CA54/17 & CA55/17

OPINION OF LORD BANNATYNE

in the cause

AGILISYS LIMITED

<u>Pursuer</u>

against

CGI IT UK LIMITED

<u>Defender</u>

and

CGI IT UK LIMITED

<u>Pursuer</u>

against

AGILISYS LIMITED

<u>Defender</u>

Pursuer: Cormack QC, J Young; Pinsent Masons LLP
Defender: Sandison QC, G Reid; Brodies LLP

<u>4 December 2018</u>

Introduction

[1]   This matter came before me for proof before answer in the commercial court. The

general background to the dispute is a contract between the parties ("the Subcontract"). The

subject matter of the proof is issues arising from the service by Agilisys on CGI of Relief

Notices in terms of the Subcontract. The scope of the proof is as set out in a joint list of questions submitted by parties for determination by the court.

The questions to be answered by the court

Relief Notice 002 – 3rd Party APIs and Supplier Portals

1. What were the respective obligations of the parties (including as to the Milestone Dates in the Implementation Plans and timing generally) in relation to the procurement, installation and provision of access to a development, test and production instance of the Northgate API and the test data?

2. Did CGI breach its obligations by failing to provide access to a development, test and production instance of the Northgate API and test data?

3. If the answer to question 2 is yes, was CGI's breach caused or affected by a breach by Agilisys of its obligations?

4. If the answer to question 2 is yes, did that breach cause, or was it reasonably likely to cause, Agilisys to fail to achieve the Drop 1 Milestone MS-OSC 1.1 in the I Implementation Plan by the effective date?

Relief Notices 004 & 006 – Biztalk

5. What were the respective obligations of the parties (including as to the Milestone Dates in the Implementation Plans and timing generally) in relation to the provision of experienced Biztalk development resources and/or access to the Biztalk development environment?

6. Did CGI breach its obligations by failing to provide access to Biztalk development resources and/or access to the Biztalk development environment?

7. If the answer to question 6 is yes, was CGI's breach or breaches caused or affected by a breach or breaches by Agilisys of its obligations?

8. If the answer to question 6 is yes, did any breaches cause, or were they reasonably likely to cause, Agilisys to fail to achieve the Milestone MS-2.5 in the I Implementation Plan by the effective date?

Relief Notices 005 and 011 – Payroll Information

9. What were the respective obligations of the parties (including as to the Milestone Dates in the Implementation Plans and timing generally) in relation to procuring that CGI fulfilled its role under the Subcontract of providing business information, knowledge and decisions to enable the I payroll solution to be configured?

10. Did CGI breach its obligations by failing to procure that CEC provided business information, knowledge and decisions to enable the I payroll solution to be configured?

11. If the answer to question 10 is yes, was CGI's breach caused or affected by a breach by Agilisys of its obligations?

12. If the answer to question 10 is yes, did that breach cause, or was it reasonably likely to cause, Agilisys to fail to achieve the Milestone MS-2.2 in the I Implementation Plan by the effective date?

Relief Notices 007 and 016 – Data Migration

13. What were the respective obligations of the parties (including as to the Milestone Dates in the Implementation Plans and timing generally) in relation to the provision of data extracts from I's existing Finance, Human Resources and Payroll systems?

14. Did CGI breach its obligations by failing to provide data extracts from CEC's existing Finance, Human Resources and Payroll systems?

15. If the answer to question 14 is yes, was CGI's breach caused or affected by a breach by Agilisys of its obligations?

16. If the answer to question 14 is yes, did that breach cause, or was it reasonably likely to cause, Agilisys to fail to achieve the Milestone MS-2.5 in the I Implementation Plan by the effective date?

Relief Notice 008 – Interface Specifications

17. What were the respective obligations of the parties (including as to the Milestone Dates in the Implementation Plans and timing generally) in relation to the provision of a complete set of Agresso technical interface specifications?

18. Did CGI breach its obligations by failing to provide a complete set of Agresso technical interface specifications?

19. If the answer to question 18 is yes, was CGI's breach caused or affected by a breach by Agilisys of its obligations?

20. If the answer to question 18 is yes, did that breach cause, or was it reasonably likely to cause, Agilisys to fail to achieve the Milestone MS-2.5 in the I Implementation Plan by the effective date?

Relief Notices 009, 014 and 015 – I Environments

21. What were the respective obligations of the parties (including as to the Milestone Dates in the Implementation Plans and timing generally) in relation to the provision

of fully functional environments and related infrastructure, including suitable environment management services, in relation to the I Project?

22. Did CGI breach its obligations by failing to provide fully functional environments and related infrastructure, including suitable environment management services, on the I Project?

23. If the answer to question 22 is yes, was CGI's breach or breaches caused or affected by a breach by Agilisys of its obligations?

24. If the answer to question 22 is yes, did any breaches cause, or were they reasonably likely to cause, Agilisys to fail to achieve the Milestones from MS2.5 onwards in the I Implementation Plan by the effective dates?

Relief Notice 012 – I Environments

25. What were the respective obligations of the parties (including as to the Milestone Dates in the Implementation Plans and timing generally) in relation to the provision of access to fully functional I environments?

26. Did CGI breach its obligations by failing to provide access to fully functional I environments?

27. If the answer to question 26 is yes, was CGI's breach or breaches caused or affected by a breach by Agilisys of its obligations?

28. If the answer to question 26 is yes, did any breaches cause, or were they reasonably likely to cause, Agilisys to fail to achieve the Milestone MS-SC1.1 in the I Implementation Plan by the effective date?

I would intend to divide my opinion into a number of sections:

I – Background

[2]   Agilisys carries on business as a software and business service provider and is engaged in business in the United Kingdom. CGI is an information technology consulting, systems integration, outsourcing and solutions provider engaged in business in the United Kingdom and elsewhere worldwide.

[3]   On 23 August 2015 CGI entered into a contract with the City of Edinburgh Council ("CEC") for the provision to CEC of ICT (ie information, communication and technology) and Transformation Services (the "Prime Contract"). Prior to the Prime Contract, CEC's ICT services were provided by an external supplier, namely: British Telecom ("BT").

[4]   In terms of the Prime Contract CGI undertook to deliver a variety of IT functions to CEC.

[5]   On 11 September 2015 CGI and Agilisys entered into the Subcontract under which certain transformation services were delegated to Agilisys, mainly consisting of the elements of Enterprise Resource Planning ("ERP") and Enterprise Integration ("EI").

The ERP project

[6]   The ERP project correlated to Outline Business Solution ("OBS") OBS 1, 2, 3, 30, 47, and 51 and the Implementation Plan called "Finance and HR/Payroll Transformation" (see: 1119-1120 of JB 1).

[7]   In broad terms, they were concerned with the replacement and consolidation of three legacy computer systems: (1) the debtors (or accounts receivable) system called Northgate PPSL, per OBS 1, 2, 30, and 47; (2) the core financial services, reporting, and procurement system called Oracle e-business, per OBS 2, and 47; and (3) the HR and Payroll system called Midland iTrent, per OBS 3 and 47. These systems were to be replaced by a single ERP system called Business World (formally known as Agresso) (the "BW solution").

[8]   At the beginning of the Subcontract, per the agreed Implementation Plan (contained in Schedule Part 6.1 of the Subcontract), work was to commence on 14 September 2015 and complete work with the BW solution going live on 3 October 2016.

The EI project

[9]   The EI project correlated to OBS 13 and 21, and the Implementation Plan called "Enterprise Integration" (see page 1124 of JB 1).

[10]   In broad terms, the EI project was about allowing citizens to access CEC's services through an online platform in order to perform digital transactions. The online platform was proprietary software belonging to Agilisys known as Agilisys Digital ("AD").

[11]   At the beginning of the Subcontract, per the agreed Implementation Plan, work was to commence on 7 September 2015 and was not due to complete until 3 April 2018. Milestone MS-OSC 1.1 was scheduled for 1 April 2016.

The Subcontract

Services and charges

[12]   In terms of the Subcontract the rights and responsibilities in respect to services and charges are:

[13]   By Clause 5.1 of the Subcontract, Agilisys agreed to provide the Services to CGI. The Services comprised the Transition Services and the Transformation Services, which were both further defined by the Subcontract. The Transformation Services were defined as the Services which Agilisys was obliged to provide in order to implement and complete the Transformation Plan (hereinafter referred to for consistency as the "Implementation Plan") (which can be found at Schedule Part 6.1).

[14]   By Clause 1.1 and Schedule Part 1 Definitions of the Subcontract, Charges were defined as the charges for the provision of the Services set out in, or otherwise calculated in accordance with, Schedule Part 7.1, including any Milestone Payment or Service Charge. By Paragraph 1 of Part B of Schedule Part 7.1 of the Subcontract, on Achievement of a Milestone Agilisys is entitled to invoice CGI for the Milestone Payment associated with the Milestone (Milestones are further referred to below).

[15]   By Clause 10.1 of the Subcontract, Agilisys was to invoice CGI for Services and CGI

(subject to its right reasonably to dispute the invoice) was to pay the Charges to Agilisys in

respect of the Services within 30 days of receipt of a valid invoice under Paragraph 2.1, Part

E of Schedule Part 7.1. Paragraph 1.3 of that Part provided for Agilisys to first submit a draft

invoice which was to be agreed by CGI before the final invoice was submitted.

Times and milestones

[16]   In respect to times and milestones the rights and responsibilities of parties are:

[17]   By Clause 6.7 of the Subcontract, Agilisys was obliged to comply with the

Implementation Plan and ensure that each Milestone was achieved on or before its

Milestone Date. Milestones were particular events or tasks described in the Implementation

Plan and, where applicable, the relevant Milestone Date was the date set out against that

Milestone in the Implementation Plan by which the Milestone was required to be achieved.

If a Key Milestone was not achieved by the relevant Milestone Date, then Agilisys was

potentially exposed to liability to make Delay Payments to CGI.

[18]   The Relief Notices, the subject matter of the proof, are governed by clause 31 of the

Subcontract which provides reading short, as follows: a mechanism for dealing with delay

caused by CGI under the Subcontract. In terms of that clause, Agilisys must issue a Relief

Notice notifying CGI of the CGI cause that has caused, or is reasonably likely to cause, a

Supplier Non-Performance (see: page 49-50 in JB 1). CGI must then, as soon as is

reasonably practicable, consider the Relief Notice and whether it agrees with the Agilisys

assessment.

[19]   The term "CGI cause" is defined as "any material breach by CGI of any of the CGI

Responsibilities, except to the extent that such breach is: (a) the result of any act or omission

by CGI which the Supplier (the Supplier in terms of the Subcontract is Agilisys) has given its prior consent; or (b) caused by the Supplier, any Sub-contractor or any Supplier Personnel; (c) the subject of Pre-Agreed Resolution" (see: page 68 of JB 1).

[20]   The division of responsibilities between the parties was agreed in three places in the contract as follows: (a) in the column dividing responsibility in the OBS; (b) in the Rules and Responsibilities document in section C of Schedule Part 4.1; and (c) the obligations on CGI to procure various things from CEC inserted in Annex 2 to Schedule Part 6.1.

The Relief Notices

[21]   The Relief Notices issued by Agilisys in this case can helpfully be grouped in the following manner:

ERP – Environments: the Relief Notices in this group were: RN 001 (1 February 2016), RN 009 (18 March 2016), RN 013 (3 June 2016), RN 014 (26 July 2016) and RN 015 (13 October 2016). RNs 001 and 013 are not in issue in the sense that they were accepted by CGI and relief was granted. RNs 009, 012, 014 and 015 are within the scope of the Proof.

ERP – Data Migration: the Relief Notices in this group were: RN 007 (18 March 2016) and RN 016 (13 October 2016). Both of these RNs are within the scope of the Proof.

ERP – Biztalk: the Relief Notices in this group were: RN 004 (10 February 2016) and RN 006 (18 March 2016). Both of these RNs are within the scope of the Proof.

ERP – Interfaces: the Relief Notice in this group was RN 008 (18 March 2016), which is within the scope of the Proof.

EI – Environments and Interfaces: the Relief Notices in this group were RN 002 (29 January 2016), RN 003 (28 January 2016), and RN 010 (6 April 2016), and RN012 (12 May 2016). Only RN002 is within the scope of the Proof – the other two were accepted and relief was in fact granted by CGI.

Payroll information – the Relief Notices in this group were: RN 005 (11 March 2016) and RN011 (6 April 2016). Both of these RNs are within the scope of the Proof.

The dispute

[22]   In the course of its written submissions Agilisys sought to define broadly the issues in the dispute as outlined in parties' pleadings. I believe that it is a fair representation of the broad outlines of the dispute between the parties and I consider it is helpful in order to set the questions posed for determination by the court in context to set this out:

[23]   Agilisys aver that they issued a number of Relief Notices between January and October 2016, and that CGI failed to adequately respond to them: Article 20 of the Agilisys summons. Agilisys, generally, relies on CGI's failure to adequately respond to the Relief Notices (and related breaches such as failing to approve associated change requests) as an integral part of the breaches entitling it to rescind the Subcontract in March 2017: articles 20-25 of Condescendence.

[24]   CGI aver that the delays in the ERP and EI projects were properly attributable to Agilisys' failure to competently manage the ERP and EI projects: see article 9 of CGI

summons. In particular, in relation to ERP, they aver that the "*operative cause of Delay to the Transformation Plan* (Implementation Plan)" was Agilisys' failure to manage the ERP project. Stripped to its essentials the allegations seem to be that there were failures as follows: (a) to produce clear plans and strategies for implementation of the ERP project, to document project meetings and management clearly, establish a clear governance structure and communicate that to CGI, or to provide a business transformation director: article 32.1 of condescendence; (b) to provide a business transformation director or application architect: article 32.2 of CGI summons; (c) to provide a suitable technical design for an archive solution: article 32.3 in CGI summons; (d) to provide a system architecture design: article 32.4 in CGI summons; (e) to provide standard hardware (exacerbated by a refusal to accept CEC laptops); (f) to manage Unit 4; (g) delaying in designing and building BW solution: article 32.7 in CGI summons; (h) to design and manage the data migration process, including provision of templates, or to provide a data migration strategy: article 32.8.

[25] CGI disputed Agilisys' entitlement to rescind the Subcontract. CGI, following receipt of the notice rescinding the contract for Agilisys, served on Agilisys a document terminating the Subcontract in terms of clause 33.1.2 on the basis that a supplier termination event had occurred, namely: that Agilisys had committed an irremediable material default (article 40 CGI summons).

[26] Accordingly in light of the above the ultimate issues in the case: were the validity of Agilisys' recission and the validity of CGI's termination.

[27] Resulting from the above, Agilisys sought payment in terms of the Subcontract and also advanced a damages claim for its loss of opportunity (see: articles 29-37 of Agilisys'

summons). CGI sought damages for certain losses as set out in articles 43 and 44 of CGI's summons.

Submissions

[28]   Counsel prepared very lengthy and extremely detailed written submissions which they supplemented by oral submissions. They were of considerable assistance to me. When dealing with the various sections of my discussion I will outline the submissions of each party.

Discussion

II – The tactical burden of proof

[29]   It is not controversial that the tactical burden of proof is this: it is for Agilisys in the first place to establish that a CGI cause under the contract existed. It is also accepted by Mr Sandison that in many instances CGI do not take serious issue with that first point. In respect to the next question: were any such breaches on the part of CGI caused or affected by a breach by Agilisys of its obligations then the tactical burden of proof shifted to CGI.

III – Objection

[30]   During the course of oral submissions, and thereafter in terms of a note, an objection was taken by CGI to various productions referred to in the written submissions of Agilisys as not having been spoken to by a witness (see: Appendix 4). Agilisys responded to that objection in the form of a note (see: Appendix 5) accepting that certain productions had not been referred to and deleting reference thereto in its submissions; detailing where certain

documents had been referred to; and altering certain references. So far as I could see these responses answered fully the points made on behalf of CGI in the first part of its note.

[31]   In the second part of its note CGI referred to documentary productions which were referred to by Dr Hunt in the course of her report but which had not been spoken to by a witness to fact. Dr Hunt was the expert witness for Agilisys. It was accepted on behalf of Agilisys that it was correct that many of the documents on CGI's list had not been referred to by a witness to fact. Agilisys, however, pointed out that this was equally true of the report prepared by Mr Coyne, CGI's expert, and it produced a list of these documents.

[32]   Agilisys argued that it could identify no issue in respect to parties' experts referring to such documents. It was Agilisys' position that both experts referred to documents which they had found as a result of their investigations. The experts were entitled to give evidence in this respect and the references to the relevant documents by the experts were sufficient for those documents to be in evidence.

[33]   I am satisfied that the above analysis by Mr Cormack is clearly correct, that accordingly such documents form part of the evidence and that the experts were entitled to make use of these documents in reaching their conclusions.

[34]   CGI's position seemed to develop in response to Agilisys' said position and became this: it was for the court to decide how much weight should be attached to Dr Hunt's evidence which proceeds by reference to her own interpretation of documents after the fact, rather than factual evidence of those involved at the time and thus little weight should be placed on passages in her evidence which rely on such documents.

[35]   I agree it is for the court to assess the reasoning of experts in relation to the opinions which they express and to consider the weight which should be placed on any conclusions the expert reaches having regard to the reasoning including any documents to which the

expert refers. Looking to the evidence of Dr Hunt where she does refer to such

documentation I believe it is fair to characterise her position as this: she gives an accurate

summary of what is patent from the terms of the document itself and goes no further than

that. In particular I observe (as referred to by Agilisys) that I do not recall that she was

challenged in the course of cross-examination that her approach to such documents had

been anything other than as I have described above. I am not persuaded that only little

weight should be attached to her evidence which relies on such documents.

IV – Preliminary legal issue: whether CGI has compromised any part of its claim?

[36]   In the course of his submissions Mr Cormack raised a short and discrete legal point

and it is I believe appropriate to deal with this submission before turning to a detailed

consideration of the evidence and other submissions.

[37]   The argument put forward by Mr Cormack in summary was this: where CGI

accepted CGI cause following the service of a Relief Notice by Agilisys and granted relief in

the form of extension of milestone dates, it is not open to it to revisit those determinations.

That he submitted is consistent with the general principle that where an extension has been

granted it operates as a complete defence to liquidated damages: see Keating on

Construction Contracts (10th ed) at para 10-038. Otherwise, it would have the absurd

commercial consequence that long after the event Agilisys would suddenly become liable

for delay payments. The effect of CGI accepting the Relief Notices that it did has the effect

that, up until around July 2016, it had effectively compromised any claims it wished to make

in relation to delay on the part of Agilisys in that period.

[38]   In support of his submissions Mr Cormack directed my attention to first *De Beers UK*

Ltd v *ATOS Origin IT Services UK Ltd* [2010] EWHC 3276 per Mr Justice Edwards-Stewart at

paragraph 98 where he observes:

> "Fortunately, it is not necessary for me to consider which of these causes of delay
> may have been dominant or critical because, as I will explain shortly, in early April
> 2008 DB agreed to a revision of the programme which put back the dates for delivery
> of the software. Although there was no express agreement to this effect, I find that
> this agreement effectively compromised any mutual claims for delay up to about the
> middle of March 2008."

[39]   Secondly he generally referred me to *David MacBrayne Ltd* v *ATOS IT Services (UK)*

Ltd [2018] CSOH 32, Lord Doherty at paragraphs 18 and 66.

[40]   Mr Sandison's response to this argument was in summary: the granting of relief in

the course of the execution of the contract does not prevent CGI revisiting these Relief

Notices where it granted relief where the question arises in a different context, namely: the

entitlement of Agilisys to repudiate the contract. He accepted he was not entitled to

withdraw the fact that relief was granted. However, CGI was entitled to put forward a

position as to the whole circumstances in which the issue complained of occurred and the

consequences of its occurrence. The exercise in which parties are presently engaged is not

directed as to whether there was delay but whether what occurred justified the repudiation

of the contract by Agilisys.

[41]   I am persuaded by the argument put forward by Mr Sandison. What was

compromised by CGI accepting Relief Notices is this: it cannot seek, in respect to the subject

matter of those Relief Notices it accepted, a Delay Payment in terms of Schedule Part 7.1

Part C which sets out a liquidated damages clause which operated if a Key Milestone had

not been achieved by Agilisys on or before the relevant Milestone Date. This prevents

Agilisys, as argued by Mr Cormack, from long after the event suddenly becoming liable for

Delay Payments. I agree with Mr Cormack that that would be a commercially absurd result.

But CGI are not seeking Delay Payments, they are seeking to examine the Relief Notices in an entirely different context as outlined by Mr Sandison. I believe the view which I have arrived at is consistent with the passage to which I was directed in *Keating*. It also I think is consistent with the observations in *De Beers Ltd* which clearly envisages a compromise for "mutual claims for delay" in terms of the operative provisions of the contract. For the foregoing reasons I reject Mr Cormack's submissions on this issue.

IV – The second preliminary legal issue

[42]   Mr Sandison advanced the following argument in his written submissions:

> "36.   The Subcontract contained the (Implementation) Plan in Schedule Part 6.1. This stipulated a number of 'milestones' by which key events in the Subcontract were to be achieved. As a part of the Subcontract, the (Implementation) Plan could only be amended by utilising the Subcontract's change control procedure.
>
> 37.   In addition to the (Implementation) Plan, a considerable number of (Project) Plans were produced during the course of the Subcontract by Agilisys. These plans were considerably more detailed than the (Implementation) Plan. They contained many more dates by which items were to be provided (in order to achieve the more general milestone dates set out in the (Implementation) Plan. Anna Vale's evidence was that these plans were intended to 'sit behind' the contractual (Implementation) Plan.
>
> 38.   Not all (Project) Plans were released to CGI (or to CEC): of more than one hundred which were created, only six 'key' versions were provided, with other versions 'released for review'.
>
> 39.   These (Project) Plans, therefore, although created by Agilisys during the operation of the Subcontract, were not contractual in nature or effect. They represented the plans which either the parties between themselves or (in the case of the plans not released to CGI) Agilisys individually had arrived at in order to fulfil the contractual dates. Moreover, the (Project) Plans could not, in the absence of the operation of the contractual change control procedure, constitute formal alterations to the Subcontract and, accordingly, to the (Implementation) Plan. During the course of the Subcontract, delays occurred with the result that many dates in the (Implementation) Plan were not achieved. Replans of the dates took place using the (Project) Plan. These, however, did not have contractual effect."

[43]   In reply to this argument Mr Cormack submitted that it was going too far to say that you must have change control every time you make a change to a plan. Mr Cormack in elaboration of this general position advanced, first, the following argument:

[44]   There is an oddity around the fact that consequential changes required to the Implementation Plan are, at different points in Clause 31, apparently under the control of CGI or require to go through the Change Control Procedure: see Clause 31.1(c)(ii) and 31.7. He submitted, however, that these provisions are, in reality, just a form of dispute resolution that do not affect the substantive provisions. As was said in *De Beers*, "If it were otherwise, [a party] could effectively stifle any claim for breach of contract by the simple expedient of refusing to agree it within the Change Control Procedure.": Para 199. In fact, that is precisely what CGI attempted to do, because it repeatedly granted relief and then refused to operate the Change Control Procedure. This point has particular relevance in this case to the claims that the Implementation Plan was never formally amended.

[45]   He submitted that it would be absurd, and entirely destructive of the practical effect of Clause 31, if CGI could exercise a discretionary right to reject changes under the Change Control Procedure where such a change was necessary to implement an entitlement of Agilisys to relief under Clause 31. That cannot have been the intention of parties. Any tension or conflict in the Subcontract, it is submitted, can be resolved under reference to the order of precedence in Clause 1.5. As one would expect, this gives paramount precedence to the express Clauses of the Subcontract over the Schedules. There is no reason in principle that an amendment to the Implementation Plan could not be agreed through the Relief Notice, and responses, procedure. In particular, the form of a Change Request in Schedule Part 8.2 only required to be used unless both parties agreed otherwise: see paras. 2.2.3 of Schedule Part 8.2.

[46] In considering the competing submissions I believe the starting point must be *Rock Advertising Ltd* v *MWB Business Exchange Centres Ltd* [2018] UKSC 24 which Mr Sandison in a somewhat oblique fashion referred to in his oral submissions.

[47] In the above case the Supreme Court considered the issue of the validity of an oral modification to a contract where there was a "No oral modification clause" in the contract.

[48] Lord Sumption gave the judgement, with which the other Justices agreed, Lord Briggs dissenting as to reasoning but not as to the result. Lord Sumption having considered the common law jurisprudence at paragraphs 8 and 9 opined at paragraph 10:

> "In my opinion the law should and does give effect to a contractual provision requiring specific formalities to be observed for a variation".

[49] On a reading of paragraphs 10 to 15 of his judgement, it is clear that the principle enunciated is applicable not only to NOM clauses but to all clauses which lay down a specified procedure for making changes to a contract. Thus where in the present case specific formalities for making changes to the Subcontract namely: Change Control have to be followed a valid variation cannot be made in the absence of such formalities being complied with.

[50] I believe that the authority relied on by Mr Cormack is readily distinguishable. It is evident that the clause being considered in *De Beers* is not one where "Change Control" operates as a specific formality required to amend the contract. Rather "Change Control" in the context of *De Beers* relates to the issue of agreement of "loss or extra cost" (properly understood a mere form of dispute resolution procedure) (see: paragraph 197). Thus the observation at paragraph 199 relied upon by Mr Cormack provides no assistance to him.

[51] Secondly, if CGI do not operate change control in an appropriate manner then Agilisys would not be prevented from proceeding to litigation. It could proceed to litigation on the basis of breach of contract by CGI. I do not think that the practical effect of clause 31

is entirely destroyed by concluding that for an amendment to the Implementation Plan to be validly achieved Change Control must be used. Agilisys still has a remedy.

[52] For the foregoing reasons I reject Mr Cormack's first argument.

[53] The only exception to the application of the principle enunciated by Lord Sumption would be in circumstances where the concept of waiver is applicable. No case of waiver was plead in this case or argued on behalf of Agilisys. As I have set out Agilisys' argument in respect to this point was one based on the proper construction of the Subcontract.

[54] Mr Cormack did however advance a secondary argument in relation to this issue. He submitted that the various dates in Project Plans which had not gone through change control could have relevance. The argument was advanced most clearly at paragraphs 4.4.1 and 4.4.2 of his written submissions and was as follows: in considering whether a dependency had been delivered within the time required by the Implementation Plan, where no express time limit was given regard should be had to the various dates in the Implementation Plan together with dates in the various Project Plans. Whilst they are not set in stone and whilst the court must ultimately bear in mind the contractor will have built some contingency into plans, a Project Plan such as those prepared and agreed by both parties in this case can provide the court with a useful guide or starting point as to what is reasonable in this context: see Hudson's Building and Engineering Contract (13th edition) at Para 6-054, if only because it was plainly judged as reasonable by the party at the time. Indeed, as Anna Vale agreed in the course of her cross-examination, once a party has agreed to plans they are expected to comply with them: see day 10, page 43, of the transcript.

[55] It seems to me that the above argument put forward by Mr Cormack is correct. I believe the court is entitled to have regard to such dates for the purpose contended by Mr Cormack. I believe that such evidence can give guidance as to what is reasonable in this

context for the reasons advanced by Mr Cormack. By using the dates in this way the Milestone Dates or any other term in the Subcontract are not altered and accordingly it does not breach the principle laid down by the Supreme Court.

[56]   Accordingly, for the above reasons when considering the various Relief Notices which are the subject of the proof, the Milestone Dates to which I have had regard are those set out in the Implementation Plan in Schedule Part 6.1. Other dates in the Project Plans I have had regard to only to the limited extent above set out.

V – Approach to evidence

[57]   The issue of the use and value of contemporaneous documentation in assessing the evidence was, in light of the way that the evidence developed and the submissions of parties, a significant issue. In short, Mr Cormack's position was this: given the circumstances of this case such documentation was the best evidence. Mr Sandison's position was this: he urged that considerable caution should be exercised in retrospectively attributing significance to the precise terms of contemporaneous documentation.

[58]   I am of the view that in the circumstances of this case contemporaneous documentation is of significance. It appears to me that it is of particular importance in reaching a conclusion as to the true position regarding the substantive issues. I believe it is of significance in that:

- Witnesses were being asked about events which occurred some time ago. Questioning related to events which occurred between approximately September 2015 and February 2017. They were being asked questions about a time when they were very busy.

- Witnesses, in many cases, were giving evidence on a substantial range of issues.

- It was apparent that many of the witnesses, not surprisingly, did not have a full and clear recollection regarding many of the matters about which they were questioned.

- Mr Cormack in respect to critical parts of the evidence of CGI witnesses, namely: that certain documents, information or assistance which was essential to CGI performing its obligations was not provided by Agilisys, advanced the following position: it has been developed with the benefit of posterity and does not truly reflect the position of CGI at the time of the implementation of the projects. This was shown clearly, he argued, by the complete absence of written requests by CGI to Agilisys to provide, eg a data migration strategy, or specifications for environments and no written complaints relating to these. The best CGI has been able to do at all is: (1) to advance a completely strained reading of the response to RN002, which seeks to read the response out of context; and (2) to rely on Action 25 in the Partnership Board Minutes, which when read carefully, in its context and with the email correspondence in the chains at JB 893 and 908 that relate to it, appears to only relate to Biztalk and in any event was not actually put to any of the witnesses involved.

- There is a root and branch attack advanced by Agilisys in relation to the reliability of nearly all of CGI's witnesses and in relation to certain of these witnesses the attack goes further and relates to their credibility.

[59]   Against that background, I consider that contemporaneous documentation is likely to provide the most accurate version of what occurred as there is little chance of it having been composed for the benefit of posterity. Accordingly it is the best evidence.

[60]   In approaching the evidence regarding contemporaneous documentation I have:

(1) not taken individual documents in isolation but have sought to see if a pattern is formed

within the documentation; (2) examined the context in which documentation was produced

and in particular in so doing I have considered whether documents formed part of ordinary

contractual correspondence or whether the document falls outwith such a category and was

one which when written would be given materially more consideration by the writer and

recipient and therefore to which greater significance can properly be attached;

(3) considered witnesses' explanations regarding the terms of contemporaneous documents

or why contemporaneous documentation was not available; and (4) in considering the

documentation, had regard to the issue of whether the lack of contemporaneous

documentation regarding certain issues is of significance.

[61]   Moreover, in reaching my views as to what can be taken from contemporaneous

documentation I have had regard to a series of detailed written submissions made by

Mr Sandison.

[62]   The first point he made was this: the court required to have regard to the way

according to the CGI witnesses the Subcontract was operated. This evidence he argued

emphasised a partnership between CGI and Agilisys; CGI not seeking to attribute and

document fault; and CGI being interested in moving ahead with the contract.

[63]   As I understand it the court is asked to take from this evidence that it explained any

lack of contemporaneous documentation on the part of CGI raising issues with Agilisys

which CGI at proof said were of significance at the time of the performance of the contract.

[64]   This type of evidence was undoubtedly a mantra in the evidence of witnesses for

CGI and in particular in the evidence of senior members of the CGI team. I do not find this a

plausible explanation for lack of such contemporaneous documentation. It is wholly unconvincing and I do not accept it.

[65]   The position put forward by CGI witnesses in the course of the proof was: there were a significant number of very serious, longstanding and repeated failures by Agilisys to meet their obligations in terms of the Subcontract. If that in fact were the case I would expect there to be contemporaneous documentation emanating from CGI clearly, repeatedly, consistently and with increasing force and urgency calling on Agilisys to deal with these issues.

[66]   Because these witnesses said that they regarded the relationship between Agilisys and CGI as a partnership, they wanted to make progress and therefore did not want to attribute blame, does not explain the lack of such contemporaneous documentation. Such an attitude, if in fact held by CGI witnesses, would not have stopped them raising such issues with Agilisys. If CGI were genuinely being hampered by failures on the part of Agilisys to fulfil its obligations I would have expected to see a consistent picture of such issues being raised with Agilisys in the contemporaneous documentation. I believe that is particularly so given the very serious effect which CGI said these failures were having on the implementation of the two projects. To do otherwise would be to act in a wholly uncommercial fashion. CGI is a very large commercial organisation and I cannot accept it would have acted in the way advanced by its witnesses. If there were such issues they would be apparent in contemporaneous documentation where Agilisys was called on to conform to its contractual obligations. There would be a consistent picture of the various issues now relied on by CGI being raised with Agilisys in the contemporaneous documentation. I found no such pattern in relation to certain issues and I will comment in detail on this matter when looking at the evidence of certain of CGI's witnesses.

[67] Secondly it was argued by Mr Sandison that a change of approach by CGI following the issuing of RN 014 was unsurprising, as it was the first Relief Notice which sought compensation. I do not accept this submission and in the course of dealing with the evidence on certain issues I will make more detailed findings regarding this. However, as a matter of generality, it appears to me that the response to RN014 was so out of alignment with what had occurred to that point as to allow me to hold that it was a surprising change in position. The position advanced by CGI from that point on was I believe entirely inconsistent with the position it had adopted to that point. I will look at this matter in more detail later in this opinion.

[68] The third point made by Mr Sandison was this: the approach advanced by Agilisys was irrelevant to the task of analysis which required to be performed by the court in respect of each of the Relief Notices. In elaboration of this he submitted that the court was being asked to consider whether obligations were breached in respect of the subject matter of each Relief Notice. The correct question, accordingly, was not whether the parties at the time believed, or did not believe, that there had been a breach of obligations in relation to the Relief Notice, but rather whether there had, in fact, been such a breach.

[69] I accept what is said by Mr Sandison as to what is the correct question for the court. However, I am in no doubt in the circumstances of the present case, that the position of the parties at the time throws, for reasons which I will elaborate upon later in this opinion, significant light on the issues that the court is required to consider.

[70] Mr Cormack advanced a second general argument in respect to the evidence led on behalf of CGI, namely: the vagueness of the allegations. No two witnesses from CGI were clear on what they meant by various terms such as "environmental specification or design". No two witnesses identified precisely the same issue. A number of witnesses had to be

prompted by questions from the bench as to what it actually was that they said they needed

from Agilisys. And no two witnesses gave a consistent explanation of precisely what that

was or what Agilisys was supposed to have done that they failed to do. Further, they bore

absolutely no relation to issues that actually happened. By the end of the proof, it is

submitted that nobody was any clearer. For example: (a) Paul Hamilton said in his witness

statement (WS) that Agilisys should have gone as far as providing High Level and Low

Level Designs: para 2.7 of his WS; (b) in evidence, he was asked repeatedly what was

required. He gave very long answers in which about the only concrete issue was, in

essence, details about versions of software to be installed on the software and unspecified

security and connectivity aspects: see Day 11, page 75-77, and again at page 100;

(c) Niall Sheriffs' WS contradicts him insofar as security aspects are concerned and says that

"CGI would not expect Agilisys's designs would encompass security policies etc… but they should

have provided enough detail about the computing power required, storage, connectivity, supporting

software etc…": para 3.129 of Niall Sheriffs' WS. But, again, nobody suggested that

computing power was a problem, or that there were storage issues, or that there was an

issue with supporting software (other than possibly the Microsoft Office matter). Further,

no explanation was given to explain why the details contained in the Unit 4 Questionnaire

on software versions, computing power and storage were insufficient: see JB 938-939, and

particularly at pp 11933 (software and versions), 11937 (number of users), p 11940

(processor requirements), 11969 (levels of data), 11978 (Memory requirements); and

(d) Kevin Bryce just referred generically to a design: see, for example, para 2.3 of his WS.

[71]   I consider both submissions, namely the lack of contemporaneous documentation

and lack of clarity and consistency fundamentally undermine CGI's position. I will discuss

this in detail later in this opinion.

Witnesses

[72]   The following witnesses gave evidence on behalf of Agilisys:

Robert Price:	His role in respect to the project was principally bid lead and he also dealt with the Relief Notices;
Claire Conaghan:	ICT Consultant with Agilisys and the Application Architect as provided for in the Subcontract;
Peter Hall:	Managing Consultant with Agilisys;
Ravinder Johal:	Principal Consultant Agilisys, the Solution Architect as provided for in the Subcontract;
Kevin Sander:	EPR Programme Director for Agilisys;
David Buchanan:	Project Manager and worked on EI Project;
Louise Ah-Wong:	Managing Director Business Infrastructure Unit, the Business Transformation Director as provided for in the Subcontract;
Dr Gill Hunt:	Expert Witness.

In addition the evidence of Andrew Mindenhall and Steven Beard as contained in their statements was admitted.

[73]   The following witnesses gave evidence on behalf of CGI:

Niall Sheriffs:	Project Delivery Director from January 2015 to December 2016;
Anna Vale:	Vice President (including) Utilities and Telecoms;
Bridget Fox:	Role mainly involves negotiating public sector contracts and flow clause from Prime Contracts;
Andy Cleaver:	Commercial Manager;
Paul Hamilton:	Brought in to get development and test environments up and running;
Kevin Bryce	Involved in development and test environment, from about February 2016;
David Legge:	Between October 2015 until June 2016 worked on data migration;
Paul Neary:	Joined CGI in July 2016 and worked on the EI Project;

Stephen Waters:	Joined CGI in April 2016, worked a short time on data migration, moved to the EI workstream, returned to ERP workstream from September 2016;
Richard Salmond:	Solutions Architect and described role with EI and ERP Projects as peripheral (4.3 his WS);
Tom Fulda:	Directly worked on the Projects from November 2016 and also prepared two audit reports in respect to the projects at an earlier stage;
Kenny McAllister:	Supporting the existing platform and to do the migration to the new platform for EI;
Andrew Couch:	Project Manager EI Project from September 2016;
Cliff Graham:	Partnership Director CGI from April 2016 for the contract with CEC;
Colin Brown:	Originally his role with CGI in respect to the Prime Contract was as Alliances Director. He became project manager ERP in July 2016;
Jason Coyne;	Expert Witness.

In considering the evidence I did not have regard to certain sections which parties agreed for various reasons should not form part of my consideration.

[74]   As is normal practice in the commercial court in advance of the proof each party lodged signed witness statements of the witnesses it proposed to lead. The witnesses who were called to give evidence adopted their statements, which in large part constituted their evidence-in-chief.

VI – Assessment of witnesses

Overview

[75]   In respect to disputed issues, I preferred the evidence of the witnesses for Agilisys to those of CGI.

[76]   Generally I found the CGI witnesses to be defensive and very much inclined to minimise or overlook points unfavourable to CGI and overly ready to place the entire blame on Agilisys.

[77]   I did not detect the same attitude in the evidence of the witnesses led on behalf of Agilisys.

[78]   Particularly in the evidence of the more senior members of the CGI staff at the time of the Subcontract I formed the impression of an attempt to rewrite history in the period up to about July 2016 and the issuing of RN014 and to say that Agilisys were to blame for everything in that period despite having granted relief to Agilisys prior to that date and despite certain matters which they raised from that point onwards and which they relied on at proof not having appeared to be significant issues, if issues at all, up to that time. I will elaborate on this matter when looking at the evidence of particular CGI witnesses.

[79]   I found their explanations for the granting of relief during the period up to about July 2016 and how this fitted in with the picture that they were at proof seeking to present wholly unsatisfactory and unpersuasive and I later will deal with specific aspects of this when dealing with material issues which arose in relation to various Relief Notices and the evidence of individual CGI witnesses.

[80]   To an extent I felt that the evidence of CGI's witnesses was founded on a misunderstanding of the roles and responsibilities of Agilisys and CGI in terms of the Subcontract.

Detailed views on credibility and reliability

[81]   In the course of his written submissions Mr Cormack made very detailed criticisms of almost all of the CGI witnesses (see: section 3.7) and in summary submitted that I should

not accept their evidence on disputed matters. In contrast Mr Sandison did not make any detailed submissions in relation to this aspect of the case. He largely confined himself to submitting that the court without difficulty could accept as credible and reliable the evidence of each of the witnesses led on behalf of CGI.

[82]   He made one specific point in respect to the credibility and reliability of these witnesses. He highlighted that many of the witnesses who had given evidence on behalf of CGI no longer had any connection with CGI. He submitted that therefore in no sense were they beholden to CGI and their evidence could be said to be independent of CGI. This supported its essential credibility and reliability. He also made a number of comments about the evidence of Mr Coyne and I will look at these later.

[83]   I first turn to the evidence of Niall Sheriffs, I find him an unsatisfactory and unimpressive witness. His evidence is a paradigm example of the general observations in respect to CGI witnesses which I have made in my overview of the evidence. Over and above that his answers relative: (1) to the granting of relief to Agilisys in respect to certain Relief Notices during the course of the project; (2) the reply to the Ah-Wong email (which I will detail later); (3) his position regarding what properly could be taken from the first report of Mr Fulda; and (4) his position regarding the signing off of SB03 I did not find acceptable for reasons I will detail later when dealing with evidence in the context of considering specific Relief Notices.

[84]   Moreover, I believe the further criticisms made by Mr Cormack at paragraph 3.7.3.1 of his written submissions regarding this witness are justified. Overall I believe his evidence could not be accepted unless independently supported.

[85]   As regards Cliff Graham he looked most uncomfortable throughout his evidence. He answered questions in a hesitant manner and often had to have what were straightforward questions repeated. He did not make a good impression.

[86]   In regard to one particular matter of considerable significance I believe that his change of position during the course of his cross-examination when taken with other matters regarding his evidence caused me to believe that I could not hold this witness to be entirely credible. I will elaborate on this point later when looking at his evidence on certain issues. I do not find him a satisfactory witness. I am not willing to accept his evidence unless independently supported.

[87]   In respect to Mr Fulda I believe he was unable to explain inconsistencies between his first and second reports which he had prepared and in particular he could not explain why, given his position in evidence, certain issues were not raised in his first report. I will consider this matter further later in this opinion. Further criticism of his evidence made by Mr Cormack in his written submissions was I believe justified. He was not a satisfactory witness. His evidence could only be accepted where independently supported.

[88]   As regards Colin Brown I agree with the criticisms made by Mr Cormack in the course of his written submissions. I gained the impression that this witness had an agenda. In addition, despite the leading role he played in respect to the Subcontract, he constantly downplayed his involvement and took the position that others would have to be asked about matters, where one would have expected him to have knowledge. I agree with the position advanced by Mr Cormack relative to the issue of "relations" and Mr Brown's evidence relative to this. I do not find him an impressive witness. I do not think his evidence could be relied on unless independently supported.

[89]   Turning to Paul Hamilton, he was not involved in the project for any great length of time (four weeks). For reasons I detail later I do not find him reliable.

[90]   Broadly in respect to Mr Hamilton I agree with this comment made by Mr Cormack, namely: that he came across as someone who had come into a project that was already delayed, who was not provided with all of the facts, and was understandably simply frustrated by the process.

[91]   Regarding Kevin Bryce, I could not hold him reliable. I believe, in particular in respect to his evidence, it was given in a somewhat one-sided manner, as argued by Mr Cormack. He appeared as someone who was very diligent and someone who was very much wedded to CGI's culture, which came across as a somewhat bureaucratic one in which matters were put down in writing and issues raised in a structured way in writing. Given his character and his attachment to the CGI ethos, his evidence was undermined by his inability to point to where issues he claimed were of significance at the time of the implementation of the projects were raised in the contemporaneous documents. I will look at this issue in detail later in this opinion. For these reasons I could not hold him reliable. In order to accept his evidence it needed to be independently supported.

[92]   Regarding Anna Vale and Bridget Fox I agree with the criticisms made by Mr Cormack in his written submissions. In particular so far as the day to day working in relation to the ERP and EI Projects they seemed to have a somewhat peripheral role and did not appear to have any significant direct knowledge. I did not find them reliable witnesses and only where independently supported would I be prepared to accept their evidence.

[93]   As regards Andy Cleaver, broadly for the reasons advanced by Mr Cormack which I find compelling, I reject his evidence except where independently confirmed.

[94]   In respect to Paul Neary, broadly for the reasons advanced by Mr Cormack, I reject his evidence except where independently confirmed.

[95]   Turning to Stephen Waters, for reasons which I detail later, I did not find him reliable.

[96]   In respect to Richard Salmond I will deal with his evidence in detail later. However, I did not find him to be a reliable witness.

[97]   There were two further witnesses, a Mr McAllister and a Mr Couch, I do not comment on their evidence as I did not think they added anything of significance.

[98]   The last witness for CGI was David Legge. I found this witness wholly straightforward in the way he gave his evidence. He gave his evidence in a careful, thoughtful and balanced manner. He was the only CGI witness whose evidence I am prepared to accept in its entirety.

[99]   For all of the foregoing reasons I reject the evidence of the CGI witnesses unless clearly and independently supported, other than that given by Mr Legge.

[100]   I now turn to my views as regards the witnesses for Agilisys.

[101]   My general view was this: in contrast to the witnesses led on behalf of CGI I found them to be satisfactory witnesses.

[102]   The first was Robert Price, I felt he gave his evidence in a straightforward manner. He answered fully and properly the questions put to him and he was not caught out in cross-examination. I thought he was both credible and reliable.

[103]   As regards Claire Conaghan I formed the same view. Again she seemed an entirely straightforward witness, I had no difficulty in holding her credible and reliable.

[104]   Peter Hall, I formed a favourable view of this witness and thought he was credible and reliable.

[105]   As regards Ravinder Johal I found her a somewhat prickly witness and of all the Agilisys' witnesses I thought she was the most defensive when giving her evidence. However, overall I thought her evidence could be accepted as credible and reliable.

[106]   Turning to Kevin Sander, I found him an acceptable witness and thought him credible and reliable.

[107]   As regards David Buchanan I had no concerns about this witness and believed him credible and reliable.

[108]   Lastly there was Louise Ah-Wong, she appeared nervous throughout her evidence. She was not a confident witness. Her evidence I thought somewhat halting and from time to time she appeared to get slightly mixed up and was unsure in giving her answers to questions. She was prone to giving somewhat rambling answers. I had no difficulty in holding her credible. I considered carefully the issue of the reliability of her evidence and came to the view that she could be relied upon. I felt that the matters to which I have referred arose as she was someone wholly unused to appearing in court and who found it particularly challenging when giving evidence.

The expert evidence

[109]   Turning to the expert evidence in the case, the expert for CGI was Mr Coyne. I have come to the view that his evidence was one-sided. His approach was I believe not balanced. In addition for various other reasons I believe his evidence was not acceptable. In arriving at this view I considered a number of specific matters in relation to his evidence.

[110]   First I did not understand it was a contentious matter that Agilisys depended in material respects in carrying out its obligations in terms of the Subcontract on others fulfilling their obligations (ie party one was dependent on another party fulfilling its

obligations in order for party one to fulfil its obligations) including CGI and CEC. Thus there were what was described throughout the proof as dependencies.

[111]   However, when Mr Coyne was asked about this, he answered in this way:

> "Q.   But did you understand that in carrying out its work on the projects, Agilisys depended, as you understood it, in material respects on other people, including CGI; would that be right?
>
> A.   I'm not sure whether it would be right to characterise it in that way. For the particular projects that Agilisys were involved in, CGI were providing services into Agilisys.
>
> Q.   What do you mean by 'CGI were providing services into Agilisys'?
>
> A.   Well, essentially when it comes to providing environments, the provision of the environments was to allow Agilisys to satisfy their wider obligations in EI and ERP.
>
> Q.   Yes. And Agilisys had a dependency on CGI providing the environments; that would be right, wouldn't it?
>
> A.   Yes, and they had the responsibility for managing that dependency.
>
> Q.   And would it also be right that there were dependencies on the council doing certain things?
>
> A.   Yes, there were dependencies on the council, and, again, Agilisys were responsible for managing those dependencies."

(see: pages 35 and 36 of the transcript of his evidence)

[112]   It is noticeable that in this passage of the evidence Mr Coyne cannot answer the first question he is asked with a straightforward "yes", which was all that was necessary, but uses the rather odd phrase "providing services into Agilisys". When asked what "providing services into Agilisys" means he goes on and gives an answer still not using the word "dependency". Eventually he accepts there is a dependency but even then, although, not asked about the issue of management (a critical part of CGI's case at the proof) he has to put in that Agilisys was responsible for managing those dependencies. He gives this answer when asked about both CGI and CEC. Thus on this matter he seems somewhat unwilling to

accept the uncontentious and straightforward proposition that there were dependencies and even when he eventually accepts that there were dependencies he has to put a gloss on that answer which favours CGI's position.

[113]   Secondly, at pages 55 and 56 of the transcript of his evidence Mr Coyne is asked about sections 3.19 to 3.34 of his report which sets out the obligations of Agilisys. He is asked whether he has quoted any of CGI's obligations and he accepts he has not quoted any of them. He is asked why not. He then appears to suggest that it is Agilisys' obligations which are relevant not CGI's. He is then asked specifically does he think that CGI's obligations are relevant and he backtracks on his previous answer and says this:

> "they are relevant, I don't believe CGI's obligations have been called into question with regard to the delaying and failed aspects of this project."

[114]   He is then asked about this answer:

> "Q.   But you know that this whole case is about, among other things, Agilisys serving relief notices on CGI --
>
> A.   Yes.
>
> Q.   -- indicating respects in which Agilisys thinks that CGI hasn't complied with its obligation?
>
> A.   Yes."

[115]   For Mr Coyne to say that: "I don't believe CGI's obligations have been called into question" I consider is an extraordinary answer given the nature of the dispute between the parties. Fundamentally that is the case presented by Agilisys. This answer I believe suggests a very one-sided approach by Mr Coyne, namely: he is not considering whether CGI has breached any of its obligations.

[116]   Mr Sandison sought to deal with this issue in re-examination at pages 112 and 113 of the transcript of the evidence. Mr Coyne began by accepting that CGI's responsibilities were not the subject of much express discussion in his report.

[117]   Mr Sandison then asked this:

> "Q.   Are you aware, having carried out the review of the contractual documentation that you described this morning, of what the extent of those responsibilities are, at least to have formed a view about what they are?
>
> A.   Yes, I understand that CGI have wider obligations on other aspects of different projects with the same client."

[118]   It is noteworthy that he does not refer to any obligations owed by CGI in respect to Agilisys. Again it appears from this answer that Mr Coyne did not believe that CGI had any obligations in relation to the ERP and EI projects in respect to Agilisys. This answer is again suggestive of a lack of balance in Mr Coyne's evidence. He again appears to be ignoring obligations and responsibilities CGI had in respect of Agilisys in terms of the two projects.

[119]   Mr Sandison then asked:

> "Q.   Okay. And insofar as we don't see detailed description and analysis of those obligations or responsibilities, is that the product of some deliberate decision to exclude them from your report or otherwise not to deal with them?
>
> A.   No, there's been no deliberate decision to leave anything out of the report. Everything that was considered as relevant whether to help inform or support my positions or adverse to my positions were included in the report."

[120]   That answer appears to me to be incorrect, Mr Coyne has not put in and apparently considered, as I have just identified, what appears to be of critical importance in this case, namely: what are the obligations of CGI in respect to the two projects. It would appear to me to be essential in considering the various issues in this case to have regard to both the obligations of CGI and the obligations of Agilisys. Thus in this respect his report does appear to be essentially lacking in balance.

[121]   Alternatively, or perhaps in addition, the above answers appear to suggest a misunderstanding on Mr Coyne's part as to the relevance and significance of CGI's obligations.

[122] Thirdly, at page 60 to 61 of the transcript of his evidence, Mr Coyne is asked about a particular provision and whether he gave that consideration and in particular he is asked whether he understood that it was a CGI responsibility and he said yes.

[123] He is then asked what his position is as regards this matter and at pages 60 to 61 he gives a lengthy explanation of his position regarding this provision.

[124] If that was his position regarding this particular matter it ought to have been set out in his report.

[125] Fourthly, it appears to me to be of some significance in considering Mr Coyne's report as a whole that the foundation of his conclusions (see pages 61 and 62 of his cross-examination) is his analysis of the meaning of the contract. However, his conclusion on the meaning of the contract is arrived at, having regard to the passages of evidence to which I have already referred, on a consideration of Agilisys' obligations but without proper reference to and analysis of the obligations incumbent on CGI. This I consider undermines the conclusions which he reaches. Moreover, I am of the view that his analysis of the meaning of the contract is fundamentally wrong and I will further detail this later in the opinion.

[126] Fifthly, at pages 70 and 71 of the transcript of his evidence Mr Coyne is asked about the issue of body shopping. The questioner is careful to ensure that he and the witness when discussing body shopping, both have the same understanding of this term. To begin with Mr Coyne accepted that Mr Legge was body shopped from CGI to Agilisys. Following his acceptance of that position this question is asked:

> "Q. Yes. So if that's right, then … and Mr Legge was body shopped from CGI to Agilisys, why would CGI have any interest in a data migration strategy or templates because Agilisys was doing the activity using Mr Legge's labour on that analysis?

A.   Well, I think that's perhaps where… where the body shopping takes it… takes it too far. What… what essentially should have happened with the data migration is the leadership and management of the process was Agilisys, the setting of the strategy and the creation of the strategy documents was Agilisys. Once that was boiled down to specific tasks which need to be undertaken, that came down to CGI to use their technical skills to effect and provide the data back to Agilisys. So that was the process.

Q.   So is that the same thing as saying that Mr Legge was not body shopped from CGI to Agilisys for his work on data extraction?

A.   Perhaps we shouldn't have gone down the road of trying to define body shopping, really. Perhaps that's the mistake."

[127]   It is quite clear at this point in his evidence that Mr Coyne realises he has been caught out and that by his answer regarding body shopping he has undermined a position he has developed at other points in his evidence that there had been a failure on behalf of Agilisys to provide an adequate data migration strategy or adequate templates. When he realises this he immediately, although with some considerable difficulty, reverses his position. This is a short passage of evidence, however, it was in respect to an important part of the case. CGI's position in respect to data migration was to a large extent founded on the inadequacy of the data migration strategy and templates provided by Agilisys. The way that Mr Coyne dealt with this material issue, namely: switching from one position to another was highly unimpressive in the context of someone who is being offered as giving expert evidence.

[128]   Sixthly, at page 101 Mr Coyne is asked about Relief Notices and recognises that:

"Well, I see from some of the relief note responses that CGI do…I don't know if their words are 'accept responsibility' but they do acknowledge responsibility for delay and sometimes give relief for that delay."

[129]   However, as I understand it, he simply put that evidence to one side and does not consider it to be of any relevance. I believe that if his position is that this evidence was of no relevance he has to explain why. He has to look at the situation on the ground and explain

how his view on causation of delay fits in with what was the situation which appeared to be accepted at the time. I do not believe that the situation on the ground can simply be ignored as I think, having regard to the totality of his evidence, he has done.

[130] Equally at pages 101 and 102 of the transcript he says that the Ah-Wong email which I will set out in full later and the response thereto is of no relevance. This is simply not discussed in his report. At page 102 he says this:

> "A. -- I could narrate the entire history, but I don't believe it would add any value to what my opinion is, is that there's a failure to deliver an environments design or specification."
>
> Q. And can you direct us to any discussion at all of 22 April conditions (set out in the Ah-Wong email) in the section of your report dealing with the provision of environments?
>
> A. No, I don't believe it's in there."

[131] Again in my view this is a material failure not to consider this. I believe that this is a relevant document. It is a document which is dealing with parties' positions regarding the delivery of environments.

[132] He is then asked as to how long "do you say that the failure by Agilisys that you identify in relation to an environment design continued?"

> "A. Well, I don't believe that a design specification was ever delivered, but what was achieved but it was through an iterative process and CGI's delivery of environments, testing by Agilisys, being told things are not… are wrong or missing and things like that and then delivering another iteration of it, that the actual then need for a design was moot then because the system or the system… the environments had been created"

[133] At the bottom of page 103 this matter is followed up by the cross-examiner:

> "Q. So by whatever means, an iterative process or otherwise, are you able to identify a point in time where the issue about the provision of an adequate design for the environments was resolved or was it never resolved in your evidence?
>
> A. Well, it was never resolved, because a design was never provided."

[134]   Again this seems an entirely wrong approach. It is to take the approach that there is no specification provided at the outset and that everything else that is provided by way of a specification following on therefrom which eventually results in environments being created can be ignored, as somehow being of no relevance. This is again to ignore the situation on the ground in the project. It is to ignore what was actually happening.

[135]   This I believe is an example of the criticism made by Mr Cormack of Mr Coyne that he did not make a logical link between the criticisms he made of Agilisys and what was in fact happening in the course of the projects.

[136]   Seventhly, an important part in Mr Coyne's opinion is to the effect that there had been repeated material failures in management on the part of Agilisys. His view of what management amounts to is given in a passage of his evidence between pages 36 and 38 and in summary comes to this: Agilisys were "accountable for ensuring that those dependencies (the dependencies of CGI and CEC) are fulfilled" (emphasis added). He comes very close to accepting that what he is saying in relation to the issue of management amounts to more or less a "guarantee" although he will not use that word. However, in essence his position is that Agilisys project management responsibilities in respect to the delivery of dependencies by parties such as CGI or CEC amounts to making sure that the party does deliver the dependencies (a virtual guarantee). His final answer at page 37 in respect to this issue is to repeat that "they are accountable for making sure it gets … done". That view on what management in the context of the Subcontract amounts to must I believe on a sound construction of the Subcontract be wrong. It is wrong first as it empties CGI's responsibilities of any content. It in effect amounts to CGI doing no more than providing bodies, a view Mr Coyne eventually did not accept. He accepted, in the passage to which I earlier referred, that what was happening was not body shopping. It allows CGI to argue

this: no matter for what reason delivery of a dependency on its part failed it was due to the fault of Agilisys in that, to use the words of Mr Coyne, Agilisys is "accountable for ensuring that those dependencies are fulfilled". Such a wide construction of management or leadership makes no commercial sense and goes well beyond what on a plain reading either the word "leadership" or "management" would be understood. This view of management is, however, consistent with Mr Coyne's view, to which I have earlier drawn attention, as to the lack of relevance or significance of any obligations incumbent on CGI as any failure by CGI is turned into a failure by Agilisys to manage. Much of Mr Coyne's opinion is based on this understanding of the management responsibility of Agilisys. I believe his view regarding the scope of the management responsibility of Agilisys is wrong. Thus I consider the opinions he expresses in his report are fundamentally undermined.

[137]   Beyond the above I am also of the view that as argued by Mr Cormack at various points in his opinion, Mr Coyne expresses *ipse dixit* sweeping opinions.

[138]   Lastly Mr Coyne refers only briefly to the factual matrix in respect to how matters in terms of the projects were proceeding. Given the issues upon which he was commenting I believe a fuller consideration of such matters was an important element.

[139]   Mr Sandison submitted that I should accept the evidence of Mr Coyne. In particular he submitted that Mr Coyne had taken an objective and balanced approach. When looked at fairly and carefully, his report proceeded on a tacit acceptance that CGI had responsibilities. His report focused, having tacitly accepted the above, on the failures by Agilisys. It concentrates on the primary failure by Agilisys which prevented CGI fulfilling its obligations. For the reasons I have given above I do not accept this submission.

[140]   Moreover, certain further criticisms of Mr Coyne are made by Mr Cormack in his written submissions and I believe they are soundly made criticisms. I will look further at the evidence of Mr Coyne later in this opinion.

[141]   Overall I did not form a favourable view of this witness and I am not prepared to accept his evidence on disputed issues in preference to that of Dr Hunt. It did not seem to me for the above reasons that I could place reliance on any of his views.

[142]   Turning to the evidence of Dr Hunt, I found her generally to be a most impressive witness who gave her evidence in a careful and measured fashion.

[143]   My overall impression was that the terms of her report and her evidence were balanced in the way that they approached the issues.

[144]   I believe the contrast between her and Mr Coyne in respect to the issue of balance was marked.

[145]   When looking at the issue of responsibilities she looked at the responsibilities of both CGI and Agilisys. Examples of this are at 4.2.4, 4.2.5 and 6.2.1 of her report.

[146]   In addition she is prepared to make criticisms of Agilisys (see: example paragraph 6.5.4 and 6.8.6 of her report).

[147]   The above I believe are examples of the essential balance in her approach to her evidence, in marked contrast to Mr Coyne.

[148]   When considering issues she goes into considerable detail and provides substantial reasoning for the conclusions she reaches. This is again in marked contrast to Mr Coyne. Overall I found her reports and evidence, detailed, thorough, well-reasoned and balanced.

[149]   A good example of the above approach by Dr Hunt is her treatment of the issue of project management with which she deals at section 5 of her report. In this section by reference to documentation she clearly defines what management means and then seeks to

examine each of the aspects of management which she identifies and how these various aspects were managed by Agilisys. In her consideration of project management she puts this issue within its proper context by carefully considering the provisions of the Subcontract and the relevant background.

[150]   She sets out in considerable detail her views on this aspect of the case. She combines this with detailed reasoning and reference to supporting documents when necessary in order to properly support her views. This can be contrasted with Mr Coyne's approach which starts from a misunderstanding of what management properly means, and does not in detail define management and does not seek to put management into the context of the Subcontract and thereafter in detail say how any failures he identifies contributed to actual delay.

[151]   I believe that the comments I have made regarding Dr Hunt's approach to the section of her report dealing with management apply to all of the sections of her report.

[152]   Another aspect of her report which is of importance in considering whether to accept or not the views she advances is this: she has proper regard to what was happening as regards the implementation of the Subcontract on the ground.

[153]   A particularly good example of this is in the section dealing with data migration. She starts this section (see: 8.4) by setting out the relevant pleadings on behalf of CGI. She accepts that what is said there is a valid approach to data migration. Once more I think the acceptance that what is being put forward by CGI is a valid approach shows the essential balance in her report. She then discusses the approach which was actually taken by Agilisys explaining why it had to be taken given the timetable, agreed by CGI and CEC. She then explains how that approach fitted in with Agilisys' template approach and points out that CGI and CEC were aware of this approach and at the time raised no issues with it. She then

deals with the acceptability of that approach. Mr Coyne I believe in expressing his views

takes no account of matters such as the situation on the ground regarding timing in respect

to the performance of data migration which I believe he ought to have regard to for his

report to be given any weight.

[154] Overall the report of Dr Hunt is an impressive piece of work and I believe that

reliance can properly be placed upon the views which she expresses therein. I consider that

in respect to all aspects of the dispute for the foregoing reasons her opinions were entitled to

be given substantial weight. I preferred her evidence on the disputed issues to that given by

Mr Coyne.

VII – Approach to construction of the Subcontract

[155] It was as I understand it not a matter of contention between the parties that the

proper approach to the construction of the Subcontract could be summarised in the

following way, namely: as set out in the well-known passage from the judgment of

Lord Neuberger in *Arnold* v *Britton* 2015 AC 1619 at paragraph [15]:

> "When interpreting a written contract, the court is concerned to identify the intention
> of 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] AC 1101, para 14. And it does so by
> focussing on the meaning of the relevant words … 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 the document was executed, and
> (v) commercial common sense, but (vi) disregarding subjective evidence of any
> party's intentions."

[156] There was certain discussion about the relevance of intention in pre-contractual

discussions to the issue of contractual construction. It seems to me that the proper approach

to such is set out by Lord Hodge in *Patersons of Greenoakhill* v *Biffa Waste Services* 2013

SLT 729 in the following observations:

> "[17] Not everything that the parties knew when negotiating an agreement can be
> considered when the court construes the contract. For reasons both of relevancy and
> also of pragmatism the law has set its face against the consideration of parties'
> statements of intention in the negotiations leading to the contract. There is recent
> authority for this (*Chartbrook Ltd*, Lord Hoffmann at pp.1115—1121, paras 27—42;
> *Luminar Lava Ignite Ltd v Mama Group Plc* at 2010 S.C., pp.319—321; 2010 S.L.T.,
> pp.153—154, paras 39—45). Again there is also older authority in this jurisdiction
> (*Buttery & Co Inglis*, Lord Gifford (dissenting) at (1877) 5 R., pp.69—70; *Inglis v
> Buttery & Co*, Lord Blackburn at (1878) 5 R. (H.L.), pp.102—103).
>
> [18] The rule excluding statements of intention in pre-contractual negotiations has its
> limits. In *Chartbrook Ltd* Lord Hoffmann stated (at p.1121, para.42): 'The rule excludes
> evidence of what was said or done during the course of negotiating the agreement
> for the purpose of drawing inferences about what the contract meant. It does not
> exclude the use of such evidence for other purposes: for example, to establish that a
> fact which may be relevant as background was known to the parties, or to support a
> claim for rectification or estoppel. These are not exceptions to the rule. They operate
> outside it.'"

[157]   Accordingly I have only had regard to statements of intention in pre-contractual

negotiations for the limited purpose identified by Lord Hodge.

VIII – The roles of transformation director, application architect and solution architect

[158]   Before turning to look at the Relief Notices and the specific questions posed by

parties in respect thereto there is a further general issue I require to deal with and this is a

submission made by Mr Sandison. It was his submission that the Subcontract provided for

three key roles in the implementation of the ERP and EI projects, namely: transformation

director; application architect; and solution architect.

[159]   It was his position that these roles reflected Agilisys' leadership role in relation to

these two projects. Moreover, the roles themselves contained important responsibilities

which required to be properly discharged in order for the Subcontract to be properly

operated.

[160]   The first of these roles was business transformation director. This role is defined in

Annex 4 to Schedule Part 8.1 of the Subcontract which provided:

> "The business transformation director will be a Supplier employee and will represent
> the interests of both the Supplier and CGI in dealings with the Authority. The
> purpose of the role is to develop new business opportunities with the Authority
> under the Business Case Development Services, and opportunities for projects with
> PSPs. The person will work closely with the CGI team to:
> - Define, agree and initiate transformational work or new business
>   opportunities under the Business Case Development Services.
> - Manage the quality of the OBC and Business Case Development Services for
>   CGI and the Supplier, commissioning support from the relevant Party and
>   managing the delivery of the agreed outputs to the Authority.
> - Act as a trusted advisor to senior and executive Authority staff."

The Supplier in this context is Agilisys and the Authority is CEC.

[161]   Business transformation activities were widely defined in terms of the Subcontract

and included the responsibility of leading CEC through the change process:

> "Consultancy activities to support a client in changing the way it carries out its
> business processes or organises its workforce to deliver its business services to
> enable the implementation of Supplier IPR, Products, Knowhow. Such consultancy
> includes the following to the extent they are specific to and depended upon detailed
> knowledge of the Supplier IPR, Products, Knowhow: business case development,
> options appraisal, organisational design, change management, business process
> analysis and design, application selection and project management of application
> implementations." (See: Annex A to Schedule Part 4.1, JB 1101.)

The person designated to hold this role was Louise Ah-Wong of Agilisys.

[162]   On a sound construction I think that this role was in large part a forward facing one

and the extent to which it was engaged in the implementation of the ERP and EI projects

was limited. I do not consider that it was a key role in the implementation of the ERP and EI

projects.

[163]   I observe that it is of critical importance in understanding this role to note its

purpose:

> "The purpose of the role is to develop new business opportunities with the Authority
> under the Business Case Development Services, and opportunities for projects with
> PSPs."

It is clearly a development role in respect to "<u>new</u> business opportunities" with the

Authority and "<u>opportunities</u> for projects with PSPs" (emphasis added). The role was

forward looking in this sense: it was one which related to the future and was not intended

given its purpose to play any significant role in the implementation of the ERP and EI

projects which were current projects.

[164]   The bullet points which follow on in the description of the role must be read in the

context of the purpose of that role.

[165]   I do not of course say that it has no relevance to the ERP and EI projects, however, it

cannot be said to be a major role. I will where necessary comment further on the role in

terms of the specific parts of the projects considered in terms of the questions posed to the

court.

[166]   Secondly there was the role of application architect (the role was held by

Claire Conaghan), the responsibilities of which are as follows:

> "that the Application Architect was to 'work with clients to define an overall
> enterprise solution/service architecture that supports the delivery of existing and
> new services.' The responsibilities of the Application Architect included:
>
> - Understand the role and configuration of systems that support business
>   process with specialism across local government application landscapes.
>
> - Define information systems architecture to support clients' business strategy
>   or short-term objectives and ensure that technology objectives are aligned to
>   business goals.
>
> - Closely engage with customer stakeholders to determine the systems and
>   application requirements to support business plans and activities;
>   recommend technology opportunities and innovations to support business
>   improvements.
>
> - Build and sustain a relationship with key customer stakeholders
>
> - Support programmes and projects with architectural support and
>   requirements analysis

- Provide guidance and direction on the procurement of technologies; developing cost effective solutions to business requirements, optimising technologies already used and identifying suitable replacements and advancements

  […]

- Document and communicate the architecture and its benefit and impact on business processes to key stakeholders

- Work with the project teams, infrastructure architects, third party suppliers and other stakeholders to assemble and manage technical project plans and deliverables including time and cost estimations to deliver the solution.

- Evaluate and select suitable products from 3rd party vendors to deliver solutions

  […]

- Work with technical architects to ensure that non-functional requirements such as security, resilience, performance, on-going maintenance and other considerations are accounted for in the overall architecture

- Provide Technical leadership and guidance to solution architects, application service delivery teams as required." (See: Annex 4 to Schedule 8.1 of the Subcontract)

[167] This role is, given the definition, a fundamentally client facing role. The role is "to define an <u>overall</u> enterprise solution/service architecture…" (emphasis added). It is clearly a very high level and strategic role. The various responsibilities have to be read in that context. On a plain reading there are clearly responsibilities which have relevance to the implementation of the ERP and EI projects and I will consider these further where this role is referred to in respect to the various questions posed for determination by the court.

[168] The third key role was said to be that of solution architect, which role was held by Ravinder Johal of Agilisys.

[169] In terms of the PID the solution architect was to:

(a)   co-ordinate all activities in relation to system environment set up;

(b)   co-ordinate and manage all activities related to bespoke developments;

(c)   provide advice and guidance on enhancing system performance;

(d)   liaise with existing ICT supplier, BT, to obtain any necessary data.

[170]   On a plain reading there are responsibilities which have relevance to the implementation of the ERP and EI project and I will consider the significance of these in respect to the various questions posed for determination by the court.

IX – The nature and scope of the leadership/management role of Agilisys

[171]   It was a recurring theme in the submissions of CGI that Agilisys had breached its obligations to lead and manage the two projects and that this had been causative of delay. I have touched on this to a limited extent when considering the evidence of Mr Coyne.

[172]   There was no dispute between the parties that in respect to the ERP and EI projects, Agilisys was the party with the specific experience in dealing with such projects in the context of local government. Nor was it a matter of contention that in general terms Agilisys was to lead or manage the implementation of these two projects.

[173]   The issue between the parties was the scope and extent of that role.

[174]   Mr Cormack in advancing his position on this issue argued that the Subcontract clearly envisaged and recognised that a high degree of co-operation, mutual partnership, and interdependence was going to be necessary. However, when regard is had to the structure and context overall, it emphasised the junior or subordinate position of Agilisys as a party that was ultimately, reliant on and under the control of CGI as the prime contractor.

[175]   In support of these propositions Mr Cormack relied in summary on the following aspects of the contract:

- The express governance arrangements contained in clause 11 and Schedule Part 8.1 of the Subcontract;

- Agilisys' reliance on CGI's PMO function (roles and responsibilities document in Schedule Part 4.1);

- The partnership charter (Annex 2 to schedule 8.1);

- CGI's responsibility for management of CEC (clause 5.17 and Schedule Part 3);

- CGI cause and Relief Notices (clause 31);

- The length of the Subcontract and business case development and PSP opportunities (clause 4.12, 5.2 and Schedule Part 4.1);

[176]   Against that background he submitted: that sweeping statements such as the following, it is "apparent from the contractual documentation that [Agilisys] was required to be the programme manager for the delivery of the associated projects", are misleading and utterly simplistic. The quote was from the report of Mr Coyne at paragraph 3.3.

[177]   He submitted that what CGI was seeking to put forward was a position that the leadership role of Agilisys extended to managing, and taking contractual responsibility, for the way in which CGI performed its roles and responsibilities or for a failure by CEC to do the things that CGI had undertaken to procure it would do.

[178]   The above he submitted would fundamentally invert the careful division of responsibilities and the associated careful arrangement of charges for provision of services in Schedule Part 7.1 that was agreed between the parties in the Subcontract. By design, he submitted, Agilisys had absolutely no direct contractual relationship with CEC and no method of forcing them to do anything other than relying on CGI to exercise contractual powers.

[179]   In development of this argument he submitted that the construction and approach put forward by CGI effectively emptied CGI's responsibilities of any practical content other than the provision of bodies. Indeed, at various points in their evidence CGI appeared to be

making just such an extreme case in their references to "body shopping". He submitted that there were two obvious objections to that construction of the Subcontract.

[180]   First, if that was what parties had really intended, it was not easy to understand the reasons why they would have gone to such lengths in the Subcontract to demarcate various areas of responsibility or would have altered the financial model so as to simply remove any bodies from Agilisys for the relevant tasks. If that were truly the arrangement, Agilisys would simply have taken on the entire responsibility for everything on the project together with all of the profit and would have entered a separate agreement that CGI provide bodies at a lower cost.

[181]   Secondly, and closely linked to the first point, it made absolutely no commercial common sense. This construction involved the absurd suggestion that Agilisys agreed to keep all of the commercial and contractual risks for the areas of responsibility that CGI took back from them in the bid phase but lost all of the profit or direct control over delivery. That would require the clearest of language in the Subcontract to achieve such an uncommercial and obviously ill-advised arrangement. He submitted that there was nothing in the Subcontract that achieved that degree of clarity. Further, the wider context made it clear that this was not simply a body shopping exercise. As Anna Vale accepted in cross-examination, the whole language of dependencies was inconsistent with a body shopping exercise and further Mr Coyne did not accept any suggestion of body shopping. None of CGI's witnesses, apart from possibly Niall Sheriffs, genuinely supported the argument that the true nature of the arrangement between the parties was one of body shopping.

[182]   Thus he submitted that on the basis of some general leadership concept CGI in respect to data migration sought to categorise its own failure as one of mismanagement by

Agilisys of CGI and that the failure to build environments became a failure by Agilisys to tell CGI how to do it.

[183]   In relation to this issue Mr Sandison in his written submissions said this:

"16.   The Subcontract related to the ERP and EI projects which formed part of the far wider scope of the Prime Contract between CGI and CEC. CGI had the relationship of Prime Contractor with CEC. CGI was also responsible for the programme-level relationship with CEC, which extended beyond the two projects with which Agilisys was involved. Throughout the Subcontract, Agilisys is referred to as the 'Supplier'.

17.   Notwithstanding Agilisys' position as a subcontractor, however, Agilisys had specific responsibilities of leadership in relation to the EI and ERP Projects. The Subcontract was not operated in a manner whereby Agilisys, as subcontractor, was subordinate to CGI. As Robert Price recognised in his evidence, this was a contract in which both sides required seats 'at the top table'. The 'whole approach from the outset was one of partnership and collaboration across the board'.

18.   Whilst CGI led at a programme level, therefore, Agilisys was responsible for leadership of EI and ERP at a project level. Specific aspects of this have been noted in relation to individual Relief Notices, below. In particular, the Responsibilities Document provided in relation to project roles for both ERP (which was divided into a Finance and Procurement element and an HR and Payroll element) and EI: 'Supplier Leading delivery of this project,'

19.   These contractual responsibilities were reflected in the practical operation of the Subcontract. In his evidence, Robert Price acknowledged that the ERP and EI projects were led by Agilisys. Agilisys was the overall project manager for ERP. This reflected Agilisys' expertise in implementation (and, indeed, much of the day-to-day' work by Agilisys did not require CGI's input). EI was a project which Agilisys was 'managing and delivering'. A component of the role of project manager in that project, in Mr Price's evidence, was to 'seek to find out' why a participant in the project has not produced a deliverable, and, having done so, to attempt to assist. Further, it was important that the leading role played by Agilisys encompassed not only technical leadership but also change management (something which was reflected in the specific division of roles and responsibilities in the Subcontract). As it was expressed by Cliff Graham,

Agilisys were responsible for successfully delivering the ERP project and ultimately ensuring that CEC was receptive to change was part of that. Agilisys couldn't decouple that from their responsibility to ensure that the project progressed to the plan.

20.   The leadership role to be played by Agilisys reflected the respective expertise of the parties. Louise Ah-Wong's evidence was that ninety per-cent of Agilisys' business and experience was in local government. This included both 'one of the

largest Unit4 ERP practices in the UK' and, in relation to EI, the AD product which was to be used for the EI Project. Anna Vale's evidence was that the decision was taken to work with Agilisys because Agilisys were 'promoting themselves as experts in local government' and 'as a result of that expertise'.

21.   It is submitted that a key theme in relation to the operation of the Subcontract and the subject matter of the Relief Notices was Agilisys' failure adequately to discharge its obligations of leadership. Agilisys was required to provide leadership both in relation to CGI (in respect of the delivery of the EI and ERP Projects) and also in relation to CEC (who required to be led through the process of transformation). Specific aspects of this are discussed in relation to individual Relief Notices. At a general level, as a result of Agilisys' failure to provide the expected level of management, CGI were required to put in place additional management for the ERP and EI projects."

[184]   In respect to this issue I prefer the position advanced by Mr Cormack. When dealing with the evidence of Mr Coyne I have already given certain reasons why I consider the position taken by Mr Cormack is the correct one. In elaboration of those reasons I would make the following observations.

[185]   First, to state the obvious Agilisys was a subcontractor of CGI. This as a matter of generality placed it in a subordinate position to CGI. It had no contractual relationship with CEC. I believe this is significant in considering the scope and extent of its leadership and management role in respect to CEC and has to be considered in the context of the responsibility which lay on CGI "to <u>procure</u> that CEC fulfilled the roles and responsibilities allocated to them in the Subcontract" (emphasis added) which I will consider further below (see: Schedule Part 3 Clause 2.1.3).

[186]   Secondly, Mr Cormack directed my attention to the express governance arrangements. In terms of this the parties had agreed how the services to be provided under the Subcontract were to be managed and governed, the structure included: (a) nomination of suitable representatives with authority to act on behalf of either party; (b) a series of mutual obligations about a provision of suitable resources and staff; (c) proactive management of risks attributed to each party; and (d) ensuring both parties provide

representatives to attend the various boards. It is noteworthy that the chairperson for each board was given the responsibility for scheduling, preparing agenda, minuting, and facilitating giving effect to decisions (see: paragraph 5.2 of Schedule Part 8.1). Agilisys was not the chairperson for any of the boards. The programme management review board was the only one exclusive to Agilisys and CGI. It was to be chaired by a CGI representative. Thus the governance arrangements in the Subcontract, as argued by Mr Cormack, reflect the common sense position that Agilisys was a subcontractor and junior partner that was obliged to fit within CGI's wider governance arrangements. Accordingly, it was to remain subject to CGI's ultimate direction and control.

[187]   Turning to the PMO function (this is a reference to the Project Management Office) whilst, as was accepted, Agilisys had to lead the ERP and EI projects, it was expressly acknowledged that in doing so Agilisys would "rely on CGI PMO for support. CGI to support with the Authority governance and resources." This once more reflects the general contractual position that Agilisys were subcontractors with no contractual relationship with CEC and no means of compelling them to do anything. The party with such power was CGI who had the direct contractual relationship with CEC and had in addition the responsibility to leverage its commercial powers to ensure CEC complied with its obligations (see: schedule 4.1 section C of the Subcontract, JB 1, p 1080).

[188]   Thus overall having regard to the above I consider it was for Agilisys to work within the wider project management arrangements operated by CGI, it was not its responsibility to set up and operate a different approach to governance.

[189]   In respect to the issue of CGI management of CEC I observe it was a responsibility of CGI to procure that CEC fulfilled their roles and responsibilities allocated to them in the Subcontract (para 2.13 in Schedule Part 3 and Annex 2 to Schedule Part 6.1.)

[190]   As to the meaning of the word "procure" I found assistance in arriving at a true construction in the observations of Mr Justice Leveson as he then was in *Barnicoat & Another* v *Knights & Others* [2004] EWHC 330 (Ch).

[191]   The clause that was being considered by Mr Justice Leveson was in the following terms:

> "The purchasers shall procure the repayment of the director's loans upon the following terms:
> …
> 3.63   The purchasers shall procure the company to pay interest on the principal amount outstanding being not greater than…"

[192]   At paragraph 23 he holds that on a true construction " 'procure' means more than simply command. Its ordinary meaning is to achieve a result. In my judgment clause 3.6 has the same legal effect as a guarantee."

[193]   The precise context in which Mr Justice Leveson was considering the meaning of the word procure is different from the present case. However, what I believe is important is that what he has regard to is the ordinary meaning of the word "procure". In the circumstances of the present case I am unable to identify any reason why I should apply any other meaning to the word "procure" than its ordinary meaning. Accordingly I am of the view that the obligation incumbent on CGI was on a plain reading of the provision to guarantee CEC's fulfilment of its responsibilities.

[194]   I have also found some assistance in arriving at this conclusion in the observations of the Mr Justice Peter Smith in *Nearfield Limited* v *Lincoln Nominees Ltd and another* [2006] EWHC 2421 (Ch) at paragraphs 96 and 97 who reached the same conclusion as to the meaning of the word "procure".

[195]   It appears to me that the critical responsibility in relation to management of CEC is placed on CGI. Ultimately it is for CGI to ensure that CEC complies with its responsibilities; it has guaranteed that CEC will do this.

[196]   Beyond the above I consider that the mechanism of CGI cause and Relief Notices also implicitly recognise the extent of Agilisys' dependence on CGI fulfilling its responsibilities. This mechanism is difficult to understand if that is not correct.

[197]   I consider that this general leadership/management role which is summed up in the provision referred to by Mr Sandison "supplier leading delivery of this project" cannot be turned into a management role whereby Agilisys takes contractual responsibility, for the way in which CGI performed its roles and responsibilities or for a failure by CEC to do the things that CGI had undertaken to procure it would do. As argued by Mr Cormack, such an approach is not consistent with the division of responsibilities in the Subcontract. Beyond that, it makes no commercial sense for the reasons advanced by Mr Cormack.

[198]   Further the above analysis I also observe fits in with the analysis of Dr Hunt in her initial report in section 5. She analyses what management means in terms of the Subcontract. She identifies four detailed areas which it encompasses, namely: planning; progress; risk, issue and action tracking; and escalation. Her analysis is clear and compelling as to the scope and nature of the management role and how it required to be carried out within the context of a much larger contract where Agilisys was the subcontractor. Thereafter, Dr Hunt between paragraphs 5.2.4 and 5.5.4 of her initial report carefully analyses and comments upon Agilisys' performance of its management role: first within the context of the wider project management system operated by CGI; and secondly having regard to practical difficulties it encountered such as the high turnover of CGI personnel in the course of the implementation of the projects (see: 5.3.16) and finds its

performance satisfactory. I believe her analysis and conclusions regarding the scope of the general management role of Agilisys and regarding its performance of that role should be accepted.

[199]   Lastly, the above analysis of the management role fits with the evidence of the wider context which came from Ms Vale and Mr Coyne, namely: their rejection of the concept of a body shopping exercise. I think that it would only be in the context of such an extreme position of body shopping that Agilisys management role could have had the scope contended for by CGI. Ultimately Agilisys relied on and were under the control of CGI.

[200]   For all of the above reasons I reject the overarching position developed by Mr Sandison across all aspects of the project that there was a fundamental failure by Agilisys to discharge its responsibilities of leadership and management of the projects. I will further refer to this issue as I consider the individual Relief Notices.

The Relief Notices

ERP – data migration, RN 007 and RN 016

[201]   RN007 concerned delay of provision of data extracts. Agilisys asserted "a CGI cause is reasonably likely to cause Agilisys to fail to achieve a Milestone Date – System Acceptance Testing... CGI have not provided a data extracts from existing Finance, HR and Payroll systems and have not confirmed a date by which these will be available." RN016 also concerned delay of provision of data extracts. Agilisys asserted "a CGI cause is reasonably likely to cause Agilisys to fail to achieve a Milestone Date – User Acceptance Testing (UAT). An earlier Relief Notice, covering exactly the same cause, was raised on 18 March 2016 (RN007) but CGI have still not provided data extracts from existing Finance, HR and Payroll systems and have not confirmed a date by which these will be available."

[202] RN007 was based on a failure to provide extracts by either the original deadline agreed between the parties in version 9 of the Project Plan of 22 December 2015 or by the later deadline in version 12 of the Project Plan of 3 February 2016. RN016 was based on the continuing failure to provide extracts by the revised deadline that had been agreed between the parties of 17 August 2016 in version 13 and 29 September 2016 in version 16.6 of the Projects Plan. These deadlines were agreed between the parties in the context of the conditions in the Ah-Wong email (which I will detail later in this opinion) and the replan and relief which was granted at the time.

[203] Data Extraction forms part of the data migration process and involves the process of retrieving data from an old system (the legacy system), typically in a neutral format such as a CSI file. Data migration is the process of moving data from one system to another, most commonly so that a new system can make use of data contained in the legacy system. In the present case CEC data had been held on a legacy system operated by BT and was being moved to a new system (the target system).

[204] The first question in relation to this group of Relief Notices is this: What were the respective obligations of the parties (including as to the Milestone Dates in the Implementation Plans and timing generally) in relation to the provision of data extracts from CEC's existing Finance, Human Resources and Payroll systems?

[205] Agilisys submitted in its written submissions that the Subcontract allocates the following responsibilities to CGI (either directly or by virtue of its obligation to procure that CEC perform its responsibilities).

Section	Extract
OBS 1, OBS 2, OBS 3, OBS 30	*"Provide technical resource to develop all data migration scripts from the legacy system…and manage the delivery of any 3rd parties such as BT to complete."*

	"Address data quality issues that will impact the integrity of the system." (via CEC)
	"Manage the contractual relationship with BT enabling CGI to work as [CEC's] *agent."* (via CEC)
OBS 47	*"Undertake the data migration out of PPSL, Oracle e-business and iTrent to enable Agilisys to import to Unit 4 Business World."*
	"Address data quality issues that will impact the integrity of the system."
	"Manage the contractual relationship with BT enabling CGI to work as [CEC's] *agent."* (via CEC)
Roles & Responsibilities Document, Section C of Schedule Part 4.1	Project Roles: *"CGI providing data migration and integration services."* *"*[Council] *is responsible for Data cleansing"* CGI Responsibilities & Deliverables: *"Technical resource to define the technical specifications of the data migration extraction files, create the data extraction scripts and undertake all testing and documentation to complete the data extract process, working to the Agresso solutions architect. The data will be extracted from the legacy systems Oracle e-business, and PPSL.."*
Annex 2 to the Implementation Plans (p 1125 of JB)	*"CGI shall procure that the Authority will comply with the duties listed below, as required to deliver the Authority functions listed in Schedule 2.1 (Service Description):* … *Request the Incumbent Supplier to provide data extracts in accordance with specifications provided by the Supplier."*

It further argued that the Subcontract allocates the following responsibilities to Agilisys:

Section	Extract
OBS 1, OBS 2, OBS 3, OBS 30, and OBS 47	*"Define and agree the solution design with CEC based on Agilisys local government templates and agreed through workshops with CEC."* *"Working with CEC, define the technical specification of the data to be migrated from the* [relevant legacy system]*"* *"Undertake the data migration into Unit 4 Business World using the data extracted by CGI teams."* (NB. In OBS 47 additional words '*ERP Solution*' are inserted after '*Business World*' but otherwise is identical) *"Identify any data issues that will impact the integrity of the system."*
Roles & Responsibilities document, Section C of Schedule Part 4.1	Project Roles: *"(9)* [Agilisys] *to provide templates and specifications for data migration requirements."* Supplier Responsibilities & Deliverables: *"Solutions architect resource which will generate…data migration strategy…Each of these will produce a document deliverable for sign-off with the Authority. The solution architect will manage the technical resource provided by CGI."* *"Lead on the creation of the technical specifications, specifying the data translation rules. CGI will lead on the lower level specification elements such as coding standards, error trappings etc.."* *"Technical resource to undertake migration into Agresso, using the data extracted by the CGI technical data migration resource."*

[206]   CGI referred to three other responsibilities incumbent upon Agilisys, I do not

understand that these were disputed by Agilisys. They were:

- "Facilitate design workshops to agree the implementation design of the Agresso system – this will cover all business areas and include interfaces, data migration and reporting. Deliverables will include the workshop materials and the overall solution design document."

- "Change management resource to lead the Authority through the change programme. Deliverables will include change management strategy, communications plan and materials for relevant workshops and communications"

- "The archive solution will be configured by Agilisys and Agilisys will import the archive data provided by CGI that has been exported from the legacy systems."

[207] CGI emphasised that the above responsibilities were incumbent upon Agilisys in addition to the general obligations of leadership and management which I have already discussed and in respect to which I have set out my views as to the scope of this responsibility. Lastly Mr Sandison stressed that the solutions architect was to produce a data migration strategy and to manage the technical resource provided by CGI.

[208] I consider that the obligations referred to above by each side in respect to these Relief Notices were incumbent on the parties and were relevant to the discussion of the various issues relative to these Relief Notices.

[209] At paragraph 5.2.4 of its written submissions Agilisys argued that on a proper construction of these contractual provisions the scope of the responsibilities on a proper reading of the foregoing provisions is as follows:

> "Agilisys were to work with the Council to produce a documented and signed-off design of the Business World solution (including data migration strategy). Secondly, in implement of that design, Agilisys were to provide suitable templates to CGI. Thirdly, CGI had to use the templates to undertake all of the work to extract the data from the legacy systems (including, managing BT and providing all of the technical programming such as scripts or specifications of the extraction files). Fourthly, CGI had to give those extracts to Agilisys. They, also, had an absolute obligation to procure that CEC would request the Incumbent Supplier to provide such data extracts to Agilisys. Fifthly, Agilisys had to load that data into Business World."

[210] As to a sound construction of the various provisions I observe first that it is implicit in the whole structure and nature of the contract and the nature of the data migration work itself that Agilisys was dependent on CGI to perform its obligations in relation to extraction, in order for Agilisys to load the data (for which Agilisys is responsible). Data migration

involves three principle steps performed sequentially, namely: (a) extract; (b) transform; and (c) load. Secondly, I am persuaded that on a plain reading of the Subcontract the submission put forward by Mr Cormack is broadly correct as to what is a sound construction of the parties' respective responsibilities as regards data extraction subject to this: the general management role of Agilisys as I have earlier defined it and the express obligation that "the solution architect will manage the technical resource provided by CGI". For the reasons which I have already given the foregoing cannot be turned into a management role whereby Agilisys takes contractual responsibility for the way in which CGI performed its roles and responsibilities or for a failure by CEC to do the things that CGI had undertaken to procure it would do. The proposition that CGI was doing no more than providing a body to be managed by Agilisys (body shopping) and nothing more is not for the reasons I have earlier set out consistent with the terms of the Subcontract when looked at as a whole. In this context I believe management of the resource amounted to this: giving assistance and advice where necessary or requested. Agilisys was not responsible in respect to the data migration process in the way submitted on behalf of CGI.

[211] In respect to issues of timing and whether CGI had failed to provide the data extracts within the time necessarily required by the Implementation Plan, Agilisys submitted that the obligation required to be construed in light of the sequence of events in the Implementation Plan. Thus for the reasons I have set out above, Agilisys was dependent on CGI performing its obligations first: Agilisys could not load the data until CGI had extracted it. In the Implementation Plan in the Subcontract, data migration, building and testing was agreed as being a lengthy activity commencing on 1 December 2015 and concluding on 2 September 2016 (see: Schedule Part 6.1, JB 1, p 1119).

[212]   As set out earlier I have held that agreement of certain dates by parties can be had

regard to in judging what was a reasonable time in terms of the Implementation Plan as to

when dependencies required to be produced. Thus I have had regard to the dates set out in

the Project Plans and the Implementation Plan set out above when considering this question.

[213]   It is clear from the chronology of events, which I will set out when considering the

second question relative to these Relief Notices, that the data extracts were not provided

within the time necessarily required by the Implementation Plan. CGI accordingly breached

its obligations in respect of data migration. Therefore in respect of the question did CGI

breach its obligations by failing to provide data extracts from CEC's existing Finance,

Human Resources and Payrolls systems? I accordingly answer yes. In any event when

CGI's response in its written submissions is considered it is in the following terms:

> "151.   Certain data extracts were provided by David Legge between 19 and 31 May
> 2016, but these could not be validated by Agilisys. In August 2016, data migration
> entered 'special measures'. At that stage, sixteen of the required twenty-seven data
> extracts had been provided. Following the entry of data migration into special
> measures, however, it became apparent that there were significant difficulties in
> defining the scope of live data migration (in addition to historic data, which is
> discussed in answer to question 16, below). These issues had not been resolved when
> Agilisys left the project in March 2017.
>
> 152.   Accordingly, CGI did not entirely meet its obligation to provide full data
> extracts."

[214]   The next question is this: if the answer to question 14 is yes, was CGI's breach

caused or affected by a breach by Agilisys of its obligations?

[215]   As above set out CGI accepted it had not entirely met its obligations to provide data

extracts. However it went on to submit this:

> "It is submitted, however, that this failure was a result of the failure of Agilisys to
> comply with its obligations under the Subcontract in respect of data migration.
> CGI's position was set out in its response to RN016, issued on 13 October 2016."

[216]   Given CGI's position regarding the second question in relation to this group of Relief

Notices, the central question in regard to data migration becomes this: was CGI's breach

caused or affected by a breach of Agilisys of its obligations?

[217]   As regards the period up to the email JB 716 referred to in the next paragraph, the

chronology of events in respect to data migration was as set out in an Appendix produced

by Agilisys along with its written submissions. I believe this correctly sets out the timeline

during that period and the causes in that period for extracts not being produced. Moreover,

I consider that the appendix correctly sets out the timeline for the whole of data migration

including data archiving and the causes for extracts not being produced. This is Appendix 1

to this opinion.

[218]   The principal difficulty in relation to implementation of data extraction was

obtaining access to the legacy system. This issue is concisely captured in (1) David Legge's

email of 7.1.16 (JB 716): "I still don't have access to ANY of the legacy systems. It's getting

beyond a joke now."; and (2) an email (JB 738) on 21 January 2016: "Getting access to

HR/Payroll and Finance still seems to be problematic. Looks like the issue is around the fact

that they don't want us working with personal data and they do not have test instances that

have been anonymised." At the beginning of February 2016, it was confirmed that

David Legge had access to Oracle and iTrent. But the access granted to him by BT was such

that he was not actually allowed to do any extracts and was read only. His access was

conditional on not accessing live data other than to anonymise it: see emails at JB 790,

and 796.

[219]   By approximately May 2016 when Mr Legge left CGI he still did not have full access

to the legacy systems. And he had not passed any data extracts to Agilisys: see para 2.38 of

David Legge's WS. As he said in evidence: "We didn't get to the point of being able to

transfer any data to Agilisys." See: page 65, line 6 of the transcript. Accordingly, very little

actual progress was made with data extraction. The following events between March and

May 2016 I believe are noteworthy:

- On 18 March 2016, Agilisys issued RN007 relating to Data Migration delays:

  Peter Hall's WS 8.43, and see RN007 at JB 16. It was issued then because CGI's

  delay in providing full data extracts to Agilisys it was asserted was going to

  affect their ability to meet the System Acceptance Testing Milestone. By this

  stage, CGI was almost 6 weeks late in delivering full data extracts in accordance

  with the Implementation Plan v 12 deadline of 3 February 2016. This was

  ultimately accepted insofar as Relief was granted as a result of the ERP re-plan

  agreed with the Council at the end of April 2016: see response to RN007 among

  others at JB 30.

- By early April 2016, Kevin Bryce, Stephen Waters, and David Legge were

  meeting with CEC to try to persuade them to let Agilisys have access to live data:

  see JB 993. Following this meeting it was identified by Derek Brown of CGI (who

  bears to have been involved in data security), and having discussed it with CEC,

  that a statement of why access was required needed to be put together to obtain

  formal approval. Kevin Bryce acknowledged in an email that CGI had missed

  the data extract deadline in February 2016, and wanted to set a new date of

  18 April 2016, which would still be unlikely to hit but would mean they could

  push David Legge: see Peter Hall WS 8.42.3, and JB 1001-1002). This meeting was

  followed by a meeting between Ravinder Johal, Stephen Waters, and Derek

  Brown to discuss the necessary issues around access to live data, and

  Derek Brown then puts the document together: see references in JB 1037, 1038

(WS of Ravinder Johal at paragraph 4.15.6 and Steven Waters pages 30-31 of the transcript of his evidence). This document was ultimately rejected and a Privacy Impact Assessment had to be submitted: see JB 1144. It is in this context that Peter Hall was asked to get the consent of the Information Asset Owners within the Council on 26 April 2016, and ultimately only obtained full consent on 19 May 2016: see JB 1241.

- In the course of April 2016, Stephen Waters and David Legge bear to have started to try to make more progress. In particular, it is in this context that there are discussions about provision of further templates to David Legge, which ultimately were sent on 22 April 2016: see emails in JB 1030, and JB 1141.

- There is the sequence that was explored in cross-examination with Stephen Waters and Colin Brown in relation to the preparation of the plan provided for in the 22 April Conditions: see JB 1241. This plan is notable because it failed to meet the deadlines of a first extract cycle being completed by 7 June 2016, and a second cycle by 8 July 2016. It is also notable in that it identified no dependencies on Agilisys for a data migration strategy or anything else. As I will discuss further later, there is a general lack of reference in the contemporaneous documents of any issues regarding a lack of such a strategy or adequate templates.

- In cross-examination, David Legge accepted that the data migration document he had created in May 2016 was a combination substantially of material taken from the SDDs joined together particularly with some content written by himself about anonymisation: see page 27, lines 1-7 of the transcript.

[220]   In June 2016: this period I observe is notable in the evidence for the, almost,

complete absence of any evidence of CGI doing anything in relation to data migration. The

evidence tends to support the view that CGI struggled to obtain resource to replace

David Legge after he left and nothing much seems to have happened in this period: see

Ravinder Johal's WS at para 4.15.6. It is not until Graeme King's involvement in mid-July

2016 that there is anything obviously concrete that happens.

[221]   Between July and August 2016 data extraction was placed in special measures. In

summary, the sequence of events established in evidence was that, by the time David Legge

left at the end of May 2016, not even initial extracts had been provided to Agilisys and not

all of the systems had even been able to be accessed. Almost nothing appears to have

happened in the immediate period after David Legge left. By the beginning of August 2016,

some initial extracts for some of the templates had been provided and were in the process of

being validated. But there were still 9 templates for which absolutely no data extracts had

been provided. By September 2016, as the Programme Highlight Report for 6 September

2016 clearly demonstrates: JB 203, CGI had still only managed to provide usable extracts in

relation to a very small number of templates. Indeed, the final daily report on data

migration dated 29 September 2016, only showed 2 of the 30 templates as having been

completed. Extraction was not even completed by the time the Subcontract was terminated

in March 2017.

[222]   As set out earlier RN007 was based on a failure to provide extracts by either the

original deadline agreed between the parties in version 9 of the Project Plan of 22 December

2015, or by the later deadline in version 12 of the Project Plan of 3 February 2016.

David Legge gave clear evidence that he had not even been able to access the data in the

legacy systems by 3 February 2016 and in fact had only gained access to one of them from

BT by 4 March 2016: see paras 2.22 – 2.25 of David Legge's witness statement. In the circumstances, I agree with the submission made by Mr Cormack, it appears that RN007 was factually well founded and CGI had materially breached its responsibilities on data extraction.

[223]   Thereafter RN016 was based on the continuing failure to provide extracts by the revised deadlines that had been agreed between the parties of 17 August 2016 in version 13, and 29 September 2016 in version 16.6 of the Project Plans. These failures appear to be vouched by the evidence. These are the deadlines in the relevant Project Plans. They were the deadlines agreed between the parties in the context of the 22 April Conditions and the re-plan and relief that was granted at that time. Again, it is clear that these deadlines were not met. Data Migration was described as being in "special measures" throughout August and September 2016: see for example JB 104 and JB 203. As summarised above, it is clear that complete extracts had not been provided to Agilisys by the end of September 2016.

[224]   Mr Sandison made four distinct points regarding breaches by Agilisys in the performance of the Subcontract in respect to data extraction:

- No adequate data migration strategy had been provided by Agilisys;

- The templates provided by Agilisys were inadequate;

- Failure in leadership/management by Agilisys first in respect of a resource provided by CGI, principally Mr Legge and secondly a failure to manage CEC/BT.

- Failure to produce a change management strategy.

I will consider each of these in turn.

[225]   It was not a contentious issue that one of the responsibilities on the part of Agilisys was that a data migration strategy would be generated (see: section C of schedule 4.1).

[226]   The first question which therefore arises is this: was such a data migration strategy produced? Secondly, was it produced timeously? Thirdly, was it adequate?

[227]   The position of Agilisys in respect to the above questions was that they should be answered yes, on the other hand CGI's position was that the answer to these questions was no.

[228]   Agilisys' starting point was that the solution design document JB 234-241 contained the data migration strategy and that this was adequate.

[229]   I observe that at least initially there appeared on behalf of CGI to be a recognition that this was a data migration strategy and that it was adequate in that it signed off Milestone 2.1 JB 241. The purpose of it signing off this document was to indicate that Agilisys had met the milestone for design of the system including the production of a data migration strategy.

[230]   Mr Sheriffs was asked a number of questions in respect to the signing off between pages 99 and 108 of the transcript of his evidence. He was the person within CGI who actually signed off Milestone 2.1.

[231]   Mr Sheriffs explained in cross-examination why he had signed off this milestone, when it was his position in evidence, that what was produced was inadequate and said this:

> "These were produced following workshops between Agilisys and CEC. They were presented for sign off by CGI along with client. This was done to a very compressed timescale. I took Agilisys at their word that they were appropriate, and as CEC approved them I did so at the same time." (see: p101)

[232]   The test success criteria for certification was this: "CGI and Agilisys confirmed that agreed deliverables had been completed and approved by the Council as required."
Mr Sandison's position regarding the certification was this, that the certification by CGI having regard to the whole circumstances did not amount to much and little or nothing as regards the adequacy of the data migration strategy could be taken from it.

[233]   I do not accept Mr Sandison's submission as to what can be taken from the signing off by CGI. In terms of the structure of the contract Milestones and certification were an important part of the mechanism for the operation of the Subcontract and the reaching of Milestones had material consequences. It appeared to me to be a matter which is unlikely to have been given as little consideration as Mr Sheriffs in his evidence sought to put forward. I do not accept Mr Sheriffs' evidence regarding this matter.

[234]   This evidence of Mr Sheriffs appeared to me to be an example of the rewriting of history by CGI, namely: taking up one position at the time of the performance of the Subcontract and taking up a different position later for the purposes of this action. I am persuaded that the certification is an early indicator of the adequacy of the data migration strategy produced by Agilisys.

[235]   That the data migration strategy produced was adequate I believe is supported by other contemporaneous evidence, see: Mr Legge's email JB 716 and the lack of any adverse comment about the data migration strategy in the first report prepared by Mr Fulda. If there was a failure to provide at the outset an adequate data migration strategy I believe it would have been highlighted in this report given the nature and purpose in preparing it. I would also note the email of Dr Speed of 23 February 2016 expressly accepting that the data migration strategy was covered in the Solution Design Document ("SDD").

[236]   I am unable to identify any other contemporaneous documents until late September/October on behalf of CGI raising the issue of the lack of an adequate data migration strategy with Agilisys.

[237]   In respect to the data migration strategy which was produced at the outset by Agilisys it is I believe important to note the following part of the written submissions on the part of Agilisys:

"Further, to borrow Mr. Coyne's language, these were documents produced following '*a series of meetings with the Authority, in order to gain an understanding of the current business processes (on the legacy systems) and to agree how the processes would operate on the new system*': see para. 4.13 in Mr. Coyne's report. In particular, they followed workshops with all of the key members of the Council on 6 October and 20 October 2015. They were then distilled into the draft SDD, which were the subject of checks by various people at the Council. They set-out in copious detail: how certain data was to be displayed in the new system; to the extent that it was known, areas where that might require changes and cleansing of data in the legacy system; and a record of decisions that had been taken about the overall design of the system. These were all correlated to the specific requirements set out in the OBS. The data migration strategy then sets out: (a) the process to be following in extracting, transforming, and loading the data; (b) the level of data to be migrated to the live and historic clients; and (c) a record of the various design decisions made about the level of live and historic data that is to be migrated. Although hearsay evidence was led by CGI that almost a year later, the CEC representatives did not understand and were still querying the process. No actual evidence was led from CEC. No evidence was led from anyone at those meetings. No cross-examination of Agilisys' witnesses was undertaken to suggest that those meetings had not fully covered the matters and decisions recorded in the SDD." (see: 5.6.5)

[238]   I believe that this is a very powerful submission clearly supporting the adequacy of the data migration strategy produced in the SDDs and undermining the criticisms made on behalf of CGI regarding this documentation.

[239]   CGI in the course of its evidence tried to develop a position through the evidence of Mr Waters, Mr Brown and Mr Sheriffs that it was really only where Kevin Sander produced a document on 23 November 2016 that anything approaching an adequate data migration strategy was produced by Agilisys.

[240]   In respect to this issue I prefer the evidence of Mr Sander. I accepted the evidence contained in his statement at paragraph 6.2.3 that all he had done in preparing this document was review and consolidate what was already there in respect of a data migration strategy. I also believe it is noteworthy in this context what is said by the witness at 6.4 and 6.5 of his statement which was as follows:

"Given the passage of time and change in stakeholders and general level of frustration within the Council, I wrote a detailed Data Migration Strategy document that ran to 100 plus pages. To do so, I copied information in from both the SDDs and

the data migration templates, reviewed each section with relevant stakeholders from both the Council and CGI to ensure that we jointly captured any questions or concerns they wanted to raise. I also reviewed the options paper which had been previously produced by Julia Jackson to ensure that my document was consistent with the recommendation made there. I then issued several iterations of the draft document which progressively added in any changes or additional clarifications required in order to respond to and close out the questions and concerns which we had jointly captured.

6.5 However, we have worked perfectly well on other similar projects without this consolidation and reformulation of information. In my view it became desirable in this case only because by October 2016 the relationship between Agilisys, CGI and the Council was perceived by the Council to be working so badly, and because so much of the earlier discussion and knowledge transfer had been eroded by the passage of time coupled with high turnover of CGI extraction personnel. My motivation for writing a new document was only to restore confidence with Council stakeholders. I perceived that consolidating all the already available information into a single document and using that as a basis for review was the quickest and most efficient way to achieve that."

[241] These passages reinforce his position as to what the document he produced amounted to and that in particular it was not an adequate data migration strategy being produced for the first time. The reasons he gives for the production of this document appear to me cogent and explain why this document was produced, not because there was not already an adequate data migration strategy but because of other problems which had occurred in the implementation of the project and which had in particular been caused by the changes in personnel within CGI. It was clear from the evidence that there had been significant changes in CGI personnel in respect to data migration (see: Dr Hunt's initial report at 8.7.1).

[242] Four detailed points were made by Mr Sandison in relation to the position of Mr Sander which were as follows:

(a)   In comparison to the existing sources of information which Mr Sander used, Mr Sander noted that "I probably documented a little more explanation and

context around some of the information". This included Mr Sander's own

experience and knowledge of data migration.

(b)   The strategy document brought together previously disparate sources of

information, including the templates and SDDs. These documents were, in

Mr Sander's own description, not sufficient without the additional

(non-documented) "knowledge transfer" said to have been given to

David Legge at the outset of the project.

(c)   Production of the document, including the investigative process that preceded

it, took around one month.

(d)   The process of producing the document was a "process that I went through

with the council workstream leads", and was intended to reflect the "feedback"

from that process in addition to any "additional questions" that had been

raised. Further versions of the document were produced which incorporated

further changes and revisions.

[243]   Point (a) does not suggest that there was anything significant added to what had

already been provided.

[244]   Point (b) emphasises that Mr Sander was bringing together information from a

number of sources (already available) and adds nothing further. I do not understand that

there is evidence which supports a lack of knowledge transfer to Mr Legge. When I look at

his evidence as a whole he appears generally happy with the information that was provided

by Agilisys.

[245]   Point (c) stresses the length of time it took Mr Sander to prepare this document,

however, Mr Sander at 6.4 and 6.5 of his statement gives an explanation as to why in the

context of the problems with the Subcontract it would have taken that long to produce this

further document. It does not suggest that anything significant had been added in this document to what was already available or what had been provided to that point was inadequate.

[246]   So far as the point made at paragraph (d) this is dealing with no more than feedback, I think that would be expected in an iterative process. The mere fact that feedback had to be taken account of does not mean that the original data migration strategy was in any sense inadequate. All that can be taken from his taking account of feedback is this: as with any document prepared issues may arise which cause it to be altered, that however does not necessarily suggest the document was inadequate, it is merely a process of refining.

[247]   Further in respect to the issue of the adequacy of the data migration strategy there is the evidence of Dr Hunt which she sets out as part of her consideration of data migration in section 8 of her initial report. She considers this issue in some detail including consideration of the general approach to data migration by Agilisys in section 8.4 and in particular considers the adequacy of the data migration strategy under a number of headings and in respect to certain specific criticism made on behalf of CGI regarding the strategy. Her views are I think well reasoned and based on a full analysis of the relevant circumstances and clearly support the view that the data migration strategy produced was adequate. I believe having regard to her approach and reasoning that considerable weight can be attached to it. I prefer her views on this matter to those given by Mr Coyne. I have already set out my reasons for rejecting the evidence of Mr Coyne. I preferred the evidence of Dr Hunt to that of Mr Coyne on this issue. I rejected his evidence for the reasons set out.

[248]   Overall I am persuaded that Agilisys produced at the outset (therefore timeously) an adequate data migration strategy document.

[249]   Even, if contrary to my view the strategy document was not adequate and timeous I am not persuaded that any such failure had causative substance. The evidence led by CGI in respect to this was in my view sparse and not persuasive.

[250]   I believe an appropriate place to start consideration of this issue is the evidence of Mr Legge. His position regarding a data migration strategy is given at paragraph 2.8 of his statement:

> "That (a data migration strategy) was not hugely important to me since my job was to extract the data and the strategy would only come into play after that. The data migration process can be described as extract, transform and load, and I was only responsible for the extract part. I understood that Agilisys would subsequently provide details of which data they wanted and the format of that, since that wasn't set out in the SDDs."

[251]   The above answer I consider to be informative on this issue. Mr Legge was the man on the ground initially doing the data extraction and the issue of the existence or otherwise of a data migration strategy is of no importance to him. It is implicit in that answer that the absence of such was not causative of any delay in the data extraction process. He was the person on the ground for much of the project carrying out the work and it appears that he was not held up by the lack of such a strategy.

[252]   Turning to Stephen Waters, his position regarding a lack of a data migration strategy is given at 2.5 of his statement where he says:

> "We didn't have a data migration strategy from Agilisys when I started in April 2016. That was something we knew we needed, but as we didn't have one no one was clear on what the scope of work was. …there was no data migration strategy produced by Agilisys until Kevin Sander produced one on 23rd November 2016."

[253]   However, as to how a lack of such a strategy document impacted on the delivery of the project and caused delay I am unable to identify anything further in his evidence regarding this.

[254]   It is also clear that he implicitly accepts that Kevin Sander produced an adequate

data migration strategy and if all he was doing was consolidating (as I have earlier held)

then from the outset there had been an adequate strategy.

[255]   As regards the evidence of Colin Brown, he refers at paragraph 3.91 of his statement

to an email from Bridget Fox and at 3.91.4 he goes on to say this:

> "Agilisys had not provided a data migration strategy (only a high level version
> included in design documents) or a plan to engage the business in the data migration
> stream. As such CGI was unaware of what Agilisys' process was regarding ensuring
> data integrity."

[256]   His position was the same as Mr Waters on Mr Sander producing a data migration

strategy in November: "Agilisys started noticeably to improve" (see: 3.98). Again there is

an implicit acceptance that if what Mr Sander produced was a consolidation there was from

the outset an adequate data migration strategy.

[257]   This witness sets out what he regards as the critical importance of a strategy

document at page 79 of the transcript of his evidence:

> "So strategy, get a good strategy, then you build your plan out, so this really should
> have maybe fed in to that whole process of getting a good strategy and then getting
> the plan, and I think that's why we find data migration failing, because there's not a
> solid foundation to start building these plans off…"

[258]   What the witness makes clear in this answer is that from the outset a strategy needed

to be in place.

[259]   In light of the position which he took up about the necessity for this strategy

document to be there from the outset, at page 146 of the transcript he is asked this about a

lessons learned exercise put in place by him in August 2016:

> "And if there had been problems with SDDs, if there had been problems with SDDs,
> like outstanding information, again, that would have been called out by your team.
> It would be a shocking state of affairs having spent a month intensively reviewing
> the data migration workstream for CGI not to have realised if it was the case that
> there was no data migration strategy?"

[260] He answered the above question in this way:

"I think it is a shocking state of affairs there is no data migration strategy. I think you're absolutely right. As I say, we tried to work within the approach that was suggested and we couldn't impact at that time, but when the wheels do fall off something like this, you do have to take it back and say 'Okay, that hasn't worked. What do we need to ensure this works? What should we have done?' Lessons learned, it's back to that, and I believe what should have been done was when Kevin Sander came in and managed that stream correctly."

[261] What in the answer he does not give any proper explanation for is this: why, if this matter was of such importance, was it not identified at the end of August following the month of intense activity reviewing the data migration workstream, that there had been a lack of a strategy document from the outset.

[262] This appears to be an area where the contemporaneous documentation does not support the position being advanced at proof by CGI. If a strategy document should have been supplied at the outset, if it was not supplied, and if it was of critical importance as this and other CGI witnesses seemed to suggest, I believe there would have been from the outset documentation emanating from CGI and sent to Agilisys calling this out. In addition there would have been a consistent pattern of contemporaneous documentation calling this out with ever greater urgency. I do not believe there is such documentation. This lack of contemporaneous documentation emanating from CGI calling out matters which it now says were of importance is I believe a theme, across many of the issues and strongly supports the view that there was no breach of obligations on the part of Agilisys which caused or affected a breach by CGI of its obligations.

[263] The next witness who gives evidence in respect of this issue is Mr Tom Fulda. Mr Fulda prepared two audit reports which in some detail considered the implementation of in particular the ERP project. Mr Fulda in his second report under project methodology at

5.2 identified as a criticism of Agilisys a lack of data migration strategy, although there is no particular development of this point. This report was prepared in November 2016.

[264]   It is noteworthy that in his first report prepared in February 2016 he does not recommend any form of rewriting of the design documents and does not note that there is a requirement for a data migration strategy to be in place.

[265]   Given that it was, according to CGI witnesses, necessary from the outset, that an adequate data migration strategy was in place and this was a significant issue, I would have expected it to be identified by Mr Fulda in his first report. At pages 92 and 93 of the transcript of his evidence he accepts no such issue was identified.

[266]   For reasons I have already set out, I was not prepared to accept the evidence of Mr Fulda arising from his second report.

[267]   Ms Fox, Mr Graham and Mr Sheriffs it appears to me say nothing significant relative to a lack of a strategy document.

[268]   I believe given the whole evidence that this issue of a lack of a data migration strategy was sought by CGI at a later stage to be turned into an issue of significance, which it was not during the course of implementation of the project. This I believe supports a conclusion that Agilisys fulfilled its obligations in respect of the production timeously of an adequate migration strategy and that in any event any lack of such a strategy document was not causative of delay in the performance of CGI's obligations. Beyond that any evidence of actual causative effect of such a lack is vague and inspecific.

[269]   Thus I conclude for the foregoing reasons that a data migration strategy was produced at the outset and that it was an adequate document. Even if I am wrong in that view, it was not causative of any significant delay in the performance of CGI's obligations.

[270]   The next issue is whether Agilisys failed to provide adequate templates for the data extraction process in the sense that they were not fit for their purpose.

[271]   The data extraction process involved the use of templates. Specification of the required extract is provided by the template. The template is typically a spreadsheet which contains a sample worksheet with the required columns for the data extract identified. It was a matter of agreement that these templates were to be prepared by Agilisys.

[272]   It was accepted at all hands that the data extraction process was an iterative one. Thus templates would be used and what was recovered from the legacy system would be examined and the templates amended and refined in order to obtain a better extract of data.

[273]   From October 2015 to June 2016 the person who was carrying out the extraction of data from the legacy system was David Legge.

[274]   Looking at his witness statement at paragraph 2.34 he says that on 22 April 2016 he obtained a set of updated templates from Agilisys. The only comment he makes about the adequacy of these was that certain further templates were received in May (see: 2.35). He does not raise any significant issues relative to the adequacy of the templates.

[275]   With respect to the new templates, provided in May, he made, what was clear from his cross-examination a minor criticism about changing file names and the need for change control (see: 2.42 of his statement).

[276]   In cross-examination he dealt with the position regarding the first set of templates sent to him by Agilisys on 4 December 2015. He said this in an email:

> "Just had a look through these, I don't see anything untoward at this stage." (see: page 33 in the transcript of his evidence)

[277]   As at 21 January 2016 he describes a request that he is receiving from Agilisys as being "the kind of routine thing which takes place in a data extraction process".

[278]   At page 63 of the transcript he makes it clear that the one time he sought assistance

from Agilisys, it sought to provide assistance.

[279]   So far as the issue of any failures to manage him by Agilisys he makes a very general

criticism of this at paragraph 2.2 of his statement. This related to him being left to

communicate with BT and CEC without any assistance from Agilisys. However, when the

evidence which he gives in cross-examination at pages 28 to 31 of the transcript is

considered, he cannot identify anything Agilisys could have done by way of management

regarding the problems with CEC and BT over access by him to the legacy system which

arose at least in part from security concerns of CEC. In addition it is quite clear he knew

what he was doing relative to these matters and in relation in particular to BT he was

following a set process. The difficulties he was having in obtaining material from BT and

CEC did not arise through any failure in management by Agilisys of Mr Legge. The issue

was not one of management. It was an issue requiring CGI to procure that CEC complied

with its responsibilities, rather than simply not dealing with requests in an adequate and

timeous manner. Moreover, so far as being under the management and control of CGI

Mr Legge said this at page 55 of his cross-examination:

> "Someone at CGI, and I can't remember who it was, had said 'Just deal directly with
> Peter. Let him know how you're getting on'. So reporting in this context does just
> mean 'Here's what I'm doing. Here's how I'm getting on.' Doesn't mean I do what
> Peter specifically asks."

[280]   Overall I do not think his evidence could be characterised as critical of the adequacy

of the templates. His evidence on this issue is important as he was the man on the ground

carrying out the extraction of data. Nor do I think any failure in management of Mr Legge

by Agilisys can be identified in his evidence. Beyond that I cannot see any causative

substance so far as delay is concerned which arises due to lack of management by Agilisys of

Mr Legge.

[281]   The next witness to work, hands on, in relation to the templates was Stephen Waters

who worked on this aspect of the project from September 2016 onwards (WS 1.4).

[282]   Mr Waters makes certain criticism of the adequacy of the templates at paragraph 2.7

of his statement. However, his first email after the receipt of these templates on 22 April

does not raise these issues (see 2.8 of WS). Nor does his email to Peter Hall on 26 April

referred to at paragraph 2.15 of his statement. If there was a significant problem with the

templates I would expect it to be raised in these emails. What he does say in the email of

26 April is that he is still awaiting "confirmation from the client that CGI can use live data".

[283]   He refers at 2.31 of his statement to a document prepared by a Mr King (about

18 July 2016) in respect to the templates. Mr King was not led in evidence. I observe that in

his email Mr King says this: "Concern that Agilisys is being paid to do the data migration

and yet we are doing all the investigation work…" This takes no account of the fact that the

responsibility for data extraction was CGI's and this misunderstanding may colour his

views. Mr Waters was unable to give any detailed evidence relative to the position

regarding templates in July/August 2016 as he was not directly involved with the ERP

project, only returning to it in September 2016 (see: paragraph 2.32).

[284]   Mr Waters between pages 81 and 85 of the transcript of his evidence is asked about

the adequacy of the templates, in the context of their being used in an iterative process. He

eventually is asked this question at page 85:

> "Q.   Yes. If that's right, that some extracts were being added to the SharePoint site
> at this point, then would that not indicate that the Agilisys templates were
> functioning satisfactorily at least in terms of delivering a first extract or first cut
> of data?
>
> A: Yes."

This was in relation to matters as at August 2016.

[285]   Data extraction, as was accepted at all hands, is iterative, so that after a first cut the templates could be refined. This was the whole basis upon which the template solution worked. It is clear from the above answer that the use of the templates was producing an extract which could later be refined.

[286]   At 2.35 of his initial statement he says this:

> "Around that time [September 2016] a serious issue arose regarding 'relations' not being defined. The templates from Agilisys had a field for employee relations. There were no further elements for relations within that, such as if an employee was in a car leasing system, or had a season ticket for travel etc. and all of those elements had to go into Business World. CGI had incorrectly assumed that Agilisys knew what they were doing."

[287]   He is then asked about this issue in cross-examination at page 93 of the transcript.

He is then referred to an email from Ms Johal in JB 1528 which says:

> "Here are the valid relations for employee/pursuer employment."

This email was written on 5 August. He accepts at page 95 that these "look like relations".

[288]   Thereafter at pages 96/97 in the transcript it becomes apparent that the particular examples of employee relations which he raised as a difficulty had in fact been covered in the document earlier produced by Ms Johal.

[289]   The next person from CGI who had involvement in this issue was Mr Tom Fulda.

[290]   His principal involvement in the ERP project was the preparation of what were described as two audit reports. The first report was dated 13 February 2016 (JB 808).

[291]   Mr Fulda in his statement at paragraph 2.5 sets out in full his recommendations arising from this audit report. I do not read any of these recommendations as making any implicit or explicit criticisms of the templates which had been produced by Agilisys.

[292]   He quotes from his report at paragraph 2.4 of his statement and says that the three largest areas of concern were:

"Interfaces and data migration (large delays, multiple parties involved, too many hand-offs, now an issue rather than a risk) and customer resources (multiple impacts, see customer resources below)."

In this section I do not see anything about problems with the quality of templates being identified. Nor do I see anything about a lack of a data migration strategy or failures to manage by Agilisys.

[293]   The entire findings section of Mr Fulda's report is in the following terms:

"**Findings**
- There are many risks, many of which are significant, but broadly affect just two outcomes:
  - Those that jeopardise go-live date
  - Those that jeopardise solution adoption/benefits realisation and impact post go-live hypercare (Well documented examples of local authorities in this situation exist, e.g. Birmingham CC backlog in supplier payments. Extensive bad publicity.)
  The second outcome is more important than the first. A technical go-live (on time delivery of tested solution that meets the specification) into a business that is not prepared for it has both immediate and longer term costs: hypercare, repeat training, delays to processing which can also be felt externally (delayed payments/bad publicity), user engagement and morale/system credibility, proliferation of poor practices/off-system working, delayed benefits-realisation, time consuming and costly to turn around, etc.
- Current version of the plan (v12) is coherent but there is now minimal contingency. I cannot see a way of reshaping the plan to introduce more contingency whilst retaining the same go-live date or introducing new risks.
- A little contingency remains in the short period after the second payroll parallel run (by increasing backfilling CEC training resource with Agilisys/CGI) but hitting dates for parallel run is critical or a month is lost. Activities on critical path leading up to that are tight and many are subject to significant risks (see Appendix)
- 3 largest areas of concern are around interfaces and data migration (large delays, multiple parties involved, too many hand-offs, now an issue rather than a risk) and customer resources (multiple impacts, see Customer Resources below)
- Taken individually, most risks can be mitigated to a greater or less extent (though surely time is running out for data and interfaces) but taken collectively the challenge is great.
- On its own, extending the project timeline is likely to have limited impact on the outcomes in the first point; it must be accompanied by other changes (see Customer Resources below and Recommendations)
- Although signed off, I am concerned about the degree of understanding of the new solution and the resultant impacts. Documentation is extensive but has it been understood? Insufficient/no ongoing involvement from senior business users/process owners. Insufficient involvement of CEC project team members

with the project activities. Agilisys activities progress on best endeavours basis (consultant I briefly met appeared diligent) but they are rather isolated from customer scrutiny.

- Fully expect Agilisys to deliver to spec (they are delivering their template solution to a large degree) but a gap between this and customer expectations/understanding is to be expected. It normally materialises throughout the build phase but given relative hands off approach from customer it is likely to materialise at UAT at earliest (adversely impacting UAT timeline) and quite possibly after go live.
- Test strategy document is rather loose, for example, SAT acceptance criteria 'There should be no critical defects, and the number of major/minor defects should be reasonable'
- Risks and Issues: not comprehensively captured. Risks not updated in timely fashion. Agilisys don't have access to iTools and PMO input process appears to have lapsed? Didn't find an issue log (?)
- Project documentation: appeared difficult to access Agilisys documentation. All of the following documentation must be jointly and readily accessible: process design, functional specs, technical specs, configuration notes, access authorisations for roles, test scripts, end-user procedures, cutover planning."

[294]   When the whole findings are looked at there does not appear to be any criticisms of

Agilisys templates or any other significant aspect of its implementation of this part of the

project.

[295]   In particular it appears to me to be noteworthy that the only specific comment on

templates is as follows:

> "Fully expect Agilisys to deliver to spec (they are delivering their template solution to a large degree)…"

[296]   On a fair reading this suggests that the templates part of the process is proceeding

properly and that there is no difficulty regarding the adequacy of the templates being

produced.

[297]   At page 93 of the transcript of his evidence he accepts that there is no

recommendation in his report regarding templates and their being altered in any way. Had

there been any material difficulties with the templates at that time I would have expected

this to have been raised within his report.

[298]   Against that whole background I find this comment at paragraph 3.2.1 in Mr Fulda's statement regarding data migration: "The quality of Agilisys material in this area was poor" when speaking about the time of his first report to be entirely at odds with his findings which he made at the time. This is perhaps another example of CGI rewriting. It undermines the general acceptability of this witness's evidence.

[299]   Mr Fulda did a further review in November 2016. In this review he made fairly trenchant observations regarding the template solution (see 5.3.4 of his statement).

[300]   There is thus a seismic change in his view between February and November. In section 5.3 of his supplementary audit report there is a root and branch criticism of the approach and methodology of Agilisys in respect to data migration. It appears to me that if these criticisms are justified they could equally have been made at the time of the February review. The approach and methodology of Agilisys had not, as I understand it from the evidence, changed during the period February to November. I therefore cannot understand why if all of these criticisms are justified they are not set out in the report of his February review. Moreover they are entirely at odds with Dr Hunt's views regarding Agilisys' approach at 2.5.2, 2.5.3; 8.4.1 to 8.4.5; 8.5.2 to 8.5.4 and 8.11.1 to 8.11.2. I find her analysis in relation to this aspect of the case convincing and I believe it strongly supports the adequacy of the templates.

[301]   I think the difference between the February and November report, at least in part, relates to the context in which the two reports were prepared. At the time of the February report there was no commercial dispute between the parties. By November there was quite clearly such a dispute and Mr Fulda was aware of this. As Mr Fulda makes clear, at page 95 of the transcript of his evidence, by November he is concentrating on those elements which have a commercial impact. As I understand it the question that he is considering is the

commercial impact on CGI in the context of its dispute with Agilisys. I believe to an extent this context has affected the nature and degree of criticism of Agilisys.

[302] At pages 113 and 114 of his transcript of evidence, Mr Fulda's attention is drawn to the difference between the terms of his report and the evidence of Mr Legge regarding the adequacy of the templates and he was asked who was in the better position to judge. I believe that the man on the ground doing the extraction process, namely Mr Legge, is the best person to speak on this issue and this again casts a shadow over the opinion of Mr Fulda which he expresses in his report.

[303] Finally between pages 100 and 109 of the transcript of his evidence Mr Fulda is asked about his conclusions relative to "Frontier". It is clear from this passage of evidence that he has failed to take account of evidence and that his conclusion is erroneous.

[304] I would restate my position regarding Mr Fulda, I was not prepared to place any reliance on his evidence except when independently supported.

[305] Other witnesses led on behalf of CGI gave evidence regarding the adequacy of the templates. First Andy Cleaver who says that the templates were inadequate (see: paragraph 3 of his statement). He also says in the same paragraph that he had little involvement with the ERP project. I take absolutely nothing from this wholly general and inspecific evidence given on the basis of little involvement in the project.

[306] Niall Sheriffs also gives evidence on this issue. At 3.54 of his statement he says the following:

> "Agilisys delivered some templates in December 2015 for data migration … I was informed that they contained a list of field names but no field sizes, permitted values or validation rules. It seems from what I was told that Agilisys reused templates created for an earlier ERP client of theirs, Bristol City Council, as there were still references to Avon Fire and Rescue settings within the templates."

[307]   He does not say who informed him of these particular difficulties with the templates. However, I observe that these difficulties have not at that stage been identified by Mr Legge or Mr Fulda.

[308]   At paragraph 3.90 Mr Sheriffs sets out the findings section of Mr Fulda's report of 13 February 2016, which I have already set out in full in this opinion. Mr Sheriffs then says this at paragraph 3.91:

"This illustrates that there were many issues with Agilisys' approach at that time."

[309]   It does not appear to me that this comment is in any way justified by what is said within the findings section. The findings section simply does not support that conclusion. For reasons I have already set out I do not believe that the section can be said to be supportive of criticisms of Agilisys.

[310]   The two sections of Mr Sheriffs evidence to which I have above referred are I believe difficult to explain if what we have is a witness who is seeking to give evidence in a fair and balanced way.

[311]   At 3.145 of his statement he sets out a workstream highlight report dated 4 April 2016 relative to data migration. There is nothing said about lack of a data migration strategy nor is there anything about the inadequacy of templates contained within this document. Nor is there any reference to some lack of management on the part of Agilisys as a problem that is being encountered and which is causing delays. If these were real issues a document such as this would have been an obvious place to expect to see such issues highlighted.

[312]   At paragraph 3.149, when dealing with the situation as at April 2016, Mr Sheriffs makes further criticism of templates, repeating in large part his position stated at paragraph 3.54 about which I have already commented.

[313]   This position which he gives as at April 2016 does not seem to fit with Mr Legge's position (see: 2.34 and 2.35 of Mr Legge's statement).

[314]   His position in addition does not appear to fit in with the initial response to RN005 to RN009 which he deals with at paragraph 3.150 of his statement. In respect to data extracts he says this:

> "This has been delayed due to BT, and now that the servers are in our control is being scheduled."

He further says:

> "Without attributing fault CGI recognises that the replan is required due to circumstances not under the direct responsibility of Agilisys and therefore relief from any liquidated damages should be provided as a sole remedy to the Relief Notices RN005 –RN009"

[315]   If there had been a delay caused by a failure by Agilisys to produce adequate templates as is suggested at paragraph 3.149 of this witness's statement or a failure by Agilisys to manage BT or CEC or Mr Legge, or a failure to produce an adequate data migration strategy, one would have expected something to be said about it in this document, however, it is not. Moreover, one would have expected this initial response to RN005 to RN009 to have been in wholly different terms. This initial response is wholly inconsistent with the position this witness and CGI generally sought to advance in evidence.

[316]   In the ERP workstream report of 11 April in the last section no criticism is made of the templates. All the templates Mr Sheriffs was criticising had been supplied on 22 April. However, again I observe in the Workstream Highlight Report of 25 April 206 no criticism is made of the templates. The problem which is causing concern is the data anonymisation issue (see: 3.167 of his statement).

[317]   At 3.168 Mr Sheriffs criticises further templates provided by Agilisys but gives no details as to the nature of those criticisms and what, if anything, flowed therefrom in terms of causative effect, simply saying "CGI raised many issues".

[318]   At paragraph 3.208 of his statement Mr Sheriffs sets out the terms of an internal report of Graham King dated 18 July 2016, dealing in particular with templates, and data migration, however, as I have said I heard no evidence from Mr King.

[319]   It is I find of assistance in considering Mr Sheriffs evidence to consider his position relative to the response to Ms Ah-Wong's email of 22 April. It would be appropriate at this stage to set out the terms of this email (to which I have earlier made reference) in full:

[320]   The April conditions to which reference has been made were contained in an email sent by Louise Ah-Wong of Agilisys to Niall Sheriffs (CGI):

> "This note is regarding this week's special ERP programme board and the decision to extend the ERP project by two months.
>
> Subject to the points below, I can confirm that Agilisys will not seek to make extra charges to CGI for the costs incurred by Agilisys due to the delay to the project dates, and the change to a December 1 Go Live date.
>
> 1. That CGI provides Agilisys with a detailed plan for the following areas (within 3 working days) for inclusion into the detailed replan :
>   o Development, test and Gold Environment provisions including the transfer from the Agilisys temporary environment to the CGI environments in Wales and Scotland
>   ▪ Pre-production and production environment delivery and their proposed move (if any) to Wales
>   ▪ Delivery of practical management procedures for all environments and their move into service including resolution of access issues
>   o Biz talk environment support and maintenance activities
>   o Detailed test plan activities
>   o The provision of test data and data migration activities under CGI management
> 2. That CGI works with Agilisys to produce a joint detailed plan for the Council's review (based on the high level plan/critical path attached, this is the same version that CGI/Agilisys discussed and has been presented to Jimmy Lumsden the Council's representative prior to this weeks' project board meeting).
> 3. That CGI formally approves the revised ERP plan by the 29th April 2016 for joint presentation to the Council for approval.

4. That CGI agrees to the CGI Cause in the EI Relief Notice RN003.

I hope you understand that Agilisys is not confident in CGI's ability to meet the deadlines on the provision of infrastructure services based on your performance to date on both the EI and ERP projects. On the EI project this has been the cause of delay. We need to be confident that CGI recognises this and the importance of implementing infrastructure to agreed timescales. The new solution/approach that CGI is proposing for the ERP project is more complicated and higher risk to manage – a responsibility that we expect CGI to manage, communicate clearly to us and resource accordingly.

Please let me know your response to these conditions."

[321]   It was not a matter of dispute that these conditions were accepted on behalf of CGI.

In its response to RN 005-9 (the composite response) (JB 30) CGI said this in the part headed

"Response":

"As a consequence of RN 011 (payroll resource delay), a Go Live Re Plan to the 1st December has been agreed between CGI and the Council. The Council has agreed to amend the associated ERP milestone dates to align with the replanned Go Live dates. Therefore there will be no impact on associated LDs in regard to the ERP project milestone relating to RN 005, RN 006, RN 007, RN 008, RN 009. The Council has stated that the approval of the delayed implementation is contingent on there being no additional financial cost to the Council.

CGI has confirmed to the Council that the time delay will be absorbed and the cost of the CGI implementation will not increase.

Agilisys has confirmed to CGI that the time delay will be absorbed and the cost of the Agilisys implementation will not increase. This confirmation was subject to four criteria as defined in an email sent from Louise Ah-Wong to Niall Sheriffs on the 22nd of April 2016. CGI has agreed to meet these four criteria."

[322]   Mr Sheriffs was a senior member of the management team in CGI relative to this

project by December 2015 (see: 1.3 and 1.4 of his statement).

[323]   If he had formed the view that the templates were inadequate at the stage he is

speaking about at 3.54 of his statement namely about December 2015 that there were

material problems with the templates (see: 3.94 of his statement) and as at February 2016,

that "many issues with Agilisys' approach at that point" (see: 3.91 of his witness statement),

it does not fit and is not consistent with his acceptance of the points made in Ms Ah-Wong's

email and in his granting relief at various stages to Agilisys. Those actings are not consistent

with the litany of criticisms of Agilisys this witness now puts forward including criticism of

the templates.

[324] Mr Sheriffs' explanation for what had happened at the time in respect to the granting

of relief in terms of Relief Notices and in respect to the response to the Ah-Wong email was

given at paragraph 3.7 of his statement:

> "Agilisys were very quick to issue Relief Notices. Earlier in the programme CGI's
> stance was more conciliatory, with a willingness to accept without too much scrutiny
> the suggestion that CGI might be the cause of delay, and the acceptance of CGI cause
> in some relief notices. However it soon became clear that there was a tendency from
> Agilisys to be disingenuously simple in the relief notices, claiming that all delays
> were due to CGI when the reality was much more complex. It was a very large
> programme with interdependencies between streams."

[325] This paragraph encapsulates a theme in the evidence of in particular more senior

members of CGI management who gave evidence. I have already commented to some

extent at an earlier point in my opinion about this supposed attitude of CGI. However, I

think this particular paragraph is illuminating. The point which the court is being asked to

accept is that a large commercial organisation such as CGI did not properly investigate

important matters such as Relief Notices and simply accepted what was said in these notices

"without too much scrutiny". Such a statement in my view does not stand up to any

examination, far less close examination. The idea that Relief Notices were being accepted

and that an important document such as the Ah-Wong email was agreed without much

scrutiny simply seems to me to be wholly implausible.

[326] Another matter referred to in this section of evidence is CGI being "conciliatory" and

this is another theme in the evidence of CGI witnesses. It just wanted to move matters

ahead and not to apportion blame. This is said to explain why it did not call out Agilisys on

matters which it now says that in retrospect it should.

[327]   Again, and I have to some extent commented on this earlier, such evidence stands up

to no real scrutiny. The relationship between CGI and Agilisys was a purely commercial

one. Because you want to be conciliatory, take a partnership attitude, make things work and

move things along does in no way stop the raising of, what are now said to be major issues,

with the other party. It may affect the language used when the issue is raised. It does not,

however, stop the issue itself being raised.

[328]   There is also a suggestion in the above paragraph of Mr Sheriffs' statement that

Agilisys in some sense were not acting properly in their presentation of the Relief Notices,

"they were quick to issue these and were disingenuously simple in the notices that they put

forth". Agilisys were doing no more when issuing Relief Notices than operating the agreed

contractual procedure. This evidence about Agilisys in some way acting improperly again

was a recurring issue in the evidence of members of CGI's staff. I found no evidence in the

case to back up the suggestions made on behalf of CGI that in some way Agilisys had acted

in any way improperly in respect to the issue of Relief Notices.

[329]   I have dealt at some length with the evidence of Mr Sheriffs. I have done so in that

he was a witness, as I have already stated, who I found very unsatisfactory.

[330]   I turn now from Mr Sheriffs to Mr Colin Brown who also gave evidence on this issue

and was critical of the templates provided by Agilisys.

[331]   However, at page 123 of the transcript of his evidence he says this in regard to the

situation in August 2016 in respect to the templates:

> "Q.   Aside from the point he [Mr King] makes about queries, it's fair to say that he's
> not envisaging any particular difficulty in continuing on with the data
> migration templates as is. That would be fair, isn't it?
>
> A.   I think at this point he's obviously read through the document and he's given
> his initial assessment, so at this point, no, he's not raised that."

[332]   One of the key criticisms that this witness makes about templates as is made by other witnesses on behalf of CGI is the lack of specification of relations, however, the witness appears to accept at page 129 of the transcript that this had been dealt with by Agilisys at 5 August 2016.

[333]   At page 137 he accepts that the first revised extracts have been produced by 30 August 2016. He is then referred to an email at page 139 which says this:

> "There are no issues at present that will take us beyond the end of September for delivering all the templates and as per an iterative development there are some changes within the individual sprints, all noted within the report."

[334]   He then accepts that an iterative process was being followed and that this involved "the checking for errors and then you keep coming back and go round in that circle". He then accepted at page 140 that during August 2016 a full and thorough review of the data migration workstream had been carried out.

[335]   There is then a long section of evidence in cross-examination in which the witness is asked: why after such a review, if there were any problems with the adequacy of the templates, they were not called out at that stage, (see: pages 140 to 144). The answers the witness gives I believe are rambling and do not answer the fundamental question, ie: why, if they existed, were these inadequacies not called out by CGI at this point?

[336]   Lastly there was the expert evidence, as I understand it Dr Hunt did not have any criticisms of the approach of Agilisys to data migration nor in respect to the adequacy of the templates and I have set out the critical parts of her report earlier. I rejected the evidence of Mr Coyne on this aspect of the case for the reasons I have set out.

[337]   For the reasons which I have referred to I do not think that the evidence supports that there was any real issue with the adequacy of the templates. When looked at as a whole

the evidence supports the adequacy of the templates. It does not support the CGI position that the templates were inadequate and in particular not fit for purpose.

[338] The next issue is this: was there some causative breach in leadership or project management of the ERP project in relation to the issue of data migration.

[339] I do not believe that the issue of management properly arises in the context of data migration. The two principal obligations on Agilisys were to produce a data migration strategy and to produce adequate templates. I have analysed the situation in terms of those two specific obligations and for the reasons I have given above I am persuaded that Agilisys fulfilled its obligations. So far as management of Mr Legge is concerned for the reasons I have earlier set out, there is no breach of any obligation. Turning to the issue of management of CEC/BT I am not persuaded there was a breach of any such duty. It was explicitly stated that it was for CGI to manage BT (see: OBS 1, 2, 3 and 30). I cannot see how Agilisys have failed in some leadership role regarding CEC. It was the responsibility of CGI to produce the extracts; it was CGI who had the contractual relationship with CEC and critically it was for CGI to procure CEC would comply with its duties. Given the nature of the difficulties with CEC which I have outlined this required CGI to procure CEC's compliance. I cannot see how any general leadership role in relation to the project or any general management role on the part of Agilisys could have impacted on these difficulties with CEC.

[340] Moreover, even if I am wrong in my above conclusion regarding any issue of failure to manage by Agilisys in respect to the data migration part of the project I believe that the points put forward by CGI were vague and of no substance. An illustration of this is at paragraph 207 of its written submissions it says:

> "Mr Legge's evidence contained multiple instances of Agilisys' failure to manage him properly."

There is then a single reference to paragraph 2.2 of his statement about which I have already commented. It is, for reasons I have given, entirely unclear what Agilisys by way of management of Mr Legge or management of the project could do regarding the issues which arose in respect of data migration.

[341] Some issues are raised at paragraph 209 and thereafter of CGI's written submissions about the use of anonymised data, this however, is not a failure to manage rather it is if anything a simple misunderstanding by each party of the other's position.

[342] As regards the management of CEC and Agilisys' failure to do so there is no specification of what at a practical level this should have amounted to. A good example of this is in the evidence of Mr Sheriffs quoted at paragraph 227 of the submission for CGI. An issue is raised by Mr Sheriffs who then says this: "Agilisys did not assist in managing this process (obtaining agreement with CEC regarding access), as we had expected they would but instead left CGI to deal with it" (emphasis added). He does not say what CGI expected or what Agilisys could in fact do by way of management. CEC would not provide access. It was for CGI to procure that they provided it. In this respect I believe that the points made by Agilisys at paragraph 5.8.4 of its written submissions where it in summary refers to the management structure within which Agilisys had to work and argues that that procedure was used and Agilisys could no nothing more in respect of management has some considerable force. These submissions fit in well with the detailed position of Dr Hunt as regards project management set out in section 5 of her initial report. Her views are I believe a correct analysis of the position. They also fit in with her analysis of the data migration issues in part 8 of her initial report. As I have said I preferred her evidence to Mr Coyne on this management issue.

[343]   There are also criticisms of the management by Agilisys made on the basis of the evidence of Mr Waters (see: paragraphs 213 to 216 of the submission of CGI).

[344]   I have considered these various criticisms and in my view they amount in reality to almost nothing.

[345]   Reference is made at paragraph 217 about the bringing in of Graham King of CGI as an additional layer of management and that this was because of Agilisys' failure to manage data extraction. However, this is an example of the inversion of responsibilities as detailed in the Subcontract. CGI was to carry out the data extraction. That was its responsibility. It was for CGI to implement that part of the project. That this was the position is made expressly clear by Louise Ah-Wong, if it was ever necessary to be made clear, in her 22 April 2016 email in which she set out that CGI required to produce a detailed plan for: "the provision of test data and data migration activities under CGI management" (emphasis added). The terms of this email were, as I have said, accepted by CGI. This is a clear acceptance by CGI that it was managing the process. Thus if CGI had to bring on board a further person to manage the data extraction process it was because it had failed to properly carry out its responsibilities relative to data extraction.

[346]   A criticism is made at paragraph 221 about when extracts could be regarded as "complete". I do not understand how this is a management issue. This point appears to arise from a discussion between parties as to at what stage a particular extract was going to be regarded as having been fully validated. It has nothing to do with management. It seems to have been no more than a discussion between the parties as to what the term "complete" would mean in the context of this particular part of the project and no more than that.

[347]   It is submitted at paragraph 224 that it was only when Mr Sander was appointed that Agilisys properly engaged with its obligations of leadership and management.

[348]   I do not accept Mr Waters' and Mr Brown's evidence relative to this. I prefer the evidence of Mr Sander for the reasons which I have already stated.

[349]   From paragraph 227 there is criticism of Agilisys' management of CEC and flowing from that CEC's management of BT.

[350]   I would make the following points in regard to this criticism:

(1)   In terms of the OBS set out earlier it was for CGI to manage BT.

(2)   It was for CGI to procure that the Authority would comply with its duties, including:

> "Request the incumbent supplier to provide data." (Schedule Part 6.1 Annex 2)

(3)   The above two express obligations make it clear that the responsibility was on CGI to manage both CEC and BT in respect to the issue of data migration.

(4)   CEC was the only party with leverage in respect to BT. CGI was the only party with any leverage with CEC to procure that it obtained the extracts.
On a plain reading it was for CGI to carry out its obligations in respect to dealing with issues with BT and CEC.

(5)   I believe on a proper construction the ultimate responsibility relative to BT and CEC lay with CGI.

(6)   For the reasons I have already stated CGI cannot turn a project leadership role on the part of Agilisys into a duty which empties CGI's responsibilities of any content.

The next issue related to a failure to produce a change management strategy which was an obligation incumbent on Agilisys. First the evidence relied on that this had not been provided was this: "I would very much doubt that Agilisys provided a change management strategy. I certainly never read one provided by Agilisys" (Colin Brown – see para 234 of

CGI's written submissions). I am not prepared to rely on this single piece of evidence, which does not amount to a positive statement that no business change strategy was produced as a basis for holding such a strategy was not produced. In any event I have earlier set out why I would not accept this witness' evidence unless independently supported.

[351] As to the causative effect of any such failure at paragraph 235 again reference is made to Mr Brown's evidence and to a passage where he says two persons who were CEC business users raised concerns about the templates. It gives no detail as to what their concerns were, when they expressed these, the context in which they were expressed, whether their concerns were justified and if so whether and how they were dealt with. Absolutely nothing can be taken from this in respect to a failure to produce a change management strategy or any causative effect that may have had.

[352] At paragraph 236 of the submissions of CGI reference is made to a further section of Mr Brown's evidence at page 14 of the transcript of his evidence. He is asked a question about data migration approach. He gives a lengthy answer, the essence of which seems to be that Agilisys should speak to CEC about its data migration approach and get CEC to agree it. As to what in causative terms is said to flow from this is entirely unclear. It may be that this is said in relation to the issue of the archive solution which I deal with in terms of the next question.

[353] Within the evidence led by CGI there was further criticism of Agilisys in respect to data migration including failures to: define data mappings; and produce data translation rules. In respect to these matters I note that Dr Hunt rejected these criticisms at paragraphs 8.10.4 and 8.10.6 of her initial report. I find the reasoning and conclusion in this part of her report convincing.

[354]   Thus in summary upon the basis of the findings I have made to this point: in the period September 2015 to June 2016, the dominant cause of delay was the inability of CGI to procure CEC's consent for Agilisys to have access to data from the legacy systems and thereafter access to live data. In the period from June 2016 – the root causes were: (a) the continuing impact of the substantial initial delay in the data extraction work; and (b) a lack of consistent or proper resources from CGI together with wider issues of environments which I will shortly turn to discuss; and (c) CEC's change of position in relation to the volume and availability of historic data. I believe therefore the dominant cause of delay was a CGI cause.

[355]   For the foregoing reasons I do not believe that CGI's breach was caused or affected by a breach by Agilisys of its obligations. It seems to me for the reasons outlined that CGI breached its obligations to provide the necessary data extracts due to its failures as above set out.

[356]   The next question is this: did that breach cause, or was it reasonably likely to cause, Agilisys to fail to achieve the Milestone MS-2.5 in the ERP Implementation Plan by the effective date? MS 2.5 per the Implementation Plan had a start date of 3 May 2016 and end date of 26 July 2016.

[357]   Mr Sandison's position was this: that any failure by CGI to provide data extracts in breach of its obligations was not, in any event, the operative cause of Agilisys' failure to achieve the User Acceptance Testing (UAT) milestone. It was made clear by CEC that UAT could not proceed without an adequate solution for historic data. The creation of an archive solution was the responsibility of Agilisys, as was management of CEC at a project level and change management. Agilisys failed both to generate a satisfactory solution but also to manage CEC in order that a solution acceptable to all parties could be deployed.

[358]   This issue of the archive solution appears to have first been raised at an ERP project

meeting on 31 August 2016. An analysis of this issue was produced by Mr Sander

suggesting a data warehousing solution for historic data. This was rejected at a Project

Board meeting on 22 February 2017. On the basis of these points Mr Sandison submitted:

Agilisys accordingly failed in both its obligation to produce the archive solution in order to

allow UAT to proceed, but also in its obligation to lead the change management process

with CEC in order to produce a solution which was in an acceptable form for CEC.

[359]   Mr Cormack in reply submitted: in the period from June 2016 – the root causes were:

(a) the continuing impact of the substantial initial delay in the data extraction work; and

(b) a lack of consistent or proper resources from CGI; and (c) in specific response to the

argument of Mr Sandison regarding the data archive solution he submitted that there had

been a change of position by CEC in relation to the volume and availability of historic data.

In reality, what happened in this period was that from the ERP Project Board meetings on 13

and 29 October 2016 onwards, CEC took the view that they needed to have absolutely all

historic data available to them. This represented a fundamental departure from the design

decisions recorded in the SDD. It did not represent a failure of management by Agilisys. If

this was anybody's fault, it was CGI's fault for failing in its responsibility to use its

commercial and contractual powers with CEC, and in particular to emphasise that this

amounted to an unauthorised change to the scope of the already signed-off design

documentation. Beyond that he argued that archiving was not in any event due to be done

until after the planned go live date (see: Appendix 1).

[360]   I am persuaded by the argument advanced by Mr Cormack. First there appears at a

fairly late stage to have been a material change in the requirements of CEC in respect to

archiving. The SDD recorded, in terms, what was to happen in respect to historic data. It

was to be dealt with as follows: there would be a read only instance of Business World that amounted to an archive of historic data. As regards HR it was only to be historical payroll information for the years 2008 to 2015 and in Accounts Receivable it would be all customer invoices, customer notes, credit notes from 1 April 2009 onwards. In addition categories of data were identified which were not to be archived. Thereafter CEC moved to a position where it required all data to be archived and for it to be available seamlessly (emphasis added). It is not a failure in management on the part of Agilisys that CEC have at a late stage made such a unilateral decision. I do not see how any form of management could deal with such an issue. In particular management could not in any sense seek to deal with this issue until it arose. Thereafter Agilisys sought to deal with the matter through the document prepared by Mr Sander. Secondly, in circumstances such as this it appears to me that it was ultimately for CGI to exercise its contractual and commercial powers to emphasise that this amounted to an unauthorised change. It is notable, as argued by Mr Cormack, that while the archiving strategy created a delay ultimately CEC eventually returned to the same basic approach outlined in the SDD. In any event I accept his argument as to when archiving was to be available.

[361]   It appears to me that Dr Hunt's careful analysis reaches the same conclusion (see: section 8.9 of her original report). There was no breach of any obligation by Agilisys.

[362]   For the above reasons I do not accept Mr Sandison's argument. CGI's breach was reasonably likely to and in fact eventually did cause Agilisys to fail to achieve Milestone 2.5 (completion of UAT).

[363]   In the original Implementation Plan, User Acceptance Testing was due to start on 3 May 2016 and conclude on 26 July 2016. It is obvious that, given CGI did not even have

access to the legacy systems until after the date for commencement of UAT, then the failure

to provide extracts was likely to cause Agilisys to miss this deadline.

[364]   When relief was granted in May 2016 and by agreement to the 22 April 2016

Conditions and milestones moved to comply with version 13 of the Project Plan, User

Acceptance Testing was due to start on 10 August 2016 and conclude on 8 November 2016.

Again, it is plain from the above that progress on extracts did not even commence in earnest

until around July/August 2016, and was not even complete by the revised deadline in later

Project Plans of 29 September 2016.

[365]   For the foregoing reasons I am persuaded that the delay in provision of data extract

was a dominant cause of delay as regards the ERP project and that as a direct consequence

Agilisys was likely to miss Milestone 2.5 for UAT (as set out in the Implementation Plan

which was due to start on 3 May 2016 and conclude on 26 July 2016 [see Schedule Part 6.1]).

It could not even have met the dates in the Project Plan. I will discuss the issue of

concurrent dominant causes later in this opinion.

ERP environments: RN001, RN008, RN 009, RN013, RN014 and RN015

[366]   The disputed Relief Notices in this group are RN009, RN014 and RN015.

[367]   RN009 concerned asserted delay of access to hosted ERP production and

pre-production environments and asserted that a CGI cause was reasonably likely to cause

Agilisys to fail to achieve Milestone 2.5 completion of UAT (issued 18 March 2016).

[368]   RN014 concerned asserted delay of access to ERP Environments and it asserted that a

CGI cause is continuing to cause Agilisys to fail to achieve all remaining Milestone Dates.

CGI have not provided reasonable access to the following hosted environments Gold, dev,

test, PPE-A and PPE-B including environment management services to support the delivery of the next phase of the projects (issued 26 July 2016).

[369] RN015 concerned asserted failure of provision of accessible ERP Environments and it asserted that a CGI cause is continuing to cause delay to the ERP project and this may result in Agilisys failing to achieve Milestone Dates. "CGI have not provided all necessary services and functionality to the following hosted environments Gold, dev, test, PPE-A and PPE-B including environment management services to support the delivery of the next phase of the project.

As a result of ongoing issues with CGI providing fully functioning ERP environments, there have been delays to the Project:

- On 13/6/2016, CGI accepted that it had not provided hosted environments and agreed that delay to the project was a CGI cause. At this stage the delay was expected to be limited to 4 weeks.

- On 26/7/2016, CGI had still not provided usable pre-production environments. This was a further 7 weeks of delay since CGI accepted the CGI cause on 13/6/2016. Agilisys raised Relief Notice RN014 to document the causes of delay. As at 11/10/2016, CGI has not responded to RN014." (issued 13 October 2016)

[370] An environment in this context means: a physical or virtual system in which a computer program can be run. It is normal practice for an organisation to have multiple environments when delivering a new system – e.g. a test environment and a production environment.

[371] The first question in relation to this group of Relief Notices is this: what are the respective obligations of the parties (including as to the Milestone Dates in the Implementation Plans and timing generally) in relation to the provision of fully functional

environments and related infrastructure, including suitable environment management

services, in relation to the ERP Project?

[372]   Agilisys contended that the Subcontract allocated the following responsibilities to

CGI either directly or by virtue of its obligation to procure that CEC perform its

responsibilities.

Section	Extract
OBS 1, OBS 2, OBS 3, OBS 30, OBS 47, OBS 51	"*Procure the Unit 4 Business World ERP solution and manage the contractual relationship with Unit 4.*" "*Provide infrastructure hosting and support of the Unit 4 Business World ERP solution*" "*Provision of required system access to Agilisys to deliver programme work.*"
Roles & Responsibilities document, Section C of Schedule Part 4.1	Project Roles: "*CGI providing hosting, technical, DBA and infrastructure services (including the copy and creation of environments as required and no fewer than 5 environments).*" CGI Responsibilities and Deliverables: "*Infrastructure build and hosting of the Agresso solution x 5 environments and the provision of access to Agilisys to maintain the Agresso installation across the environments.*" "*Management of Unit 4 contract and on-going support.*"

Agilisys contended that the following are Agilisys' responsibilities, in terms of the

Subcontract:

Section	Extract
Roles & Responsibilities document, Section C of Schedule Part 4.1	Project Roles: "*Supplier leading delivery of this project including commissioning and management of the supplier UNIT4 (through Agent relationship) implementation services. This will cover specialist product support and bespoke development for interest across instalment plans. The Supplier will rely on CGI PMO for support. CGI to support with the Authority*

	governance and resources." Supplier Responsibilities & Deliverables: *"Client Management and Governance (Project Level)"* *"Programme management of the implementation programme and generation of all programme control documents."* *"Management of Unit 4 implementation services (Agent Relationship) across the programme, including management of bugs and resolution."* *"Facilitate design workshops to agree the implementation design of the Agresso system…"* *"Solutions architect resource which will generate the technical solution design, interface strategy, data migration strategy, the archiving solution and design of the supplier portal. Each of these will produce a document deliverable for sign-off with the Authority. The solution architect will manage the technical resource provided by CGI."*

[373]   I did not understand CGI to dispute the foregoing as being Agilisys' obligations other than to add one further responsibility: "The Supplier responsible for the system design and build using their local government templates where applicable". Mr Sandison stressed that CGI's obligations must be considered in terms of the general leadership obligation of Agilisys in terms of the ERP project.

[374]   I consider that the obligations referred to by each side in respect to these Relief Notices were incumbent on the parties and were relevant to the discussion of the various issues relative to these Relief Notices.

[375]   CGI contended that the effect of the respective obligations was that whilst CGI were to provide the environments, responsibility for the leadership of the project and the provision of environment design were the responsibility of Agilisys. In respect to the issue of design it was argued that the critical obligation was that incumbent on the solutions architect to generate a "technical solution design". In development of this argument it was

submitted that the design to be generated required to encompass a design for the complete

Business World solution (rather than the position put forward by Dr Hunt to the effect that

"solution" related to "the software aspect of the solution primarily"). Mr Sandison argued

that the interpretation of "technical solution design" which he was advancing was consistent

both with the words of the Responsibilities Document (which neither seek to restrict the

aspects of the design for which the Solutions Architect is responsible nor allocate

responsibilities for design elsewhere) and also with the evidence of Mr Coyne. Mr Coyne's

evidence, which he invited the court to accept, was that the Solutions Architect was

responsible for designing the "technical aspects of a system", including:

    a.   How much storage space would be required?

    b.   What performance profile would the storage need to have?

    c.   How much load would the system be under?

    d.   How much peak computing power would be required?

    e.   The size of the memory?

    f.   The requirement for swap space?

    g.   Who needs to connect to the system?

    h.   Network/Access requirements?

    i.   Tolerance for latency?

    j.   Testing requirements?

    k.   Where will users be connecting from?

    l.   What devices will they be using when they connect: PCs, laptop or mobile

        phone?

[376]   Mr Coyne's evidence was that these matters required to be designed prior to CGI

commencing the build of environments: because designing environments, certainly in this

security-sensitive space, only wants to be done once. Essentially, any rework – in a data

centre where there's secure data is generally costly, typically in terms of time, because

there's a process that you need to go through to change anything within the environment.

You can't just tweak something. All of the considerations about security impact and things

like that must be considered.

[377] Mr Cormack's position in summary was that I should prefer the analysis of Dr Hunt.

[378] When considering the opinion evidence of an expert, evidence which is neither

relevant nor admissible is what a contractual provision means, that being a matter entirely

for the court. However, in terms of the Subcontract the term "technical solution design" is

not a defined term. It is first a generic term and secondly a technical term. Given the

foregoing in reaching a sound conclusion as to the meaning of the above term the court is I

consider entitled to have regard to expert technical evidence and guidance as to what such a

term means and what in practice is required to fulfil such an obligation. Accordingly

assistance can be sought from the views of Dr Hunt and Mr Coyne as regards this matter.

Each party directed my attention to the views of their respective expert in respect to this

question. Although placing a strict demarcation line in respect of such evidence may in

practice be difficult I believe that Dr Hunt's and Mr Coyne's evidence regarding this issue is

admissible. Dr Hunt at paragraph 6.2.2 to 6.2.6 of her initial report sets out her views:

> "6.2.2 As discussed in section 4.2, terms such as 'infrastructure services', 'technical solution design' and 'solution architect' are generic and need to be read in the context of a project that sits within a wider Programme.
>
> 6.2.3 A solution architect is typically someone with knowledge of the design issues specific to a particular solution or application. In the context of an ERP implementation within a much larger transition and transformation programme I would expect the 'technical solution design' produced by such an architect to be confined to the technical design for the ERP solution. I would not expect an informed reader of this contract to expect an ERP solutions architect to be able to design every detail of the infrastructure required for the various environments. For example, large, complex

installations typically have separate architects responsible for networking and security aspects of the infrastructure that apply across **all** applications and which an ERP solution would need to work within.

6.2.4   Decisions and information about the data centre that would house the environments and the network, security and other infrastructure that comprised CEC's IT systems and the network connections required to connect the two were all the responsibility of CGI. In my view the primary responsibility for designing the infrastructure to support the required environments lay with CGI.

6.2.5   However, CGI did need some assistance from both Agilisys and Unit 4, who needed to provide information about the infrastructure required by BW, such as the number of servers required to support the expected user population and database size.

6.2.6   Given that there was a requirement for a number of environments across the two projects I would have expected CGI to appoint a systems architect or technical architect to work with Agilisys and Unit 4 to produce the infrastructure design. As CGI were also responsible for hosting, technical, DBA and infrastructure services as well as supporting the system once it went live I would also have expected them to appoint an environment manager straightaway who would be involved in the design process and take on support for the environments to ensure that they were properly setup and maintained. As discussed in section 3 I would also expect those resources to have been supported by a CGI project manager with responsibility for liaising with BT to ensure timely access to information about CEC's legacy infrastructure."

I find the analysis contained in this section of her report persuasive. It is clear, thorough and well reasoned.

[379]   I would also refer to her evidence at paragraphs 2.2.1, 2.3.2 and 2.3.4 where she sets forth a further analysis of this issue which is consistent with the views sets out in the paragraphs I have set out in full above.

[380]   She explained in a little more detail in her re-examination her reasoning in respect to this matter:

"So CGI were designing infrastructure for the wider programme. They were designing and networking to connect Edinburgh's offices with what was going to be the new IT estate, some of which was going to be moved from BT and some of it was going to be new. They had to take account of whatever CEC already had, what CEC's policies were, what their security arrangements were and what they wanted

them to be in the future, even down to the telephony. So whatever was designed for the ERP and EI systems had to co-operate and work inside that. It was going to be in CGI's data centre along with everything else. So they had to design. The ERP and EI environments were just the environments within that overall infrastructure design, so it had to be a piece of work that they did." (see: p 127 of the transcript of her evidence)

[381]   Her analysis is consistent with the structure within which the Subcontract existed, namely: it being a small part of CGI's prime contract with CEC and that CGI was responsible for not only the infrastructure build but the hosting of this within its data centre. That is part of the "documentary, factual and commercial context" in which the relevant words have to be construed. Such a construction does not damage the ordinary meaning of the clause. It does not limit "technical solution design". It gives the term its meaning within its proper context in the way asserted by Mr Cormack. Mr Coyne in his opinion takes no account of this context and if for no other reason I would have rejected his opinion in relation to this issue.

[382]   I accordingly am persuaded that the technical solution design obligation incumbent on Agilisys did not mean that the solutions architect was to produce the design for the infrastructure. The "primary responsibility for designing the infrastructure to support the required environments lay with CGI" (see: 6.2.4 Dr Hunt's first report). I reject Mr Coyne's evidence, where it differs from Dr Hunt's evidence on this issue. There are, I recognise, areas where there is agreement.

[383]   In respect to the proper construction of Agilisys' obligation: "Management of Unit 4 implementation services (Agent Relationship) across the programme, including management of bugs and resolution." Mr Cormack made a very detailed written submission:

> "4.3.3. In order to understand the reference to management of 'Unit 4 implementation services', it is necessary to read the whole of the Subcontract

in its proper factual context. A fact that seems to have escaped later witnesses and experts for CGI.

4.3.4. First, in the Project Roles section of the Roles & Responsibilities document for ERP, Unit 4 is expressly described as providing: 'Business World software, procurement solution and limited implementation services including technical training services for client only (Note there is currently no budget for external training of CGI support staff).' There is, accordingly, a recognition that the term 'implementation services' has a more limited and specific meaning in this context. Further, that it would not include the training provided by Unit 4 as part of installation. Secondly, this same obligation is given slightly more detail in the OBS. In the OBS, there is an obligation on CGI to 'Procure training and implementation services from Unit 4 which will be managed by Agilisys as CGI agent. 175 days required – 100 to support the solution implementation, 25 for bespoke development, 50 for training.' That very same breakdown was provided by Claire Conaghan to Niall Sherriffs the day after the Subcontract was signed in her email of 16 September 2015: JB [ ] at p. 8037. As she explained in that email, the 100 days were to support specific delivery elements of the ERP project. Nothing was mentioned about installation or installation services. This is a contemporaneous account at exactly the time of the Subcontract, from the person involved in drafting the OBS, and at a very early time when Claire Conaghan would have had no reason or desire to minimise Agilisys' role. Fourthly, the reason for this was very clearly explained by Robert Price at para. 6.17 of his Witness Statement (on which he was not challenged). It is, also, consistent with the email exchange between Bob price and Terry Wiest on 27 August 2015: JB 440. It is, also, consistent with the same distinction Unit 4 itself made between installation and implementation services in its email to Niall Sherriffs on 21 September 2015: JB 465. It is also consistent with Raj Sudra's email of 4 November 2015 in which he stated '..but because of the commercial relationships we are managing Unit 4 for their 'specific' deliverables.': JB 542. At no point, from Claire Conaghan pointing CGI to Unit 4 in September 2015 onwards, was it ever raised with Agilisys that they should be managing Unit 4.

4.3.5. In short, CGI's witnesses and expert have tried to elevate this obligation out of all proportion and context. It is quite clear from the wider context referred to above that the references to management of Unit 4 resource had nothing to do with the base installation. It was, always, intended to relate to the procurement of specialist resource from Unit 4 up to a specified amount of days to provide support for configuration of the software, bespoke development of the product, and training during the project."

I believe that this is a sound analysis of the contractual position. Implementation, when looked at in the context of the Subcontract has a limited meaning and does not relate to the issue of base installation. Agilisys' responsibilities in respect to Unit 4 were limited to

supporting CGI where necessary and requested. Thus Agilisys' management role in respect to Unit 4 was limited in its scope and did not relate to installation. This I think is a sound construction of the Subcontract and also fits in with the evidence and the way that matters operated on the ground.

[384]   The next question is: did CGI breach its obligations by failing to provide fully functional environments and related infrastructure, including suitable environment management services, on the ERP Project? CGI in its written submissions said this in relation to the above question:

> "271.   The five environments specified in the Responsibilities Document, and the dates upon which they were recorded as being delivered were as follows (as set out in the in the [sic] ERP environments status update of 9 September 2016):
>
>   a.   Development environment: provided in December 2015.
>
>   b.   Test environment: provided in December 2015.
>
>   c.   Gold environment: provided on 25 March 2016.
>
>   d.   PPE-A (part of the pre-production environment requirement): provided on 7 June 2016.
>
>   e.   PPE-A (part of the pre-production environment requirement): provided on 30 June 2016.
>
>   f.   Production environment: provided on 1 August 2016.
>
> 272.   In addition, a 'sandbox' environment was identified by Agilisys as a requirement in August 2016 to allow CEC staff familiarisation. The environment was provided on 26 August 2016.
>
> 273.   Environments were accordingly not provided within the contractual timeframe.
>
> 274.   Following provision of the environments on the dates above, further specifications or requirements were raised by Agilisys. Peter Hall accepted that Agilisys 'habitually' raised new defects with the environments. In addition, difficulties were experienced with access to environments (both discussed in relation to question 23 below). These issues were raised in RN016 (*should be RN015*) (which concerned issues with environments which had been provided, rather than the provision of environments themselves). For the reasons set out in relation to

question 23, it is submitted that there was no breach by CGI of its obligations in relation to the issues raised by RN016 (*should be RN015*)."

[385]   Mr Cormack's position was that CGI had breached its obligations in respect to environments. It had failed first to provide the development environment within the time required by the Implementation Plan. In development of this he argued CGI's obligation to build and provide access to the five environments was not given an express time limit. However, he submitted that regard has to be had in this context to the various dates that parties had agreed in the Implementation Plan in the Subcontract. He again submitted that regard had to be had in this respect to dates agreed in Project Plans. I accepted this approach for reasons I have set out.

[386]   He then drew my attention to the Implementation Plan in Schedule Part 6.1 where parties had contracted for the "Agresso infrastructure build" activity to take 55 days from 14 September 2015 to 27 November 2015. This was to be immediately followed by the commencement of Build activity. He then submitted in actuality, the Development Environment was not first made available until 9 December 2015. When it was made available, it was unusable. It was not made fully available until 16 February 2016. Accordingly, on any view, CGI failed to meet its responsibilities to provide the Development Environment within the time necessarily required by the Implementation Plan.

[387]   It was also his position that CGI had failed to provide the PPE and Production Environments in the time required by the Implementation Plan. In elaboration of this submission the original Implementation Plan in Schedule Part 6.1 (consistently with version 9 of the Project Plan) made no distinction between the different dates on which the five environments would be made available. The intention at this stage was that all five would be provided together. On any view, CGI utterly failed to build and provide access to the PPE and Production Environments in those timescales.

[388]   Even looking at the dates agreed in later Project Plans and other more informal agreements, CGI consistently failed to meet any of the deadlines agreed. In particular, it missed the deadline of 1 March 2016 in version 9 of the Project Plan, the deadline of 31 March 2016 in version 12 of the Project Plan, the deadlines proposed by Kevin Bryce in March 2016 and 29 April 2016, and the deadlines of 13 May and 4 July 2016 in version 13 of the Project Plan. In fact, PPE-A was only made available at the beginning of July 2016, PPE-B was not made available until mid-July 2016, and Production was not made available until into August 2016.

[389]   It is submitted that, on any conceivable view, CGI plainly failed to build and provide access to the Environments within the time required by the Implementation Plan.

[390]   In support of its position Agilisys produced a detailed chronology of the events surrounding environments in the form of an appendix. Having considered the terms of that Appendix I believe first it accurately set out the timeline; second it accurately sets out by reference to oral evidence and documentation, a factual basis upon which I conclude that CGI had breached its obligations as set out in the above question; it supports the factual basis set forth in each of the Relief Notices.   I have produced it as Appendix 2 to this opinion. It clearly supports the submission that CGI had breached its obligations in respect of provision of hosted environments, that being the issue raised in Relief Notice RN009 and Relief Notice RN014. So far as breach of obligations asserted in RN015 given the position taken up by CGI regarding this issue I will consider whether it breached its obligations in the context of my consideration of the next question which is: was CGI's breach or breaches caused or affected by a breach by Agilisys of its obligations?

[391]   Before turning to that question I think it is helpful to set out the position taken up by CGI in relation to the Relief Notices served regarding environments during the course of the project.

[392]   Between the commencement of the Subcontract and June 2016, Agilisys issued six Relief Notices relating, generally, to the environments as follows: (1) RN001 on 27 January 2016 for delay of access to ERP Development: JB 10; (2) RN003 on 28 January 2016 for delay of hosted Biztalk infrastructure: JB 12; (3) RN004 on 10 February 2016, in part, for continuing delay to Biztalk infrastructure: JB 13; (4) RN006 on 18 March 2016 for delay of access to Biztalk development environment; (5) RN009 on 18 March 2016 for delay of access to ERP PPE and Production Environments: JB 18; and (6) RN013 on 3 June 2016 for delay of access to ERP PPE and Production Environments: JB 22.

[393]   CGI, either immediately or eventually, accepted all of these and purported to grant relief. In particular: (1) they expressly accepted RN001 in their response of 10 February 2016 and granted relief by accepting that the dates in the Implementation Plan had been amended to bring them into line with version 12 of the Project Plan, and they indicated that hosting of the temporary environments would amount to 'full and final compensation' for that Relief Notice; (2) they eventually accepted RN003, RN004, and RN006 as part of the 22 April Conditions and their composite response on 1 May 2016 (see JB 30), and essentially granted relief in the form of postponing Milestones in accordance with the re-planned dates in version 13 of the Project Plan, and by confirming there would be no liability for Delay Payments; and (3) RN013 was agreed as CGI Cause and relief was agreed to the extent of recognising that Agilisys would be unlikely to be able to meet the deadline of System Acceptance Testing.

[394]   CGI's position in summary regarding this question was: CGI could not properly

fulfil its obligation to provide environments without the prior fulfilment by Agilisys of its

obligation to specify the design for these environments. It was Mr Sandison's position that

Agilisys failed to discharge this obligation. This caused, or at the least materially affected,

the issues which were experienced with regard to environments.

[395]   The line taken by all of CGI's witnesses was that the dominant cause of the delay in

respect to the provision of the environments was the failure by Agilisys at the outset to

provide a specification for the environments or put another way the failure by Agilisys to

advise them at the outset what its requirements were in respect to the various environments.

[396]   The witnesses for CGI who gave evidence on this issue were Paul Hamilton,

Kevin Bryce, Niall Sheriffs, Cliff Graham, Colin Brown and lastly Bridget Fox.

[397]   It was evident on looking at the evidence of these witnesses, when taken as a whole,

that their position at the stage of proof was this: this failure had existed from the start of the

ERP project and continued throughout the life of the project. On looking at their evidence as

a whole I understood their position at the proof to be that this had been a critical failure.

[398]   The criticality of that failure, according to the CGI witnesses, is perhaps best

captured in the evidence of Paul Hamilton who in his witness statement at paragraph 2.1

says this:

> "We couldn't do anything constructive until Agilisys told us what should be in the
> environments. Essentially we were working blind."

[399]   If that is a proper characterisation of the failure I would expect from the outset there

would be documentation emanating from CGI calling on Agilisys to produce this

specification. I would expect there to be considerable documentation thereafter to the same

effect (but with the demands made with increasing urgency) which produced a consistent

pattern of demands that such a specification should be produced by Agilisys. Looking at the

evidence of CGI's witnesses and the contemporary documentation produced I am unable to identify such a pattern in the documentation. This casts substantial doubt on whether there was any failure to produce such a design. Nor does the position which CGI now advances fit in with its responses to Relief Notices which I have earlier set out. This equally undermines the position taken up by CGI at proof.

[400]   The first witness on behalf of CGI who spoke to this issue was: Paul Hamilton who was CGI's man on the ground relative to environments at the outset of the Subcontract.

[401]   At page 90 in the transcript of his evidence he is asked this question:

> "Q.   And are you able to identify to us from your witness statement or otherwise any written communication, including an email, from you to Agilisys where you are complaining about Agilisys not having provided an environment design in relation to the development environment?
>
> A: I am… off the top of my head I'm not aware of any, no."

[402]   To put his answer fully in context he also says at page 91 that the issue had been raised with Agilisys on a number of occasions verbally.

[403]   Further, at pages 57 and 58 in cross-examination he is asked about a document prepared by a CGI colleague Sebastian Wood and he is directed to the fact that in this document no reference is made to Agilisys providing a requirements document or a design document. He is asked if this is a significant issue why is it not referred to there. He replies by saying he does not know what was in Mr Wood's mind.

[404]   I of course accept that he cannot know what was in Mr Wood's mind. However, given the nature of this document I believe it is odd if the issue of a design document was a significant matter that it is not referred to therein and given the criticality of the issue according to Mr Hamilton's evidence it is odd that he could not point to a single document in which this design had been sought by CGI. This inability on the part of this witness to point to anything in the documentation raising this issue with Agilisys I believe strongly

supports the view that this lack of a design was not an issue of any significance and that

Agilisys did not breach any obligation in respect thereto.

[405]   The next witness from CGI who gave evidence on this issue was Kevin Bryce. From

about February 2016 he took over from Mr Hamilton as environment manager in respect to

the ERP project.

[406]   Once more it was a theme of his evidence that there was a necessity for a single

document setting out the requirements for the environments to be provided by Agilisys in

order for CGI to build the environments.

[407]   On 4 March 2016 he emailed Mr Hall of Agilisys (see: JB 881, page 11476). In that

email he asked for a copy of the development environment requirement (see: page 31/32 of

the transcript of his evidence). However, I note in the same email he says: "I am aware that

the ERP dev and test environment have already been provided". Mr Hall replies the same

day setting out Agilisys' position (see: 32/33 of this witness's cross-examination).

[408]   Mr Bryce then accepts in his cross-examination that requirements had been set out by

Agilisys but in the form of "a series of conversations and in a couple of different emails"

(see: page 34 of the transcript). However, he again complains: "we lacked that single

document which we expected to see that said. This is what we need in the environments to

make it fit for purpose".

[409]   It appears from the above passages of evidence that environments were able to be

built given the requirements stated by Agilisys. Secondly it appears that the concern on

Mr Bryce's part is not that Agilisys failed to state its requirements but they were not set out

in the form of a single document.

[410]   When the evidence is analysed this need for a single document appears to be no

more than this: it was required to satisfy an internal requirement of CGI's and not in reality

because CGI could not build the environments without such a single document. This is clear

from an answer given by Mr Bryce at page 110 of the transcript of his evidence where he

says this:

> "Yes, that's correct. So that was us trying to get the documentation in to a state that GIS [an internal body within CGI] would accept it without having a formal documented set of requirements from the application owners."

[411]   This evidence is echoed in the evidence of Mr Hamilton at page 90 in the transcript

where he says this:

> "In CGI we are not allowed to simply stand up and make live servers and environments without a design, so we were forced into writing our own HLD to allow work to proceed within CGI. CGI has some very strict governance processes around deploying servers. As you'd imagine, we support quite a lot of organisations and our servers are tens of thousands in the number, so we had to draft our own HLD, which was a very, very high-level diagram based on the environments matrix which Agilisys had issued us."

[412]   So once again the necessity for some single document appears to be in order to

satisfy internal requirements of CGI.

[413]   Mr Bryce makes a further comment on this issue at paragraph 2.7 of his statement

where he says this:

> "Agilisys did not provide us with detailed requirements for the environment until 5 July 2016… and even then they were incomplete. CGI approaches things in a much more structured and documented fashion which lends itself to an orderly design solution, I get the impression that Agilisys have less structure. That led to an incompatible work approach."

[414]   Once more the requirement for a single document appeared to come from internal

CGI work practices.

[415]   I gained the impression that the issue of the single design document issued at the

outset in the end of the day was really no more than a difference in working practices

between CGI and Agilisys which had no causative effect so far as the issue of delay is

concerned. The issue did not appear to be: no requirements were provided by Agilisys but they were not provided in a single document.

[416] Returning to the evidence of Mr Bryce, at a number of points in cross-examination he was asked to consider documents which had been produced at various stages by CGI in the course of the project and asked why in this documentation the provision of a single document setting out Agilisys' requirements is not referred to (see: page 40-42; page 55, lines 12-16, pages 67-72; page 83, lines 1-9; page 87 and 88; and pages 111 and 112).

[417] In these documents the lack of reference to the absence of a design document and of Agilisys being called out in relation to this issue by CGI strongly points to there being no issue in respect to this matter and that Agilisys had fulfilled its obligations regarding this.

[418] Mr Bryce was the person on the ground who was in charge of the production of the environments. If there was a real problem with this lack of provision of a single document setting out the requirements which was materially hampering CGI in the building of the environments it would have been called out somewhere by this witness and in particular in the various documents to which he was directed. Given his position in relation to environments, given his character which seemed careful and given the bureaucratic, structured nature of the way in which CGI according to him approached its work in respect to matters such as environments then if this lack of a single document setting out the specifications was a real and significant issue it would have been documented by him. It was not.

[419] The next witness who gave evidence in respect to this issue from CGI was Mr Sheriffs. As I have already said he was referred to the April email from Louise Ah-Wong, I set out the text of that email earlier on.

[420] He conceded that the conditions contained in the email had been accepted by CGI. Between pages 60 and 62 he was asked why CGI would accept such conditions if Agilisys had significantly contributed to the problems as regards provision of environments. His response for reasons I have already detailed I did not find plausible. I have commented on this to some extent earlier. I would add that in particular in relation to environments, if the position as now put forward by CGI is correct then I believe these conditions would not have been accepted and the reply would have been something like this: Agilisys is to blame for the delay because it did not provide a specification for environments. This email is dealing explicitly with the issue of environments.

[421] Mr Sheriffs was not a low level functionary in CGI. He worked at a high level within that organisation and was a senior person in respect to both the programme and the projects. Given his position within CGI I simply did not find his position convincing as to why this document was agreed to if the position was as he now set out in his evidence.

[422] It appeared to me that the response to the Ah-Wong email was inconsistent with the position which CGI was seeking to advance at the proof relative to environment specification.

[423] Cliff Graham also gave evidence on this issue.

[424] He was also questioned about Ms Ah-Wong's email in the course of his cross-examination.

[425] His initial response to the Ah-Wong email is contained at page 12725 in the JB. It was this:

> "My initial impression is that the requests from Agilisys are not unreasonable."
> (see: page 59 of the transcript)

[426] Mr Graham was then asked at page 59 was the above response not inconsistent with his earlier having said in his evidence that he had been told that no requirements had been

set out by Agilisys beyond "rudimentary instructions" (see: page 55, lines 15-23). The questioner is careful to ensure that the witness understands the question by asking him to confirm his answer.

[427] In response to the above question Mr Graham gives a series of answers between pages 60 and 64 of the transcript culminating, when it is plain to him that the response which he had given to the Ah-Wong email at the time is inconsistent with the position CGI is now taking he says: he did not have the information at the time when the response to the email was drafted (see: page 63, lines 7-13 of the transcript). However earlier in his evidence at page 55, lines 15 to 23 of the transcript he had said that he did have the information. I believe that this witness's change of position on what was a matter of some importance undermined his evidence. I do not think on this matter that his evidence was acceptable.

[428] There are thus two senior members of the CGI team who at the time took up positions with respect to the Ah-Wong email which are wholly inconsistent with the position which is now being put forward by CGI. Again I think that the contemporaneous documentation shows the true position, namely: there was no issue on CGI's part of any significance regarding a failure to provide a single requirements document relative to environments.

[429] The next witness for CGI was Colin Brown who took over the ERP project from Mr Sheriffs in July 2016. When he came on board it was his position that there were problems regarding the ERP project. CGI accordingly carried out what was described as a lessons learned exercise. As I understand it this was a review of what had occurred to date in order to identify problems which had occurred and means of solving these problems.

[430]   At pages 40 and 41 of the transcript of evidence he was asked about the content of

the document which was prepared as a result of the lessons learned exercise and in

particular he was asked if this document raised issues of lack of information necessary for

environments to be built being provided by Agilisys. He answered that no it did not raise

that matter, however, he said that this was because the document was going to be made

available to the client, CEC.

[431]   This document appeared to me to be a clear opportunity to set forth, what as I

understand it, CGI is saying was a critical issue for it at the time of the implementation of

the project. If this was a real issue at the time I would have expected this to be clearly set out

in this document. The reason given by Mr Brown as to why it was not clearly articulated

therein makes no sense if it was in fact the critical issue. What is the point in carrying out

the exercise and preparing this document if critical issues are not to be raised in the

document.

[432]   In respect to Ms Ah-Wong's email he gave no plausible explanation as to why CGI

had accepted the conditions contained therein. He tried to say this was a matter for others

in CGI, however, given his relationship to the response (see: page 65) this did not make any

sense. He repeated this answer seeking to say that it was other persons who were

responsible (see: page 65).

[433]   This matter is returned to at page 75 and 76 of the transcript. His answer there

saying that Agilisys was at fault does not explain why therefore CGI had agreed to the

conditions.

[434]   Looking at the evidence led on behalf of CGI on this issue as a whole, I observe that:

over a significant period of time; from the stand point of persons who were working on the

ground in order to build the environments; from the perspective of persons higher up in

CGI's management; and in various types of contemporaneous documentation there is a significant lack of evidence that there was a real issue regarding a failure to provide a single document specifying the requirements of the environment by Agilisys. This evidence I believe strongly points to this not having been an issue of any significance at the time and that Agilisys had not breached any obligations in relation thereto.

[435] Between paragraphs 322 and 340 of his submissions Mr Sandison sought to highlight contemporaneous documents in which this was raised. At paragraphs 325 and 326 he contended that the documents prepared after the lessons learned exercise raise the issue. Nothing referred to there says that there was a failure by Agilisys to provide a specification document at the outset. At its highest this is said "As subject matter experts, Agilisys/Unit 4 should have provided greater detail…". That is not the same thing. It does not say Agilisys should have produced at the outset a document setting out its requirements. It does not say what precisely that document should have contained. This is no more than a passing reference in this document. If there was an obligation on Agilisys to produce this document at the outset and its failure to produce this had been the dominant cause of delay, this document would have contained more than such a general passing reference.

[436] At paragraphs 327-330 reference is made to a Partnership Board meeting on 7 March 2016 and actions taken following that. The issue of CGI providing environments is raised. However, I note that it is dealt with by it being recorded that "…this was an area of work that would be ongoing throughout the life of the project" which does not suggest that this was an area in which there would be supply by Agilisys of a single document at the outset. It reflects the reality of the situation that there was bound to be fine tuning in requirements during the lifetime of the project.

[437]   There was certain internal CGI documentation which was founded upon at

paragraph 332 and 333 of CGI's written submission, and in particular two emails were

founded upon: one from a Chris Bennet on 4 November 2015, I did not hear any evidence

from this witness and one from Sebastian Wood in December 2015, who was also not led as

a witness. They both date to a period early in the project and do not appear to have been

followed up with Agilisys. They amount to very little, if this was a significant issue.

[438]   There is further support for the conclusion that there was no difficulty in respect to

provision of requirements by Agilisys and this is found in the responses at the time to

various Relief Notices.

[439]   RN001, reading short said:

> "The responsibilities have not been met due to CGI not providing a fully functioning
> ERP development environment which can be accessed by Agilisys users." (which is
> dated 27/1/16).

[440]   CGI's response was to grant relief. If the issue of a single document setting out

specifications which was required from the outset had been a significant issue I cannot see

that relief would have been granted in terms of this Relief Notice. In the evidence of CGI's

witnesses there is nothing which persuades me that there is any explanation as to why relief

was granted if there was a real issue from the outset regarding a lack of specification of

environments by Agilisys.

[441]   There is an associated issue and that is the payment by CGI to Agilisys to set up its

own temporary ERP development environment on Microsoft Azure to enable progress to be

made. CGI paid an extra £40,000 to Agilisys to carry this out (see: the evidence of

Mr Sheriffs at page 36 of the transcript).

[442]   If the environment problems were caused by the failure to provide a single

document at the outset setting out specifications it is difficult to understand CGI's position

in doing this. Rather this supports the position that CGI had not put in sufficient resources to produce the environments timeously.

[443]   RN013 relates to "ERP - delay of access to hosted environments". It is dated 3 June 2016. The response to that was this:

> "CGI have not provided hosted environments and have not confirmed a date by which these will be accessible."

> "CGI agree that this delay has the likelihood of Agilisys not meeting the system acceptance testing 11/7/16 date within ERP plan version 13 and is due to CGI cause as described above."

[444]   Again this response is wholly inconsistent with the position now being taken by CGI and no plausible explanation was advanced for this inconsistency.

[445]   It was put to Ms Fox in cross-examination at pages 138 and 139 of the transcript of her evidence that this would not have been CGI's response to RN013 if Agilisys had not provided the specification for environments. She says "Possibly yes … May have been".

[446]   I believe the only accurate answer to that question is a straightforward "yes". Her explanation as to why the response to this was not: "Agilisys did not provide a specification of its requirements at the outset and therefore no relief will be granted" was this: "It was not flagged to me to put it into a response". This answer does not bear any close scrutiny. If this was an issue then at June 2016, she must have known about it.

[447]   RN014 also related to delay of access to ERP environments and was dated 26 July 2016.

[448]   At page 114 in her cross-examination Ms Fox is asked about the initial response to this Relief Notice. Ms Fox sent an email to other CGI colleagues, it was in response to RN014, once more in this email there was no reference to there being a lack of an environment specification. The explanation given for the lack of reference to this issue in

this document by this witness I believe does not hold water. If this was an important issue surely it would be at the top of the list of matters mentioned.

[449]   Overall I am persuaded that looking to all the contemporaneous documentation the position now being put forward by CGI is inconsistent with the position that it put forward at the time and no plausible explanation is put forward explaining that. Its position is inconsistent to its responses to Relief Notices; its response to the Ah-Wong email and in general terms with the contemporaneous documentation which does not raise this issue of a specification. I believe that this shows that the question of a specification of environments being provided by Agilisys at the outset was not a significant issue at the time and that CGI are attempting to rewrite history. Overall I am not persuaded that any failure to provide environments on the part of CGI was caused or contributed to by any failure by Agilisys to provide a design specification.

[450]   I have set out earlier my view as to the scope of the obligation to provide a technical solution design. In terms of that limited obligation Dr Hunt does level certain criticisms at Agilisys. She opines that at the outset the delivery of requirements was somewhat piecemeal (see: her initial report at 6.5.4 and 6.8.6). However, I accept her conclusion that this failure was not causative of anything other than minimal delay.

[451]   Moreover, insofar as evidence was led on behalf of CGI that any delay flowed from this alleged failure I believe that the evidence either did not show that any delay had taken place or alternatively if there had been a delay that it was minimal.

[452]   The two principal witnesses regarding this issue were Mr Hamilton and Mr Bryce.

[453]   First looking at Mr Hamilton, an issue was raised in his evidence by him about not being aware that internet connections was a requirement in relation to the environments. However, his attention was directed to documentation emanating from Mr Wood (another

CGI employee) and he appeared to know about the necessity for internet connections on 13 November 2015 (see: page 62). He further later accepted at page 88 that this had been known about by CGI from 5 November.

[454] Beyond that at page 84 he confirmed that the points which had been raised in the snagging list by Agilisys in December 2015 were dealt with within a matter of a few days.

[455] A further point which he had raised in relation to lack of specification of the environments was that it was unknown as at December 2015 that Agilisys required Excel. However he eventually accepted at page 87, lines 16 to 18 of the transcript that this had in fact been known about on 11 November 2015.

[456] His evidence when looked at as a whole did not support any significant delays arising from a failure to specify environments.

[457] Turning to Mr Bryce, at about pages 128 to 133 of his cross-examination Mr Bryce made a number of complaints relative to the issue of lack of requirements and these were related to a period as at 5 July 2016. However, these issues do not appear to have caused any real delay.

[458] He complained about not being informed prior to that about the need for BIF and Excelerator, however, at page 140 of the transcript of his evidence he accepted that these were known about as at 5 November 2015.

[459] His evidence does not support any significant delay being caused by this issue.

[460] The next issue raised by Mr Sandison which he submitted was a cause of delay was lack of management on the part of Agilisys in respect to environments. I am unable to identify with any precision what any such failure amounted to. Mr Sandison made a criticism of Agilisys at paragraphs 289 to 291 of his submissions to the effect that Agilisys had failed in its management responsibilities by directing CGI to Unit 4 for the details of the

environments. I observe that Unit 4 were installing in the environments the ERP solution, namely: Business World. It seems to me in no sense surprising in those circumstances that in respect to the installation of Business World Agilisys would direct CGI to Unit 4. Business World was Unit 4's proprietary product. In these circumstances it would be entirely appropriate to direct CGI to Unit 4 for advice.

[461]   Lastly Mr Sandison referred to difficulties which were also caused by issues experienced by Agilisys in accessing environments. CGI engaged Advance7, an external set of consultants, to attempt to resolve these problems. Following Advance7's recommendations, performance issues were improved. Kevin Bryce's evidence was that this did not prevent Agilisys from proceeding with testing. Difficulties were also experienced at an earlier stage with access by Agilisys to environments using the laptops used by Agilisys contractors. Kevin Bryce's evidence was that:

> "the challenge that we had, which I hadn't encountered before, was that the individuals that Agilisys were using as contractors used their own device, so that made the ability to allow people to connect remotely with a personal laptop to a client network or, indeed, our own corporate network a bit of a challenge."

Use of personal laptops posed a particular difficulty because CGI "had no ability to know if they were patched, if they had antivirus software on, if they were running up-to-date antivirus, and as soon as we allowed those to connect to our network it then introduced a level of risk." The contractors did not wish to use separate CEC laptops, as suggested by CGI in December 2015, as this would have involved the Agilisys contractors having to carry two laptops. The difficulty was not resolved until mid-2016, when the original CGI suggestion of use of CEC laptops was ultimately accepted by Agilisys. Mr Sandison accordingly argued that delay in access to the environments was caused by this issue and was due to fault on the part of Agilisys.

[462]   In reply Mr Cormack said this: First, there was no contractual obligation (express or implied) for Agilisys to provide some form of standardised laptop, whatever is meant by that term. Further, there was no clear explanation or consensus on what a standardised laptop would be or would involve.

[463]   I am unable to identify any evidence relied upon by CGI which sets out the contractual basis for such an obligation nor in the evidence is it possible to identify what is meant by "a standardised laptop". Dr Hunt looks at this issue at paragraph 6.6.12 of her initial report and I find her analysis of this issue compelling. If there was any party at fault in respect to this issue it was CGI.

[464]   Mr Cormack secondly argued: the contemporaneous email evidence clearly shows that Peter Hall was always willing to consider the use of either CGI provided or CEC laptops if that was the only way to perform the Subcontract. Every time the issue was actually raised by CGI, he responded positively: see in particular emails at JB 633, JB 878, and JB 1281. The actual evidence led by CGI was often merely rumour and hearsay. For example, Kevin Bryce suggested in his witness statement that there had been some form of refusal to use CEC laptops in December 2015. But he had absolutely no direct knowledge, had no details of it, and was unable to explain Peter Hall's contemporaneous email to the opposite effect. The highest the evidence got in relation to this issue for CGI was that Peter Hall had expressed to Paul Hamilton a concern about having his contractors carry two laptops and about software installed on their laptops being necessary for their work. An expression of concern is not a refusal. And it is not anything remotely approaching a breach of any contractual responsibility or obligation.

[465]   I find this line of argument persuasive. There simply was no body of cogent evidence that Agilisys had refused either a CGI or CEC laptop. At its highest, Mr Hall had

raised a reasonable point about the necessity to use two laptops. That is not a refusal. Again, to return to a point I have made on a number of occasions, if this was a real issue as a matter causative of delay the contemporaneous documentation does not support this.

[466] In conclusion, for the foregoing reasons, I do not accept that Agilisys failed to fulfil its obligations in terms of the environments part of the project. CGI was unable to provide environments in the form and at the time required as a result of their own failures.

[467] From the evidence as a whole, Agilisys submitted the dominant and effective cause of CGI's failure to set-up the Environments was, plainly, an underestimation of the time, resources, and effort that would be involved in setting them up.

[468] Agilisys has prepared a detailed chronology of the events relating to the Environments to which I earlier referred and I would reiterate that I believe having considered this document it accurately sets out the timeline in respect of environments; and accurately sets out the causes of the environments not being produced timeously by CGI and supports the factual position put forward by Agilisys in the relevant Relief Notices.

[469] Agilisys submitted in summary form, what can be taken from the chronology is as follows. In the initial period from September 2015 – December 2015, CGI appears to have simply not understood the urgency of its obligations in relation to Environments within the context of the Implementation Plan at the start of the Subcontract. This was, possibly, due to a misunderstanding on their part about what would be involved when they entered into the Subcontract. There is the typical high turnover of different people being involved in September and October 2015 and then being replaced by others in November 2015. By early November 2015, CGI had managed to arrange an installation from Unit 4. Sebastian Wood of CGI, in particular, seems to have been the person responsible for meeting with Agilisys and others for the purposes of producing High Level Designs.

[470]   In December 2015, access was provided but the development environment was not fit for purpose. The major issue seeming to be that CGI struggled for an inordinate amount of time to overcome an internal security protocol in relation to providing internet access. By early January 2016, CGI had asked Agilisys to set-up their own temporary environments at their cost, which was done. That allowed build work to commence. By late February 2016, CGI had recruited Kevin Bryce as an environments manager to help with setting up the remaining PPE and Production Environments. Between March 2016 and July 2016, CGI experienced significant difficulties in deciding where to set-up servers, then setting-up the servers, and then arranging Unit 4 to install the base software. It was, also, interrupted by the data centre move at the end of June 2016. By mid-July 2016, it was recorded that the environments were essentially unusable due to performance issues. This was investigated by CGI and was not ultimately resolved until use of a workaround in September 2016. But the workaround was not ever going to be fully acceptable for use in order to complete UAT.

[471]   The clearest evidence on the root cause came from CGI's own contemporaneous internal email from Niall Sheriffs of 24 April 2016 (JB 1069 at p 12724). In that email, he expressly stated "The real issue with the ERP project from our point of view is that we under-estimated the effort to get the environment and data migration team resourced and effective." Further, it is supported by the fact that from January 2016 – June 2016, whether at Partnership Board meetings or in responses to Relief Notices, CGI repeatedly acknowledged that it was failing to meet its responsibilities.

[472]   This general underestimation seems to have been exacerbated by the very bureaucratic and technocratic approach taken within CGI to provision of environments. The contrast between the time taken for Agilisys to set-up their temporary environments in January (a matter of a couple of weeks), and the time taken for CGI to set-up environments

is striking. This was explained by a number of witnesses to be due to a "matrix management chain of command" with the GTO internal team that meant there was no direct control between the CGI project team at CEC and the GTO unit: see Niall Sheriffs on Day 9 at p 13 of the Transcript. It was, also, accepted there were substantial lead times for procuring work. And the evidence, amply, demonstrates the lack of consistency of people being involved.

[473] Whilst it is not intended to necessarily be a criticism that CGI are so formalistic and bureaucratic, it should have been a significant factor in CGI's thinking when it took on responsibility for environments. By way of example, as Paul Hamilton explained in cross-examination, the issue of internet connectivity in the Development Environment was technically very simple. Indeed, he managed to provide it within a day of it being identified. As he explained, the issue was it then took almost 2 months (from mid-December 2015 to mid-February 2016) for CGI's internal security protocols to be resolved to allow a permanent internet connection. He accepted this was a CGI issue: Day 11, page 69, of the Transcript.

[474] Given the original Implementation Plan allowed just over 2 months for the entire completion of all of the infrastructure building, it is not clear how CGI intended to fulfil its obligations in the Subcontract within the framework of such processes. But if, for example, CGI needed to have highly documented requirements or specifications for the purposes of operating its own internal procedures and the arms length arrangement with GTO, that is not a failing on the part of Agilisys - CGI needed to tell Agilisys clearly that such documentation needed to be provided for their purposes.

[475] I accept the above submission for all of the reasons I have hereinbefore set out.

[476]   In conclusion CGI did not meet its obligations in relation to provision of

environments in respect of the dates in the Implementation Plan or any other agreed dates in

Project Plans. Its failure was not caused or affected by any breach of obligations by Agilisys.

[477]   In the questions posed to the court the issue of "suitable environment management

services" is raised. This issue does not appear explicitly to form a material part of Agilisys'

submissions. It is referred to briefly in CGI's submissions at paragraphs 313 and 314. There

was almost no evidence on this issue. It appears from such evidence as there was (see:

paras 313 and 314) that CGI fulfilled its obligations regarding this.

[478]   The final question in respect of environments: did any breaches cause, or were they

reasonably likely to cause, Agilisys to fail to achieve milestones from MS2.5 onwards in the

ERP Implementation Plan by the effective dates? The effective dates in terms of the

Implementation Plan for MS2.5 were: start date 3 May 2016 and end date 26 July 2016.

[479]   Mr Sandison's position was this in respect to the above question. Milestone MS2.5

founded upon by Agilisys was the commencement of UAT. He submitted that in any event,

delay to the provision of ERP environments (irrespective of the cause of that delay) was not

the operative cause of the failure to achieve UAT (and subsequent milestones) by the

required date. By the autumn of 2016, it was clear that serious issues in relation to data

migration to which he had earlier referred would prevent the achievement of UAT. Colin

Brown's evidence was that, "The ERP programme would have been delayed due to data

migration issues, regardless of any environments issues."

[480]   Mr Brown's evidence was supported by the "Business World ERP Re-Plan Proposal"

dated 25 November 2016. Mr Brown's evidence was that this was a 'joint' document,

produced by CGI and Agilisys. The document stated, "Business World (ERP) will not

deliver to the planned go live of 3rd of April 2017. The reason for this is primarily due to the

Data Migration stream not running to plan."

[481]   At 5.12.1 to 5.12.4 of his submission Mr Cormack said this:

"5.12.1. The interdependence between data migration and UAT was repeatedly
acknowledged at ERP Project Board Meetings, Programme Highlight Reports, and in
correspondence between May 2016 and September 2016. It is also vouched by the
sequencing of data migration prior to UAT in the Project Plans (or, at least, in the
later ones that the bulk of data migration would be completed) and the original
Implementation Plan. Indeed, the Council raised concerns in October 2016 at the ERP
Project Board in relation to the fact that not all data was going to have been migrated
before UAT. Finally, it was expressly identified as a dependency for UAT in the
Project Initiation Document: see JB 147 at p. 17 of 30.

5.12.2. In the original Implementation Plan, User Acceptance Testing was due to
start on 3 May 2016 and conclude on 26 July 2016. It is obvious that, given CGI did
not even have access to the legacy systems until after the date for commencement of
UAT, then the failure to provide extracts was likely to cause Agilisys to miss this
deadline.

5.12.3. When relief was granted in May 2016 and by agreement to the 22 April 2016
Conditions and milestones moved to comply with version 13 of the Project Plan,
User Acceptance Testing was due to start on 10 August 2016 and conclude on 8
November 2016. Again, it is plain from the above that progress on extracts did not
even commence in earnest until around July / August 2016. And was not even
complete by the revised deadline in later Project Plans of 29 September 2016.

5.12.4   In all of these circumstances, it is plain that, along with environments, this
was a persistent and dominant cause of delay on the ERP project. And that, as a
direct consequence, Agilisys was reasonably likely to miss Milestone 2.5 for UAT
both in the original Implementation Plan and in relation to the postponed Milestone
dates accepted and agreed under other Relief Notices."

[482]   It appears to me that there are two relevant causes of delay operating concurrently in

respect to the ERP project, namely: CGI's failure in respect of environments and in respect

of data migration. It does appear that irrespective of delays in environments, data migration

would have stopped the achievement of Milestone MS2.5 and future dates. Equally delay in

provision of environments would, irrespective of delays in data migration, have stopped the

achievement of Milestone MS2.5.

ERP Biztalk: RN004 and RN006

[483]   Relief Notices 004 and 006 concerned the Biztalk development environment for the

ERP project. Biztalk environments were also required for the EI project. The provision of

the Biztalk environments for EI is not the subject of dispute in the present proof.

[484]   Relief Notices 004 and 006 asserted that the claimed CGI cause would cause Agilisys

to fail to achieve Milestone MS2.5: User Acceptance Testing ("UAT").

[485]   The issue in respect to these environments concerned interfaces. An interface is a

means of exchanging data between two systems or software applications. The BW software

required batch interfaces with various back office systems run by CEC (in particular the

Housing, Benefits, Bank, and Parking systems). In order to do so, it required the existing

interfaces (that were in place for the existing PPSL, Oracle, and iTrent) to be replaced with

interfaces to Business World via BizTalk: see, generally, Dr Hunt's Report at paras 9.1.1 –

9.1.4.

[486]   The first question in relation to this group of Relief Notices was this: what were the

respective obligations of the parties (including as to the Milestone Dates in the

Implementation Plans and timing generally) in relation to the provision of experienced

Biztalk development resources and/or access to the Biztalk development environment?

[487]   Agilisys contended that the following responsibilities were allocated to CGI in terms

of the Subcontract.

Section	Extract
OBS 1, OBS 2, OBS 3, OBS 30, and OBS 47	*"Provide experienced Biztalk development redevelop all required interfaces into and out of the Unit 4 Business World solution through the Biztalk middleware, using the Agilisys Biztalk integration framework."* *"Manage the contractual relationship with BT enabling CGI to work as its agent."* (via CEC)

Roles & Responsibilities document, Section C of Schedule Part 4.1	Project Roles: *"CGI providing data migration and integration services."* CGI Responsibilities & Deliverables: *"Technical resource to define the technical specifications of the Agresso interfaces, replacing all interfaces into and out of the legacy systems and redesign of the integration with Capita Axis income management system. The technical resource will be appropriately skilled in Biztalk middleware and will be responsible for all coding, testing and documentation to complete the interfaces, working to the Agresso solutions architect."* *"Supplier management of existing applications that Agresso will interface with, co-ordinating any support required to complete integration testing. Key applications where Agresso will need to feed data into are Northgate Swift and Capita Axis."*

Agilisys contended that the Subcontract allocated the following responsibilities to Agilisys in relation to the work on interfaces and integration on the ERP project.

Section	Extract
OBS 1, OBS 2, OBS 3, OBS 30, and OBS 47	*"Working with CEC, define the technical specification of each interface required into and out of the Unit 4 Business World solution."*
Roles & Responsibilities document, Section C of Schedule Part 4.1	Supplier Responsibilities & Deliverables: *"Facilitate design workshops to agree the implementation design of the Agresso system – this will cover all business areas and include interfaces, data migration and reporting. Deliverables will include the workshop materials and the overall solution design document."* *"Solutions architect resource which will generate the technical solution design, interface strategy, data migration strategy, the archiving solution and design of the supplier portal. Each of these will produce a document deliverable for sign-off with the Authority. The solution architect will manage the technical resource provided by CGI."*

I consider that the above obligations were incumbent on parties. CGI in its written

submissions developed the following position in relation to obligations incumbent on

Agilisys:

> "98.   Agilisys was under obligations as the leader of the ERP Programme. These
> obligations were extensive, and included the provision of the solutions
> architect resource to which the CGI responsibility makes reference. Agilisys's
> obligations with regard to the ERP programme are discussed more fully in the
> 'Subcontract: roles and responsibilities' section of these Written Submissions,
> above. It is submitted that these obligations gave rise to two specific obligations
> in the context of the Biztalk development environment:
>
>   a.   As part of Agilisys' overall responsibility for design and leadership, the
>   provision of adequate and detailed specifications for the Biztalk
>   development environment was an Agilisys responsibility.
>
>   b.   Agilisys was responsible for managing the Biztalk developers provided
>   by CGI. This was in any event made clear in the drafting of the
>   Responsibilities Document: CGI was responsible for the provision of the
>   'resource', which was 'working to the Agresso solutions architect.'
>
> 99.   Accordingly it is submitted that CGI's obligations in relation to the Biztalk
> environments for ERP were subject to Agilisys' obligation to lead the ERP
> programme and, in particular, Agilisys' responsibility to specify environment
> design. There was no obligation on CGI to deliver the Biztalk environments by
> a particular date."

[488]   The response of Agilisys was this:

> "The basic division of responsibilities was that Agilisys was responsible for
> designing the integration strategy and identifying and defining the necessary
> technical specifications of the interfaces. CGI were responsible for all matters relating
> to the procurement and redevelopment of interfaces through Biztalk. This included,
> by necessary implication, the creation of the Biztalk environments being the place
> where that work would be undertaken."

[489]   I am satisfied that the above analysis by Agilisys is correct. It is pointed out by

Dr Hunt at paragraph 9.2.3 of her report: there is no specific responsibility within the

Subcontract for providing Biztalk environments. However, given CGI's responsibility to

provide all infrastructure, hosting and support for the BW solution and the obligations as

identified in the OBS incumbent on CGI that is, as submitted by Agilisys, not surprising.

[490]   The only substantial difference between parties as regards obligations incumbent upon them appeared to be in respect to the general management role of Agilisys and in particular regarding the managing of the Biztalk developers provided by CGI. There is in express obligation on the solution architect "to manage the resource provided by CGI." and in addition it is explicitly stated that the technical resource: "is working to the Agresso solutions architect". Reading these two provisions together there is a clear management aspect to the role of the solutions architect in respect of the Biztalk resource. I have already commented on the scope of the general management role of Agilisys. The scope of the management obligations of the solutions architect has to be considered in terms of the general management responsibilities and the roles and responsibilities as a whole imposed on parties in respect of this area of the project. In particular it has to be construed in the context of CGI's obligation to "redevelop all required interfaces" and "CGI providing data migration and integration services". Thus the management role cannot empty these responsibilities of any content. It seems to me that a sound construction of the obligations of the solutions architect is this: she was to be the principal person within CGI to initiate the management functions identified by Dr Hunt, which I set out earlier and in addition was obliged to provide such assistance as required to the Biztalk resource and such assistance as requested by the Biztalk resource. CGI's position appeared to be this. It was a failure in this responsibility of management if, first, environments were not provided in conformity to a timeline and, second, if the environments were not of the appropriate quality. That is a clear example of emptying the responsibilities of CGI and rendering them devoid of content. It is creating, by use of a management obligation, an obligation on Agilisys which amounts to a guarantee that CGI performed its responsibilities in terms of the Subcontract. I reject this for all of the reasons I have outlined in the course of my opinion.

[491]   As regards timing, no express date is given in respect to the delivery of Biztalk

Environments. However in terms of the Implementation Plan at Schedule Part 6.1 the build

period for interfaces and integration was 1 December 2015 to 30 June 2016. Thus in order for

Agilisys to meet these dates the interfaces necessarily had to be provided well before that

latter date. By issuing AG003 on 13 May 2016 CGI accepted that it had not produced the

Biztalk environments within the time necessarily required by the Subcontract as set out in

the Implementation Plan.

[492]   Having considered the responsibilities of parties in respect to this part of the project,

the next question is: did CGI breach its obligations by failing to provide access to Biztalk

development resources and/or access to the Biztalk development environment?

[493]   Mr Cormack submitted in respect to this issue:

> "6.2.2.   Insofar as Biztalk environments are concerned, the initial background was
> neatly summarised in the email of 17 February 2016 from Bob Price to Bridget Fox,
> and the attached slide: JB 820. From an early point in October 2015, Agilisys
> requested that CGI provide the necessary Biztalk infrastructure and were working on
> providing it. It suffered identical problems as the ERP Development Environment
> and EI Environments; namely, despite Agilisys having identified the need for an
> internet connection as early as October 2015, it took an inordinate amount of time for
> CGI to overcome its own security protocols on this issue. This is neatly captured in
> an internal CGI email in December 2015 discussing the two Biztalk developers that
> had been employed by CGI. They were complaining about the lack of work. As
> Richard Salmond, candidly, says: 'They have been waiting for the development
> environment to be available before they could do any development. This has been "it
> will be ready tomorrow" for weeks and should now be available." Despite earlier
> escalations within the project, this was an on-going delay when RN004 was issued on
> 10 February 2016. The issuing of RN004 led directly to AG003, which is discussed
> below.
>
> 6.2.3.   Insofar as Biztalk resource is concerned, Agilisys' principal complaint was
> that, as a result of the general re-plan of ERP that took place in late 2015, the time
> period for Biztalk development had been compressed and, accordingly, more
> resource was required. This was the fundamental concern when RN004 was issued."

[494]   RN004 was issued in direct response to the fact that: (a) the Biztalk development

environment was not set-up; and (b) in his email of 10 February 2016, Barry Speed of CGI

had expressly said to Peter Hall of Agilisys that CGI had insufficient resource to cover both the EI and ERP requirements: JB 824.

[495]   The sequence, after RN004, was that on 18 February 2016 CGI asked Agilisys to provide a quote to provide the Biztalk resource: see JB 826. Kevin Bryce of CGI was involved in setting-up the Biztalk Environments and was initially targeting a delivery date of 14 March 2016: see JB 908. This date was missed and led to the issuing of RN006 on 18 March 2016. And, thereafter, the Biztalk environment was eventually made available to Agilisys around mid-April 2016: see Kevin Bryce WS at para 2.24- 2.25.

[496]   Eventually, CGI formalised the informal agreement reached in early March 2016 and granted AG003 on 13 May 2016: see Bridget Fox WS at para 3.9 and see AG003 in JB 983. The effect was to transfer the responsibility for interface and Biztalk development to Agilisys.

[497]   The above sequence of events appears to confirm the failure to provide on the part of CGI sufficient Biztalk resources and the relevant environment within the time necessary for the Implementation Plan. Mr Cormack submitted that the effect of AG003 was to put CGI in immediate breach of its obligations, which perhaps reflects an acceptance they had not properly performed their responsibilities. This is because AG003 updated CGI's obligations to a straightforward obligation to provide "the required Biztalk infrastructure, any necessary technical support and environment management services, for a minimum of 3 environments, by the 1st of March." However, as can be seen from the sequence of events, the Biztalk Environments were not provided.

[498]   I agree with this analysis of the effect of AG003. I further agree with the submission of Mr Cormack at 6.3.1 of his written submissions where he argues the root cause or reason for CGI's failure was its own inability to correctly resource the Biztalk development work

within any sort of reasonable period. In my view the evidence of CGI's witnesses essentially

confirms it: see para 3.85 and 3.101 of Niall Sheriffs' WS, and para 3.6 of Bridget Fox's WS.

Both sections of Mr Sheriffs' statement explicitly accept that CGI had a resources issue as

does the referred to section of Ms Fox's statement. This, it appears to me, has nothing to do

with a lack of management by CGI but is purely and simply a failure on CGI's part to

provide the appropriate resources.

[499]   In addition to the above it took an inordinate length of time to overcome issues with

internet connectivity, set up of and providing access to the Biztalk environments.

[500]   In my view the above position is entirely supported by the analysis of Dr Hunt

between 9.3.8 and 9.3.15 of her initial report, where she clearly sets out the timeline in

respect to this aspect of the case and analyses the root cause of the difficulties and delay.

[501]   I have considered the written submissions made by CGI in relation to this question,

in particular at paragraph 108. There is nothing therein which causes me to depart from my

view in respect to this question. I cannot see how in the light of AG003 CGI is not in breach

of its obligations.

[502]   The next question is: was CGI's breach of its obligations in respect to Biztalk caused

or contributed to by Agilisys' breach of its obligations. CGI's position is that it was caused

or contributed to by Agilisys' breach. This position was founded on first a failure to provide

an adequate specification. My attention was directed to the evidence of Mr Sheriffs at 3.84.1

to 3.84.3 of his witness statement. However, in the course of his cross-examination, at least

to a material extent, he accepts that prior to 10 December 2015 (the date about which he is

talking in this part of his statement) there had been notification by Agilisys to CGI of the

requirements he mentions at 3.84.1 to 3.84.3 of his statement. In particular internet

connection was identified by Agilisys in October 2015.

[503]   The only other reference to a lack of specification relied on by CGI is an email of

18 April 2016 from Mr Olejnik of CGI to Agilisys. This does refer to a problem relative to

specification by Agilisys. In the first part of the email there is a general criticism of the

specification provided by Agilisys but no detail is provided as to what were the problems,

how significant they were and how long the issue took to be dealt with. I did not hear any

evidence from Mr Olejnik. The above is completely lacking in specification and does not for

that reason establish that there was a material problem with specifications being provided

by Agilisys. The second half of the email refers to one further requirement being specified,

again there is no detail regarding this issue. There is insufficient in this document as a

whole to establish that delay in providing requirements by Agilisys was causative of delay

in the provision of resources to Biztalk and or access to the Biztalk development

environment. Once more if there had been a significant problem in the provision of

requirements the contemporaneous documentation would have been much more

voluminous than this and I would have been referred to such by CGI. The

contemporaneous documentation, as I have said, tends to support the conclusion that the

effective cause of the delay was lack of resources being provided by CGI and difficulties in

access.

[504]   Once more, criticism is also levelled in respect to Agilisys' failure to manage the

developers (see para 118 written submission CGI). This raises the issue of failure to manage

timelines and quality. I have already to some extent dealt with this issue earlier. I would

add this: if the obligation to manage required management relative to timelines, I am not

aware from the evidence in what way Agilisys failed to manage so that timelines were not

adhered to. The problem was lack of resources provided by CGI. I cannot see how any

management by Agilisys could affect this issue. Nor how it could affect any issue of access.

Equally in respect to quality I do not see in what way any management in respect to "quality", whatever that might mean, had any causative impact given the root causes I have identified for the failures. In conclusion, it is wholly unclear in what way Agilisys failed to manage the developers. Secondly it is wholly unclear how this led to any delay. I do not find this line of argument persuasive.

[505] Thereafter, the final question is this: did any breaches cause, or were they reasonably likely to cause, Agilisys to fail to achieve the Milestone MS-2.5 in the ERP Implementation Plan by the effective date?

[506] CGI's position in respect to this was as follows:

"The UAT milestone was not dependent upon the provision of Biztalk resource and environments alone. In particular, the achievement of UAT in May 2016 was dependent on other aspects of the programme, including payroll, data extracts and data migration. For the reasons set out in relation to those relief notices, the failure of Agilisys to meet its obligations in those areas would have prevented the achievement of UAT in any event. It is accordingly submitted that any breach by CGI in respect of question 6 was not in any event the operative cause of the failure to achieve UAT."

[507] The effective date for UAT had a start date of 3 May 2016 and end date 26 July 2016 per Schedule Part 6.1. Biztalk environments became available in April 2016. In the period up to April 2016 there were three concurrent causes operating: the wider issue of environments as earlier discussed in this opinion; the issue of data migration as earlier discussed; and, lastly, the issue of the failure to provide the Biztalk environments. Thereafter for the reasons I have already set out the dominant causes were the issues of data migration and the wider environment issues. Thus the three causes would have had a cumulative effect on the achievement of this Milestone.

Relief Notice 008 – ERP Interfaces

[508]   Relief Notice 008 concerned the provision of technical specifications for interfaces to existing feeder systems. It was issued by email on 21 March 2016. Agilisys asserted that a failure to provide those specifications caused Agilisys to fail to achieve Milestone MS2.5 and relates generally to relief from delay under version 12 of the Project Plan.

[509]   The particular matter in relation to interfaces which was at the core of the dispute concerning interfaces was: interface specifications. These are helpfully defined in the following section of the written submissions of Agilisys:

> "7.2.2. This section relates to the specific batch interface specifications that were required as part of the redevelopment of the required interfaces to the legacy systems (in email correspondence they, and the legacy systems, are often referred to more colloquially as 'feeders', 'feeder files', and 'feeder output documents'). The basics of this concept are, helpfully, described at: paras. 6.13 and 8.49 of Peter Hall's WS, para. 5.5 of Ravinder Johal's WS. As there explained, interface specifications are Microsoft Word documents that detail the format and content of the output of data from the legacy systems. They are critical in order for Agilisys to develop a specification of how that data output can be translated into an acceptable format for BW. This specification was then required to allow the CGI Biztalk developers to write programming code in Biztalk to complete their work."

[510]   The first question in respect to this section is: what were the respective obligations of the parties (including as to the Milestone Dates in the Implementation Plans and timing generally) in relation to the provision of a complete set of Agresso technical interface specifications? Agilisys contended that the following responsibilities were allocated to CGI in terms of the Subcontract in relation to the work on interfaces and integration on the ERP project:

Section	Extract
OBS 1, OBS 2, OBS 3, OBS 30, and OBS 47	"*Provide experienced Biztalk development redevelop all required interfaces into and out of the Unit 4 Business World solution through the Biztalk middleware, using the Agilisys Biztalk integration framework.*" "*Manage the contractual relationship with BT enabling CGI to work as its agent.*" (via CEC)

Roles & Responsibilities document, Section C of Schedule Part 4.1	Project Roles:
	"*CGI providing data migration and integration services.*"
	CGI Responsibilities & Deliverables:
	"*Technical resource to define the technical specifications of the Agresso interfaces, replacing all interfaces into and out of the legacy systems and redesign of the integration with Capita Axis income management system. The technical resource will be appropriately skilled in Biztalk middleware and will be responsible for all coding, testing and documentation to complete the interfaces, working to the Agresso solutions architect.*"
	"*Supplier management of existing applications that Agresso will interface with, co-ordinating any support required to complete integration testing. Key applications where Agresso will need to feed data into are Northgate Swift and Capita Axis.*"
	"*As prime contractor/partner with the Authority, leverage commercial powers to ensure that the Authority fulfil obligations such as timely decisions, participation in workshops and testing in accordance with the implementation plan) and ensure approval of designs for EI are not unreasonably withheld.*"
	Annex 2:
	"*CGI shall procure that the Authority will comply with the duties listed below, as required to deliver the Authority functions listed in Schedule 2.1 (Service Description):*
	…
	Provide business specifications for interfaces and reports"
	…
	Request the Incumbent Supplier to provide data extracts in accordance with specifications provided by the Supplier."

The Subcontract allocates the following responsibilities to Agilisys in relation to the work on interfaces and integration on the ERP project:

Section	Extract
OBS 1, OBS 2, OBS 3, OBS 30, and OBS 47	*"Working with CEC, define the technical specification of each interface required into and out of the Unit 4 Business World solution."*
Roles & Responsibilities document, Section C of Schedule Part 4.1	Supplier Responsibilities & Deliverables: *"Facilitate design workshops to agree the implementation design of the Agresso system – this will cover all business areas and include interfaces, data migration and reporting. Deliverables will include the workshop materials and the overall solution design document."* *"Solutions architect resource which will generate the technical solution design, interface strategy, data migration strategy, the archiving solution and design of the supplier portal. Each of these will produce a document deliverable for sign-off with the Authority. The solution architect will manage the technical resource provided by CGI."*

[511]   CGI relied in particular on the general obligation in the responsibilities document that: "Agilisys was responsible for client management and governance (project level)." It also relied on the solutions architect's responsibility to prepare an interface strategy. It submitted that these obligations had been breached.

[512]   I consider that the obligations above referred to by each side in respect to this Relief Notice were incumbent on the parties and were relevant to the discussion of the various issues relative to this Relief Notice.

[513]   The position of CGI in summary was this: the delays to the provision of interface specifications were caused by a combination of the delay in BT responding to requests (which was a matter outwith the control of CGI, and which could only be resolved by

escalation through CEC) and a delay in obtaining approval from CEC. Agilisys were responsible for CEC management and governance at a project level. Responsibility for resolving these delays were with Agilisys, rather than with CGI, as a result, there was no breach of CGI's contractual responsibilities in relation to the provision of interface specifications.

[514] There was in essence no dispute between parties as to what was the factual cause of the delay (see: 7.3.1 to 7.3.3 of the submissions for Agilisys and paragraphs 250 to 257 of the submissions of CGI).

[515] The dispute was entirely a legal one as to whose was the legal responsibility to deal with these issues, namely: the issue with BT.

[516] I would observe regarding this legal issue as follows:

[517] First, it was for CGI to "manage the contractual relationship with BT enabling CGI to work as its agent".

[518] Secondly: "CGI shall procure that the Authority will comply with the duties … Request the Incumbent Supplier (BT) to provide data extracts in accordance with specifications provided by the Supplier." "…provide business specifications for interfaces and reports."

[519] Thirdly, it was CGI's responsibility to "leverage commercial powers to ensure that the Authority fulfil obligations…"

[520] Fourthly: "Agilisys was responsible for client management and governance (project level)". Having regard to these four responsibilities I am persuaded that the principal and the ultimate responsibility in obtaining the specifications from BT fell on CGI. It was its responsibility to procure that CEC complied with its responsibilities. I have already discussed the nature and scope of that responsibility. It was CGI who had the responsibility

to exercise its commercial powers. It was to manage the contractual relationship with BT. These responsibilities sat within the context of Agilisys playing a subordinate role to CGI for the reasons already set out. When these responsibilities are read together the responsibility for client management on the part of Agilisys is clearly a subordinate one. It was given the difficulties encountered with BT and CEC for CGI to exercise its power to procure CEC's compliance in order to resolve the delay issues and to exercise its financial leverage in respect of CEC. The principal and ultimate responsibility to obtain the specifications was incumbent on CGI. That at a practical level it was a failure by CGI is illustrated by this passage in Mr Sheriffs' evidence.

> "At an operational level, Agilisys were able to interact through the weekly meetings we had with BT, and with the progress through the tracker of issues. There was no direct means for management escalation and interaction from Agilisys, or from CGI, as BT would only deal with CEC at that level." (Supplementary statement of Mr Sheriffs at 4.11)

[521]   This passage of evidence illustrates the importance of CEC in obtaining the specifications and it was CGI who had the power to procure CEC complied with its responsibilities.

[522]   So far as an interface strategy being prepared by the solutions architect there was I believe no evidence before the court that the non-existence of such a strategy had any impact in relation to the issues of obtaining specifications from BT.

[523]   CGI in its written submissions raised the issue of no date being specified in the contract as to when the specifications were to be provided.

[524]   The specifications were held by BT. In respect to the issue of timing it is clear from the nature of interface specifications that they were required at the outset in order to allow work to progress on ERP interfaces. Agilisys submitted as follows as regards the issue of timing:

"Agilisys requested the interface specifications at an earlier point. They had, in fact, made it clear that there were going to be required pre-contract and as early as 27 February 2015: see the Expert Report of Dr Hunt at para 3.2.4 (footnote 14) referring to JB 402. They are recorded as already being delayed in the Weekly Highlights Reports for the project around October / November 2015, they by January 2016 they were recorded as severely delayed, CGI failed to obtain the majority of them until well after April 2016, and indeed some minor work was on-going on them still in February 2017. It is submitted the factual position is entirely accurately recorded in RN008."

[525] Taking into account the explanation given by Agilisys as to when interface specifications were needed by Agilisys they were not provided within the time necessarily required by the Implementation Plan. By the time of the issue of the Relief Notice it was accepted by CGI that only 34 from 50 specifications had been provided and the rest were not provided until 1 April 2016.

[526] Having held that the responsibility for resolving the delays lay with CGI, and my above view as to when these specifications were necessarily required in terms of the Implementation Plan, there was a breach of CGI's contractual responsibilities in relation to the provision of interface specifications. It did not provide the full specifications in the time reasonably required by the Implementation Plan. The root cause of its failure was the difficulty in obtaining the information from BT.

[527] The next question is: was CGI's breach caused or affected by a breach by Agilisys of its obligations? For the reasons given above my answer to this question is no. I am unable to identify any evidence which would support a conclusion that CGI's breach was caused or affected by a breach by Agilisys of its obligations.

[528] The final question in respect to these Relief Notices is this: did the breach by CGI cause, or was it reasonably likely to cause, Agilisys to fail to achieve the Milestone MS-2.5 in the ERP Implementation Plan by the effective date?

[529]   CGI's position in respect to this question was this: RN008 is founded upon an anticipated failure to achieve UAT. For the reasons given in answer to other questions, it is submitted that the operative cause of delay was not any failure by CGI to discharge its obligations in respect of interface specifications. UAT was not achieved following the provision of the missing specifications on 1 April 2016. The reason for this was not CGI's failure to provide specifications, but rather was Agilisys' failures to discharge its obligations in respect of data migration and environments.

[530]   I have already held that Agilisys did not fail to discharge its obligation in respect of data migration and environments. Accordingly my answer to this question is yes. It was a concurrent cause along with the wider issues of data migrations and environments more generally in relation to which I have already identified CGI cause.

RN002 and RN012: EI environments

[531]   RN002 was issued to CGI by email on 1 February 2016. It was concerned with the provision of development, test and production instances of Northgate iWorld to allow build and configuration of the Agilisys Digital module and to provide test data to allow proving and testing of the configured modules.

[532]   Relief Notice 012 was concerned with the provision of the infrastructure required to allow Systems Integration Testing to commence. Systems Integration Testing was required in order for Milestone MS-OSC1.1 to be achieved. Milestone MS-OSC1.1 was the Go-Live of the AD platform, myGovScot integration and initial transactions.

[533]   Turning to look first at RN002, the first question in respect to this Relief Notice was this: what were the respective obligations of the parties (including as to the Milestone Dates in the Implementation Plans and timing generally) in relation to the procurement,

installation and provision of access to a development, test and production instance of the

Northgate API and the test data?

[534]   Agilisys contended that the Subcontract allocated the following responsibilities to

CGI in relation to third parties:

Section	Extract
OBS 21	*"Technical architecture working in partnership with Agilisys"* *"Procure and manage the contractual relationship with all 3rd parties providing support across the Enterprise Integration platform"* *"Procurement of required 3rd party APIs and supplier portals as required to deliver the online transactions to meet the requirement."* *"Installation of 3rd party portals and APIs for AD integration and provision of development and test environments of 3rd party portals and APIs"* NB. The term 'Third Party Suppliers' is defined in OBS 21 as *'Third parties provide solutions which comprise functional components of this service, which may be hosted in the Authority estate, or externally.'*
Roles & Responsibilities document, Section C of Schedule Part 4.1	Project Roles: *"CGI responsible for negotiation of subcontract, licence and payments to line of business application portals or APIs (CGI have put aside budget for APIs) – liaise with Authority & BT"* *"CGI responsible for contract management and delivery of the 3rd parties across the current Authority Applications in scope of the Enterprise Integration suite e.g. the MDM infosphere product, CRM, LPG, Payment engine etc…"* CGI Responsibilities & Deliverables: *"Procurement of required 3rd party APIs and supplier portals as required to deliver the online transactions outlines within the OBS."* *"Installation of 3rd party portals and APIs for AD*

	integration and provision of development and test environments of 3rd party portals and APIs." *"As prime contractor/partner with the Authority, leverage commercial powers to ensure that the Authority fulfil obligations such as timely decisions, participation in workshops and testing in accordance with the implementation plan) and ensure approval of designs for EI are not unreasonably withheld."*

[535] Agilisys contended that the Subcontract allocated the following responsibilities to

Agilisys in respect to third parties:

Section	Extract
OBS 21	*"Replace the online transactions with the AD product with modules as required to deliver the functionality as outlined within the OBS"*
Roles & Responsibilities document, Section C of Schedule Part 4.1	Project Roles: *"The Supplier responsible for defining 3rd party requirements including APIs or online portals (GovTech, Oracle, Xerox, Pitney-Bowes, APP, Northgate, Idox)"* Supplier Responsibilities & Deliverables: *"Replace the online transactions with the AD product with modules as required to deliver the functionality as outlined within the OBS"*

[536] Lastly Agilisys contended that the Subcontract allocated the following

responsibilities to CGI in relation to environments (including Biztalk environments) on EI:

Section	Extract
OBS 21	*"Provision of dev/test environments that are on the same version of the software/environments as the production system of Line of business applications for AD integration development and training."* *"Infrastructure hosting and support of the Enterprise Integration platform apart from Oracle RightNow SAAS provision."* *"Provide Biztalk infrastructure to replace the WebSphere middleware product"* *"Redevelop the Websphere middleware rules and translation maps to Biztalk with experienced Biztalk development capability."* (and a slight variation on these words elsewhere)
Roles & Responsibilities document, Section C of Schedule Part 4.1	Project Roles: *"CGI providing infrastructure and connectivity services and security management covering IT security management plan and data protection etc. (The Supplier to feed into plans)"* *"CGI providing biz talk integration licences and technical training to CGI development and support team."* *"CGI providing BizTalk Resources to redesign all integration through websphere to go through Biztalk where required"* CGI Responsibilities & Deliverables: *"Infrastructure hosting and support of the Enterprise Integration platform apart from Agilisys Digital and Agilisys Engage products hosted by Agilisys."* *"Provision of dev/test environments that are on the same version of the software/environments as the production system of Line of business applications for AD integration development and training."*

[537]   The particular responsibility CGI emphasised within the above was "The Supplier

responsible for defining third party requirements including APIs…".

[538]   Moreover, CGI in its submissions stressed Agilisys' responsibility as the manager of the EI programme and the general responsibilities of management and leadership. It was CGI's submission that these management/leadership responsibilities had been breached. I have earlier set out my views regarding the scope of the general management responsibility.

[539]   I consider that the obligations referred to by each side in respect to these Relief Notices as set out above were incumbent on the parties and were relevant to the discussion of the various issues relative to these Relief Notices.

[540]   In summary CGI's position became this:

> "Accordingly it is submitted that whilst CGI had specific obligations under OBS 21 in respect of API provision, these responsibilities were subject to Agilisys's overall responsibility for the EI project and for the AD product. In particular, they were subject to Agilisys' responsibilities firstly to specify the time at which the dependencies were required and secondly to specify properly the design of the environments."

[541]   In respect to design, the obligation of Agilisys was explicitly confined to it being "responsible for defining 3rd party requirements including APIs or online portals". This obligation has to be understood in terms of the general nature of the AD product. This is set out by Claire Conaghan in her witness statement between paragraphs 8.4 to 8.6. What importantly can be taken from the foregoing description is this: the AD product has certain services fully integrated as built in modules, which require connection through APIs to CEC's system. In other cases the AD has no built in module and here the product relies on integration with either SSOs or APIs. Thus it is not the position that CGI were required in terms of the contract to develop and build bespoke APIs. Rather in terms of the Subcontract at OBS 21 CGI were to take a tiered approach using (1) published APIs; (2) failing which SSOs; and (3) failing which electronic forms. Thus Agilisys' responsibility on a proper understanding is to advise CGI as to the APIs necessary and not to give a specification on how to build the API.

[542] I consider so far as timing is concerned if party one is depending on another to fulfil a particular aspect of its obligation in order to start work in terms of its obligations then the first party has a duty to advise the second party at what time the dependency is required assuming that is not clear from the nature of the work itself.

[543] Did CGI breach its obligations by failing to provide access to a development, test and production instance of the Northgate API and test data? Agilisys helpfully produced a timeline in relation to this issue which I have appended as Appendix 3 to this opinion. On reviewing this document I believe it accurately sets out the relevant chronology and the factual basis for the failure.

[544] The above chronology in my view clearly establishes a breach by CGI. The Northgate API and associated environment were requested in September 2015 to support Agilisys' build activities for Drop 1/MS-OSC1.1, but were not actually delivered until December 2015. Once delivered, the data anonymisation in the cloned environment was so severe as to make it impossible for Agilisys to test the API properly, and that issue was not resolved until late January 2016. This was most clearly spoken to by David Buchanan in his WS and in his evidence in court.

[545] It was submitted by Agilisys that in the original Implementation Plan in Schedule Part 6.1 of the Subcontract, the period allowed for build was 21 September 2015 to 26 February 2016. As David Buchanan explained in his WS, "This [access to Northgate iWorld API] was fundamental to the work to be undertaken by the AD team and having the access was necessary for around 80% of the build work." That is unsurprising as Northgate was the line of business system for the Revenues, Benefits, and Housing element of AD that was to make up the majority of the substance of Drop 1.

[546]   I am persuaded by the above submission and accordingly CGI breached its

obligations. It did not produce the Northgate instance and test data in the time necessarily

required by the Implementation Plan.

[547]   The next question is whether CGI's breach was caused or affected by a breach by

Agilisys of its obligations. The first issue raised by CGI is a failure to specify the time at

which the dependencies were required.

[548]   It does not appear from the evidence that specific dates were given by Agilisys.

However, I accept the evidence of David Buchanan and Claire Conaghan referred to in

Appendix 3 that Northgate API was "fundamental" and "critically important" and it

therefore should have been obvious to CGI that Northgate API would be required at an

early stage. I do not think that Agilisys breached its obligations to advise as to when the

specifications would be required.

[549]   CGI in its written submission in respect to the issue of lack of specifications relied on

certain parts of the evidence from Richard Salmond. His evidence was to the effect that

there was a fundamental failure in this regard. It is noteworthy: (1) he refers to not a single

contemporaneous document in which this issue was raised with Agilisys; (2) there is no

reference to the issue being escalated; and (3) there is even a lack of internal

contemporaneous documentation which is referred to. One email is referred to (see:

supplementary statement 2.7). However, I do not find it surprising that one email was sent

regarding specification of APIs. It would be surprising if no questions had to be asked of

Agilisys. As is accepted by CGI certain of these questions were answered by reference to

architecture documentation, again suggesting there was no significant issue.

[550]   I find it is noteworthy that the evidence of Mr Salmond is relied on by CGI. As he

points out in his witness statement: "In general my involvement in both EI and ERP was

peripheral and was focused on changes to the business" (para 4.2 of his witness statement). His lack of direct involvement means that his evidence such as it is on this issue is of little value.

[551] In the whole circumstances, given the lack of contemporaneous documentation and his peripheral role I am not prepared to accept Mr Salmond's evidence on this issue. It is also noticeable that his evidence is wholly lacking in detail as to what questions were not answered and as to when they were asked and what effect, if any, the failure to provide specifications caused.

[552] In addition I accept the analysis of Dr Hunt in relation to this issue. It is once again a well-reasoned analysis of the position (see: 9.25 to 9.3.7 of her original report).

[553] The final question in respect to RN002 is this: if the answer to the above question is yes, did that breach cause, or was it reasonably likely to cause, Agilisys to fail to achieve the Drop 1 Milestone MS-OSC 1.1 in the EI Implementation Plan by the effective date? CGI's position was that the root cause was the failure to give adequate notice in respect of the EI environment.

[554] Agilisys' response to this argument was:

> "8.8.1 The Court is invited to conclude that the two dominant causes of Agilisys' inability to meet the originally planned Milestone of MS-OSC 1.1 in the Subcontract were both the Northgate API issue and the Environments (particularly in this context the Biztalk Environments). These were, it is submitted, the dominant causes operating concurrently in the period September 2015 – January 2016.
>
> 8.8.2 It is, further, submitted that (whilst the Northgate API issue was resolved by late January 2016) the dominant causes of delay in the period after January 2016 continued to be the unavailability of the Biztalk, Development, and Test Environments (also joined by the Production and Pre-Production Environments as outlined in RN010). As RN010 clearly stated: '*Agilisys has made it clear that it is in a position to deliver all required functionality for milestone MS-OSC1.1 – with the exception of the Biztalk integration – which is dependent on CGI delivering on its Biztalk responsibilities.*' As will be recalled, CGI accepted RN010 and granted relief on 20 May 2016."

[555] I am persuaded that the analysis of Agilisys is correct. CGI had a further position in relation to the final question regarding RN002 to the effect that in any event the relevant milestone would not have been achieved owing to the inadequacy of Agilisys' AD product. I will discuss this question when considering RN012.

[556] Turning to RN012 I first want to deal with a preliminary argument. As I said earlier there was a specific argument advanced by Mr Sandison in terms of RN002 and RN012 based upon his position that changes to the contract which did not follow change control were invalid. His position was this:

> "The Transformation Plan provided that the Milestone was to be achieved by 1 April 2016. Following the delays to the provision of the EI development environment caused by the failure of Agilisys to specify requirements with sufficient time, the Go-Live date was moved to 29 April (discussed at §74 above). On 18 February 2016, Agilisys proposed a revised plan following the delay which split the Go-Live into two separate 'drops' in June 2016. A version control note signed on 28 April 2016 (which was stated to have no contractual force) scheduled drop 1 for 16 June and drop 2 for 30 June. This plan was subject to further (non-contractual) variations. By September 2016, the EI project had been split into six separate drops (also referred to as 'phases'), with the first (drop 1) to take place on 24 November 2016) and the last (drop 6) to take place on 23 March 2017. These drops, and their contents, were summarised in an 'EI phase timeline' document issued on 7 September 2016. There was, however, no contractual variation (utilising the Change Control procedure) to the single milestone in the Transformation Plan."

[557] Given the views I have earlier expressed, the division of the EI project into drops did not produce a valid alteration to the Subcontract terms, there was only a single milestone.

[558] There was a second preliminary issue regarding this group of Relief Notices, namely this: an objection to certain evidence led by CGI was taken by Agilisys. This in particular related to the evidence led by CGI about what were described as strategic issues with the EI Project [these strategic issues related to alleged inadequacies with the AD product.] The objection as developed came to this:

> "8.9.2   The thrust of all of CGI's witnesses that gave any detailed evidence directly about the EI project was to focus on the strategic issues that came to a head

around November 2016. It is submitted that these issues are quite simply utterly irrelevant.

8.9.3   This is, principally, because Agilisys did not issue or seek to rely on any Relief Notices relating to the deferral of Drop 1. The Relief Notices relied upon in relation to the EI project were all related to the delay that caused the prior deferrals to the Go Live date of November 2016.

8.9.4   If the submission is that it is relevant because it shows that Agilisys would never have been able to meet the Milestone, it is flawed because: (a) it is misconceived as a matter of law because it involves judging Relief Notices retrospectively, which is the same fallacy discussed in *Walter Lilly & Co Limited v. Mackay & Anor* [2012] EWHC 1773 at para. 365 (Akenhead J); and (b) it is misconceived as a matter of fact because all of the witnesses were clear and consistent that Agilisys was in a position to meet the Milestone – the Council's reticence related to the potential ability of AD to meet certain requirements it wished to see achieved in later drops."

[559]   Earlier in his submissions at 3.4.5 Mr Cormack submitted:

"Thirdly, when read as a whole, the Subcontract required Relief Notices to be issued and determined in the currency of the Subcontract prior to completion. This, accordingly, requires the Court to engage in an essentially prospective analysis of what was delaying the projects at any given time. In general terms, the Court will not approach issues of delay from an entirely retrospective perspective. That this is the correct approach is clear from the following features of the Subcontract: (a) Clause 31 is intimately linked to the form of liquidated damages in the Subcontract called Delay Payments and specified in Section C of Schedule Part 7.1 of the Subcontract; (b) such Delay Payments were immediately payable once a Key Milestone had not been achieved: Para. 1.1 of Section C of Schedule Part 7.1, and other than in very specific circumstances on the EI project were non-refundable: Para. 1.5 of Section C of Schedule Part 7.1. Accordingly, there is no post-completion mechanism for a review of the parties' respective entitlements; and (c) the notice and response provisions in Clause 31 required notice to be given and a response to be made '*as soon as reasonably practicable*' (Clause 31.2 and 31.4 of Subcontract), and much of the language is inherently prospective in nature ('*the Milestone Date shall be postponed*' and '*shall have no liability to pay any Delay Payments*'). In practical terms, this means that: '*In the context of this contractual based approach to extension, one cannot therefore do a purely retrospective exercise. What one can not do is to identify the last of a number of events which delayed completion and then say it was that last event at the end which caused the overall delay to the Works. One needs to consider what critically delayed the Works as they went along*': cf. *Walter Lilly & Co Limited v. Mackay & Anor* [2012] EWHC 1773 at para. 365 (Akenhead J)."

[560]   CGI's response to the objection was this:

"It should also be noted that this question is directed at milestone MS-OSC1.1. As set out at §346 below, there was only one contractual milestone for EI Go-Live, with the

subsequent division into 'drops' having no contractual effect. Agilisys' contentions in relation to the relevance of subsequent drops in their Note of Objections are therefore misconceived. An objection is also taken by Agilisys on the basis that there are no averments to support these passages of CGI's witness statements. This objection is ill-founded. The relevant averments can be found at Articles 33-37 of Condescendence in Action CA54/17."

[561]   As I have said, I regard the division of the milestone into drops as having no

contractual effect. Nevertheless, the objection by Agilisys appears to be well founded for

this reason: no relief is sought relating to the deferral of drop 1, but rather to the prior

deferrals. Mr Sandison's approach requires retrospectively judging the Relief Notices and I

agree with Mr Cormack that this is not the correct approach. I am persuaded that his

construction of the Subcontract is correct that Relief Notices are to be determined in the

currency of the Subcontract and that this requires a prospective approach to be taken.

[562]   Before turning to look at the various responsibilities incumbent on each party

regarding RN012, it is perhaps helpful in relation to RN012 to understand the nature of the

AD platform and this is conveniently summarised by Ms Conaghan in her witness statement

between paragraphs 8.4 and 8.6 (to which I earlier referred in passing):

> "8.4   The AD platform provides local authorities with an integrated single platform to manage digital contact with its customers. Citizens can access the platform by web, tablet and smartphone, and officers (e.g. in the contact centre and face to face) can use the same platform through the AD Contact module (enabling contact centre staff to undertake the same transactions on behalf of the customer.)
>
> 8.5   AD provides certain services fully integrated 'out of the box' as built in modules (such as Council Tax transactions, Benefits Account, Housing Account) with others added through single sign-on ("SSO") integration with 3rd party portals (such as Benefits applications, Registrars bookings, bulky waste booking). Integration with 3rd party portals to provide SSO (to enable one customer account to be authenticated and used across all the online portals and the platform to manage the customers session information across all the online portals which would remove the necessity for customers to relog in to each online portal as they moved around the CEC website). For this to work, the 3rd parties were required to undertake development to integrate with the AD federated identify services so they could receive the

customer log on information from AD and match it to their own authentication userid.

8.6 Integration between AD and line of business systems 'out of the box' is implemented via "connectors" or APIs provided by the line of business systems. The connectors/APIs allow data collected by residents online to be automatically entered into the line of business systems without the need to re-key data or contact a council officer to do it for them.t. [sic] All other solutions within the AD platform are integrated through SSO to online portals as described above."

In addition to the responsibilities incumbent upon Agilisys referred to in its previous submissions in relation to RN002, CGI referred to a number of responsibilities of Agilisys which specifically related to the EI project.

"(1) Client Management and Governance (Project level).

(2) Programme management of the implementation programme and generation of all programme control documents.

(3) Solutions architect to deliver the overall architecture of the solution and the delivery roadmap, working with the CGI technical architect across the infrastructure architecture.

(4) Take the lead in the digital architecture design with the Authority enterprise architect and design authority, supported by the CGI technical architect.

(5) Replace the online transactions with the AD product with modules as required to deliver the functionality within the OBS.

(6) Provide transaction data extract to be shown within the Oracle RightNow CRM system.

[…]

(8) Implement the Agilisys Engage product.

(9) Integrate the AD product with the Scottish government authentication service.

(10) Business Analysis resource to work with the Authority team to define the scope of the transactions and align to the AD modules.

(11) Technical resource to undertake the electronic forms development to provide functionality not within the AD product.

[…]

(13) Project management of the transactional solutions to the timelines outlined with the OBS, generating associated project control documents."

I accept these are incumbent on Agilisys.

[563]   Agilisys referred to the same responsibilities as in respect to RN002. Once more CGI emphasised the general leadership and management role of Agilisys. I have already set out my views regarding the nature and scope of this obligation. On a proper construction I believe that the principal obligation incumbent on Agilisys was this: "The Supplier responsible for defining third party requirements including APIs…" On a sound construction of the foregoing it was incumbent upon Agilisys to identify what interfaces were required and the extent of that duty is as I have earlier defined it. I do not believe any of the individual responsibilities relied on by CGI expands on the scope of that duty incumbent upon Agilisys. This I consider fits in with the obligation on the solutions architect to deliver the <u>overall</u> architecture." (emphasis added). Thus as part of the overall architecture of the solution there is a necessity for APIs and Agilisys have to inform CGI what APIs are required. However in terms of OBS 21 "the technical architecture" is a matter for CGI "working in partnership with Agilisys" and this fits in with the evidence of Ms Conaghan that Agilisys were responsible for "logical design", ie what is necessary by way of APIs but CGI was responsible for "physical design" although she accepted that in order for logical design to work certain features of the infrastructure will require to be specified; thus Agilisys to work "in partnership" with CGI relative to technical architecture. Thus I believe Agilisys' responsibilities were restricted as set out by Ms Conaghan.

[564]   The next question was whether CGI breached its obligations by failing to provide access to fully functional EI environments? CGI's response to this question was this: "The

required environments were provided by 11th August. Accordingly CGI failed to provide the required environments by the contractually required dates" (para 355).

[565]   The next question: was CGI's breach caused or affected by a breach by Agilisys of its obligations? The same argument was advanced here by CGI as in relation to the ERP environments, namely delay being caused by failure by Agilisys to provide an adequate specification. The first piece of evidence relied on by CGI in respect to this was a short passage in the evidence of Kevin Bryce at 4.1 of his witness statement. First this witness had little to do with the EI project as he said in paragraph 4.1 of his witness statement. The evidence to which I was directed was entirely general in nature. It did not identify what particular requirements were not specified and what effect if any this had in respect of CGI's ability to fulfil its obligations. Reliance is placed on a passage in Richard Salmond's evidence. I have already commented on this passage of evidence and for the reasons I have given I attach no weight in this evidence.

[566]   There is next reference to an email of Steve O'Sullivan of CGI where he asks for a "consolidated document for EI environment Agilisys requirements?" Agilisys' response is set out in full at paragraph 360 of CGI's submissions. Agilisys' position in short was "all necessary documents" were already available and that the "single required artefact" requested by CGI was the responsibility of Kenny McAllister of CGI. It is submitted by CGI that this approach is a breach by Agilisys of its obligations. I do not agree, Agilisys explain that all necessary documents were available. It is saying it provided the information necessary and it was dependent on Mr McAllister's knowledge of "how these things were set up". This seems an entirely reasonable approach given Mr McAllister's job and the responsibilities of CGI regarding "technical architecture"; "procurement of required 3rd party APIs" and "installation of 3rd party portals and APIs". Mr McAllister in his evidence

said he produced a draft solutions document, although it had gaps (see: para 361, CGI submissions). However, there is no specification as to when this was done; what the gaps were and what effect, if any, it had on CGI in carrying out its obligations. I again observe that in its submissions CGI refer to a single email in relation to EI environments issued at the time of the implementation of the project regarding the issue of specification and it again relates to production of a single document. Had this been an issue of significance I would have expected the contemporaneous documentation to be littered with requests for requirements.

[567]   For the foregoing reasons I am not persuaded that any failure to provide a specification of requirements in relation to this aspect of the project caused or affected CGI's compliance with its obligations. Nor do I think any failure in general management responsibilities on the part of Agilisys caused or affected CGI's compliance with its obligations.

[568]   The final question in relation to these Relief Notices was this: did any breaches cause or were reasonably likely to cause Agilisys to fail to achieve the Milestone MS OSC1.1 in the Implementation Plan by the effective date? Milestone MS-OSC1.1 was the Go-Live Milestone for the EI project which according to Schedule Part 6.1 was 1 April 2016. CGI submitted that the operative cause of the failure to reach Milestone MS-OSC1.1 was the unsuitability of the AD product provided by Agilisys. On the basis that I am wrong in relation to the issue of the objection to evidence regarding the suitability of the AD product I will now turn to this issue.

[569]   Mr Cormack argued:

> "8.10.   **In any event, the four strategic issues identified with the EI Project at the time did not represent a breach by Agilisys of any of its obligations and did not have any causative effect on delay to the project.**

8.10.1. The evidence led by CGI on this issue fell woefully short of establishing any breach of responsibilities or contractual obligations on the part of Agilisys.

8.10.2. The common thread was that all of the issues were areas where CEC had decided it wanted to make changes to the scope of the Project and were then unhappy that these scope changes could not be instantly produced. It is submitted that Dr. Hunt's analysis of these issues was entirely correct in her Supplementary Report and in the Joint Statement of Experts. Mr. Coyne's criticisms were impressionistic, reliant on statements of opinion by other people, and were not backed up by any actual technical analysis of the AD product, or the issues, or proper evidential foundation.

8.10.3. The four strategic issues, and Agilisys position in relation to them, are summarised, as follows.

8.10.4. The first issue is Business Authentication. This arose from a perverse stance taken by CEC, coupled with the lack of any commercial support by CGI when that stance was taken in late 2016.

8.10.5. As appears to be common ground, Agilisys' obligations were specified in the column headed Agilisys in OBS 21. The specific obligation on Agilisys in relation to authentication was to *'integrate the AD product with the Scottish government authentication service'*. This related to the actual functional requirement from CEC in OBS 21 that specified *'Customers are identified and authenticated by use of the Scottish Government Citizen Account Services and Council's identity & access management platform.'* This is entirely consistent with the Implementation Plan that mentions in Milestone MS-OSC1.1 *'myGovScot integration'*. It is, also, entirely consistent with the Project Overview, and Supplier Responsibilities & Deliverables that only mention integration with the Scottish government authentication service. Accordingly, Agilisys was contractually obliged to provide integration with the Scottish Government's myGovScot account for customers. The Court will search in vain for a requirement that a separate and bespoke solution for business authentication required to be provided. It, also, did not feature anywhere in, and is inconsistent with, the Conceptual Architecture for EI that was signed-off by CGI in February 2016: see JB 651, particularly at p. 9979 —9980, and JB 357 for sign-off by CGI

8.10.6. The stance taken by CEC in late 2016 came to be a classic Catch 22 from Agilisys point of view: (a) CEC remained insistent on the contractual obligation that authentication be done through MyGovScot, as opposed to any other method; but (b) at the same time, MyGovScot did not have an established system for business authentication and CEC were unwilling to contemplate that authentication of businesses by an individual representative through that method for unspecified 'data protection' issues (despite having been willing to contemplate that at an earlier stage). It is submitted that Agilisys were entirely correct to identify that what CEC were requesting was the development of an entirely separate and bespoke method

of business authentication that featured nowhere in OBS 21 or the Roles & Responsibilities in Schedule Part 4.1: see JB 1. Agilisys endeavoured to assist CEC in finding a solution. But they simply were not supported by CGI leveraging its commercial powers with CEC to make it clear this amounted to a change to the project scope.

8.10.7. The second issue is Gandlake. This, again, arose from changing requirements from CEC. As Mr. Fulda himself accepted in evidence, the issue in relation to Gandlake was that it contained functions that OBS 21 had not identified. This is recorded in the Gandlake Summary issued by Agilisys in June 2016: see JB 2220, and in particular p. 22792. As was said then: *'During the Enterprise Integration project implementation, it has since been identified that the actual functionality provided by the Gandlake product delivers much more functionality than that outlined in OBS 13... Gandlake in fact delivers additional functionality to citizens and... to a large number of staff. As a consequence of this mismatch, the Council raised a Change Request (CR 154 — please see Appendix A) for Agilisys to assess and define the requirements for staff users that had been missed."* Agilisys very clearly identified in that report that the Agilisys Digital product did not provide some of this additional functionality and, as such, that a technical workaround would have to be found. Again, it is extremely difficult to understand the basis on which this later became founded on as a breach of Agilisys' obligations. Agilisys never undertook to provide a system with functionality that was nowhere mentioned in OBS 13 or 21. Again, it is submitted that Dr. Hunt's analysis of the issues here was entirely correct.

8.10.8. The third issue was CRM Replacement. This reflects, in effect, an attempt by CEC to accelerate and impose upon Agilisys an obligation it had never undertaken. This is, perhaps, the most striking of the four issues. It is plain beyond peradventure that OBS 21 does not require replacement of CRM. The term 'CRM' is defined in OBS 21 under reference to the existing CRM system, Oracle RightNow. Agilisys' obligations in OBS 21 in relation to CRM were as follows: *'Provide transaction data extracts to be imported into the Oracle RightNow CRM system.'* This corresponded to CGI's obligation to *'Provide Right Now expertise to undertake changes delivered as a catalogue item'* and *'Import customer transaction data extracted from AD into the Oracle RightNow CRM'*

8.10.9. The Supplier Solution in OBS 21 itself stated: *'The Supplier shall deliver existing agent-facing capabilities through the Authority's current CRM platform at Operational Service Commencement Date, and shall integrate the customer history record from the Agilisys Digital platform with the current CRM. The Supplier shall ensure that the agent-facing functionality of the CRM provides visibility of transactions that have been completed through the online services.'* It went on to state that *'The Supplier shall deliver, within six months from Operational Service Commencement Date, a roadmap and business case detailing its plans to <u>replace or maintain the current CRMylatform:</u>* The same references are clearly made in Schedule Part 4.1 of the Subcontract.

8.10.10. CGI's own witnesses, Richard Salmond and Tom Fulda, both confirmed that it was never understood to be within the scope of OBS 21 to replace CRM. Mr. Coyne is really the only witness who seriously suggests another construction, and he has no proper basis for doing so. It is submitted that he materially damaged his credibility and reliability as an independent expert witness by becoming an advocate for CGI on this point.

8.10.11. The fourth, and final, issue was the issue of an agent authenticating on behalf of a citizen. This, in effect, arose from two conflicting requirements. Agilisys was obliged to use MyGovScot to authenticate customers. But that method of authentication meant that if an agent wanted to do an online transaction on behalf of the customer over the phone then it would potentially need to go through the authentication system. This solution was unacceptable to CEC despite being the inexorable logic of the system they had contracted for. It did not affect Drop 1. And by the time of rescission of the Subcontract, Agilisys had a fully worked out solution to the issue.

8.10.12. A number of other issues were canvassed but it is submitted that they can be quickly dealt with in submissions:

8.10.13. Parking: the issue was the refusal of the 3rd party supplier NSL Limited to work with Agilisys and CGI in providing an SSO to the Xerox Easipermits portal. As was explained by Claire Conaghan, NSL Limited had been overlooked in the managed contracts being taken over by CGI: para. 12.10.4 of her WS. As all of the Agilisys witnesses explained, there was an Easipermits online portal provided by Xerox capable of integrating with AD over an SSO. The difficulty was that NSL refused to admit it existed or would be suitable for months. If the responsibility for this lay anywhere, it plainly fell under CGI's remit of procurement and installation of 3rd party portals. They, ultimately, took the commercial risk that it might be difficult to procure such portals as transpired to be the case in relation to Parking.

8.10.14. Housing: the issue with Housing was not canvassed with any of the Agilisys witnesses and was not spoken to by any of CGI's factual witnesses. As Dr. Hunt observes in the Joint Statement at Para. 72, no detailed complaint at a technical or project level is actually made nor is any actual period of delay identified. It is submitted that this issue is utterly irrelevant."

[570]   In reply CGI submitted:

"364. The Go-Live Milestone was split into a number of 'drops', to take place between November 2016 and March 2017 [para 346 above]. Completion of the EI project to achieve the Milestone accordingly required the achievement of each drop. None of the drops was achieved.

365.   David Buchanan's evidence concerning the position in relation to the Go-Live Milestone was that CEC were 'confident' in relation to the status of the activities required for Drop 1, but that there was concern about 'the wider

strategic challenges which we [sic] relevant to the future drops.' It is submitted that this analysis ignores the close relationship between all of the drops. It was necessary for CEC to be confident not only that Drop 1 could be achieved, but also that the remaining drops were viable. Tom Fulda's evidence in relation to CEC's position was that,

> *Once they had decided to Go Live with Phase 1 they would have burned their bridges. It was deferred to allow Agilisys to satisfy CEC that the further business requirements to be met by subsequent phases could be met.*

366. The Court is invited to accept Mr Fulda's analysis, which is supported by the evidence of CEC's attitude to Drop 1 in November 2016. On 16 November 2016, Colin Ronald of CEC emailed Greg White and Cliff Graham of CGI to advice that CEC,

> *were not prepared to accept part of a solution that ties the Council into a technical platform that is unable to deliver what was stated as part of the contract. The dates below do not align with the Council supporting such a decision prior to the go/no go decision date for Drop 1.*

367. Following this message, the decision was taken to defer Drop 1. Andrew Couch's evidence was that the decision was a decision made at a 'senior' level by representatives of CEC, CGI and Agilisys. The reason expressed for this in the email sent by Cliff Graham to CGI and CEC advising of the decision was that,

> *we have collectively agreed to defer delivery of Drop 1 of the El project (previously scheduled for the 24th November 2016) until we have completed activity on establishing a full and detailed project delivery plan for all subsequent phases of the project.*

368. Mr Graham's evidence was that this decision took place against a background where,

> *Agilisys were becoming increasingly less confident of Phases 2 to 5 and their timescales for delivery; and also because we were apparently some way off an agreement on the four critical issues, which were Gandlake replacement, CRM, AD contact and business authentication.*

369. It is submitted that it was the unsuitability of the AD product which was the operative cause of both the deferral of Drop 1 and also of the ultimate failure to achieve all drops (and thus the Go-Live Milestone). This was manifested in the 'critical issues' identified by Mr Graham, in addition to further difficulties experienced in relation to the fitness for purpose of AD.

370. Agilisys were aware that CEC had chosen the AD product because of the opportunity which it offered to extend the services which they provided 'in a cost-effective way'. David Buchanan's evidence was that Agilisys Digital was

'absolutely a flagship product. A whole business strategy had been predicated on its success'. Similarly, CGI were told by Agilisys that 'AD could do a lot of the work more cheaply and more flexibly.' AD, however, had not previously been used in a situation where Agilisys was acting in a prime-subcontractor relationship.

371. The performance of AD was contrary to CGI and CEC's expectation that it would be a Commercial Off the Shelf (COTS) or 'plug and play' solution. David Buchanan's evidence was that on '[a]lmost every occasion there are going to be levels of bespoking or customisation' with AD. As Claire Conaghan acknowledged in her evidence, a COTS solution was not possible:

> *AD could never be that because of the number of back-office systems that would need to be integrated to enable transactions to go from the customer self-service through to the back-office systems.*

372. Furthermore, the amount of 'bespoking' required for the AD product varied between clients. It was conceded by Ms Conaghan that, although the work had not been completed, 'significant development' had been estimated by Agilisys to deal with the scale of the exercise required for CEC, given the 'wide range of services much more than other customers' which CEC required. Mr Buchanan accepted that it was a 'fair reflection' that AD had never been delivered in a project as complex as that required by CEC.

373. Kenny McAllister's evidence was that:

> *I was of the view that AD had been sold as a complete solution, but the off-the-shelf, self-service part of AD moved a lot, so it was not a complete solution. Not everything was within the AD platform. Agilisys were having to use a number of third parties in order to deliver the proposed solution.*

374. This problem identified by Mr McAllister – third-party integration for AD – caused particular difficulties.

375. As a result, the AD product required more interfaces in practice than had been envisaged at the time of entering into the Subcontract. Anna Vale's evidence was that:

> *We had understood pre-contract that the EI product had pre-existing interfaces, and you'll see in the letter of 29 September that we do go on to describe the fact that a lot of – Agilisys appeared to change their policy and presented then to us that they were going to move forward with their product in a specific way, which meant that we would need greater interfaces than we had originally envisaged in the contract.*

376. The unsuitability of the AD product was evident in the specific areas identified below. In respect of each these areas, an issue arose as to the ability of the AD product to meet the requirements of OBS21. In respect of each of these issues, it is submitted that the AD product was unable to deliver the contractually-

required functionality. In any event, however – and irrespective of any possible modifications which might ultimately have been made to the AD Product – no solution to any of the issues had been found by the time at which Agilisys chose to leave the project in March 2017. On any view, therefore, it is submitted that the failures of AD in this regard were the operative cause of delay to the Go-Live milestone.

Gandlake

377. Gandlake was the function which allowed certain records (relating to revenues and benefits) to be viewed. The requirements for Gandlake replacement were set out in OBS 13 and OBS 21. OBS 13 provided:

> *The Supplier [Agilisys] will initially will provide all the requirements listed in this paragraph 6 utilising the current version of Citizen Access Portal (Gandlake), non-version-specific, which will be based within the current Supplier's cloud infrastructure, retaining or enhancing all current functionality utilised by the Authority at the Service Cut Over Date.*

> *After undertaking transformation, the Supplier will then provide all of the requirements listed in this paragraph 6 utilising Agilisys Digital, non-version-specific, which will be based on cloud infrastructure retaining or enhancing all current functionality utilised by the Authority at the Service Cut Over Date.*

378. In respect of two of the requirements of OBS 13 (OBS13.1: 'View their Council Tax and Non-Domestic Rates and Recovery Notices'; and OBS 13.5: 'Automatically receive files transferred from the Income and Benefits Management System, where they can be viewed by citizens'), OBS13 provided as an Agilisys requirement,

> *Through the Enterprise Integration (OBS 21) programme, replace the Gandlake Account view with the AD product with modules to deliver the functionality.*

379. OBS 21.1 provided that Agilisys was to

> *Provide customer access across MyAccount Revenues and Benefits replacing Gandlake for customers.*

380. Despite these requirements – expressly based upon the functionality of the legacy system, rather than the functionality that AD might be able to offer – Claire Conaghan acknowledged that, following conclusion of the Subcontract and the specifications in OBS21,

> *we then reviewed the functionality of Gandlake, how it was used, what was available for both customers and staff that wasn't outlined in the OBS requirements, there were big gaps from what we could do and what the Gandlake product did.*

381. David Buchanan's evidence was to the same effect. It is submitted this position advanced on behalf of Agilisys fails to engage with the terms of OBS21. OBS21 did not limit the functions which AD was to perform: it simply stated that Gandlake was to be replaced by AD. That this involved functionality which had not been anticipated by Agilisys was not relevant to the scope of the contractual obligation. Moreover, Agilisys, as leaders of the EI project, ought to have engaged with CEC in order to manage the change from Gandlake to AD, and to identify any difficulties in relation to functionality. Agilisys failed in respect of both of these obligations. Dr Hunt acknowledged that no agreed solution had been found at the time Agilisys left the project.

382. The Notifiable Default issued on 13 December set out that Agilisys had 'no solution' to the requirement of OBS 21.1 noted at para 379 above. It is submitted that this analysis was correct. No solution had been identified which would have given CEC sufficient confidence to proceed with Drop 1.

Business authentication

383. OBS21 required use of AD for transactions both by individual citizens and also by businesses. The identifies [sic] of these users had to be authenticated. OBS21.1 required that Agilisys 'Integrate the AD product with the Scottish Government authentication service.'

384. The AD product was not designed to separate citizens and businesses. Previous local authority customers of Agilisys had not had such a requirement. CEC's concerns in this regard were raised in an email from Paul Neary to Claire Conaghan on 27 September 2016. Claire Conaghan acknowledge that she could 'see where [CEC] were coming from'. Solutions were discussed (including the use of the existing authentication method for individual citizens for businesses), but no agreement was reached with CEC as to the way forward. David Buchanan's evidence was that 'a fundamental design change of how the [AD] platform is built' would have been required in order to meet CEC's requirements.

385. Business authentication was raised in the Notifiable Default issued by CGI on 13 December 2016. This stated that Agilisys had 'failed to provide a viable solution' in respect of business authentication, and noted that,

> *Agilisys' proposed solution of using the existing "citizen" authentication to meet this requirement is unacceptable and has been rejected by the Council. Citizen authentication cannot be used to fulfil this requirement due to the associated information governance issues and as an 'expert' in local government transformation, that has implemented the AD product numerous times before, Agilisys should have known this.*

386. No solution to business authentication had been identified by the time Agilisys left the project. The Court is accordingly invited to accept Mr Coyne's view that in respect of business authentication, 'CGI's position of default appears to be correct'.

Customer Relationship Management (CRM)

387. CRM was the,

> *customer relationship management system. If a citizen were to phone CEC, a call handler would complete the task over the phone and report the outcome on the CRM. If the same transaction were to be done by the citizen online, then AD would need to be able to record the dialogue onto the CRM.*

388. OBS 21.7 required the provision of 'customer facing and agent facing portals'. In respect of these two different contact routes, OBS21.7 required,

> *Development of the CRM functionality for agents and other council staff should match that available to citizens within the customer portal or as web transaction.*

389. OBS 21.7 required that Agilisys was to 'develop new online and agent-facing transactions in the Agilisys Digital solution to meet the specific requirements of this OBS'. This included the requirement, noted above, for matching functionality for customer and agent transactions. OBS21.7 further provided that the Agilisys 'solution shall enable the staff and customer use the same web forms.'

390. Paul Neary's evidence was that,

> *The Agilisys design documents do not make clear how it would handle the multi-channel requirements of being able to raise an incident as a "citizen" via the web and as a "contact centre agent" on behalf of a citizen calling into the contact centre via telephone.*

391. Similarly, Tom Fulda's evidence was that,

> *CEC did not consider Agilisys Digital ("AD") … to be capable of meeting all the CRM-type obligations specified in OBS21.7. Sch 4.1 states a 'roadmap and business case detailing its plans to replace or maintain the current CRM platform' would be produced. The absence of this roadmap/business case became a strategic issue.*

392. This issue was to be addressed by the 'AD Contact' solution which was part of Agilisys Digital, and was to be delivered as part of Drop 2 (as for Drop 1 the legacy system, Oracle CRM, was to be retained). The AD Contact solution, however, was unable to deliver the functionality required by OBS21.7. The Notifiable Default of 13 December 2016 set out,

On Tuesday 20 September 2016 Agilisys provided a demonstration of the functionality of their "AD Contact" solution. This highlighted that the solution would only provide functionality for agents to act as a simple proxy for citizen on-line transactions, and only when the citizen has an online account. There is no facility to process transactions in this way for citizens who do not have, or do not wish an online account, and contravenes the DBS requirement that the solution should provide the same experience irrespective the [sic] channel used for the interaction.

393. A 'CRM Options Document' was produced in February 2017, but no solution had been agreed at the time that Agilisys left the project. Accordingly, it is submitted that Agilisys failed to meet the requirements of OBS21.7.

Phone-only contact

394. Phone-only contact also related to the requirements of OBS 21.7. OBS 21.7 required Agilisys to 'develop new online and agent-facing transactions in the Agilisys Digital solution'. Accordingly the OBS required that AD could be used for a transaction that was 'online' (that is, where the customer initiated the contact directly online), or 'agent-facing' (that is, where the customer telephoned a CEC agent, with the agent then carrying out the transaction rather than the customer doing so directly).

395. This requirement raised similar issues to those found in relation to CRM. The Notifiable Default of 13 December stated,

Due to the design of the Agilisys proposed "AD Contact" solution; any on-line transactions which are required to be performed by a contact centre agent on behalf of a citizen, require the citizen to have previously been registered with mygov.scot. This is an issue for citizens contacting the Council by phone, as highlighted by the Council at the demonstration of the AD Contact solution by Agilisys on Tuesday 20th September 2016.

396. The changes required to AD to enable this requirement to be met were still 'being worked on' at the time of termination.

Parking solution

397. OBS 21.25 provided,

The Supplier [Agilisys] shall provide the necessary systems integration to internal and external line of business systems to support the programme described in Annex C of the Authority's OBS.

398. These requirements (which were also set out in OBS 21.25) included the following for 'Parking':

> *Provide the identified Parking transactions using the EI Platform.*
>
> *The Supplier intends to use an SSO to the SIDEM Portal to fulfil this requirement.*

399. Claire Conaghan's evidence was that 'We knew the portal was available as our AD team had been talking to another of our clients implementing the portal there'. In cross examination, however, she acknowledged that the project with Agilisys' other client (the London Borough of Hammersmith and Fulham) had not reached the stage where a successful integration had been achieved.

400. A Notifiable Default, identifying the inability of AD to interface with the SiDem portal was issued on 18 February 2016. The issue had not been solved by the time of the Notifiable Default issued on 13 December, which noted that the proposals made by Agilisys to resolve the issue in the interim were 'commercially complex and unacceptable'. Dr Hunt's evidence in relation to whether AD was able to interface with SiDem at the date Agilisys left the project was that '[i]t couldn't'.

Housing

401. The requirements for housing were, as for parking, found in OBS21.25. This provided that Agilisys was to,

> *Provide the identified Housing transactions using the EI Platform.*
>
> *The Supplier intends to deliver these capabilities using an SSO to the Northgate Housing Portal, combined with the forms capabilities of Agilisys Digital.*

402. The Notifiable Default of 13 December 2016 stated that there was 'no confidence that Agilisys will deliver the integration at the date identified in the roadmap.' The Court is invited to accept Mr Coyne's analysis that,

> *Given the various re-planning activities that occurred in respect of EI, and the failure to meet previous milestones, it is understandable that confidence was low.*

Suitability: conclusion

403. It is submitted that the issues identified in the Notifiable Default of 13 December 2016 – individually and collectively – represented the major obstacle to progress to Go-Live in respect of the AD Product. Irrespective of whether a solution to these issues would ever technically have been possible, no solution had been identified by the Drop 1 date (and, indeed, no solution had been identified by the time at which Agilisys left the project). The failure to

resolve these issues, together with Agilisys' earlier failures of management, caused CEC to lose confidence in the AD product. As a result, CEC refused to proceed to Drop 1, with the situation not remedied prior to Agilisys leaving the project. This loss of confidence, caused by the failings of the AD product, was the cause of the failure to meet the Go-Live Milestone."

[571]   As regards the first issue, namely: business authentication, I am persuaded by the analysis of Agilisys contained at paragraph 8.10.5 and 8.10.6 of the submissions. The submissions advanced by CGI in relation to business authentication do not answer the points made by Mr Cormack. Agilisys could integrate its AD product with the Scottish Government authentication service, which was the specific obligation incumbent upon it. The difficulty was CEC's insistence on the use of the authentication service which did not have an established procedure for business clients. That is not a failure in the AD product, it is CEC wanting something more than integration with the authentication service.

[572]   I clearly prefer Agilisys' analysis in relation to CRM. On a sound construction of OBS 21 there was no obligation on Agilisys to replace the current CRM platform. Its obligation regarding replacement extended only to the preparation of a roadmap "defining its plans to replace or maintain the current CRM platform" within six months of the operational commencement date.

[573]   In respect to agent authentication again I prefer the analysis of Mr Cormack.

[574]   As regards Gandlake, I agree with the submissions of Mr Cormack.

[575]   The next issue is parking. As argued by Mr Cormack this issue appeared to relate to a 3rd party portal. An explicit obligation imposed on CGI was the "Procurement of required 3rd party APIs and supplier portals". Accordingly the difficulty arose here from a failure by CGI to procure the necessary portal.

[576]   As regards housing, I agree with the position taken by Mr Cormack.

[577]   Dr Hunt in her supplementary report carefully analyses each of these areas and gives detailed reasons why she believes that no criticism can properly be made of Agilisys in respect to these matters. I find her evidence in respect to this part of the case convincing. Overall I prefer the position of Agilisys in relation to these issues.

[578]   A final point made by Mr Sandison was this: drop 1 was postponed as a matter of agreement between Agilisys, CGI and CEC. He developed this argument as follows: all that we need to establish on our analysis is that it had not been made to work at the point that the milestone that is complained of having been missed was due to go ahead, and that lack of demonstration that it could be made to work in the various regards led to a decision among all three of the interested parties that the events that would constitute the occurrence of the milestone would not in fact occur. Thus the EI milestone was not missed because of a CGI failure but because of a collective decision not to proceed to the milestone. It does appear that there was a joint decision. However, on a proper analysis what underlay and necessitated this decision was CGI's failures as earlier identified. These were the effective underlying causes of the decision.

[579]   In the end I accepted the following submissions made by Agilisys:

> "8.8.1. The Court is invited to conclude that the two dominant causes of Agilisys' inability to meet the originally planned Milestone of MS-OSC 1.1 in the Subcontract were both the Northgate API issue and the Environments (particularly in this context the Biztalk Environments). These were, it is submitted, the dominant causes operating concurrently in the period September 2015 – January 2016.
>
> 8.8.2. It is, further, submitted that (whilst the Northgate API issue was resolved by late January 2016) the dominant causes of delay in the period after January 2016 continued to be the unavailability of the Biztalk, Development, and Test Environments (also joined by the Production and Pre-Production Environments as outlined in RN010). As RN010 clearly stated: "*Agilisys has made it clear that it is in a position to deliver all required functionality for milestone MS-OSC1.1 – with the exception of the Biztalk integration – which is dependent on CGI delivering on its Biztalk responsibilities*." As will be recalled, CGI accepted RN010 and granted relief on 20 May 2016."

RN005 & RN011 – Payroll

[580]   Agilisys did not make detailed submissions in respect to these matters on the basis that on its understanding of the way that the case had developed there was no apparent dispute regarding payroll and therefore it was not clear to Agilisys that there was any relevant dispute between the parties. CGI had accepted RN011 in its response to that Relief Notice. This was done on the basis that CEC had agreed that its inability to provide a payroll resource to enable configuration and build work of the BW solution amounted to Authority cause under the Prime Contract. Mr Cormack noted that Mr Coyne had revisited these Relief Notices in his report. But the purpose of that does not seem to be clear and seems to take no account of the fact that CEC accepted it was in breach of its responsibilities. The above understanding that there was no dispute, however, proved to be wrong and short written submissions were advanced by CGI.

[581]   Relief Notices 005 and 011 concerned the provision of information by CEC's payroll team to enable the completion of the build element of the ERP project. CGI in its response to RN011 accept that CGI had the following responsibilities in terms of OBS 1:

> "'Provide business information, knowledge and decisions to enable the solution to be configured. The necessary information and support to enable Payroll configuration to complete on the scheduled date on 31st March 2016, was not met."

[582]   In addition, Agilisys had relied on the following responsibility incumbent on CGI in RN011:

> "CGI has a responsibility in the subcontract Schedule 3 to: 'procure that the Authority fulfils its roles and duties under this Agreement and as defined in the Implementation Plans and in Schedule 2.1 (Services Description) and in Schedule 4.1 (Supplier Solution)'. The Authority has not fulfilled its role of providing business information, knowledge and decisions to enable the completion of the build process for the Payroll element of the ERP project."

[583]   CGI relied on the following responsibilities of Agilisys' "Project Roles" that Agilisys was responsible for "Leading delivery of this project", with CGI responsible for "support with the Authority governance and resources." Agilisys was further stated to be responsible for, *inter alia*:

> "1.   Client management and Governance (Project level)
>
> 2.   Programme management of the implementation programme and generation of all programme control documents
>
> […]
>
> 8.   Change management resource to lead the Authority through the change programme."

[584]   In addition it relied on

> "Change management was a responsibility of the Application Architect role which should have been carried out by Claire Conaghan (discussed at §28 above). In addition, leadership of the collaborative work with CEC was the responsibility of the Transformation Director (Louise Ah-Wong), as discussed in relation to the roles and responsibilities of parties under the Subcontract at §§16ff above."

I accept all of the above referred to obligations are incumbent on parties.

[585]   The critical responsibilities are those incumbent on CGI. It was incumbent on CGI in respect of payroll to procure that CEC met its obligations, procure being defined as I have earlier set out. This is consistent with CGI's responsibility for support with the Authority governance and resource. Agilisys was, for the reasons I have already set out, playing a subordinate role in respect to CEC. In order to obtain business information, knowledge and decisions from CEC, it is the power to procure which is critical. Where CEC is not providing information requested and by the response to RN011 that was accepted I do not see how some general management responsibility incumbent on Agilisys could in any way impact on the failure by CEC to provide the necessary information. The obligation of Agilisys to manage has to be seen within the context of CGI's obligation to procure the business

information etc as earlier set out. It cannot simply avoid that obligation and empty it of content by blaming a failure of management on the part of Agilisys which is both vague and nebulous. Nor can I identify how the issue of change management impacts on this issue. Finally the role of Transformation Director is again subordinate to the role of CGI procuring that CEC fulfilled its duties.

[586]   It is clear, from the narrative set out in RN011 as follows:

> "Identification of the data required from the Payroll team was initially requested by Agilisys from the Council during the Design Workshops held in **September and October 2015** in the form of templates. A consolidated list of outstanding data requirements and the dates by which this information was required was incorporated in the Payroll Detailed Design Document that was approved by the Council on **27th November 2011**. Subsequent updates to this list of outstanding actions and data requests has been provided on a monthly basis both in presentation to the ERP Project Board on **15th December 2015, 19th January 2016** and **16th February 2016** and as a detailed analysis provided to the Payroll team following these Project Board meetings. Agilisys received an email from the Council Payroll workstream lead on **7th March 2016** advising 'I am unable to support this work in the manner in which Agilisys require.' Subsequent discussion with the Council Payroll team following this email clearly identified that there was insufficient resource within the Council Payroll team to provide the necessary information and knowledge to enable the configuration of the BW Payroll to continue. The Council did manage to provide a resource with Payroll experience on 29th March."

that Agilisys had done what it could in order to obtain the information. It is clear from that narrative that it was thereafter for CGI to procure performance by CEC of its responsibilities.

[587]   The actual failures in management relied on by CGI are based on first an email of Mr Sheriffs of 7 April 2016. He says, *inter alia*, "the escalation of the lack of payroll information was handled in a very low key manner". He then sets out a number of points. These points all relate to the period after 7 March 2016 when CEC's workstream leader Grant Craig had accepted "unable to support this work in the manner in which Agilisys required". I cannot see how what he states amounts to a serious criticism in respect to management. The next matter relied on is a response by Hugh Dunn to Ms Ah-Wong complaining of a lack of availability of CEC resources and his comment "he has never been

made aware of the time critical resource requirement until it has caused a delay". These

comments have to be seen within the context of the response to RN011 which accepted that:

"the necessary information and <u>support</u> to enable payroll configuration to complete on the

31st of March 2016 was not met." This appears to me on a fair reading to be wholly

inconsistent with the position now being advanced by CGI. There is reference in the

response to Agilisys leading the project, however, it is clear that no particular management

failure is identified on the part of Agilisys. Those observations in addition have to be seen in

the context of the narrative to which I have above referred which sets out that this

information had been sought for a substantial period from CEC.

[588]   I am persuaded by the foregoing that: (1) there was a breach of its obligations by

CGI; (2) it was not caused or affected by any breach of Agilisys' responsibilities. I am

further persuaded that in conjunction with environment difficulties it would have caused a

failure to achieve the relevant milestone.

Conclusion

[589]   For the foregoing reasons I would answer the questions as follows:

   Relief Notice 002 – 3rd Party APIs and Supplier Portals: To answer question 2 "yes",
   question 3 "no" and question 4 "yes".

   Relief Notices 004 & 006 – Biztalk: To answer question 6 "yes", question 7 "no" and
   question 8 "yes".

   Relief Notices 005 and 011 – Payroll Information: To answer question 10 "yes",
   question 11 "no" and question 12 "yes".

   Relief Notices 007 and 016 - Data Migration: To answer question 14 "yes", question
   15 "no" and question 16 "yes".

   Relief Notice 008 – Interface Specifications: To answer question 18 "yes", question 19
   "no" and question 20 "yes".

Relief Notices 009, 014, and 015 – ERP Environments: To answer question 22 "yes", question 23 "no" and question 24 "yes".

Relief Notice 012 – EI Environments: To answer question 26 "yes", question 27 "no" and question 28 "yes".

[590] I shall put the case out By Order to determine the orders necessary, and reserve all issues of expenses meantime.

APPENDIX 1

DATA MIGRATION

Date	Chronology
October 2015	On 6 October 2015, and further in the course of October 2015, Agilisys holds a series meetings with CEC representatives for the purposes of discussing, communicating, and understanding the data migration strategy in order to feed into the Solution Design Documents: see JB 244, and reference in SDDs (for example at p. 5208 in JB 235), Ravinder Johal's WS at para. 4.2.1, and see reference to 5 further planned meetings in the Project Board slides in October 2015 at JB 72 – 73 (particularly at p. 2298).
November 2015	On 2 November 2015, Ravinder Johal and Peter Hall exchanged emails about the request for a PPSL database extract: JB 533. Ravinder records that she had agreed with PPSL leads they would need access to this data. She records her statement that "*we will need access to this data for migration so happy to sign any NDA as we will be doing the migration and to do so we will have access to more council data than this including HR and payroll*" On 18 November 2015, David Legge emailed Ravinder Johal after having reviewed the SDD and asks various questions about extracting from PPSL in order to assist with requests for data from BT [JB 1753]. At this point, it is clear that Agilisys has already requested access to the PPSL database and it is acknowledge there are issues being raised by CEC, even prior to signing off the SDD, about access to live data. On 18 November 2015, Ravinder Johal and Charles Wyndham Jones exchange an email in which Agilisys clearly explain

that they do not intend to take the approach of producing a Data Migration Specification which details source data location (database table and field), transformation rules and the new data location (database table and field) in the ERP solution. Ravinder clearly explains the strategy of defining the data to be moved and then using the templates to move it: JB 568 and Ravinder Johal's WS at para. 4.2.6.

Between 24 November 2015 and 2 December 2015, the SDD for each workstream was signed off containing the data migration strategy: see JB 234 – 241.

On 25 November 2015, Peter Hall emails a Data Migration Overview document to David Camilleri of CEC: JB 590. It is of importance to note a number of aspects of this document that clearly set-out Agilisys' strategy. These include: '*Principle 2 – Migrate early, Migrate often*' at p. 9115. The point being that if migrations are done early and often enough then it reduces time pressure and allows it to be done in parallel with the build; and '*Principle 4 – Iterate Data Loads*' where it explains the changing nature of the templates. It sets out in detail the various data to be migrated. This document is not discussed by any of CGI's witnesses, despite the fact that criticisms are repeatedly made of not having communicated the precise strategy and approach to CEC.

On 27 November 2015, the Milestone Date for MS2.1 (Design Specification Approved) in the Implementation Plan is reached (JB 1 @ page number 1119) and Milestone 2.1 is signed-off by CGI: JB 241. It is plain from looking at the PID, the wording in the Subcontract, and subsequent references that everyone viewed these as containing the data migration strategy discussed and agreed at the design meetings recorded in them.

December 2015	On 4 December 2015, Martin Spelman sends the first draft HRP templates to David Legge by email: JB 620 - 632. David Legge repled to the email to say that he had '*Just had a look through these – I don't see anything untoward at this stage*': in JB 716. He, also, explained that he was not making as much headway with PPSL as he would like. He said that getting access to HR/ Payroll and Finance is problematic due to personal data. On 14 December 2015, Ravinder Johal and David Legge exchanged further emails. The particular topic was PPSL extracts. The issue of personal data is raised again. Ravinder Johal asks '*what do we need to do to get round this?*': in JB 683. David Legge replied to say that, if Ravinder could confirm that what he has suggested met her needs, he would raise a request with BT. This is clear evidence that: (a) Ravinder was being helpful and co-operative; and (b) that David Legge was indicating he was intending to take up the issue of live data.
January 2016	In January 2016, Agilisys and CGI representatives undertook lengthy steps to take matters forward, and to ensure that David Legge fully understood the templates and data migration strategy as follows. On 6 January 2016, Peter Hall and Barry Speed meet to discuss various issues including Data Migration. Barry Speed indicates that he is arranging a face-to-face meting the following week to review the Data Migration strategy and outline plan, and to review the status of extracts with David Legge in preparation for that: see JB 709.

	On 7 January 2016, Martin Spellman emailed David Legge to check how he is progressing with data extracts. David Legge emailed back to say that '*I still don't have access to ANY of the legacy systems. Its getting beyond a joke now.*': JB 716
	On 12 January 2016, the meeting discussed the week before takes place between Peter Hall, David Legge, and Barry Speed: see Ravinder Johal's WS at para. 4.15.6 and JB 722. In that email chain, David Legge plainly recognises the Solution Design Documents as being the current data migration strategy. This meeting was used as part of knowledge transfer and involved. Ravinder Johal recalled "*discussing and explaining the templates to him. I recall that he understood them and only raised routine queries with them at that time which I was able to address.*": Para. 4.15.6 of Ravinder Johal's WS. Following that meeting, Barry Speed takes over escalating matters with BT from David Legge: see the WS of Niall Sheriffs at para 3.64.
	On 14 January 2016, BT email CEC to ask them to confirm that access to data can be given to David Legge under his request. Derek Masson of CEC asks Niall Sherriffs whether it has gone through the approved process.
	Between 15 and 18 January 2016, in light of the '*unfortunately cumbersome process*', David Legge starts to take steps to make a request for live data: see JB 732
	On 21 January 2016, Martin Spelman emailed, again, on having heard that David Legge had obtained access to the legacy systems. David Legge explained that he had managed to use the Transoft tool to extract certain data, but goes on to say '*Getting access to HR/Payroll and Finance still seems to be problematic. Looks like the issue is around the fact that they don't want us working with personal data and they do not have test instances that have been anonymised.*': JB 738. David Legge, also, emailed

	Ravinder Johal looking for drop dead dates for data. Again, Ravinder Johal made it clear that she did not want anonymised data and that there was '*no reason why I cannot see that as migration will need to any way for the live tests and parallel runs*': JB 739.
February 2016	At the beginning of February 2016, it was confirmed that David Legge had access to Oracle and iTrent. But the access granted to him by BT was such that he was not actually allowed to do any extracts and was read only. His access was conditional on not accessing live data other than to anonymise it: see emails at JB 790, and 796. On 13 February 2016, Tom Fulda issues his report to Niall Sherriffs and Barry Speed: JB 808. The Court will recall that Mr. Fulda was taken through the broadly positive statements that he made in that report in relation to the '*extensive documentation*', the lack of any criticism of the absence of a data migration strategy or issues with the templates in cross-examination. This was, entirely, consistent with the fact that on 16 February 2016, following receipt of that report, Dr. Speed emailed his updated actions for the ERP Workstream in which he noted that '*Data migration strategy (in Tom Fulda report). Clarified this is fully covered in the approved design documents.*' Accordingly, again, as they plainly state themselves, it is clear that everyone at that stage recognised the Data Migration Strategy was contained in the SDD. On 15 February 2016, the ongoing delay in getting access to data has clearly been escalated to Niall Sherriffs. David Legge emailed him about the issue and emphasised that there was increasing concern about the impact the delay was having on the migration timescales. He emphasises the need for live data to Niall Sherriffs: see for discussion in Peter Hall's WS at para. 8.42.4, David Legge's WS at para. 2.22, emails at JB 816 and 818. This is important because it emphasises that the

	issue was already escalated to the head of the entire programme within CGI. Agilisys could not have escalated it higher themselves. On 22 February 2016, Julia Jackson issues Migration Report to David Camilleri of CEC: JB 837. This is important. As is recorded at p.11200, the purpose of the document was to address the one outstanding design decision on data migration noted in the R2R SDD. This is the 'further meetings' that was later referred to by Colin Brown in his evidence, which he claimed had never taken place but which were always intended to be addressed by this document.
March – May 2016	By the end of this period, Mr. Legge had left CGI. He still did not have full access to the legacy systems. And he had not passed any data extracts to Agilisys: see para. 2.38 of David Legge's WS. As he said in evidence: "*We didn't get to the point of being able to transfer any data to Agilisys.*"see Day 13, page 65, Line 6 of the Transcript. Accordingly, very little actual progress was made with data extraction. But it is helpful to highlight the following aspects of this period that show that CGI struggled to obtain CEC's agreement to get access to live data and that that was the principal cause of delay: On 18 March 2016, Agilisys issued RN007 relating to Data Migration delays: Peter Hall's WS 8.43, and see RN007 at JB 16. It was issued then because issued because CGI's delay in providing full data extracts to Agilisys was going to affect their ability to meet the System Acceptance Testing Milestone. By this stage, CGI was almost 6 weeks late in delivering full data extracts in accordance with the Implementation Plan v 12 deadline of 3 February

2016. This was ultimately accepted insofar as Relief was granted as a result of the ERP re-plan agreed with the Council at the end of April 2016: see response to RN007 at JB30.

- By early April 2016, Kevin Bryce, Stephen Waters, and David Legge were meeting with CEC to try to persuade them to let Agilisys have access to live data: see JB 993. Following this meeting it was identified by Derek Brown of CGI (who bears to have been involved in data security), and having discussed it with CEC, that a statement of why access was required needed to be put together to obtain formal approval. (NB. It is in this context that the email from Kevin Bryce to Peter Hall is critical of David Legge's performance: "*David lacks urgency in everything he does*" Further, Kevin Bryce acknowledged in the email that CGI had missed the data extract deadline in February 2016, and wanted to set a new date of 18 April 2016, which would still be unlikely to hit but would mean they could push David Legge: see Peter Hall WS 8.42.3, and JB 1001 – 1002). This meeting was followed by a meeting between Ravinder Johal, Stephen Waters, and Derek Brown to discuss the necessary issues around access to live data, and Derek Brown then puts the document together: see references in JB 1038 and the evidence of Stephen Waters, Day 14, pages 30 and 31 of the Transcript. This document was ultimately rejected and a Privacy Impact Assessment had to be submitted: see JB 1144. It is in this context that Peter Hall was asked to get the consent of the Information Asset Owners within the Council on 26 April 2016, and ultimately only obtained full consent on 19 May 2016: see JB 1241. Although there was some attempt by Stephen Waters to suggest there was some inordinate delay on the part of Peter Hall, it is submitted that that is to simply disregard: (a) Peter Hall's explanation that '*The delay had been that we could not get CEC to sign off on the PIA. Part of the reason for the delay was that some of the most senior people within CEC had to sign the PIA and it needed more than one signature*': Para. 6.1 of Peter Hall's Supp. WS;

and (b) the fact that it is so minor in comparison to the inordinate delay to this point by CGI in even getting to the point of asking Peter Hall to complete a PIA.

- In the course of April 2016, Stephen Waters and David Legge bear to have started to try to make more progress. In particular, it is in this context that there are discussions about provision of further templates to David Legge, which ultimately were sent on 22 April 2016: see emails in JB 1030, and JB 1141.

- There is the sequence that was explored in cross-examination with Stephen Waters and Colin Brown in relation to the preparation of the plan provided for in the 22 April Conditions: see JB 1152. This plan is particularly notable because it utterly failed to meet the deadlines of a first extract cycle being completed by 7 June 2016, and a second cycle by 8 July 2016. It is also notable in that it identified no dependencies on Agilisys for a data migration strategy or anything else.

- In cross-examination, David Legge accepted that the data migration document he had created in May 2016 was a combination substantially of material taken from the SDDs joined together particularly with some content written by himself about anonymisation: see Day 13 at Page 27, Lines 1 – 7 of the Transcript.

In addition, it is worth also noting in this period that, on 9 March 2016, Julia Jackson sent an updated Migration document to CEC having been discussed at length with CEC in February: Peter Hall's WS 8.41, and JB 897. By the end of the month, they had indicated that CEC would accept the Julia Jackson document's recommendations if CGI would retain a copy of

	Oracle post go live for reference. Niall Sherriffs indicated that their may be a licencing issue but that he would investigate and requesting a copy of the document: see see Peter Hall WS at para. 8.41 and JB 971. The same explanation is provided by Ravinder to David Legge on 14 April 2016: see JB1044. Again, the issues in the SDD had been agreed with CEC subject only to CGI confirming it would retain a copy of Oracle. Accordingly, Colin Brown's evidence on these meetings and discussions not having taken place was simply wrong.
June 2016	This period is notable in the evidence for the, almost, complete absence of any evidence of CGI doing anything in this period in relation to data migration. The evidence bears out Agilisys impression that CGI struggled to obtain resource to replace David Legge after he left and nothing much seems to have happened in this period: see Ravinder Johal's WS at para. 4.15.6. It is not until Graeme King's involvement in mid-July 2016 that there is anything obviously concrete that happens.
July 2016 – October 2016	The sequence of events in this period of time was explored with Colin Brown in cross-examination on Day 17. It is most notable for the fact that there is an intensive period of 'special measures' that starts to commence near the end of July and continues throughout August. Despite this, there is no point until the oblique reference to templates in the letter of 29 September 2016 (JB 42) and the more detailed response to RN016 in October 2016 (JB 35). In particular, no complaints of a lack of a data migration strategy, no complaints that the templates were not fit for purpose, and no complaints that they could not undertake their task because of something Agilisys had done or not done. That is remarkable if CGI's case is to be believed.

In summary, the sequence was as follows:

- There was a workshop between CGI and Agilisys on 2 August 2016 to discuss and agree how to deliver data extracts. Gerard Breukink emailed to advise that they were doing extracts based on templates provided by Agilisys, but there seemed to be little guidance from Agilisys regarding which specific tables and fields the data needed to be taken from: cf. Ravinder Johal comments in her Supp. WS at para. 6.3. Graeme King volunteers to be the '*technical lead*': JB 1514.

- On 3 August 2016, there was an email from Graeme King of CGI. It is plain that, as with all previous data migration individuals, Mr King has looked at the design document for HR and found that it states what will be migrated and that this has been agreed by the Council: JB 1519 at page 15425. The CGI team now working on data migration, therefore, had the matter of the templates, the matter of the scope of the data to be migrated, and data mapping all in view

- On 5 August 2016, there are a series of emailed queries about the templates between CGI and Agilisys. Peter Hall chased Ravinder Johal to respond quickly, which she does the same day. She, also, sends on the relations values. This latter point is particularly significant given that CGI later claimed not have seen them or understood them at all. It was plain from Mr. Brown's evidence that he had not been aware that they had been shared with the CGI team at this point: see JB1522, 1524, and 1528

- From 6 August 2016 onwards, there is a flurry of special measures such as daily meetings, further data migration workshops, and daily calls: see JB 1532, 1533, Colin Brown WS at para. 3.26, and 3.27.2.

- On 17 August 2016, Colin Brown emailed a plan for data migration to Peter Hall, and the following morning Peter Hall asked for a call to go through it: JB 1558. There are then further action plans by Stephen Waters following yet another data migration meeting: JB 1560.

- From 30 August 2016, there are daily data migration reports: see first report on JB 1570, and subsequent one on JB 1583. By this point the data migration strategy, data migration plan and templates have all been addressed intensively over 4 weeks. It defies all credibility that there was some hidden problem that CGI had not identified. Colin Brown's evidence on this was strident, but ultimately he gave no credible answer. He appeared to suggest that CGI had agreed to get on with the method that Agilisys had stipulated. Even if that were true, it would be incredible if there was an aspect of that method that was so obviously flawed and was actually causing CGI problems that it had not been identified.

- Between August 2016 and September 2016, it is clear that both teams were working very hard at Data Migration: see Ravinder Johal WS at 4.15.9 – 4.15.17. However, CGI simply struggled to complete the work in the timescales they had set themselves and were still working on them into late October 2016: see Ravinder Johal WS at para. 4.15.26.

	In October 2016, Agilisys issued RN016 relating to the delay in data extracts: see RN016 at JB 25. CGI responded on 27 Octber 2016: see Response at JB 35. It is worth noting about the response to RN016 that it refers to '*limited detail within the Data Migration Strategy*' so that even at that point CGI recognised the SDDs as containing the data migration strategy. Kevin Sander's gave evidence explaining precisely why the issues raised in the response to RN015 were correct: see Kevin Sander WS at para. 5.9.1 – 5.9.5. The points he makes are manifestly borne out by the chronology. He correctly notes that '*all the information required had been provided during discussion and knowledge transfer sessions held with CGI's David Legge at a much earlier stage in the project when the templates were originally reviewed.*' The knowledge transfer in August 2016 could be added to that point as well.
October 2016 – March 2017	There has been limited exploration of the detail of data migration in this period of time at the Proof and it is largely irrelevant as post-dating the last Relief Notice within the scope of the Proof. CGI place weight on it because of the activities of Kevin Sander in this period, which are said to represent what should have happened originally. The best evidence in relation to that matter is what Kevin Sander himself says: "*In my view, [the work he undertook] became desirable in this case only because by October 2016 the relationship between Agilisys, CGI and the Council was perceived by the Council to be working so badly, and because so much of the earlier discussion and knowledge transfer had been eroded by the passage of time, coupled with high turnover of CGI extraction personnel. My motivation for writing a new document was only to restore confidence with Council stakeholders. I perceived that consolidating all the already available information into a single document and using that as a basis for review was the quickest and most efficient way to achieve that.*": Kevin Sander WS at Para. 6.5.

ARCHIVE SOLUTION

In the Notifiable Default Notice served by CGI on Agilisys on 8 November 2016 (within JB 46) and in the pleadings an issue has been taken about archive solution not being available, the detailed evidence on this point can be found as follows.

First, the strategy for archiving was clearly set out in the SDD and other documents as being a separate instance of Business World that would hold historic archive data. The strategy for archiving is specifically covered in each of the SDD: see JB 234 – 241, particularly at pp. 5171 – 5176, 5289 – 5293, 5410 – 5415, 5454 – 5457, 5615 – 5620, 5, and 5831 – 5834. Further, the SDDs set-out in detail the number of years data to be kept and which is going into live and archive.

Secondly, it is clear from the SDD that archiving was due to be done after the planned Go-Live date: Archiving would be done after Go Live: (a) the ERP Project Board Slides on 22 October 2015 at JB 73; (b) PID on 12 November 2015 at JB 147 at p. 18; and (c) Solution Design Documents, above, shows Archive and clearly record as a design decision reached on 20 October 2015 and later signed off as being a separate BW instance.

Thirdly, as it was always intended to be a separate historic instance of BW, it did not need some sort of bespoke design document. It was intended to be a further installation of BW and it was for CGI to '*provide the archiving solution, including hosting and licensing. The archive solution will be configured by the Supplier and the Supplier will import the archive data provided by CGI…*': see Number (16) of Project Roles for Agresso ERP in Roles & Responsibilities document in Schedule Part 4.1 (JB 1 at p. 1076).

Fourthly, it is clear that CEC changed its mind on both the levels of historic data and whether the archive was to be available at Go Live or not in the course of July – October 2016. The sequence can be seen as follows: (a) the beginning of the shift in position in July 2016 as per the Project Board Meeting on 27 July 2016 in JB 96 – 97, and subsequent email on 2 August 2016 at JB 1535; and (b) it is then a recurring them in September 2016 Project Boards and is properly focused in October and November 2016 Project Boards: see JB 120 at p. 3080, JB 122 at p. 3130, and JB 124 at p. 3144. It is telling that much of CEC's change of position in this period was then simply passed back to Agilisys by CGI without any recognition that it represented a fundamental change and departure from the agreed scope and design decisions reached a year previously.

APPENDIX 2

ERP ENVIRONMENTS CHRONOLOGY

Date	Chronology
September 2015	On 15 September 2015, a meeting takes place between CGI and Agilisys '*running through all the dependencies etc.*' and there is an immediate concern because CGI '*are not remotely ready to set up an environment*': email from Tim Pitts to Nigel Muirhead at JB 449. Claire Conaghan emails Grant Lithgow and Richard Salmond of CGI to suggests that it '*makes sense*' that Unit 4 define the infrastructure. She stresses the timelines are very worrying, and that a development environment will be needed by start of October 2015. There is no push back from members of CGI and nobody suggests Agilisys should be doing this on CGI's behalf: Claire Conaghan's WS at Para. 15.2.2, Niall Sherriffs' WS at Para. 3.8, and Emails at JB 451. On the same day, Agilisys issue a Workstream update that identifies that there is a risk over the timeline for BW infrastructure build and installation, with an action on Richard Salmond to confirm the timelines and that Unit 4 have been commissioned: JB 154 at p. 3750. Between 21 – 23 September 2015, Niall Sherriffs requests a quote from Unit 4 and indicates that once they have provided it then they can agree a schedule for installation: see Niall Sherriffs' WS at Para. 3.11 and Email at JB465. This ultimately takes until 1 October 2015 to get resolved: see JB 477 at pp. 8116 – 8118. On 23 September 2015, Niall Sherriffs exchanges emails with Claire Conaghan to confirm he has progressed the installation quote. There is a clear disagreement about timescales between Niall and Claire Conaghan, but no issue is raised that Agilisys need to provide CGI with anything or should be managing Unit 4: see JB 467. On 29 September 2015, Peter Hall issues a summary plan for ERP to various CEC and CGI staff: see email at JB 470.
October 2015	On 1 – 2 October 2015, there is an exchange of emails between Grant Lithgow of CGI, Claire Conaghan, and Niall Sherriffs. Claire Conaghan explains that '*Unit 4 are doing the installation, they need to provide the specification so they take full ownership. We do need an ETA when the environment will be ready*': JB 478 at p. 8122. Niall Sherriffs confirms that Unit 4 will be doing the installation, and that he is going to catch-up with Raj [Sudra] and Grant [Lithgow] of CGI about the timings and approach. There is no suggestion that CGI are expecting Agilisys to be involved. The next day Claire Conaghan again

asks for a confirmed ETA and explains that if they do not have the environment by the end of October they are likely to have significant issues delivering the milestone: JB 478 at p.8121. Niall Sherriffs promises to chase and keep on top of the team and get a date as soon as possible. Again, there is no suggestion anything is needed from Agilisys at this stage: JB 478 at p. 8120.

In the same period, Niall Sherriffs emails Grant Lithgow and Raj Sudra asking them to get in contact with Unit 4 to '*find out what spec is needed and then when and how we can configure the relevant infrastructure*': JB 477 at p.8114. Grant Lithgow exchanges emails with Unit 4 to arrange a phone call to discuss Unit 4's '*requirements for the test and dev enviromments*'. Again, there is no suggestion that CGI need anything from Agilisys. However, Peter Hall emails Unit 4 directly and indicates to both CGI and Unit 4 that '*Installation of the dev system is becoming an urgent issue for my delivery team. We have a drop dead date of end October to have this in place or it will significantly impact our ability to meet our contractual milestones.*': JB 480.

On the following Monday, 5 October 2015, Unit 4 send a series of documents to Grant Lithgow including BW Technical Specification, and the sizing questionnaire and spreadsheet: see JB 508.

On Wednesday, 7 October 2015, there is an exchange of emails between Grant Lithgow, Ravinder Johal, and John Davidson about proceeding with a minimum specification for the development environment. Unit 4 ask for an eta from CGI on when the servers will be ready and whether it will be an onsite or remote installation. There then appears to have been a call. This is the first mention of internet connection because Unit 4 states that '*The web client can work over the internet using standard https though security advice would be needed once sensitive data has been imported into the system.*': JB 496.

On Friday, 9 October 2015, Ravinder Johal chases Grant Lithgow again for an eta on the servers and whether parties are on track for the end of October. She expressly mentions that this is important for '*milestone deliveries*'. She mentions that '*we want to ensure that Unit 4 resource is booked as quickly as possible as we normally have to give several weeks of notice for this.*': JB 496.

On Tuesday, 13 October 2015, Claire Conaghan and Niall Sherriffs exchange emails about finding a solution that does not involve using the BT data centre. This leads to discussions with Unit 4 and CGI about possible alternative hosting methods using Unit4hosting or CGI providing Azure hosting: JB 512.

	On 26 October 2015, Raj Sudra and Huw Williams of CGI provide an update on the development environment. Raj Sudra recognises that this is critical and asks Huw Williams to outline, *inter alia*, the '*Dependencies and timescales on Agilisys / Unit 4 / BT / Council etc. that you are dependent on to achieve our deliverables.*' Huw Williams reports on progess, and he does not identify any dependencies on receiving anything from Agilisys: JB 525. On 30 October 2015, Huw Williams of CGI sends out an update stating that '*We have provisioned our VM's as per the attached templates*' and that '*We have requested bandwidth requirements from our third parties.*' Again, there is no indication they are waiting on or expecting anything from Agilisys: JB 531.
November 2015	On 4 November 2015, there is an internal CGI email chain about the installation of the development environment following the offer from Unit 4 of installation dates in mid-November 2015. The general subject matter is a concern that there is no design or blue print for the development environment. Raj Sudra emails to say that '*I'm not totally sure who is managing the end to end deliverable - from speaking to Nial [sic] understand this is Agilisys but because of the commercial relationships we are managing Unit 4 for their 'specific' deliverables. However, their statement of work is not clear in respective [sic] to providing design documents, their requirements, how many servers they would need, software licensing for SQL, OS etc…*': JB 542. On 5 November 2015, apparently motivated by the internal email chain the day before, Huw Williams emails various people from CGI, Agilisys and CEC asking whether there has been any work done on the design or requirements by Unit 4 or Agilisys. Huw Williams records that '*We have been informed that internet access from the dev environment is required, we will need to discuss how we do this because there is not a shared proxy service in CCC at present.*': JB 543. On the same day, Huw Williams chases and is sent a copy of Unit 4's Statement of Work that requires to be completed prior to installation: see JB 617 – 618. The Statement of Work mentions a number of items that later became controversial and claimed to have never been required before such as Microsoft Office and Excel (at p. 9764), Supported Web Browser (p. 9769), BIF and the Report Engine (Excelerator and Worderator) (at p. 9769). It does not appear that CGI ever completed the Statement of Work as it was sent in its incomplete form to Agilisys later in November 2015: see JB 617.

At this point in November 2015, Sebastian Wood appears to become involved. On 11 November 2015, there is a meeting between Peter Hall and Sebastian Wood to discuss environments. Peter Hall emails Sebastian Wood a list of the users that need access to the Development Environment and their levels of access: see JB 556. Peter Hall, again, mentions Excel will require to be on the server. On 12 November 2015, Sebastian Wood emails out a weekly update for Infrastructure: JB 557. It does not list anywhere a concern that Agilisys have not provided a design or a specification. There are, however, planned meetings for the following week. It records that Unit 4 are going to do the installation the following Monday, 15 November 2015. It, also, records that CGI and Agilisys intend to complete the Unit 4 questionnaire together. It, also, records a plan of meetings with Agilisys to discuss their requirements, which is consistent with the email from Seb Wood for a meeting on the same date: see emails in JB 558.

In the week commencing 16 November 2015, there are a series of workshops, emails and meetings involving CGI and Agilisys to discuss and clarify requirements on environments. These are for the purpose of enabling Sebastian Wood to prepare a High Level Design as mentioned in the previous weeks update report. In particular: (a) a meeting on Tuesday, 17 November 2015, between Ravinder Johal and Sebastian Wood as per the weekly report. This is spoken to by both Ravinder Johal at para. 7.2.2 of her WS. Paul Hamilton confirmed in evidence that this meeting had taken place: see Day 11, Line 6, of the Transcript. It is, also, clear that Claire Conaghan emailed Sebastian Wood indicating, *inter alia*, '*Microsoft office excel & world on the apps server*' would be needed: JB 577; (b) although Mr. Hamilton claimed it was earlier, there is a specific email introducing him to Agilisys on 18 November 2015 as coming on board: see JB 574, and cf. Day 11, pages 47 – 50, and on the same day Seb Wood chases for the '*environments document*' as soon as possible; and (c) on 19 November 2015, Agilisys provided CGI with a simple environments matrix: see JB 573 – 576, and on the same day Paul Hamilton emails Peter Hall to ask for a meeting to '*iron out some of the challenges we are currently facing…with environments*': JB 574.

There is a telling email exchange where, despite the fact that the sizing questionnaire was sent directly to CGI in October 2015, Paul Hamilton is unable to find it and emails Peter Hall to get it: see JB 580.

Although work started on installing the necessary Entrust software on Agilisys laptops towards the end of November 2015 to provide access to the Development Environment, CGI suffered a malware attack and all forms of remote access to the data centre were severely restricted for a number of days: see Paul Hamilton's WS at para. 2.15, and see JB 599 about setting up of accounts.

December 2015	In early December 2015, CGI started to provide access.
	In that period of time, and contrary to the evidence from a number of CGI's witnesses, Peter Hall indicated he would have been willing to accept CGI laptops if that was a way around the problems: see Email of 4 December 2015 at JB 633
	Finally, access was provided on or around 9 December 2015. As soon as access was granted, Agilisys mentioned: (a) that none of the Microsoft products were installed (those having been mentioned on a number of occasions previously in October and November 2015, as above); (b) a specific part of BW that had been licensed as part of the BW purchase called Invoice4 Onsite; (c) only 2 concurrent users can access the server (despite the fact that Peter Hall had sent an earlier email in November 2015 outlining all of the people that needed access); and (d) there were still logins outstanding for the rest of the Agilisys team to get access (again despite the individuals details having been provided about a month earlier on 11 November 2015): see JB 652. A number of other issues were then identified between 10 December 2015 and 17 December 2015. The main one being internet access (which as pointed out above had actually been raised by Unit 4 in October 2015 and again specifically with CGI in early November 2015, but which seems to have gotten lost sight of by December 2015) Mr. Hamilton described the internet access as being a new requirement, but it is submitted that that is manifestly wrong, and when the earlier correspondence was put to him his evidence became very confused and indeed contradictory: see Day 11, p. 69 – 72, of the Transcript.
	Mr. Hamilton gave evidence in cross-examination that he accepted the need to overcome CGI's internal security protocols to enable internet access was a CGI issue and said: "*It was, yes. My only additional comment to that would be if we'd known the requirement was needed earlier, we could have dealt with it a lot sooner.*": Day 11, page 69, Line 20 in the Transcript. It is submitted that answer is correct – the only issue being that CGI did know earlier even if Mr. Hamilton did not.
January 2016	In early January 2016, there were meetings and discussions about the ongoing difficulties with environments. This led to the decision that Agilisys would host their own Azure environments to allow the build work to start commencing at CGI's expense: see Peter Hall WS at para. 7.10, and emails at JB 709. Peter Hall immediately emailed Unit 4 about setting up an Azure environment and it was completed in a couple of weeks: see the WS of Peter Hall at para. 7.10 and the evidence of Peter Hall on Day 3, pages 143 and 144 of the Transcript. The quote was later provided in February 2016 and paid by CGI: Email on 8 February 2016 at JB 794, page 10874 (Quote on page 10876 is for £39,101 plus VAT).

	On 27 January 2016, Agilisys issued RN001 seeking relief as a result of delay of access to the Development Environment: see RN001 dated 27 January 2016: JB 10. As Peter Hall explained, '*In this type of project, there is no way that you can lose 6 weeks out of a 3 month window and still deliver to schedule. CGI were well aware that this Relief Notice was coming and had to be raised.*': para. 7.12.
February 2016	CGI issue response to RN001 on 10 February 2016 accepting CGI Cause, and granting relief in the form of postponing Milestone 2.2 to 31 March 2016 and recording that the Transformation Plan had been amended to version 12 of the Project Plan: see Response to RN001 dated 10 February 2016: JB 26

On or around 16 February 2016, the ERP Development Environment is finally provided: see the Lessons Learned slides on 23 February 2016 at JB 842, email of 4 March 2016 at JB 881, and Kevin Bryce's plan of 14 March 2016 at JB 926.

On or around 23 February 2016, the Lessons Learned exercise is undertaken in relation to the Development Environment. It does not identify any issues outstanding or required from Agilisys, and portrays a picture that all matters have been resolved.

In late February 2016, Kevin Bryce is recruited by CGI for the purposes of being an Environments Manager for the ERP and EI projects. At the point in time he joined, and as recorded in the response to RN002, the relevant date in Version 12 of the Project Plan was 31 March 2016. Mr. Bryce was, plainly, aware of that date when he initially started: see the reference to these dates in his email of 3 March 2016 at JB 875. He accepted this under cross-examination: see page 48 – 49 on Day 12 of the Transcript.

It is a notable feature of the evidence that almost nothing seems to have been happening with progressing build of the Pre-production and Production environments between December 2015 and February 2016. It is not until into March 2016 that Kevin Bryce began to plan and begin construction of the environments. |

March 2016	At the Partnership Board meeting, following a discussion about the issue of responsibility for managing infrastructure, it was agreed that '*Agilisys cannot manage some work streams such as infrastructure*': JB 890, and Robert Price supplementary WS at para. 2.14.
	Mr. Bryce was cross-examined extensively on this period of time onwards. Reference is made generally to his cross-examination from Pages 50 onwards on Day 12 of the Transcript.
	In the course of early March 2016, Mr. Bryce proposed dates of 15 and 29 April 2016: see, in particular, the internal emails of 8 March 2016 at JB 900 and the Plan on a Page produced on 14 March 2016. This immediately meant the date in the Project Plan was not going to be viable.
	On 15 March 2016, Peter Hall assisted Kevin Bryce in completing the sizing questionnaire for the ERP Environments: see Peter Hall's WS at para. 7.7 and JB 931, and 938 – 939
	It is submitted that it was clear from the cross-examination of Mr. Bryce that his approach was that, following an initial meeting with Mr. Hall, he had formed the impression (rightly or wrongly – given the issue was never put to Mr. Hall) that he was not going to obtain a document setting out requirements and that Agilisys were content with what had previously been provided. It was nerve clear precisely what document, or details he was expecting. He, himself, appeared content to proceed on that basis. As he said: '*I had initially expected a detailed document of requirements. When we were pointed to conversations in different documents I was happy based on the timeline that we could try and push ahead with information we had and just accept the risks.*': Page 118, lines 11- 16, on Day 12 of the Transcript.
	On 18 March 2016, Agilisys issue RN009 seeking relief as a result of delay of access to Production and PPE Environments.
April 2016	CGI experienced a number of difficulties in setting-up the servers and arranging an installation of the PPE and Production Environments in this period. In particular, a planned installation for 8 April 2016 was cancelled because the servers were not ready: see Email chain on 7 – 11 April 2016 in JB 1018. And then, again, due to difficulties with the CGI server failures on 21 April 2016 in JB 1222.

	Against this background, the 22 April Conditions were sent to Louise Ah-Wong requesting, *inter alia*, a detailed plan for *'Development, test and Gold Environment provisions including the transfer from Agilisys temporary environment…Pre-production and production environment delivery and their proposed move (if any) to Wales'*: see JB 1069 at p. 12726. Niall Sherriffs allocated Kevin Bryce to produce this plan and it was produced on 27 April 2016: see emails and plan at JB 1163 – 1164. Kevin Bryce was cross-examined on the fact that this plan: (a) records that all requirements had been provided by Agilisys; and (b) places all of the dependencies for design documents on CGI employees. His evidence came to be that he did not think at this time there were any outstanding requirements based on his meetings and discussions and said '*At the time it was based on what I had been told by Agilisys. I accepted that we had sufficient -- sufficient information to build the environments, so I didn't labour the point at that stage.*': Day 12, page 111, of the Transcript.
May 2016	PPE-A was finally installed on 12 May 2016: see email of that date in JB 1163 – 1164. As Mr. Bryce eventually accepted in cross-examination, they remained effectively accessible until into June 2016. He did not attribute any delay in this period to Agilisys either in his Witness Statement of Cross Examination. The progression can be seen in the email in JB 1246, and the further environments plan in JB 1271 targeting new dates for availability. The delay by this point because of access issues with the VPN had become significant.
June 2016	Agilisys issue RN013 seeking relief as a result of delay of access to hosted PPE on 3 June 2016: RN013 dated 3 June 2016: JB 22. This was a direct result of the ongoing environment difficulties. CGI accepted in its response CGI cause and agreed to postpone the SAT Milestone of 11 July 2016. They agreed to work together to understand and agree the extent of the relief granted: see Response to RN013 dated 10 June 2016: JB 33 At the same time, in the beginning of June 2016, Agilisys readily agreed to the suggestion that access issues could be overcome by the use of CEC Laptops. There is not the slightest hint of reluctance on the part of Agilisys. The email correspondence is in JB 1281. Peter Hall provided details of what was to go on the laptops in terms of software including Excelerator, Worderator, BIF and Agresso: see in particular email exchange between Peter Hall and Kevin Bryce on 7 June 2016 at JB 1306.

	It took a number of weeks to provide CEC laptops to Agilisys for the purposes of accessing the Environments. There were still outstanding laptops into July 2016. The process was also disrupted by the data centre move at the end of June 2016: see WS of Peter Hall at para 10.22, JB 1396 and the evidence of Peter Hall on Day 3, page 145 of the Transcript.
July 2016	Proper access to PPE-A was provided in early July 2016. Agilisys checked the environments and provided a snagging list to CGI. In his Witness Statement, Kevin Bryce made much of this list as an example of drip feeding of requirements. However, from his cross-examination, it was clear that: (a) a number of the software issues he identified as new requirements were the Reporting Engines (Worderator and Excelerator) and BIF being on both the server (client side in his terminology) and laptops. It was pointed out to him that, again, these had in fact been identified in the Statement of Works as far back as November 2015, which he ultimately accepted but said he had not seen. As he himself said: "*So based on this document, they certainly had been stated previously.*": Page 140 of Day 12 of the Transcript.
	Work on the production environment had been abandoned and it was still not available at this stage. PPE-B became available early in this month.
	Agilisys issue RN014 seeking relief as a result of delay of access to all of the Environments on 26 July 2016: see RN014 dated 26 July 2016 at JB 23.
	In the course of July 2016, the major issue was network latency. Mr. Bryce accepted this had nothing to do with Agilisys: see Day 12, Page 151, of the Transcript. This was not ultimately resolved until into September 2016 by a temporary workaround.
September 2016	In or around September 2016, the temporary workaround was recommended by Advance 7 to get around the latency issue: see JB 1608. There, also, continued to be other issues arising on the environments with things not functioning, largely due to the absence of environment management procedures being in place. There also continued to be issues with email functionality being rolled back: see JB 1666 and Peter Hall's WS at Para. 11.5.

October 2016	Agilisys issue RN015 on 13 October 2015 seeking relief as a result of the provision of accessible ERP Environments. It detailed numerous issues with the Environments, but the main issues were matters within the environments that were not functioning and the latency issue. CGI issue RN015 on 27 October 2016 rejecting claim for relief: see RN015 dated 13 October 2016: JB 34, and response to RN015: JB 34. The response largely accepts the defects and, indeed, records in detail the delays that had occurred in resolving. The core defence seemed to be the suggestion this was not preventing Agilisys from moving to UAT, albeit CGI Cause is denied. That defence was misconceived for two reasons. First, as Kevin Bryce accepted in cross-examination, it would have been unsuitable for final UAT sign-off: Day 12, page 160 – 161, of the Transcript. At that stage, there was no obvious or guaranteed fix. Secondly, CEC had made it clear they would now allow Agilisys to move to UAT using the workaround.

APPENDIX 3

NORTHGATE API & EI ENVIRONMENTS CHRONOLOGY (RN002 AND RN012), AND AD SUITABILITY ISSUES

NORTHGATE API CHRONOLOGY

Date	Chronology
September 2015	At the pre-kick-off meeting on 14 September 2015, Agilisys made it clear they were going to require the Northgate API. They explained to CGI that it was '*fundamental*' and '*critically important*' that access was provided to Northgate iWorld API: David Buchanan's WS at para. 8.5.1 and Claire Conaghan's WS at Para. 12.8.1. A target date of 30 September 2015 is identified, but missed: see first Weekly Report on 6 October 2015 for EI at JB246 at p. 5948
October 2015	On 9 October 2015, Niall Sherriffs emails Claire Conaghan and David Buchanan about, *inter alia*, the Northgate API. He says that '*iWorld is progressing technically, we will need to do some test data scrambling, but has some commercial issues for the Council to resolve as it sits in live…They have already completed a significant amount of work, so it should be available soon after an agreement on commercials.*': JB 494 at p.8204. Accordingly, at this stage, there are no issues identified with Agilisys and the delay is being caused by agreement on commercials. On 20 October 2015, the Weekly Report records that Agilisys were still waiting on a confirmed date for the Northgate iWorld API: JB247 at p 5944. On 23 October 2015, Niall Sherriffs emails Matt Stiles of Agilisys and others to say, *inter alia*, '*Access to iWorld in the BT centre would be available from mid-Dec. This is a worst case date and we are looking to bring it forward, but it is highly dependent on availability of key technical resources in short supply.*' The reference to technical resources is, presumably, either at BT or CGI. Again, at this stage, there are no issues identified with Agilisys and the delay is being caused by lack of sufficient technical resource to complete the work. This is in slight contrast to the position in Niall's email on 9 October.

November 2015	The Weekly Reports for EI continue to note delayed access to APIs in line with Niall's '*worst case date*'. Agilisys make it clear to CGI in these reports that they have significant concerns with meeting the Milestones as a result of the delay. See, in particular:
	3 November 2015 – JB249 p5958
	Estimated due date changed to 4/12/15. Commentary: "*CGI planning to have a cloned development API with anonymised data available before 04.12.*"
	10 November 2015 – JB250 p5968
	Dates as per 3 November. Commentary: "*Re-planning has confirmed that access to production iWorld API will be required 04.12*"
	17 November 2015 - JB251 p5972 + p5974
	Dates as per 3 November. Commentary: "*Re-planning and build assumes production API on 04/12/2015. This is unlikely and may not be until 01/04/2015. Needs impact assessment re go-live implications*"
	p5974 "Risks"
	Risk Description: *A date for being able to access the BT hosted iWorld environment has not yet been established with any confidence.*
	Impact: *The new platform cannot test the interaction with the iWorld APIs, and therefore will need to go live with an interim access to iWorld*
	Actions: *Ensure the commercial liability is adequately backed off, and BT given approval to make the iWorld test (and subsequent production) environment available for development and go live*

	There is, also, a call recorded in relation to this matter as having taken place. CEC are adamant that Agilisys cannot have access to a production instance of the Northgate API due to liabilities issues, and CGI are attempting to get an instance for 4 December 2015: see JB 566 at p. 8779. **24 November 2015 – JB252 p5975 + p5977** Dates as per 3 November. Commentary: *"Re-planning and build assumes production API on 04/12/2015. Impact assessment requested of AD on build implications"* **p5977** – Risks as per 17 November.
December 2015	On or around 7 / 8 December 2015, CGI provided Agilisys with a cloned version of the Northgate API: see Para. 8.5.6 of David Buchanan's WS, and Para. 12.8.2 of Claire Conaghan's WS.
January – February 2016	Once the API had been provided, there were issues first with the level of anonymisation required by CEC and then the usability of that test data. David Buchanan expanded on the difficulties with the data anonymisation in cross examination, where he described the issue as follows: *"So they would take -- they would take the names, addresses and all the codings in there and change it to something that the council felt was suitably – suitably opaque. But the problem with that, my Lord, was it meant that -- it meant that anyone who was trying to use the information had real difficulty in understanding whether it was relevant or not. So it was very difficult to configure something where you would expect to see Mr or Mrs G Smith at such and such address if that information was changed completely, and it was simply -- you know, words, names, addresses were scrambled, postcodes were switched around into sort of random statements. You know, you could see the information was there but you couldn't -- it was not in a format that was usable to allow us to configure the system."*: Day 6 at Page 53, lines 1 – 16, of the Transcript. The Weekly Reports for EI record a progressive resolution of the issues in January – February 2016:

5 January 2016 – JB 256 p. 5988 – 89

Lowlights: *"Data in iWorld still to be anonyised before any testing can complete – City of Edinburgh CIO requesting changes."*

Commentary: *"05.01 – Initial connectivity confirmed. Test data WIP (extra steps requested by CEC)*

David Buchanan was re-examined on this on Day 6 at page 81 – 84. He explained the anonymisation issue as follows: *"it effectively says that the whole anonymisation process still had to be fully resolved before any further progress with respect to testing could -- could complete."*: Day 6 at page 83, line 3 of the Transcript.

12 January 2016 – JB 257 –p.5993 – 5994

Highlights: *"iWorld connectivity (development) and anonymised now confirmed CGI 12.01"*

Commentary: *"12.01 – Test data now resolved. There may be a v. 6.12 issue that Northgae need to fix."*

A usability issue was raised by David Buchanan with Niall Sherriffs by email of 22 January 2016: see JB 741. This records that the issue was that the test data was causing limited to no testing capability. David Buchanan was re-examined on this issue on Day 6 at page 83 – 84. He explained the nature of the practical problem that the lack of a usable API was causing for configuration and the Conference Room Pilot session.

27 January 2016 – JB 258 -

Commentary: *"27.01 – Test data anonymisation resolved, usability issue. Further test extracts required"*

In re-examination, David Buchanan expanded on this by saying: *"That there were not sufficient test information. So the -- the test anonymisation process, if you like – is described there, the usability issue had been resolved, but there were further test extracts, and we required more test information to be provided to us. And this comes back to the issue with the clone. So the clone only contained a certain extract at a point in time and wasn't the same as AD would normally have used. If they had access to the full system they would know what they wanted to pull."* At Day 6, page 85, of the Transcript.

9 February 2016 – JB 259 – p.6008

Commentary: *"09.02 – Test data anonymization issue being resolved with support by Service areas"*

And it is shown as green.

David Buchanan gave evidence that around this time the issue had been resolved, but that both it and the issue of environments had caused delay and the initial Milestone would not have been required to move: see para. 8.5.10 of David Bucnhanan's WS. Mr. Buchanan was cross-examined on this evidence. The line of cross did not seek to dispute this and tended only to suggest that it was both of the issues of environments and the Northgate API operating: see page 54 – 55 of Day 6 of the Transcript.

EI - ENVIRONMENT CHRONOLOGY

Date	Chronology
September 2015	On Monday 14 September 2015, there was a pre-kick-off meeting between CGI and Agilisys. It immediately became clear that CGI was not going to be able to provide us with the necessary infrastructure in the timescales required: Claire Conaghan's WS at para. 12.7.1. This is the same concern manifested in relation to the ERP Environments, namely that CGI '*are not remotely ready to set up an environment*': email from Tim Pitts to Nigel Muirhead at JB 449. On Wednesday 16 September 2015, Claire Conaghan emailed Grant Lithgow and Raj Sudra two documents specifying the details on connectivity requirements for the infrastructure hosting on Agilisys Digital: see JB 460 – 463. Claire states '*As stated, in order to ensure we meet our tight deadlines, we need to have infrastructure in place by the end of September for the team to start installation. I appreciate this is a challenge and thank you for your support in helping us find a resolution*' This is, entirely, consistent with the Implementation Plan in the Subcontract that had building activities commencing at the end of September. This is discussed at para. 12.7.6 of Claire Conaghan's WS. She states that: "*the real issue appeared to be that CGI had not given any thought to their responsibility to host the AD Platform and where they were going to do this.*" at para. 12.7.3 of her WS. These documents covered the specifications for both the AD product itself and the Biztalk environment needed to support it. On 21 September 2015, Raj Sudra emailed Claire Conaghan back to say "*Further to our conversation today it's clear that there are a number of challenges <u>we</u> have to set-up the test/dev environment you need. Whilst we progress with setting up meetings with BT and looking at alternatives can I please ask the following from yourselves…*' and goes on to request that Agilisys look at alternatives and also pull together an interface document such as a system context diagram.
October 2015	By the beginning of October 2015, there was no committed timeframe that had been supplied by BT to CGI for setting up the Development and Test Environments. Claire Conaghan, accordingly, issued a draft Relief Notice to Niall Sherriffs saying that '*any feedback would be appreciated before it goes to the commercial team.*': see email at JB 484 and draft RN at JB 485. The principal comments of Niall Sherriffs on this RN were that 14 September 2015 had been "*the first date this was identified as far as I am aware, and the timeline for delivery by 30 September was not agreed by CGI*', and also criticising Agilisys for not

	having called it out. This production is important in understanding the background and context to the response to RN002 referring to a draft Relief Notice and referring to '*the original environment requirements not being requested with sufficient notice*': see JB 27. It is obvious from the context that Niall Sherriffs was referring to the fact that CGI had not realised and was not prepared to setup an environment as quickly as Agilisys needed. It had nothing to do with requirements not having been provided by Agilisys. On 9 October 2015, Niall Sherriffs emailed Claire Conaghan and others to say that he had just had a call with BT and that '*the development environment, this should be available Friday 16th am (the current servers need to be upgraded to Win 2008).*': JB 494. There is absolutely no indication that CGI or BT were waiting on, or needed, anything from Agilisys. This deadline was, subsequently, missed. On 22 October 2015, it is plain that the Agilisys development environment is in the process of going through the BT request process. See JB 521. On 23 October 2015, there had been no progress. Niall Sherriffs emailed Agilisys to say that '*We had an update from the latest discussion about when we could arrange environments and more importantly connectivity with BT, and the answer I got was not going to be acceptable. So could you please go ahead with the set of environments. We have a route to resolve the commercial issue which was holding us up, but the technical delivery of connectivity meant we would not be able to use this approach.*': JB 523.
November 2015	By 2 November 2015, Agilisys had setup the two development and test environments themselves: para. 12.7.15 of Claire Conaghan's WS and Weekly Update for EI 3 November 2015 – JB249 p5958 (Action 4 – EI Infrastructure to be built by Agilisys Digital showing as Blue (complete) with an estimated due date of 02/11/2015). CGI agreed to pay Agilisys for these: see Invoice in JB 2127. Again, as with the ERP project, it is striking that Agilisys were able to setup environments within a matter of weeks, whereas CGI had been unable to do so at all for the prior 6 weeks. However, insofar as Biztalk environments to support EI, and the more permanent Environments were concerned, they remained with CGI. They followed essentially the same path as the ERP Development environment. This can be seen by comparing the narrative of RN003 and RN001: see JB 10 – 12. Reference is made to that chronology, but for summary purposes it was as follows.

	As is recorded on 5 November 2015, CGI held an internal meeting appointing Maciej Olejnik as project manager and Sebastian Wood as the primary architect for both ERP and EI Environments (including Biztalk). Around 11 November 2015 Sebastian Wood held meetings with Shepherd Chengeta of Agilisys, and planned to engage in an EI and Biztalk environment scoping meeting on 16 November 2015: see weekly update for Infrastructure: JB 557. The same potential issue about internet access being required for access to the EI Biztalk environment is raised, specifically by the Biztalk developers employed by CGI for the purposes of doing the Biztalk redevelopment: see JB 543 at p. 8573.
December 2015	On 8 December 2015, Shepherd Chengeta emailed Richard Salmond saying that he was '*greatly concerned by the pace at which the provisioning of the Development Environment is going. Even the revised date for the availability of this environment (27th November 2015) has come and gone without success. Its my understanding that outstanding issues are: 1. No internet access on the actual Biztalk servers, which will allow service calls to be made 2. Not enough storage on one of the terminal servers…3. One of the developers (Jim McLay) is yet to gain access to the servers. I have a provisional estimate of over 3 months for two developers.*': see JB 648 at p. 9960. Paul Hamilton replies and apologises for the issues they are experiencing. Shepherd replies to say, among other things, that the delay may mean that they need a further Biztalk developer resource: see JB 648. These issues are captured by Paul Hamilton in his snagging list, as per the discussion in the ERP Environments chronology. Again, it will be noted that despite the fact that Agilisys had indicated that the EI Environments, including Biztalk, would require internet access from as long ago as October 2015 the issue appears to come as a surprise to Mr. Hamilton. On 21 December 2015, there is an exchange of emails due to the fact that, although internet access was initially activated in December 2015 following the requests above, it was then switched off due to CGI internal security protocols: see JB 704. Shepherd Chengeta advises that, in relation to the EI Biztalk environment, '*Internet is a critical piece for the EI work and the developers cannot progress until this is resolved.*': see p. 10276 of JB 704. This same internet connectivity issue appears to have stalled any progress from this point until late January 2016 / early February 2016, as per the ERP Development Environment.
January 2016	On 28 January 2016, and one day after RN001 in relation to the ERP Development Environment, Agilisys issued RN003 in relation to delays to the Biztalk server: see JB 12.

February 2016	On 11 February 2016, CGI issued its initial response to RN003: JB 11. It denied responsibility as it said the issues had not been escalated early enough.
	The Weekly Update for 12 February 2016 records that "*Access to Biztalk environments now available, issues still to be resolved (refer to daily tracker for detail)*
	On 17 February 2016, Robert Price replied to CGI about RN003. He provided a detailed timeline summarising much of the above. And he said '*It is simply nonsense to suggest that we haven't escalated this before 19 Jan*': see JB 821. It is submitted that that was plainly correct given the history outlined above.
	The access to the Biztalk Development Environment continued not to be available until around mid-February 2016: it disappears from the Weekly Highlights in the Report for the week ending 22 February 2016 at JB 261, and see generally David Buchanan's WS at para. 8.6.2 – 8.6.10.
	There was, at this stage, still no Biztalk Test Environment in use though, as that did not become available till much later: see Para. 8.7.14 – 8.7.24 David Buchanan's WS.
	At the end of February 2016, Agilisys raised concerns over the quality of the Biztalk development resource: see para. 12.9.8 of Claire Conaghan's WS. Although this is denied by Richard Salmond, he had no very clear recollection of events during the project. And this would be consistent with the fact that access had only just been enabled to the Biztalk infrastructure and so would have been the first opportunity for an issue of this nature to emerge.
	In late February 2016, Kevin Bryce is recruited by CGI for the purposes of being an Environments Manager for the ERP and EI projects.
March 2016	On 3 March 2016, Kevin Bryce emailed a number of internal CGI people to record the fact that he was working to a deadline of 31 March 2016 for the Test and Production Environments for EI: see JB 875. It is a striking feature of his evidence in his witness statement that he makes no specific statements about the progress of EI or his involvement in those environments, particularly as detailed documents were provided at the outset and the issues experienced were different.

	In the course of early March 2016, Mr. Bryce proposed dates of 1 April 2016 for the EI Test and PPE Environments and 29 April 2016 for the Production Environments: see, in particular, the internal emails of 8 March 2016 at JB 900 and the Plan on a Page produced and sent to Agilisys on 14 March 2016 at JB 926, and discussed by David Buchanan at para. 8.7.11 of his WS. Agilisys relied on the plan in planning its activities, although it was also being asked by CGI to explore the possibility of it hosting the AD product: see Niall Sherriffs' WS at para. 4.62. Agilisys' witnesses were consistent in speaking to the fact that they considered they were waiting on information from CGI in order to explore whether that was possible, and there is no evidence that Agilisys consented to defer all work whilst this option was explored: see David Buchanan WS at para. 8.7.12. On 22 March 2016, the EI-Web Project Board formally agreed a re-plan to move the milestone date for Drop 1 to 16 June 2016: see David Buchanan's WS at para. 6.2.
April 2016	CGI missed the deadline of 1 April 2016 for the EI Environments. Accordingly, on 6 April 2016, Agilisys issued RN010 relating to a delay in access to the EI & Biztalk test environment: see JB 19. No clear evidence was given on this point but in April 2016 at the Partnership Board meeting stated that '*work has stopped on this* [i.e. the EI Environments] *while waiting for the quote* [from Agilisys]': see JB 2104 at p.20885. It was discussion on this point between Bob Price and Niall Sherriffs that caused the latter to leave the meeting. On 16 April 2016, Kevin Bryce provided an update, *inter alia*, indicating that the EI Test environment was being targeted for 22 April 2016, and PPE and Production for 29 April 2016. These deadlines were, again, missed. There is nothing, in the witness statements or elsewhere, that suggest CGI were remotely waiting on Agilisys for anything. Against this background, the 22 April Conditions were sent by Louise Ah-Wong requesting, *inter alia*, that CGI agree to RN003: see JB 1069 at p. 12726.
May 2016	On 1 May 2016, CGI issued a composite response re-addressing RN003 and addressing RN010. They granted relief and formally agreed to push the Milestones back consistently with the agreement reached in March 2016.

On 6 May 2016, CGI issued an Environments update indicating that they were aiming to have the EI Test, PPE and Production Environments built by 11 May 2016: JB 1202, and see Claire Conaghan's WS at para. 13.3.4.

On 10 May 2016, David Buchanan recorded that in his discussions this morning with Keith B [Bolton] CGI were not confident they would hit the deadline of the following day: JB 1202.

On 11 May 2016, Martin McNeney and Stephen Waters had a call. Martin stated '*In summary – The EI SIT environment is NOT YET ready. This is still a work in progress (i.e. the CGI target handover COB Tue 10th May has now come and gone.*': JB 1206.

Against this background, on 12 May 2016, Agilisys issued RN012 seeking relief from delay of access to the EI Test, PPE, and Production Environments: see JB 21. The narrative contained therein is clearly referable to the chronology above, and is entirely accurate. The main point being that the absence of a test environment meant that there was simply no prospect of System Integration Testing being able to start on 16 June 2016.

The Weekly Report demonstrates that shortly after this access to the Test Environment was provided but with significant access issues. In particular, the Weekly Report for 16 May 2016 at JB273 p6075 and p6078 record:

> *p6075 "EI Project / Overall Summary…EI Test environment handed over but with restricted connectivity to allow commencement of SIT to proceed 13/05. Critical connectivity issues remain WIP and need to be resolved for SIT"*

> p6078 Risks: *"The remaining environmental build elements are required for EI SIT…Daily environmental review calls to progress agreed solutions and planned delivered dates"* Owner – Stephen Waters

Although this allowed SIT to commence, it was very shortly thereafter suspended: see David Buchanan Supp. WS at paras. 8.7.14 – 8.7.24.

On 20 May 2016, CGI issued its response re-addressing RN010 and addressing RN012. The notice simply stated '*CGI agree to this delay as being CGI Cause*', and envisaged working together to quantify the precise relief.

June - August 2016	On 7 June 2016, the Weekly Report records that the connectivity issues with the Environments had caused SIT to be suspended: *"EI Project / Overall Summary…* • *EI environments (SIT, Pre-Production and Production) including completion of any subsystem connectivity remains problematic. A revised infrastructure (and connectivity) plan has been issued that will not work. This has initiated further re-planning to mitigate impact on EI go-live dates.* • *SIT has temporarily been suspended because of incomplete installation / connectivity of subsystems associated with the SIT environment."*: Weekly Report for 7 June 2016 in JB276 at p6090 The issues with the Test Environment continued until around 27 July 2016, and SIT re-commenced with 'smoke testing' on around 2 August 2016: see David Buchanan WS at para. 8.7.17. The cumulative effect of the delay meant that SIT was not completed until November 2016, which represented a delay of 5 months from the original planned completion date: see David Buchanan's WS at para. 8.7.21. All of the witnesses confirmed that the remaining environments of PPE and Production were not eventually produced until around mid-late August 2016: see Niall Sherriff's WS at para. 4.85, and David Buchanan's WS at para. 8.7.19

APPENDIX 4

1. A preliminary review of the submissions for the pursuer has identified the following
    productions which do not appear to have been spoken to by a witness to fact:

Joint bundle number	Reference in submissions for the pursuer
459	§4.3.4
676	§6.2.2
402	§7.3.2
356	§8.10.5
450	Appendix A, p 1
617	Appendix A, p 4
577	Appendix A, p 4
575	Appendix A, p 4
619	Appendix A, p 5
712	Appendix A, p 6 (mistakenly identified as 702).
1312	Appendix A, p 9
1378	Appendix A, p 9
1372	Appendix A, p 9
569	Appendix B, p 1
587	Appendix B, p 1
589	Appendix B, p 2
621-632	Appendix B, p 3
677	Appendix B, p 3
682	Appendix B, p 4
1037	Appendix B, p 8
1153	Appendix B, p 8 and p 9
920	Appendix B, p 10
1524	Appendix B, p 12
1389	Appendix B, p 16
1616	Appendix B, p 16
247	Appendix C, p 1
249	Appendix C, p 2
252	Appendix C, p 3
450	Appendix C, p 6
503	Appendix C, p 7
520	Appendix C, p 7
249	Appendix C, p 8
545	Appendix C, p 8
649	Appendix C, p 8
700	Appendix C, p 9
740	Appendix C, p 9

261	Appendix C, p 10
276	Appendix C, p 13
2049	Appendix C, p 21

2. In addition, the following productions are referred to by Dr Hunt in her report without having been spoken to by a factual witness:

    a. JB 29;

    b. JB 244;

    c. JB 261;

    d. JB 402;

    e. JB430;

    f. HB441;

    g. JB443;

    h. JB446

    i. JB448

    j. JB498;

    k. JB499;

    l. JB515;

    m. JB550;

    n. JB589;

    o. JB676;

    p. JB811;

    q. JB886;

    r. JB901;

    s. JB903;

    t. JB906;

    u. JB920;

    v. JB932;

    w. JB1171;

    x. JB1280;

    y. JB1304;

    z. JB1336;

aa. JB1381;

bb. JB1402

cc. JB1486;

dd. JB1485;

ee. JB1561;

ff. JB1596;

gg. JB1597;

hh. JB1687;

ii. JB1861;

jj. JB2015;

kk. JB2074;

ll. JB2111;

mm.   JB2112

nn. JB2135;

oo. JB2156;

pp. JB2160;

qq. JB2185;

rr. JB2187-2192.

ss. JB2230

APPENDIX 5

1. A preliminary review of the submissions for the pursuer has identified the following productions which do not appear to have been spoken to by a witness to fact:

Joint bundle number	Reference in submissions for the pursuer	Response for the pursuer
459	§4.3.4	This reference has been removed.
676	§6.2.2	JB 676 was referred to in the Expert Report of Dr Hunt at para 9.3.4 (footnote 224).
402	§7.3.2	JB 402 was referred to in the Expert Report of Dr Hunt at para 3.2.4 (footnote 14).
356	§8.10.5	We will change the reference to JB 651, which is referred to in the WS of Paul Neary at para 3.2
450	Appendix A, p 1	We will change the reference to JB 449 at pg. 7985. Referred to in the WS of David Buchanan at para 5.1.3.
617	Appendix A, p 4	JB 618 and 617 (pg. 9745) put to Kevin Bryce – Day 12 – page 139 of the transcript.
577	Appendix A, p 4	JB 577 put to Peter Hall – Day 3 – page 137 to 138 of the transcript.
575	Appendix A, p 4	JB 575 (pp. 8850 – 8851) in JB 577 (pp. 8859 – 8860), which was spoken to by Peter Hall as above.
619	Appendix A, p 5	This reference has been removed.

712	Appendix A, p 6 (mistakenly identified as 702).	We will change the reference to the WS of Peter Hall at para 7.10 and the evidence of Peter Hall on Day 3, pages 143 and 144 of the transcript.
1312	Appendix A, p 9	Reference should be to JB 1306, which was put to Kevin Bryce – Day 12 – page 136 of the transcript.
1378	Appendix A, p 9	We will change these references to the WS of Peter Hall at para 10.22, JB 1396 (referred to in that paragraph), and the evidence of Peter Hall on Day 3 – page 145 of the transcript.
1372	Appendix A, p 9	
569	Appendix B, p 1	Email is also contained in JB 1753. Referred to in the WS of Ravinder Johal at para 4.2.5
587	Appendix B, p 1	This reference has been removed.
589	Appendix B, p 2	JB 589 is a cover email. The reference is to JB 590, which is document 46 in the appendix to the supplementary WS of David Buchanan. It is also referred to at para 3.2.2 of the Joint Statement of Experts.
621-632	Appendix B, p 3	Referred to in the WS of Ravinder Johal at para 4.15.1
677	Appendix B, p 3	JB 677 is not cited as a reference. In any event the email is contained within JB 683, which was put to David Legge – Day 13 – page 35 of the transcript.
682	Appendix B, p 4	We will change this reference to the WS of Niall Sheriffs at para 3.64

1037	Appendix B, p 8	We will change this reference to the WS of Ravinder Johal at para 4.15.6 (d) and the evidence of Stephen Waters – Day 14 – pages 30 – 31 of the transcript.
1153	Appendix B, p 8 and p 9	On page 8 we will change the reference to JB 1241, which is referred to at para 2.12.2 of the WS of Stephen Waters. On page 9 we will change the reference to JB 1152, which was put to Colin Brown – Day 17 – page 78 of the transcript.
920	Appendix B, p 10	This reference has been removed.
1524	Appendix B, p 12	JB 1524 was put to Colin Brown – Day 17 – page 127 of the transcript.
1389	Appendix B, p 16	This reference has been removed.
1616	Appendix B, p 16	This reference has been removed.
247	Appendix C, p 1	This production was part of a section in the joint bundle (EI Highlight Reports and Weekly Reports) that was put to David Buchanan who confirmed that he had reviewed the items, that they were correctly and accurately described – Day 6 – pages 6 – 11 of the transcript.
249	Appendix C, p 2	As above – see the response to JB 247.
252	Appendix C, p 3	As above – see the response to JB 247.
450	Appendix C, p 6	The response in relation to JB 450 is set out above.

503	Appendix C, p 7	This reference has been removed.
520	Appendix C, p 7	We will change the reference to JB 521, which is referred to in the WS of David Buchanan at para 8.5.3.
249	Appendix C, p 8	As above – see the response to JB 247.
545	Appendix C, p 8	We will change the reference to JB 543 at pg. 8573. This production is referred to in the WS of Niall Sheriffs at para 3.38.
649	Appendix C, p 8	We will change the reference to JB 648 at pg. 9960. This production is referred to in the WS of David Buchanan at para 8.6.2.
700	Appendix C, p 9	We will change the reference to JB 704 at pg. 10276. This production is referred to in the WS of David Buchanan at para 8.6.2.
740	Appendix C, p 9	This reference has been removed.
261	Appendix C, p 10	As above – see the response to JB 247.
276	Appendix C, p 13	As above – see the response to JB 247.
2049	Appendix C, p 21	We will change the reference to JB 2028.

This production is referred to in the WS of Paul Neary at para 3.3. We also refer to the oral evidence of Paul Neary on Day 13 – pages 97 – 99 of the transcript. |

Part 2 of the Note

With reference to Part 2 of the Note, it appears to be correct that most (but not all) of the productions listed in this part of the Note were only referred to by Dr Hunt. We understand from a review we have undertaken this week, that it appears that the same position applies to a material number of the documents referred to by Mr Coyne in his report, i.e. they were only referred to by him. We do not see an issue with this as both experts are referring to documents which they have found as a result of their investigations. The experts were entitled to give evidence in this respect and the reference to the relevant documents by the experts are sufficient for those documents to be in evidence. On this basis, we have not included a document by document response to Part 2 of the Note.