been contrary to my wishes? In fact you waited five months to tell me, choosing Valentines Day to do this. The magnitude of this breach of trust is without precedent.
>
> …"

R did not reply.

The Contemporaneous Documentary Evidence: the Clinic

49. The Human Fertilisation and Embryology Authority ("HFEA") inspected the clinic in October 2010. Its inspection team recommended the continuation of the clinic's licence. It is unclear whether HFEA undertook a close analysis of the clinic's SOPs.

50. On 7th January 2013 ARB wrote to the clinic seeking an explanation of what had happened in the circumstances that had arisen. He made clear that he had no knowledge of and had not consented to the IVF treatment following the couple's separation.

51. On 25th January 2013 Mr Trew replied on behalf of the clinic. He set out the relevant history. Then:

> "The usual practice for a frozen cycle is to get the consent of both partners to thaw and use the frozen embryos. I have attached the completed consent to thawing the frozen embryos and that was duly completed and returned to us by R prior to us utilising the stored embryos. As you can see she is signed for the female partner, and there is a signature on the male partner that we presumed was your own.
>
> Judging from your letter, I assume this was not your signature and if this is the case then it must have been fraudulently signed …"

52. ARB replied on 3rd February 2013 confirming that the signature next to "male partner" is not his. He asked for a meeting, which took place in due course.

53. On 17th February 2015 ARB wrote to the CEO of HFEA drawing his attention to the issue, inquiring as to the regulatory framework, stating that "it cannot be right that a clinic be allowed to operate when those protections are so blatantly ignored", and seeking a meeting.

54. On 30th June 2015 the Clinical Governance Lead/Inspector of HFEA replied to ARB's letter. She sincerely apologised for the delay, pointed out that ARB's delay in making the complaint meant that "there would be no genuine opportunity regarding complaint resolution", and further pointed out that ARB had failed to inform the clinic of his separation from R. Further:

> "With hindsight, it seems that the centre's process was not as robust as it could have been in this case. However, since the clinic did not know that you and your partner had separated at that time, or that she had forged your signature, it is reasonable to conclude that the clinic acted within their protocols.
>
> However to reassure ourselves that the clinic have learnt from this experience I contacted them to discuss the issues raised in your complaint. The clinic provided me with copies of their revised protocols. I have carefully reviewed the protocols and consider that the risk of reoccurrence has been eliminated."

55. Unsurprisingly in my view, ARB was dissatisfied with this response and continued to pursue the matter. On 24th July 2015 HFEA's CEO wrote to ARB in a more appropriate tone:

> "The law expects fully documented consent to be in place and not to have been withdrawn prior to treatment. This is a condition of the licence the HFEA issues to all fertility clinics. We also require clinics to have procedures to ensure patients, donors, and their gametes and embryos are accurately identified.
>
> What happened in your case is highly unusual if not unique. We are not aware of such an event occurring in any other UK clinics, either before or since your experience. That may be of little comfort but I am sure you will appreciate that it is difficult for regulations and procedures to cover every eventuality, particularly where an act of deception may be involved."

56. At a meeting with ARB on 3rd September 2015, the Director of HFEA "stated categorically that the clinic is NOT in breach of its own SOP, HFEA Code of Practice nor Legislation".

57. On 25th January 2016 ARB wrote to HFEA's CEO questioning whether it was properly discharging its function as a regulator, and drawing attention to adverse judicial comments in this context. On 29th February 2016 the CEO replied. He repeated HFEA's line that the clinic acted reasonably, and that it was only with the benefit of hindsight that one might think otherwise.

58. ARB has also drawn attention to news reports of fertility clinics suspecting or experiencing identity fraud. In 2008 the *Evening Standard* reported as follows:

> "A husband is threatening legal action after his estranged wife twice gave birth without his consent by using frozen embryos created while they were still together.
>
> The woman deceived a world-renowned IVF clinic into fertilising her on two occasions by forging her husband's signature on a consent form."

HFEA was aware of this impending legal action at the time. Its assertion that ARB's experience was "highly unusual if not unique" appears to ignore this evidence.

ARB's Oral Evidence

59. As with all other witnesses in this case, the reference to "oral evidence" includes the contents of ARB's witness statements - three in his case. Any significant matters which emerged in cross-examination will be identified specifically.

60. ARB told me that, following the birth of D in November 2008, his relationship with R deteriorated "catastrophically", due in the main to the "life-changing" injuries and trauma that R suffered during the course of giving birth to D. By the following year it had become a "dutiful yet loveless relationship, and at times I think it fair to say that we hated each other". ARB accepted in cross-examination by Mr Jeremy Hyam QC for the clinic that his relationship with R had been volatile even before they attended the clinic in 2007/8 for IVF treatment. Mr Mark McDonald for R asked ARB a series of detailed questions about the nature of his relationship with R before 2010. He said that these questions were relevant to the issue of ARB's credibility. I bear this evidence in mind, but save in one specific respect I do not consider that I was greatly assisted by this line of questioning. The parties to any relationship, particularly a bad one, are likely to have very different perceptions as to the state and quality of that relationship at any given point in time: even more so through the prism of hindsight.

61. Mr McDonald rightly pressed ARB to explain his email to R dated 11th April 2008 (see paragraph 41 above). I think that the email speaks for itself. ARB agreed that it is an embarrassing email, and in effect that he could not excuse it. However, he denied that D was an unwanted child or that he was really inviting R to have an abortion.

62. ARB stated that he and R visited the clinic on 5th March 2010: this was the only occasion on which he attended. The purpose of the consultation with Mr Trew was "exploratory"; it was "simply a fact-finding exercise", to avoid a "stand-up fight". In cross-examination ARB did not accept that he attended the clinic in March 2010 because he wanted another child. From his perspective, they were exploring how R could deal with her life-changing injuries; and this included considering whether she could, or could not, have further children. ARB could not recall the specifics of whether R had been advised that she needed to complete her family before remedial surgery could take place.

63. Mr Trew's advice to them was that there was no reason why they could not have another child because there were unused frozen embryos. However, a number of tests would need to be carried out on R. ARB paid the fee of £750 (which did not include the cost of the tests Mr Trew recommended) and signed the Patient and Partner Questionnaire that day, leaving the date blank. He then gave the questionnaire, and I infer the rest of the "package of papers" he refers to in this first witness statement, to R. ARB said that he did not read these documents, from which it may be deduced he did not take on board the further information contained in them to which he was referred by Mr Hyam. ARB said that he was aware of the further consultation on Friday 30th April 2010 but that he did not attend it. Aside from his recollection, ARB relies on the fact that he would not have been sending various emails between 10:03 and 10:57 had he been attending a clinic appointment starting at 10:00. It is common ground that ARB did not attend the co-ordination appointment on 14th May 2010, and it is his case that he was unaware of it.

64. ARB was very closely cross-examined by Mr Hyam as to his true intentions in relation to consulting Mr Trew on 5th March 2010, and thereafter. He accepted that the tests that R would have to undergo were a "precursor" to treatment, namely FERC. He also accepted that he told Mr Trew that there had been no change as regards his own health. Further, in the event that the tests were positive ARB understood that R would be in a position to undergo FERC using the frozen embryos the freezing and use of which he had previously consented. However, he was adamant that, at least as far as he was concerned, he had not agreed to have another child: "this was not a conversation, or decision, to have another child". Later in his cross-examination, ARB agreed, "perhaps she wanted another child". He added that R's intentions were unclear and that this was "not a normal situation".

65. When cross-examined by Mr McDonald, ARB was taken to paragraph 18 of the Amended Particulars of Claim and paragraph 6 of his solicitor's witness statement which could be interpreted as accepting that the purpose of the consultation with Mr Trew was to explore the potential options for conceiving a second child. Further, the point was made by Mr McDonald that R had already had gynaecological and obstetric investigations-relevant-to-her-vaginal-tear-before 5th March 2010. Then I asked the following questions:

> "JUDGE: Do you think in March 2010 R wanted another child, looking at it from her perspective, not yours?
>
> A: yes probably … she probably – in a sense what she wanted was to kind of get on with her life. We all want to get on with life, you know what I mean?
>
> …
>
> JUDGE: Do you think she wanted to have another child?
>
> A: in hindsight, probably yes. In hindsight, yes … You don't go to an appointment like that unless it's your contemplation. We were still a couple …"

66. ARB was also asked by Mr Hyam about the bundle of documents that was handed to him and R following the consultation with Mr Trew. He could not recall reading any of them, although he signed but did not date the Patient and Partner Questionnaire in three places. His evidence was that he did not complete any part of the questionnaire, and trusted R to do so accurately. He agreed that the negative answer to the question, "is there any serious violence or discord within your family environment" was incorrect. I set out some of the answers he gave in relation to the questionnaire:

> "Q: Do you accept that if you had read it, you could have been under no misapprehension that the document was, in fact, concerned with a questionnaire about the welfare of any child to be born as a result of the treatment?
>
> A: Yes, if I had read it, I would
>
> …
>
> Q: Yes, so, again, I think you will accept that had you read that, you could have been under no misapprehension that this document was about the Frozen Embryo Replacement Cycle, which had been recommended by Dr Trew with the precursor of ultrasound scan, hysterosalpingogram. You are nodding, I think the answer is
>
> A: Had I read the document, I might have interpreted that, yes.
>
> Q: You might have interpreted? My suggestion is that you couldn't have given it any other interpretation.
>
> A: Okay, I'll accept that."

67. ARB accepted that the document, "FERC Day 21 Start – Patient Guide" gave detailed information about FERC cycles which would, had he read it, have reinforced the information that he had already been given by Mr Trew.

68. ARB was also asked by Mr Hyam about R's evidence (see paragraph 27 of her witness statement) to the effect that following the consultation with Mr Trew she had a discussion with ARB, and agreed, that only one embryo would be replaced. On R's account this was before the second consultation with Mr Trew (on 30th April 2010) which ARB is adamant he did not attend. ARB was clear that R's evidence in this regard is a fabrication.

69. ARB was asked about whether R told him about the positive results of her tests carried out on 30th April. His evidence was that she did so in passing, and that this certainly was not a "joyous moment" in the context of an agreement to have a child. There was no discussion about what to do next: they were barely on speaking terms.

70. ARB, R and D went to Southwold on 30th April 2010 and returned after the long weekend. This by all accounts was disastrous, and ARB's evidence is that R decided to move out of his house and to return to her own property once a tenant left in July. ARB paid for and carried out a number of decorative improvements to R's home: these cost approximately £8,000.

71. In July 2010 ARB had a clear-out at home and found a pouch containing IVF drugs together with R's other possessions in the garage. ARB believed that this was left over from one of the many failed attempts at IVV, and thinking nothing of it disposed of the pouch. When he later mentioned this to R, his recollection is that she made no comment.

72. In August 2010 ARB received from the clinic the form, "Frozen Embryo Bank Record Update and Agreement Renewal". He had completed, and signed, similar forms in previous years. On 5th September 2010 he signed the form and gave it to R, in order to "prevent another shouting-match" and not to jeopardise his access to D. ARB is adamant that he did not sign this form because he and R had agreed to have another child. Specifically:

> "Again I emphasise that at no point did we have a conversation where we agreed to return to the clinic to have another child. At paragraph 41 of the Defence, R says she told me that there were some forms to be signed "to complete the process" and she is clearly suggesting that the "process" was the consent to thaw and implant the embryo. This is a fabrication and absolutely not true. Given the rancour within the relationship there was no way I would have signed a document agreeing to a further implantation then or at any other time. It was stressful enough dealing with R and negotiating reasonable contact with D; the very last thing I would have agreed to was the imminent implantation of another embryo which would have made matters much worse."

In cross-examination by Mr Hyam ARB did accept that the only purpose of continuing to store embryos was for the treatment of R. ARB also had to accept that, in signing this form as R's partner, he was misstating the position. He agreed in cross-examination that the clinic could not know if he and R had separated unless he (or R) told them. From his point of view, however, he was signing this form in order not to inflame an already delicate situation. He was "content to continue with storage because [he] was protected by the Agreement"; as he added in cross-examination, there was not one "iota of risk".

73. In cross-examination by Mr McDonald, ARB agreed that R paid the annual storage fee. Later, I was told that this was £300. ARB denied that he was being cruel to R in giving her false hope.

74. Neither Mr Hyam nor Mr McDonald dealt in much detail with ARB about the timing of his signature of the Patient and Partner questionnaire and the terms of his letter dated 18th March 2011 (see paragraph 48 above). In answer to Mr Hyam's questions, ARB was constrained to agree that the date on the questionnaire – 14th September 2010 in relation to his signatures - tallied with the Tuesday on which he delivered his dogs to R to be looked after by her for two or three days. Mr McDonald did not cover this topic at all. So, ARB was not asked specifically about his affirmative statement in the March 2011 letter that he signed forms in addition to the renewal document, and that he asked R twice not to do anything without his permission.

75. ARB told me that between July 2010 and February 2011 his relationship with R was "very strained". In November 2010 he met T and married her in April 2012. They have one son.

76. In January 2013 Mr Trew sent ARB a copy of the form, "Consent to Thawing of Frozen Embryos". ARB's evidence was that he had not seen it before. According to paragraph 32 of his witness statement:

> "I had never previously seen this document, and the one provided by Mr Trew dated 20th October 2010 purports to contain my signature. Although the signature may be similar to mine, I know without a shadow of a doubt it is not. The other handwriting on the form, including the date of 20th October 2010, is R's. I have checked my diary and on [Wednesday] 20th October 2010 I was in London attending a full day of meetings and appointments: 8am at the vet with the dog, noon at a Museum trustee board meeting, 5pm at the vet again, and at 6:30pm meeting a planner at Shoreditch."

Mr Hyam pressed ARB on this point, seeking to explore how and why he could be so sure. ARB's answer was that he could see that it is not his signature just by looking at it. In answer to questions asked by Mr McDonald, ARB pointed to specific differences between the signature on the form and his true signature. I invited Mr McDonald to put to ARB, if so advised, that he was fabricating his evidence (it seemed to me that the possibilities here were binary, and that there is no real room for mistake). Mr McDonald did so, and ARB denied that he was giving untrue evidence.

77. Mr McDonald was clearly alive to the point that, if ARB knew that he had signed a number of forms without reading them carefully, the possibility that he in fact signed the Consent to Thaw form could not logically be excluded. ARB's absence of a recollection could not be dispositive. This point was then pursued by me in the following way:

> "JUDGE: May I look at it from this point of view: did the possibility cross your mind, Mr ARB, that you may have signed some sort of consent form which enabled this to take place but you had done so without reading it carefully?
>
> A. No.
>
> …
>
> JUDGE: Why not?
>
> A. Because I'd never signed a form titled consent to anything. I was absolutely clear in my memory of that. I remember the subscription form. I remembered that. I am absolutely clear.
>
> JUDGE: But there were forms where you consented to the storage and use of the embryos. Those were consent forms, weren't they?
>
> A. You may call it a "consent form", I call a "subscription form".
>
> JUDGE: Well, we've seen that you were consenting to the storage of the embryos, weren't you?
>
> A. Yes.

> JUDGE: But I am just trying to ask you to put yourself in your position back in February 2011 rather than allowing hindsight to infiltrate. As you said at the time, you signed forms without reading them carefully because you trusted R.
>
> A. I scanned them, yes.
>
> JUDGE: You scanned them. So did it not pass through your mind at least as a possibility that, contrary to your intentions, you had in fact signed a form which amounted to a consent?
>
> A. No, never.
>
> JUDGE: And why was that?
>
> A. Because I was clear that I had not signed a consent form. You know, when I've signed -- when we -- with the previous fertility -- rounds of fertility, you know, those forms, the consent forms, carry weight. You sort of look at those things and they are important forms.
>
> JUDGE: So what you haven't said to me is that, "When that pack was given to me on 5 March 2010, after the Trew appointment, I could see what the documents were in it and one of the documents was a consent to thaw form, and that registered with me and therefore I knew that I hadn't signed that particular form". You haven't said that, have you?
>
> A. No."

It was put to ARB that there had been "plenty of conversations about having a second child, on that day and before": ARB denied that. He accepted that he did inform the clinic that he had not signed the relevant consent form until 16th June 2011. At that stage he had not seen any Consent to Thaw form. Finally, in re-examination ARB said that, in relation to all the documents he signed, he did undertake a quick visual scan of them to see what they were.

78. ARB had told his expert, Ms Suthers, that it was possible that he did sign the Consent to Thaw form but had been deceived into so doing. This was before ARB had seen the expert handwriting evidence in this case.

79. The first that ARB was aware of R's pregnancy was on 14th February 2011 when he received a text message from her. It was a bolt out of the blue. At paragraphs 47-48 above I have dealt with the contemporaneous documentary evidence.

80. On 15th February 2011 ARB contacted the clinic "to explain the shocking events and seeking to view the complete medical file". Initially in cross-examination ARB said that he phoned the clinic "to reveal all", but when Mr Hyam returned to the issue the following morning (Day 2 of the trial) ARB said that he could not recall the full detail of that call. The clinic would not release the file without R's written consent. ARB's evidence was that R refused to give this on two separate occasions. In August 2011 R refused to agree to a DNA test to confirm paternity. She finally agreed to this in December 2011 when the judge in the family proceedings asked her to do so. ARB

succeeded in obtaining reasonable access to R's file; the precise detail and sequence of events matters not.

81. ARB's evidence was also clear that he was not party to any discussion with Ben Lavender regarding the implantation of "1 good embryo" (see paragraph 26 above).

82. Finally, on 7th January 2013 ARB wrote to the clinic explaining that he and R separated in July 2010. When ARB and T visited the clinic and met Mr Trew and Dr Perez on 13th February 2013, they were both helpful, "contrite" and admitted that the clinic had failed.

83. Towards the very end of his cross-examination, ARB said that E was an "unwanted child". I was genuinely saddened to hear that evidence, and asked him to expand, if he so wished. I set out the whole of ARB's evidence on this point:

> "A: We will treat all the children, although E is an unwanted child, we will treat all the children exactly the same.
>
> Q: Is that how you put it? That she is, even now, an unwanted child?
>
> A: She was not wanted, no. Including the costs, the assistance of buying a home and paying for a wedding and attending university, these are the kind of things that I would consider what I need … a responsible parent. A good parent. That's what will certainly be there for all our children.
>
> JUDGE: Is this a list of expenditure you feel you're doing out of duty, or dare I say, out of love, and you say 'unwanted child', is that really the message you want me to take? I understand what you mean.
>
> A: It's a very, very, complicated position.
>
> JUDGE: Well, you explain it to me then, as best you can, unless you don't want to.
>
> A: (Silence for 13 seconds). It's very difficult to comprehend the situation. You have a beautiful girl who, when she's in our midst, all she does is remind us of pain. She's a beautiful girl who doesn't feel like she's part of our family. She feels like an alien in our home despite the fact that she's a beautiful girl. It's an impossible situation. It torments my wife who shows nothing but kindness and generosity towards her, but it's deeply painful to her which is deeply painful to me. I can't, at times, bring myself to even hug her, but at the same time it makes me feel terribly guilty. How can I not want to hug a beautiful young girl? To describe such an event, it's just impossible, it's impossible to reconcile this conflicting situation.
>
> JUDGE: Would you feel the same, ARB, if it transpired that you had signed the consent form by mistake, or it was just one of those forms that you signed and then you looked at it and you realised, 'Oh, yes, that is my signature.' Would your attitude be the same?

> A: It's impossible to speculate, these are very irrational responses. [here, I am correcting the transcript]
>
> JUDGE: I understand.
>
> A: You know, in terms of the, sort of, the obligation, it would be easy at her invitation never to have anything to do with that child, at her invitation offering me never to have anything to do with her, ever. There are enough broken children in this world, damaged children. I have a duty, I have the means and I have a duty and irrespective of the outcome I'll fulfil that duty and so will my wife."

R's Oral Evidence

84. R's evidence was that her relationship with ARB was volatile and argumentative almost from the start (i.e. in 2005), rather than after the birth of D. On various occasions they lived apart but then moved back in together. Although any relevant emails and text messages are no longer available from that period, R was clear that they did not differ in tone from those I have set out at paragraphs 41-46 above. Despite the nature of their relationship, she and ARB decided to have a child by IVF.

85. R told me that there were a number of attempts to conceive at other fertility clinics that were unsuccessful: "these … had a profound and lasting emotional impact on me".

86. After D was born, the physical and emotional trauma of the birth caused R's relationship with ARB to suffer greatly. In 2009 the parties attended counselling sessions which were stressful and, from R's perspective, unpleasant, humiliating and insulting.

87. Notwithstanding the turbulence of their relationship, R and ARB discussed having another child on many occasions. They agreed to undergo another round of treatment at the clinic. On R's account, ARB was "very much committed" to having another child, which explains why he was prepared to sign the "Frozen Embryo Bank Record Update and Agreement Renewal" on 29th January 2010.

88. R's evidence was that the joint purpose of visiting the clinic on 5th March 2010 was to discuss the use of the frozen embryos to create a pregnancy and a sibling for D. In answer to Mr Mylonas, she said that this was not a decision which would or could have been taken lightly. The treatment was "very scary" for her, but it was her last chance, she was getting older and she knew that she did not have time to play with. R's account of this consultation with Mr Trew was that he gave a full explanation of the FERC procedure, including the success rates. Following the consultation, ARB was very excited at the prospect of a second child, and expressed the hope that this would be a sister for D. R's recollection was that the information pack was provided not on that occasion but subsequently.

89. R's evidence was that ARB attended the follow-up consultation with Mr Trew on 30th April 2010. The consultant was told that they wanted only one embryo to be replaced. Mr Trew apparently said that they could confirm this later, nearer the time of transfer.

R was adamant that ARB was present on this occasion, and that Mr Trew drew a diagram which enabled ARB better to understand a problem with her fallopian tubes which had not been detected before.

90. According to paragraph 30 of her witness statement:

> "… ARB and the clinic respectively allege that I attended an appointment with Mr Trew on 30th April 2010. I confirm that I have no record of this date. I do not remember seeing Mr Trew without ARB being present and do not remember a meeting with him to discuss the scan results on my own. As stated previously I remember ARB being present for this feedback of the scan results. I note Mr Trew comments at paragraph 24 of the Defence and also confirm that I definitely had no intention of undertaking a "blastocyst transfer" as I was always very much against this procedure."

91. When cross-examined by Mr Hyam about this, R repeated that she had a clear recollection of discussing with ARB the results of these investigations, and her belief was that this was at the consultation itself. ARB was surprised that the scan had revealed that one of her ovaries was twisted.

92. R agrees that the consultation with Mr Carl Batilo (whom she describes as a "nurse technician") on 14th May 2010 was in the absence of ARB. However, ARB was aware of the appointment and they spoke about it. Her recollection is that the relevant forms were provided on that date (i.e. not on 5th March 2010).

93. R's evidence was that, following ARB's employment difficulties in early 2010, "our relationship entered another strained and volatile period". She agreed that by the end of May 2010 she and ARB had effectively separated, although they remained living under the same roof. In late July 2010 she took the decision to move in with her parents "in order to give each other space to deal with our relationship issues". In or around August 2010 she moved into her own house, and she agreed that ARB gave her £8,000 to redecorate. However, she did not accept that her relationship with ARB broke down irrevocably either in May or in July/August 2010. She had moved out on many occasions before and after each occasion they had resumed their relationship. It was therefore "on the cards" that they might get back together.

94. On R's account the plan originally was for the FERC treatment to start in August, during the school holidays. However, it was postponed because at that time their relationship was going through a volatile stage. However, in early September 2010 ARB's signing of the "Frozen Embryo Bank Record Update and Agreement Renewal" "was in the explicit knowledge that I was only agreeing to pay for the continued freezing because we agreed that I was to use them". According to paragraph 39 of her witness statement:

> "We both agreed that time was running out for me so I would need to be starting the cycle as soon as possible. We also both agreed that our son should have a sibling. I recall very clearly ARB saying "do what you want" and that if I wanted to undertake the treatment that the ultimate decision was "up to me". … ARB's responses and conduct clearly confirmed to me that he consented to our use of the embryos in order to enter into another cycle with the purpose of having another child."

95. ARB also signed the Patient and Partner Questionnaire in September (I have already noted that it bears the date, 14th September, in three places). R's evidence was that she completed all the information in the form, including the date. R was clear in her evidence that the 14th September date was correct because ARB left his dogs with her on that Tuesday.

96. Mr Hyam put to R that the Patient and Partner Questionnaire was untrue inasmuch as she and ARB were no longer partners by mid-September 2010. She accepted that they were not in a romantic relationship. Her full answers to Counsel's question was revealing:

> "My view is that we were working together as parents of D and taking a decision in September to have a second child. Obviously we had separated, but my view was that we'd separated before and there was a high likelihood that we could get back together. Obviously I was aware that we might not get back together … But a partnership means parents as well, and we were both already partners to D, so we were partners."

and later:

> "JUDGE: Sorry, what did you say to him, then, before he signed this form on 14 September?
>
> A. Well, the big discussion I remember was on the day of the decision to refreeze, because he brought the form to -- from London to my house, and I remember saying to him, "Well, why have you brought this here? Just get the embryos destroyed". And that's when we had quite a lengthy discussion about the possibility of using them, the outcome of that, the chances, and we discussed again what Dr Trew had said, that it was a 50 per cent -- a 15 per cent chance that it would work. I reinforced that I would only pay what, to me, is a significant amount of money, it was £300 from my recollection, to refreeze if I could definitely use them, otherwise I would definitely want them destroyed because there was no point. The whole point in refreezing was to use them. And so it was at that meeting, there was the long discussion, and then further to that I remember asking him to bring all the forms from his house. I had a separate little area in the dressing room where there was one little drawer that I had for all the documents, and I asked him to bring everything. And so in the subsequent visits he brought the things that he could find, and so he brought these forms and signed them at my house.
>
> …
>
> JUDGE: … Who do you think had the copy of the questionnaire, the ones that you'd been given either on 5 March or on some later occasion? Do you think --
>
> A: They were taken --
>
> JUDGE: -- you had kept them or he had kept them?

> A. No, he kept -- they were all -- all my IVF things were put in this one area in his house. And when I left in July it wasn't a priority to put those in the car. The priority was D's belongings, my basic belongings. And I never emptied that drawer because I didn't need them to move back to my parents.
>
> JUDGE: And then the final question is, the consent to thaw form, does it follow that that was kept at his house too --
>
> A. Yes.
>
> JUDGE: -- until he brought it?
>
> A. Yes."

It follows that on this version ARB brought Patient and Partner Questionnaire, and the Consent to Thaw form, from his house to R's home on some date between 7th September and 13th September inclusive.

97. Further, R's evidence was that in September 2010 "I certainly felt our relationship was in a good place and we seemed to be making progress". When cross-examined by Mr Mylonas, R provided more detail about this. She said that she chatted on the phone with ARB, that he stayed for dinner on occasion, and that he brought Christmas presents for her and her parents in 2010.

98. As for the critical document:

> "I remember informing ARB he needed to sign the Consent to Thaw Form. However, I could not find a copy in the documents he had given me so I requested for the clinic to send me another copy. I note … that the clinic states that it sent the consent form to me on 19th October 2010. However, I would question whether the clinic's records are accurate on this point as I believe that I may have received the form at an earlier date in October 2010.
>
> Subsequent to my request for a replacement Consent to Thaw Form I located the original copy that ARB had given me. I am unsure as to which of these forms was eventually signed.
>
> ARB signed the Consent to Thaw Form when he called to my house on a day that he collected and dropped off our son. ARB signed it, as with the other forms, during one of the many occasions he came to collect or drop off our son. This was every Saturday but he also visited during some weekday evenings. As with the previous documents ARB signed it and I dated it afterwards.
>
> …
>
> For the avoidance of doubt I confirm that I did not forge ARB's signature as he alleges or at all."

99. In answer to Mr Hyam's questions, R said that she could not remember exactly when ARB signed this form. She agreed that all the writing on the form, excepting ARB's signature, was hers. She could not recall what handwriting, if any, was on the form before ARB signed it. She could not recall the date of the conversation with Ben Lavender but believed that it was likely to have been in October. The completed Consent to Thaw form was either the one that ARB had given her between 7th and 13th September, or it was the one the clinic had sent her on 19th October; she could not say which. Further:

> "Mr HYAM: You thought, either because he'd said, "Do what you want", or he'd signed some forms generally tending towards treatment, you thought that you had his permission to go ahead. And you, in the habit of filling in other details for him, took the extra step and put his signature on the document?
>
> A: No. ARB consented and he signed all the forms.
>
> JUDGE: Mr Hyam, the premise of that question flies in the face of common sense. If she thought that he had his consent, well, then the form would have been proffered for his signature and would have been given. The signature would have been given. So I didn't think it was a very fair question. Maybe the question is, if you don't mind me putting it in these terms, that you knew he wouldn't consent and therefore you had to forge his signature?
>
> A: No.
>
> …
>
> JUDGE: Can I be clear, though, you're not sure what was on the form when he signed it: is that right?
>
> A: No.
>
> JUDGE: Because if he had seen the form he would have seen at the very top, "Consent to the thawing of frozen embryos, wouldn't he?
>
> A: Yes."

100. In answer to Mr Hyam's questions, R had to agree that the form contained at least two misrepresentations: ARB was not living at her address, and they were not being treated as a couple.

101. Mr Mylonas cross-examined R closely about the sequence of events in September and October 2010. This was in the context of R's written evidence in the family court proceedings which had said as follows:

> "In the autumn of 2010 [ARB] received a letter requesting payment and permission to continue freezing the embryos. He brought the consent forms to me and I told him to take them back to London and to get the embryos destroyed. When he next came to collect D he brought the documents, signed them and told me to do what I wanted. I said I would

> not pay for freezing the embryos again unless I could use them and informed him that additional forms would need to be brought from his house in London and signed. In subsequent weeks he brought the forms and signed them by the car and I told him I intended to give a frozen embryos cycle a go as I didn't want D to be an only child. He commented I could do whatever I wanted with them. I therefore went ahead with the cycle and D was conceived. When I found out the pregnancy was healthy I informed ARB. ARB was angry and so I asked him if he wanted me to terminate the pregnancy and he said that he didn't want me to do so."

The discrepancies between this statement, which R said was mainly for the purpose of setting out her case on the issue of contact in the family court proceedings, and R's evidence in these proceedings are obvious; and I will touch on these below. I add at this stage that R was pressed both my Mr Mylonas and me to identify these "additional forms" and exactly where they were signed. R's evidence was vague about this, and she seemed unwilling to accept that they must have included the Consent to Thaw form. She also said that she could no longer remember exactly where forms were signed.

102. In answer to Mr Mylonas' further questions about the signing of the Consent to Thaw form, R could not say whether it was signed on 20th October 2010 or later. She agreed that it was most likely to have been a Saturday, but said that R did have mid-week visits as well to put D to bed. R's evidence as to the timing of ARB's signature was very thoroughly tested. This was conducted by Counsel in a number of ways, including with reference to the clinic's HRT FERC form which I have already mentioned. My interpretation of this form - which is shared by the clinic, although the person who completed the relevant entry has not been called to give evidence – is that the Consent to Thaw form was posted to R on 19th October. It is probable, albeit not certain, that the replacement form was sent to her on the day she requested it. It is also probable – indeed in my view close to certain - that R arrived at her clinic appointment on 19th October without the form. On those premises, and interpreting R's evidence that she dated the form "afterwards" to mean that if the form was signed on a later date then it was that date that she wrote in, the Consent to Thaw form could only have been signed by ARB on either 19th or 20th October 2010.

103. However, it became clear from Mr McDonald's re-examination of R that this interpretation may have been incorrect. He put two scenarios to R. The first scenario was that she completed, signed and dated the form on 20th October 2011. R could have signed the form later. According to this first scenario, R told me that it was probable that the form was completely filled in before ARB signed it. She also told me that she did not think that R signed the form on 20th October. The second scenario was that they both signed the form (Mr McDonald did not suggest in what order) and left it undated. Subsequently, when R took the form to the clinic on 29th October, she realised that it needed to be dated, so she in effect backdated the form, based on her then best guess of when it had in fact been signed. Thus, the adverb "afterwards" means "on a later date but giving the (believed) true date".

104. I will be returning to the timing of signing the Consent to Thaw form under Chapter G below. At this stage I note that the first scenario is completely inconsistent with R's witness statement, and that the second is predicated on R probably inserting the wrong date.

105. R agreed that the form ARB signed could not have been in his possession after 13th September 2010. Either it was the form that ARB brought to her between 7th – 13th September, or it was the replacement form sent to her by the clinic. It follows that R must have produced the Consent to Thaw form for ARB to sign when he came to visit D. R apparently could not recall whether ARB signed the form in her presence. I pressed her on this, and – R no doubt anticipating where I might have been going – appeared evasive and non-committal. She could give no explanation for any pencil marks under ARB's signature if that is indeed what these were. When I put to R that it was implausible that anyone genuinely signing his signature would want or need to trace it out in pencil first, Mr McDonald objected to the question. I doubt whether it needed an answer.

106. Mr Mylonas put to R that it is quite unthinkable that the Consent to Thaw form could have been signed a few days before R's email dated 26th October 2010 (see paragraph 45 above), the terms of which are self-explanatory. R's explanation was that there had been similar, "hideous" emails and text messages sent at the time of D's conception.

107. R was asked by Mr Hyam about ARB's text message dated 15th February 2011 – "I clearly remember saying, and you agreeing, that you were not to do anything without my permission". R's evidence was that this conversation took place after the implantation on 2nd November 2011, and came too late. During this conversation ARB specifically asked about the forms he had signed. R said that she did not want to have a lengthy conversation at that stage. It was quite obvious to her that ARB was changing his mind. I do not read R's evidence, of which there was no mention in her witness statement, as suggesting that she made ARB aware that she was pregnant.

108. Mr Mylonas pursued several lines of questioning in relation to the text message of 15th February 2011. In it R had stated that the sibling was for D. Mr Mylonas put to R that she did not say that ARB knew that there was to be a sibling because he had agreed to it. R's answer was that in this text message she was making clear to ARB that he knew about the procedure, and that they would always be tied through D. Then she said that she spoke to ARB on more than one occasion after this spate of electronic communication. She offered to have an abortion, but ARB refused. Although this evidence is not in her witness statement in these proceedings, it is briefly mentioned in one of her witness statements in the family proceedings. ARB was not cross-examined about it.

109. Mr Mylonas pressed R on her evidence hereabouts. In one of her text messages dated 14th February 2011, R had said – "I want D to have a brother or sister. I don't want him to be an only child". Mr Mylonas was noting the first person singular, not plural. R's answer was that this was a reply to ARB's question, "why would you do that?". She also said that she gave further explanation by phone, and that there were a "fair few" conversations over the following weeks.

110. R was asked about ARB's letter dated 5th August 2011 which was hand-delivered to her. In it ARB asked her to consent to the release of the clinic's records to him, and to agree to a DNA test. ARB also made the point that he had previously asked her to consent to the release of the records, on two occasions, but she refused. R's explanation for not giving her consent was that it was coupled with a hurtful request to agree to a DNA test.

111. R's belief is that ARB is mounting a smear campaign against her and is seeking to engineer a forensic advantage in the Family Court proceedings.

The Clinic's Evidence

112. Mr Geoffrey Trew is a consultant in Reproductive Medicine and Surgery at the Hammersmith Hospital, and he is also the Director of the clinic. He is extremely experienced in his chosen specialism.

113. At paragraph 18 above, I have set out Mr Trew's deciphering of his clinic notes. In his evidence Mr Trew told me that medically, albeit not necessarily from the perspective of an embryologist or the patient, his preferred option in 2010 was to do a blastocyst transfer. The fact that R did not express a negative preference at that stage, or later, was not unusual.

114. When cross-examined by Mr Mylonas, Mr Trew said that he would have been surprised had R and ARB not gone ahead with an FERC. In this context he mentioned the expense, the active participation of the couple, and the unpleasant nature of the tests. It was not unusual for couples to decide to delay treatment for up to 6 months.

115. Mr Trew saw R again on 30th April 2010. He cannot recall whether ARB was present; his notes do not assist on this issue; his witness statement refers just to R. Back in 2010 it was normal for female patients to attend alone. He discussed the scan results which were, broadly speaking, normal. Accordingly, he said that he would have told R that "we could proceed with the planned FERC and suggested that we thaw all five of her embryos" and, if enough survived, allow these to develop to the 5-day stage for transfer if possible. R did not express any concerns about this. The number of embryos which would or might have been transferred was not discussed. Mr Trew told me that it was probable that R's co-ordination appointment was booked on 30th April (for approximately two weeks later).

116. Mr Trew had no further involvement in R's treatment. I have already covered his subsequent involvement with ARB.

117. I asked Mr Trew why he had referred to ARB as "male partner" rather than as "patient". His answer was that the partner is not regarded as a patient unless there is a medical problem on his side.

118. Dr Marta Jansa Perez has worked as a Consultant Embryologist and in 2012 was Head of Embryology at the clinic. She was not employed at the clinic in 2010, but she was involved with the disposal of the couple's embryos, the family proceedings, the amendment of the clinic's protocols, HFEA's investigation; and she met ARB and his wife, T, in 2013.

119. Dr Perez attempted to contact R in order to notify her of ARB's withdrawal of consent. She had difficulty in doing so, but in my judgment nothing turns on that.

120. As regards ARB's complaint to HFEA, Dr Perez informs me that she liaised with HFEA and provided it with copies of relevant documentation. However, she does not say

exactly what information was provided, and what explanation, if any, the clinic gave the regulator.

121. Ms Dima Abdo is a Clinical Embryologist. She was Deputy Head of Embryology at the clinic at the time of R's treatment.

122. Ms Abdo was the embryologist who thawed what she describes as "R's embryos" on 2nd November 2010. She has no recollection of this particular procedure. She informs me that she personally checked "the patient's consent forms, including the 'Consent to Thaw' form". I do not know if the apostrophe in "patient's" was intended to be placed before rather than after the "s". However, she does say that she would have checked the signatures by visually comparing them on previous consent forms, and this process would have been witnessed by one of her colleagues in the laboratory. In the case of the male partner, she would have checked the signature against that on the HFEA MT1 form. Had there been any concerns, she would have raised those with the Head of Embryology.

123. Mr Carl Batilo was a Senior Charge Nurse at the clinic in 2010. He saw R on 14th May 2010. His handwriting is clear, and in virtually all respects his notes are self-explanatory. Mr Batilo's evidence was that it was not unusual for a woman in R's position to have attended without her partner.

124. In his witness statement dated 10th July 2017 Mr Batilo tells me that it was the clinic's routine practice to provide patients with a package of documents being those I have specified under paragraph 19 above. Mr Batilo does not say exactly when this package would have been provided, but he correlates this with ARB's evidence about a "package of papers" which the latter says was given to the couple on 5th March 2010.

125. Mr Batilo informs me that R was unsure about thawing all of the embryos. He therefore suggested that R and her partner speak to the embryologist to confirm the number of embryos they were happy to have thawed before they signed the "Consent to Thaw" form. It became clear during his oral evidence that Mr Batilo recorded this on the HRT FERC form. His evidence continues:

> "Since ARB did not attend the appointment with R, and since R was uncertain about how many embryos they wished to have thawed, I gave her the form to take home to complete with ARB and obtain her signature. This process was in accordance with the protocol in place at the time: it was the practice of the nursing team to witness and sign the "Consent to Thaw" form if both partners signed it in front of them.
>
> I have also written that I instructed R to return the completed "Consent to Thaw" form when she returned to the clinic for her first scan appointment. I have written "? Suppress scan". A suppressed scan is usually the first of a number of scans during a treatment cycle …
>
> I asked R to return the completed "Consent to Thaw" form on the day she attended her appointment for the suppressed scan because this would be her next appointment so the form would be returned as soon as possible.

…

> I would also have made a note if I had any concerns about my appointment with R, including any concerns about the nature or status of her relationship with ARB."

126. Mr Batilo gave additional helpful evidence about the HRT FERC form. Day 1 of the cycle was 14th September 2010 and Mr Batilo explained how this tallied with the 19th October date on the form itself. I also note that the last entry on the form reads, "Patient would like to proceed with Day 2-3 Embryo transfer". For the avoidance of doubt, this is not the blastocyst transfer which Mr Trew had recommended. I do not consider that it is possible to draw any inferences from the layout of this document as to *exactly* when R expressed this wish, although I can draw the inference that it was likely to have been agreed with Ben Lavender, as the Consent to Thaw form records. This must have been discussed in October (possibly in late October), and not before.

E. SYNOPSIS OF THE EXPERT EVIDENCE

HANDWRITING

The Evidence of Dr Audrey Giles, BSc PhD

127. Dr Giles is a member of the Chartered Society of Forensic Sciences. Formerly, she was head of the Questioned Documents Section of the Metropolitan Police Forensic Science Laboratory. She has nearly 40 years' experience in this domain. It is clear from her report that Dr Giles is eminent in her field, both in the UK and internationally.

128. Dr Giles examined the "questioned signature" on the Consent to Thaw form against originals of ARB's signature and various copies of it. In her opinion, the questioned signature demonstrates a similarity in overall style when compared with ARB's undisputed signatures, but there were clear differences in terms of the fluency and the number of pen lifts. Dr Giles has explained to me in some detail the respects in which this is so, particularly in relation to the "R" and the "B". Further, the final long upward stroke of the questioned signature is not present in the comparison signatures.

129. In short:

> "The questioned signature on the Consent to Thaw form lacks fluency. This signature bears a superficial resemblance to the undisputed signatures of the male partner provided to me but differs from them in detail.
>
> Examination of the questioned signature under specialised lighting conditions shows the presence of pencil lines closely associated with the black ballpoint pen ink lines of the signature. The nature of the pencil lines is entirely consistent with their having been used as guide lines in the process of tracing. Signatures simulated by means of tracing are commonly associated with poor fluency and they contain structures which, whilst appearing to be pictorially similar to those in genuine

> signatures, are drawn incorrectly compared to those in the genuine signatures.
>
> The features of the questioned signature that I have observed amount to very strong positive evidence to support the view that the questioned signature on the Consent dated 20th October 2010 is not a genuine signature of the male partner but is an attempt to simulate the signature by means of tracing.
>
> I cannot exclude the possibility that the questioned signature is a genuine signature of the male partner made under highly unusual circumstances. However, I consider this possibility to be extremely remote."

130. In her oral evidence (cross-examination, not further evidence in chief) Dr Giles expanded on the technical aspects of her testimony. Under the Video Spectral Comparator, 1,000 nanometres of infra-red light shows the presence of carbon, appearing as black in colour to the human eye. Taken in isolation, Dr Giles agreed that this did not necessarily show the presence of pencil markings because it could be ink. However, she added that whereas black ink fluoresces, pencil does not – and there was no fluorescence she could see. Under the stereomicroscope, Dr Giles could see the characteristics of graphite deposits. In her experience, these were clearly the appearance of pencil markings.

131. Mr McDonald valiantly cross-examined Dr Giles to the best of his ability, but the upshot was that her evidence was, if anything, fortified by that process. Dr Giles did not accept that her methodology was "unscientific" or "subjective", although she did agree that this discipline is qualitative, not quantitative. She agreed that a person's signature will show variability from time to time, and in different environments. She added that ARB's is a sophisticated signature which is difficult to simulate. Dr Giles could see some evidence of smudging of the pen signature, which was consistent with someone attempting to rub out the pencil tracings. It is not possible, she said, for ARB's pen to have malfunctioned part way through writing his signature, not least because her specialist examination had revealed the existence of a complete, now effaced, signature under the ink signature which is present on the document. Further, someone writing over a traced signature would find it difficult to attain the characteristic fluency of the true signatory.

REGULATORY

The Evidence of Ms Elaine Suthers

132. Ms Elaine Suthers was called by ARB to report on the procedures in place at the clinic during the period 2008-10 relating to FERC treatment and obtaining informed consent. She has over 20 years' experience in the management and delivery of healthcare services, including employment in the Assisted Reproductive Therapies sector. Between 2008 and 2012 she was a Regulation Inspector/Methodology Lead at HFEA. She informs the Court that on 13th July 2010 she was a support inspector on an unannounced interim inspection at the clinic. One area of activity requiring

improvement was the requirement for documenting the patient/donor identity check within medical records.

133. Ms Suthers' evidence was that it was incumbent on the clinic to obtain ARB's informed consent in writing. A valid informed consent must be voluntary, informed and given by someone with requisite capacity. Further, "consent is a process – it results from open dialogue, not from getting a signature on a form".

134. Ms Suthers' analysis, drawing together all of the relevant regulatory materials, was that the clinic owed ARB a duty to obtain his written informed consent before R underwent the FERC at the end of October 2010. In her opinion, the clinic failed in that duty. Specifically, there is no evidence that Mr Trew dealt with the issue of consent on 5th March 2010; ARB did not attend any of the later clinics or consultations, and so was given no opportunity to discuss or understand the procedures; no one checked with ARB whether he wanted to go ahead. Further:

> "In this case, the Clinic separated the provision of information about the proposed procedure, i.e. at the consultation with Mr Trew where R and ARB were both present on 5th March 2010, and the later signing of a consent form (dated 20th October 2010). This was an inherent weakness in the clinic's operating procedures. In ARB's absence a member of clinic staff receiving a signed consent form some seven months later than ARB's last attendance could not verify what information had been provided, as it had not been documented, nor verify that it had been understood or if circumstances had changed."

135. Thus, in Ms Suthers' opinion, there was not merely a failure to obtain ARB's written consent; the clinic failed to obtain his consent at all.

The Evidence of Dr Sue Avery, PhD

136. Dr Sue Avery was called by the clinic to provide an expert regulatory report regarding the procedures and practices at the clinic. She is a Clinical Embryologist by training, has been working in the field of Reproductive Science and Medicine since 1981, and is currently the Director and Person Responsible for Birmingham Women's Fertility Centre. Dr Avery is also a fellow of the Royal College of Pathologists. In the past Dr Avery has been a Board Member of HFEA and served on its Code of Practice committee.

137. Dr Avery accepts that the principle that governs the law around gametes and embryos is based on the concept that nothing can be done with a person's eggs or sperm, or embryos developed from them, without their explicit consent (the use of the possessive pronoun "their" can give rise to ambiguity: in relation to embryos, it means the consent of each gamete provider). In the event of withdrawal of consent by one party, that exercise of autonomy prevails over the wishes of the other party.

138. In Dr Avery's opinion, it would appear that the couple gave adequate and appropriate consent to the continued storage of their embryos. She refers to the renewal form signed by the parties in September 2010. She notes that the clinic proceeded with the FERC

on the basis of relying on the Consent to Thaw form presented to them by R, which had apparently been signed by ARB and R. Ms Dima Abdo checked the consents against the signatures on previous consent forms, prior to thawing on 2nd November 2010. Dr Avery points out that "to the lay eye" the signature appears to be indistinguishable, and that the clinic had no knowledge of the breakdown in the relationship between ARB and R which had not been communicated to it.

139. In Dr Avery's opinion, the clinic followed its SOPs in this case. It is not unusual for female partners to attend alone. Until they were revised after this incident, the clinic's SOPs were predicated on reasonable presumptions as to communication between the parties and the absence of fraudulent conduct by one party. Dr Avery observes that even the revised SOPs "cannot be said to be utter proof against a similar situation". However, "a balance must be struck between protecting the individual partners from one another, protecting the clinic, and treating patients in a sensitive and supportive manner".

The Joint Statement

140. In their joint statement the experts are agreed that:

(1) the event requiring written informed consent is the individual procedure for the thawing of an embryo and FERC treatment.

(2) written informed consent is required from both gamete providers.

(3) "disingenuous behaviour is not anticipated".

(4) should the Court conclude that ARB's signature is forged, "this does not constitute effective consent".

(5) broadly speaking, ARB was given information about the general nature of the treatment to be provided, the consequences and the risks, and the requirement for further tests.

141. The joint statement also revealed the fault line between the experts' respective views. It is Dr Avery's opinion that ARB was given sufficient information about the procedure to be undertaken, and that this information must be deemed to include that which was only communicated to R at the FERC consultation on 14th May 2010 (and, one might add, later appointments). This is because many partners do not attend these consultations and it is reasonable for a clinic to proceed on the basis that information will be shared. However, it is Ms Suthers' opinion that a clinic should not operate on this presumption, "but should individually confirm informed consent from both gamete providers". On her analysis, a clinic must provide information "face to face", or at least verify on such a basis that information has been given and understood.

Cross-Examination of the Regulatory Experts

142. I am grateful for the courteous, skilful cross-examinations undertaken by Mr Hyam and Mr Mylonas. The point at which the experts were being asked to opine on matters of

law was sometimes difficult to discern. Further, if – but only if - the clinic's contractual obligation was absolute, it seems to me that the experts could not usefully assist me in any way. For the purposes of evaluating what they said in cross-examination, I must therefore proceed on the premise that the clinic's obligation was less than absolute. On that hypothesis, these experts were excellently placed to assist me as to the standard of care.

143. Ms Suthers agreed in cross-examination that the Patient and Partner questionnaire, dated September 2010, was furnished to the clinic "to all appearances on behalf of both of them".

144. Ms Suthers was asked about the DoH Guidance (see paragraph 35 above). She agreed that written consent merely serves as evidence of consent. She also agreed with the propositions that the presence of a written consent document did not necessarily mean that the signatory had *in fact* consented, and that the absence of such a document did not necessarily mean that the individual was not *in fact* consenting to the relevant procedure.

145. Mr Hyam spent some time seeking to demonstrate that the Consent to Thaw form was not a document required under Schedule 3 to the HFEA 1990; rather, it was a "local" documentary requirement designed to fulfil the clinic's common law obligation to secure the informed consent of both gamete providers. Ms Suthers agreed with that proposition. She also agreed that the written consent which satisfied the HFEA 1990 was the MT1 form which had been signed in this case in February 2008.

146. Ms Suthers was asked whether she agreed that Mr Trew had gone through the whole FERC cycle procedure during the course of the consultation on 5th March 1990. Ms Suthers did not accept that this was so: further information would have been provided at what she called the FERC appointment (this was the co-ordination appointment which took place on 14th May) and at the appointments in October. This information would have been "around thawing of the embryo, the risks involved in the embryo thawing, [and] the number of embryos in the actual cycle". Ms Suthers drew attention to the additional writing on the Consent to Thaw form, and to the time gap between the Trew appointment in March and the thawing in October.

147. However, Ms Suthers was constrained to have to agree that:

(1) the clinic's SOP for telephone or postal co-ordination, or something similar, was practised in a number of IVF clinics at the time (at one point, she went further and agreed that it was common practice).

(2) the presumption that a couple being treated together would share information, whether commonplace or not, was one which some clinics would make.

(3) it was not uncommon for the male partner not to attend the co-ordination appointment or the final appointment before implantation.

(4) some clinics operate a practice whereby the Consent to Thaw form, as a "provisional consent", is in place at or before the time of the first suppress scan appointment, with the final decision being made on the day of implantation (when

it would be common only for the female partner to be present) as to the number of embryos to be thawed.

148. Mr Hyam put to Ms Suthers that the MT1 form signed by ARB and R in 2008 was a valid consent for the replacement of embryos (but not their thawing) unless and until it was withdrawn, or the couple separated. Given that this raised a point of law, I did not require Ms Suthers to answer that question. She did agree with a slightly different proposition, namely that it is important that couples inform a clinic that they have separated, and that without such information there is no other way that the clinic could have known. However, Ms Suthers did not accept that it was unrealistic for clinics to check with each gamete provider that informed consent had been given even if signed forms existed. As she put it:

> "Informed consent is one of the central tenets of this. And it should be absolutely clear that both parties have given their absolute informed consent. How the clinic chooses to do that is entirely their matter … They should discuss their treatment [i.e. the couple should discuss it as between themselves], and I think it is reasonable that the clinic needs to reassure themselves that both parties have [been] provided with that information. At that point, the clinic did not know [that they had been]."

149. In re-examination Ms Suthers resiled somewhat from what she had agreed with Mr Hyam (see paragraph 145 above):

> "Q: Did you understand that the Act meant that the requirement for consent, written informed consent, was satisfied by the MT1 form, and under the Act there was no further requirement for written consent by Mr ARB?
>
> A: There would always be a requirement for – prior to the FERC, the frozen embryo replacement cycle, for the thawing of the embryo and the use at that time."

150. Turing now to Dr Avery, she was asked by Mr Mylonas about her time at the Bourn Hall clinic between 1991 and 2003, during the last six years of which she was its scientific director. She was unaware of the detail of the claim reported in the national press in 2008 arising out of forged consent forms on two occasions leading to two live births. Further, her clinic had not been asked to take part in a study conducted by Dr Luca Sabatini at Barts. This entailed a poll of 45 of the then 86 IVF clinics in the UK, and it was found that 37% of these had experienced or suspected ID fraud.

151. Dr Avery continued to agree that, if ARB's signature on the Consent to Thaw form was forged, he had not given an effective consent. However, from the perspective of the clinic, he had been given the relevant information. The clinic could reasonably rely on the fact that the couple were being treated together, generating the presumption that they would communicate with each other. Her position was that the MT1 form amounted to an effective consent to the use of embryos under Schedule 3 to the HFEA 1990, whereas the clinic's Consent to Thaw form was "internal", "good practice" and a requirement of the common law.

152. Dr Avery accepted that she would regard the male partner as a "patient" because he was participating in treatment with his female partner. It was put to Dr Avery that the presumption that all relevant information would be communicated by one person to another, with responsibility for this being effectively delegated by the clinic to the female partner, was unique in medical practice. Dr Avery's answers were as follows:

> "A: I would concede that I can't think of another circumstance, but I think also it's necessary to understand that this treatment in itself is unique, in that it involves more than one person. So if you were carrying out -- it wouldn't be reasonable, were I to need surgery, to send my husband to attend the appointment and for him to come home and tell me about the surgery that's going to be carried out directly on me. However, this is quite a different concept, medically, to having second-hand information about a procedure that only involves the one person directly.
>
> Q: Well, it means that you need to have the informed consent of both parties, doesn't it?
>
> A: I don't think there's been an argument that you don't need informed consent from both parties.
>
> Q: If you turn to page 409, I am just wondering about the reasonableness of all these presumptions. In your response at 409 at the top of the page I think you explain why these shortcuts are allowed. And it's the third line down: "It's common practice for such consultations to be carried out in the absence of the male partner, as it is often difficult and a matter of additional stress for couples to arrange to attend the number of appointments required together." Pause there. They don't need to attend together, do they? They could attend on separate occasions, as long as each partner had the risks/benefits explained to them and provided they consent. You don't need to have them synchronising their diaries to attend?
>
> A: Yes, that's a possibility. However, there is no need for both partners to attend all appointments generally, because of the nature of the appointments that take place during the course of either an IVF treatment cycle or a frozen embryo replacement cycle."

153. Dr Avery was pressed by Mr Mylonas on the clinic's SOPs. In a case where both partners are present, the requirement is for the Consent to Thaw form to be signed in front of a clinician, and witnessed. In a case where both partners do not attend the clinic, "give the consent form and emphasise the importance of returning it at the first scan appointment". Dr Avery did not accept that this practice "hugely diluted the protection to the partner who did not attend". She said that the premise of this was the need for trust between clinics and their patients, that the clinic's SOPs were common practice at the time and "not unreasonable practice because of the amount of information they've had up to that point and the concept of what they are consenting to". However, Dr Avery had to accept that the same logic would apply even had the male partner attended no FERC consultations whatsoever. Then, and in answer to my question:

> "A: I would say that had both partners been present or were they present for this consenting procedure, then there wouldn't be a position whereby the clinic had any reason, as we're in the position now, to doubt that the paper they had received was genuine, because it had been signed in their presence. In terms of the protection -- there are two groups of people being protected by this process. You're protecting the patients and you're also protecting the clinic. And in terms of protecting the patients, the question then is, did they receive any further information in this face-to-face consultation that's pertinent to the concept of thawing and frozen embryo transfer, information that would have changed their decision-making process? And I'm not convinced that it would have changed the decision as to whether or not to proceed with the frozen embryo transfer, had they both been present on that day. And it's the decision to proceed with the thawing and the frozen embryo transfer that we are discussing. And that would appear to have been the decision that had already been made. Hence the earlier attendance for the consultation to discuss the procedure."

Before she gave this answer, I had put to Dr Avery the possibility that R might have decided in October 2010 to thaw all five remaining embryos and to replace the maximum of three. Her answer was the same: from the clinic's perspective, it had followed its procedures.

154. It was also put to Dr Avery that the clinic's practice in effectively delegating the transmission of information from one partner to another was illogical because it relied on someone who was "wholly unqualified and subjective". Dr Avery repeated her answer based on a degree of trust and the fact that both partners had received information orally and in writing. She added that "we are looking at it in terms of treating couples sensitively, and that's why we retain the possibility for consent to be taken where both parties are unable to be present and there is no requirement for them both to be present".

F. THE PLEADINGS AND EPITOME OF THE ISSUES

155. ARB's case is advanced on the following bases, some of which must be seen as alternatives to others, viz.:

(1) breach of an express term, in the nature of a warranty or guarantee, to secure his signed written consent to the thawing of one or more embryos and their subsequent implantation.

(2) breach of an implied term to similar effect.

(3) In the alternative to (1) and (2), breach of an express or implied term to take reasonable care in and about the obtaining of his signed written consent.

156. The clinic's answer to ARB's case proceeds along the following pathway:

(1) no express or implied term of the nature alleged by ARB: the extent of the clinic's implied obligation (there was no express obligation to that effect) was to take reasonable care in and about the obtaining of ARB's signed written consent, and in relation to complying with the terms of its licence and the 1990 Act.

(2) the clinic took reasonable care and was not therefore in breach of contract.

(3) irrespective of the nature of the clinic's obligation to ARB (i.e. strict or to take reasonable care), this obligation did not arise (or was not breached) in circumstances where ARB had himself failed, in breach of contract, to inform the clinic that he had separated from R.

(4) if, contrary to (2) above, the clinic was in breach of contract on this basis, ARB was himself guilty of contributory negligence in failing to notify the clinic that he had separated from R.

(5) in any event, and regardless of the nature of the clinic's obligation to ARB, public policy precluded the recovery of damages for the upkeep of a healthy child.

(6) if all else fails, the claim for the upkeep of a healthy child is too remote, not being in the reasonable contemplation of the parties.

157. The clinic's Part 20 claim against R raises one straightforward issue. The clinic could only be liable to ARB if R forged ARB's signature. In such circumstances, and in the event that ARB surmounts the legal hurdles the clinic has imposed, it must follow that R would be liable to indemnify the clinic against ARB's claim.

158. Counsels' development of the pleaded issues will be taken into account in Chapters H-K below. In my judgment, the issues which arise on the pleadings are as follows.

159. The first issue is whether R forged ARB's signature. If she did not, the case ends at that point.

160. The second issue is whether ARB in fact consented to the thawing and use of the frozen embryos: in other words, the absence of a Consent to Thaw form signed by him is incidental.

161. The third issue is whether it was an express term of the contract between the parties, in the nature of a warranty or guarantee, that the clinic would secure ARB's signed written consent to the thawing and use of the frozen embryos; alternatively an implied term to like effect. Further, it is convenient to address under this rubric the clinic's contention that any obligation it might have owed did not arise in circumstances where ARB had himself failed, in breach of contract, to inform the clinic that he had separated from R.

162. The fourth issue is whether, in the event that the clinic's obligation was limited to one take reasonable care, the clinic was in breach of that duty.

163. The fifth issue in whether, in the event that the fourth issue is determined in ARB's favour (on this alternative iteration of his case), his claim should be obliterated or reduced by his own contributory fault.

164. The sixth issue is whether public policy precludes ARB's primary or alternative claims for the upkeep of a healthy child.

165. The seventh issue is whether the upkeep of a healthy child is too remote a head of claim in the circumstances of this case.

166. It may be seen that the first and second issues depend on my findings of fact. I therefore proceed to set these out under the next Chapter.

G. FINDINGS OF FACT

Introductory Observations

167. I must begin with my impressions of the witnesses.

168. ARB is an intelligent, articulate man whose presentation in the witness box was somewhat tense and overwrought. Once he had got into his stride, some of his answers to Mr McDonald's questions were verbose and tended towards the self-indulgent. However, I do not underestimate the appalling shock which he suffered in February 2011 when he received R's "by the way I am pregnant" text message, and the psychological and emotional conflict he continues to suffer in relation to his daughter, E. I assess ARB to be an honest witness who did his best to give accurate and reliable evidence. However, he has persuaded himself that the purpose of the consultation with Mr Trew was not to discuss the use of the frozen embryos in the context of R having another baby. Save in this respect, I have not hesitated in preferring ARB's evidence to R's.

169. R is also an intelligent and articulate person who seemed fully in control of herself and her emotional responses when she gave her evidence. Her presentation in the witness box was relaxed and quietly confident. R is a professional woman and I have little doubt that in other respects she is an honest and reliable person. However, I have no doubt that her evidence to me, at least on most of the key matters of dispute with ARB, was dishonest. She lied to me about the signature of the Consent to Thaw form, about conversations which she says took place in November 2010 and February 2011, about what she says ARB agreed to in September 2010, and about ARB attending the consultation with Mr Trew on 30th April 2010.

170. It is obvious to me that, by the time the parties' relationship had collapsed in May 2010 with R moving out in July, R felt that this was her last chance. She wanted a sibling for D; by then, ARB did not. R's reasoning at the time, and it remains so even now, was that she and R were in it together as parents of D. She rationalises and justifies the outcome on the basis that her family is now complete. ARB's rights, interests and feelings were, and are, wholly subordinate.

My Assessment of Dr Giles

171. In relation to the allegation of forgery, I agree with Mr McDonald that the burden of proof lies on ARB and I must apply the civil standard of proof (see B (Children) (Care

Proceedings: Standard of Proof) (CAFCASS Intervening) [2009] AC 11 and In re S-B (Children) (Care Proceedings: Standard of Proof) [2010] 1 AC 678) to the entirety of the evidence before me, including the inferences to be drawn from that evidence and the inherent probabilities. I accept Mr McDonald's submission that were I to decide that ARB's evidence were not credible, that would require me to scrutinise Dr Giles' evidence with even greater care. This, in other words, is a composite assessment which does not depend on my chosen point of embarkation.

172. However, for the purposes of setting out my conclusions in this Judgment I do have to start somewhere, and it is convenient to begin with Dr Giles' evidence. She was an excellent witness who gave her evidence in a careful and measured fashion notwithstanding the tone of parts of Mr McDonald's cross-examination. I cannot fairly say whether it was Mr McDonald's intention to ruffle the witness; if it was, he did not succeed.

173. Mr McDonald submitted that there are a number of reasons for caution before accepting Dr Giles' evidence, not least because (1) the veracity of handwriting analysis and the comparison of signatures has been doubted across the world, and (2) the parts of Dr Giles' report relevant to the tracing aspect and alleged presence of pencil on the Consent to Thaw form lack detail.

174. Mr McDonald has submitted three reports which he observed may be of interest to the Court when evaluating Dr Giles' evidence. The UK Association of Forensic Science Providers sets out a recommended approach to the evaluation of forensic evidence. The National Academy of Sciences in the US has reviewed and highlighted some of the criticisms of the forensic sciences. Finally, an Australian study published in 2002 has examined the error rates in forensic handwriting analysis.

175. Further, Mr McDonald characterised Dr Giles' evidence as "subjective" (in relation to her comparative analysis of the signature on the Consent to Thaw form with ARB's verified signatures elsewhere) and as "an assertion" (in relation to the pencil marks). In particular, it is complained that Dr Giles gave additional evidence about the pencil markings which was not in her report. Thus:

> "It is not hard to see that the potential identification of something which on the face of it appears to be a pencil trace of a signature, provided an easy route to the conclusion that the signature was a forgery. This becomes even more likely when considering that Dr Giles was instructed to consider whether there was a forgery or not; creating a bias from the outset of the exercise."

176. I simply cannot accept these submissions. Dr Giles' evidence is admissible as expert opinion evidence on well-established principles: see, for example, the decision of the Supreme Court in Kennedy v Cordia (Services) LLP [2016] 1 WLR 597 (in particular, paragraphs 41-44). It is the duty of an expert to be objective, to approach the given exercise without preconception and solely with regards to the available evidence. In that regard, an expert is little different from a judge. Mr McDonald's cross-examination of Dr Giles failed to demonstrate that she violated this fundamental aspect of her duty. I agree with Mr Mylonas that it is unnecessary to characterise handwriting expertise as "scientific" in order to render Dr Giles' evidence admissible. An expert witness may give evidence of her own observations, as well as opinion evidence based on her

knowledge and experience of a subject-matter. However, the more that it is demonstrable that an expert has applied scientific methods to her task, the greater the weight that should be accorded to her product.

177. The approach to expert evidence in other common law jurisdictions is of some interest but I am not writing a treatise in comparative law. For example, the decision of the US Supreme Court in Daubert v Merrell Dow Pharmaceuticals [1993] 509 US 579, 589 is based on social and policy considerations intimately tied up with jury trials in civil cases.

178. In my judgment, it is clear that Dr Giles has applied scientific methods to the task of ascertaining what, if anything, was under the biro signature on the Consent to Thaw form. Mr McDonald complains that she gave greater detail about this in the witness box than she had done in her report. That is correct, but experts often do that when pressed in cross-examination. Mr McDonald might have had a valid complaint had Mr Hyam sought to elicit supplementary evidence by way of examination in chief, but he did not. The upshot is of Mr McDonald's own making. Further, it seems to me that Dr Giles was quite entitled as an expert to unify her scientific observations with her considerable experience of similar findings.

179. In his closing submissions but not when cross-examining Dr Giles, Mr McDonald sought to persuade me that there was nothing under the biro signature at all: in other words, what the infra-red light reveals as a palimpsest is non-existent. I do not consider that it is open to Mr McDonald to advance that submission at this stage. Its implications are that what Dr Giles has told the Court *is* something under the visible signature in biro is in fact that very signature illuminated in a different way. If that were really Dr Giles' evidence, she would be seriously misleading the Court. In fact, it is not her evidence because she told me in terms that ink and pencil fluoresce differently, and she also referred me to what was visible on the stereomicroscope. Further, if one carefully examines the middle signature (item (b)) in her report, showing both the pencil and the ink signatures, it is apparent that they do not precisely overlap. It is also clear that there is no separate colouration under R's signature. Finally, Dr Giles was not asked to explain the difference between fluorescence at the green and blue ends of the light spectrum.

180. Dr Giles' comparative evaluation of the signature on the Consent to Thaw form with ARB's known "true" signatures is less scientific, and more opinion-based and experiential. Dr Giles has made a series of qualitative assessments, some of which are not particularly concrete: for example, the degree of fluency. This is not to undermine her judgments; it is merely to point out that they amount to matters of opinion which cannot be quantified. Caution needs to be exercised by me in the weight to be accorded to such matters. However, Dr Giles has also identified clear differences between the disputed signature and ARB's "true" signatures about which in my view I need be less cautious, albeit always appropriately careful and analytical.

181. In my judgment, Mr McDonald signally failed to undermine Dr Giles' opinions in these respects. All that he was able to do was to point out a number of general methodological difficulties. I do not accept that "the veracity of handwriting analysis and the comparison of signatures has been doubted across the world". That is to put the point far too high, and cannot survive Dr Giles' direct rebuttal of it. Some weight should be given to the experience of other common law jurisdictions, but it is difficult to specify

the exact evidence-base for the concerns expressed. It may well be that other jurisdictions do not routinely receive expert evidence in this field from witnesses of the calibre of Dr Giles.

182. It follows that I must reject all of Mr McDonald's criticisms of Dr Giles' evidence. I have indicated the respects in which I approach her evidence with a degree of caution. Overall, however, I felt when listening to her evidence that I was in safe hands.

183. R cannot get away from the fact that underneath the biro signature on the Consent to Thaw form is another complete signature, visible not to the naked eye but only with specialist equipment. Dr Giles has clearly explained the basis for her conclusion that this complete signature was written in pencil. We know, because it is no longer there, that it has been removed in some way. The irresistible inference is that someone has rubbed out this signature, leaving just the biro signature. For that someone else to have been ARB, he would have had to sign first in pencil (or some carbon-based product with similar properties), sign in biro above it, and then rub out the pencil. It was not put to ARB that he did that, and no remotely sensible or intelligible reason for him so doing has been advanced. It matters not for these purposes which copy of the Consent to Thaw form ARB was asked to sign, or indeed the precise circumstances which obtained before and during this event. On the other hand, someone forging ARB's signature had a very good reason for tracing it out in pencil before signing it in biro. This "someone" could only have been R.

184. The evidential force of this point is fortified when consideration is given to Dr Giles' evidence, which I accept, that there are differences between ARB's true signature and the signature on the Consent to Thaw form; and that the latter lacks fluency.

185. In my judgment, Dr Giles' evidence amounts to very strong evidence that R forged ARB's signature on or about 20th October 2010. However, that evidence does not exist in isolation. It is strengthened by other evidence in this case in respect of which I make the following findings.

Findings of Fact: March 2010 to July 2011

186. I find that in March 2010 ARB's and R's relationship may well have been in terminal decline, but it was ongoing. The reason why ARB and R consulted Mr Trew on 5th March 2010 was to discuss the use of frozen embryos to make R pregnant. However, there was a difference in the parties' strength of feeling about this. R desperately wanted another child, a brother or sister for D. ARB was very lukewarm but went along with it. I believe him when he said that by attending this consultation he felt that he was not committing himself to having another child. Given his means, he was not particularly concerned about the financial cost of meeting the clinic's fees. Further, although I am not saying that by going along with it he was altogether oblivious to R's heightened expectations and discomfort (consequent on the medical examinations), these were for him subsidiary considerations.

187. Mr Trew gave ARB and R general information about the FERC procedure, the chances of success and the risks. However, he did not discuss the *minutiae* such as the number of embryos to be thawed, and blastocyst transfer versus implantation at the 2-3 Day

stage. Mr Trew's preference in March 2010 was for blastocysts, although R's evidence was clearly to the effect that she disfavoured this procedure. Mr Trew's clinic letter dated 8th March 2010 ("she wants another baby") clearly reflected his overall understanding of the position; he was doubtless unaware of ARB's reservations.

188. I find that following this consultation with Mr Trew, on 5th March 2010 ARB and R were given the bundle of documents listed at paragraph 19(4) above. It follows that he was given the opportunity to read them, although I find that he did not. In this context it is important to note that ARB has consistently stated that the parties were furnished with the bundle on this occasion, and that it has not been until very recently that the clinic has confirmed through Mr Batilo that that would be its standard practice. R's evidence is that she (and not ARB) was given the bundle on 14th May. I have had no hesitation in preferring ARB's evidence on this issue (subject to the point about a second copy of the Consent to Thaw form: see paragraph 193 below). I also agree with Mr Mylonas that this is another example of R deliberately fabricating evidence in an attempt to undermine ARB's case.

189. ARB's evidence is that he signed the Patient and Partner questionnaire on 5th March 2010 because his understanding was that it was required by the clinic in relation to the tests R would undergo. His evidence was that he did not date the questionnaire, nor did he fill in any details relevant to him. He then left for a meeting, and the package of documents was retained by R. I do not think that the clinic did require the questionnaire to be signed on this occasion, and I infer that had it been a necessary document R would have signed it too. However, that observation does not undermine ARB's understanding. Whether he signed the questionnaire on this occasion, or later in September, is an issue to which I will revert below.

190. I do not accept R's evidence that ARB was "very much committed" to having another child, and that he appeared to be "very excited" about this when they left Mr Trew's consulting room. These are just two examples of mendacious embellishment on her part.

191. Even more importantly, I do not accept R's evidence that between 5th March and 30th April 2010 she agreed with ARB that only one embryo would be transferred. She says that this agreement was communicated to Mr Trew on 30th April 2010, but his notes, and Mr Batilo's notes for 14th May, are inconsistent with that proposition. R made no decision about this until October, and the evidence equally demonstrates that she only expressed her disinclination to have a blastocyst implanted in October.

192. I find that R attended the 30th April consultation with Mr Trew alone, and that she has embellished her evidence about ARB being present – including Mr Trew drawing a diagram of her fallopian tubes to illustrate the issue revealed by her scans. Mr Trew cannot say whether ARB was present and I disregard his evidence that normally the male partner did not attend these appointments in 2010. More compelling is ARB's evidence (he would be lying to me if he had been present, because he would have remembered it), including his evidence about the emails he sent between 10:03 and 10:57 that morning. Furthermore, there would not have been a brief discussion about the scan results after the event had ARB attended the consultation.

193. The long weekend in Southwold was clearly a disaster (ARB's evidence about the date of this weekend has only recently been confirmed by late disclosure of documents), and

by the date of R's consultation with Mr Batilo on 14th May 2010 I find that the parties were breaking up. I accept ARB's evidence that he was unaware of the co-ordination appointment. On the other hand, it is clear that the clinic was continuing to proceed on the basis that R and ARB were being treated together. Mr Batilo's note as to the number of embryos "they're happy to thaw" – directed as it was to the future – reflected his reasonable understanding that he was dealing with a woman who was part of a couple with shared objectives. Given that Mr Batilo's clinic note so records, I find that R was given a Consent to Thaw form by him: this was in addition to the form the parties had been given in March.

194. Exactly when the parties broke up may be difficult to pinpoint, and in my view the precise date does not really matter. By the end of May 2010 ARB and R had decided to live apart; this decision was effectuated in July; there was always a possibility that they could get back together, but that is true of many relationships. I do not accept R's evidence that this was "on the cards".

195. Probably at the end of August 2010 a letter from the clinic arrived at ARB's home address. It is not disputed that it contained the form, "Frozen Embryo Bank Record Update and Agreement Renewal". ARB says that he brought the letter containing this form to R's home address, and I infer that at that stage he was not unaware what the letter contained. The form was signed by him on 5th September 2010 which was a Sunday. I find that ARB signed the form in blank and handed it to R. Whether he or R dated it is unclear, and this point was left unexplored in cross-examination. The legal effect of this form, and the reasonable inferences to be drawn from it, from the perspective of the clinic, raise separate issues which I will address later.

196. The parties are far apart indeed as to the circumstances in which this renewal form was signed, and I unhesitatingly prefer ARB's evidence in this regard. I cannot accept R's evidence that there was a lengthy discussion culminating in ARB effectively telling her, "do what you want". I find that the parties' relationship from July 2010 onwards was extremely fraught, and I reject R's evidence that there were times when it was much better. All the available email traffic supports ARB's version. Had there been such a discussion, whether on this occasion or subsequently, I would have expected to see some reference to it in contemporaneous or subsequent email or text communications. Nor, speaking bluntly, was ARB so irrational and/or supine as to give R what amounted to a blank cheque to proceed as she wished. The correct analysis is that the discussion on or about 5th September 2010 culminated in ARB telling R not to do anything without his permission.

197. I accept ARB's evidence that he signed the renewal form without reading it carefully because he did not think that it was particularly significant; and, moreover, his main concern was to preserve his contact arrangements in relation to D.

198. I return to the issue of whether ARB signed the Patient and Partner questionnaire in March or in September 2010. I have found this a difficult issue to resolve, for the following reasons. First, support for the proposition that the questionnaire was signed in September is to be found in the coincidence as to the dates (14th September 2010 was the first day of R's period – see the HRT FERC form – and it was also the day on which ARB left his dogs with R for a short time), the fact that in ARB's text message dated 15th March 2011 and then with greater detail in his letter dated 18th March 2011 there is reference to R apparently agreeing twice not to do anything without his permission

(if the chronology set out in the letter is correct, the first conversation took place around 5th-7th September, and the second approximately two weeks later), and the fact that in the same letter ARB said in terms that he signed a number of forms at the time (he did not mean the exact time) that he signed the renewal form. Critically, he could not be sure exactly what he signed, and I think that he feared that he might have signed a form which allowed the procedure to go ahead with his consent. In fact, he did not sign the Consent to Thaw form. It follows that, if his letter is to be taken at face value the "forms" he was referring to in March 2011 comprised the Patient and Partner questionnaire, which we know bears his signature in three places. In my judgment, these are cogent points but they are not decisive.

199. On the other hand, I cannot place any reliance on R's evidence about timings and the sequence of events. Although she has consistently maintained that ARB brought forms (i.e. in addition to the renewal form) to her from his home, her accounts have varied over time. It was a significant omission that ARB was not cross-examined by Mr McDonald on the basis that he brought forms to R's home: had ARB done so, that might indicate that he was still working together with R to have another child. Furthermore, ARB has been demonstrated to be an accurate witness in relation to the timing of the Southwold weekend and, as I have said, the date of the provision of the package of documents by the clinic. ARB has a clear recollection of signing the Patient and Partner questionnaire in March, not in September, and I consider that this raises the forensic stakes to this extent: either he is correct, or (at the very least) he is unreliable. Finally, signing the questionnaire in September would be a strange thing to do had the relationship between the parties really been as bad as ARB states.

200. My mind has wavered on this point. I have considered whether ARB might have signed the questionnaire twice, namely in March and again in September 2010, the first copy having been mislaid in the interim. Albeit plausible, this possibility was not properly explored in evidence, and cannot be elevated above speculation. Ultimately, I have concluded that I should accept ARB's evidence that he signed the Patient and Partner questionnaire in March and not in September. The letter ARB wrote on 18th March 2011 is explicable on the basis that, in the absence of sight of the medical file, he could not know what he had signed, and as I have said believed that he might even have signed a consent form. The renewal form was almost certainly signed by ARB on 5th September 2010 and I find that R dated the Patient and Partner questionnaire against ARB's signature on 14th September. On this chronology the March 2011 letter does not prove that further forms were signed by ARB on 5th September. In any event, the March 2011 letter reflects a shocked and fearful state of mind. In these circumstances, I do not think that it is right to treat it as wholly reliable – contrary to my usual practice which is to give greater weight to documents written closer in time to the disputed events.

201. In his closing argument Mr Hyam turned this point round and tried to persuade me that ARB might indeed have signed the Consent to Thaw form at the same time as he signed the Patient and Partner questionnaire. This is complete speculation and clutching at straws. Had he done so, R would surely have kept all relevant documents safely together in the same place. Turning the point round yet further, I consider that there is force in Mr Mylonas' submission that no good reason has been advanced for ARB not signing the Consent to Thaw form on 14th September if he signed the questionnaire on that occasion.

202. Upon the counterfactual premise that ARB signed the questionnaire on or about 14th September 2010, I do not consider that the upshot on the key issues would be any different. On that footing, I would hold that ARB did not sign the Patient and Partner questionnaire because he shared R's wish to create a sibling for D. He did so because he did not wish to upset the delicate contact arrangements in relation to D. On this version of the facts (which I reiterate is not my preferred version), the March 2011 letter would be incorrect inasmuch as the second conversation ARB had with R about not proceeding without his permission could only sensibly have been on or about 14th September 2010, on which occasion – contrary to the terms of the letter – he signed the questionnaire. Critically, even if ARB signed the questionnaire in September, R still had to forge his signature in October because she knew that he would not consent to the FERC.

203. I find that on any view of the evidence ARB and R had no further discussions relevant to this case between approximately 14th September 2010 (I cannot be precise about the date of the second conversation mentioned in the March 2011 letter) and 14th February 2011. At paragraph 207 below, I will be returning to R's evidence about an alleged discussion after 2nd November 2010.

204. Moving forward to October 2010, I find that when R attended the clinic for her first suppress scan on 19th October 2010 she attended without the Consent to Thaw form. She was told that she needed to bring this form to her next appointment. I conclude that it is probable that she telephoned the clinic for a replacement form after she returned home on 19th October, and it is also probable that it arrived the following day. The possibility that R's first attempt to forge ARB's signature was so inept that she had to discard the copy of the Consent to Thaw form that she had retained, and request a replacement, has not evaded my apprehension; but it was not explored in evidence and cannot be elevated above speculation.

205. I reject R's evidence that she had mislaid the form and *then* located it before it was signed. R's evidence as to the exact sequence of events in relation to the signing of the Consent to Thaw form, so obviously a critical document in this case, was chaotic. In her witness statement in these proceedings, ARB signed the form during the course of one of the many visits to her home to see D. In her witness statement in the family proceedings (see paragraph 101 above), ARB brought a number of forms to her and he signed the Consent to Thaw form by the car. This, apparently, was some weeks later. In re-examination (see paragraph 103 above), two possibilities were put to R, to which she assented: the first was contrary to her witness statement in these proceedings; the second predicated that she was highly likely to have placed the wrong date on the form. Mr McDonald's leading re-examination would not have been permitted in a criminal trial, but the latitude I gave him has not helped R.

206. I conclude that it is overwhelmingly likely that the Consent to Thaw form was signed on Wednesday 20th October 2010, which was the day after the replacement document arrived from the clinic. R did not think that it was likely to have been signed that day. ARB was unlikely to have been there that day. R gave evasive evidence about the form possibly being signed by ARB in her brief absence from the room, but that is inherently unlikely too. If ARB did indeed sign the Consent to Thaw form, it is overwhelmingly likely that he did so in R's presence and immediately returned the form to her. Had this been the true scenario, R agreed that ARB would have seen what he was signing. Given the tone of R's email dated 26th October 2010 – the best evidence as to the state of the

parties' relationship at that time – I regard it as close to unthinkable that ARB would have signed a form consenting to this procedure in these circumstances. To the extent that the issue turns on a comparison between the credibility of ARB and R, I unhesitatingly prefer ARB's evidence on this issue.

207. There are five further pieces of circumstantial evidence which point strongly towards R's account being incorrect – aside from the credibility and reliability factors I have already enumerated. First, I refer to R's evidence in cross-examination that after 2nd November 2010 she had a brief telephone conversation with ARB during the course of which he allegedly said for the first time that she should not do anything without his permission. I disbelieve R about this. Not merely do I prefer ARB's evidence that the conversation was in early September 2010, I do not think it plausible that ARB would have asked R not to do anything without his permission many weeks after he had signed the renewal form (and, *a fortiori*, weeks after the various forms which R claims ARB signed but I have found he did not). Secondly, I reject R's evidence as mendacious about asking ARB after the revelation in February whether he wanted her to have an abortion. Given how much she wanted a sibling for D, it is unthinkable that she would have made her estranged partner such an offer. Thirdly, the text messages passing between the parties on 14th and 15th February 2011 are only really consistent with the proposition that R was divulging remarkable information to ARB which he was stunned to receive. Fourthly, although this is a weaker point, I accept Mr Mylonas' submission that R has failed to give a satisfactory explanation as to why she did not consent to the release of the medical file to ARB so that he could see what he did, and did not, sign. Fifthly, well after the conclusion of the hearing, but in response to my general inquiry, the clinic gave disclosure of documents which showed that R paid the £1,100 fee for the FERC procedure on 19th October 2010. Despite its lateness and R's objection, I can see no reason not to refer to this material in my Judgment: it speaks for itself. The clinic's fee was paid by debit card, and it was open to R to dispute that she made the payment by pointing out, if it be the case, that the account number on the face of the document is not hers. For the avoidance of any doubt, however, the late revelation of this document merely served to confirm a firm conclusion I had already reached.

208. None of the contemporaneous documentary evidence remotely supports R's case. Frequently in her oral evidence R was compelled to resort to accounts of conversations she said that she had with ARB, in order to support her version of events. Many of these conversations had not been prefigured in her witness statement. I accept that R is not a woman of means, and that it may have been difficult for her to assemble the best possible case with the benefit of legal advice, but she is an intelligent woman who is not diffident or timorous. I have to say that some of her evidence was made up as she went along.

209. Thus, I conclude that ARB did not sign the Consent to Thaw form on 20th October 2010 or at all. His signature was forged by R. I further conclude that he did not in fact give his informed consent to the procedure because he was not given all the necessary information which would have enabled him to provide his consent, he was not willing to have a child with R in September and October 2010, and he would not have signed the Consent to Thaw form had R asked him to do so. I am completely satisfied that ARB had not in fact been given sufficient information by R in relation to the number of embryos to be implanted and their stage of development. I am also completely satisfied that ARB had no intention of having another child with R after May 2010. In

October 2010 R well knew that, which explains why she resorted to desperate, dishonest measures.

210. In any event, the issue of what ARB consented to is not merely a question of fact. Whatever might be the position under the 1990 Act, the position at common law was that ARB's consent to the procedure was required; and he did not provide it. By signing the Patient and Partner questionnaire, even in blank, ARB is deemed to have given the clinic relevant information relating to the welfare of any child born by treatment under the provisions of the Act. That is a necessary but insufficient requirement as regards the giving of informed consent. Had ARB signed the Consent to Thaw form, he would have been deemed to have given written informed consent whatever his actual state of mind: the plea of *non est factum* cannot be made on these facts. The forgery of the form means that it does not represent a valid decision by the person apparently signing it: see Hale LJ (giving the judgment of the court) in Mrs U v Centre for Reproductive Medicine [2002] Lloyd's Rep Med 259, at 264. I will be returning to this authority in the context of the third issue.

H. THE THIRD ISSUE: ASCERTAINING AND DEFINING THE TERMS OF THE CONTRACT

Introduction

211. Paragraphs 28-30A of the Amended Particulars of Claim advance ARB's case on a number of different bases, but it seems to me that the essence of what is being alleged is as follows:

(1) an express alternatively implied term of the agreement that the clinic would comply with the terms of its licence and the 1990 Act.

(2) an express term of the agreement that ARB's written informed consent would be obtained before any embryos were thawed.

(3) an express alternatively implied term of the agreement that the clinic would exercise reasonable care in and about the discharge of its obligations under it.

212. On preliminary analysis, it appears that the first formulation depends on the Court implying an obligation on the clinic to obey the 1990 Act, HFEA Guidance and the licence conditions: there is no express term I can find to that effect. The source for the express term underpinning the second formulation is the Cryopreservation Agreement: see paragraph 7 of the Amended Particulars of Claim. The third formulation is ARB's alternative case and the clinic's primary case, and so at this stage I need say nothing more about it, save to observe that there is no basis for the averment that the obligation was express.

213. On further analysis, I should add that the first and second formulations are really saying that the clinic gave a warranty, in the nature of a guarantee, to secure ARB's written (informed) consent before any embryos were thawed. I have placed "informed" in parenthesis because the Cryopreservation agreement does not mention it. Anything less than a warranty of this nature collapses into the third formulation, which the clinic does

not dispute. Further, whereas the first formulation states that a term must be implied in law as a necessary incident of the relationship concerned (see, for example, the decision of the Supreme Court in Société Générale, London Branch v Geys [2013] 1 AC 523), the second formulation requires no more, and no less, than construing the contract in line with the objective, contextual principles enunciated at the highest judicial level: see Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, Arnold v Britton [2015] AC 1619 (in particular, Lord Neuberger at paragraphs 15, 17 and 19) and Lord Sumption's scintillating jurisprudential review of these and other decisions in his 2007 Harris Lecture, A Question of Taste: the Supreme Court and the Interpretation of Contracts.

214. In the event that I should hold that the clinic owed a strict or absolute obligation to secure ARB's written consent, informed or otherwise, Mr Hyam does not dispute, subject to his submission that ARB was himself in breach, that his clients failed to discharge that duty. However, Mr Hyam's case is that the clinic did as a matter of fact and law comply with the terms of its licence and 1990 Act.

Implied Term: a Strict Duty?

215. The proposition that duties impliedly arising under the 1990 Act and HFEA Guidance are strict is a challenging one. The Sale of Goods Act 1979 implies undertakings as to title, quality, fitness for purpose and correspondence with description of sample which could fairly be described as strict, but that is because the statute specifically defines them in that way. Usually, implied obligations in a contract of this sort are reasonable care obligations.

216. Apart from this difficulty, ARB's argument under this heading could not succeed unless either the thawing of embryos amounts to their "use" for the purposes of Schedule 3 to the 1990 Act, or alternatively that each implantation is a discrete use which requires separate written informed consent. Thus, these are alternative necessary, albeit insufficient, conditions for ARB's success.

217. In the crucible of oral argument (Mr Mylonas' closing written submissions were silent on this issue), it gradually became clear that what I am calling the necessary condition sub-divides into three questions which themselves interrelate, viz.:

(1) was the thawing and/or implantation of an embryo on 2nd November 2010 "use" for the purposes of Schedule 3 to the 1990 Act?

(2) was the MT1 form signed in February 2008 capable of being a valid, subsisting consent to the "use" of an embryo on 2nd November 2010 notwithstanding that this was a further procedure?

(3) on the facts of this case, was the MT1 form in any event no longer valid because ARB and R were no longer being "treated together"?

218. These are three difficult questions which have not been definitively answered in any of the judicial learning on this topic. In post-hearing emails the parties sought to address a fourth question which had been touched on but not fully explored during the course

of the trial, but in my view (in the light of my conclusions on these three difficult questions) it is unnecessary for me to address it.

219. If the thawing of an embryo on 2nd November was "use" for the purposes of Schedule 3 to the 1990 Act, it would follow that (1) written informed consent to that "use" would be required, and (2) the clinic could not rely on the MT1 form given in February 2008 because that form did not refer to thawing. On the facts of this case, it would inexorably flow that ARB's written informed consent had not been given to the thawing, and the clinic had not complied with the 1990 Act.

220. If the thawing of an embryo on 2nd November 2010 was not "use" for the purposes of the 1990 Act, it would follow that no separate statutory consent for that specific process would be required. Such consent would be required for the implantation, which everyone agrees is "use", and the question therefore arises of whether the MT1 was sufficient, or whether a further statutory consent was requisite.

221. If the MT1 form given in February 2008 was no longer valid because ARB and R were no longer being treated together, the clinic would have to accept that it would have needed a fresh MT1 form, completed in a different way, as the basis for the implantation, and use, of an embryo on 2nd November 1990. There was no such form. The upshot, therefore, would be the same as that I have set out under paragraph 218 above.

222. In order to address these issues (all under the sub-rubric of necessary condition), I begin with a review of relevant authority.

223. In Mrs U, Mr U had signed a consent form (the broad equivalent to an MT1) agreeing that his sperm could be stored and used after his death. Subsequently, Mr U signed a form withdrawing his consent to posthumous use. After his untimely death, the issue was whether the withdrawal form had been procured by undue influence. The President of the Family Division found as a fact that it had not been. The Court of Appeal, in upholding her decision, went further. The clinic did not have an effective consent for the storage and later use of Mr U's sperm, because that had been withdrawn. And:

> "Hence a Centre having in their possession a form dealing with the matters with which it is required by Schedule 3 to the 1990 Act to deal should be both entitled and expected to rely upon that form according to its letter, unless and until it can clearly be established that the form does not represent a valid decision by the person apparently signing it. The most obvious examples are forgery, duress or mistake as the nature of the form being signed. The equitable concepts of misrepresentation and undue influence may have a part to play but the courts should be slow to find them established in such a way as to supply a centre with a consent which they would not otherwise have." [paragraph 26]

Thus, the facts of Mrs U were an inversion of the present facts. The form Hale LJ was referring to amounted, if valid, to a qualification or withdrawal of consent by Mr U. Accordingly, if that form were valid the clinic had no relevant consent in place to justify the retention of embryos. Hale LJ held that the form should be treated as valid unless clearly demonstrated not to be.

224. In Evans v Amicus Healthcare Ltd [2005] Fam 1, embryos had been created and stored, each of the claimants wished to remove these from storage in order to have them implanted, and their former partners objected. Consent forms had been signed in which the latter consented only to the use of embryos fertilised with their sperm for the "treatment of himself, together with his partner". Each claimant sought a declaration that her partner had not and could not in the future vary or withdraw his consent to the storage and use of embryos. The Court of Appeal (Thorpe, Sedley and Arden LJJ, upholding Wall J) refused to grant the declaration. The *ratio* of their decision was that each male partner was entitled to withdraw his consent under the 1990 Act, and that the effect of doing so was to prevent both the use and the continued storage of embryos since future treatment of the claimant would not be "treatment together" with her partner.

225. There are subtle differences between the reasoning of Wall J at first instance, and the members of the Court of Appeal, on the issues which arose as germane to the present case. I am not concerned with the HRA arguments in respect of which the reasoning clearly differed. In the view of Wall J, the issue of "treatment together" generated a simple question of fact, and it could not be said that the relevant persons remained in treatment together after their relationships broke down. The consent that the male partners had given was no longer effective. Secondly, Wall J rejected the argument that the embryos had already been "used" for the purposes of the 1990 Act such that the consent of the male partners could not be withdrawn. He considered that this was a simple point which raised another issue of fact. The position was that the embryos were examined after they were created to check that they were fertilised, and then they were stored. In Wall J's view, it was clear that inspection and storage did not amount to "use" for the purposes of Schedule 3.

226. The question arises of whether Wall J went further and accepted the full force of Ms Dinah Rose's submission for the HFEA that "use" could not cover creation, selection, freezing and storage. Mr Mylonas took me carefully through paragraphs 154-165 of Wall J's judgment. It is to be noted that Wall J specifically referred to the decision of the Court of Appeal in R (Quintavalle) v HFEA [2004] QB 164 which does make clear that the "use" of an embryo is not limited to its transfer into a woman. At paragraph 165 Wall J held that "in the context of this case, "use" can only mean the transfer into either claimant". I agree with Mr Mylonas that Wall J was tethering this holding to the particular factual scenario which was before him, namely there was nothing which could possibly amount to "use": inspection and storage *simpliciter* could not be.

227. In the opinion of Thorpe and Sedley LJJ (giving a joint judgment), the requirement of "treatment together" is satisfied:

> "… provided and so long as the couple are united in their pursuit of treatment, whatever may otherwise be the nature of the relationship between them. Of course clinics can hardly be expected to investigate and pass judgment upon the physical, sexual, psychological and emotional togetherness as a couple, but it does not seem to us unrealistic to leave to the clinic the necessity to judge whether the couple remain united in their pursuit of IVF treatment. Indeed it can be said that that inquiry is but an element of the obligation created by section 13(5) namely the obligation to take account of the welfare of any child who

> may be born as a result of the treatment or be affected by the birth." [paragraph 29]

What is meant by the clause, "the necessity to judge" is not clear. Further, Thorpe and Sedley LJJ did not expressly disagree with Wall J or Arden LJ on this topic. Mr Mylonas' submission was that all three members of the Court of Appeal were in agreement.

228. Thorpe and Sedley LJJ agreed with Wall J that "the embryo is only used once transferred to the woman" (paragraph 33). They said that this construction was both natural and free from anomalous consequences. However, they expressly mentioned Mance LJ's judgment in Quintavalle: he held that "use" was not confined to transfer. The outcome was that there was nothing to prevent the male partners withdrawing their consents (paragraphs 37 and 41): "future treatment of the claimant would not be "treatment together" with [her former partner]".

229. Thorpe and Sedley LJJ also noted Hale LJ's judgment in Mrs U, observing that it showed "the great importance that must be attached to the prescribed form completed in compliance with Schedule 3 to the Act" (paragraph 39).

230. Arden LJ concurred in the outcome but her reasoning was not quite the same. In her view:

> "… **the consent to the provision of treatment services together must be consent to each and every stage of the provision of treatment services.** Accordingly, if the consent is not formally withdrawn, but those who formerly sought treatment "as a joint enterprise" no longer do so, the consent is inoperative as the treatment services would no longer be within those described in the consent.
>
> The licence holder will not commit an offence under section 4(1) as a result of the treatment becoming ineffective, provided that he had taken all reasonable steps and exercised all due diligence to avoid committing an offence: see section 41(11) …" [paragraphs 94 and 95] (emphasis supplied)

231. As for the meaning of "use", Arden LJ held that processes preparatory to "use" did not fall within the statutory definition (paragraph 101). Although the removal of a single cell from an embryo was "use", this concept applied only to the "final stage" (paragraph 103). On the facts of the case before her, Arden LJ was fully satisfied that visual inspection could not amount to "use": this, *pace* Wall J, was a question of law.

232. I agree with Mr Mylonas that (1) "use" is not limited to transfer or implantation, and (2) the Court of Appeal was not expressly endorsing the submission of Ms Rose that "use" does not cover creation, selection, freezing and storage. It was unnecessary to go that far because the facts of the case before it were straightforward: the processes which occurred before implantation could not remotely be envisaged as "use".

233. I can infer that HFEA does not believe that the thawing of an embryo amounts to its "use". There is some force in the submission that HFEA's view is incorrect. Freezing is temporally anterior to any "use"; it may proceed it by a factor of years. On the other

hand, thawing, being the inverse of freezing, takes a number of minutes and may be immediately succeeded by the act of implantation (there can be refreezing, or there can be disposal in the event of unviability). From the perspective of the patient, this is a process rather than two discrete events.

234. Even so, and attractively as the submission was advanced by Mr Mylonas, I cannot accept it. "Use" is not defined in the 1990 Act, but "processing" is defined in section 2(1) to mean "any operation involved in their [sc. gamete or embryo] preparation, manipulation or packaging, and related terms are to be interpreted accordingly". Processes preparatory to use are not "use" within the meaning of Schedule 3. In my judgment, thawing is such a process, because it is preparatory to the act of replacing the embryo. The Consent to Thaw form rightly refers to two matters, thawing and replacing, and in my opinion these are legally separate. It was therefore unnecessary under the 1990 Act to obtain ARB's written informed consent to the thawing of the embryo.

235. The next question I must address is whether a further statutory consent was required for the implantation of the embryo on 2nd November 2010. Mr Mylonas relies on the sentence I have highlighted in paragraph 94 of Arden LJ's judgment: see my paragraph 230 above. He submits that ARB had to consent to each and every stage of the provision of treatment services. I do not think that this sentence bears the weight that Mr Mylonas is seeking to place upon it. It needs to be read in the context of what follows. The MT1 form signed in February 2008 was, unless withdrawn, a valid continuing consent to the use of an embryo in the treatment of R. If, but only if, ARB and R were no longer seeking treatment "as a joint enterprise", it would follow that no valid consent was in place. However, if they remained joint entrepreneurs, I consider that it must follow that the MT1 form was valid for any of the uses set out in it.

236. The final question I must address under this sub-rubric is whether the MT1 form was no longer valid because ARB and R were no longer being treated together. I have accepted ARB's evidence that this was the case. On my reading of Arden LJ's judgment, she was holding that a necessary condition to the validity and legal efficacy of the MT1 was no longer extant. In such circumstances there would be a criminal liability unless the due diligence defence operated.

237. It must be questionable whether Arden LJ's reasoning is shared by Thorpe and Sedley LJJ at paragraph 29 of their joint judgment. The phrase "necessity to judge" is weakly suggestive of some sort of due diligence obligation, but the juridical source of this duty is not specified. It may be a reference to section 41(11). Even so, I do not interpret the Court of Appeal as differing significantly on this issue. The members of the Court clearly diverged on the HRA points, but I would have expected them expressly to refer to their colleague's or colleagues' judgments if they were in fact disagreeing with them. The same observation applies to the judgment of Wall J which was very clear on this point.

238. In my judgment, the Court of Appeal in Evans was holding that, if the relevant persons were no longer united in their pursuit of treatment, as I have found, then the MT1 was ineffective to amount to valid consent. It follows that the clinic cannot rely on the MT1 form which ARB signed on 13th February 2008. It is not suggested that he gave some other valid consent under the 1990 Act. It further follows that the third of the necessary conditions I set out under paragraph 217 above has been fulfilled.

239. However, that does not mean that the clinic was in breach of any implied term. That would inevitably follow, subject to my conclusion under Chapter I below, only if the predicated implied term imposed a strict obligation. I have noted Arden LJ's analysis in relation to criminal liability, but the Court of Appeal in Evans were not addressing the question of civil liability.

240. I return to the challenging proposition (from ARB's perspective) that in most contractual contexts implied obligations are not strict. Thus far, Mr Mylonas has succeeded in persuading me that on the facts of this case the clinic are *prima facie* in breach of the terms of its licence and the 1990 Act because on 2nd November 2010 an embryo was implanted in R without ARB's consent. *Non constat*, in my view, that the clinic was therefore in breach of an implied term that it would comply with its licence conditions etc. On the assumption that the clinic exercised due diligence, it would have a defence to any criminal proceedings. The fact that these are civil proceedings does not mean, because section 41(11) of the 1990 Act is not available, that there is strict liability. It remains necessary to examine the basis for and nature of the clinic's implied duty under contract, read for these purposes with reference to the 1990 Act.

241. Strict liabilities arise under the Sale of Goods Act 1979 because sections 12-15 so provide. An obligation that goods shall correspond to their description is clear on its face. There are no comparable provisions in the 1990 Act; it is silent as to any civil liability. I go further, in agreement with Mr Hyam, that the 1990 Act does not create civil liabilities which are directly actionable. Accordingly, there is nothing in the 1990 Act itself which can feed directly into the strict obligation invoked by ARB, and no direct bridge between any statutory requirement and the clinic's contractual duties. On any view the implied term relied on does not represent the obvious, unexpressed intentions of the parties.

242. The closest analogy to the present case is to be found in the decision of the House of Lords in Liverpool Corporation v Irwin [1997] AC 239. There, terms were implied into tenancy agreements, which were incomplete, against the general backdrop of the Housing Act 1961. Lord Wilberforce made clear that the obligation cannot be strict:

> "It remains to define the standard. My Lords, if, as I think, the test of the existence of the term is necessity the standard must surely not exceed what is necessary having regard to the circumstances. To imply an absolute obligation to repair would go beyond what is a necessary legal incident and would indeed be unreasonable. An obligation to take reasonable care to keep in reasonable repair and usability is what fits the requirements of the case. Such a definition involves – and I think rightly – the recognition that the tenants themselves have their responsibilities. What it is reasonable to expect of a landlord has a clear relation to what a reasonable set of tenants should do for themselves." [at 256G-H]

243. Paragraph 33 of the clinic's Amended Defence pleads:

> "Insofar as the duty extended to complying with licence conditions and the terms of the Act, the Defendant's duty under the contract was to take reasonable steps to ensure that the licence conditions and/or the terms of the Act were complied with."

244. At one stage in his closing argument Mr Hyam appeared to resile from this, and to accept that the clinic owed a more onerous duty:

> "JUDGE: Could it not be said that it must be an implied term of that contract that you don't act --
>
> MR HYAM: In contravention of the licence.
>
> JUDGE: -- in contravention of the Act and your licence under the Act. That's Mr Mylonas' formulation.
>
> MR HYAM: If that is the formulation I think, as I will be returning to after lunch, but I think at that level that you will comply with the terms of your licence, our answer is we did comply with the terms of our licence on the facts. If it's being said, "Ah, but you didn't because thawing is use", then our argument is we would accept that the contract has to be understood in its context. The context is this is a licensed clinic providing treatment services. Implied into that arrangement is for business efficacy it must be an implied term that the clinic will comply with its licence conditions, and we say that we did. So I am not dissenting from the proposition that --
>
> JUDGE: Sorry, you did because? You complied because?
>
> MR HYAM: There was no breach of the licence conditions in this case" [Day 5, pages 75-76]

On reflection, I do not think that Mr Hyam was resiling from paragraph 33 of the Amended Defence. All that he was saying was that his clients had complied with the licence conditions. I have found that in one respect that they had not.

245. I should make clear that I am not convinced that business efficacy and The Moorcock [1889] 14 PD 64 is the correct taxonomy. I prefer to base myself on Lord Wilberforce's analysis. Further, it must be relevant that the clinic's tortious obligation in relation to obtaining informed consent was to exercise reasonable care: see Montgomery v Lanarkshire Health Board [2015] AC 1430, at paragraphs 87 and 88.

246. In my judgment, although as a matter of fact that there was no valid MT1 in place on 2nd November 2010 for the use of this embryo, the clinic's implied contractual obligation in relation to complying with its licence conditions and/or the terms of the 1990 Act was to exercise reasonable care. I examine whether the clinic was in breach of that obligation under Chapter I below.

Express Term: a Strict Duty?

247. I must now address Mr Mylonas' case that it was an express term of the Cryopreservation agreement that ARB's written informed consent would be obtained before any embryos were thawed. This case depends, as I have said, on the true construction of clause 1(a) of the Cryopreservation agreement.

248. Mr Hyam's elegant submission was that clause 1(a) – "[we] understand that we must both give written consent before any embryos are thawed and replaced" – places no obligation on the clinic to do anything. The clause is solely directed to the patients. He accepted that there was an implied obligation on the clinic in relation to the obtaining of both parties' written consent, and submitted that it required no more than the taking of reasonable care. Mr Hyam invited me to construe the clause against the backdrop of the common law position: namely, a duty to take reasonable care. He submitted that the clause was really doing no more than expressing the clinic's general duty outside the contract. Moreover, he said, the circumstances in which the Court would construe a term in an agreement of this sort as amounting to a warranty or guarantee are rare: see the decision of the Court of Appeal in Thake v Maurice [1986] QB 644. Finally Mr Hyam submitted that to hold that clause 1(a) created a strict obligation would lead to absurd and unworkable consequences.

249. Mr Mylonas submitted that the meaning of clause 1(a) is clear, and that there is no basis for implying any term which is inconsistent with it. The Court should construe the clause according to what it says, because the clinic could have selected other wording, and the Court should also ignore the position at common law, because this is a contract. As for the true construction of the clause, the best way of putting Mr Mylonas' point is as follows. By clause 1(a) ARB and R understand, and therefore agree, that the clinic will not thaw and replace any embryos without the written consent of both of them. ARB and R understand, and therefore agree, that neither of them may be heard to object that if the clinic later refuses to thaw and consent any embryos because the consent of one of them is lacking. It therefore follows that the clinic is informing ARB and R that, in the event that the written consent of one of them is not present, it will not thaw and replace any embryos. This is the mutual understanding shared by the patients on the one hand and the clinic on the other. The hypothetical reasonable reader would not understand this clause in any other way.

250. Although he did not refer to it in this context, Mr Mylonas' argument is fortified with reference to clause 2 of the Cryopreservation agreement. This applies in the event of divorce or separation. In that event, the clinic "will only thaw and replace if both parties give written consent". That, in effect, is the meaning of clause 1.

251. My point of departure is to observe that my duty is to construe the Cryopreservation agreement applying the guidance laid down by Lord Neuberger in Arnold. I have had regard to Lord Neuberger's seven factors. Aside from these, the position is as summarised at paragraph 15 of his judgment:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties

> at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30."

252. I agree with Mr Hyam that clause 1(a), taken entirely literally, requires the clinic to do nothing. I agree with Mr Mylonas that the Court should not imply a term which would contradict the meaning of the express term (see Marks & Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd [2016] AC 742). However, the real interpretative challenge for me is to ascertain how a reasonable person with background knowledge etc. would understand this clause. At one stage in his submissions Mr Hyam came close to suggesting that that this was a jury assessment. I do not agree with that. It is an interpretative exercise, using legal tools and methods, but (and at the same time) focussing on how a reasonable person would have understood the clause. Further, at this stage of the analysis I am construing the contract; I am not implying a term (*pace* Lord Hoffmann in Attorney-General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988 where this distinction comes close to disappearing).

253. Mr Hyam did not address me on Lord Neuberger's third factor: the overall purpose of the Cryopreservation agreement and the requirement for consent to be in writing. I do not think that the purpose underlying this requirement was to safeguard against identity fraud. Rather, I consider that in circumstances such as these, where human life is being created in part by artificial means, it may be inferred that the clinic recognises the need for there to be written proof that both parties are consenting, and continuing to consent, to this procedure. ARB made clear in his evidence that he took comfort in the fact that he had been asked to sign consent forms in the past, and knew that any procedure could not go ahead with R unless he expressly agreed to it and there was proof of that agreement.

254. The case which comes closest to the instant case is Thake v Maurice [1986] 1 QB 644. There, a surgeon carried out a vasectomy having stated that it was irreversible. The operation was competently performed but there was a recanalization of the *vas* so that Mr Thake became fertile again. In relation to the claim in contract, Peter Pain J held that the surgeon should be interpreted as warranting that Mr Thake would be irreversibly sterile. The Court of Appeal (Neill and Nourse LJJ, Kerr LJ dissenting) overturned the judge's decision, holding that, determined objectively, the statements made by the surgeon did not amount to a binding promise that the operation would achieve its purpose of making Mr Thake permanently sterile.

255. According to Neill LJ:

> "I accept that there may be cases where, because of the claims made by a surgeon or physician for his method of treatment, the court is driven to the conclusion that the result of the treatment is guaranteed or warranted. But in the present case I do not regard the statements made by the defendant as to the effect of his treatment as passing beyond the realm of expectation and assumption. … Both the plaintiffs and the

> defendant expected that sterility would be the result of the operation and the defendant appreciated that this was the plaintiffs' expectation. This does not mean, however, that a reasonable person would have understood the defendant to be giving a binding promise that the operation would achieve its purpose or that the defendant was going further than to give an assurance that he expected and believed that it would have the desired result. Furthermore, I do not consider that a reasonable person would have expected a responsible medical man to be intending to give a guarantee." [at 685B-E]

Nourse LJ's reasoning was similar. In his view a reasonable person would know that "in medical science all things, or nearly all things, are uncertain" [at 687A]. Nourse LJ also referred to the observations of Lord Denning MR in Greaves & Co (Contractors) Ltd v Baynham Meilke & Partners [1975] 1 WLR 1095 to the effect that a professional man is not usually to be regarded as warranting achievement of the desired result. Further:

> "Indeed, it seems that that [the postulated warranty] would not fit well with the universal warranty of reasonable care and skill, which tends to affirm the inexactness of the science which is professed" [at 688A]"

This comes close to saying that it would never be possible for a surgeon to give an express warranty.

256. Thake v Maurice was a borderline case on its facts, and Kerr LJ gave a strong dissent. In my view, the instant case is even closer to the borderline. On which side of the line does it fall?

257. The present case is closer to the borderline because "the desired result" does not depend on the vagaries of medical science; it was simply to obtain written consent. Taken literally, that would require a signature on a document and nothing more. There is considerable force in the argument that a reasonable person would have expected the clinic to have obtained the written consent of both parties before proceeding. Clause 1(a) of the Cryopreservation agreement does not mention written *informed* consent.

258. Counsel did not address me on the difference between "written consent" and "written informed consent". There is limited force in the point that, if the latter were required, the present case would come closer to the sort of case identified in Thake. In my judgment, the term "written consent" should be interpreted to mean "written informed consent": all consent in medicine must be informed. However, there is no material distinction between these two formulations in the context of the Consent to Thaw form. If the form is signed, there is deemed to be informed consent, subject to a plea of *non est factum* which could be made in only very limited circumstances. Furthermore, in the event that the form is correctly signed, the presumption must be that there was prior discussion between both patients. If written consent is not given, written informed consent is not given either. Furthermore, in almost all situations where consent to this is required, and given, there is in place a valid MT1 form.

259. I agree that the circumstances in which the clinic finds itself in potential breach of its licence conditions, and proceeding to thaw without a valid consent being in place, may have arisen without negligence on its part. The forged signature bears superficial

similarities with ARB's genuine signature. Some reasonable people would say that it is unfair that the clinic should be found liable in these circumstances. However, this misses the point. In my view, the circumstances giving rise to the present claim are irrelevant to the true construction of the clause.

260. Ultimately, I am persuaded that Mr Mylonas' submission is correct. The instant case falls on the side of the line which equates to strict liability. Appropriate weight must be given to the language the clinic has chosen to use, I infer without having taken legal advice. A forged consent is a non-existent consent (cf. a consent obtained by duress, the consequence of which is that the agreement is voidable: see Lord Simon of Glaisdale in Lynch v DPP of Northern Ireland [1975] AC 653, 695 noted in Chitty on Contracts, 32nd Edn., Volume 1, paragraph 8-004). The clinic undertook not to proceed without the written consent of both parties. This was a straightforward process which did not depend on medical or scientific uncertainty. The Cryopreservation agreement could have contained a different undertaking, or no undertaking at all; it could have limited or excluded liability for the consequences. In particular, the clinic could have said that it would owe no legal liability under the contract without proof of want to care on its part. Furthermore, it is clear from Dr Marta Perez's evidence that it is quite possible to have in place protocols which effectively prevent what happened in the instant case.

261. Before leaving this topic, I should address two additional submissions advanced by Mr Hyam. First, he submitted that light is thrown on clause 1(a) by the different language of clause 2(a), which applies in the event of divorce and separation. His point was that clause 2(a) states, "at the time of replacement". In my view, that is a distinction without a difference, as is the wording, "[the clinic] will only thaw and replace" etc. Overall, the light thrown on clause 1(a) by clause 2 strongly favours ARB's case. Then Mr Hyam submitted that "before implying any term as to what damages if any would be payable for breach of such a term, the Court would have to consider what the position would be if there were no clause 1, and whether the parties can have intended to create a remedy". In my view this is completely the wrong approach. The obligation to pay damages is a secondary obligation which, in the absence of an express term, arises by implication of the common law: see Lord Diplock in Photo Production Ltd v Securicor Ltd [1980] AC 827, at 849A. It is not helpful to speak in terms of implying terms as to the payment of damages.

262. My conclusions under this third issue are that:

(1) the clinic owed an implied obligation to exercise reasonable care in relation to complying with its obligations under the 1990 Act, HFEA Guidance and its licence conditions at the time consent was being sought for the thawing and replacement of the embryo,

(2) the clinic owed an express obligation to ARB not to thaw and replace an embryo if he did not give his written consent, and

(3) the express obligation under (2) is strict.

ARB's Concurrent Breach?

263. Mr Hyam's submission was that, even if the clinic gave a strict guarantee, ARB cannot sue on it because he is himself in breach of contract. This submission has not been prefigured in the clinic's pleadings. Mr Mylonas advanced a procedural objection in his written closing argument, and at no stage did Mr Hyam apply to me to re-amend his Defence. That omission should be fatal to his case, but I address its merits out of an abundance of caution.

264. In developing this argument, Mr Hyam submitted that ARB is in breach of Contract Condition 5 of the Cryopreservation agreement in failing to inform the senior embryologist about the change in his person circumstances. He further submitted that ARB owed an implied duty to take reasonable care to ensure that any documents he completed were accurate. ARB is in breach of that implied obligation by wrongly describing himself as "partner" on the renewal form signed by him on 5th September 2010.

265. Mr Hyam relied on the principle that as a matter of construction, unless the contract clearly provides to the contrary, it will be presumed that it was not the intention of the parties that either should be entitled to rely on his own breach of duty to obtain a benefit under it: see Rede v Farr [1817] 105 ER 1188; New Zealand Shipping Co v Societé des Ateliers et Chantiers de France [1919] AC 1; Cheall v Association of Professional Executive and Computer Staff [1983] 2 AC 180 and Alghussein Establishment v Eton College [1988] 1 WLR 587.

266. Mr Mylonas submitted that ARB was not in breach of the Cryopreservation agreement. Signing *qua* partner does not amount to a representation of an intimate relationship because clause 2 ("in the event of divorce or separation") also describes the parties as "partners". On 5th September 2010 ARB had no intention of consenting to the thawing and replacing of an embryo, but by the renewal agreement all he was doing was agreeing to the further storage of embryos for a period of one year. Accordingly, there was no misrepresentation of his position, and no "change of circumstances" to be communicated to the senior embryologist.

267. I consider that this is taking too narrow a view. Accepting ARB's evidence that he signed the renewal agreement in blank, I think that on 5th September 2010 there had been a relevant change of circumstances which should have been notified by him to the clinic. In such circumstances, although clause 2 of the Cryopreservation agreement is not materially different from clause 1, the clinic would have been on notice that it was now dealing with a separated couple. In any event, ARB owed an implied obligation to inform the clinic.

268. In my view, it is overly restrictive to say that the renewal agreement is limited to storage of embryos. It is true that the clinic undertook not to thaw and replace without ARB's consent, but the only purpose for which the embryos could have been used was for treatment together with R.

269. Mr Mylonas submitted that the clinic has not pleaded factual causation, and there is no evidence of it. I cannot infer causation by applying common sense. Mr Hyam drew my attention to Dr Perez's letter dated 16th July 2013 where she stated:

> "I can also confirm that there is nothing in our file to indicate that [R] and [ARB] were separated during the time when she had treatment with

> the frozen embryos, otherwise we would not have proceeded with the treatment."

Even if I were to take this as Dr Perez's evidence, I have to say that it is mere assertion. Had the clinic been informed that ARB and R had separated, the treatment could still have proceeded under clause 2. It is possible that the clinic might have taken greater care, but there is no evidence of that. It is just as plausible that the clinic would have relied on the forged Consent Form and any mendacious oral confirmation of the position from R. Had Dr Perez said in evidence that the clinic would have taken specific steps to contact ARB, the position might be different.

270. The principle of construction on which Mr Hyam relies has been clearly explained by Lord Jauncey in Alghussein Establishment. In that case a tenant claimed to be entitled to receive the benefit of the grant of a lease in circumstances where failure to complete necessary works was due to his wilful default. Thus, the tenant could receive a substantial commercial benefit even if he was in wilful default and, I would add, in repudiatory breach of the agreement. The House of Lords held, Lord Jauncey giving the sole reasoned Opinion, that the agreement could not be construed in that way.

271. In my judgment, there are three reasons why this principle of construction cannot apply to the present case. First, the wording of clause 1(a) is clear, and the presumption is rebutted. This reason does not apply to Mr Mylonas' alternative case based on an implied term. Secondly, ARB is not claiming a benefit under the contract; he is seeking damages for breach of contract. His breach, subject to my third reason, may theoretically have rendered the clinic's performance more difficult, but that is insufficient to invoke this principle. I must proceed on the premise that ARB complied with General Condition 5 but did not formally withdraw his consent. It is not being alleged that he was in breach of duty for failing to do so. Thirdly, the clinic has failed to plead, and to prove, factual causation.

272. Accordingly, I must reject Mr Hyam's submission that ARB's breach of the Cryopreservation agreement precludes him from claiming damages for the clinic's breaches.

I. WANT OF CARE BY THE CLINIC AND CONTRIBUTORY NEGLIGENCE

273. The fourth issue only arises if my conclusion about the third issue in relation to an express term fixing the clinic with a strict obligation is incorrect (and, likewise, my conclusion in relation to concurrent breach). However, it is prudent to address the fourth issue, and it is convenient to consider the issue of contributory negligence under the same rubric.

274. I have found that the clinic owed an implied obligation to comply with its licence conditions and/or the terms of the 1990 Act (see paragraphs 238 and 262(1) above), that this obligation was to take reasonable care (see paragraphs 246 and 162(1) above), and I have also noted that the clinic concedes that it owed an implied obligation to take reasonable care to obtain ARB's informed consent. In practice, there is no substantive difference between these implied obligations because, had the clinic obtained ARB's informed consent, it would perforce have complied with its licence conditions and/or

the terms of the 1990 Act. It follows that I may consider these two matters simultaneously.

275. My point of departure is that Ms Abdo was not negligent when on 2nd November 2010 she checked the signature on the Consent to Thaw form against the clinic's records. The clinic was fully entitled to proceed on that date without ARB being present. ARB was, at least apparently, being treated together with R in circumstances where he was physically distant from the procedure. Virtually all other situations in medicine entail treatment on a patient who is present, or at least in contact with the clinician.

276. I fully take the force of Mr Mylonas' point that consent is absolutely central to the 1990 Act and to concurrent common law obligations. Further, there must be consent at all stages of the procedure, including the final stage (see, for an interesting comparative evaluation of this issue, the decision of the Supreme Court of Israel in Nahmani v Nahmani [1996] CFH 2401/95, where the views of the minority would more closely reflect our common law).

277. I have set out the expert evidence in some detail. Both Counsel were critical of the experts on the other side, but I am not. In my opinion, both Ms Suthers and Dr Avery assisted the Court in full and proper discharge of their functions as independent experts advising me. Both gave very reasonable evidence. If pressed, I have a slight preference for Dr Avery's evidence in terms of the manner in which it was given and her greater experience and expertise.

278. It is unnecessary for me to set out the parties' respective cases on this issue. I apply the standard Bolam/Bolitho test to the standard of care. In my judgment, there are a number of factors and reasons which, taken together, compel me to conclude that the clinic was not in breach of any duty to take reasonable care in obtaining ARB's written consent.

279. First, Ms Suthers accepted that the clinic's SOP for telephone or postal co-ordination, or something similar, was practised in a number of IVF clinics at the time (at one point, she went further and agreed that it was common practice); that the presumption that a couple being treated together would share information, whether commonplace or not, was one which some clinics would make; that it was not uncommon for the male partner not to attend the co-ordination appointment or the final appointment before implantation; and that some clinics operate a practice whereby the Consent to Thaw form, as a "provisional consent", is in place at or before the time of the first suppress scan appointment, with the final decision being made on the day of implantation (when it would be common only for the female partner to be present) as to the number of embryos to be thawed.

280. Secondly, clause 5.10 of HFEA's Code of Practice states that clinics should take all reasonable care to verify identity, "including partners who may not visit the centre during treatment".

281. Thirdly, on the facts of this case the clinic was entitled to believe that the Patient and Partner questionnaire was completed by ARB on the date the document bore.

282. Fourthly, on the facts of this case R was continuing to represent, or at least give the impression, that she was communicating with her partner ARB, who was being treated together with her in pursuit of a common objective.

283. I have reached these conclusions despite three matters which cause me concern. First, Mr Trew said in evidence that his clinic would not regard the male partner as a "patient" unless he had some medical condition of his own, just as midwives regard healthy pregnant mothers as "clients". I do not accept this nomenclature. ARB was a patient for these purposes regardless of his fertility (in fact, the evidence is that there is no issue with his fertility). ARB and R were being treated together as patients at all material times before they separated. My second concern is that the clinic's SOPs operative at the material time made clear that if both partners were present, their signatures should be witnessed, but if one partner was not present, this need not happen. This is illogical. Thirdly, a strict application of the clinic's former SOPs could have permitted what occurred in this case without ARB having attended *any* relevant clinic appointment. This is troubling. Mr Mylonas did not directly rely on the fact that the clinic's SOPs have now been amended in the light of this case, but this demonstrates that more robust procedures were not beyond the bounds of practical possibility. The Bolam principle is generous to clinics and medical practitioners, but the Court is still entitled to examine the rationality of procedures, practices and clinical procedures. I have reflected very carefully on these matters, but I must have regard to the full picture (including in particular Ms Suthers' concessions in cross-examination) and not just these specific points. Adopting that approach, I conclude that the clinic was not in breach of any duty to exercise reasonable care in and about the obtaining of ARB's written consent.

Contributory Negligence

284. This issue only arises if I am wrong as regards both the third and fourth issues. It follows that I may be brief.

285. It is common ground that contributory negligence cannot apply to limit or negative a strict or absolute obligation. As the Court of Appeal made clear in Forsikringsaktieselskapet Vesta v Butcher [1989] AC 852, the Law Reform (Miscellaneous Provisions) Act 1945 can apply to situations "where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract". Mr Mylonas submitted that this principle cannot apply to the instant case, because public policy bars ARB's claim if the clinic's duty amounts to one to take reasonable care. I cannot agree. Contributory negligence applies because there is negligence, either contractual or tortious, to which it is contributory. The fact that damages may be irrecoverable for a separate reason does not remove the instant case from the scope of the principle.

286. Given my conclusion on the issue of factual causation (see paragraphs 269 and 271 above), contributory negligence cannot arise: see Froom v Butcher [1976] QB 286, at 296E.

287. If I had found the clinic in breach of its implied contractual duty to ARB to take reasonable care, and in the event that my conclusion on factual causation is incorrect, then (subject always to Chapter J below) I would have reduced his damages by one-third.

J. A PUBLIC OR LEGAL POLICY BAR?

288. My finding that the clinic is in breach of contract is insufficient for ARB's purposes. He does not claim nominal damages, nor does he seek an award of general damages on a conventional basis (see paragraph 295 below). Ambitiously or otherwise, he seeks substantial damages in recoupment of past and future financial losses.

289. Mr Mylonas accepts, short of the Supreme Court, that any claim for substantial damages for breach of an implied contractual obligation to take reasonable care is precluded to ARB on account of House of Lords authority. Strictly speaking, such authority applies only to claims in tort, but Mr Mylonas' concession is predicated on the premise that there can be no difference between tortious and contractual claims founded on identical substantive duties. I consider that Mr Mylonas' concession was correctly made, although it will be necessary to examine precisely why this is so. Mr Mylonas submits that relevant authority, and the principles underpinning such authority, do not apply to contractual claims founded on breach of a strict duty.

290. In McFarlane v Tayside Health Board [2000] 2 AC 59, the House of Lords held that a claim in tort brought by parents for the upkeep of a healthy child born after negligence in connection with a vasectomy procedure could not be sustained in law. As others have pointed out, their Lordships gave different reasons for arriving at the same conclusion.

291. In the view of Lord Slynn, this was a claim for pure economic loss, and it would not be fair, just and reasonable to impose on the doctor or the health board liability for the consequential responsibilities imposed on or accepted by the parents to bring up a healthy child. Lord Steyn and Hope were of the same opinion, but Lord Steyn added that considerations of distributive justice indicated that the law did not permit the parents of a healthy but unwanted child to claim upbringing costs. Lord Clyde's analysis was based on the concept of restitution: he concluded that it would be unreasonable for the parents in effect to be relieved of the financial obligations of caring for their child. Lord Millett based himself on a narrower and different principle, namely that the law regarded the birth of a healthy baby as a blessing and not as a detriment, the advantages and disadvantages of parenthood were inextricably bound together, and that the benefits should be regarded as outweighing any loss.

292. Three members of the Appellate Committee touched on the possibility of a claim in contract:

> "If a client wants to be able to recover such costs he or she must do so by an appropriate contract" [per Lord Slynn, at 76D].
>
> "… the claim before the House of framed in delict. Counsel cited observations to the effect that it is immaterial whether such an action is brought in contract or in delict. The correctness of this assumption may depend on the nature of the term of the contract alleged to have been breached. Usually, since a contract of services is involved, or may be an obligation to take reasonable care. On the other hand, the term may be expressed more stringently and may amount to a warranty of outcome. It is unnecessary in the present case to consider whether different considerations may arise in such cases. My views are confined to claims in delict" [per Lord Steyn at 76G-77A].

> "but the distinction between cases of breach of contract and cases of delict may be of some significance, and in so far as in contract some special considerations may arise it is as well to note that the present case is founded purely on negligence and not on contract" [per Lord Clyde, at 99G]

293. In my judgment, the reasoning and conclusions of three members of the Appellate Committee (Lords Slynn, Steyn and Hope) were specifically tied to the tort of negligence. Lord Steyn's invocation of "distributive justice" was said by him to underpin tort law [at 83D/E]. Lord Clyde's reasoning was said by him not to apply to contractual claims, but it is highly arguable that his concept of restitution does. The same point may be made, with greater force perhaps, in relation to the reasoning of Lord Millett.

294. If McFarlane were the sole House of Lords decision which impinged on this topic, I would not regard myself as bound by authority to hold that ARB's contractual claim founded on a strict duty was precluded. This is because the reasoning and conclusions of the majority were confined to tort claims. Their Lordships did not decide whether the same reasoning should apply to a contract claim of the type I am examining, but one interpretation of what Lords Slynn and Steyn did say was that the outcome might be different.

295. The House of Lords returned to this issue in Rees v Darlington Memorial Hospital NHS Trust [2004] 1 AC 309. This was also a tort claim. Here, the situation was slightly different in that the mother was disabled and underwent a sterilisation procedure because she feared that her blindness would prevent her from looking after any child. The procedure was negligently performed. The House of Lords, reversing the Court of Appeal, held that the mother could not recover damages for any of the costs of providing for the child, although there would be a conventional award of £15,000 to reflect the fact that she was the victim of a legal wrong.

296. It is necessary to examine the separate reasons given by the seven members of the Appellate Committee.

297. In the view of Lord Bingham:

> "The [legal] policy considerations underpinning the judgments of the House [in McFarlane] were, as I read them, an unwillingness to regard a child (even if unwanted) as a financial liability and nothing else, a recognition that the rewards which parenthood (even if involuntary) may or may not bring cannot be quantified and a sense that to award potentially very large sums of damages to the parents of a normal and healthy child against a National Health Service always in need of funds to meet pressing demands would rightly offend the community's sense of how public resources should be allocated. " [at 316B-C]

298. In the view of Lord Nicholls:

> "This argument is forceful. But it is important to keep in mind that the law's evaluation of the damages recoverable for a legal wrong is not an automatic, mechanical exercise. Recoverability of damages is always

> bounded by considerations of fairness and reasonableness: see *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1090 - 1091, paras 69-70. So the answers to the questions I have stated calls for an assessment of what is fair and reasonable in cases of this nature." [at 318E]

The adverb "always" needs to be understood in its context. The Kuwaiti Airways case involved a claim in tort.

299. In the view of Lord Steyn:

> "… despite differences in reasoning, two features were crucial. First, in monetary terms it is impossible to calculate the benefits of avoiding a birth and having a healthy child. In *Parkinson* [2002] QB 266 Hale LJ sought to rationalise the decision in *McFarlane* by saying that it depended on a deemed equilibrium theory: 292-293, paras 87-91. That is not a correct interpretation of *McFarlane.* Instead the emphasis was squarely on the impossibility of undertaking a process of weighing the advantages and disadvantages. The second feature was explained by Lord Millett as follows (113 H - 114 A):
>
> "In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable and take steps to forgo the pleasures as well as the responsibilities of parenthood. They are entitled to decide for themselves where their own interests lie. *But society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth.*" (Emphasis added.)
>
> These I believe to be themes which led the Law Lords sitting in the case to reject the claim for the cost of bringing up the healthy child: see Lord Slynn of Hadley, at 75C and 76C; my judgment, at 83D-E; Lord Hope of Craighead, at 97C-D; Lord Clyde, at 103 B-D; Lord Millett, at 111C-D.
>
> That brings me to the question what the foundation of this reasoning was. For my part the answer is clear. The House did not rest its decision on public policy in a conventional sense: Lord Slynn of Hadley, at 76D; my judgment, at 83D-E; Lord Hope of Craighead, at 95A; Lord Clyde, at 100A-C; and Lord Millett, at 108A-C. Instead the Law Lords relied on legal policy. In considering this question the House was bound, in the circumstances of the case, to consider what in their view the ordinary citizen would regard as morally acceptable. Invoking the moral theory of distributive justice, and the requirements of being just, fair and reasonable, culled from case law, are in context simply routes to establishing the legal policy." [at 322B-G]

300. In the view of Lord Hope:

> "When I was giving my reasons for the decision in *McFarlane* I said that the value which was to be attached to the benefits which would have to be set off against the costs of rearing the child were incalculable: [2002] 2 AC 59, 97. I did not base my decision on a belief that it was morally repugnant to award damages for the birth of a healthy child. As Gleeson CJ observed in *Cattanach v Melchior* [2003] HCA 38 (18 July 2003), para 6, the fundamental value which is attached to human life is an ethical, not an economic, concept and the problem which had to be addressed was legal, not theological. It was the insuperable problem of calculation that was the critical point in the decision so far as I was concerned. If, as I believe, it is impossible to measure the benefits, it must follow that no value can properly be arrived at for the balance that would need to be struck between the costs and the benefits to arrive at a figure which could be awarded as damages. The conclusion which I drew was that, for this reason, these costs must be held to fall outside the ambit of the duty of care which was owed to the pursuers by the persons who carried out the procedures in the hospital and the laboratory." [at 328F-H]

301. In the view of Lord Hutton:

> "What is important is that the two concepts, the one stated by Lord Slynn and Lord Hope, the other by Lord Clyde, yield the same result, and in my opinion the fundamental principle underlying the speeches in *McFarlane* is that it would not be fair, just or reasonable to award damages for the cost of bringing up a healthy child." [at 338E]

302. In the view of Lord Millett:

> "In their speeches the individual members of the Appellate Committee all based this conclusion on legal policy, though they expressed themselves in different terms." [344D]
>
> and
>
> "The problem in a case of wrongful pregnancy is not the same. There is no difficulty about causation, whether as a matter of fact or of legal responsibility. The pregnancy and birth of a child are the very things which the defendants are employed to prevent. It is impossible to say that consequential loss falls outside the scope of their duty of care. They are accordingly liable for the normal and foreseeable heads of loss, such as the mother's pain and suffering (and where appropriate loss of earnings) due to the confinement and delivery. The novelty of the claim in *McFarlane* lay in one particular head of damage - the cost of bringing up a healthy child. The House considered it to be morally repugnant to award damages for the birth of a healthy child. It makes for easier exposition to identify the issue by reference to the head of damage rather than the duty of care. It also has the added advantage that identifying

> the *ratio* of *McFarlane* in this way may make it simpler to find the answer to the question raised by the present case.
>
> In a lecture to the Personal Injury Bar Association's Annual Conference in 2003 Sir Roger Toulson, Chairman of the Law Commission, described the ratio of *McFarlane* as follows:
>
> "Although at a detailed level there are therefore significant differences between the judgments, at a broader level two features dominate them. These are, first, the incalculability in monetary terms of the benefits to the parents of the birth of a healthy child; and, secondly, a sense that for the parents to recover the costs of bringing up a healthy child ran counter to the values which they held and which they believed that society at large could be expected to hold."" [at 345E-H]

303. Finally, in the view of Lord Scott:

> "… the extent of the duty of care owed to each NHS patient and the extent of the doctor's liability, and his NHS employer's vicarious liability, if the doctor is in breach of that duty, cannot in my opinion be any different from the extent of the duty and of the liability for any breach of duty that would apply in the case of a private patient with whom the doctor had a contractual relationship. The NHS patient is entitled to the benefit of the contractual duty owed by the doctor pursuant to his contract with his NHS employers. (c/f *White v Jones*[1995] 2 AC 207 where the disappointed beneficiaries, suing in tort, were placed by way of damages in the position they would have been in if the negligent solicitor had properly discharged his duty to his client, the testator).
>
> Alternatively, applying the traditional approach to tortious damages, it can be said that if, in a case like *McFarlane*, no representation at all had been made by the surgeon about Mr McFarlane's post-vasectomy fertility, the McFarlanes would not have assumed that contraceptive measures were unnecessary, would have taken suitable precautions and would have been in exactly the same position as they would have been in if a correct representation about his fertility had been made. Similarly, in a case like the present one, if a sterilisation operation had not been carried out on the respondent by the negligent doctor, the respondent would either have continued to take contraceptive measures or she would have had a sterilisation operation carried out by some other doctor. In either case her baby would, on a balance of probabilities, not have been conceived.
>
> Accordingly, as it seems to me, the answer to the *McFarlane* case, to the present case and to each of the other like cases to which your Lordships have been referred does not depend on whether the claim is a contractual or a tortious one. The same result must be reached whether the claimant was a private patient or an NHS patient. In every case the claimant, having established negligence, is entitled, as a matter of general principle, to be placed in the same position he or she would have been

> in if the professional advice or services had been competently provided. So in every case this general principle of damages would require the claimant to be placed in the position he or she would have been in if the baby had not been born." [at 351F-352C]

304. In my judgment, Rees is not binding authority in Mr Hyam's favour because its *ratio* is limited to tortious claims. Mr Hyam relied on what he said were universal statements of principle in McGregor on Damages, 19th Edn., but these appear under the tort section of this textbook. Only Lord Scott in Rees referred to contract. This was in the context of a discussion about the measure of damages, but it is also clear from that context that Lord Scott did not believe that the outcome could be any different regarding public policy in a circumstance where the contractual obligation was to take reasonable care. Further, it is apparent that Lord Scott was not addressing strict contractual obligations. Lord Scott's observations provide sound albeit not decisive support for the correctness of Mr Mylonas' concession (see paragraph 289 above); they throw no direct light on the specific question posed by this litigation. Further consideration of both topics is therefore required.

305. Unlike an NHS patient, ARB had a choice as to which cause of action to bring. Generally speaking, the law respects that choice. If, for example, the Limitation Act 1980 bars one claim (e.g. in tort) but allows a concurrent claim (e.g. in contract), there is no difficulty in giving free rein to the claimant's election: see, for example, Henderson v Merritt [1995] 2 AC 145. Even so, I think that it is clear that the public policy bar would apply to the contractual claim if there were relevant equivalence or congruence with a hypothetical claim in tort brought on the same facts.

306. In order to discern whether there is relevant equivalence or congruence, I begin by examining the measure of damages. This, as I have said, was touched on by Lord Scott, but I had raised the point with Counsel upon the conclusion of the evidence and before having closely re-examined Rees. It is trite law that the object of an award of damages in contract is to place the innocent party in the position he would have been in had the contract been performed: see Parke B in Robinson v Harman [1848] 1 Ex Rep 850. Some textbook writers have labelled this "expectation interest". Exceptionally, the law recognises claims for "reliance interest" and "restitutionary interest" damages, but these have no application here.

307. The principle underlying the tortious measure of damages is equally familiar. The object is to place the injured party in the position he would have been in had the breach of duty not occurred: see Lord Blackburn in Livingstone v Raywards Coal Co [1880] 5 App Cas 25, at 39.

308. Had the clinic performed the contract, it would not have proceeded without ARB's written consent. ARB would not have given it, and E would not have been born. So, "expectation interest" is the correct legal bracket for ARB's pleaded losses. In substance then, on the facts of this case (cf. Thake v Maurice where the contract and tort claims were differently quantified) there is no difference between placing ARB in the position which would have obtained had the contract been performed, and that which would have obtained had the breach not been committed. Although - contrary to the provisional view I expressed in oral argument - it would be incorrect to say that this case has all the hallmarks of a claim in tort, the real point is that in one important respect there is convergence in outcome as between these separate causes of action.

309. The convergence of outcome issue was discussed by the Court of Appeal in the difficult case of H. Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd [1978] 1 QB 791, although a question arises as to how far it goes.

310. The facts of Parsons do not require extensive iteration in this Judgment, save to note that a faulty hopper or storage facility was supplied to pig farmers with a valuable herd. The pig nuts stored in the hopper became mouldy and the pigs developed *E coli*. The evidence established that this specific consequence was not within contemplation although on my reading of the case the Court of Appeal proceeded on the basis that the parties would have anticipated some form of injury to the pigs resulting from a hopper which was unfit for purpose.

311. The claim was for breach of an implied warranty of fitness for purpose under section 14 of the Sale of Goods Act 1893, which the Court of Appeal described as "absolute". The *ratio* of Parsons is not altogether easy to discern, but this authority is valuable for other reasons. In *obiter* observations two members of the Court of Appeal addressed the legal policy I have described:

> "Another familiar class of case is where the occupier of premises is under the common duty of care, both in pursuant of a contract with a visitor or under the Occupiers Liability Act, 1957. If he fails in that duty and a visitor is injured, the test of remoteness must be the same, no matter whether the injured person enters by virtue of a contract or as a visitor by permission without a contract. No matter whether in contract or tort, the damages must be the same. Likewise when a contractor is doing work on premises for a tenant - and either the tenant or a visitor is injured - the test of remoteness is the same: no matter whether the person injured is a tenant under the contract or a visitor without a contract - see Billings v. Riden [1958] AC 240.
>
> Yet another class of case is where a hospital authority renders medical services in contract to a paying patient and gratuitously to another patient without any contract. The paying patient can sue in contract for negligence. The poor patient can sue in tort - see Cassidy v. Ministry of Health (1951) 2 King's Bench at pages 359/360. The test of remoteness should be the same whether the hospital authorities are sued in contract or in tort - see Petroleum v. Mardon [1976] 2 W.L.R. 583 at page 595.
>
> Instances could be multiplied of injuries to persons or damage to property where the defendant is liable for his negligence to one man in contract and to another in tort. Each suffers like damage. The test of remoteness is, and should be, the same in both.
>
> Come now to the present case. We were told that in some cases the makers of these hoppers supply them direct to the pig farmer under contract with him: but in other cases they supply them through an intermediate dealer - who buys from the manufacturer and resells to the pig farmer on the self-same terms - in which the manufacturer delivers direct to the pig farmer. In the one case the pig farmer can sue the manufacturer in contract. In the other in tort. The test of remoteness

should be the same. It should be the test in tort." [per Lord Denning MR, at 803G-804D]

and

"I agree with him in thinking it absurd that the test for remoteness of damage should, in principle, differ according to the legal classification of the cause of action - though one must recognise that parties to a contract have the right to agree on a measure of damages which may be greater, or less, than the law would offer in the absence of agreement. I also agree with him in thinking that, notwithstanding the interpretation put on some dicta in Czarnikow v. Koufos, the law is not so absurd as to differentiate between contract and tort save in situations where the agreement, or the factual relationship, of the parties with each other requires it in the interests of justice. I differ from him only to this extent; the cases do not, in my judgment, support a distinction in law between loss of profit and physical damage. Neither do I think it necessary to develop the law judicially by drawing such a distinction. Of course (and this is a reason for refusing to draw the distinction in law) the type of consequence - loss of profit or market or physical injury - will always be an important matter of fact in determining whether in all the circumstances the loss or injury was of a type which the parties could reasonably be supposed to have in contemplation.

…

Two problems are left unsolved by Czarnikow v. Koufos: (1) the law's reconciliation of the remoteness principle in contract with that in tort where, as, for instance, in some product liability cases, there arises the danger of differing awards, the lesser award going to the party who has a contract, even though the contract is silent as to the measure of damages and all parties are, or must be deemed to be, burdened with the same knowledge (or enjoying the same state of ignorance): (2) what is meant by "serious possibility" (or its synonyms): it is a reference to the type of consequence which the parties might be supposed to contemplate as possible though unlikely, or must the chance of it happening appear to be likely? See the way Lord Pearce puts it at pages 416-417 of the report.

As to the first problem, I agree with the Master of the Rolls in thinking that the law must be such that, in a factual situation where all have the same actual or imputed knowledge and the contract contains no term limiting the damages recoverable for breach, the amount of damages recoverable does not depend upon whether, as a matter of legal classification, the Plaintiff's cause of action is breach of contract or tort. It may be that the necessary reconciliation is to be found, notwithstanding the strictures of Lord Reid at pages 389-390, in holding that the difference between "reasonably foreseeable" (the test in tort) and "reasonably contemplated" (the test in contract) is semantic, not substantial. Certainly Lord Justice Asquith in Victoria Laundry v. Newman (1949) 2 King's Bench 528 at page 535 and Lord Pearce

> *in Czarnikow v. Koufos thought so: and I confess I think so too. The second problem - what is meant by a "serious possibility" - is, in my judgment, ultimately a question of fact." [per Scarman LJ, at 806A/B-D; 806G-807D]*

312. Orr LJ, the remaining member of the Court, agreed with Scarman LJ that Lord Denning MR's distinction between physical damage and economic loss was unsustainable in this context. He also agreed with Scarman LJ that there was one sole contract of sale and supply, not two. In other respects, however, the three members of the Court were in substantial agreement.

313. Parsons carries a notional health warning in relation to its formulation of the rule relating to remoteness of damage in this type of case: more recently, in Wellesley Partners LLP v Withers LLP [2015] EWCA Civ 1146 the Court of Appeal adopted a different approach. I am also aware that Lord Denning MR's distinction between cases involving physical damage and pure economic loss has been heavily criticised by the leading textbook on this subject. However, I draw the following two important propositions from this case.

314. First, it is clear from Lord Denning MR's analysis – and in this respect Scarman LJ did not disagree – that the outcome in relation to remoteness of damage should be the same in the classes of case to which he was referring: being cases in which the contractual and tortious duties were, in the main, identical (I express the matter in these terms because the duties would not have been the same in the product liability example given by Lord Denning MR in the final paragraph from the citation at paragraph 311 above). On any view, Parsons supports the correctness of Mr Mylonas' concession.

315. Secondly, I consider that for the purposes of defining the law relating to remoteness of damage the nature of the contractual obligation – i.e. whether strict or to take reasonable care – is immaterial. I fully appreciate that the premise of coextensive claims in contract and tort predicates proof of negligence. Thus, on the facts of Parsons, there was contractual negligence by the supplier of the faulty hopper in leaving the ventilation cowl in the closed position (see Scarman LJ at 809E-G). For Lord Denning MR (at 800G/H) this amounted to a free-standing breach of a separate installation contract; for Scarman LJ (whose analysis was founded on breach of one contract not two) the supplier had actual or imputed knowledge of the pig farmer's requirements (*loc. cit.*). In my view, this latter analysis, which represented the majority opinion of the Court of Appeal, did not hinge on the nature of the contractual obligation, as I have ventured to describe it, but rather on the nature or degree of the supplier's knowledge so as to constitute it in breach of the warranty to provide and deliver a hopper which was reasonably fit for purpose.

316. I have already mentioned that Lord Denning MR's reference to product liability cases (at 804C-D) elides the distinction regarding the nature of the supplier's obligation in breach of warranty cases on the one hand and tortious cases on the other. It would be wrong, however, to place any great reliance on his minority opinion. Grounding myself on Scarman LJ provides a stronger jurisprudential foothold. Moreover, earlier in his judgment, Scarman LJ had said this:

> *"Secondly, the breach does not have to be foreseen, or contemplated. In a breach of warranty case the point may be put*

> *in this way: it does not matter if the defect is latent. It may be unknown, even unknowable: see Grant v. Australian Knitting Mills Limited [1936] AC 85. The Court has to assume, though it be contrary to the fact, that the parties had in mind the breach that has occurred. Thus, whenever a question of remoteness of damage arises in a contract case, its solution involves the Court in making a hypothesis, which may, or may not, correspond with fact." [at 807F-G]*

Overall, in my judgment, Parsons is reasonably strong authority in support of the proposition that, in the context of the rules relating to remoteness of damage, in situations where there could be coextensive tortious and contractual claims, the outcome militated by "the interests of justice" (per Scarman LJ) should not depend on whether the underlying contractual obligation was strict or to take reasonable care.

317. The crux of the matter remains whether the legal policy enunciated by the House of Lords in Rees, and undoubtedly applicable to contractual claims founded on reasonable care obligations in the light of the principle of relevant equivalence or congruence which I have identified, should – for reasons of principle, logic and policy – apply equally to contractual claims founded on strict obligations in circumstances where the parties have not sought to quantify or liquidate the damages payable in the event of breach. This last aspect is crucial because the current focus is on the secondary obligation to pay damages arising under the common law.

318. In my judgment, the same legal policy applies to thwart ARB's claim. The measure of damages is the same; the test for remoteness does not turn on any distinction pertaining to the nature of the underlying obligation; and, most particularly, there is no material difference for the purposes of this legal policy between contractual duties of these two types. Mr Mylonas could not identify a relevant difference, and in my view there is none. All that Mr Mylonas could point to was the existence of a contract; but that in itself could not be a relevant difference because it cuts right across his concession.

319. Looking again at Rees, the legal policy objections may be characterised as follows: the inherent difficulty, if not impossibility, of measuring the loss; the unwillingness to regard the child as a financial liability; the refusal to offset the benefits which will accrue from parenthood from any additional financial liabilities; the feeling that it is morally unacceptable to attempt this exercise; and the notion that it is not fair, just and reasonable to allow this sort of claim. These objections overlap, and may be expressed in different ways, with different emphasis. Most of them are apt to apply where the contractual obligation is strict. The last of these objections is expressly tied to considerations which traditionally have only operated in the tortious sphere, and it is to be noted that Lord Bingham also expressly referred to burdens on the NHS. However, the secondary obligation to pay damages arises by implication of the common law, and in my view the result should be the same even if one were notionally to strip away the tort-specific objections. Furthermore, I have difficulty with the notion that a private patient could succeed whereas an NHS patient could not.

320. Mr Mylonas sought to persuade me that the facts of ARB's case are special. E is an unwanted child, born in extremely fraught, possibly unique, circumstances. ARB has been deceived by R and let down by the clinic. I have accepted ARB's evidence in its entirety on the liability issues, and remind myself of what he said about his feelings for

E in answer to my question. However, stepping back from the facts of this case, I do not believe that ARB is able to distinguish Rees. I have no reason to believe that Ms Rees did not love her child, but she did not want him. ARB has suffered a legal wrong, but so did Ms Rees – more profound in her case, because a relatively straightforward procedure was ineptly performed. The fact that ARB feels conflicted, and Ms Rees probably does not, is not an important distinction. ARB tells me that he wishes to treat E in exactly the same way as all his other children. It is the apparent fulfilment of this wish which enables him to mount so expensive a claim, but there are obvious difficulties in the law countenancing such a claim on one factual scenario but not another. Paradoxically, ARB's claim against the clinic would have greater legal merit if he had refused to provide for E but the Family Court had so ordered. In my judgment, Ms Rees and ARB find themselves for these present purposes in like case.

321. The House of Lords refused to accept the possibility of affording less than full recovery. The reasons for this seem clear, particularly when examining how the benefits might be offset on different factual scenarios. Should the offset be more in ARB's case than in Ms Rees'? It is difficult to see why.

322. As I have said, ARB has not sought to advance his case on the basis of a conventional award. If he applies to amend his pleadings, I would be obliged to consider such a claim at that stage – I say nothing about ARB's prospects of success in relation to this hypothetical application. I continue to analyse this case on the basis of the pleaded issues.

323. I confess that my initial disquiet for the conclusion I have reached has abated as I have reflected upon this case over the long vacation. Whatever my personal response to this extraordinary case, acting in obedience with clear authority and principle compels me to uphold the clinic's submission that legal policy precludes all of ARB's pleaded claims.

K. THE LOSS IS TOO REMOTE?

324. If, contrary to my conclusion in Chapter J above, damages are recoverable in principle, an issue arises as to whether all or any of the losses claimed by ARB are in any event too remote.

325. ARB claims substantial damages including the cost of private education, a gap year, university abroad, a generous wedding, refurbishing a bedroom, the cost of litigating with R etc. The claims reflect ARB's economic status and, as I have said, are predicated on E receiving the same level of economic provision as all other children in his family, including his step-children. I have to say that they rather ignore the wishes and aspirations of R, and are in some respects unattractive – e.g. the claim for refurbishing E's bedroom in a house purchased after her birth.

326. The instant case is to be contrasted with the vasectomy and sterilisation cases, in which the whole object was to prevent what happened. As I have said, the principal policy reason for requiring written consent is to ensure that there can be no dispute that both gamete providers are agreeing to the creation of human life.

327. However, in the event that written consent is not obtained from one party (inevitably the male partner), and it transpires that he would not have consented if asked, it must follow that any human life that ensues is "unwanted" in the sense that he has not agreed to it. This state of affairs would more likely arise if a clinic negligently overlooked the need for consent at the final stage of the procedure in line with its common law obligation to obtain it. It has arisen in the present case owing to R's forgery. I have already described this as remarkable. I could add that the possibility of forgery is remote. However, that is not the legal test: remoteness proceeds on the premise that there has been a breach of contract; it does not examine the chances of it occurring (see Scarman LJ's analysis at paragraph 316 above).

328. The legal test has been re-examined by the House of Lords in Transfield Shipping Inc v Mercator Shipping Inc ("The Achilleas") [2009] 1 AC 61. There, the charterers re-delivered the vessel to the owners several days late. In the meantime, the owners had entered into a fresh charterparty with new charterers set to begin shortly after the due date for re-delivery. Owing to volatile market conditions, the owners were constrained to accept a lower hire rate with the new charterers once the delay became apparent. The owners claimed the difference between the original rate and the lower rate; the charterers said that they were only entitled to the difference between the market rate and the charter rate for the nine days in which the owners had been deprived of use of the vessel.

329. The House of Lords, reversing the decisions of the lower courts and the arbitrators, upheld the charterer's argument. It was generally understood in the shipping industry that liability was not at large, but was limited to the difference between the market rate and the charter rate. In subscribing to this unanimous decision Lady Hale doubted its correctness. I agree with her, but I must remain loyal to, and apply, what this case decides.

330. Although he was overruled in the result, I believe that paragraph 45 of Christopher Clarke J's judgment in the Commercial Court contains an accurate epitome of the key questions:

> *"I derive from Lord Reid's speech [in Czarnikow v Koufos] the following propositions:*
>
> *(a) The mere fact that a type of loss is foreseeable is not, of itself, sufficient to make it recoverable; someone may foresee a result that is very remote.*
>
> *(b) A claimant is, however, entitled to recover damages in respect of a foreseeable result which either (i) will happen in the great majority of cases; or (ii) in respect of which, on the facts known or available to the defendant, the chances of its happening are considerably less than evens but the occurrence of which would not be very unusual.*
>
> *(c) But a plaintiff is not entitled to recover in respect of an occurrence which, although foreseeable as a substantial possibility will only happen in a small minority of cases and whose occurrence would therefore be very unusual."*

The "result" or "occurrence" being referred to is not the breach of contract but its consequence or consequences.

331. The Achilleas has both a broad and a narrow *ratio*. For Lord Hoffmann (squarely in the broad camp, as was Lord Hope) the test for remoteness did not entail the application of an "external" rule of law but required the identification of the intention of the parties on an objective basis: the essence of contractual liability was the voluntary undertaking of risk (paragraph 12). Thus the real question was whether the losses claimed were of the same or a different type from what the party in breach can be treated as having assumed responsibility (paragraphs 21-23). In other words, Lord Hoffmann was drawing on the same principle which underpinned the earlier decision of the House of Lords - in which he had written the sole reasoned Opinion - in Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd (sub nom South Australia Asset Management Corporation v York Montague Ltd) [1997] AC 191. Although the losses claimed were "not unlikely", and therefore foreseeable, they were not of the same type as those under contemplation because they were completely unquantifiable. The first rule in Hadley v Baxendale [1854] 9 Exch 341 (as further explained in Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528 and Czarnikow v Koufos (The Heron II) [1969] 1 AC 350) did not cover them.

332. The narrow basis for the *ratio* is most clearly outlined in paragraphs 60-62 of Lord Rodger's Opinion, with which his two remaining colleagues agreed. The owners' pleaded losses did not arise in the ordinary course of events: they resulted from unusual circumstances which were by definition outside the contemplation of the parties when they formed this contract. The outcome was also inimical to good commercial sense. The owners' loss of profit arose out of extremely volatile market conditions in relation to an arrangement with a third party about which the charterers knew nothing.

333. Applying even the narrow *ratio* of The Achilleas to the instant case is not free from difficulty, not least because the relevant contract was not made between two commercial parties. I have already made the point that the exceptionality of the instant case in terms of the probability of a breach of contract occurring in the first place is not the true question. However, it remains necessary to be precise as to the nature of the breach that has occurred, being the exercise that Scarman LJ in particular undertook in Parsons. In my judgment, the clinic's breach of contract should be defined solely in terms of it thawing and replacing an embryo without having obtained ARB's prior consent, as it had promised to do. R's forgery, albeit outside the reasonable contemplation of both parties, is irrelevant.

334. In the majority of cases I consider that proceeding to FERC without the written consent of one party would have no adverse consequences: that party would have given his consent, had it been sought. In such cases there could be no claim because causation would be absent. In the present case, ARB did not give his signature and on the facts I have found he did not in fact consent: had he been asked, he would have declined to proceed. Applying Christopher Clarke J's proposition (b)(ii) (see paragraph 330 above), the correct analysis must be that the consequences that have come about, an unwanted child, and some associated costs, are not "very unusual".

335. I accept that in cases of this sort, despite their obvious rarity, there could be a range of possible scenarios. These extend from the male gamete provider refusing to accept any responsibility for the "unwanted" child (and the female gamete provider accepting full

responsibility) to the male gamete provider agreeing to bear significant financial burdens without necessarily seeking any contribution from his ex-partner. Thus, it is clear that the loss is unquantifiable in the sense that it must be case-specific. However, ARB and R attended the clinic as private patients on this occasion, and fertility treatment is never cheap. Lord Hoffmann in The Achilleas noted (at paragraph 21) that the guilty party will be liable for damages of the same type even if they are unforeseeably large.

336. It is notable that in none of the cases which pre-date McFarlane and Rees, some of which involved claims in contract, was the argument maintained that the losses being sought were too remote. This was also the position in these two House of Lords authorities, despite the fact that central to the legal policy objection is impossibility of quantification. This was no doubt because there is a difference between the inherent impossibility in quantifying the cost of an unwanted child and the contingent impossibility of assessing a financial loss, expressible in a monetary amount, against the backdrop of a volatile market.

337. Further, and as a free-standing point, I am grateful to Mr Mylonas for drawing to my attention the decision of Hamblen J in Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd [2010] EWHC 542 (Comm) which serves to demonstrate that The Achilleas was a rare instance of the orthodox approach ceding to "clear evidence that such a liability [namely, one which was "unquantifiable, unpredictable, uncontrollable or disproportionate"] would be contrary to market understanding and expectations" (see paragraphs 40 and 73). I accept the submission that in the instant case there is no such market understanding.

338. Mr Hyam drew my attention to the decisions of the Court of Appeal in Siemens Building Technologies Ltd v Supershield Ltd [2010] EWCA Civ 7 and John Grimes Partnership v Gubbins [2013] EWCA 37. These reflect Lord Hoffmann's approach, which as I have said was the minority view. In any event, the analyses of Toulson LJ and Sir David Keene, including the latter's reference to "other special circumstances [which] render that implied assumption of responsibility inappropriate for a type of loss", seem to me to lend further support to Mr Hyam's public policy arguments rather than his separate case under the label of remoteness.

339. In my judgment, the majority of the losses claimed by ARB are of the same type as those under contemplation in the event of breach, are "not unlikely" and do not depend on the operation of any unusual circumstances. They should not be denied to ARB applying the first rule in Hadley v Baxendale. The true reasons for denying recovery fall under a separate rubric.

340. In the event that this Judgment is overturned on appeal and I am required to assess damages in due course, I would not rule out concluding that at least one of ARB's heads of claim is too remote. Further, as I have already pointed out, I am not sympathetic to some of the claims he has advanced, owing to their speculative nature and their amount. My ruling under this chapter heading is therefore limited in scope in the sense that all I am holding is that the law relating to remoteness of damage does not provide an in principle objection to ARB's claim. Its separate ingredients will, if necessary, require closer examination.

L. CONCLUSION

341. ARB has succeeded on all issues germane to his primary case save the issue of legal policy. It follows that there must be judgment for the clinic on the claim and, subject to the clinic's contention that R must indemnify it in relation to costs - which matter remains to be determined - judgment for R on the Part 20 claim.

342. Although he has lost this case, my Judgment must be seen as a complete personal and moral vindication for ARB. The same, of course, cannot be said for R.

343. I have concluded that it would not be in line with the overriding objective for me to assess quantum on the basis that my Judgment could be overturned elsewhere. I cannot proceed on the basis that damages are at large. I would need to know the correct basis of assessment. On reflection, furthermore, I would like to hear more evidence. Finally, in the event that my Judgment were overturned on appeal, and the case remitted to me for assessment of damages, that exercise would not take long.

344. The parties should submit written arguments on the issues of the form of order, costs and permission to appeal.