Land	Storbritannien
Domstol	Scottish Court of Session
Parter	David Macbrayne ltd. mod Atos IT Services (UK) ltd.
Dato for afgørelse	5. april 2018
Afgørelsestype	Dom
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OUTER HOUSE, COURT OF SESSION

[2018] CSOH 32

CA98/16

OPINION OF LORD DOHERTY

In the cause

DAVID MACBRAYNE LIMITED

Pursuer

against

ATOS IT SERVICES (UK) LIMITED

Defender

Pursuer: Borland QC, Manson; Pinsent Masons LLP
Defender: Higgins QC, Massaro; CMS Cameron McKenna Nabarro Olswang LLP

5 April 2018

Introduction

[1] The pursuer is a ferry operator. It has a fleet of 33 ferries with which it operates 28 routes serving 24 islands within the Clyde and Hebrides areas. In addition to passengers, the ferries carry cars, coaches, commercial vehicles, livestock, and goods. The defender provides digital services.

[2] For about twenty years prior to 2013 the pursuer used a ticket and reservation system ("Compass") by agreement with a service provider. By 2013 Compass was viewed by the pursuer as outdated and as not meeting its future business requirements and aspirations. Accordingly, the pursuer embarked upon a public procurement exercise. On

22 October 2013 it issued an Invitation to Tender ("ITT") for the provision of a ferry management ticketing and reservation back office managed service with integration capability. That project was called Project Titan ("Titan"). Titan formed one part of a wider business transformation programme which the pursuer envisaged would modernise its business. One of the drivers for modernisation was that in late 2015/early 2016 the Scottish Government was inviting tenders for the award of the contract to operate Clyde and Hebrides Ferry Services for an eight year period from October 2016 ("CHFS2"). The other projects in the wider programme were Digital Platform ("DP"), which would provide the means by which the pursuer's customers would interact online with the new ticketing and reservations system; Veritas, which was a programme to collect and analyse information input by customers and which could be used for future development of the pursuer's services; Valiant, which concerned the installation of a wi-fi infrastructure to provide connectivity for vessels on all of the pursuer's routes, however remote; Portunes, which was an overhaul of the pursuer's processes at harbours and the retraining of staff; and Argonaut, which was a scheme to ensure collaboration and innovation from the pursuer's staff through the use of modernised technology. The defender was only involved in the delivery of Titan.

[3] On 20 December 2013 the defender submitted a Tender in response to the ITT. It emerged initially as one of two preferred bidders, and latterly as the preferred bidder. Between about April and August 2014 the pursuer and the defender discussed the terms of the proposed Agreement. In particular, the pursuer's Mr Ward and the defender's Mr Wright collaborated in order to prepare Part 2.1 of the Schedule to the Agreement. On 5 August 2014 the parties entered into the Agreement. The Agreement set out Milestones which the defender was required to meet by specified Milestone Dates.

[4] Significant delays occurred on the project. On 27 January 2015 the parties agreed to vary Milestone Dates. In July 2015 they agreed to suspend performance of their obligations under the Agreement. Thereafter, attempts to resolve their differences using the Agreement's dispute resolution procedure (culminating in a mediation in March 2016) were unsuccessful. On 20 July 2016 the pursuer terminated the Agreement on the grounds of the defender's material breach.

[5] In this commercial action the pursuer seeks to recover damages from the defender for breach of the Agreement. It maintains that the defender failed to achieve Milestone 7 ("M-7") by the relevant Milestone Date, and that prior to that it had failed to achieve Milestones 3, 4, and 5 ("M-3, M-4, and M-5"). The pursuer contends that as a result of the defender's breaches it was entitled to terminate the contract on 20 July 2016. In response the defender maintains that any failures by it to achieve M-7 or the other Milestones were caused by the pursuer's breach of contract with the result that the defender was not in breach at the relevant Milestone Dates or at the date of termination. If, contrary to the defender's primary position, it was in breach at the Milestone Dates, it does not accept that any of the breaches entitled the pursuer to terminate the Agreement for cause in terms of clauses 55.1 and 55.2; and it contends that even if the defender had been in such breach, the pursuer failed to exercise the right to terminate within a reasonable time. It says that, accordingly, the purported termination was wrongful and a material breach of the Agreement. It has a counterclaim in which it which seeks (i) declarator that the purported termination notice from the pursuer is invalid, and (ii) damages in respect of the pursuer's breach of the Agreement. The matter came before me for a proof before answer.

The Agreement

[6] The Agreement was based on a Government form of contract, the Managed ICT Services Model Agreement (version 2.3)(2011) issued by the Efficiency and Reform Group of the Cabinet Office. In terms thereof the pursuer was the Authority and the defender was the Contractor. The Agreement comprised 41 clauses and a Schedule divided into nine parts. The introduction narrated that the pursuer required "the provision of back office ticketing and ferry reservation solutions in order to develop its business for the future"; and that the defender was a provider of ticketing and reservation solutions and was able to provide ticketing and reservation solutions to the pursuer. The defender bound itself to provide the pursuer with all the managed services to be provided under the Agreement including those set out in Schedule Part 2.1. Part 2.1 was headed "Services Description" and it set out the pursuer's requirements. The initial term was three years, but the pursuer had the option to extend that term. The defender undertook to provide the Services in accordance with the "Implementation Plan" (clause 3). The Implementation Plan was defined as meaning the "Outline Implementation Plan" set out at paragraph 2 of Schedule Part 6.1 or, if and when approved by the pursuer, the "Detailed Implementation Plan". The Outline Implementation Plan set out ten Milestones, *viz.* M-0 Mobilisation, M-1 Phase 1 - Analysis and High Level Design Complete, M-2 Production Environment Build Complete, M3-Phase 1 CUT Complete, M-4 Phase 1 System Test Complete, M-5 Functional Test Execution Complete, M-6 Phase 1 Acceptance Test Complete, M-7 Phase 1 Ready for Go-Live (ATP (Authority to Proceed) and a Critical Implementation Milestone), M-8 Phase 2 System Test Complete, M-9 Phase 2 Functional Test Complete, and M-10 Phase 2 Go-Live (CPP (Contract Performance Point) and a Critical Implementation Milestone). In respect of each Milestone, "Deliverables" were specified which the defender required to provide to the pursuer by the

Milestone Date. In terms of paragraph 3.1 of Part 6.1 of the Schedule the defender was obliged to perform its obligations so as to "Achieve" each Milestone by the Milestone Date, ie when the pursuer was satisfied that all "Tests" relating to a Milestone had been successfully completed and a "Milestone Achievement Certificate" had been issued. On the issue of that certificate in relation to a Milestone the defender became entitled to payment of the "Charge" associated with the Milestone set out in paragraph 2.1 of Part 7.1 of the Schedule. Clause 5 contained general provisions relating to implementation delays, clause 6 dealt with delays due to "Contractor Default", clause 7 provided for delays to Milestones due to Authority Cause, and clause 8 made provision for delays attributable in part to Contractor Default and in part to an Authority Cause. In terms of clause 9.1 the defender was bound to provide the "Services" and to ensure that they complied in all respects with the "Services Description". Clause 21 and Part 9.3 of the Schedule provided for each party appointing a Representative. At the time of contracting the Authority Representative was Andrew Ward and the Contractor Representative was Kenny Gordon. Clause 23 prohibited the defender from sub-contracting any of its obligations without the pursuer's prior written consent. In terms of clause 23.5 and Part 4.3 of the Schedule the pursuer consented to the engagement of two sub-contractors, Hogia Ferry Systems AB (a company registered in Finland) ("Hogia"), and Atos Worldline UK Limited (a subsidiary of the defender) ("Worldline"). The defender notified the pursuer that Hogia would provide the Bookit Ferry and Reservation Product and the Pubtrans public information product, and that Worldline would provide other services. In paragraph 3 of the Appendix to Part A of Part 2.2 of the Schedule the parties acknowledged that Bookit is a commercial off-the-shelf ("COTS") product which would be deemed by the parties to be available for use when the applicable infrastructure, consisting of the Ferry Reservation Management Application and

System that it required for use, was available. Clause 26 and the Schedule Part 8.2 made provision for a Change Control Procedure for altering the Agreement. Clause 27 and the Schedule Part 8.3 made provision for a Dispute Resolution Procedure. Clause 28 imposed obligations on the defender to minimise disruption and discontinuity of Key Personnel employed by it and its subcontractors. In terms of clause 44.1.1 the defender undertook at all times to allocate sufficient resources to provide the Services in accordance with the terms of the Agreement. Clause 44.3 provided that any change in the way in which the defender provided the Services which would materially increase the pursuer's risk or reduce the effect of the governance provisions of the Agreement required to be agreed in accordance with the Change Control Procedure. Clause 44.4 obliged the pursuer to comply with the Authority Responsibilities set out in Part 3 of the Schedule. Paragraph 2 of Part 3 of the Schedule set out certain general obligations, including an obligation to provide sufficient and suitably qualified staff to fulfil its roles and duties under the Agreement (paragraph 2.1.3); and an obligation to use all reasonable endeavours to provide such documentation, data and/or information that the defender reasonably requests that is necessary to perform its obligations under the Agreement (paragraph 2.1.4). Paragraph 3 contained 100 specific Authority Responsibilities relating to the provision of information (1-11), the availability of locations (12-15), the provision of Authority staff (16-30), product acceptance (31-42), infrastructure provision (43-50), operational processes (51-56), training (57-60), digital interface (61-71), internal system (72-76), testing (77-86), system usage (87-88), customer data provision (89-91), and governance (92-100). In terms of clause 55.1 the pursuer was entitled to terminate the agreement by giving written notice of termination to the defender if one or more of the circumstances set out in clause 55.1.5 existed. The circumstances included:

> "55.1.5.2 the Contractor commits a material breach of this Agreement which is irremediable;
> …
> 55.1.5.3 the Contractor's failure to:
>
> (a) achieve a Critical Implementation Milestone … "

M-7 and M-10 were Critical Implementation Milestones. Clause 55.2 provided:

> "The rights of the Authority (to terminate or otherwise) under this clause 55 are in addition (and without prejudice) to any other right or remedy which the Authority may have to claim the amount of loss or damage suffered by the Authority on account of the acts or omissions of the Contractor (or to take any action other than termination of this Agreement)."

In terms of clause 55.3 the pursuer could terminate the Agreement "for convenience" at any time on giving written notice to the defender. Clauses 52 and 58 and the Schedule part 7.2 made provision for the parties' respective liabilities *inter se* in the event of termination.

Clause 62 provided:

> "62. WAIVER AND CUMULATIVE REMEDIES
>
> 62.1 The rights and remedies provided by this Agreement may be waived only in writing by the relevant Representative in a manner that expressly states that a waiver is intended, and such waiver shall only be operative with regard to the specific circumstance referred to.
>
> 62.2 Unless a right or remedy of the Authority is expressed to be an exclusive right or remedy, the exercise of it by the Authority is without prejudice to the Authority's other right and remedies. Any failure to exercise or any delay in exercising a right or remedy by either party shall not constitute a waiver of that right or remedy or of any other rights or remedies.
>
> 62.3 The rights and remedies provided by this Agreement are cumulative and, unless otherwise provided in this Agreement, are not exclusive of any right or remedies provided at law or in equity or otherwise under this Agreement.
> …"

Clause 70.1 stated:

> "Any notices given under or in relation to this Agreement shall be in writing, signed by or on behalf of the party giving it and shall be served by delivering it personally or by sending it by pre-paid first class post, recorded delivery or registered post or by fax to the address and for the attention of the relevant party notified for such

> purpose or to such other address as that party may have stipulated in accordance with this clause."

The evidence

The witnesses and the joint minutes

[7] In advance of the proof each party lodged signed witness statements of witnesses which it proposed to lead. The witnesses who were called to give evidence adopted their statements, which in large part constituted their evidence-in-chief.

[8] In accordance with the *Guidance by the Commercial Judges, The use of signed witness statements or affidavits in commercial actions* (March 2012) ("the *Guidance*"), the pursuer lodged a written note of objections (no 79 of process) to parts of the contents of the witness statements of certain of the defender's witnesses. The basis of the objection was that the passages concerned were inadmissible because they were evidence of negotiations, or of the subjective intentions of the parties, or of their view as to the meaning and effect of the Agreement. While evidence of facts known to or reasonably available to both parties at the time of contracting might be admissible as an aid to construction, the defender gave no notice in its pleadings of any such facts which were founded upon. The pursuer maintained that the passages concerned were therefore inadmissible. Senior counsel for the pursuer was content that the matters objected to, and oral evidence relating to them, should be admitted under reservation of the objection.

[9] The pursuer led evidence from Andrew Ward, Andrew Collier, Isabel Bruce, Martin Dorchester and Anthony Sykes. Mr Ward was heavily involved throughout Titan, initially as a Technical Project Manager and then as the Contract Compliance Officer. Since July 2016 he has been employed by the pursuer as Project Manager for its Smart Ticketing Reservations Project. He was able to speak in considerable detail to the progress of Titan from

the time of conclusion of the Agreement to its suspension. He had prepared comments on the defender's claims (Joint Bundle ("JB") 255), a response (JB 272) to the defender's Obligations Matrix, and a document (JB 273) setting out inadequacies and omissions in the Minimum Viable Product ("MVP") which had been proposed by Mr Burgess. He referred in some detail to the contents of each of these productions and he confirmed that they set out his position. He commented in detail on the witness statements of the defender's witnesses. Mr Collier was the pursuer's Chief Risk Officer between January 2013 and January 2015. He was Operations Director between January 2015 and February 2017. Between November 2011 and January 2013 he had been Head of Commercial Operations. He ceased to be employed by the pursuer in February 2017. In October 2014 he took over from Cathy Craig as Project Sponsor for Project Titan and he was involved thereafter until termination of the Agreement. Ms Bruce is a very experienced management consultant. Between February 2014 and November 2015 she was engaged as Interim Strategic Adviser to the pursuer's chief executive, Mr Dorchester. She had an active role in the project between March 2015 and July 2015, providing a strategic project mentoring function. Mr Dorchester has held the role of chief executive of the pursuer since 2012. He became personally involved in the project when issues were escalated to him in May 2015. Mr Sykes is an expert witness who was instructed on behalf of the pursuer. His expertise is in information technology systems and their delivery. He has many years' experience in that field. He spoke to his report (JB 265) and he commented on Mr Aldridge's reports and Mr Shewell-Cooper's witness statements.

[10] The defender led evidence from Andrew Wright, Anthony Burgess, Jonathan Shewell-Cooper, James Bain, Williamina O'Brien, Richard Robinson, Graeme Bodys, Andrew Knott, Helen Lisa Coleman, and Colin Aldridge. Mr Wright was employed by the defender as a Solution Director. His responsibilities included Project Titan. He was involved in the tender

process and in the contract delivery. Of the defender's witnesses, he was the one best placed to provide an account of the progress of the project from the beginning until April 2015 when he took early retirement. Mr Burgess has been employed by the defender/Worldline in a succession of management roles since about 1999. During Titan he was a Worldline Client Executive. His involvement began late in the contract negotiations and it continued up to the contract termination. Mr Knott has worked for the defender/Worldline for about 12 years. He became involved in Titan in around January 2015. At that time he was appointed as Technical Director of Worldline's Mobility Transaction Services Business Unit. That role involved overseeing the governance process and providing technical support in respect of projects and bids in which Worldline had an interest. His predecessor as Technical Director, David Jennings, had also been one of the key solution architects on the project. However, Mr Knott made it clear that he could not take on both of those responsibilities and that someone else required to be appointed as solution architect. As a result, Mr Bodys, a self-employed IT consultant, was appointed in March 2015 to provide solution architect services for Titan. Ms Coleman was appointed as chief executive of Worldline (UK and Ireland) at the end of June 2014. Before that she had been in executive positions in other companies in the Atos Group and had latterly been in charge of the Group's health business. Her involvement was largely at a strategic, rather than a day-to-day, level. Mr Bain was Worldline's Director of Mobility and E-transactional Services. He was Internal Executive Sponsor for Titan, but his involvement in the project prior to January 2015 was largely as a recipient of reports made to him by subordinates. His involvement escalated from about January 2015. Mr Shewell-Cooper was (and is) employed by Worldline as a Product Governance Manager in the Mobility and E-transactional Services Division. He carried out the role of a Business Analyst on Titan from October 2014. The previous Business Analyst on the

project, Tim Dennehy, had left. While the Solution Architect's role was technical (it involved working out the different elements of the solution and mapping them together), the Business Analyst's role was not. The Business Analyst's job was to analyse the customer's business processes and systems - to discover what business rules and processes are associated with particular contractual requirements - and translate that into how the relevant technology was to be delivered. Mr Robinson was (and is) employed by the Worldline as a Systems Accountant and Business Analyst. Between about September 2014 and the suspension he was one of the Business Analysts working on Titan's finance requirements. Ms O'Brien worked for the defender and Worldline between 2012 and 2016. Her first involvement in Titan was in December 2014 when she was appointed as Project Manager. She took over from Kenneth Gordon, who had resigned in November 2014. She was Project Manager for the remainder of the project. Mr Aldridge was instructed as an expert witness on behalf of the defender. Like Mr Sykes, his expertise is in information technology systems and their delivery, and he too has many years' experience in that field. He spoke to his reports (JB 266, 274 and 328) and he commented on Mr Sykes' report and Mr Shewell-Cooper's witness statements.

[11] The parties agreed the matters set out in the Joint Minute no 85 of process. In terms of a second Joint Minute (no 89 of process) they agreed that two signed witness statements of Tomas Ekblad (no 28 and no 50 of process) could be admitted in evidence and should be taken as comprising his evidence. Mr Ekblad was employed by the defender's subcontractor, Hogia Ferry Systems as a developer and Project Manager. He was involved with Project Titan from around the autumn of 2014. His witness statements described the Bookit package, his involvement in Bookit Workshops, and gaps and issues with Bookit which were raised. He indicated that normally Bookit had been used by ferry operators providing services from just

two or three ports, and that he had not anticipated how much development of the standard Bookit product would be needed for Titan.

[12] The pursuer's witnesses founded upon the defender's failures to meet the relevant Milestones. In their view the defender had been slow in making progress. It had soon become plain that the Hogia Bookit COTS package ("Bookit") would not meet as many of the contract requirements as the defender appeared to have assumed - there were significant gaps and issues. The defender had been under-resourced, and during the project there had been a lack of continuity of key personnel and poor management of the requirements analysis phase and other contract processes. The defender had been left trying to catch up, and it had proposed to do so by changing the methodology of delivery from Waterfall to Agile and by providing an MVP rather than full Release 1 functionality at M-7. The pursuer had become increasingly concerned at the defender's lack of progress and it was prepared to consider and discuss proposals along the suggested lines, but when the defender had eventually come up with proposals they were not acceptable and had been rejected. They had been high risk and the pursuer could not - and did not - have any confidence that they would deliver what the pursuer needed. Notwithstanding that rejection the defender had sought to deliver the proposed MVP, or something which was not materially different to it, at M-7.

[13] The thrust of the defender's evidence was that while it accepted that it bore some of the responsibility for delays which occurred and the failures to meet Milestones, the pursuer had also materially contributed to those delays and failures by failing to fulfil Authority Responsibilities. In particular, it was contended that the pursuer had primary responsibility for setting out the detail which was needed to fulfil the contract requirements - for giving them "granularity"; and that it had failed or delayed to perform its obligations in that regard. It had failed to map the contract requirements to the Bookit processes. It had also

unreasonably delayed or failed to approve specifications, in particular the Retail Hub/API Specification and the ticketing specification. In addition, it had delayed matters by requesting items which were not within the scope of the contract requirements, in particular in relation to finance requirements. The pursuer's witnesses rejected each of these suggestions. They emphasised that at no stage prior to any of the Milestone Dates had the defender given notice under clause 5.1 that failure to achieve a Milestone was likely because of an Authority Cause. The defender's witnesses' response was that they had been intent on adopting a co-operative and facilitative approach, rather than "reaching for the contract". While they accepted that the defender had not delivered the full Release 1 functionality required for M-7, Mr Bain indicated that he thought the pursuer was "happy" to defer functionality on the basis set out in Mr Ward's spreadsheet (JB 112). It was his understanding that the pursuer consented to less functionality being provided at M-7 provided that what was supplied sufficed to enable the winter timetable to "go live" for commercial vehicle and block/bulk bookings in August 2015. Mr Wright's evidence was that he thought the pursuer agreed to the use of Agile at the meeting on 20 and 21 April 2015; and that he thought there was an openness to deferring functionality provided it could be delivered in time and would not be detrimental to how the pursuer's business was run. The defender's witnesses maintained that sufficient functionality had in fact been delivered on 6 July 2017 by way of the MVP. The pursuer's witnesses denied that it had assented to the provision of something less than full Release 1 functionality for M-7. They had been prepared to consider and discuss such proposals, but both the MVP which had been proposed and the MVP which was delivered had fallen materially short of what would have been needed to go live for the winter timetable, and would have required the pursuer to take unacceptable risks.

[14] There was also dispute as to whether completion of Titan was dependent upon progress being made with other projects in the business transformation. Mr Aldridge and some of the defender's other witnesses maintained that it was; that, in particular, completion of Titan was dependent upon completion of DP, and that DP and other projects were running late. However, Mr Knott's evidence was that DP was not on Titan's critical path, and Mr Aldridge agreed with that in cross-examination. The evidence of the pursuer's witnesses, principally Mr Ward and Mr Sykes, was that performance by the defender of its obligations was not dependent on completion by the pursuer of DP. If anything, completion of DP was dependent upon Titan.

Submissions

[15] Counsel prepared written submissions which they supplemented with oral submissions. They were of considerable assistance to me. What follows is an outline of those submissions.

Senior counsel for the pursuer

[16] Senior counsel for the pursuer submitted that the defender was obliged to achieve the Milestones by the Milestone Dates. In particular, it required to Achieve M-3, M-4, M-5 and M-7 by the revised Milestone Dates of 13 March 2015, 7 April 2015, 8 May 2015 and 6 July 2015 respectively. It failed to do so. The Deliverables in respect of those Milestones were neither delivered nor accepted by the relevant dates. The failure to achieve each of those Milestones was a material breach of contract. The failures entitled the pursuer to terminate the Agreement in terms of clause 55.1.5.2 and 55.1.5.3. The breaches were irremediable. In any case, the failure to achieve M-7 was a failure to achieve a Critical Implementation Milestone.

Termination had been within a reasonable time of the breach. The context was important. The parties had agreed that activity on the project should be suspended from 16 July 2015. Thereafter the parties had sought to resolve their differences using the dispute resolution procedure, without success. The termination had followed within a few months of a mediation.

[17] In terms of the Agreement, by M-7 all Release 1 functionality ought to have been provided and all necessary testing ought to have been carried out. It was common ground that was not done. Whatever may have been delivered on 6 July 2017, it had not incorporated all Release 1 functionality. Nor had the defender produced, at the time of M-7 or at the proof, documentation vouching the testing procedures carried out by the defender and their results.

[18] The pursuer had not agreed to vary the Agreement so as to accept deferment of any of the Release 1 functionality to a date later than M-7. Mr Ward's schedule (JB 112) in no way represented any such concluded agreement. A revised Implementation Plan and revised Milestone Dates had been agreed on 27 January 2015. That agreement effectively compromised any mutual claims which the parties had for delay up to that point in time: *cf De Beers UK Ltd (formerly The Diamond Trading Co Ltd)* v *Atos Origin IT Services UK Ltd* [2011] BLR 274, per Edwards-Stuart J at paragraph 98. Thereafter, the pursuer did not agree to vary the Agreement. It did not agree to, or acquiesce to, the defender's change of methodology from Waterfall to Agile. It did not agree to the defender's proposed MVP - on the contrary, it rejected it. The contentions that the pursuer had waived its rights to object to the defender's change of methodology from Waterfall to Agile (Answer 13 of the defences), or to insist upon "strict compliance by the Defender with the procedural provisions of the Agreement and, in particular, the provisions *anent* Change Requests" (Answer 20 of the defences), or that it was personally barred from following each of those courses, were untenable. Reference was made

to *Armia Limited* v *Daejan Developments Limited* 1979 SC (HL) 56, per Lord Fraser of Tullybelton at p 69 and Lord Keith of Kinkel at p 62; *James Howden & Co. Ltd* v *Taylor Woodrow Property Co. Ltd* 1998 SC 853, per Lord Kirkwood at pp 866I-877A; and *William Grant & Sons Limited* v *Glen Catrine Bonded Warehouse Limited* 2001 SC 901, per Lord Nimmo Smith at paragraph 4 and Lord Clark at paragraph 3. In its written closing submissions the defender also sought to maintain (i) that there had been waiver or personal bar which prevented the pursuer insisting upon compliance with clause 5; and (ii) that the pursuer was personally barred from terminating the Agreement "based upon the Defender only providing the Pursuer with MVP in advance of the M-7 date … the Pursuer had led the Defender to believe that it would accept deferred functionality." Neither of these matters had been pled. In any case, neither waiver nor personal bar was made out in relation to them.

[19] M-7 was not achieved. Nor had delivery of the MVP resulted in M-7 being "substantially reached"- but even if it had been that would not have prevented the defender from being in breach. A major difficulty for the defender was that it had not produced the MVP which it said had been delivered. It ought to have done that as it was the best evidence (*Dickson, Evidence,* Title I of Part III, Chapter 1, para 195; *Walkers, The Law of Evidence in Scotland* (4th ed.), para 18.5.1). It could have preserved or reconstituted the MVP said to have been delivered. The pursuer was prejudiced by not having been able to examine it. A best evidence objection had been taken to secondary evidence of delivery of the MVP and its content, and the objection was insisted upon. In the event that the secondary evidence was admitted, it should be treated with considerable caution given the disadvantage to the pursuer of the MVP not having been produced (*Stirling Aquatic Technology Ltd* v *Farmocean AB (No.2)* 1996 SLT 456, per Lord Johnston at p 456K-L; *Haddow* v *Glasgow City Council* 2005 SLT 1219, per Lord MacPhail at paragraph 16). In any case, the evidence did not allow the court to draw

any safe conclusions as to what was delivered on 6 July 2015. Right up until days before M-7, what the defender said it proposed to deliver fell well short not only of full Release 1 functionality, but also of the functionality which Mr Ward's schedule (JB 112) suggested could not be considered for deferral, and of the functionality which the pursuer needed to operate its business satisfactorily.

[20] On a proper construction of the Agreement the primary obligation to supply granularity to the requirements in Schedule Part 2.1 was the defender's. The contract was requirements based. It was for the defender to decide how those requirements would be met. The pursuer's obligations were mainly responsive - to respond to requests from the defender for information which it reasonably required in order to perform its obligations under the Agreement (see eg Schedule Part 3, General Obligation 2.1.4 and Authority Responsibilities 20 and 92). The defender's suggested construction of paragraph 2.1.4 of Schedule Part 3 was untenable.

[21] The Agreement did not make performance by the defender of its obligations contingent or dependent upon the pursuer progressing any of the other projects in the business transformation. In any case, on the evidence progress of DP was dependent on delivery of Titan.

[22] There was no proper basis for implying into the Agreement any of the terms which the defender suggested ought to be implied, other than a term that the pursuer would not hinder or obstruct the defender in the performance of its obligations under the Agreement. The pursuer had not breached that implied term.

[23] The defender's contention that its failures to achieve the Milestones had been caused by breaches of the Agreement by the pursuer had not been made out. The suggestion that the failures were due to Authority Causes came after the event. No such claim had been made at

the relevant times. That was significant, particularly in view of the defender's obligations under clauses 5.1 and 5.2. The contemporaneous documentation did not support the claims which the defender now sought to advance. It was much more consistent with the account of events given by the pursuer's witnesses.

[24] Most of Mr Aldridge's evidence was problematical. He had made many erroneous assumptions as to the parties' respective obligations. His evidence disclosed an unwarranted tendency to find fault with the pursuer. By contrast, he appeared to be blind to some of the defender's failings and he understated others. Some of the respects in which he suggested that the pursuer had failed to perform Authority Responsibilities were, at best, tenuous and unconvincing. Standing back and looking at his evidence in the context of the evidence as a whole, Mr Aldridge seemed more like an advocate or proponent of the defender's case than an expert fairly and independently endeavouring to assist the court. He provided no satisfactory indication of whether, and if so, how, particular breaches delayed the achievement of M-7 or prevented the delivery of specific functionality required at M-7. He did not distinguish between alleged failures which caused delay up to 27 January 2015 and failures which caused (or continued to cause) delays after that date.

[25] The pursuer had not unreasonably refused or delayed to approve the Retail Hub/API Specification. It had had legitimate concerns which it had made clear to the defender, and which the defender had accepted it needed to address. The pursuer had not unreasonably refused or delayed to approve the finance specification or to finalise the finance requirements. It had raised matters which fell within the ambit of the Schedule Part 2.1 requirements. If, contrary to the pursuer's view, they did not, the appropriate course had been for the defender to bring the matter to a head using the contract machinery by initiating a change request for the disputed items. The pursuer was not in breach of any of its obligations in relation to

ticketing (and, *esto* it was, that was not the cause of the failure of the defender to achieve M-7). The pursuer duly fulfilled its obligations to provide empowered staff. In any case, the complaints made largely related to the workshops. If the complaints had been well founded, any delay caused would have been taken account of when the revised Milestone Dates were agreed on 27 January 2015.

[26] Even if the pursuer had been in breach in any of the respects which the defender suggested, the defender had not demonstrated the specific effect of any such breach in limiting functionality or causing delay. Moreover, it was clear from the evidence that there were causes for which the defender was responsible which were likely to have played a very large part in the failures to achieve the Milestones. It had under-estimated the resources which would be needed to deliver what it had contracted to provide. It had devoted insufficient resources to the performance of its obligations. It had failed to ensure continuity of its key personnel. It had failed to manage the project firmly and efficiently using sufficient and appropriate personnel.

[27] The termination having been lawfully made in terms of clause 55.1, the pursuer was entitled to damages. Clause 52.5.2 expressly entitled the pursuer to recover as a direct loss any wasted expenditure. In terms of clause 55.2 the pursuer's rights under clause 55 were in addition to (and without prejudice to) the pursuer's other rights and remedies. In the circumstances it was open to the court to conclude, and it should conclude, that the proper measure of damages was the pursuer's wasted expenditure (*Haberstitch* v *McCormick & Nicolson* 1975 SC 1, per Lord President Emslie at p 10; *McBryde, The Law of Contract in Scotland* (3rd ed.), para 22-93; *Lancashire Textiles (Jersey) Limited v Thomson-Shepherd & Company Limited* 1985 SC 135, per Lord Davidson at pp 139-140). As matters had turned out, the M-0, M-1 and M-2 Milestone Payments were wasted expenditure. Since the contract had been lawfully

terminated for cause, the Deliverables provided at those Milestones were of no commercial value or benefit to the pursuer. The evidence of Mr Ward, Mr Collier and Mr Dorchester to that effect had been unchallenged and should be accepted.

[28] Since the termination for cause had been lawful, the pursuer should be assoilzied from the counterclaim. Even if the pursuer had not been entitled to terminate for cause, it was clear that on no view had it elected to terminate for convenience in terms of clause 55.3. Neither that provision nor clause 58 was in play. On this hypothesis it had been for the defender to prove that it had suffered loss and damage as a result of the wrongful termination. It had not done that. Even if clause 58 had been in play, the defender would have needed to show that but for the termination it would have met each of the Milestones and received each of the payments. On the evidence that had not been established.

Senior counsel for the defender

[29] The pursuer's "best evidence" objection to the evidence relating to the content of the MVP delivered on 6 July 2015 should be repelled. First, it was misconceived because the MVP was not a physical article - it comprised codes relating to functionality. The best evidence rule was concerned with physical articles (*Walker and Walker, The Law of Evidence in Scotland* (3rd ed.), paragraph 18.5.1). Second, and in any case, the objection came too late. An objection on the ground of the best evidence rule required to be made at the earliest possible stage (*Stair Memorial Encyclopaedia, Evidence* (Reissue), paragraph 136; *Wilson* v *Thomas Usher & Son Limited* 1934 SC 332, per Lord Justice-Clerk Aitchison at p 338; *Tudhope* v *Stewart* 1986 JC 88). If objection was to be taken to the relevant parts of Mr Shewell-Cooper's witness statements it ought to have been done prior to the proof (the *Guidance*, page 3 and footnote 7). No such objection had been made here. Indeed, by the time the objection was first made at the proof

the pursuer had already led evidence from Mr Ward and Mr Collier bearing upon the content of the MVP; and the parties had agreed that all documentary productions (other than JB 267) could be admitted into evidence and taken as read whether spoken to by a witness or not (paragraph 3 of the Joint Minute no 85 of process). The documents admitted in terms of the Joint Minute included documents relating to the content of the MVP which was delivered, such as the RTC report (JB 251). Third, the best evidence rule did not require the production of an article when it was not practical and convenient to produce it (*Morrison* v *Mackenzie* 1990 JC 185). It had not been practical and convenient to produce the MVP here. At no stage had the pursuer requested its production or access to it. There was no prejudice to the pursuer as a result of the MVP not being produced.

[30] The defender did not contend that the MVP which was delivered had contained all the functionality needed to fulfil M-7: it was accepted that the defender did not Achieve M-7. However, the pursuer was personally barred from terminating the Agreement on the basis that the defender had only provided the MVP. The basis for personal bar was as pled in Answers 13 and 20 of the defences, *viz.*(i) neither the pursuer nor the defender had operated the Agreement strictly according to its terms (for example, the Milestone Dates were changed by agreement on 27 January 2015 without use of the change control procedure), and (ii) the pursuer had led the defender to believe that it would accept deferred functionality. In both respects the defender had relied on the pursuer’s conduct to its detriment. Although the defender had acted unilaterally in moving to an Agile methodology in March 2015, the pursuer had been made aware of the change and had acquiesced to it. In the whole circumstances it had not been open to the pursuer to reject the proposed MVP on 27 May 2015, or to treat the MVP delivered on 6 July 2015 as a failure to meet M-7 which entitled it to terminate the Agreement.

[31] Besides, at M-7 and at the time the pursuer purported to terminate the Agreement it had been in material breach. The defender's non-achievement of M-3, M-4, M-5 and M-7 had been caused by the pursuer's breaches. The defender founded upon the pursuer's non-compliance with the 35 Authority Responsibilities referred to in Mr Aldridge's Obligations Matrix (JB 268) (in oral evidence Mr Aldridge had departed from the suggested non-compliance with Authority Responsibility 90), but it placed most emphasis on the following breaches. First, the pursuer unreasonably refused or delayed to approve the Retail Hub/API Specification. Second, it unreasonably refused or delayed to approve the finance specification and to finalise the finance requirements. Third, it unreasonably refused or delayed to provide the defender with more detailed specification of its requirements for ticketing. Fourth, the pursuer was in breach of its obligations (under Schedule Part 3, paragraphs 2.1.2 and 2.1.3 and Authority Responsibilities 17, 19, 21, 22, 23 and 26) to provide appropriate, suitably qualified or "empowered" staff.

[32] In addition, paragraph 2.1.4 of Schedule Part 3 was an onerous obligation (*cf EDI Central Ltd* v *National Car Parks Ltd* 2012 SLT 421, per the Opinion of the Court at paragraph 28 as to what reasonable endeavours involved). Properly construed, paragraph 2.1.4 obliged the pursuer to provide the defender with detailed specification of the Services requirements in sufficient time for the defender to be able to comply timeously with its obligations under the Agreement. In the event that paragraph 2.1.4 did not expressly impose that obligation, such an obligation should be implied. Implication of such a term was justified having regard to the principles discussed in *Marks & Spencer Plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, per Lord Neuberger PSC at paragraphs 14-21. Whether the term was express or implied, the pursuer was in breach of it.

[33] Moreover, on the evidence there were interdependencies between Titan and each of DP, Valiant and Veritas. As at the M-7 Milestone Date, DP, Valiant and Veritas were running late. They were not ready to be tested by the pursuer with Titan. Titan did not delay DP. Given the interdependencies, it was an implied term of the Agreement that the pursuer would take all steps within its powers which were reasonably necessary to enable the defender to perform its obligations under the Agreement; and in particular that it required to manage the interdependencies between Titan and the other projects in the business transformation so as to enable the defender to perform its obligations. The pursuer had breached that implied term.

[34] In consequence, the pursuer had not been entitled to terminate the Agreement in terms of clause 55.1. The defender would have been able to Achieve M-7 by 6 July 2015 and only failed to do so as a result of Authority Causes. Accordingly, it was not in breach of the Agreement as a result of the failure to Achieve M-7 or the earlier Milestones (clauses 7.1 and 7.2.2).

[35] Even if the defender made a partial but material contribution towards the failure to Achieve those Milestones, the pursuer had also been in material breach of its obligations under the Agreement. In those circumstances the defender was able to rely upon the mutuality principle to resist the termination. Reference was made to *Forster* v *Ferguson & Forster, MacFie & Alexander* 2010 SLT 867, per Lord Clarke at paragraph 15. The upshot was that the pursuer had not been entitled to terminate the Agreement, and the termination was wrongful.

[36] In any case, even if the pursuer had been entitled to terminate because of the failure to achieve M-7 and the earlier Milestones, it had only been able to do so within a reasonable time of the breach occurring. More than a reasonable time had expired by 20 July 2016 when the pursuer purported to terminate the Agreement (*Ford Sellar Morris Properties PLC* v *E.W.*

Hutchison Ltd 1990 SC 34, per Lord Sutherland at p 37; *James Howden & Co. Ltd* v *Taylor Woodrow Property Co. Ltd* 1998 SC 853, per Lord Kirkwood at p 871; *McBryde, supra*, paragraph 20-121).

[37] The fact the defender had issued few change requests was not indicative of it having accepted that matters requested by the pursuer fell within the scope of the contract requirements. Generally, the defender's approach had been to seek to accommodate the pursuer's requirements without "reaching for the contract": but that should not disguise the fact that there had been significant "scope creep", particularly in relation to financial requirements.

[38] The pursuer's construction of clauses 5.1 and 5.2 was erroneous. Compliance with clauses 5.1 and 5.2 was merely a pre-condition of seeking compensation under clauses 7.4 or 8. Clauses 5.1 and 5.2 were not "stand-alone" obligations. Since the defender did not claim compensation under clauses 7.4 or 8, clauses 5.1 and 5.2 had not been applicable. The defender had not been obliged in terms of clause 5.1 to notify the pursuer that it would not (or was unlikely to) Achieve any Milestones by the Milestone Date. It had not been obliged thereafter to give full details in writing of the matters specified in clause 5.2. Its non-compliance with clause 5.1 and 5.2 was not a breach of contract. Even if it was, it was not a material breach. Besides, any such breach would not disable the defender from obtaining the relief provided by clause 7.2.2. If failure to give notice in terms of clauses 5.1 and 5.2 would prevent the defender from relying on clause 7.2.2, in the whole circumstances the pursuer had waived the right to rely upon, and/or was personally barred from relying on, that failure. Reference was made to *City Inn Ltd* v *Shepherd Construction Ltd* 2011 SC 127, per Lord Osborne at paragraphs 65-75. The pursuer never raised the issue of the need for such notices, notwithstanding the fact that the defender complained to the pursuer that it was causing delay and that this was going to cause

the defender to miss Milestones. Neither party was serving notices under clause 5 or clause 6: rather, both parties were working collaboratively to progress the project. The defender reasonably believed that service of clause 5 notices was not necessary. That belief was induced by the conduct of the pursuer. The defender conducted itself on the basis of that belief.

[39] Since the pursuer was not entitled to terminate the Agreement for Cause in terms of clause 55.1.5 or clause 55.1.5.2, the termination had been wrongful. Decree of declarator should be pronounced in terms of the first conclusion of the counterclaim. The only contractual basis for termination which had been open to the pursuer had been termination for convenience in terms of clause 55.3. The fact of the matter was that by 20 July 2016 it had suited the pursuer to terminate the Agreement. Circumstances had changed since the Agreement had been concluded. Bidding for the CHFS2 contract on the basis of Compass had become a viable option, and such a bid by the pursuer had been accepted by the Scottish Government on 19 May 2016. The realities were that by the time it terminated the Agreement the pursuer had no longer needed Titan, and the termination had been a termination for convenience. That being so, the contractual Termination Payment was due (clause 58.2 and the Schedule Part 7.2, paragraphs 2 and 3); or if not contractually due it nonetheless represented the proper measure of damages. But for the wrongful termination the defender would have invoiced further sums totalling £3,335,678 during the remainder of the initial term of the Agreement. Decree for that sum should be pronounced in terms of the second conclusion of the counterclaim.

[40] If, contrary to the defender's submissions, the defender was in material breach of contract in failing to Achieve M-7 and the earlier Milestones, the pursuer had failed to prove that it was entitled to recover any of the damages which it claimed. There was no contractual right to repayment of the M-0, M-1 and M-2 Milestone Payments on termination. The claim was for damages. Damages were compensatory not restitutionary (*Scottish Law Commission,*

Report on Remedies for Breach of Contract (April 1999) (Report No 174), paragraphs 8.29 - 8.35; *Scottish Law Commission, Discussion Paper on Remedies for Breach of Contract* (July 2017) (DP No 163), paragraphs 7.4 - 7.6). There was no presumption that a party's loss was at least equivalent to the price paid under the contract (*Scottish Law Commission,* Report No 174, paragraph 8.35; *cf* the position in English law, *Khan* v *Malik* [2011] EWHC 1319 (Ch), per Deputy Judge Christopher Nugee QC (as he then was) at paragraphs 121 -132; *Royal Devon and Exeter NHS Foundation Trust* v *ATOS IT Services UK Ltd* [2017] EWHC 2197 (TCC)). It was for the pursuer to establish that it had suffered a loss as a result of the defender's breach (*Duncan* v *Gumleys* 1987 SLT 729, per the Opinion of the Court delivered by Lord Justice-Clerk Ross at p 734E-K; *McBryde, supra,* paragraph 22.93). It had failed to show that. Since the services in return for which those payments had been made had been duly supplied to the pursuer by the defender, the payments had not been wasted expenditure (notwithstanding the evidence of Mr Ward, Mr Collier and Mr Dorchester that ultimately the pursuer had obtained no commercial benefit from the payments) (cf *Khan* v *Malik, supra,* at paragraphs 130 -132; *Stocznia Gdanska SA* v *Latvian Shipping Co* [1998] 1 WLR 574, per Lord Goff of Chieveley at p 588 and Lord Lloyd of Berwick at pp 599-600). In Scots law in order to establish that costs were wasted costs it was necessary to show that the expenditure would have been recovered had the contract been performed (*Dawson International plc* v *Coats Paton plc* 1993 SLT 80, per Lord Prosser at pp 99F-100K). The pursuer had not demonstrated that here.

[41] In any case, in failing to accept the MVP the pursuer had failed to mitigate its loss. It would have been reasonable for the pursuer to follow that course. Reference was made to *Payzu Ltd* v *Saunders* [1919] 2 KB 581, and to *Nolan* v *Advance Construction (Scotland) Ltd* [2014] CSOH 4, 2014 SCLR 351, per Lord Woolman at paragraph 76.

Decision and reasons

Interpretation of the Agreement

[42] Senior counsel for the defender, and Mr Aldridge and several other of the defender's witnesses, appeared to proceed upon the basis that since the pursuer was aware of, and had agreed to, the proposed sub-contracting by the defender of aspects of the services (eg Hogia's provision of Bookit), it was obliged to investigate the nature and scope of those sub-contracted services. In my opinion the pursuer had no such obligation. The requirements were outputs based, and the obligation to deliver them to the pursuer remained the defender's, irrespective of the defender's use of subcontractors. It was for the defender to ensure that the overall package of services which it delivered to the pursuer satisfied the contract requirements. In so far as the defender relied upon Bookit to fulfil a requirement (in whole or in part), it was up to it to ensure that it did indeed do so.

[43] Senior counsel for the pursuer accepted that it was difficult to resist the implication of a term that the pursuer would not hinder or prevent the defender from performing its obligations under the Agreement. In my opinion he was right to do so (*McBryde, supra,* paragraph 20-16; *E & J Glasgow Limited* v *UGC Estates Limited,* May 16, 2005, per Lord Eassie at paragraph [39], and authorities there referred to, including *Scottish Power Plc* v *Kvaerner Construction (Regions) Ltd,* 1999 SLT 721). In my opinion a term falls to be implied that the pursuer would not hinder or prevent the defender from performing its obligations, save in the proper exercise by the pursuer of its rights and powers under the Agreement.

[44] I am not persuaded that paragraph 2.1.4 of Part 3 of the Schedule ought to be construed in the way the defender suggests. The suggested construction is not the ordinary and natural reading of the provision. The language of paragraph 2.1.4 is indicative of the obligation imposed on the pursuer being a responsive, collaborative obligation, rather than an

obligation to take the lead in further articulating the granularity of the Services requirements. It involves providing documentation or information which the defender reasonably requests as being necessary to perform its obligations; but the primary obligation in relation to requirements analysis and capture is the defender's. In my opinion nothing in the other terms of the Agreement or in the surrounding circumstances at the time of contracting suggests that the provision ought not to be given its ordinary meaning. The requirements specified in Part 2.1 of the Schedule were outputs based. Subject to satisfying all of its obligations under the Agreement, precisely how those outputs were to be delivered was a matter for the defender. No doubt the defender's preference would be to do so in a way which pleased the pursuer. But the Agreement did not entitle or oblige the pursuer to dictate to the defender what the granularity should be.

[45] For similar reasons I am not persuaded that it was an implied term of the Agreement that the pursuer provide the defender with specification of the granularity of the requirements in sufficient time for the defender to be able to comply timeously with its obligations. Implication of the proposed term is premised on the basis that it was for the pursuer to supply the granularity of the requirements. As already indicated, in my opinion that premise is not well-founded. What is more, the pursuer's general and specific obligations were set out in considerable detail by the parties in Part 3 of the Schedule. Having regard to these, and to the implied term not to hinder or prevent the defender performing its obligations, in my opinion it is not necessary to imply the further suggested term in order to give the Agreement business efficacy.

[46] In my view the defender's obligations under the Agreement to deliver the M-3, M-4, M-5 and M-7 Deliverables were not expressly or impliedly contingent or dependent upon the pursuer progressing any of the other projects in the business transformation. How the

pursuer managed the other projects was a matter for it. It was no concern of the defender. All that the defender had to do was deliver what it had contracted to deliver. That included APIs to interface with some of the other projects, but provision of those interfaces was not dependent on the state of readiness or otherwise of those projects.

[47] I turn to the parties' opposing interpretations of clauses 5 and 7 of the Agreement. Clauses 5 and 7 provided:

> "**5. IMPLEMENTATION DELAYS - GENERAL PROVISIONS**
>
> 5.1 If, at any time, the Contractor becomes aware that it will not (or is unlikely to) Achieve any Milestone by the Milestone Date it shall, as soon as reasonably practicable, notify the Authority of the fact of the Delay and summarise the reasons for it.
>
> 5.2 The Contractor shall, as soon as reasonably practicable and in any event not later than ten (10) Working Days after the initial notification under clause 5.1 give the Authority full details in writing of:
>
> 5.2.1 the reasons for the Delay;
>
> 5.2.2 the consequences of the Delay; and
>
> 5.2.3 if the Contractor claims that the Delay is due to an Authority Cause, the reason for making that claim.
>
> 5.3 Whether the Delay is due to an Authority Cause or not, the Contractor shall make all reasonable endeavours to eliminate or mitigate the consequences of the Delay.
>
> 5.4 Where the Contractor considers that a Delay is being caused or contributed to by an Authority Cause the Authority shall not be liable to compensate the Contractor for Delays to which clauses 7 or 8 apply unless the Contractor has fulfilled its obligations set out in, and in accordance with, clauses 5.1, 5.2 and 5.3.
>
> 5.5 Any Disputes about or arising out of Delays shall be resolved through the Dispute Resolution Procedure. Pending the resolution of the Dispute both parties shall continue to work to resolve the causes of, and mitigate the effects of, the Delay.
> …
>
> **7. DELAYS TO MILESTONES DUE TO AUTHORITY CAUSE**
>
> 7.1 Without prejudice to clause 5.3 and subject to clause 5.4, if the Contractor would have been able to Achieve the Milestone by its Milestone Date but has failed to do so

as a result of an Authority Cause the Contractor will have the rights and relief set out in this clause 7.

7.2 The Contractor shall:

7.2.1 subject to clause 7.3, be allowed an extension of time equal to the Delay caused by that Authority Cause;

7.2.2 not be in breach of this Agreement as a result of the failure to Achieve the relevant Milestone by its Milestone Date;

7.2.3 have no liability for Delay Payments in respect of the relevant Milestone to the extent that the Delay results directly from the Authority Cause; and

7.2.4 be entitled to compensation as set out in clause 7.4.

…"

Part 1 of the Schedule contained *inter alia* the following definitions:

"…

'Authority Cause'	any breach by the Authority of any of the Authority's Responsibilities …;
…	
'Authority's Responsibilities'	the responsibilities of the Authority specified in Schedule Part 3 (Authority Responsibilities);
…	
'Default'	any breach of the obligations of the relevant party … or any other default, act, omission, negligence or statement of the relevant party, its employees, servants, agents or Sub-contractors in connection with or in relation to the subject-matter of this Agreement and in respect of which such party is liable to the other;
'Delay'	the period of time by which the implementation of the Services by reference to the Implementation Plan is delayed arising from a failure to Achieve a Milestone;

..."

[48] Senior counsel for the pursuer submitted that clause 5.1 obliged the defender to notify the pursuer if it became aware that it would not (or was unlikely to) Achieve any Milestone by the Milestone Date; and that clause 5.2 further obliged the defender to give the pursuer full details in writing of the matters indicated within the time specified. On the

other hand, senior counsel for the defender maintained that clauses 5.1 and 5.2 were merely procedural requirements which had to be met if a claim for compensation for Delay in terms of clause 7.4 was to be advanced. They were not free-standing substantive obligations. Failure by the defender to comply with them was not a breach of the Agreement.

[49] In my opinion the pursuer's construction of clauses 5.1 and 5.2 is correct. On an ordinary reading of those provisions they impose substantive obligations on the defender. I am not persuaded that they only apply where a claim for compensation is advanced. First, they address *all* cases where the Contractor becomes aware that it will not, or is unlikely to, Achieve any Milestone by the Milestone Date, whether or not the Delay is due to an Authority Cause. Many of the circumstances where clauses 5.1 and 5.2 may be triggered are not circumstances where a claim for compensation will arise. Second, in all cases where failure to Achieve a Milestone is anticipated the Authority has an obvious interest in obtaining the relevant notification and information so that it may properly consider an appropriate response. That is especially the case where the Contractor maintains that Delay is due to an Authority Cause. Hence the obligations to notify the Authority of the anticipated failure and summarise the reasons for it as soon as reasonably practicable (clause 5.1), and to provide full details of the matters specified in clause 5.2.

[50] Senior counsel for the defender also maintained that while it was a precondition of the right to make a claim for compensation under clause 7.2.4 that clauses 5.1 to 5.3 had been complied with, there was no such precondition to obtaining the relief provided by clause 7.2.2. While I agree that an ordinary reading of clause 7.1 suggests that is correct, there are other indications to the contrary (for example, clause 7.5 contemplates the existence of a contractor's analysis in terms of clause 5.2). However, since I do not understand the

pursuer to contend that compliance with clauses 5.1 and 5.2 is a pre-condition of obtaining relief in terms of clause 7.2.2, it is unnecessary to decide the point.

[51] Finally, while the right of the Authority to terminate for cause (clause 55) is not expressly qualified by any time limit, both parties proceeded upon the basis that a term should be implied that the right had to be exercised within a reasonable time of the occurrence of the breach founded upon. I agree that implication of such a term is justified having regard to the principles discussed in *Marks & Spencer Plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd, supra.*

Credibility and reliability

[52] While I am satisfied that each of the witnesses gave evidence to the best of his or her recollection, and that no issues of credibility arise, there are material parts of the evidence of Mr Wright, Mr Burgess, Mr Shewell-Cooper, Mr Bain, Mr Robinson, Ms O'Brien, Ms Coleman, Mr Knott and Mr Aldridge which I do not accept. While I do not doubt that these witnesses have convinced themselves that the defender was more sinned against than sinner, and that those views are sincerely held, I do not agree with them. In my opinion the starting point of each witness was wrong. Each erroneously assumed, to a greater or lesser degree, that the onus lay on the pursuer to flesh out the granularity of the requirements in the Schedule Part 2.1. That misconception was at the root of their unfounded view that material fault for delay lay with the pursuer. The reality is that the defender did not manage the process of fleshing out the detail of the requirements in an efficient and effective way. Similarly, as I explain below, several of these witnesses wrongly attributed to the pursuer the delays which arose as a result of Bookit gaps and issues. The fact is that the defender seriously over-estimated the extent to which Bookit would meet the contract requirements.

The work required to perform its obligations under the Agreement was far greater than it appreciated at the time of contracting. Perhaps because they regarded the pursuer's case as an attack upon them and the defender, some of the witnesses were rather defensive, and were inclined to minimise or overlook points which were unfavourable to the defender, or were overly ready to attribute blame to the pursuer. The contemporaneous evidence - including the minutes of meetings and the lack of any clause 5 notices at the material times (giving notification that failures to meet Milestones were attributable to Authority Causes) - accords better with the evidence of the pursuer's witnesses.

[53] At times Mr Burgess' evidence was immoderate. While I do not doubt that he had the best of intentions in following the course which he did from March 2015, and that his aspiration was that the proposed MVP would allow the pursuer to go live with the winter timetable, there is no escaping that it was a high risk strategy, and that the defender was to blame for finding itself in the position which it did. Ms Coleman seemed prone to minimising the defender's failings and to emphasising perceived failings on the part of the pursuer. Her disparagement of the pursuer's personnel and their capabilities was unjustified in my view. The dismissive way in which Mr Bain dealt with the pursuer's comments on the Retail Hub/API Specification did not inspire confidence in his evidence. Ms O'Brien did not seem to have a particularly good command of detail or a firm grasp of the parties' respective obligations. She considered, for example, that the defender did not require the pursuer's agreement to change from Waterfall to Agile. Frequently during her evidence she did not focus on answering the question put to her, but took the opportunity to make points of her own (often at some length). At times Mr Robinson came across as rather dogged and unyielding. These were additional factors which made me less inclined to

accept the evidence of these witnesses where it differed from the evidence of the pursuer's witnesses or from the documents.

[54] I had difficulty with a good deal of Mr Aldridge's evidence. As with the other witnesses, I do not doubt the sincerity of his views, but in my opinion his evidence was undermined by several flaws. He saw fit to criticise the pursuer in relation to pre-contractual matters, including the form of contract selected. It was evident that his understanding of the respective obligations of the parties under the Agreement was erroneous. He considered, in my view wrongly, that the onus lay on the pursuer to set out the granularity of the requirements in the Schedule Part 2.1. He also proceeded on the basis that it was incumbent upon the pursuer to map the contract requirements to the Bookit processes. During re-examination he indicated that the source of that obligation was Authority Responsibility 87, but senior counsel for the pursuer objected to that evidence. The evidence was admitted under reservation of all questions of competency and relevancy. In its closing written submissions the pursuer insisted in the objection. It is convenient to record here the basis of the objection and my ruling upon it. The objection was (i) that the point was not a matter founded upon in the defender's pleadings and it had not been articulated in Mr Aldridge's reports; (ii) that there was no production showing any form of delay analysis in relation to it; (iii) that the point, and the question of its impact, had not been put to Mr Sykes or the pursuer's other witnesses. Although there is force in each of these points, I shall repel the objection. I am not persuaded that the nature of the evidence is such that the lack of reference to it in the pleadings or in Mr Aldridge's reports ought to prevent it from being admitted. Rather, it seems to me that the points made by the pursuer are legitimate matters for comment, and they would have made me cautious of giving any significant weight to the evidence. However, the matter is rather academic, because in my

opinion Responsibility 87 did not impose the suggested obligation. It provided that the Authority was responsible for all data configuration within the Contractor System: it was nothing to do with mapping the contract requirements to the Bookit processes. On a proper construction of the contract it was for the defender to satisfy all of the contract requirements, whether that be through Bookit or by other means. It was the defender's responsibility, not the pursuer's, to demonstrate just how it proposed to do that.

[55] Mr Aldridge's misunderstanding of the parties' respective obligations undermined his conclusions that material fault for delay lay with the pursuer. His conclusion that lack of knowledge, availability and empowerment of the pursuer's staff was the principal cause of delays to the requirements phase is at odds with both the proper analysis of the parties' respective obligations and with the evidence. Points unfavourable to the defender were downplayed or not mentioned. The pursuer's issues concerning the API/Retail Hub Specification were not given the significance which they deserved. Mr Aldridge's evidence that the MVP would have provided the pursuer with sufficient functionality was qualified by vague reference to the need for the defender to provide "workarounds" which were not specified or adequately explained. His "overall conclusions" attributed delay to (i) the delays in finalising and accepting requirements (for which the pursuer was "predominantly responsible") and (ii) "failure" by the pursuer to agree to an Agile approach in November 2014 and to agree to an Agile approach with parallel testing in March 2015 (for which the pursuer was "wholly responsible") (JB 266, section 2, para 3.2). However, in my opinion the pursuer was perfectly entitled to withhold assent to the adoption of an Agile approach and all that that would involve; and having regard to the evidence as a whole I think the predominant responsibility for the delays in setting out the granularity of requirements lay with the defender.

[56] On the other hand, each of the pursuer's witnesses was impressive. They came across as being careful and moderate in their evidence (Mr Ward and Ms Bruce were particularly impressive). Their evidence inspired confidence. Of all the witnesses, Mr Ward was the one who was able to give the most reliable and detailed account of the progress of Titan from the ITT until the suspension of work. Mr Sykes' evidence was measured and fair, and I found it to be of considerable assistance. For the most part, I found his analysis and opinions to be much more persuasive, and much more in line with the facts as I see them, than Mr Aldridge's views.

The pre-contractual period

[57] The evidence relating to pre-contractual matters was admitted under reservation. During closing submissions it became apparent that all that the defender sought to take from it was that the parties - or anyone placed in their position - would have understood at the time of contracting that at least some of the Authority's Requirements set out in Part 2.1 of the Schedule would have to be more fully elaborated in order for the services to be delivered. While at points some of the pursuer's witnesses appeared to give evidence which was resistant to that proposition, ultimately I did not understand it to be disputed that a hypothetical contractor in the position of the parties at the time of contracting would have appreciated that during the analysis phase greater "granularity" would need to be achieved in respect of many of the requirements. In any case I am satisfied that that is indeed the case. It is plain that the Agreement was premised upon there being an analysis phase when the requirements would be "worked up". As the evidence disclosed, that was one of the features of a Waterfall methodology. The parties were at one (and it is clear from the Milestone approach taken in the Outline Implementation Plan, the Implementation Plan,

and the Revised Implementation Plan) that it was understood that a Waterfall approach was being followed.

[58] I shall allow the evidence relating to pre-contractual matters to be admitted for the limited purpose described above. *Quoad ultra* I shall sustain the pursuer's objection to that evidence.

Factual outline

[59] It is convenient at this stage to provide an outline of the facts.

Waterfall and Agile

[60] Waterfall is a sequential methodology of software development. Broadly speaking, the starting point is generally contract requirements specified at a relatively high level from which more detailed functional and technical specifications are produced. Relevant coding and documentation are then derived using those specifications. Each module of software is then tested by itself and in conjunction with the other modules till the whole system is complete and working.

[61] By contrast, with Agile development the supplier undertakes a series of very short software developments ("sprints") based on iterative incremental development which eventually build up to the complete system. Requirements and solutions evolve through collaboration between self-organising cross-functional teams. Significant customer input is usually necessary during the sprints, and customer testing of the module during or at the end of each sprint is common.

[62] Part 2.3 of the Schedule to the Agreement provided that the defender should comply with certain standards including:

> "6. SYSTEMS DEVELOPMENT ENVIRONMENT
>
> Any requirements analysis or requirements capture shall be based on Structured System Analysis and Design Methodology, (SSADM) or Dynamic Systems Development Methodology (DSDM) or equivalents (tailored where appropriate and necessary) as agreed with the Authority."

It was common ground that Waterfall is a form of SSADM and that Agile is a form of DSDM. The Outline Implementation Plan, the Detailed Implementation Plan issued on November 2014, and the revised version of the Implementation Plan agreed on 27 January 2015 all proceeded on the basis of a Waterfall approach.

Milestone achievement

[63] Milestone M-0 (Project Mobilisation) was achieved on 6 August 2014 and the pursuer paid the defender the relevant Milestone Payment of £267,140. Milestone M-1 (M-1 Phase 1 – Analysis and High Level Design Complete) was achieved on 22 September 2014 and the pursuer paid the defender the relevant Milestone Payment of £534,280. Milestone M-2 (Production Environment Build Complete) was achieved on 8 December 2014 and the pursuer paid the defender the relevant Milestone Payment of £400,710. M-2 was the last Milestone which the defender achieved.

The period from mobilisation until 27 January 2015

[64] Following mobilisation, the parties worked together with a view to giving granularity to the Schedule Part 2.1 requirements. There were a variety of meetings and other contacts between employees of the pursuer and the defender. Several workshops with a representative of Hogia took place. While the representatives of the pursuer attended all of these workshops, no representatives of the defender attended the initial workshops.

[65] As early as November 2014 it was clear that the defender was experiencing difficulties in adhering to contract requirements and timescales. While on 5 November 2014 it issued a Detailed Implementation Plan with a view to appearing to meet its obligation in that regard, it indicated at the same time that it would not be able to adhere to the plan. At around the same time it proposed changing from a Waterfall to an Agile methodology, but the pursuer was not prepared to agree to that. The defender accepted that decision.

Programme Board Meeting of 27 January 2015

[66] By 27 January 2015 it was plain that progress of Titan was about eight or nine weeks behind schedule. In recognition of this, at the Programme Board meeting on that date the parties agreed a revised version of the Implementation Plan. They also agreed to vary Milestone Dates. M-3 was varied from 12 January 2015 to 13 March 2015. M-4 was varied from 6 February 2015 to 7 April 2015. M-5 was varied from 9 March 2015 to 8 May 2015. M-6 was varied from 17 April 2015 to 25 June 2015. M-7 was varied from 27 April 2015 to 6 July 2015. M-8 was varied from 7 August 2015 to 10 August 2015. M-9 remained 28 September 2015 and M-10 remained 26 November 2015. The changes were intended to take account of the delays which had occurred up to that time. When the variation was agreed the understanding was that provision of Release 1 functionality by 6 July 2015 in accordance with the Agreement would allow the pursuer to go live with the new system in time for the winter 2015 timetable. That would have entailed going live for commercial vehicles and block/bulk bookings (ie regular bookings of vehicles) by 10 August 2015 and going live for all bookings on 14 September 2015, with the system being fully live for the timetable commencing on 26 October 2015. The revised Implementation Plan, like its predecessors, was based on a Waterfall methodology of delivery.

27 January 2015 until 20 April 2015

[67] At the Project Board meeting on 10 February 2015 the defender indicated that it was running behind schedule and that it was likely that M-3 would be a further eight weeks later than the agreed revised date of 13 March 2015. Sometime between 11 and 13 March 2015, unknown to the pursuer, the defender unilaterally departed from the revised Implementation Plan and changed from Waterfall to an Agile methodology. At the Project Board meeting on 31 March 2015 the defender indicated that successful completion of the project was at real risk. It announced that it was going to switch to an Agile method. The pursuer did not agree to that switch or to departure from the revised Implementation Plan. The defender did not achieve M-3 on 13 March 2015 or M-4 on 7 April 2015.

20 April 2015 until 20 May 2015

[68] Meetings took place between representatives of the pursuer and the defender on 20 and 21 April 2015. On 20 April the defender asked the pursuer to consider whether it was essential that all Release 1 functionality was delivered by M-7. In response Mr Ward prepared a spreadsheet (JB 112). The spreadsheet set out his personal view of functionality which would have to be delivered by 6 July 2015 to enable go live for commercial vehicle and block/bulk bookings in August 2015, and other functionality which it might be possible to defer delivery of until later than 6 July 2015. However, Mr Ward indicated that the respective areas of the pursuer's business would need to validate any such deferral. On 24 April 2015 the pursuer wrote to the defender confirming that the dates set out in the revised Implementation Plan were the dates which remained in force. While by the meeting on 20 April 2015 Mr Wright and the defender had agreed that he would take early

retirement with effect from 28 April 2015, the pursuer was not informed of this until 28 April 2015. At a meeting on 27 April 2015 attended by Mr Collier, Ms Coleman, Cathy Craig and Gavin Thomson (the defender's senior vice-president), Cathy Craig stressed the pursuer's concerns about the defender's intention to provide Agile delivery and the pursuer's doubts as to whether proper testing would be possible under such an approach. At a meeting on 28 April 2015 attended by Ms Bruce, Mr Ward, Mr Burgess, Mr Wright and others, issues raised included the pursuer's lack of confidence in the detail of what the defender was planning, and concern that there was potentially insufficient time for testing issues to be fixed.

The MVP

[69] On 20 May 2015 Mr Burgess came to the pursuer's offices. He had not given the pursuer advance notice of his visit. He orally proposed to the pursuer an MVP, which he indicated the defender intended to deliver by 6 July 2015. The pursuer was taken by surprise by the visit and the proposal. There had been no consultation by the defender with the pursuer in relation to the preparation and content of what was proposed. The pursuer asked Mr Burgess to provide the proposal in writing so that it could be fully and properly considered. The following day Mr Burgess emailed a written outline of the proposed MVP (JB 145) to the pursuer.

Rejection of the MVP and events up to 6 July 2015

[70] On 27 May 2015 the pursuer emailed the defender rejecting the proposed MVP. On 1 June 2015 the pursuer's chief executive, Mr Dorchester, met the defender's Ms Coleman. Ms Coleman asked Mr Dorchester to accept the defender's assurances that what was

proposed would be delivered and would be sufficient and in time for opening of the winter timetable in October 2015. Despite the rejection of the proposed MVP, the defender carried on as if it had been accepted. It worked towards delivery of that product, using an Agile methodology. By letter dated 11 June 2015 the pursuer wrote to the defender seeking confirmation that M-7 and M-10 would be delivered in accordance with the Agreement. Ms Coleman's reply of 16 June 2015 (JB 177) was unsatisfactory and failed to provide that confirmation. By letter dated 30 June 2015 Mr Dorchester repeated his request for confirmation. On 1 July 2015 Mr Dorchester and Ms Morgenstern (the defender's chief executive) had a telephone discussion, but the requested confirmation was not forthcoming. On 2 July 2015 Mr Dorchester wrote to Ms Morgenstern proposing a suspension of the project (JB 187) to avoid either party incurring further costs pending a resolution involving delivery in conformity with the Agreement.

6 and 7 July 2015

[71] Notwithstanding the pursuer's rejection on 27 May 2015 of the proposed MVP, at 17.19 on 6 July 2015 Ms O'Brien sent the following email to the pursuer's Mr Ward and Mr Todd:

> "…
> Subject: Deployment of MVP in to DML Pre-Production
>
> Dear Sirs:
> We wish to inform you that we have delivered the MVP ('minimal viable product' – Sprint 0 to 7, HOGIA batches 1, 2, & 3) and deployed into the DML Pre-Production Environment, for User Acceptance Testing (UAT). This delivery milestone is alignment with the current project implementation plan that Worldline is working to. In addition, this release incorporates 69 APIs that can be called by the Digital Platform.
>
> We are actively refreshing the Pre-Production environment with the Production data and this due to be completed by 9PM this evening. Upon completion of the refresh,

> the environment will be available for you to test... We welcome any feedback on the release.
> …"

By email at 10.45 the following day Mr Ward responded to Ms O'Brien:

> "…
> I would be grateful if (sic) could provide us with a definitive list of the functionality which has been delivered, against your requirements matrix.
>
> Please also be advised that data from the Production Environment does not appear to have been copied in to the Pre-Production Environment, which we understood was scheduled to commence on Thursday 2/7, and per your note yesterday, was also scheduled to be refreshed by 9pm yesterday.
> …"

Ms O'Brien did not respond to Mr Ward's request.

Suspension to termination

[72] The parties mutually agreed that project activity be suspended with effect from 17:00 on 16 July 2015 pending resolution of the issues which had arisen between them. Thereafter the parties corresponded and arranged a meeting on 12 November 2015 to discuss possible resolution. The meeting took place but the dispute was not resolved. The formal dispute resolution procedure was instigated. A mediation took place on 24 March 2016, but no resolution was reached. The defender gave notice of termination of the agreement on 20 July 2016 (JB 210).

Compass and CHFS2

[73] The pursuer's contract for the provision of the Compass ticket and reservations system was due to expire at the end of 2015. In June 2015, by which time it had become apparent that M-7 was likely to be missed, the pursuer required to negotiate, and pay a very substantial fee for, a temporary extension of Compass. In early 2016 the pursuer submitted

its tender for CHFS2. The tender was based on the ticket and reservation system being Compass. In May 2016 the pursuer was awarded the CHFS2 contract.

The defender's assessment of the contract requirements and the resources which it allocated to delivery of the services

[74] I formed the clear view on the evidence that the defender had significantly over-estimated the extent to which the standard Hogia Bookit product would meet the contract requirements. This was one of the major respects in which it under-estimated the work which it would have to do to deliver those requirements.

[75] It was also evident (partly because of the over-estimation of the extent to which Bookit would meet the requirements), that the defender was under-resourced at the outset of the project, and that it continued to have insufficient appropriate personnel allocated to it until at least its later stages.

[76] Moreover, it seems to me that the performance of some of the defender's personnel was disappointing; and that discontinuity of personnel in critical project roles was also detrimental to the timely performance of the defender's obligations. Mr Gordon, Mr Dennehy, Mr Jennings and Mr Wright moved on during the course of the project. It was clear from Mr Bodys' evidence that when he joined the project in March 2015 the defender's project team was significantly under-resourced and that it had to be supplemented.

[77] The combined effect of these failings was that the defender found itself playing catch up to try and meet Milestones.

Breach by the pursuer and Authority Cause?

[78] I am not satisfied that the pursuer was in breach of the implied obligation not to hinder or prevent the defender from performing its obligations, or that any such breach materially contributed to the defender's failure to achieve any of the Milestones. I am also not satisfied that any of the failures to achieve Milestones were caused or materially contributed to by breaches by the pursuer of its obligations under the Agreement. The defender's case smacked very much of being a retrospective attempt to deflect blame for its failures to achieve Milestones.

[79] I am not persuaded that the performance by the defender of its obligations was hindered or prevented by the state of progress of any of the other projects in the business transformation. In particular, it was not necessary for DP to be live in order for the defender to carry out its testing obligations in respect of the Retail Hub/API Specification. In the event that DP was not live when the defender needed to test, it could carry out stub testing on its side of the interface. Mr Aldridge and Mr Knott accepted that DP was not on Titan's critical path. Indeed, there was persuasive evidence from Mr Sykes and Mr Ward that Titan may have held up DP, and Mr Bodys' evidence also provided some support for that view.

[80] Many of the Authority Responsibilities which Mr Aldridge maintained were not complied with concerned four matters which he emphasised. I deal with those four matters in more detail below. In relation to them and the other instances of suggested non-compliance, I found Mr Ward's and Mr Sykes' evidence more persuasive than the evidence of Mr Aldridge and the defender's personnel. For the reasons given by Mr Ward and Mr Sykes, I am not satisfied that there was material non-compliance. In so far as there may have been any instances of non-compliance, I am not satisfied any resultant breach of contract was material, or that it was a material cause of any of the Milestone failures.

[81] The first of the matters which the defender and Mr Aldridge emphasised was the contention that the pursuer unreasonably refused or delayed to approve the Retail Hub/API Specification. I do not accept that there was any such failure. For a period of about ten weeks between January and mid-March 2015 the role of the defender's solutions architect was unfilled (between Mr Jennings' departure and Mr Bodys' appointment). In February and March 2015 the pursuer had legitimate concerns about the draft Specification which the defender required to address (see Mr Ward's email to Mr Shewell-Cooper of 07:22 on 5 February 2015 (JB 68) and the minutes of the API Workshop dated 25 March 2015 (JB 222)). Significant further work by the defender was required. There was no suggestion at the time of the Workshop that approval of the Specification was being held up by anything which the pursuer was doing or failing to do. I prefer the evidence of the pursuer's witnesses on this matter - in particular Mr Ward and Mr Sykes - to the evidence of the defender's witnesses. I was particularly unimpressed by Mr Bain's dismissive - and unconvincing - characterisation of the pursuer's feedback as "grammatical and linguistic rather than technical". The contemporaneous documentation provides substantial support for the pursuer's position that it had significant concerns which the defender had not addressed. By 31 March 2015, rather than addressing the concerns and getting approval for the Specification, the defender had decided to "base-line" the Specification and carry on regardless with its Agile development. It continued to follow that course up to the delivery of the MVP on 6 July 2015.

[82] The second emphasised matter was the contention that the pursuer unreasonably refused or delayed to approve the finance specification and finalise the finance requirements. In my opinion the root of the problem in relation to the lateness of discussions on these matters was that the defender had under-estimated the granularity of

the finance requirements and had over-estimated the extent to which Bookit would meet those requirements. It allocated limited resources to this aspect of the project. Mr Robinson indicated that initially it had been expected that part-time work by him over a period of six weeks would suffice. In fact, he had ended up working full-time on it for about nine months. When it became clear that Bookit would not meet as many of the finance requirements as the defender had expected, much more work by the defender was needed. The defender was slow to produce realistic granularity in respect of the finance requirements. That led to the pursuer pro-actively formulating suggested granularity when, if matters had proceeded as the Agreement contemplated, the defender would have taken the lead and the pursuer's input would have been more responsive. The defender was primarily responsible for the process of setting out the detail of the requirements, and in my view that included responsibility for good management of that process. It was for it to take the lead in relation to the finance requirements and to drive the process forward. It was to be anticipated that the pursuer's views might differ in some respects from the defender's. If agreement could not be reached as to what the requirements covered, the appropriate course was for the defender to bring the issue to a head using options available to it under the Agreement. There were several ways in which it could have done that (eg by making a change request in respect of the disputed item (a course which in Mr Sykes' experience was normal where a contractor considered that work was out of scope), or by invoking the dispute resolution procedure). I agree with Mr Ward and Mr Sykes that on this aspect of the project, as with others, there was poor management and governance by the defender.

[83] There were differences between the parties as to whether some of the items the pursuer had wanted were in fact within the scope of the requirements. Mr Sykes and Mr Ward thought that revenue recognition was the sort of thing which would be expected to

fall within the granularity of requirements 6-13-21, 6-13-22 and 6-14-2, whereas Mr Robinson and Mr Aldridge were adamant that it did not. Mr Robinson and Mr Aldridge also thought that there had been an increase in the number of finance reports from 17 to 39. They equated each subject heading listed in the middle column of the Draft List of Report Requirements (in paragraph 9, Appendix B, to Part 4 of the Schedule) as a prescriptive requirement for a report; whereas Mr Ward and Mr Sykes indicated there were 35 contract requirements relating to reports (which requirements were cross-referenced in the following column of the Draft List, and in several cases more than one requirement was listed against a subject heading). Mr Robinson and Mr Aldridge also seemed to think that there had been a change from a requirement of three financial interfaces to nine such interfaces. Mr Ward and Mr Sykes disagreed. They thought that Mr Robinson and Mr Aldridge treated the reference in the requirements to three csvs as if it was a requirement for three interfaces. A csv was not an interface as such - it was a common separated variable. None of these matters involved changes to contract requirements. Rather, they were the sort of configuration/set up requirements one would expect to give effect to the contract requirements.

[84] Generally, and in relation to each of these three matters, I found the evidence of Mr Sykes and Mr Ward to be more persuasive than the evidence of Mr Robinson and Mr Aldridge. I think that Mr Robinson and Mr Aldridge's under-estimation of the scope of the finance requirements, and their error as to who had the primary obligation to provide granularity, coloured their interpretation of the requirements and affected where they drew the line between configuration and change. I am not satisfied that a reasonable and disinterested third party in the position of the parties at the time of contracting would have interpreted the requirements as Mr Aldridge and Mr Robinson did. Nor am I persuaded

that Mr Aldridge and Mr Robinson drew the line correctly between matters of configuration and matters of change.

[85] In any case, I found Mr Sykes' evidence very helpful in putting the issues relating to finance requirements into perspective. The financial requirements were reasonably straightforward. In the scheme of things, there was nothing out of the ordinary in relation to the matters which were being discussed. That was also the general tenor of Mr Ekblad's evidence. Revenue recognition was a very common and normal requirement. The sort of adjustments to ledgers which were being proposed would not normally be considered changes to requirements, as opposed to part of necessary configuration and set up. Thirty-nine finance reports were not very many for a finance system. I accept Mr Sykes' evidence that there were not many out of scope items which the pursuer insisted upon following the expected discussion process, and that none of them caused a critical delay. For a project of this size the number of changes was really quite small.

[86] The reality, it seems to me, is that the real causes of delay in relation to finance issues were the failings of the defender which I have described. I am not convinced that the pursuer unreasonably refused or delayed to approve the finance specification and finalise the finance requirements. Nor am I persuaded that any such refusal or delay, or any scope creep in relation to finance requirements, was a material cause of any of the Milestone failures.

[87] The third emphasised matter was the contention that the pursuer unreasonably refused or delayed to provide the defender with more detailed specification of its requirements for ticketing. Once again, in my opinion, it was for the defender, not the pursuer, to take the lead in relation to the granularity of the ticketing requirements. Moreover, and importantly, the MVP which the defender proposed and delivered did not

offer functionality which would support the printing of tickets - it could only provide functionality which generated confirmations of bookings. The functionality proposed and delivered would not have allowed printing of tickets even if a ticket specification had been agreed and even if appropriate printers were put in place. (In fact, details of printers had been provided and obtaining appropriate printers was unlikely to be a difficult task.) It was the limited functionality rather than the absence of agreement on a ticket specification which was the real problem. I am not satisfied that the absence of a detailed ticket specification was a material cause of any of the Milestone failures.

[88] Finally, the fourth emphasised matter was the contention that the pursuer was in breach of its obligations (under Schedule Part 3, paragraphs 2.1.2 and 2.1.3 and Authority Responsibilities 17, 19, 21, 22, 23 and 26) to provide appropriate, suitably qualified and "empowered" staff. In my view this contention was not made out. The complaint focussed largely upon the workshops which took place during 2014. Once again, on this matter the perception of the defender's witnesses appears to me to have been coloured by their mistaken understanding that the pursuer bore primary responsibility for achieving granularity of the contract requirements and for driving the process forward, and for mapping the contract requirements to the Bookit processes. In any case, I am satisfied on the evidence that the pursuer duly complied with its obligations. Indeed, the evidence points to it having been the defender, rather than the pursuer, whose project staffing was inadequate.

[89] In my opinion it is telling that none of these four matters - nor any of the other suggested breaches by the pursuer - led the defender to notify the pursuer that there would be a Delay in the achievement of a Milestone by a Milestone Date, or that such Delay was due to an Authority Cause (clauses 5.1, 5.2). Had any of the suggested breaches truly caused

such Delay and been due to an Authority Cause, it would have been incumbent upon the defender to give the appropriate notification. I do not think it would have refrained from doing so. I reject the contention that the pursuer waived the right to rely upon the absence of such notification in the event of the defender later claiming that Delay was due to breach by the pursuer. Standing the terms of clause 62.1, the defender's submission is clearly a difficult one. In any case, there was no express abandonment by the pursuer of the right to found upon the absence of such notification in the event of the defender later claiming that Delay was due to breach by the pursuer. Nor in my opinion, looking objectively at the pursuer's conduct, was there an implied abandonment; nor was there any alteration by the defender of its position in reliance upon such abandonment. Neither am I persuaded that the pursuer is personally barred from relying on the absence of such notification. Nothing the pursuer said or did gave rise to a representation that clauses 5.1 or 5.2 would not be relied upon in the event of the defender later claiming that Delay was due to breach by the pursuer. (Indeed, during cross-examination Mr Wright described the fact that the defender did not give notice under clause 5 as "an oversight". He acknowledged that it ought to have done so.) There is no inconsistency between the pursuer's previous conduct and its reliance on the absence of notification, and no unfairness to the defender arises in consequence of that reliance.

[90] Even if, contrary to my view, there were breaches by the pursuer which were Authority Causes, in my opinion it is doubtful whether the defender would have been able to avail itself of clause 7.2.2 relief in respect of its Milestone failures. Its own failings were serious and substantial, and it seems very unlikely that, but for Authority Causes, it would have Achieved the relevant Milestones by the Milestone Dates (clause 7.1).

[91] Besides, whereas there was a clear causal link between the defender's defaults and its failures to meet the Milestones, in my opinion no such connection was demonstrated between the suggested breaches by the pursuer and the Milestone failures. The pursuer's criticisms of Mr Aldridge's approach in this regard appear to me to be well founded. There was no attempt by him at any detailed critical path analysis. I am not satisfied that his attributions of "High", "Medium" and "Low" effects to suggested breaches had any satisfactory objective foundation. Moreover, his evidence did not distinguish between delays which arose prior to 27 January 2015 and delays caused by breaches which occurred (or continued) after that date, even though the revised Milestone Dates which were agreed on 27 January 2015 took account of the delays which had occurred up to that time.

Waiver or personal bar?

[92] The suggested change of methodology from Waterfall to Agile, and any suggested change in the functionality to be delivered (be it the proposed MVP or otherwise), would have been changes "in the way in which the Contractor provides the Services which would materially increase the Authority's risk". Clause 44.3 provided that any such changes "shall be agreed in accordance with the Change Control Procedure".

[93] In Answer 13 of the defences the defender averred:

> "By April 2015, the Defender had, with the knowledge of the Pursuer, adopted the 'Agile' methodology. In light of the Pursuer's failures, there was no other way for the Defender to make progress in providing the Services other than by adopting an agile approach. The Pursuer knew that the Defender had adopted an agile approach and raised no objection thereto. Moreover, the Pursuer did not advise the Defender that it considered the latter to be in breach of the Agreement for doing so. This conduct on the part of the Pursuer led the Defender to believe that the Pursuer consented to its use of the 'Agile' methodology. The Defender proceeded with the project on the basis of this belief, including by investing considerable further time and resources in producing MVP. Accordingly, the Pursuer waived any right under the Agreement to object to the Defender's change of methodology. In any event, the Pursuer is

> personally barred from asserting that the Defender was in breach of the Agreement by adopting the 'Agile' methodology."

In Answer 20 the defender averred:

> "…(T)he Pursuer has waived its right to insist upon, *et separatim* is personally barred from insisting upon, strict compliance by the Defender with the procedural provisions of the Agreement and, in particular, the provisions *anent* Change Requests. The Pursuer itself did not follow the procedural requirements of the Agreement. The Pursuer asked the Defender to include many out-of-scope items in Titan without raising formal Change Requests under Clause 26 of the Agreement and Part 8.2 of the Schedule… In addition, the Milestone Dates under the Agreement were altered by the parties without the issuing of a Change Request by the Pursuer. In the circumstances, the conduct of the Pursuer led the Defender to believe that neither party required to operate the formal procedural provisions of the Agreement and, in particular, the provisions *anent* Change Requests, and that informal or *ad hoc* agreements with the Pursuer would be sufficient, so as to enable progress to be made and delays to be mitigated. The Defender conducted itself on the basis of this belief."

Reading short, the defences pled in Answers 13 and 20 were (i) that the pursuer had waived its right to object to the use of Agile, or was personally barred from so objecting; and (ii) that the pursuer had waived its right to insist upon, *et separatim* was personally barred from insisting upon, strict compliance by the defender with the procedural provisions of the Agreement. However, in its closing written submissions the defender put the matter somewhat differently. The submission was that the pursuer was personally barred from terminating the Agreement

> "based upon the Defender only providing the Pursuer with MVP … the basis for personal bar is as plead in Answers 13 and 20 of the Defences. Specifically, (i) neither the Pursuer or Defender had been operating the terms of the Agreement, and (ii) the Pursuer had led the Defender to believe that it would accept deferred functionality. In relation to both of these matters, the Defender had relied upon the Pursuer's conduct to its considerable detriment…"

[94] I do not accept that the pursuer ever committed itself, expressly or impliedly, informally or otherwise, to accept Agile delivery. Nor do I accept that the pursuer abandoned any of the rights under the contract which the defender suggests were abandoned, or that it is personally barred from founding upon such rights. The further

suggestions that the pursuer is personally barred from terminating the Agreement because the defender only provided the pursuer with the MVP, or is personally barred from adopting a position inconsistent with the acceptance of deferred functionality, were not matters focussed in the defences or properly explored in the evidence. That suffices to dispose of them. However, I am also clear that on the evidence which was adduced those further suggested cases of personal bar were not made out.

[95] In about the middle of March 2015 the defender unilaterally departed from the revised Implementation Plan and pursued an Agile approach. While some weeks later the pursuer was made aware that was happening, at no point did it endorse the Agile approach or act on the basis that the parties' rights and obligations under the Agreement had changed. That was hardly surprising. What was proposed - a change in methodology mid-project - was unprecedented in Mr Sykes' experience. As Mr Ward said, there were too many unknowns for the pursuer simply to agree to the change. Mr Bain acknowledged that the defender's strategy had no contingency for overrun of any activity; and that it took no account of any business constraints (eg resourcing, testing timelines, operational challenges) which might affect the pursuer's ability to accommodate the strategy. At the discussions on 20 and 21 April 2015, and when Mr Ward provided his spreadsheet (JB 112), the pursuer's position was that it was prepared to consider and discuss proposals which the defender might make with a view to delivery of the functionality required to secure the timely launch of the winter 2015 timetable. It co-operated with the defender to that end. It did not rule out the possibility of agreeing to an Agile delivery and some deferral of functionality *if* the defender could satisfy it that what it proposed could be relied upon with confidence to achieve that aim. The pursuer would have to be confident that the functionality to be delivered would have been sufficient and that it would have worked. It

would have to have been satisfactorily tested by the defender, and there would have to be sufficient time for the pursuer to test it and to train staff. That was the context in which Mr Ward prepared his spreadsheet. The spreadsheet outlined his view of the dates by which aspects of Release 1 functionality would need to be delivered, with a very substantial proportion of such functionality being delivered by 6 July 2015 in a state which would enable it to be used to go live for commercial vehicle and bulk bookings on 14 August 2015; with the remaining Release 1 functionality being delivered in August and September to allow going live for all bookings on 14 September 2015; and the timetable being fully live and operational from 26 October 2015. Mr Ward made it clear that the respective areas of the business would need to validate any deferrals. While the pursuer was open to consideration and discussion of proposals which departed from the parties' obligations under the Agreement, unless and until it was agreed otherwise those obligations continued to apply. Consistently with that, on 24 April 2015 the pursuer wrote to the defender making clear that the Milestone Dates set out in the revised Implementation Plan continued to be applicable. The meetings on 27 and 28 April 2015 proceeded on the basis that it remained for the defender to satisfy the pursuer that it could deliver proposals involving Agile delivery and reduced functionality which were acceptable. Thereafter the defender did not discuss with the pursuer what, if any, functionality the pursuer would agree to defer; nor did it discuss with the pursuer the details of what it was proposing to do. The first the pursuer knew of the proposed MVP was Mr Burgess' visit on 20 May 2015, followed by his outline proposal in writing on 21 May 2015.

[96] The MVP which Mr Burgess proposed on 21 May 2015 was materially different from the scenario outlined in Mr Ward's spreadsheet (in the respects itemised in Table 2 of JB 273). That was one of the reasons it was not acceptable to the pursuer. On scrutiny of the

proposal the pursuer was not satisfied that it would deliver sufficient functionality for the pursuer's needs or that there would be sufficient time for testing or training before the launch of the winter timetable. The pursuer clearly and unambiguously rejected the proposal on 27 May 2015. In my view it was fully entitled to do that. It was not obliged to accept a plan which proposed delivering less than the defender had contracted to provide; and which, not least given the history of the defender's poor performance to that date, involved a very significant risk that it would not be in place for the launch of the winter timetable. The risk of serious business and reputational damage to the pursuer should that happen was very real indeed.

[97] In my opinion the pursuer's position on personal bar and waiver is supported by the witness evidence which it led and by the documentary evidence. Moreover, three aspects of Mr Wright's evidence cannot be squared with the defender's suggestions of waiver or personal bar. First, his evidence was that at the time of the meeting on 20/21 April 2015 the pursuer demonstrated an openness to deferring functionality provided it could be delivered in time and would not be detrimental to how the pursuer's business was run. That evidence is more consistent with the pursuer's position than with the defender's position. Second, he indicated that at the time he retired he expected the defender to deliver all Release 1 functionality by M-7, apart from some functionality relating to the manual booking of dangerous goods. He confirmed that he had expected there to be functionality which would allow tickets to be issued and to allow Hopscotch ticketing. That evidence is inconsistent with the contentions that the pursuer had waived its right to reject the MVP, or that it was personally barred from rejecting it; or that it had waived its right to insist at M-7 on greater functionality than the MVP contained, or that it was personally barred from so insisting. Third, Mr Wright stated that if there was a change to the original contractual scope of the

work which had financial implications, or which had implications for the applicable contractual deadlines, he would have expected the defender to raise change control requests. That conflicts with the suggestions that the pursuer had waived its right to found upon the Agreement's change control provisions, or that it was personally barred from doing so.

[98] In my opinion, looking at the evidence objectively, the pursuer did not acquiesce to a change to Agile. Nor did it represent, expressly or impliedly, that it had agreed to such a change. Neither did it expressly or impliedly abandon any of its rights under the Agreement, or represent, expressly or impliedly, that it would not seek to rely on any such rights. In particular, the fact that the parties did not ultimately carry through the change control procedure in respect of the changes agreed on 27 January 2015 does not justify the conclusion that the pursuer abandoned its rights to rely upon the change control provisions in relation to subsequent changes, or that it was personally barred from doing so. Nothing that the pursuer did gave rise to a representation, express or implied, that it would accept the MVP which the defender proposed on 21 May 2015, or the MVP which the defender delivered on 6 July 2015. The pursuer's rejection of the MVP proposed on 21 May 2015, and its position that by delivering the MVP the defender failed to Achieve M-7, are not inconsistent with its previous conduct. Nor am I satisfied that the defender altered its position or acted to its detriment in reliance upon any such acquiescence, representation, or implied abandonment. Rather, from mid-March 2015 onwards the defender was simply proceeding with the project on its own terms at its own risk. The pursuer left open the door to be persuaded that it should accept something less than its contractual entitlement; but ultimately what the defender proposed failed to convince the pursuer that it should accept it.

MVP

[99] I accept that the MVP proposed by Mr Burgess fell short of full Release 1 functionality in the respects specified in Table 1 of JB 273.

[100] Mr Shewell-Cooper was the witness who spoke to the content of the MVP which he maintained was actually delivered to the pursuer. Mr Aldridge also gave evidence of its content using Mr Shewell-Cooper's witness statement and the RTC document (JB 251) as the foundation for this part of his evidence. Their evidence on these matters was objected to at the proof on the basis that the best evidence of something having been delivered and its content would have been production of the MVP itself. (Objection was also taken to exploring with a number of other witnesses the content of the MVP which was delivered.)

[101] In my opinion the MVP delivered on 6 July 2015 was an article for the purposes of the best evidence rule. The functionality delivered had identifiable digital characteristics. In my view the best evidence of that MVP would have been preservation of it in the state in which it was delivered, failing which, its reconstitution to that state. I am not persuaded that it would have been unfeasible or impracticable to follow one or other of those courses. Nevertheless, I propose to admit the evidence, because objection to it ought to have been taken earlier, in advance of the proof. The pursuer had sight of Mr Shewell-Cooper's witness statement in good time to comply with page 3 and footnote 7 of the *Guidance* concerning objection to the content of witness statements. However, given that this secondary evidence is not the best evidence, I approach it with caution. The disadvantage to the pursuer of the MVP not having been preserved or reconstituted is obvious. That disadvantage is compounded by the fact that on delivery of the MVP the defender provided little by the way of description or verification of what had been delivered, despite Mr Ward's direct request for a full list of the functionality. Mr Shewell-Cooper's evidence was largely based on the RTC document, which was not

downloaded until April 2016. I am not satisfied that the possibility of change in its content during that nine month period may be wholly discounted.

[102] Given the unsatisfactory secondary nature of the evidence, I am reluctant to rely upon it to the extent that it suggests that the delivered MVP supplied more functionality than was described in Mr Burgess' proposed MVP. However, even on Mr Shewell-Cooper's account, what was delivered on 6 July 2015 fell short, in several respects, of the functionality which the pursuer needed.

[103] In any case, in my view there is force in Mr Sykes' observation that it is impossible for Mr Shewell-Cooper to say definitively that particular functionality had been duly delivered, because he was not able to confirm that what was delivered had been tested. The only reliable way of demonstrating that functionality is present is to test it. In Mr Sykes' opinion it was not possible to say with confidence from the documents upon which Mr Shewell-Cooper relied that all the relevant functionality referred to in them was in fact present and working.

[104] Looking at the evidence as a whole it is plain that what was delivered fell short of full Release 1 functionality in material respects. It did not allow the pursuer to operate all of its services or all of its ticket products. It did not permit the pursuer to produce paper tickets, multi-journey tickets, or Hopscotch tickets. It did not enable the purchase of season tickets in advance. It did not provide the necessary functionality in relation to audit reporting. It did not support issuing confirmations in respect of bulk bookings. Customers would not be able to make such bookings themselves, and the pursuer's staff would receive no automated confirmations of any such bookings which they made for a customer. It did not enable a full booking history to be viewed. It did not facilitate appropriate management of dangerous goods. No satisfactory testing of what was delivered was demonstrated by the defender. The MVP was not accompanied by any software release documents or handover notes. Delivery

of the MVP on 6 July 2015 left the pursuer without adequate time to carry out its testing and to train end users. The MVP was also premised on further important code drops being made after 6 July 2015, very shortly before the whole system was to be live and operational. Given the history of delays on the project, the pursuer was justifiably concerned at the risks inherent in code drops being planned for dates very close to the date when the timetable required to go live.

[105] I accept the evidence of Mr Ward, Mr Sykes, Mr Collier, Ms Bruce and Mr Dorchester that the MVP would not have allowed the pursuer to operate the winter 2015 timetable. In particular, the absence of functionality to support the provision of tickets was a critical omission. As Mr Sykes put it, it was "a showstopper". As Mr Ward explained, in some cases train loads of passengers arriving at a port for a connecting ferry would have to queue at the port ticket office to be issued with tickets before sailing. At some ports there was no ticket office or facility for the issuing of tickets. It is clear that there were also several other serious problems in addition to the ticket functionality issue. What the defender proposed in relation to the MVP and further Release 1 code drops after 6 July 2015 would have been a very high risk strategy for the pursuer. In my opinion the pursuer was fully entitled to conclude that the MVP and the risks which accompanied it were unacceptable.

Termination for Cause?

[106] I am satisfied that the defender's failure to achieve Milestones M-3, M-4, M-5 and M-7 was a material breach which was irremediable. The failure to achieve M-7 was also a failure to achieve a Critical Implementation Milestone. There was no agreed Correction Plan. Accordingly, the pursuer was entitled to terminate the Agreement for cause in terms of both

clause 55.1.5.2 and clause 55.1.5.3(a) as long as the right to terminate was exercised within a reasonable time of the failure to achieve M-7.

[107] In determining whether the right was exercised within a reasonable time regard has to be had to the whole circumstances. The situation was that the parties had mutually agreed to suspend performance of their respective obligations with effect from 16 July 2015. Thereafter they sought to resolve their differences, first by way of direct discussion and then by mediation. The pursuer gave notice of termination within a few months of the unsuccessful mediation, at a time when the mutually agreed suspension was still in place. In the circumstances I am satisfied that the pursuer exercised its right to terminate within a reasonable time of the material breaches which gave rise to that right.

[108] I reject the contention that the termination was for convenience (clause 55.3). The pursuer did not purport to exercise the clause 55.3 right to terminate for convenience. I accept that it was entitled to terminate for cause, and that that is what it in fact did. I am not swayed from that conclusion by the fact that by the date of termination the pursuer had secured the CHFS2 contract. In general, a party's motives for exercising a contractual right are neither here nor there (*McBryde, supra,* paragraph 17-32; *Brown* v *Magistrates of Edinburgh* 1907 SC 256; *Macari* v *Celtic Football and Athletic Co Ltd* 1999 SC 628, per Lord President Rodger at p 634C-H; *Monde Petroleum SA* v *Westernzagros Limited* [2016] 2 Lloyd's Rep 229, per Deputy Judge Richard Salter QC at paragraph 261). The defender's material breach having given rise to the right to terminate for cause, the pursuer was entitled to have regard to its own interests when deciding whether to exercise that right.

[109] Since, as already outlined, I am not persuaded that the pursuer was in material breach of the Agreement, the defender does not get off the ground with its submission that the pursuer was not entitled to exercise the right to terminate because it was itself in material

breach. If the position had been that the pursuer was in material breach of one or more of its obligations under the Agreement, but, notwithstanding that, the defender was in material breach in respect of its failures to achieve Milestones by the Milestone Dates, it may have been moot whether the general principle of mutuality of contract could have been used by the defender to prevent the pursuer from exercising its rights to terminate the Agreement and to sue for damages (see eg *McBryde, supra,* paragraphs 20-49 to 20-52; *MacQueen and Thomson, Contract Law in Scotland* (4th ed.), paragraphs 6.57 to 6.60; *Macari* v *Celtic Football and Athletic Co Ltd, supra,* per Lord President Rodger at pp 641E-642H, per Lord Caplan at pp. 649G-651B; *cf Hayes* v *Robinson* 1984 SLT 300). Since it is unnecessary to decide the point, and I did not have the benefit of fully developed submissions which focussed the matter, I prefer to reserve my opinion on it.

Damages

[110] Clause 52 of the agreement set out certain limitations on liability. Clause 52.2.1 to 52.2.5 made provision for the contractor's total aggregate liability in a number of specified circumstances. Clause 52.2.6 provided:

> "52.2.6 in respect of all other claims, losses or damages, whether arising from delict (including negligence), breach of contract or otherwise under or in connection with this Agreement shall in no event exceed an amount equal to one hundred per cent (100%) of the total Charges paid or payable under the terms of this Agreement."

Clause 52.5 provided:

> "52.5 Subject to clause 52.2, the Authority may, amongst other things, recover as a direct loss:
> …
> 52.5.2 any wasted expenditure or charges rendered unnecessary and/or incurred by the Authority arising from the Contractor's Default;
> …"

[111] The defender's material breach of contract resulted in the pursuer exercising its right to terminate for cause. The general principles relating to the assessment of damages for breach of contract are well established and were summarised by Lord President Emslie in *Haberstitch* v *McCormick & Nicolson*, *supra,* at pp 6-7. As his Lordship emphasised at pp 9-10, in applying those principles the court is not constrained to apply a single method of computation:

> "… each case must be considered on its own facts and circumstances, and in each the question of damages which remains a question of fact, must be resolved upon the proper application of the well-known general principles…"

[112] In my opinion, where as a result of a breach of contract expenditure incurred by the innocent party has been wasted, that is often likely to represent a loss which falls within the first head of the rule in *Hadley* v *Baxendale* ((1854) 9 Ex 41, per Baron Alderson at pp 354 and 355). In any case, here it is clear from clause 52.5.2 that it was within the contemplation of the parties at the time of contracting that there might be wasted expenditure in the event of a Contractor's Default.

[113] In principle, wasted costs may be recoverable (*Haberstitch* v *McCormick & Nicolson, supra*, per Lord President Emslie at p 10; *McBryde, supra*, para 22-93; *Lancashire Textiles (Jersey) Ltd* v *Thomson-Shepherd & Co. Ltd, supra,* per Lord Davidson at pp 139-140). I do not accept that for wasted costs to be recoverable as damages a pursuer must always show that but for the breach the costs would have been recovered. In my opinion no such general rule was stated in *Dawson International PLC* v *Coats Paton PLC, supra.* The facts of that case were rather special, in that Lord Prosser held that the pursuer's expenditure would have been abortive whatever the defender had done. I am not persuaded that the pursuer's expenditure here would have been abortive if the defender had not been in breach. If the defender had not been in breach the pursuer would have received the services it contracted

for. Moreover, I am not satisfied that the pursuer would have been unable to go live with the winter 2015 timetable if the defender had duly performed its obligations. First, while there was some evidence that DP, and perhaps Valiant and Veritas, were running late in July 2015, it does not follow that the position would have been the same had the defender duly performed its obligations. It seems likely that if Titan was proceeding according to plan there would have been greater impetus to get other projects ready in time too. Mr Ward and Mr Sykes were of the view that DP had been delayed at least to some extent by Titan; and support for that view may be found in Mr Bodys' evidence and in the Minutes of the API Workshop held on 25 March 2015 (JB 222). Second, I am not persuaded Titan would have been of no value to the pursuer if other projects had not been available to go live immediately with it. It was no doubt desirable to have the other projects go live as soon as possible, but they were not essential to Titan's use. The availability of DP would obviously enhance the benefits of Titan; but, as Mr Ward indicated, even if DP had not been ready, Titan would have been of use and value to the pursuer. On that scenario on-line sales and reservations by customers through DP would not have been available, but other reservation and sales channels (such as at ports and at the contact centre) would have been.

[114] I accept that the M-0, M-1 and M-2 payments (a total of £1,202,130) were wasted expenditure, and that that wasted expenditure represents loss and damage suffered by the pursuer as a result of the defender's breach of contract. Once the contract was lawfully terminated for cause, the Deliverables provided at those Milestones were of no commercial value or benefit to the pursuer. I accept the evidence of Mr Ward, Mr Collier and Mr Dorchester on that matter. That scenario is markedly different from a situation where a contract has been partially performed, and the partial performance continues to be of value

to the recipient after the contract is lawfully terminated before completion on the grounds of the supplier's breach (*cf Stocznia Gdanska S.A.* v *Latvian Shipping Co. & Others*, supra).

[115] I reject the proposition that the pursuer was under a duty to mitigate its loss by accepting the MVP. First, in relation to the failure to achieve M-7, the issue of mitigation did not arise until that breach had occurred (*McBryde, supra*, paragraph 22-42). In any case, given that the MVP fell well short of the contractual requirements, and bearing in mind the very real risks and difficulties for the pursuer associated with it, I am satisfied that it was reasonable of the pursuer to act as it did.

[116] It follows that the pursuer is entitled to damages of £1,202,130. Since I have concluded that the pursuer was entitled to terminate the Agreement for cause on 20 July 2016, the defender's counterclaim fails.

[117] If, contrary to my view, the pursuer did not exercise its right to terminate within a reasonable time, I would not have been satisfied that the defender is entitled to the damages which it claims. The pursuer did not in fact exercise the right to terminate for convenience, and I am not persuaded that it should be treated as if it had. Nor am I convinced that the contractual Termination Payment would have been the proper measure of damages for late, and therefore wrongful, termination for cause. The defender's own material breaches would require to be taken into account when assessing what would have happened but for the wrongful termination. It seems probable that, *prima facie*, the proper measure of damages would have been the loss of profit, if any, that the defender would have been likely to have made had the Agreement not been wrongly terminated. No evidence directed to that issue was adduced. In any case, in view of the defender's failures to comply with its obligations under the Agreement, I am not satisfied that, but for the termination, it would have become

entitled to payment of any of the charges for meeting Milestones M-3 to M-10 or to any of the service charges which it claims.

Disposal

[118] Parties were agreed that I should issue my decision and put the case out by order to discuss (i) the appropriate interlocutor to give effect to the decision; (ii) interest; and (iii) expenses. I shall accede to that request.