



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 13

CA179/19

OPINION OF LORD ERICHT

In the cause

INCREMENTAL GROUP LTD

Pursuer

against

HiETA TECHNOLOGIES LTD

Defender

Pursuer: G Reid; Burness Paull LLP
Defender: Reekie (sol adv); Brodies LLP

29 January 2021

Introduction

[1] The pursuer is a company that develops digital solutions for customers. This includes the delivery of Microsoft ERP (Enterprise Resource Planning) solutions, in respect of which the pursuer has Microsoft Gold ERP status. An ERP system is a product that allows an organisation to use one system to manage its business. The defender is a thermal engineering technology company. On or around 14 September 2018, the pursuer issued a proposal to the defender for the provision of an ERP solution (the “Proposal”). The Proposal proposed the use of Microsoft Dynamics 365 for Finance and Operations (“D365”) as the core platform for the defender’s ERP solution. The Proposal contained, at Appendix A, the

pursuer's standard terms and conditions which were to apply to any work done by the pursuer (the "Terms and Conditions"). The defender accepted the Proposal and Terms and Conditions on or around 28 September 2018. A contract was accordingly formed between the pursuer and the defender on the terms set out in the Proposal and Terms and Conditions (the "Agreement"). The Agreement was for a period of three years.

[2] The services to be provided by the pursuer to the defender in terms of the Agreement had three principal components:

- (a) The pursuer was to purchase and supply to the defender twenty D365 licences. This involved a yearly cost to the defender for the three years of the Agreement.
- (b) The pursuer was to provide implementation services in order to deliver the ERP solution to the defender (the "Implementation Services"). The Implementation Services were divided into seven stages: analysis and design, project kick-off, test pilot 1, test pilot 2, project delivery, D365 deployment and go-live support.
- (c) The pursuer was to provide ongoing support and maintenance to the defender for the three years of the Agreement.

[3] The defender was dissatisfied with the pursuer's performance and terminated the contract.

[4] The pursuer then rescinded the contract for repudiatory breach.

[5] The pursuer brought an action for declarator that it was entitled to rescind the contract on the basis of (i) the defender's material breach of contract by its purported termination of the contract and (ii) the defender's material breach of contract in failing to

make payment of sums due to the pursuer. The pursuer also concluded for payment of sums due under the contract and damages for breach of contract.

[6] The defender counterclaimed, seeking declarator that the defender was entitled to rescind from the contract on the basis that the pursuer was in material breach of the agreement and for damages for breach of contract.

The contractual terms

[7] The Proposal included the following terms:

“Section 1 - Executive summary

Incremental Group is delighted to provide HiETA Technologies (HiETA) with this proposal for the provision of an Enterprise Resource Planning (ERP) solution. Given our engagement to date with the HiETA team, we understand the drivers behind the need for an ERP' solution, and the challenges faced with existing solutions and processes within HiETA's business.

HiETA's existing technology stack comprises: Office 365 for email; Excel spreadsheets for reporting and project management; a bespoke manufacturing tool, MoneyWorks for finance; and, Odoo for time and attendance. To replace these systems, HiETA is seeking a single technology platform to rationalise its IT estate, automate processes, and ultimately support the growth initiatives over the next three years. This new system should be a scalable cloud solution, which is easily adaptable, and easy to roll out to new sites as the business grows. HiETA is seeking a Digital Technology Partner to design, implement and support this new platform whilst utilising the in-house development capabilities of the HiETA IT team.

We wish to set out our understanding of HiETA's ERP requirements, the strategic significance of the ERP solution and, why Incremental Group is the right Partner. We work collaboratively with HiETA to ensure that the delivered solution enables HiETA to continue its growth and meet its business objectives.

Section 2 - Proposed solution

2.1 Microsoft Dynamics 365 overview

Incremental Group's proposed solution is an out-of-the-box deployment of Microsoft Dynamics 365 for Finance and Operations (D365). This provides the core platform for HiETA's ERP solution, meeting the existing requirements, and providing a platform for growth as the business expands.

D365 is the latest and most up to date product in the Microsoft portfolio, and protects HiETA's investment in several ways, including:

- » D365 offers rich out-of-the-box manufacturing and projects functionality comfortably meeting HiETA's immediate business requirements.

D365 covers most aspects of a business; as shown in Figure 2.1, which illustrates its out-of-the-box functionality. Incremental Group anticipates that HiETA may seek to use some of this functionality in future projects e.g. the HR module to support HiETA's growth ambitions of doubling its headcount and revenue.

Section 3 - Scope of work

The scope of work for the HiETA ERP solution is defined during the Analysis and Design Phase of the project, where all initial requirements are captured and documented.

3.1 Dynamics 365 modules

Incremental Group delivers and configures the modules detailed in Table 3.1.1 below. As agreed with HiETA this is a completely out-of-the-box deployment for 1 UK legal entity, and no customisation or integrations are included as part of this initial project.

Finance Modules	Manufacturing Modules
General Ledger	Project Management and Accounting
Purchase Ledger	Production
Sales Ledger	Inventory and Warehouse Management
Fixed Assets	Product Information Management
Cash and Bank	Procurement and Sourcing

Table 3.1.1 - Dynamics 365 module in scope

During the Analysis and Design phase, requirements are explored and documented in detail. Any customisations, integration, or additional changes requested are reviewed and agreed with HiETA before the work begins. HiETA and the Incremental Group project Manager assess the impact on the overall project timescales and budget of changes, but as this is a Time and Materials project, it is HiETA's discretion to approve any change requests.

3.2 Delivery activities

Incremental Group and HiETA deliver the following project activities. It has been made clear below which activities are delivered by HiETA:

- » **Analysis and Design**
 - » Business Requirement Definition Workshops;
 - » Business Requirements definition and Workshop Write up;
 - » Project Plan and Timeline.

- » **Project Kick-Off**
 - » Project Plan initiation;
 - » Dynamics 365 installation;
 - » Dynamics 365 Configuration – 1 legal entity;
 - » Basic Dynamics 365 Training Executed.

- » **Test Pilot 1**
 - » Dynamics 365 prototype configured;
 - » Validation of Business Requirements;
 - » Solution Design presented and accepted;
 - » Define test scripts and scenarios (HiETA)
 - » Basic data conversion (HiETA)

- » **Test Pilot 2**
 - » Dynamics 365 - Configuration Changes;
 - » Revised Business Requirements validated;
 - » Revised Solution Design presented and accepted;
 - » Define test scripts and scenarios (HiETA);
 - » Basic data conversion (HiETA);
 - » Solution Design and Requirements sign-off.

- » **Project Delivery**
 - » Complete Dynamics 365 set-up;
 - » Documents and Reports Formats - Standard Templates without Customisation
 - » Data Migration to PRD (HiETA);
 - » Solution Sign-off;
 - » Additional Super User training (HiETA);
 - » Security & Workflows (HiETA);
 - » Personalisation developed (HiETA);
 - » Work instructions documented (HiETA);
 - » Acceptance and Delivery sign-off and final checks;
 - » Life Cycle Services Preparation;
 - » Life Cycle Services review (Microsoft).

- » **Dynamics 365 Deployment**
- » End user training (HiETA);
- » Final checks, readiness review, and Go-Live.
- » **Go Live Support**
- » Early after live support.

3.3 Project deliverables

Incremental Group delivers the following documentation deliverables as part of this project.

- » Project initiation Document (PID)
- » Analysis and Design document;
- » High-level Solution Design document;
- » RAID log;
- » Project Plan.

All documentation is subject to review from HiETA before it is formally issued.

3.4 Assumptions

Incremental Group has made the following assumptions for this project:

- » Out of the box document templates are used. Custom templates/formats and document formats e.g. remittance advices, are not included in scope;
- » There will be a mix of on-site and off-site working, which is agreed with HiETA in advance of project commencement;
- » Travel and subsistence is not included and will be charged at cost;
- » Weekly calls will be scheduled in place of a formal highlight report;
- » HiETA key stakeholders are available for the duration of the project;
- » All data cleansing and migration activities are completed by HiETA with light support from Incremental Group. Successful data migration is dependent on all required data being identified and cleansed. Incremental Group provides out-of-the-box upload templates for HiETA to complete, and Incremental Group is responsible for uploading the templates to D365. This is dependent on HiETA having all required data identified and cleansed in advance of the upload process;
- » System and User Testing, including the creation of test scripts and plans is completed by HiETA stakeholders.

- » Full administrative access to all relevant HiETA IT systems is granted for the duration of the project. Relevant Systems are defined and agreed with HiETA during the initial stages of the project.

Section 4 - Delivery approach

One Team Approach

To ensure the successful delivery of our D365 projects and our customer's key objectives, we form close collaborative partnerships. This 'one-team' approach facilitates a closer understanding of requirements, smoother deployment, and a seamless transfer of knowledge to the HiETA team to help meet their strategic and project objectives.

Incremental Group recommends on-site working, as agreed with HiETA during the implementation phase of each D365 project. This co-location element aids with clarifying requirements and resolving any potential blockers to the project. Co-location is also important during Project Meetings and Service Reviews in gathering feedback and making process improvements. Testing and training phases encompass a large amount of co-location activity, with Incremental Group's project team supporting HiETA in ensuring the organisation is prepared for the deployment of the system, and the key objectives are met.

During rollout, Incremental Group works alongside the HiETA team and users to ensure an effective deployment of the solution and to facilitate the handover to Business as Usual Support.

Project Management Methodology

It is the responsibility of our Project Manager to co-ordinate Incremental Group's activities and to provide a focal point to whom HiETA can refer to on any matter concerning the delivery of the project. Our Project Manager works closely with the HiETA team, with regular bidirectional information transfer. The Project Manager is the facilitator for the delivery team and has primary contact with the HiETA Project Manager, and has responsibility for reporting team progress and issues to the HiETA team. The Project Manager is the escalation point for the project.

Our Project Manager is:

- » Outward facing to ensure effective communications to HiETA and all stakeholders;
- » Inward facing to ensure successful delivery of the project.

Incremental Group adopts an open approach to project management and believes that inherent to effective project management is a style that is open, clean and honest at all times. Our Project Managers have single point responsibility for the success of

the project. We have extensive experience in a range of methodologies including PRINCE2 and SUMMIT, although our defined standards do not enforce adoption of any specific methodology. We have found that the best use of any methodology is to adopt a pragmatic approach, rather than to follow it slavishly, so that the project management cost incurred is commensurate with the task in hand.

Project Management Responsibilities

Our Project Manager is ultimately responsible for the following:

- » To ensure that the contract is soundly based and that the project team is properly briefed at the outset (this covers areas such as cost basis, timescales, invoicing, scope of work, quality requirements, confidentiality agreements, warranty, etc.);
- » To ensure that the contract is completed on time, to specification and within an agreed budget;
- » To interface with HiETA;
- » To motivate the project team;
- » To plan the project and allocate responsibilities and tasks to the project team;
- » To manage progress and provide visibility of the pain and progress to HiETA and the project team;
- » To adopt and promote a quality approach within the project;
- » To meet Incremental Group's and HiETA's quality requirements;
- » To ensure that the project is suitably resourced;
- » To comply with the company's Data Protection Policy;
- » To ensure that appropriate records of the project are kept and that these are filed appropriately (in accordance with any Confidentiality Agreements or Data Protection requirements).

Project Governance

Incremental Group has a proven and effective approach to Project Governance. We empower our Project Managers to assume full control and responsibility of all elements of project delivery, and provide the optimum amount of internal Governance to support both the project team and HiETA in ensuring a successful project delivery.

Project plans, communications and documentation will be agreed with HiETA during the project kick-off meeting, although these are specified within the scope of work above.

Risk Management

Incremental Group understands the importance of risk prevention and management to HiETA and the requirement to have a structured system and processes through which risk is effectively and proactively managed.

We understand the need to capture risks, to ensure that the circumstances which may cause the risk are fully understood by those responsible for managing and mitigating the risk, that risks are accurately assessed and appropriately rated. We also understand the requirement to align with our customer's Risk Management policy and to review risks and issues within the framework of that policy.

Our risk management procedure is aligned to the needs of HiETA and our approach consists of these steps:

- » Identify;
- » Assess;
- » Plan;
- » Implement and Manage; and
- » Communicate, Review and Report.

Based on the risk probability and impact, a mitigation strategy is formulated. The mitigation plan is an "actionable" plan that is effectively translated into formal action items and to which ownership for execution is assigned. The mitigation strategy is executed throughout the delivery lifecycle to limit the impact of the risk on the project.

When performing an accurate assessment of risks and issues and making decisions about the responses to them, it is vital that a record is kept of this assessment and decision-making process using a risk and issues register. The purpose of a register is to capture and maintain information on all identified threats and opportunities relating to the project.

Risk Register

Based on our previous experience of delivering D365 projects of a similar scale and scope to HiETA, Incremental Group has created a register of risks prior to the commencement of the project. The following table presents suggested mitigations for these risks to expedite and ensure a smooth implementation of the new ERP System.

Risk	Probability	Impact	Mitigation
Delay in the determination of requirements impacts delivery timescales.	L	H	As part of the ongoing Project Management, key decision points will be identified throughout the project. Incremental Group works with the HiETA ERP Manager in order to gain the appropriate support from the business.

			This risk is further mitigated by the insight gained into HiETA's requirements by virtue of our initial dialogue.
Potential delay in the agreement of the prioritisation of key D365 requirements to be delivered	M	M	We work closely with the HiETA ERP Manager and key stakeholders to understand the high priority requirements and to understand HiETA business. This facilitates effective discussions and decision making over the prioritisation of the requirements.
Lack of participation (qualitative and timely) from the key stakeholders	L	H	<p>As part of our Project Governance (which will be agreed with HiETA during the mobilisation phase), we ensure that the roles of stakeholders are clearly understood, and that requirements on all stakeholders are clearly defined. We will work with HiETA stakeholders to understand any constraints they will have, and where possible, we will accommodate these constraints. If necessary, we will escalate any constraints which cannot be resolved through the Project Board.</p> <p>Incremental Group's intention to deliver the majority of this project on-site with the HiETA team will also mitigate this risk</p>
The size of the Incremental Group delivery team is not	L	H	Incremental Group has sufficient capacity (i.e., additional full-time

sufficient to meet the agreed Service Levels			resources) that it can use to mitigate this risk. We do not use Contractors to deliver projects of this nature as this introduces a risk in relation to continuity of resource.
Availability of Super Users and other key stakeholders for training workshops.	L	H	The scope and timetable of workshops is provided as early in the project as possible in order to ensure advanced warning can be provided to required key HiETA personnel
Availability of Incremental Group personnel (holidays, sickness).	L	M	Incremental Group's approach to projects is to ensure that no one individual is vital to the success of the project. From our large pool of experienced D365 consultants and developers, staff can be rotated to ensure that there is coverage for unforeseen events.
Inappropriate resourcing/staffing model management	L	M	Use Incremental Group's agreed reporting structure and resource meetings to ensure that any potential resource gaps are quickly addressed.
Insufficient attention to interdependencies on other applications and processes	L	H	Ensure that interdependencies and mitigating plans are identified during Discovery Phase.
Training courses are not aligned with users' requirements	L	L	Use feedback and evaluation forms and adjust training and re-run if necessary.
Quality of data from existing sources is insufficient	M	M	Assess data at an early stage and utilise service oriented migration. Incremental

			Group's detailed knowledge of D365 and it's built in data migration tools mitigates this risk.
Additional requirements are identified during the project initiation phase.	H	M	Incremental Group has suggested a change budget to account for any project changes. HiETA should consider this in any funding requests made as part of this project.

Table 4.1 - risk Register

Training

Incremental Group works with HiETA to provide user training that balances the technical change aspects of the project and the behavioural change aspects. The training is focussed around ensuring successful user adoption.

We intend implementing a 'Train the Trainer' approach, in which HiETA nominated trainer(s) drawn from the appropriate team(s) or other appropriate groups, develop training material and deliver the training with light touch support from our D365 Technical Lead. This approach to 'cascading' knowledge is extremely effective and provides a basis upon which user training can be rolled out to all users in a cost-effective way.

Incremental Group will provide basic training for HiETA nominated SuperUsers to enable them to support the business change programme and data migration activities. We further recommend that HiETA SuperUsers attend any available and scheduled D365 training courses available on-line or held on-site at Microsoft. This training can be fully facilitated by Incremental Group.

...

Section 5 - Indicative high-level project plan

Incremental Group has provided an indicative Project Plan based on the core activities detailed within the scope of work in Section 3 of this proposal. Incremental Group engages with HiETA during the project kick to finalise and agree all project milestones in the plan below."

[The proposal then set out Figure 5.1 which was described as “Indicative project plan”.

Figure 5.1 included the following table:]

“ID	Project Activity	Indicative Start	Indicative Finish	Estimated Duration
1	Analysis and Design	6/08/2018	24/08/2018	15d
2	Project Kick-Off	4/09/2018	17/09/2018	10d
3	Test Pilot 1	18/09/2018	15/10/2018	20d
4	Test Pilot 2	16/10/2018	05/11/2018	15d
5	Project Delivery	09/11/2018	17/01/2019	50d
6	D365 Deployment	18/01/2019	31/01/2019	10d
7	Go-Live Support	01/02/2019	07/02/2019	5d”

[8] Section 5 went on to say:

“The start dates, and durations in this project plan are not confirmed, and this indicative Project Plan is reviewed and agreed with HiETA before commencing the project.”

[9] The Proposal continued:

“SECTION 7 - Pricing schedule

7.1 Cost Breakdown

The following pricing is based on our understanding of system and project requirements and all professional services, are provided on a Time & Materials (T&M) basis as agreed with HiETA.

3 Year License Profile

As discussed with HiETA, D365 requires a minimum of 20 full licences to be purchased to provision the system which is reflected in the license costs below. Additionally, for configuration and testing a second Tier 2 Sandbox environment is required during implementation as shown in Table 7.1.1 below.

Software Description	Unit Cost	Months	Quantity	Total
Year 1 Dynamics 365 enterprise Edition, Plan	£158.40	12	20	£38,016.00

Additional Tier 2 Testing Sandbox Environment	£1,018.00	5	1	£5,090.00
Year 2 Dynamics 365 Enterprise Edition, Plan	£158.40	12	20	£38,016.00
Year 3 Dynamics 365 Enterprise Edition, Plan	£158.40	12	20	£38,016.00
Total 3 Year Licensing Cost				£119,138.00

Table 7.1.1 - License Costs

*Years 2 and 3 are estimated based on the September 2018 price list and may be subject to change.

Implementation Services

The following implementation services are offer on a T&M basis based on our understanding of the requirements. During the Analysis and Design phase of this project, Incremental Group works with HiETA to confirm and agree the activities below and the associated effort against each.

Implementation Services	Role	Day Rate	Est Days	Total
Analysis & Design	Senior Consultant	£850.00	10	£8,500.00
	Consultant	£750.00	10	£7,500.00
	Project Manager	£800.00	4	£3,200.00
Project Kick-Off	Senior Consultant	£850.00	5.5	£4,675.00
	Consultant	£750.00	6	£4,500.00
	Engineer	£775.00	2	£1,550.00
	Project Manager	£800.00	6	£4,800.00
Test Pilot 1	Senior Consultant	£850.00	6	£5,100.00
	Consultant	£750.00	3	£2,250.00
	Engineer	£775.00	0.5	£ 387.50
	Project Manager	£800.00	4	£3,200.00
Test Pilot 2	Senior Consultant	£850.00	2	£1,700.00
	Consultant	£750.00	1	£750.00
	Engineer	£775.00	0.5	£387.50
	Project Manager	£800.00	4	£3,200.00
Project Delivery	Senior Consultant	£850.00	7.5	£6,375.00
	Consultant	£750.00	9.5	£7,125.00
	Engineer	£775.00	3	£2,325.00

	Project Manager	£800.00	5.5	£4,400.00
D365 Deployment	Senior Consultant	£850.00	1	£ 850.00
	Consultant	£750.00	0.5	£ 375.00
	Engineer	£775.00	0.5	£ 387.50
	Project Manager	£800.00	3	£2,400.00
Go-Live Support	Senior Consultant	£850.00	0.5	£ 425.00
	Consultant	£750.00	2.5	£1,875.00
	Engineer	£775.00	0.5	£ 387.50
	Project Manager	£800.00	3	£2,400.00
Total One-Off Implementation			101.5	£81,025.00

Table 7.1.2 - Implementation Costs

Ongoing Support and Maintenance

The Ongoing Support and Maintenance costs below are offered as a Fixed Price service and based on 2 days of support per month. These costs are also inclusive of 1 service review in year 1, which is conducted 2 months after go-live. Subsequently, there are 2 service reviews in years 2 and 3. After each service review, usage is reviewed and costs realigned accordingly.

Support Services	Total
Year 1 Support and Maintenance	£13,500.00
Year 2 Support and Maintenance	£23,400.00
Year 3 Support and Maintenance	£23,400.00
Total 3 Year Support cost	£60,300.00

Table 7.1.3 - Support Costs

*Year 1 support costs are less due to implementation.

Risk Pot

Based our engagement to date and our understanding of HiETA's requirements, there is currently no customisation associated with the deployment. However, there is no detailed understanding of the final requirements and certain assumptions have been made regarding the delivery of this solution. However, as requested we have suggested a Risk Pot below which is roughly 20% of the overall professional services days. This pot should be used to manage any realisation of risk which may lead to additional configuration, or customisation of the system during each and any phase.

Please note, HiETA will own and manage this change budget and Incremental Group will only draw from this budget when it has been agreed and approved. This cost should not, unless otherwise requested, be included in our overall proposal as it is only a suggested budget that should be kept separate from the overall project.

Role	Days	Total
Senior Consultant	22	£18,700.00

Table 7.1.4 – Risk Pot

7.2 Overall 3 Year Investment

Incremental Group has provided costs below for the overall 3-year investment.

Year	Description	Cost	Total
Year 1	D365 Licenses	£43,106.00	£137,631.00
	Implementation Services	£81,025.00	
	Ongoing Support and Maintenance	£13,500.00	
Year 2	D365 Licenses	£38,016.00	£61,416.00
	Ongoing Support and Maintenance	£23,400.00	
Year 3	D365 Licences	£38,016.00	£61,416.00
	Ongoing Support and Maintenance	£23,400.00	
Total (Excluding VAT)			£260,463.00

Table 7.2.1 - 3 Year Costs

...

8.1 Payment Milestones

The following payment milestones will apply:

- » Software invoiced monthly or annually in advance;
- » Support Services invoiced monthly in advance;
- » Travel and Expenses invoiced monthly in arrears.

Implementation Services

Implementation services are invoiced upon the completion of each phase of work a detailed in table 8.1.1 below:

Completed Phase	Invoice Amount
Analysis & Design	£19,200.00
Project Kick-Off	£15,525.00
Test Pilot 1	£10,937.50
Test Pilot 2	£6,037.50
Project Delivery	£20,225.00

D365 Deployment	£4,012.50
Post Go-Live Support	£5,087.50
Total	£81,025.00

Table 8.1.1 - Payment Milestones

Estimate reviews

As discussed and agreed with HiETA, the current T&M estimates are calculated as accurately as possible based on Incremental Group's existing understanding of requirements, but there are still unknowns and assumptions that cannot yet be verified so costs cannot be fixed. However, we do not expect these T&M costs to alter any more than +/- 20%. To manage cost expectations, risk, and planning, after each individual deliver phase listed above is completed, Incremental Group will review, and where necessary, re-estimate the costs for the next phase, adjusting them either up or down. HiETA will be provided with information detailing the reasoning behind any increase or decrease in costs.

8.2 Terms and Conditions

This quotation is provided on the basis that any resulting contract for supply is to Incremental Group's Standard Terms and Conditions for the supply of systems and services, a copy of which is attached in Appendix A."

[10] The Standard Terms and Conditions set out in Appendix A included the following:

"9.0 CHANGES

The Client may request changes to the Specification at any time on giving reasonable notice to Incremental Group provided that such changes shall only become effective if contained in a change order signed by the Client setting forth as applicable the changes in the System or services to be carried out, variation to delivery schedule and prices.

...

11.0 WARRANTY

11.1 Subject to the provisions of this clause:

...

11.5 Incremental Group warrants that services supplied on an hourly or day rate basis will be performed with reasonable skill and care consistent with generally accepted computer software services industry practices. Clauses 11.1 and 11.2 herein shall not apply for services supplied on an hourly or day rate basis. All other warranties and conditions or other terms are expressly excluded.

11.6 The undertakings contained in this Clause are given in lieu of all representations, warranties, conditions and guarantees whether expressed or implied all of which are hereby excluded.

13.0 TERMINATION

13.1 In addition to any rights of termination specified herein, the Contract for supply may be terminated by Incremental Group in the event of

13.1.1 failure by the Client to make payment of any sum due within 14 days of receipt of notice calling for payment of sums due under any Contract between the Client and Incremental Group, or to perform any other material obligation under the Contract within 30 days of receipt of notice of such failure, or

...

13.2 The Contract for supply may be terminated by the Client or Incremental Group upon giving on month written notice to the other party at any time after completion of any agreed initial Contract period.

13.2.1 Upon termination of the contract the Client shall pay to Incremental Group the amounts for all items ordered for services, Hardware, Bespoke Software and Third-Party Software whether delivered or not. Notwithstanding the foregoing Incremental Group shall use reasonable endeavours for the Client to obtain from any Third-Party Software vendor or Hardware supplier, agreement to waive charges for products and service ordered for the Client's project and not yet delivered.

13.3 Any termination shall be without prejudice to the rights of Incremental Group in respect of any antecedent breach or non-performance of the Client's obligations hereunder."

Termination letter

[11] On 4 October 2019, the defender wrote to the pursuer terminating the Agreement.

The letter stated:

"2. **Termination Notice.** By this letter, we are exercising our right under Scottish law to terminate the Agreement for your repudiatory breach of contract.

3. **Termination Date.** The Agreement will terminate on 7 October 2019. We expect Incremental to continue to provide access to licenses and environments to enable us to maintain continuity of our business and enact

our rights to ensuring appropriate back-ups etc are in place in accordance with the contract.

4. **Our right to terminate for repudiatory breach.** A right to terminate for repudiatory breach is implied into a contract under common-law.
5. In addition, the parties agreed in email correspondence on 7 June 2019 to make time of the essence in relation to the obligations of each party. A time of the essence provision creates a hard deadline where any late performance against the agreed timescale will be a repudiatory breach of the contract.
6. **Repudiatory breach.** When deciding what constituted a repudiatory breach in relation to an implied right to terminate agreement, the courts will look at the individual circumstances in the case to work out whether the other party has breached a condition of the agreement . The current test applied by the courts to determine whether this threshold has be reached is whether the innocent party has been deprived of substantially the whole benefit of the contract, such that it would be unfair to hold that innocent party to the contract.

The original scope contained within your proposal was, at your own admission , not fit for purpose based on HiETA's requirements. We experienced significant delays in receiving the first draft of the Analysis and Design Document (ADD), which was finally agreed in early August 2019, approximately six months after the project commenced. The fact that the proposed scope was not fit-for-purpose was only identified by Incremental in late March, two months after the planned Analysis and Design phase during which we would expect that should have been identified. In fact, the original draft ADD itself did not identify the requirement to change scope; this was only identified through the review process and following extensive changes to Incremental's project team. We understand that you now consider the system to be largely complete, following a number of significant reconfigurations causing material delay to the project, but that full system configuration still remains incomplete. As a result we have been unable to perform any detailed testing on the system (in line with your recommendation), which is now already eight months late on an original six-month project timescale, to obtain assurance that the system as configured meets the amended requirements.

Furthermore, the Agreement states that the project costs are not likely to exceed 20% over the quoted price. It is a term of the Agreement that Incremental will review and where necessary re-estimate the costs adjusting them up or down as the project progresses (page 30). A 20% cost overrun would be approximately £4k for the first set of deliverables and £3k for the second (which remains incomplete). In email correspondence dated 29 August 2019 and subsequent telephone conversations, Incremental proposed we pay historic overruns of approximately £44,000 for the contract to date, which is approximately 130% of the quoted costs. This is a hugely significant

cost overrun which Incremental was under a contractual obligation to bring our attention in advance of the work being undertaken, including, "detailing the reasoning behind any increase or decrease in costs". This correspondence came after a previous meeting on 6 June 2019 during which Kim Mccann, Chief Operating Officer of Incremental, verbally committed to honour the quoted price for the first set of deliverables and confirmed that there were no material overruns on the second set of deliverables, which was anticipated to be close to completion at that time. Reversal of this this commitment creates a significant issue for us as had the commitment not been made at that time by an individual that we could reasonably have assumed was an authorised representative of Incremental, we would have taken the opportunity to review the ongoing viability of the project at that point given the issues and delays that had been experienced in the first five months of delivery.

We continue to disagree that the majority of costs identified by you as overruns are chargeable to us under the existing agreed scope and terms of the Agreement. We also note that a contractual commitment was made, both in the original quote and in the email correspondence on 7 June to put in place a proposal for revised ways of working; specifically management of overruns (including who bears the costs) and amendments to Terms and Conditions to provide better protection for both parties. This commitment has not been met, despite both parties agreeing that time would be of the essence in relation to each party's obligations, which is particularly problematic in light of the subsequent receipt of a claim for significant additional costs. On 2 October 2019, we received an email changing Incremental's position for a third time and increasing the total historic costs claimed to over £170,000 and proposing to more than double the quoted implementation cost. None of these additional costs were brought to our attention for formal approval prior to being incurred, despite previous assurances listed above. Throughout the most recent discussions, there has been a clear implication that if we do not agree to these additional costs then you would seek to terminate the contract.

All of the above constitutes a repudiatory breach of the Agreement to the extent that we have been deprived of the benefit of the contract for substantially all of the original projected timeframe and are now facing at least a 100% increase on the total cost of implementation if we proceed. Both English and Scottish case law sets good precedent for an implied right to terminate the agreement in these circumstances."

Project documentation

Functional Design Document

[12] Functional Design Document was an output of the January workshops and was part of the Analysis and Design phase of the project. It was issued to the defender on 8 March

2019 there was then discussion of FDD between the parties, including at a meeting on 9 June, and the final version of the FDD [version 5] dated 24 June 2019 was agreed and signed off by the defender on 26 July.

(c) The FDD is a 39 page document which addressed the Project in considerable detail.

[13] Under the heading Background (section 1.1) the FDD stated:

“HiETA is looking for an integrated ERP system, Microsoft Dynamics 365 for Finance and Operations (D365). This provides the core platform for HiETA’s ERP solution, meeting the existing requirements, and providing a platform for growth as the business expands. HiETA’s existing technology stack comprises:

- » Office 365 for email;
- » Excel spreadsheets for reporting and project management;
- » Prodman - a bespoke manufacturing tool;
- » MoneyWorks for Finance;
- » Tande for time and attendance.

To replace these systems, HiETA is seeking a single technology platform to rationalise its IT estate, automate processes, and ultimately support the growth initiatives over the next three years. This new system should be a scalable cloud solution, which is easily adaptable, and easy to roll out to new sites as the business grows. HiETA is seeking a Digital Technology Partner to design, implement and support this new platform whilst utilising the in-house development capabilities of the HiETA IT team.”

[14] Under the heading “purpose” the documents stated (section 1.2):

“The purpose of this document is to detail the high level solution and functional design requirements for the Microsoft Dynamics 365 for Finance and Operations solution for HiETA Limited. This document is the basis for the project implementation and agreed as part of the Analysis phase of the project. The document details the following information:

- » The modules and feature matrix of the Microsoft Dynamics 365 for Finance and Operations solution based on the requirements analysis carried out to date;
- » The environments required, and their expected usage during the initial phase 1 for the projects;
- » Details of the key processes and features required within each module, and the results of the Fit-Gap analysis performed during the analysis and design phases;

- » Technical and architecture design information regarding the Cloud based solution;
- » A summary of the change requests and detailed functional designs required to fulfil the requirements of the Gaps which have been agreed.”

[15] Under the heading Fit-Gap Analysis (section 2.2) the documents states:

“2.4. Processes and Features

The fit-gap analysis sections within the document indicate the details gathered from the analysis and design workshops that have been undertaken to review HiETA’s current business processes and operating procedures, where these have been made available. A fit-gap analysis has been carried out against the standard Microsoft Dynamics 365 for Finance and Operations product. For each core process within this module, the following information is provided as part of the analysis and design

Item	Description	Details
Within Scope (Phase 1)	This details whether the core process is within scope for the initial, phase 1 implementation and go live.	<ul style="list-style-type: none"> » Yes - The process is included for implementation on Phase 1 » No - The process is not included for implementation in Phase 1
Fit-Gap	This details whether the core process in Dynamics 365 is a fit to the standard system, if there is a Gap which has been identified during the analysis and design phase, or whether this is a new area of functionality in the standard product.	<ul style="list-style-type: none"> » Fit - The process can, at this time, be considered a fit to standard functionality. » Gap - One or more product Gaps have been identified and noted during the readiness assessment or analysis and design phases.
Comments	Any additional information relating to the process which has been identified during the analysis and design process.	

	For example, if this has been identified as an area for inclusion in a future project phase.	
--	--	--

[16] In section 3.3, “organisation, licensing and security”, the document states: “This section is awaiting information from HiETA with regards users and roles.”

[17] In relation to the financial operation aspects of the system, the FDD identifies gaps in relation to TANDE and the month end revenue accrual process. TANDE was the defender’s existing in house system for managing time and expenses. The document comments on these gaps as follows:

“4.9.4 Tande Time-writing Integration

HiETA will continue to use Tande for time-writing during the initial phase of implementation. HiETA would like to consider as simple as possible integration between Tande and D365 to transfer actual hours for projects and production between the two systems to avoid manual re-entry of all time.

4.9.4 Month End Revenue Accrual Process

The required month end accrued process is not a supported process in standard D365 and any such accrual process would be manual. This could be in full or in part met by either a product customisation or using reporting, and a manual or data upload facility for the project and financials accrual. Any such provision for this gap requires further discussion during implementation.”

[18] There are various references in the FDD to the Prodman system. Prodman was a bespoke, in-house production management system used by the defender for its manufacturing process. For example:

“5.5.1 Background and Overview

HiETA’s manufacturing is currently controlled by a separate system, Prodman, and this system will continue to be used as the main production control system.

HiETA require to have a two-way set of interfaces between Microsoft Dynamics 365 for Finance and Operations Prodman so information automatically flows between them e.g. works orders, routes, materials issued, update report as finished / serial numbers.”

[19] The FDD went into detail on aspects of Prodman and what integration would be required. For example the FDD states:

“5.3.5 Batch Mixing

Prodman currently allows two batches to be mixed together during production. The interface between Prodman and Dynamics 365 Finance and Operations is required to support the existing Prodman features for mixing two batches, and for this to be reflected to Dynamics 365.

Business Requirement Document (“BRD”)

[20] The business requirement document was an output of the January workshop and was part of the Analysis and Design phase of the project. It was issued to the defender on 8 March 2019. The business requirement document was a two page table listing the requirements of the defender, whether these were in scope for phase 1 and whether there was a fit or a gap. Phase entries in relation to Prodman were identified as not being in scope and being a gap.

Witnesses as to fact

[21] There was little dispute between the witnesses on factual matters. I found all the witnesses to be generally credible and reliable in relation to factual matters. The differences between them were largely attributable to their differing understandings of the legal effect of the contract, or their differing opinions as to the reasons why the project took longer than it did, both of which are (to the extent that they are relevant to the determination of this case) matters for the court and not matters of fact for the witnesses.

Pursuer's witnesses as to fact

[22] The pursuer led the following witnesses.

Jamie Watson

[23] Jamie Watson was an employee of the pursuer who was responsible for bringing in new business. Mr Watson gave evidence that on about 10 May 2018 he had a phone call with the defender's Hugh Smithson which led to a series of phone calls and then a pre-sale technical session in Glasgow on 22 May 2018. The session was attended by Mr Watson, Michelle Baxter (the pursuer's pre-sales consultant for finance and operations) and the defender's Hugh Smithson, Andy Watson and Linda Fairhurst. The session was to discuss the defender's requirements and the features of Dynamics 365 products. The defender's representatives made it quite clear that they wanted a straightforward implementation of Dynamic 365 "out of the box". That meant taking the product as it comes with light configuration (setup) and not developing or customising it in any way. Unless a client provides proposed low level architecture or solution design in advance of writing the proposals, which would help to better determine the implementation costs, these matters have to come as a result of the Analysis and Design phase. The defender did not provide this detail and did not have documented processes. On 25 July 2018, Mr Watson emailed Mr Smithson with a note of some "could have" requirements were identified that could potentially impact an out of the box solution. A draft proposal was submitted to the defender on 20 July 2018, a revised proposal on 6 September and the final proposal, which accepted and became the contract, on 14 September 2018. An introductory meeting between the pursuer and defender was held on 4 December 2018 but the defender requested not to

commence the project until January 2019, when its budget would become available in the new financial year. Mr Watson's formal involvement with the project ceased around 18 December 2019, other than one email to advise of a change in project manager in March 2019.

[24] When it was put to the witness in cross-examination that it had not been foreseen that the only possible implementation was out of the box, he replied that at the time it was. With regard to the risk provisions, he explained that typically one would have a change budget from the risk pot. A risk pot is something that the pursuer includes in a proposal of a time and materials nature. In a fixed price contract one has to incorporate a level of risk. This contract was not on a fixed cost basis because the defender's lack of understanding of the detail meant that it was difficult to protect the risk and the pursuer suggested to the customer that they should account for an additional budget so there was no challenge when a risk happens. One of the risks would be that there might be a change. The risk pot was to cover all risks and not just changes. On re-examination, he confirmed that the purpose of the risk pot was that if risk occurred the customer would have a budget for it. It is better to engage with the client to say there are some risks and it would be best for the client to set aside funds for the risks rather than not have an ability to pay in the future. Risks might not occur.

Jamesina (known as Jenny) Sclater

[25] Jenny Sclater was a senior consultant with the pursuer and was involved in the analysis and the implementation of ERP Systems and training users on ERP Systems. Miss Sclater was involved in the workshops in January 2019. She covered Stock and Production and her colleague Asif Khan covered finance and project. The format of the

workshops was a combination of the pursuer's representatives going through a checklist of what the different standard modules within the ERP System offer and then understanding what the customer wants the system to do and working out whether it could deliver that. As she went through the checklist, a lot of what the defender wanted was not in scope and Linda Fairhurst verbally confirmed that the initial implementation could concentrate on what was agreed in the Proposal only. HiETA talked about their legacy systems and in particular wanted to continue to use their production control system, known as Prodman which they wanted to integrate with the ERP System. They had their own IT team who they said they were capable of doing integrations but would probably need some assistance from IG, but integrations were not in scope. There was also discussion about their in-house TimeandExpense system (TANDE). There was also discussion of the master planning module capabilities. Miss Sclater explained that although D365 could deal with Kanban it was not in scope for this project. Kanban is a visual system for managing work as it moves through a process to assist with just-in-time production. The pursuer takes notes at workshops and on the basis of these produces two documents to go back to the customer. The first is the Functional Design Document ("FDD"). The second is a Business Requirements Document ("BRD"). An FDD and BRD were produced by the pursuer for the defender, and Miss Sclater had input into both of these. Miss Sclater moved to other work and her only other involvement was in March 2019 to respond to questions raised by the defenders' Linda Fairhurst on out of scope functionality. The purpose of the workshops was to get the defender's requirements in more detail. The defender wished to integrate Prodman into ERP but the contract did not include customisation by the pursuer. When the defender's representatives mentioned integration at the workshops, Miss Sclater pointed out that it was not within the scope as per the contract.

[26] Under cross-examination, she explained that at the workshop she was shown Prodman and that the defender's representatives intimated that they wished to undertake the integration of Prodman as they had the expertise to do so. Miss Sclater pointed out that the contract was for an out of the box system with no customisation included. She took notes but she did not think these were provided to the defender because they would have been incorporated into the FDD.

Asif Dabhad

[27] Mr Dabhad was a Senior Project Manager working for the pursuer. He became involved in the project with the defender on 21 February 2019 when Mike Barn, the outgoing project manager had an internal handover with him. The original full day onsite requirements gathering workshops took place between 14 and 25 January 2019. Asif Khan had completed the workshops on 14 to 17 January for finance and Jenny Sclater had completed the workshops between 22 and 25 January for operations. On 21 February 2019, the draft FDD was submitted to the pursuer's operations director and Principal Dynamics Consultant for internal pay review. The purpose of the FDD was to detail the design requirements and identify gaps that required bespoke customisation and additional change to the original proposal. On 26 February 2019, Wayne Mather, the pursuer's Principal Crowd Engineer set up the VSTS project as part of provisioning Dynamics 365 or Finance and Operations environment. The subscription estimate task required information from the defender and a usage profile spreadsheet was uploaded to Microsoft teams to populate the required data. On 1 March 2019, Mr Dabhad arranged a re-planning meeting with Asif Khan (covering Finance) Anthony Hampson (covering operations) and Jenny Sclater.

On 4 March 2019, Mr Dabhad sent an email to Linda Fairhurst, the defender's Project Manager, to arrange weekly catch-up calls to track project progress.

[28] On 25 February 2019 Linda Fairhurst sent an email to Mike Barn stating:

"I was wondering how we are getting on with the requirements document? I've got everyone lined up for review of it this week and I'm keen to get started."

[29] On 28 January 2019 Linda Fairhurst emailed Andy Watson, Will Bolt and

Liam McCulloch of the pursuer thanking them for their time at the workshop sessions the previous week and stating:

"As an exercise this week I think that it would be beneficial if we could write our own 'requirements' document to clarify our understanding from the sessions last week. This will give us something to compare to the requirements specification that Incremental are writing to try and ensure that we have a) captured everything we think that we need the system to do b) highlight anything that may have slipped our mind with the meetings last week."

[30] On 31 January, Mr Watson replied stating:

"I've started off the requirements lists for Inventory/Warehousing and Production; between us we should be able to cover everything; although we'll probably miss a few things that we covered last week and no doubt will have discovered a couple of bits that we missed. There are also some notes/observations of things that aren't necessarily ERP related but ideas/thoughts that cropped up during the workshops so this is also a bit of a brain dump; feel free to dump your brains here too."

[31] That email included detail lists of points arising out of the workshop.

[32] On 8 February 2019, Mike Barn emailed Linda Fairhurst stating:

"We've almost completed the FDD, Asif is putting the finishing touches to this just now. We'll have a quick peer review internally and then get it over to you the start of next. Apologies for the delay in providing this, we've recently moved to some new templates and needed to transpose the information into this."

[33] In an email dated 30 February 2019 to Linda Fairhurst, Mike Barn's stated:

"Apologies for the delay in sending the FDD, we're still in the process of finalising it. Asif has had to take some emergency leave so I'm currently looking to bring someone in temporarily to complete the Finance/Project side of the doc so we can distribute."

[34] Linda Fairhurst attempted to arrange a meeting but was unable to do so. On

12 March 2019 she emailed Mr Dabhad as follows:

“No such luck here getting all the people I need in a room on Thursday. Looking at dates we will be ready to go from 26th March for an intense two weeks before I go on holiday. I have a hospital appointment on Thursday 28th but as long as the guys are doing config then they’ll be able to cope without me. In the meantime we will spend the next week and a half pulling together the remaining information requests (from the workshops) and get this over to you.”

[35] On 8 March 2019, Mr Dabhad uploaded the FDD and BRD to Microsoft teams, which was how documents were communicated between the pursuer and defender.

[36] By email dated 18 March 2019, Linda Fairhurst raised a number of queries. In that email she said:

“Integration with our system Prodman is noted everywhere in the document that it is not in scope for Phase 1, my understanding that we intend to integrate this ourselves but our IT department will need some guidance from yours.”

[37] By email dated 20 March 2019 Asif Khan replied to the specific queries raised. His reply included the following:

“The question of integrations with Prodman and the other systems is a considerably larger conversation and again this needs to be discussed to as Phase 1 includes no integration work at all currently.

With the various systems needing integrations from Go Live means a scope out will be needed to ascertain what we have on both sides if any work is required, nothing is currently planned around this and again it would be worthwhile confirming expectations on both sides in terms of support potentially required.”

[38] In his evidence, Mr Dabhad described this email as the first indication of several decisions that still needed to be made within the defender that would impact the scope and timelines.

[39] On 19 March 2019, Linda Fairhurst emailed confirming that she was happy with paying hotel expenses for the pursuer’s staff at the meetings the following week. In an email dated 21 March 2019 to Asif Khan, Linda Fairhurst stated:

“Regarding Integrations, I believe our intention is still that we are hoping to do this all ourselves but we will need guidance (and the associated cost) of that from yourselves. Talking to Hugh today as long as we can access the back end data from ERP we don’t have to complete the Prodman integration in Phase 1, further conversations do need to be had but they go over my IT knowledge.

Migration journals (as in the data cleansing) is a worry if I’m honest. We are behind. I’m hoping that for UAT1 we can give a select amount of data and continue working on cleaning it up ready for UAT2. I assume that Go Live will use a completely new set of the latest fully clean data anyway? We are constantly setting up and closing projects so the data now will be very different to the data mid-year. We also don’t have the spreadsheets for the finance module data yet, are we able to get these?

I have a meeting with Rob shortly to finalise some of the data required from the workshops, I should have a first cut of data over to you by the end of the week.”

[40] On 22 March 2019, Asif Dabhad emailed Linda Fairhurst introducing her to the pursuer’s Emma Bannister:

“who can help explore the different options for supporting the integration. Can I suggest we set up a call with the relevant stakeholders, to understand what assistance you would like during and after Phase 1?”

[41] On 25 March Linda Fairhurst uploaded data which had been requested by the pursuer in the January workshops.

[42] On-site working began on 26 March 2019. It had been agreed that during that week the pursuer’s representatives would attend at the defender’s premises to go through the FDD with them in order to sign it off, and the pursuer’s consultants would stay on site to complete the basic configuration of the system alongside the defender’s staff. Mr Dabhad’s evidence was that this involved only configuring the “out of the box” system in terms of the contract.

[43] At the on-site meetings, Mr Dabhad presented a high level overview of where they were in the project and the decisions that the defender required to make and highlighted that there were gaps that needed addressing. He also presented the project initiation document (PID).

[44] On the evening of 27 March 2019, Mr Dabhad was informed by Anthony Hampson of the defender that the FDD did not address the customer's requirements in terms of Kanban and Scheduling.

[45] During that week, Mr Dabhad became aware for the first time that the standard functionality of Dynamics 365 Finance and Operations would not be able to map on to the defender's current processes. On 29 March 2019 there was a Skype call on Prodman integration with Dynamics 365 with the pursuer's head of applications Damian Gresch, Mr Dabhad, Linda Fairhurst and Hugh Smithson. After that meeting, Mr Dabhad had to go away and start working on defining what the defender's additional requirements were. According to Mr Dabhad, the defender was aware of what the pursuer was doing and were fully engaged.

[46] On 29 March 2019 Linda Fairhurst emailed Mr Dabhad stating:

"Thank you for the call earlier, talking to our stakeholders internally and also the Incremental guys we have made the decision that we want to push next weeks UAT testing until we have a complete Phase 1 system configured. Once you have had a de-brief of this week with your guys the next steps need to be getting an updated scope and cost as I need to get this signed off internally ASAP before we undertake the next stage of the project. We can then arrange the remaining config and the first UAT session to follow promptly after the scope change sign off. In the meantime we will use the sandbox we have access to here to familiarise ourselves with the system and ensure that our internal understanding is 100% as to get the most out of our UAT sessions."

[47] On 2 April 2019 Asif Dabhad emailed Linda Fairhurst asking whether the requirements for Phase 1 integration with Prodman were available for Mr Smithson and Ms Fairhurst replied that day stating:

"Sorry you've not had these yet. We've had a review meeting today where we've been through all the interactions between Prodman and Dynamics to make sure we've got it all covered. I need to write these up, I'm now aiming to have them with you for Thursday."

[48] Mr Dabhad's evidence was that by 3 April 2019, the basic configuration was pretty much all done as outlined in the FDD. The pursuer was however waiting on the defender's finance team to provide some financial postings for item groups and posting profiles to complete the finance configuration. The defender needed to decide on whether they wanted to split the chart of accounts and add new accounts also they could not complete the Subscription Estimator until the scope for Phase 1 was agreed. They also needed to complete analysis of the volume of data to be processed. The pursuer could not progress the project without understanding the new scope and revised costs.

[49] On 4 April 2019, Hugh Smithson emailed to Asif Dabhad two documents in relation to the work the defender was looking at for how the defender needed to integrate between Dynamics and Prodman.

[50] Mr Dabhad raised several questions relating to the defender's processes, some of which the defender's Andy Watson was unable to answer in his response on 15 April 2019.

[51] Andy Watson met with the pursuer's personnel at the pursuer's Norwich office on 24 and 25 April 2019 for on-site scoping workshop.

[52] On 26 April 2019, in his weekly call to Linda Fairhurst, Mr Dabhad asked when the defender were proposing to start the integration work and suggested a bank of days which could be agreed on time and material basis for the pursuer's developers to support them.

On 29 April 2019 Linda Fairhurst emailed Hugh Smithson stating:

"Incremental have asked for a timeline of when we are going to implement our end of the integrations (as per the sheet you sent across to Asif). Asif would also like to know our estimate of how many days help we think we will need. The plan is to just have a bank of say 10 days you can draw down from as and when needed. I should have a new estimate of cost at some point this week so I'll need this reviewing and authorising when it comes in."

Mr Smithson replied to her on 1 May 2019 saying:

“That’s really difficult to answer without more information about how the actual integrations work and what we need to do! We’re not working on it yet. If they are doing development and providing API access for the things we need then it’s probably three weeks of Joe’s time. How much of their time we’d like would depend on their documentation.”

[53] In an email of 1 May, Linda Fairhurst stated:

“Please see below the response from Hugh on a timeline. My understanding is that our IT guy in house is ready to work on this as soon as we are signed off on the new scope.”

[54] Mr Dabhad’s evidence was that by the time he left the project on 2 May 2019, the pursuer had not defined the amount of effort required for the Prodman integration of the defender’s scheduling requirement. The pursuer was still trying to understand the defender’s scope due to insufficient details on their requirements and lack of business process maps. The pursuer was not able to execute the project in terms of the timescale set out in his project plan of 15 March 2019 because the delivery got blocked by the change of the defender’s requirement. The initial draft of the FDD could not be signed off by the defender because the defender went off-plan. There was a whole scale review of their requirements. What the defender was proposing was complex and required bespoke development work. The pursuer would be able to deliver it, but they were caught off guard because their understanding was that they were delivering something very close to an “out of the box” solution.

Emma Bannister

[55] Emma Bannister was the pursuer’s Head of Customer Success. She managed the customer relationship with the defender. She was involved in discussions with the defender after it became apparent that defender had not paid the first milestone payment.

Jane Johnston

[56] Jane Johnston was a contractor working for the pursuer.

[57] In around June 2019 she had the task of liaising with the pursuer's solution architect, Kevin Taylor, to try and work out how the defender's requirement could function within the system. After the meeting on 6 June, the pursuer issued the FDD again and on 26 July 2019 the defender emailed the pursuer to advise that the FDD was agreed. As the FDD was signed off by the defender out of the sequence envisaged by the proposal, at the point at which it was signed off there was still some training and testing to be done but the ERP System itself was pretty much there in terms of being configured. Between June and October 2019, the pursuer completed the last of the configuration and either provided training or arranged training. The defender was responsible for uploading the data/data migration but the pursuer had provided templates to assist. Later on the defender said they simply did not have the people to do the job so the pursuer agreed to do this task.

[58] In her view, the ERP System which was left *in situ* when the contract was terminated was fit for purpose. Without Prodman, the defender would still have a system that enabled them to carry out their financial operations including their costs and timesheet information through the project accounting module. It allows access to procurement information and enables them access to their up to date financial information. Whether the Prodman interface was used or not, in the meantime, there was nothing to stop the defender manually entering the relevant data into the Dynamics 365 system. The system was fit to do the work that the defender required, but there simply had to be some manual work if they wanted to include the information from Prodman without the dynamic interface that would have been there had the Prodman change request proceeded at additional cost.

Kevin Taylor

[59] Kevin Taylor was a Senior Solutions Architect with the pursuer. He was generally involved early in the Analysis and Design stage of projects to capture the customer's businesses requirements and to look at the design and use of the products in the solution. Where the product does not suit the customer's requirements, he looks at how other software systems and tools can be used to fill the gap, including the design of relevant software extensions or integrations to other software.

[60] Mr Taylor became involved in the project with the defender in April 2019 when the project consultants, Anthony Hampson and Mike Logue were looking to discuss their design ideas around the use and tracking requirements of bill plates, part of the defender manufacturing process, and how they could be best fitted into the system. He was subsequently engaged by the same team to review their project design documentation, including a change request around a gap being discussed in relation to the defender's Prodman system. The Prodman system was a bespoke, in-house, on premise production management system developed in Python programming language, and was used by the defender for the creation, maintenance and execution of their project and manufacturing plan. He attended the defender's Bristol office on 19 June. As a result of the session, he updated a section of the FDD around the financials and project accounting area. He also attended the defender's offices on 30/31 July 2019 to deliver a training session to some of the defender's staff. The training sessions covered an overview of the module within the production, a review of the configuration areas and data set up for the defender. Each session had an agenda of topics. Feedback from the sessions he attended was that they were very well received. As a result of the involvement of new members of staff of both the pursuer and the defender, some discussions took place during the sessions around areas of

the system which may not have been discussed at length previously. One example would have been discussing with the new defender's staff how Prodman would affect their processes, and options on how the pursuer might design this if it were to proceed.

[61] A change request was prepared by the pursuer's project team in relation to Prodman. Mr Taylor was involved in the internal review of the document but he did not recall if it was issued, approved, finalised and agreed by way of signing off by the defender. In relation to capacity planning and scheduling, although this change required additional configuration and not software development (as with the case with Prodman), the pursuer would have still raised a change request if they felt it was an extra scope of work over and above what was in the contract. A change request was prepared in this case but Mr Taylor did not recall if the change request was ever issued or approved and his understanding was that the pursuer did not get to that stage.

[62] In his view, the solution as it stands is fully functional. Work had started on capacity and scheduling areas of the master planning module. The original Analysis and Design project phase had been completed: requirements and design documentation were approved. Additional Analysis and Design activities had been undertaken regarding the new requirements of integration with Prodman. Analysis and design activities and related project management had also been produced regarding scheduling, and piloting had taken place in that area. Configuration and data roadwork had been undertaken and was progressing as a joint activity involving the pursuer and the defender. Testing of the solution by the pursuer had been carried out using the configuration and data supply by the defender. Training had commenced to key users at the defender to allow them to become familiar with the product and to allow them to collaborate to continue to develop the

system. No detailed technical design for the interface where Prodman was produced as interface requirements were not finalised.

[63] The additional Prodman integration would not have been a small piece of work. Interfaces to make systems talk to one another are notoriously complicated and take a significant level of effort to implement. The testing and issue resolution phases are particularly time consuming.

Donald Grieve

[64] Donald Grieve was employed by the pursuer as a Programme Manager. His role involved assisting sales managers with their pre-sale negotiations and managing ongoing projects.

[65] He explained that the Proposal contained an indicative high-level project plan at section 5. The project plan was based on the scope of the project and indicated that it was expected to last approximately 5½ months. That however assumed that the Analysis and Design phase did not identify any significant business requirements that were unplanned for and also required the FDD to be prepared at the end of the Analysis and Design phase to be agreed upon and signed off in a timely matter. If an FDD is not agreed timeously then this will cause delays to the other stages of the project whilst discussions continued regarding the final design.

[66] The pursuer's project team left the January workshop with a log of 42 information requests. This was a log of requests for information that the defender was unable to answer during the workshop. It is an unusually large number for a project of this nature and demonstrates that the project team had difficulty getting answers from the defender to allow the FDD to be created. The spreadsheet containing the information that was required from

the defender was available on the shared Microsoft teams on 30 January 2019. The pursuer did not create or stand up the environments until February 2019, as the design workshops had to be completed first. The pursuer then started to configure the environment, and did so on the assumption that the FDD would be issued in February 2019.

[67] From mid-March 2019, the project direction shifted. The immediate focus became change requests. The additional items were Prodman integration and the change to Scheduling. These two changes would require change requests. The FDD could not be signed off while there were discussions on site about trying to narrow down what was required in terms of integrations and how the master planning module and scheduling was to work. The pursuer needed to know what specific data had to be extracted from D365 ERP System to input to Prodman and vice versa. Although the FDD had not been formally signed off, the pursuer continued with elements of the project, including initiation, installation and configuration of the system. They did so as they wanted to begin progress in whatever areas they could in order to increase efficiency and try and reduce the overall length of the project.

[68] The pursuer had completed the Analysis Design stage. The project kick-off stage was largely complete and 95% of the training had been given. Test pilot 1 stage has resulted in further work for the pursuer as new members of the defender's staff were involved.

[69] Test pilot two was not carried out because the project was put on hold because of holidays by the defender's personnel in August 2019 and then disputes about payment of invoices.

[70] The delays were caused by (a) the defender not signing off the FDD for months, due to changes in its requirements re out of scope work such as Prodman integration (b) time lost because of changes in both parties' personnel. The material cause of the delay was the

defender's prevarication in dealing with the 42 information requests raised by the pursuer in the Analysis and Design phase.

[71] On 24 May 2019 Mr Grieve emailed the defender asking for a meeting to discuss the project as the parties needed to come to an agreement on outstanding invoices, commercials and project milestones going forward, and informing that he had asked his team to stand down until this was discussed and agreed. The meeting was held on 6 June 2019 and was attended by Kim McCann, Donald Grieve, Emma Bannister, Rob Hemsley, Linda Fairhurst and Andy Watson. Notes of the meeting were produced by both the pursuer and the defender. There was discussion of *inter alia* of payment of outstanding invoices, reform of project governance and the signing off of the FDD by the defender.

[72] On 13 June 2019 Mr Grieve emailed Linda Fairhurst with suggested changes to guidance on governance with the project moving forward, which were not approved by her. After sundry correspondence and a further meeting on 19 June the FDD was signed off on 26 July.

[73] On 29 August 2019 emailed Rob Hemsley with details of the day's work for the milestones in the project and proposing a payment of £44,000 beyond the estimates in the Proposal to bring a conclusion to the dispute and move on. He gave an indication of the future work required to complete the project, being 50.5 days. An estimate of around £60,000 had been given in May 2019 to carry out both parts of the change request.

[74] Mr Hemsley replied on 6 September indicating that this was not acceptable and he would not pay the outstanding invoices. After further correspondence, the defender sent the termination letter of 4 October 2019.

[75] It would have been possible to leave the integration work to a later stage: the defender did not need the changes developed to go live. They could use the system but

manual work was required. It would have been for the defender to put these manual work places in place themselves.

Defender's witnesses as to fact

Hugh Smithson

[76] Hugh Smithson was the head of HR and IT at the defender. His role in the project was to carry out initial work and engagement with potential ERP suppliers and get a cost and plan for presentation to the Board. He was less frequently involved once the project was initiated.

[77] When looking for a supplier, the defender spoke to a number of companies. The defender had a preference for one of the Microsoft solutions so looked for companies that would be able to offer a Microsoft ERP implementation. They approached two other companies. These companies quoted for a Microsoft Dynamic NAV system rather than Dynamics 365 but the defender specifically wanted D365. One company indicated that they could quote for D365 but it would cost at least £300,000. They chose the pursuer because they were offering D365 at a price they could afford and was not of an order of magnitude higher than the quotes received for Dynamics NAV. The defender's understanding from Mr Watson's email of 25 July 2018 was that the pursuer had understood what they were looking for and had determined that the out of the box functionality would be modified in line with these requirements. The main meeting was in Glasgow on 4 December 2018. The defender made it very clear to Jamie Watson that none of the people on the project had implemented ERP before and that they were totally reliant on the pursuer's expertise for a successful project. At the meetings the defender described Prodman in detail. The defender's preference was to retain Prodman. The defender also

discussed that they would want to do some development and possible integration themselves between D365 and Prodman. At the meetings they made it clear to the pursuer that they needed the pursuer to guide them through the process.

[78] The defender wanted out of the box because they felt it would reduce the initial and ongoing costs of an ERP solution. They felt that because the defender were not a very old company it would be better to change the defender's ways of working to match the ERP system rather than to carry out lots of complicated ERP developments.

[79] Mr Smithson attended some of the January 2019 workshops. His recollection was that during the workshops there were detailed discussions about how the business worked and how they carried out various business processes. In his view, the January workshops were worthwhile and it felt like Asif Khan and Jenny Sclater understood how the defender worked and what they were trying to achieve.

[80] Mr Smithson became aware of changes in the pursuer's team around 5 March. He emailed Jamie Watson who replied explaining that the pursuer had made some changes to team due to a restructuring within the organisation and that the handover had been smooth and had not and would not impact delivery of the project. Mr Smithson accepted the response but remained concerned about the impact of the changes on project delivery.

[81] Mr Smithson received the FDD on 25 March 2020. The document did not make it clear what the exact output from the workshops was or what functionality the defender would get from a configured system. The defender did not understand the FDD and were not taken through it by anyone from the pursuer. Mr Smithson was expecting more guidance from the pursuer on where it should change internal processes to avoid configuration. The document did not do that.

[82] On 26 March 2019 Mr Smithson produced a document visually representing the expected data interchanges between D365 and Prodman and shared it internally in the defender for comment.

[83] On 27 March 2019 he emailed internally within the defender:

“It was clear yesterday that there is still a gap between our expectations of ERP and what Incremental think that they are going to deliver. It’s frustrating that a lot of this has been discussed with someone who is no longer on the project. Equally frustrating is we haven’t got a lot written down and that is going to make it very difficult to ensure a successful delivery and confirming what is and isn’t in scope. As a matter of urgency, please can you provide a basic spec of what you are expecting the system to do (including the inputs that go in to it and where they come from). I’m more interested in the actual information than you going to town on fancy diagrams, so email/word/whatever is fine.”

[84] Mr Watson replied the same day stating:

“I agree, it was a bit frustrating. When we were doing the workshops it was difficult to pin some people down and in some cases get people to engage at all. It’s great that George is involved now and picking up on stuff but I can’t help but think it would have been useful to have his involvement/input back in January. Will was involved and is now not; David wasn’t and now is. Linda and I were being pulled from pillar to post for most of the last two months and major stakeholders were often absent/not fully engaged during important parts of the process; and two of the major players on the Incremental side are no longer involved too; so it’s not surprising we’re in this situation. Might be worthwhile us having a have a catch up on all this this morning and a sense check of what we think our original scope was. I’m sure there are things that they think are out of scope which we asked to be in scope; and am a little worried that due to Incremental team changes, maybe some of our original scope has been lost in translation/handover between PM’s and consultants; (E.g. Kanban & some aspects of Sales/Marketing?); it may not be the case, but maybe worth us having a quick review on what we think.”

[85] Mr Smithson had been shown an email chain of internal correspondence within the pursuer dated 29 March 2019 stating:

“HiETA would like internal IT resources to complete the integration with Dynamics D365 for F&O. They currently have in house web development skills working in Python Web framework (Django) and C#. They have experience of integration with Dynamics CE for PSA. This will impact the current Phase 1 delivery with UAT phase stalled until additional scope is added. HiETA are aware this will be an additional cost and will require revised commercials. They currently use Prodman software for production and want the integration, to capture stock items moving

from the warehouse into production passing data between the two systems. Damian has managed expectations on the complexity of Dynamics F&O where only some API is available and they will need to learn new programming language. This will also involve customising further entities for stock management, time and projects. Additional licensing costs were also highlighted for 2 further development environments. Damian was fortunately able to also reference our experience of similar integration done and that went down well with HiETA. Hugh Smithson from HiETA is going to send internal documents defining the requirements loosely. We've suggested initially involving a BA and Solutions Architect to review a number of options once we receive the document and established how much effort will be required of a D365 developer."

In his opinion, he should not have needed to send out documentation capturing the defender's requirements: that was the purpose of the workshop. In his opinion, as none of the individuals in the email chain were present during the workshops it was unsurprising that they did not know what the defender's requirements were.

[86] After an internal meeting of the defender on 2 April to discuss requirements, Mr Smithson emailed Mr Dabhad on 4 April 2019 with detailed documents on the integration between Dynamics and Prodman. He also shared the detailed Prodman diagram he had started creating on 26 March 2019. This is a detailed flowchart showing how Prodman fitted into the manufacturing process. The documents included detail on how the defender wanted ERP to work with their system. This was all work that was covered with the pursuer during the January workshops. The documents should have given the defender sufficient detail to advise them on implementation and integration.

[87] The defender only started to formally document the processes at this time because they had been through it so many times with the pursuer and the pursuer did not seem to have captured the information. At that stage, the understanding from the pursuer was that the defender could do the integration work internally.

[88] Mr Smithson attended the meeting in Bristol on 16 May 2019. He prepared a set of presentation slides headed D365 F and O Project Review. He attended the 6 June meeting and was involved in subsequent correspondence.

[89] The defender did not receive a formal change request and no approval was given with respect to cause for any additional work

[90] In Mr Smithson's opinion, the delays were primarily on the pursuer's side and stemmed from the pursuer's failure to adequately retain the information that was captured during the analysis and design phase, to commence configuration before the requirements and specifications had been formally agreed and accepted and to ensure project team continuity and information sharing. Many of the risks identified by the pursuer in the Proposal materialised in the Project.

[91] On cross-examination, it was put to Mr Smithson that the reason for the gap mentioned in the 27 March 2019 email was that the defender required more customisation than the out of the box solution that the pursuer was planning to deliver. Mr Smithson responded yes, that was very possibly correct. He added that at that stage he did not think that we knew what out of the box meant. That made it really difficult for the defender to know what was out of the box and what was not and whether what they were asking for was included or not. As at 4 April, the defender's intention was still that they would carry out the integration themselves. It was at that point when they had their first conversation with Damian Gresch that the defender realised that it was possible they would not be able to do it. The diagram showing the expected data interchanges between D365 and Prodman was a complicated document. When he was creating this document he had not expected that the pursuer was being asked to consider a complex set of interaction. His expectation was that the interactions would be simple because they just needed to tell Prodman that a

part had moved from one stage of the process to another. He said that in his naivety he didn't see it as an overly complicated piece of work; it became apparent later on that the integration was not as simple as he had assumed it to be.

Robert Hemsley

[92] Robert Hemsley was a qualified chartered accountant. His role is to lead all the financial aspects, both strategic and operational, of the defender's business.

[93] In July 2018, the board of directors of the defender agreed that they required a D365 solution. Mr Hemsley was responsible for negotiating the contract with the pursuer for providing details of financial processes through direct participation in workshops and review of various documentation. He sought to place a cap on the fees for implementation services but this was refused by the pursuer, who instead offered the "risk pot" provision. In Mr Hemsley's opinion the contract required the defender's approval for any cost overruns. He was also tasked with dealing with the project once the initial dispute was identified in May 2019 which resulted in the 6 June meeting.

[94] Mr Smithson attended most of the January workshops. He said they felt like a really good, complete and challenging series of workshops. The level of engagement on both sides was high and there were deep and challenging discussions, with both sides appearing to be working really collaboratively to each proactive solution. The majority of the feedback received during the workshops was that the D365 out of the box solution could deliver almost all of the defender's requirements. At that time the only scope changes that had been identified were relatively minor for example adding a logo to automatically generated invoices. The pursuer's team members took notes but the defender never received a copy these. The written output, being the draft BRD and FDD, did not reflect their requirements

discussed during the workshops. On reviewing the draft FDD and the BRD, the defender recognised that the integration of Prodman and TANDE would not be achievable within the project timeframes and that a second phase would be required to complete the project as initially scoped. Mr Hemsley attended the meeting on 26 March 2019. It was apparent to the defender's project team from the review of the draft FDD and BRD that the pursuer had significantly misunderstood their requirements, in particular how the Prodman integration and scheduling functionality would be applied. The defender therefore rejected the draft FDD and BRD as not being fit for purpose.

[95] The defender received an invoice for the analysis and design phase dated 14 March 2019 which they refused to pay as the invoice had been issued prematurely. Both Prodman integration and scheduling had been clearly explained to the pursuer during the January workshops and the defender was told during the workshops that the out of the box functionality would meet these requirements. The defender was surprised that they were now being told they were out of scope, particularly as this had not been identified in the draft FDD.

[96] The PID contained a clear acknowledgement that the defender's approval would be sought for changes and the implications of timescale and cost were to be discussed. No such discussions took place and no change request was submitted to the defender. No Risks Assumptions, issues and dependencies log ("RAID log") was provided.

[97] Mr Hemsley never received any change requests, and the defender never approved any change request and no purchase order was issued.

Mr Hemsley attended the meeting of 16 May and was involved in subsequent correspondence. He attended the 6 June meeting and was involved in subsequent correspondence culminating in the termination letter. His evidence was that at the meeting

of 6 June the pursuer's Chief Operating Officer Kim McCann verbally committed to honour the quoted price for the first set of deliverables. I note that it is not part of the defender's case on record or in submission that this statement had the effect of capping the fees at the level of the estimates, and so I need not deal with that further. In any event, in my opinion the evidence does not establish that parties agreed to vary the contract to that effect. No evidence was led from Ms McCann. References to capping the fees at the estimate in the meeting on correspondence in the period between the meeting and the Termination Letter were, it seems to me, in the context of unsuccessful negotiations to resolve the parties differences and get the project back on track, upon which no agreement was reached.

[98] Mr Hemsley's evidence was that the defender spent significant time with the pursuer in the summer of 2018 setting out their situation requirements, and significant time in January 2019 working through the Analysis and Design phase. The result of that work was to find out about major scope changes only in March 2019 and finally agree the FDD in July 2019. The proposal provided that Analysis and Design was supposed to take 15 days. In actual fact, it took over six months and was still never fully completed. The defender is not an ERP implementation specialist and relied on the pursuer to be experts in the process. The FDD shows that the vast majority of the defender's requirements are out of the box, so Mr Hemsley did not understand how badly out of control the project ultimately became. In his view, the delays were primarily on the pursuer's side and stemmed from the pursuer's failure to adequately retain the information that the defender maintains was captured during the Analysis and Design phase but was never subsequently shared with the defender, to commence configuration before the requirements and specifications had been formally agreed and to ensure project team continuity and information sharing. These issues were compounded by new team members being added to the project requiring

further handovers and introducing new opinions into how the pursuer could incorporate the defender's requirements into the D365 implementation.

[99] In Mr Hemsley's opinion, the project failed for two reasons. Firstly, project management and delivery was incredibly poor. Secondly, the defender lost trust in the pursuer's ability both to deliver the implementation to completion but also to be a trusted partner for a core pillar of the defender's business for the foreseeable future. Many of the risks identified by the pursuer in the risk section of the Proposal materialised in the project.

[100] His evidence was that the system that had been delivered to date is a test system that would require a significant amount of work to complete it. He could not understand the pursuer's claim that the system was 90% complete given that the pursuer was seeking another 50.5 days of work to complete it.

[101] In my opinion, Mr Hemsley's evidence, and indeed his actions in the time preceding the Termination Letter, proceeded on a fundamental misunderstanding of the nature of the Agreement in two respects.

[102] The first of these was that in Mr Hemsley's opinion the contractual position was that Prodman was in scope. He based this opinion on Section 1 of the Agreement which he read as meaning that the defender was seeking a single technology to replace its systems, including the replacement of "a bespoke manufacturing tool" ie Prodman. Mr Hemsley's opinion is not correct as a matter of law. Looking at the contractual documentation and factual matrix as a whole, in my opinion it was not the parties' intention to replace Prodman. It was the parties' intention that the defender would continue to use Prodman. The difficulties in this project arose in respect of the question of how Prodman would be integrated with the ERP solution and whether the integration would be done by the pursuer or the defender.

[103] The second of these was that, in Mr Hemsley's opinion, the contractual position was not a simple time and materials contract: the contract allowed for a 20% budget overrun but the defenders were to own that risk pot and approve any overrun prior to costs being incurred. Again Mr Hemsley is not correct as a matter of law. As was correctly understood by both the defender's counsel and the defender's expert, the contract was a time and materials contract. For the reasons I set out below, as a matter of law and on a correct construction of the contract, the risk pot provision did not change the contract to a fixed price contract, and was no more than a prudent mechanism for the defender to budget for the possibility that the time and materials cost might exceed the estimate.

Linda Fairhurst

[104] Linda Fairhurst was the defender's project manager for the Project. She became involved in the ERP project around April 2018 when the defender was in the process of making a decision between two ERP solutions, Microsoft NAV and Dynamics 365 and which supplier they would go with. She attended the meeting in Glasgow on 19 June 2018. At the meeting, there was discussion of ProdMan. Her evidence was that the defender was very clear and open and honest about their company's limited knowledge and lack of in-house experience and clear that they relied on the pursuer's expertise.

[105] Once the project went live in January 2019 she had day to day involvement in the project, liaising between the pursuer and the defender. She made it clear that she could not commit to additional work without knowing the costs and getting approval from the Board. She was at the meeting in December 2018 after which a draft PID was issued on 4 December. She had had to chase the pursuer for agendas for the January workshop. The late provision of workshop agendas made it difficult for the defender to ensure that all of the relevant staff

engaged. She was under the impression that the point of the workshops was to explain the defender's internal processes to the pursuer. Being a small company they did not have particularly well documented processes. She did not understand that the defender were looking for any process documentation in addition to the verbal run through. The defender do not have a record of their input into the workshops as the pursuer said they would give access to the notes they made.

[106] TANDE and Prodman were discussed in the workshop. Asif Dabhad explained that the defender would be able to get the data from TANDE to D365 without an integration, just a schedule import. The defender gave a demonstration of Prodman and explained how it worked and that they needed it to be linked to ERP to avoid manual data duplication. It was never explained to the defender that despite running through their systems in detail and what they needed the ERP system to do, the pursuer would only deliver what matched up with the out of the box system. It was clear from the requirements list of 31 January 2019 that Prodman was a requirement on the production and manufacturing side and had been discussed during the workshop session. Although there was email correspondence with Mike Barn about the FDD, it was not received until 8 March 2019 once project management responsibility had changed over to Asif Dabhad. The delayed receipt of the FDD and BRD on 8 March 2019 was not due to any action or inaction on the defender's part but was entirely due to the pursuer.

[107] The defender did their best to provide the data requested. They were frequently asked for information with no guidance. She frequently had to chase for information. The project was delayed because the pursuer had unrealistic expectations of the defender. The pursuer was expert in the field. The defender made it clear that they required guidance.

Instead the pursuer left to the defender to their own devices and complained when it did not know what it was doing.

[108] In cross-examination she said that she did not have an issue with the quality of the January workshops and that everyone who attended thought they were worthwhile.

Initially she was not able to focus wholly on the project because she also had another role as financial administrator until March 2019. That was listed as a risk as she could be stretching herself too thin.

[109] Her timesheet entry for 18 March 2019 stated “actually getting round to doing some actual ERP work”. She and Mr Watson identified that there were problems with the engagement in the project of the defender’s staff: the defender was a small company and people had multiple roles and there were internal staff changes. The defender was not sure how the integration would work, but she accepted that she knew that the pursuer was assuming that the defender would do the integration.

Expert witnesses

[110] The pursuer’s expert was Dr Richard N Marshall. Dr Marshall is the holder of a BSc and PhD in computer science. He has over 30 years’ experience in the software industry and held a variety of leadership roles. In the 1990s, he created the Windows version of DOORS, which he describes as still the world’s bestselling requirements management tool. He has published various articles on computer matters.

[111] The defender’s expert was Dr Gill Hunt. Dr Hunt is the holder of an MA and DPhil in chemistry. She has over 20 years’ experience in the software industry, including project management and development, and the installation, customisation and design of ERP

systems. She has extensive experience of appearing as an expert witness on ERP and other issues.

[112] Both experts were suitably qualified and experienced. Their positions were as follows.

The Analysis and Design phase

[113] Both experts agreed that the Analysis and Design phase should be structured around the Out of the Box functionality of the software and that the workshops should be structured round the OOTB product and should have identified the configuration questions the defender needed to answer to allow the product to be configured to meet the defender's requirements. They agreed that it was common for clients' staff to find it difficult to answer all the questions immediately and that there is often follow-up question and answer type activity required immediately after the workshops. They agreed that the pursuer was responsible for providing product expertise, planning and conducting the workshops, documenting configuration decisions and/or outstanding questions, identifying and producing broad time and cost estimates for any gaps and for producing the final output from the phase. They also agreed that the defender was responsible for providing staff to attend workshops who had appropriate business knowledge, providing requested information and/or answers to questions raised by the pursuer and making decision on whether to accept OOTB functionality or implement changes to their processes to deal with gaps.

[114] They disagreed on whether the output from the Analysis and Design phase was of adequate quality. Dr Marshall's view was that the BRD and the FDD were adequate high level documents for a project of this size and complexity, indicative of where further

detailed information was to be gathered by the defender. Dr Hunt's view was that both the BRD and the FDD lack sufficient detail to allow the defender to verify that the system would meet its requirement. In particular neither version of the FDD contained the Configuration Task List or Configuration Handbook that the initial version referred to and which should have captured design and configuration decisions that had been made. These were needed to allow the defender to decide if its requirements had been correctly captured and for the pursuer to configure the system to meet those requirements. The experts disagreed on whether the parties fulfilled their responsibilities for this phase. Dr Marshall's view was that the pursuer's staff ran the workshops as planned but the results were hindered by the defender not being prepared for the workshops and not having the necessary staff available. Dr Hunt's view was that the defender appeared to have had some difficulty ensuring that the right staff had attended workshops, but she would have expected the pursuer to raise any outstanding queries through an action log, and had seen no evidence that the lack of the defender's staff impacted on the pursuer's work. Based on the limited detail in the BRD/FDD and the lack of any notes, action log or follow-up actively instigated or managed by the pursuer, Dr Hunt's view was that the pursuer did not fulfil their responsibilities for analysis and design.

Project management

[115] Dr Marshall's view was that the pursuer fulfilled their project management requirements by maintaining a project plan. Dr Hunt's view was that while an initial project plan was produced, it was not maintained either to reflect delays or show what progress had been made. A RAID log was not maintained to ensure that all risks, assumptions, issues and dependencies that arose on the project were tracked and monitored. Dr Marshall's view was

that the pursuer managed their internal dependencies and worked with Linda Fairhurst to track the defender's internal dependency. Dr Hunt's view was that the pursuer did not monitor progress against the plan.

Progress and budget reporting

[116] The experts agreed that progress was reported on regular calls between the two parties. Dr Marshall's view was that there was no requirement to report on budget after project outset. Dr Hunt's view was that the pursuer did have responsibility for reporting on the budget to allow the defender to manage its costs, particularly as much of the work was being done off site so that the defender could not know how much effort the pursuer were expending without being told. While she would not necessarily expect a Project Manager to provide regular updates of expenditure to the client, she would expect them to track actual costs against the estimates internally and to warn the client if a cost overrun was likely. The pursuer did not inform the defender of cost overruns until after they had occurred which in her view was poor practice and not consistent with the duty of reasonable skill and care.

Reasons for delay and additional costs

[117] Both experts agreed that the introduction of the Prodman interface caused delays to the overall timeline. They disagreed on other causes of delay. Dr Marshall's view was that the initial cause of delay was that the defender did not respond rapidly to requests for information. In many cases this was because their internal processes had not been documented to sufficient level for ERP implementation and that information needed to be developed. In other cases it was because the defender's team was busy with day to day operations and did not have the time to respond. Further significant delay occurred around

the evolving requirements for an interface to Prodman which introduced complexity and uncertainty around the workflows being managed and data sources. Dr Hunt's view was that the introduction of the Prodman interface caused delay to the overall timeline but should not have impacted work on other areas of the system. Her view was that delays to these other areas were primarily due to the need to perform additional work to produce an FDD of an appropriate standard.

System as delivered

[118] The experts disagreed as to whether the system had been configured according to the contract's requirement.

[119] Dr Marshall's view was that while pending final requirement of the configuration after the UAT phase, he considered the system to be operational. This was based on a comprehensive walk through of the delivered system and that it had been tested to complete a number of end-to-end processes as required by the defender. In his opinion, the system was 80-90% complete.

[120] Dr Hunt's view was that the contract did not contain any requirements that allow the experts to determine whether the system had been configured to operate the end-to-end processes or not. The activity set out in the contract should have resulted in a set of Analysis and Design documents that included a Configuration Task List and Configuration Handbook that would set out the configuration that had been agreed. Some elements of this documentation, such as the Chart of Accounts, were produced but the pursuer did not document other configuration decisions or questions. In her opinion, without this documentation it is not possible to determine whether the system has been configured as the defender requested it.

Non-chargeable work

[121] The experts also considered to what extent the work done by the pursuer was chargeable. I return to this in the context of quantum.

Submissions for the pursuer

[122] Under reference to *Rainy Sky v Kookmin Bank* [2011] 1 WLR 2900 and *Arnold v Britton* [2015] AC 1619, counsel for the pursuer invited me to construe the Agreement in the following way. The scope of the implementation contained in the Agreement was “out of the box” only. Customisation or integration (in particular of Prodman) were not within the original contractual scope. The Master Planning module was not included within the Agreement. The Agreement envisaged that work beyond the original scope might be required. Pricing was on a time and materials basis. The figures provided were estimates, rather than guaranteed figures and no cap was given. The obligation to re-estimate costs for each phase applied only when a phase was complete, and the first phase (Analysis & Design) was not completed until the defender signed off on the FDD on 26 July 2019. The “risk pot” was simply a suggested budget and did not cap costs of the work. There was no obligation under the contract to provide an estimate of the cost of estimating further work required, and accordingly the scoping exercise prior to a change request was chargeable as work instructed on a time and materials basis.

[123] Counsel submitted that none of the breaches identified by the defender were a material breach justifying rescission (*Wade v Waldon* 1909 SC 571; *Crieff Highland Gathering v Perth and Kinross Council* 2011 SLT 992). The breach cited in the termination letter was not the breach which was being founded on in this action, and many of the matters now relied on in

relation to the claimed breach in respect of the Analysis and Design phase and project management were not raised as serious concerns at the time.

[124] Counsel submitted that there was no material breach of contract in relation to the services provided. The issues which arose were more in the way of difficulties which were likely to be experienced in such a project.

[125] In relation to the first reason given in the Termination Notice (original scope not fit for purpose based on the defender's requirements), counsel submitted that a mismatch between the contract entered into by the defender (based on the defender's expressed desire to purchase an out of the box solution) and the services which the defender wished to purchase was the result of the pursuer's adherence to the contractual specification and not departure from it, and it was not a breach of contract. In relation to second reason given in the Termination Notice (cost overrun) counsel submitted that there was no fixed price in respect to which an overrun could occur. Further, there was no provision in the Agreement requiring regular reporting on costs. While there were obligations in relation to re-estimation of costs, these related to cost estimates for future phases and not costs incurred in the present phase. Dr Hunt's approach involved the insertion of a specific duty to report. The defender should have been aware of the possibility of rising costs given the continuing work which he was instructing, whether the work was carried on, on or off site.

[126] In relation to delays, counsel accepted that the implementation was not completed within the time envisaged in the project plan contained in the Agreement. However he submitted that any delay did not of itself constitute a material breach of contract. The project plan was indicative. The delays could not be laid at one party's door only. Indeed, the delays were principally the result of the defender's changing requirements and failure to engage with the pursuer. *Esto* the delays did constitute a material breach, the defender

continued to request new project plans and instruct further work thereby waiving the right to rely on that breach. (*Reid & Blackie Personal Bar* (2006) section 3.18)

[127] In relation to the alleged failure to carry out the Analysis and Design phase with reasonable skill and care, counsel submitted that the core of the difficulty experienced in relation to careful Analysis and Design was the defender's changing requirements, coupled with the divergence between the out of the box solution that had been contracted for and the customised solution that was desired.

[128] There was no agreement on 29 March that no further work be carried out, and work did in fact continue. This aspect of the management of the project did not demonstrate a material breach of contract by the pursuer.

[129] Counsel further submitted that there was no breach of contract arising from the meeting on 6 June, which reflected ongoing discussions in relation to the progress of the implementation. The pursuer progressed matters agreed at the meeting until works ceased as a result of the defender's failure to pay invoices and thereafter the defender's termination.

[130] In respect of the alleged failure to carry out training with reasonable skill and care, no clear breach of contract had been identified, still less a material breach. Counsel further submitted that the principal reason for the difficulties in the project was not the turnover of the pursuer's staff, but because the defender's own processes were poorly documented and its requirements changed dramatically over the course of the project. Counsel further submitted that there was no breach of contract in relation to the system as installed.

[131] Finally, counsel submitted that the defender was in material breach of contract in respect that (1) the notice of termination was wrongful unless a material breach of contract and (2) the defender failed to make payment (and indicated that he would not in future make payment) for the services provided by the pursuer.

Submissions for the defender

[132] The solicitor advocate for the defender submitted that prior to any work being carried out in respect of any customisations, integrations or other changes, (including changes to the scope of the Proposal), the pursuer was required (a) to assess the impact on (i) timescales and (ii) budget and (b) obtain the defender's approval of the costs of the work. The proposal clearly foresaw the possibility that customisations and integrations would be required otherwise the risk pot provision would be unnecessary. Such a risk was identified in the Risk Register. Read as a whole, the provisions in the contract placed controls on the pursuer's ability to incur costs without authorisation from the defender.

[133] The solicitor advocate further submitted that consultant's travel time was not included with the Proposal as chargeable.

[134] He further submitted that there was no obligation on the defender to produce change requests: these were to be produced by the pursuer.

[135] On material breach, the solicitor advocate submitted that the essence of the Agreement (*Wade v Waldon, McBride on Contract* 20-96) was the supply of the pursuer's services in respect of the Implementation Services. The purchase of software licenses and ongoing maintenance and support was ancillary. The defender was purchasing the pursuer's skill and expertise in (i) implementing a solution and (ii) managing that implementation. As part of the pursuer's management of the implementation, the defender was entitled to see that the agreement be completed on time to specification and within an agreed budget.

[136] He submitted that the pursuer was in material breach of the Agreement by failing to perform its services with reasonable skill and care consistent with generally accepted

computer software industry practices in relation to (i) the Analysis and Design phase, (ii) staffing changes, (iii) project management (including the issue of budget reporting). This caused the Agreement not to be completed on time to specification and within an agreed budget and thus deprived the defender of the benefit it was entitled to. The Analysis and Design phase was not performed with reasonable care and skill consistent with generally accepted computer software practices in that the FDD and the BRD did not capture details that were clearly discussed during the workshops, there was no detail that would allow the pursuer to configure the system after the defender had agreed the requirements, the content and quality was very poor compared to the effort recorded.

[137] In relation to staffing changes, he invited me to accept Dr Hunt's opinion that frequent staff changes and a lack of documentation and handover contributed to the cost overrun. In relation to project management, he invited me to accept Dr Hunt's opinion that the pursuer's management of the project was not performed with reasonable skill and care consistent with generally accepted computer software industry practices in relation to the RAID log, budget reporting and only informing the defender of cost overruns after they occurred was not consistent with that duty. The pursuer's failure to report on costs deprived the defender of its ability to approve costs in respect of customisation, integration or additional charges to the scope of the proposal. The full extent of this was only known on 2 October 2019 and the Termination Notice was issued on 4 October.

[138] The solicitor advocate submitted that the delay in providing the draft BRD and FDD from 31 January to 8 March was caused by the pursuer. Further delays in finalising the document were because the question of interaction with Prodman was being considered: the pursuer did not provide guidance on this until 30 May when advisory estimates were provided and 13 June when Mr Smithson was told the whole integration would have to be

designed by the pursuer or one of the defender's developers would have to be placed with the pursuer.

[139] The solicitor advocate submitted the defender's agreement to move on with the project in June 2019 was not an abandonment of the right to rely on delay for all time (*Armina Ltd v Daegan Developments Ltd* 1979 SC (HL) 56.)

[140] Milestone one was never completed so the invoice for that stage never became due

Discussion and decision

The Law on Rescission

[141] It is important at the outset to recognise it is not the task of the court to hold an inquiry into what went wrong in a project which has clearly had an unsatisfactory outcome for both parties. The only interest of the court is to determine whether there has been a breach of the contract which is sufficiently material to justify its termination.

[142] The issue in the summons and the counterclaim was the same: was the defender entitled to terminate the Agreement for breach of contract by the pursuer?

[143] As was said by the Lord President in *Wade v Waldon*:

"It is familiar law, and quite well settled by decision, that in any contract which contains multifarious stipulations there are some which go so to the root of the contract that a breach of those stipulations entitles the party pleading the breach to declare that the contract is at an end. There are others which do not go to the root of the contract, but which are part of the contract, and which would give rise, if broken, to an action of damages. I need not cite authority upon what is trite and very well settled law." (p576)

[144] The law on termination for breach of contract was conveniently summarised by Lord Pentland, in *Crieff Highland Gathering v Perth and Kinross Council*, in the following passage which I adopt as an accurate summary of the law:

“[43] The question whether a breach of contract is or is not material has been said to be primarily a question of fact and degree (McBryde, *The Law of Contract in Scotland*, 3rd edn, para.20-96). Over the years, the type of breach which is required in order to justify rescission of the contract has been described by different judges in different ways. Thus, in *Collard v Carswell* at (1892) 19 R., p.991, the Lord Ordinary (Lord Kyllachy) said that what was required to justify the conclusion that ‘a contract is off’ was a breach ‘in a material, and certainly in an essential part’. In the Inner House, Lord McLaren (at p.996) spoke of ‘an implied right to either party to rescind where there is a failure of performance in a matter touching the essentials of the contract’. His Lordship referred, in the same context, to a ‘substantial failure’ and to ‘a matter of vital importance. I mean a matter touching the very existence of the contract’. In *Wade v Waldon* at 1909 S.C., p.576; 1909 S.L.T., p.220, Lord President Dunedin said that what was needed was a breach going ‘to the root of the contract’; and at p.577 (p.221) Lord McLaren said that the question always was ‘whether a stipulation which has been broken is of the essence of the contract’. In *Municipal Council of Johannesburg v D Stewart & Co* (1902) Ltd at 1909 S.C., p.877; 1909 S.L.T., pp.414-415, Lord Dunedin reiterated that in order to entitle the innocent party to say that the contract was at an end there had to be the breaking of a stipulation going to the root and essence of the contract; otherwise the innocent party had to ‘go on with the contract and do what he is bound to do under it; he may claim damages for the breach of the portion which has been broken’. In *Graham & Co v United Turkey Red Co Ltd* at 1922 S.C., p.536; 1922 S.L.T., p.410, Lord Anderson referred to a term which was of ‘the root and substance of the contract’”

[145] Applying these principles to the facts of the case, Lord Pentland stated:

“... whilst I accept that the defender has not always been as diligent or prompt as it might perhaps have been in responding to complaints and concerns expressed by the pursuer about the condition of the subjects, I am not persuaded that these shortcomings can be said to be of **such fundamental gravity as to touch on the very existence of the contract**” (emphasis added).

Termination of the contract by the defender

[146] By the time the case came before me the defender had departed from the grounds of breach of contract set out in the Termination letter, and in my opinion the defender was right to do so.

[147] The sole breach on which the defender now founds in respect of termination of the contract is a breach of Condition 11.5 of the Terms and Conditions which is in the following terms:

“11.5 Incremental Group warrants that services supplied on an hourly or day rate basis will be performed with reasonable skill and care consistent with generally accepted computer software services industry practices.”

[148] The defender’s position was that the Implementation Services were not performed with reasonable skill and care consistent with generally accepted computer software services industry practices in relation to (i) the Analysis and Design phase, (ii) staffing changes and (iii) project management (including the issue of budgeting reporting).

The nature of the contract

[149] Before considering whether there is any breach of Condition 11.5 which justifies termination of the contract, it is worth reminding ourselves that in relation to Implementation Services the contract was an “out of the box” contract on a time and materials basis, not a fixed price contact.

[150] The essence of the contract is to be found in clause 3.1 of the Proposal, which stated:

“ Incremental Group delivers and configures the modules detailed in Table 3.1.1 below. As agreed with HiETA this is a completely out-of-the-box deployment for 1 UK legal entity, and no customisation or integrations are included as part of this initial project....

During the Analysis and Design phase, requirements are explored and documented in detail. Any customisations, integration, or additional changes requested are reviewed and agreed with HiETA before the work begins. HiETA and the Incremental Group project Manager assess the impact on the overall project timescales and budget of changes, but as this is a Time and Materials project, it is HiETA’s discretion to approve any change requests.”

This makes it clear that the contract was an “out of the box” contract. Any customisation or integration would have to be agreed separately at an agreed extra cost.

[151] It is also necessary to bear in mind that the difficulties which arose in this project did so not out of the implementation of the “out of the box” contract itself, but out of further integration work which was beyond the scope of the contract. In particular they arose

because of difficulties in giving effect to the defender's original intention that the integration with the defender's bespoke in-house Prodman system be done by the defender rather than the pursuer.

[152] Clause 3.1 of the Proposal specifically states that "this is a Time and Materials contract" This is also clear from clause 7.1:

"The following pricing is based on our understanding of system and project requirements and all professional services, are provided on a Time & Materials (T&M) basis as agreed with HiETA."

[153] The estimates given as to the cost of the work were no more than estimates and did not fix the price of the contract. This can be seen from Clause 8 of the Proposal:

"As discussed and agreed with HiETA, the current T&M estimates are calculated as accurately as possible based on Incremental Group's existing understanding of requirements, but there are still unknowns and assumptions that cannot yet be verified so costs cannot be fixed. However, we do not expect these T&M costs to alter any more than +/- 20%. To manage cost expectations, risk, and planning, after each individual deliver phase listed above is completed, Incremental Group will review, and where necessary, re-estimate the costs for the next phase, adjusting them either up or down. HiETA will be provided with information detailing the reasoning behind any increase or decrease in costs."

[154] The Pricing Schedule in the Proposal provided for a risk pot:

"Based on our engagement to date and our understanding of HiETA's requirements, there is currently no customisation associated with the deployment. However, there is not detailed understanding of the final requirements and certain assumptions have been made regarding the delivery of this solution. However, as requested we have suggested a Risk Pot below which is roughly 20% of the overall professional services days. This pot should be used to manage any realisation of risk which may lead to additional configuration, or customisation of the system during each and any phase.

Please note, HiETA will own and manage this change budget and Incremental Group will only draw from this budget when it has been agreed and approved. This cost should not, unless otherwise requested, be included in our overall proposal as it is only a suggested budget that should be kept separate from the overall project."

[155] The provisions for a risk pot have to be read in the context of a Time and Materials contract. In that context, and reading the contract as whole, the risk pot provision do not

change the nature of the contract by fixing or capping the price of the contract. The risk pot is no more than a prudent mechanism for the defender to budget for the possibility that the time and materials cost might exceed the estimate.

Effect of substantial completion of the contract on rescission

[156] The experts disagreed as to the extent to which the “out of the box” contract had been fulfilled by the time that the contract was terminated by the defender.

[157] The pursuer’s expert’s view was that the “out of the box” contract was operational and 80-90% completed. His conclusion was:

“It is my view that the test system deployed by Incremental is a substantially complete ERP system capable of running the HiETA business when used alongside the existing management tools. Information transfer between Dynamics 365 and those tools and the bank would be manual, but manual transfers are currently used anyway.” (Dr Marshall’s report para 27)

[158] In my view that conclusion addresses the correct issue, that is whether the “out of the box” system, without customisation or integration (other than any minor adjustments which would be generally required to get an “out of the box” system up and running) has been delivered.

[159] The defender’s expert took issue with that conclusion on the ground that :

“A Dynamics 365 system, Out of the Box (OOTB), provides a substantially complete ERP system. The key question is whether the system as configured by IG meets HTL’s requirements and is therefore capable of running the HiETA business. Since the details of the required configuration were not captured by IG in any document, including the FDD against which Dr Marshall reviews the demonstration he was shown, my view is that there is no meaningful basis on which to conclude that the system meets HTL’s requirements.” (Dr Hunt’s Supplementary Report para 8).

[160] In my opinion the defender’s expert has addressed the wrong question. The key question is not whether the system as configured meets the defender’s requirements and is capable of running the defender’s business. The key question is whether the pursuer has

delivered what it was contractually obliged to deliver, that is an “out of the box system” without integration.

[161] I prefer the evidence of Dr Marshall on this point. He has addressed the correct legal issue. Dr Marshall’s opinion was properly grounded in an examination by him of the system as delivered, whereas Dr Hunt had not examined the system and based her opinion on a small number of screenshots reproduced in Dr Marshall’s report. Dr Marshall’s view that the ERP system could work manually with existing management tools eg Prodman is supported by the evidence of Jane Johnston. Accordingly I find that the pursuer delivered an ERP system which was substantially complete and capable of running the defender’s business, with manual transfers between it and the defender’s in-house systems, and that the work was 80-90% complete.

[162] Where one party has substantially completed the contract, it will be usually be difficult for the other party to succeed in an argument that nevertheless there has been a material breach of contract justifying rescission. The essence of a contract is performance of the contract, and if the contract has been substantially performed then it will difficult to establish that there has been a breach of fundamental gravity which goes to the very existence of the contract. However, that is what the defender seeks to do in this case in respect of an alleged breach of condition 11.5 in respect of (i) the Analysis and Design Phase (ii) staffing changes and (iii) project management.

Breach of contract in respect of Analysis and Design Phase

[163] I am not satisfied that there was a breach of fundamental gravity going to the very existence of the contract in respect of failure to perform services with reasonable skill and care consistent with generally accepted computer software services industry practice in the

Analysis and Design phase. In terms of clause 3.2 of the Proposal, the Analysis and Design phase did not come to an end with the January workshops but also included business requirements definition and Project Plan and Timeline. Accordingly it did not come to an end until the BRD and FDD were signed off on 26 July 2019. Although this was later than had been originally anticipated by the parties in the Agreement, it was accepted by counsel for both parties that this was not a case where time was of the essence of the contract. What is important is that the Analysis and Design Phase was completed. As that phase was completed, and the contract was substantially performed, in my opinion there was no breach of fundamental gravity of condition 11.5 in respect of Analysis and Design phase.

[164] That is a sufficient answer on this limb of the defender's case, but I would pause to observe that in my view the delay in the Analysis and Design phase cannot be blamed solely on any one party. There were various reasons, including personnel issues on both sides and delays in responding on both sides. However the core reason for the delay was the difficulties which arose in relation to the integration of the defender's existing in-house systems to the "out of the box" system. While it is regrettable that this project was not handled better by both parties (and the reports of both experts give some indication of how both parties might have done so) the court's task is to apply the legal test for rescission.

Staffing changes

[165] Nor am I satisfied that there was a breach of fundamental gravity going to the very existence of the contract in respect of failure to perform services with reasonable skill and care consistent with generally accepted computer software services industry practice in respect of the staffing changes. Staffing changes are common and sometimes inevitable and do not of themselves constitute a lack of professional skill and care. The defender's expert

was of the opinion that multiple staff changes led to a need to redo work that should already have been done (Supplementary Report para 7). In my view, in the circumstances of this case, any duplication of work does not go to the question of a breach of fundamental gravity justifying rescission of a contract which has been substantially completed, but merely to quantification of the payments due under the contract. I have taken this into account below in considering *quantum*.

Project Management

[166] Nor am I satisfied that there was a breach of fundamental gravity going to the very existence of the contract in respect of failure to perform services with reasonable skill and care consistent with generally accepted computer software services industry practice in respect of project management (including the issue of budget reporting).

[167] The defender's expert accepted that the Agreement was not a fixed price contract in relation to Implementation Services (Report para 98) but was of the opinion that the pursuer's project manager had a duty to track actual costs against the estimates internally, warn the client if a cost overrun was likely and seek formal approval before incurring the additional cost (para 120).

[168] The contract was a time and materials contract in relation to Implementation Services. The estimates in the contract were no more than estimates and the price was not fixed. The contract made specific provision for changes to be formally quoted for and accepted in advance. The contract made no provision for prior approval of any overrun on the estimate. This is not surprising as an express provision capping the time and materials fee at the estimated figures unless the defender agreed a higher figure in advance, would change the estimated figures from being estimates to being a fixed price and change the

nature of the contract to a fixed price contract. The imposition under condition 11.5 of the duty contended for by the defender's expert would have a similar effect: if condition 11.5 obliges the pursuer to obtain prior approval in advance of exceeding the estimate, the estimate becomes in effect a fixed price which cannot be exceeded unless the defender agrees. In my opinion the contract must be read as a whole and condition 11.5 must be read consistently with the rest of the contract. The wording of condition 11.5 does no more than import a general duty of skill and care and cannot overrule the clear wording of the rest of the contract that it was not a fixed price contract. Accordingly, in my view it was not a breach of contract for the pursuer to exceed the estimates without prior approval from the defender.

[169] The defender's expert also was of the opinion that the pursuer failed in its condition 11.5 duty in respect of project management in that there was no RAID log and the pursuer made no attempt to manage issues and actions arising on the project (para 112). A RAID log is a record of Risks Assumptions Issues and Dependencies. I do not accept the factual basis on which this opinion is based. The defender's expert is wrong to say there was no RAID log. There was one, albeit it was not produced until late in the process and, as the pursuer's expert says, it would have been better to have maintained the log throughout 2019. More importantly, the defender's expert is wrong as a matter of fact to say that the pursuer made no attempt to manage issues and actions arising on the project. The evidence of the pursuer's witnesses as to fact and the defender's witness Linda Fairhurst and the supporting contemporaneous documents show a continuous process of the pursuer identifying issues and actions and seeking to manage them in liaison with the defender. It may be that the pursuer could have done this better, but it cannot be said that it made no attempt to do so. I agree with the position of the pursuer's expert, as set out in the Joint Note of the experts'

meeting, and supported by the witness evidence, that the pursuer managed its internal dependencies and worked with Linda Fairhurst to track the defender's internal dependencies.

[170] In these circumstances I am not satisfied that there is a breach of fundamental gravity of condition 11.5 in respect of project management (including budget reporting).

Conclusion

[171] In my opinion there has been no breach of contract by the pursuer which would entitle the defender to rescind the contract. It follows from that that the principal action must succeed and the counterclaim fail.

Quantum

Payment for work done

[172] In the second conclusion, the pursuer seeks payment under the Agreement. There are three elements to the sum now sought.

Work done under the Agreement

[173] The first element of the second conclusion is in respect of work done under the "out of the box" contract.

[174] The pursuer's claim under this head was evidenced by timesheet records which came to a total of £186,618 comprising time of £155,515.07 plus VAT of £31,104. The timesheet records were examined by both experts in detail. The experts agreed that the time recorded was chargeable to the defender with the following exceptions.

(a) They agreed that time amounting to £5,548 was not chargeable so I shall make a deduction of that sum.

(b) They differed on the question of how much time incurred in relation to handovers to new members of the pursuer's staff was chargeable.

Dr Marshall's view was that handover is chargeable if it results from bringing in additional domain expertise and that applied to some of the time and a deduction of £6845 should be made. Dr Hunt's view was that the pursuer was responsible for arranging for the appropriate expertise to be available and that the expertise required did not change significantly and a deduction of £10,009 should be made. Taking a broad brush view, the handovers related to the replacement of staff who were moving to new duties, so I shall make the deduction of £10,009 proposed by Dr Hunt.

(c) They agreed that a deduction should be made in respect of time recorded for training but differed as to whether the sum should be £6,300 (Dr Marshall) or £7,500 (Dr Hunt). The pursuer did not insist on this point, so I shall make a deduction of £7,500.

(d) The experts considered whether travel time of £7,003 was chargeable or should be deducted, but concluded that this was a matter for contractual interpretation. The contract makes specific provision for travel expenses:

"Travel and subsistence is not included and will be charged at cost"
(clause 3.4 of Proposal).

"Travel and subsistence expenses will be charged in addition at cost as incurred unless otherwise stated in the quotation document"
(Terms and Conditions 4.1)

These provisions make no reference to travel time. The contract entitles the pursuer to charge for time incurred on the project. There is nothing in the contract which

excludes travel time from that. In my opinion on a proper construction of the contract the pursuer is entitled to charge for travel time. The fact that Ms Sclater and Mr Grieve were under the impression that travel time was not chargeable is neither here nor there, as this is a matter of contractual interpretation to be decided by the court. Accordingly I shall make no deduction for travel time.

[175] The total deductions for (a), (b) and (c) come to £23,057 which with VAT of £4,611.4 comes to a total of £27,668.40. Deducting this from the sum of £186,618.84 (including VAT) in the timesheets gives a figure of £158,950.

Payment for work done in connection with potential scope changes

[176] The second element of the second conclusion is the sum of £24,151 comprising of fees of £20,125.83 plus VAT of £4025.16 This sum is in respect of work done in connection with scope changes. It is evidenced by time sheets.

[177] Clause 3.1 of the Agreement stated:

“During the Analysis and Design phase, requirements are explored and documented in detail. Any customisations, integration, or additional changes requested are reviewed and agreed with HiETA before the work begins. HiETA and the Incremental Group project Manager assess the impact on the overall project timescales and budget of changes, but as this is a Time and Materials project, it is HiETA’s discretion to approve any change requests.”

[178] No change requests were made and no changes were agreed. The pursuer’s position is that the work for which payment is sought under this element is work done to define what customisations, integration and changes might be necessary and by whom integrations might be performed, and that such work falls within the “review” prior to agreement of a change request envisioned by clause 3.1.

[179] In my opinion on the correct interpretation of the contract is that the pursuer is not entitled to charge for work in preparing a change request. I do not accept the pursuer's argument that the work done by the pursuer in preparing a change request falls within the work chargeable for the Analysis and Design phase as a review under clause 3.1. Clause 3.1 provides that changes are to be "reviewed and agreed" with the defender before the work begins. That does not give the pursuer *carte blanche* to do considerable work beyond the "out of the box" solution without reviewing and agreeing the work with the defender. The purpose of the change request procedure is to protect the defender from additional costs for work which has not been agreed by them. That purpose would be defeated if prior to the change request being made, and as part of the preparation for making the change request, the additional costs had to some extent been incurred anyway, whether the defender agreed or not.

[180] Although my finding that the pursuer is not entitled to charge for work in preparing a change request is based on the clear wording of the contract, it is interesting to note that that finding is also consistent with general practice in the computer industry.

[181] The experts were agreed on industry practice in respect of change requests. They agreed that a typical change request process would involve either the client or the supplier raising a change request setting out, usually fairly briefly, the functionality that is the subject of the change, typically no more than 1 or 2 pages. A supplier would then produce an impact assessment with an estimate of the cost and time required to implement the change. That work is usually not chargeable unless specified in a contractual document. They also agreed that if the change request requires more detailed work to properly understand the cost and time impact there are essentially three options a supplier can take:

- a. The supplier can choose to do this additional work without payment in anticipation of gaining from the additional revenue involved in the change request
- b. The supplier can request permission from the client to charge for the additional estimation work. The supplier would estimate the effort required and to monitor progress in the same way as for other activities.
- c. The supplier can include an estimate for further detailed analysis and design in their estimate for implementing the change request. This work would then only be done, and paid for, after the client had agreed the change request.

[182] The experts agreed that this means that normal industry practice is that work on a change request is only chargeable if the client has expressly agreed to it.

[183] In my opinion the pursuer is not entitled to payment under this head.

Travel expenses

[184] The third element sought under the second conclusion is the sum of £7099.20, comprising travel costs of £5,916 plus VAT of £1,183.20. No vouching was produced for these costs. As I am not satisfied that this element has been adequately vouched, I shall disallow it.

Payment under second conclusion

[185] Accordingly in terms of the second conclusion I shall award decree in the amount of £158,950.

Damages for early termination

[186] In relation to the third conclusion the pursuer sought damages for services which would have been supplied but for the termination of the Agreement. The pursuer did so under four heads.

Supply of D365 licences

[187] In terms of clause 7.2 of the Agreement, the pursuer was to supply D365 licences for three years. Licenses for years two and three were not paid and the pursuer sought payment of the loss of profit on these. I accept the unchallenged evidence of Jane Johnston in respect of the loss of profit on these licences and will award the sum of £18,551 sought by the pursuer.

Work to complete the implementation

[188] The pursuers seek a payment of £40,703, on the basis that 50.5 days work would have been required to complete the Implementation Services.

[189] It seems to me that if this work is to be allowed, then it would be reasonable to apply a rate of £806 per hour (being a reasonable blend of the various charge out rates of different members of the pursuer's staff).

[190] However, I do not accept the pursuer's evidence that 50.5 days of work remains. I have found that the contract substantially complete with 80% to 90% of the work done. I have awarded £158,950 (including VAT) as the payment due for the work done so far. Taking a broad brush view, if that figure represents 90% of the work done, 100% would be £176,611 and the outstanding 10% would amount to would amount to £17,661. On that basis, I find that the fee for the outstanding work would be £20,000.

[191] However, the question which then arises is whether the pursuer is entitled to the whole of that fee or only the profit element. The solicitor advocate for the defender submitted that the appropriate measure of loss would be the pursuer's loss of profit as opposed to its loss of revenue. Counsel for the pursuer submitted that revenue rather than profit was the appropriate measure of the pursuer's loss. Founding on MacGregor on *Damages* at para 34-002, he submitted that loss of profit was inapposite as a measure of loss in this case because had the pursuer continued to supply the defender, its consultants could also have continued to supply other customers.

[192] The general principle in relation to damages is that the innocent party should be put in the same position as if the contract had been performed. As Lord Ormidale put it in *Houldsworth v Brand's Trustees* (1877) 4R 369 at 374:

“the pursuer is entitled to be placed in the same position, as nearly as possible as regards to profits, as he would have been had there been no breach of contract by the defenders”

[193] The fees for Implementation Services under this contract were for the time of the pursuer's staff. The fees were not all profit as the time charged for would also reflect a proportion of the salary of the particular member doing the work, associated costs such as National Insurance and other overheads. Recovery of the non-profit elements of the fee would put the pursuer in a better position than if the contract had been performed. I did not find the passage in MacGregor on *Damages* referred to by counsel for the pursuer to be of assistance in this case. The passage is in the context of contrasting breach of a contract of employment (where an individual works entirely for one entity) with breach of a contract of services (where an individual works for a number of customers). It states (without citation of authority):

“As with the employee, he [the person engaged under a contract of services] will be required to mitigate his damage by seeking alternative remunerative occupation. However, since he has a freer hand in performing the services and may not have to devote his time exclusively to the contract, other services upon which he embarks will not be truly alternative if he could have performed both concurrently, and will therefore not go in mitigation of damage”

In my opinion, that passage does not support the general proposition which counsel for the defender sought to derive from it. Further, that passage does not detract from the general principle that the pursuer should be placed in the same position as regards to profits as if there had been no breach of contract. Accordingly I find that the measure of loss is the loss of profit.

[194] The solicitor advocate invited me to restrict any award under this head to reflect that the pursuer would not have achieved the benefit of the whole of the revenue. In principle I agree that that would be the appropriate way to proceed. However, in this particular case I am unable to do so as there was no evidence before me as to what loss of profit was suffered by the pursuer. There was no evidence as to what proportion of the fee was profit. There was no evidence as to what the figure for loss of profit would have been, having taken into account any redeployment of staff on other contracts. In these circumstances, as the pursuer has not proved its loss in respect of work to complete the Implementation Services, I shall make no award under this heading.

Ongoing support and maintenance

[195] The Agreement provided for ongoing support and maintenance on a fixed fee basis for three years at a total of £60,300 (Proposal Table 7.1.3)

[196] The same issue as to the appropriate measure of loss arose under this head, with the pursuer contending for the full fee and the defender contending for the profit element. For

the reasons set out above, in my opinion the measure of loss is the loss of profit. Again there was no evidence before me to enable me to assess any loss of profit, and in these circumstances I make no award under this head.

Management time

[197] The pursuer seeks £6, 250 in respect of loss management time.

[198] The circumstances where damages are payable in respect of loss of management time have been summarised by the English Court of Appeal as follows:

“I consider that the authorities establish the following propositions.

(a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have not been established.

(b) The claimant also has to establish that the diversion caused significant disruption to its business.

(c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time.”
(*Aerospace Publishing Ltd v Thames Water Utilities Ltd* [2007] Bus LR 726 per Wilson LJ at Para 86)

[199] The only evidence before me on loss of management time is the following passage from the witness statement of Jane Johnston:

“A number of senior personnel within [the pursuer] including myself, Emma Bannister, Stuart Kerr CFO and Kim McCann COO all spend considerable amounts of time dealing with the consequences of [the defender’s] termination. I would estimate we spent four to five days in total”

[200] In my opinion that evidence is of too general a nature to satisfy proposition (a) as to the extent of diversion. Moreover, that evidence does not establish that diversion caused significant disruption to its business (proposition (b)). Accordingly I shall not allow recovery of damages under this head.

Interest

[201] Under reference to *Farstad Supply AS v Enviroco Ltd* 2013 SC 302, the solicitor advocate for the defender invited me to exercise discretion on the judicial rate of interest. He submitted that the date of citation and 11 March 2020, the Bank of England base rate was 0.75%. It was then reduced to 0.25%. On 19 March 2020 the rate was reduced to 0.1%. He submitted that rather than the judicial rate of 8% a rate of no more than 4% should be applied. Counsel for the pursuer accepted that *Farstad* applies.

[202] In my opinion an award of interest at 8% per year will substantially overcompensate the pursuer. I shall award interest at the rate of 4% per year.

Order

[203] In the principal action, I shall sustain the pursuer's first to fourth pleas in law and repel the defender's pleas in law. I shall grant decree in terms of the first conclusion both in respect of repudiatory breach, and also (given that the defender failed to pay invoices issued under the contract) in respect of failure to make payment under the contract. I shall grant decree in the second conclusion in the sum of £158,950, with interest at a rate of 4% per annum from the date of citation until payment. I shall grant decree in the third conclusion in the sum of £18,551 with interest at a rate of 4% per annum from the date of citation until payment.

[204] In the counterclaim, I shall sustain the pursuer's third and fourth pleas in law and repel the defender's pleas in law and dismiss the counterclaim.

[205] I reserve all questions of expenses in the meantime.