Neutral Citation Number: [2010] EWCA Civ 912

Case No: A3/2009/2679

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE FIELD
[2009] EWHC 2734 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2010

Before :

THE RIGHT HONOURABLE LORD JUSTICE MUMMERY
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and
THE RIGHT HONOURABLE LORD JUSTICE WILSON

- -

Between :

GB GAS HOLDINGS LIMITED	**Respondent**
- and -	
1) ACCENTURE (UK) LIMITED	**Appellants**
2) ACCENTURE SCA	
3) ACCENTURE INTERNATIONAL SARL	
4) ACCENTURE INC	

- -
- -

Mr Joe Smouha QC, Mr David Foxton QC & Miss Philippa Hopkins (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Appellants**
Mr Jonathan Sumption QC, Mr Jeffery Onions QC and Ms Sonia Tolaney (instructed by **Linklaters LLP**) for the **Respondent**

Hearing dates : 9th, 10th & 11th June 2010

- -

Approved Judgment

Lord Justice Longmore:

Introduction

1. This is an appeal in relation to a number of preliminary issues arising out of proceedings brought by the Claimant (whom I will call "Centrica") for breach of an agreement dated 28 January 2002 ("the JPA"), as amended, under which the counterparty, Accenture plc, contracted to design, supply, install and maintain a new IT system ("the Jupiter System"), including an automated billing system based on pre-packaged SAP IS-U software. I can take the essential facts directly from Field J's admirably clear judgment.

2. Under the JPA, the Jupiter System was to be delivered in 5 software releases, the third of which ("Release 3") was to be the billing system.

3. Centrica is a subsidiary of Centrica plc which was originally part of the British Gas Corporation. Through another subsidiary, British Gas Trading Limited, Centrica supplies gas and electricity to residential customers in England and Wales. In 2002, at the time of the execution of the JPA, Centrica plc supplied energy to 18.8 million customers (13.4 million gas accounts and 5.4 million electricity accounts) and each month was issuing approximately 5 million bills.

4. Accenture (UK) Ltd ("Accenture") became a party to the JPA by a novation dated 24 November 2003. It carries on business as a global management consulting, technology services and outsourcing company. The other defendants are guarantors of Accenture.

5. The roll out of Release 3 was considerably delayed. There were disputes between the parties over the functional and system performance of Releases 1 and 2 and there were concerns about: (i) the adequacy of the testing regime in respect of Release 3; (ii) the future development of Releases 4 and 5; and (iii) Accenture's cashflow problems. A settlement of these disputes was agreed on 29 June 2004, the formal terms of which were set out in Contract Change Note 165 ("CCN 165") dated 19 July 2004.

6. Under CCN 165:

   i) Centrica agreed to pay an additional £10 million to the overall amount payable to Accenture under the JPA (Clause 1.1).

   ii) Accenture agreed to provide an additional 18,000 man days towards completion of Release 3 (Clause 1.5).

   iii) Accenture agreed to a three to four month pilot of Release 3B with live users for which the parties were to agree a set of objective pilot acceptance criteria to identify any faults in relation to Release 3B during the pilot. It was also agreed that the relevant warranties under Clause 15 of the JPA would not start to run until after completion of the pilot and the start of the migration of accounts from the old billing systems to the new one, rather than at the start of the pilot.

   iv) Releases 4 and 5 were suspended.

7. On 21 December 2005, the parties agreed that the planned migration of 2 million customer accounts from existing billing systems to the new system should be conducted in two phases, comprising 1.25 million customer accounts at the end of December 2005 and 0.75 million customer accounts during February 2006. Between December 2005 and March 2006 4.5 million customer accounts were migrated to Release 3B.

Relevant Provisions in the JPA

8. On 31 March 2006, the JPA was amended by the Jupiter Programme Contract Amendment No. 1. and I shall refer to it as "the Amended JPA". The amendments that are especially relevant are those to the warranty provisions contained in Clause 15 of the JPA. But it is unfortunately necessary first to set out the relevant terms of the original JPA. The drafting technique in the original Clause 15 was to set out what was warranted and then to provide what was to happen in the case of a breach of a warranty depending on whether the breach involved a "Fundamental Defect" (as defined) or a "Material Defect" (as defined). To that end, Clauses 15.2, 15.3 and 15.4.1 – 15.4.6 of the original JPA provided:

15.2 Release Warranties

15.2 .1 Subject as provided below Accenture warrants to Centrica that

i) for the duration of the Initial Warranty Period:

(a) each Release will comply in all material respects with its Statement of Release Requirements separately and when combined with the previously delivered Releases; and

(b) completion of each Release will not materially adversely affect functionality achieved in any previously delivered Releases;

ii) in respect of the Release(s) which implement the Billing System (currently planned to be Release 3), for the duration of the Full Warranty Period:

a) each Release will comply in all material respects with its Statement of Release Requirements separately and when combined with the previously delivered Releases; and

b) completion of each Release will not materially adversely affect the functionality achieved in any previously delivered Releases.

and in respect of this Clause 15.2.1(ii) only with regard to any functionality, processes, End User or data volumes which do not occur or are not used, operated or introduced during the Initial Warranty Period.

15.2.2 Without limiting Clause 15.2.1, for the relevant Warranty Period:

i) a Release will be free from material design and material programming and material implementation errors; and

ii) a Release will meet in all material respects the Statement of Release Requirements to give Centrica the capability to achieve competitive advantage and the System will be capable of providing the Benefits.

15.3 Warranty Process

The Parties shall agree, prior to 31 July 2002 or (if earlier) the Acceptance Date for Release 1, a process for the notification and rectification of claims under Clauses 15.1.1, 15.2.1 and 15.2.2 including processes for (i) the categorisation of such warranty claims as being within the scope of Clauses 15.1.1, 15.2.1 or 15.2.2 (ii) the prioritisation of and tracking of such claims, and (iii) acceptance by Centrica of rectifications and/or work arounds delivered by Accenture and if the Parties fail to agree such a process within a reasonable time, the matter shall be referred to the Dispute Resolution Procedure.

15.4 Level of Effort

15.4.1 Accenture will fix Material Defects and Fundamental Defects to the level of effort set out in this Clause 15.4 during the relevant Warranty Period.

15.4.2 Material Defects

Upon being notified by Centrica of a Material Defect Accenture shall promptly take all steps reasonably necessary to correct the Material Defect breach provided always that for the avoidance of doubt in no event shall the cost spent on fixing (being calculated on either the Time and Materials Basis or the Maintenance Daily Rate, whichever is relevant to the appropriate personnel being used) exceed the cap on liability set out in Clause 16. This shall constitute Accenture's entire liability and Centrica's sole and exclusive remedy for a Material Defect. For the avoidance of doubt, the only situation in which Centrica shall have a claim for damages for a Material Defect shall be if Accenture does not promptly take all steps reasonably necessary to correct the breach, and nothing in this Clause 15.4.2 shall remove Centrica's right to terminate this Agreement in accordance with its terms.

15.4.3 Fundamental Defects

Upon being notified by Centrica of a Fundamental Defect Accenture shall do what a commercial, reasonable and prudent organisation using the System to carry on its business would do when acting in its own best interests (having due regard to the costs necessary and benefits likely from correcting the Fundamental Defect) provided always that in no event shall the cost spent on fixing (being calculated on either the Time and Materials Basis or the Maintenance Daily Rate, whichever is relevant to the appropriate personnel being used) exceed the cap on liability set out in Clause 16. This shall constitute Accenture's entire liability and Centrica's sole and exclusive remedy for a Fundamental Defect. For the avoidance of doubt, the only situation in which Centrica shall have a claim for damages for a Fundamental Defect shall be if Accenture does not promptly use the endeavours set out in this Clause 15.4.3 to correct the breach and nothing in this Clause 15.4.3 shall remove Centrica's right to terminate this Agreement in accordance with its terms.

15.4.4 Reduction in Cap

The effort expended by Accenture in meeting its obligations under this Clause 15 will be calculated on either the Time and Materials Basis or the Maintenance Daily rate, whichever is relevant to the appropriate personnel being used, and will be treated as liability of Accenture and will count towards and reduce the aggregate liability cap set out in Clause 16. Accenture shall agree an action plan for fixing particular breaches of warranties with Centrica, implement such plan and keep Centrica informed as to the amount of money spent.

15.4.5 Data and Documentation

Notwithstanding Accenture's obligations under Clauses 15.1.1, 15.2.1 and 15.2.2 in relation to defects under Clause 5 (Data Audit, Cleansing, Matching, Conversion and Migration) Accenture will only be obliged to fix errors and to remedy the causes and consequences of such errors and then only errors notified during the Initial Warranty Period. In relation to Documentation defects shall be dealt with in accordance with Clause 7.1.4.

15.4.6 Material Defects and Fundamental Defects caused by Centrica

Accenture shall charge Centrica on a Time and Materials Basis or the Maintenance Daily rate, whichever is relevant to the appropriate personnel being used, for the correction of any Material Defects or Fundamental Defects notified by Centrica to the extent arising from or caused by:-

i) defects in the Centrica System and/or Legacy System not caused by Accenture;

ii) Centrica computer operator error or omission after Go-Live; and

iii) diagnosis and/or rectification of problems not associated with the System and not caused by Accenture.

9. Under Clause 16 of the JPA each party's aggregate liability to the other arising from or in connection with the JPA was made subject to a number of financial caps depending on the type of claim in question. In the case of claims relating to the Billing System, the cap was the higher of (a) £25 million and (b) 100% of the VAT exclusive Project Fees invoiced by Accenture to Centrica as at the date of the claim, which we were told was about £89 million.

10. Critical to the disputes between the parties are the respective definitions of "Fundamental Defect" and "Material Defect" contained in clause 1.1 of the JPA:

> "**Fundamental Defect**" means a fundamental breach of Clauses 15.2.1 and/or 15.2.2 and/or 15.1.1(i) (to the extent a breach of Clause 15.1.1(i) would also constitute a breach of Clauses 15.2.1 and 15.2.2 had it occurred during the Warranty Period) in relation solely to the release(s) relating to the Billing System (currently planned to be Release 3) which causes a severe adverse effect on the British Gas Business;

> "**Material Defect**" means a breach of Clauses 15.1.1 (i) (to the extent a breach of Clause 15.1.1(i) would also constitute a breach of Clauses 15.2.1 and 15.2.2 had it occurred during the Warranty Period), 15.2.1 and/or 15.2.2 which has or is likely to have an adverse effect on the British Gas Business, and which is not a Fundamental Defect;

Relevant Provisions in the Amended JPA

11. Under Clause 15 in the Amended JPA, the warranties given by Accenture apply in relation to Release 3B only and endure for a specified period beginning on 23 December 2005 and ending on 28 February 2007 ("the Warranty Period"). Further, under the amended Clause 15.4, Accenture is no longer under any obligation itself to fix Material Defects but instead is obliged during the Warranty Period to fund the fixing by Centrica of such defects and any other defects caused by Accenture that are not Fundamental Defects, with moneys paid under this obligation counting towards and reducing the aggregate liability cap set out in Clause 16.

12. In respect of Fundamental Defects, the obligation on Accenture is made subject to a notice in writing by Centrica of the Fundamental Defect and to Centrica "having provided such analysis and detail as is reasonably practicable as to its reasons for believing there is a Fundamental Defect in relation to Release 3B". That obligation was referred to at the trial as an obligation to "fix" but this is a somewhat inaccurate description. The obligation is to do "what a commercial, reasonable and prudent organisation using the System to carry on its business would do when acting in its own best interests (having due regard to the costs necessary and benefits likely from correcting the Fundamental Defect)", which sometimes will require Accenture to fix the defect and other times not. (It is convenient to refer to what Accenture has to do under the amended Clause 15.4.3 as "the prescribed steps").

13. These amendments reflect the fact that disputes as to the implementation of the JPA had broken out between the parties and it had been agreed that: (i) Releases 4 and 5 were to be cancelled; (ii) Accenture should move off site with Centrica taking over operational responsibility for the Jupiter system, including its implementation, day-to-day operation and maintenance; (iii) employees of Accenture were to be transferred to Centrica; and (iv) with certain exceptions, including any right accruing to Centrica to pursue the warranty provisions in Clauses 15.2 to 15.4, Accenture was to be released from all other claims in connection with the JPA.

14. The definitions of "Fundamental Defect" and "Material Defect" in the JPA were not amended by the Amended JPA.

15. Clauses 15.2 to 15.4 as amended now provided:-

> **15.2 Release Warranties**
>
> **15.2.1** Subject as provided below Accenture warrants to Centrica that
>
> i) for the duration of the Warranty Period:

d) each Release will comply in all material respects with its Statement of Release Requirements separately and when combined with the previously delivered Releases; and

e) completion of each Release will not materially adversely affect functionality achieved in any previously delivered Releases;

ii) in respect of the Release(s) which implement the Billing System (currently planned to be Release 3), for the duration of the Warranty Period:

a) each Release will comply in all material respects with its Statement of Release Requirements separately and when combined with the previously delivered Releases; and

f) completion of each Release will not materially adversely affect the functionality achieved in any previously delivered Releases.

15.2.2 Without limiting Clause 15.2.1, for the relevant Warranty Period:

a) a Release will be free from material design and material programming and material implementation errors; and

b) a Release will meet in all material respects the Statement of Release Requirements to give Centrica the capability to achieve competitive advantage.

15.3 [Not used].

15.4 Level of Effort

15.4.1 Accenture will fix Fundamental Defects to the level of effort set out in this Clause 15.4 during the relevant Warranty Period.

15.4.2 Material Defects

Accenture shall have no obligation to fix Material Defects during the Warranty Period, but has agreed to fund the fixing of Material Defects and any other defects caused by Accenture that are not Fundamental Defects, by Centrica that might arise during the Warranty Period, which defects shall be determined by reference to the scope definition document set out in Schedule 21 and, in relation to Material Defects by reference to Clause 15.2 ("Defects") in the following circumstances and subject to the following conditions:

i) the Centrica JAM Team (funded solely by Centrica) will comprise a 30 Full Time Equivalents team ("the Fix Team") which are intended to be sufficient to fix Defects that might arise during the Warranty Period (for the avoidance of doubt, this is in addition to the capacity provided by Accenture and Centrica for the Maintenance Release Development Services);

ii) "Full Time Equivalents" for the purposes of this Clause 15 means an appropriately qualified, productive and skilled person working a 8 hour day (where productive means the expenditure of no more than an average of 5 days per Defect);

iii) in the event that average effort required to fix such Defects exceeds 30 Full Time Equivalents then Centrica shall pay for such additional resource up to a cost of £100,000 and thereafter Accenture shall pay Centrica for such additional resource, in each case on the basis of hours worked multiplied by £460 per 8 hour period worked and lesser periods shall be prorated accordingly;

iv) the additional effort for the purpose of this Clause 15.4.2 shall not include and Accenture shall not pay for time spent by Centrica on the following activities;

(a) business effort;

(b) design authority;

(c) management;

(d) merge of fixes into future code stream;

(e) Change requests;

v) the additional effort for the purposes of this Clause 15.4.2 shall only be payable by Accenture where:

(a) Centrica has used reasonable endeavours to confirm that the code change required is to remedy a Defect rather than to implement a change to an agreed design;

(b) there is reasonable evidence that the Defect was present in the code as at 23 December 2005 as a result of actions by Accenture or that the fix effort is required to remedy a Defect caused by the implementation of a Change Request by Accenture in any of RJ313, 314, 314.2 and 315;

(c) Centrica has used reasonable endeavours to accurately prioritise the impact of the Defect in accordance with the classifications set out in (f) below;

(d) Centrica has provided adequate time reporting of effort spent on fixes of Defects;

(e) if within a calendar month Centrica is at any stage likely to exceed 30 Full Time Equivalents in order to fix Defects, Centrica shall promptly advise the Accenture Client Partner;

(f) Only Categories P1, P2, P3 or clusters of P4 as defined below shall be included:

Fault Priority	Abbreviation	Definition
Priority 1	P1	Fault is of such severity that activities cannot continue at any level. (All users out).
Priority 2	P2	i) Fault prevents an entire business process from being completed or, ii) Prevents a team of business users from performing their role in its entirety.
Priority 3	P3	Fault impacts designed process so significantly that the workarounds required to complete a process are not sustainable at volume ramp up.
Priority 4	P4	Fault impacts the designed process and requires workaround to complete, however in isolation there is no risk to volume ramp up

(g) Centrica is managing the fix team effectively and efficiently so as to minimise as far as reasonably practicable the average effort required to fix Defects and the utilisation of FTEs in any month.

vi) The payment obligation set out in this Clause 15.4.2 shall be Accenture's sole liability and Centrica's sole remedy with respect to Defects.

vii) The Parties shall meet on a monthly basis to review the number of Defects and effort expended to fix such Defects.

viii) Any invoices delivered by Centrica shall be payable by Accenture within 30 days of receipt.

15.4.3 Fundamental Defects

Upon being notified in writing by Centrica of a Fundamental Defect (and subject always to Centrica having provided such analysis and detail as is reasonably practicable as to its reasons for believing there is a Fundamental Defect in relation to Release 3B) Accenture shall do what a commercial, reasonable and prudent organisation using the System to carry on its business would do when acting in its own best interests (having due regard to the costs necessary and benefits likely from correcting the Fundamental Defect) provided always that in no event shall the cost spent on fixing (being calculated on a Time and Materials Basis, and for the purposes of calculating Centrica's time and materials costs for fixing Fundamental Defects Centrica shall only be entitled to multiply the number of days worked by relevant Centrica personnel as follows: £150 per day for business personnel; £550 per day for business IS personnel; and £460 per day for Centrica JAM personnel) exceed the cap on liability set out in Clause 16. This shall constitute Accenture's entire liability and Centrica's sole and exclusive remedy for a Fundamental Defect. For the avoidance of doubt, the only situation in which Centrica shall have a claim for damages for a Fundamental Defect shall be if Accenture does not promptly use the endeavours set out in this Clause 15.4.3

to correct the breach and nothing in this Clause 15.4.3 shall remove Centrica's right to terminate this Agreement in accordance with its terms.

15.4.4 Reduction in Cap

The effort expended by Accenture in meeting its obligations under this Clause 15 will be calculated on a Time and Materials Basis, and will be treated as liability of Accenture and will count towards and reduce the aggregate liability cap set out in Clause 16. Any moneys paid by Accenture to Centrica pursuant to Clause 15.4.2 shall count towards and reduce the aggregate liability cap set out in Clause 16. Accenture shall agree an action plan for fixing particular breaches of warranties with Centrica, implement such plan and keep Centrica informed as to the amount of money spent.

15.4.5 Data and Documentation

Notwithstanding Accenture's obligations under Clauses 15.1.1, 15.2.1 and 15.2.2 in relation to defects under Clause 5 (Data Audit, Cleansing, Matching, Conversion and Migration) Accenture will only be obliged to fix errors and to remedy the causes and consequences of such errors and then only errors notified up until 30 June 2006. In relation to Documentation defects shall be dealt with in accordance with Clause 7.1.4.

15.4.6 Fundamental Defects caused by Centrica

Accenture shall charge Centrica on a Time and Materials Basis, for the correction of any Fundamental Defects notified by Centrica to the extent arising from or caused by:-

i) defects in the Centrica System and/or Legacy System not caused by Accenture;

ii) Centrica computer operator error or omission after Go-Live; and

iii) diagnosis and/or rectification of problems not associated with the System and not caused by Accenture.

It will be noted that the detailed warranty process applicable to both Material and Fundamental Defects in clause 3 of the original JPA has been replaced by a much more detailed process applicable only to material defects.

16. The release of Accenture in respect of all claims other than claims in respect of the Release 3B warranties was provided for in Clause 27.4B (b) as follows:

> Release of Accenture: Centrica and each of its affiliates hereby release Accenture, and each of its respective subsidiaries, divisions, parents and affiliated corporations or partnerships, and each of their directors, officers, shareholders, agents, employees, partners, representatives, attorneys, successors and assigns, from the Released Claims.

The Released Claims were then set out with the proviso:

> provided, however, that Released Claims shall not include: (i) ….(ii) …(iii) …or (iv) any right accruing to Centrica now or in the future to pursue the warranty provisions in Clauses 5.2.2, 7.1.3, 7.1.4 and 15.2 to 15.4 hereof (the "**Warranty Provisions**"), in relation to a Release or Deliverable under a Release, is expressly reserved.

17. It is also appropriate to note that in Clause 21.3 (that deals with termination for default) it is provided:

> For the purposes of this Clause 21.3, the commission of a "material breach" shall include the commission of a series of related or unrelated breaches of this Agreement which, taken together, constitute a material breach of this Agreement.

The emergence of problems with the new billing system

18. Considerable problems with Release 3B began to emerge around June 2006. On 23 October 2006 an Accenture team that had gone back on site to investigate these problems produced a report setting out the results of its initial investigations. Increasing numbers of customer accounts were going unbilled and customer satisfaction was falling off. This was being caused in significant part by a backlog of "work items".

19. "Work items" are called "exceptions" in the SAP-IS-U programme. They refer to a feature invariably found in automated billing systems that requires manual intervention in certain circumstances before a bill is issued. An example might be an exception generated by an erroneous meter reading which has been entered incorrectly by the meter reader. Since critical data does not conform to what the system is expecting, the system suspends the billing cycle until the matter has been investigated and resolved by a business operative known within Centrica as a Customer Service Assistant or "CSA".

20. Centrica estimates that Release 3B generated between 4.5 million and 6.6 million "unnecessary" exceptions in 2006 and between 8 and 18 million in December 2007. On 17 November 2006 Accenture presented a study into the exceptions generated by Release 3B which recorded that between 23 October and 2 November 2006 Release 3B had generated 1.2 million new exceptions. The result was a massive backlog of unresolved exceptions.

The Notification Letter of 12 February 2007

21. By letter dated 12 February 2007 ("the Notification Letter"), Centrica notified Accenture of certain Fundamental Defects pursuant to Clause 15.4.3 of the Amended JPA and gave what it says was such analysis and detail as was reasonably practicable at that stage in relation to those defects. It was stated in the Notification Letter that the most serious Fundamental Defects related to "the large numbers of technical and business exceptions, management information and controls, insufficient hardware capacity, excessive workflow, and Jupiter integration". The Notification Letter then gave details of eight Fundamental Defects – Design of User inboxes; Management Information; Hardware capacity; SAP Archiving; Transactional and reporting systems

sharing a common infrastructure; Excessive workflow; Business and technical exceptions; and Jupiter integration.

22. In the Conclusion the Notification Letter stated:

> The information set out in this letter represents our best understanding and analysis of the matters which are currently causing us extreme concern. At this stage we cannot rule out the possibility that other Fundamental Defects will emerge as we further implement and use the System… Furthermore, at this stage we are not in a position to fully particularise all aspects of defects we have identified, although we have given here what particulars are reasonably practicable and clearly further issues are likely to arise….
>
> In accordance with Clause 15.4.3 of the JPA Accenture is required to commit to the process of identifying remedies and implementing them, failing which Centrica will make its own arrangements to do so and recover the costs from Accenture by way of damages….

Accenture's refusal to take any steps under Clause 15.4.3

23. Notwithstanding the Notification Letter, Accenture have refused to take any steps under Clause 15.4.3 of the Amended JPA. In its view, it was under no legal obligation to do so. Its position was, and is, that there were no Fundamental Defects in Release 3B, that the Notification Letter was ineffective to "trigger" Accenture's obligations under Clause 15.4.3 and that those obligations expired on 28 February 2007.

Centrica's claim against Accenture

24. Faced with this stance, Centrica has issued proceedings against Accenture in which it alleges that: (I) the massive backlog of unresolved exceptions that was generated in the wake of Release 3B was a breach of the Clause 15.2.2(i) and 15.2.2(ii) warranties in the Amended JPA; and (II) the breaches complained of have caused Centrica damage due to: (a) the need to employ a great number of additional staff to try to resolve the exceptions and to deal with rising volumes of contact with complaining and dissatisfied customers; (b) the writing-off of millions of pounds in respect of unbilled or late-billed supply of gas and/or electricity; and (c) the cost of investigating and rectifying the exceptions problem including the cost of purchasing significantly more powerful hardware and third party software.

25. Centrica pleads that Accenture's overall design of Release 3B contained two basic and critical design errors in relation to the generation of exceptions and the adequacy of accurate automation within Release 3B - "the Exceptions Error" and "the Automation Error". It contends that each of these basic errors was a fundamental breach of warranty within the meaning of the Amended JPA, and either individually or in combination, caused a severe adverse effect on the British Gas Residential Business and therefore constituted a Fundamental Defect (or Fundamental Defects) for the purposes of the Amended JPA.

26. Centrica also asserts that there were 23 individual breaches of warranty in respect of the design, programming and implementation of Release 3B in addition to the Exceptions Error and the Automation Error. The identification and particularisation of these individual breaches were completed only after the sending of the Notification Letter. Centrica alleges that these breaches are either manifestations of, or evidenced, the Exceptions and Automation Errors and are themselves material design, programming and implementation errors in Release 3B. Centrica does not allege that they individually constitute fundamental breaches of warranty or Fundamental Defects.

27. In summary, Centrica pleads:

A. There were 6 fundamental breaches of warranty:-

i) the Exceptions Error; and/or

ii) the Automation Error; and/or

iii) the combination of the Exceptions Error and the Automation Error; and/or

iv) the individual material errors in combination; and/or

v) the combination of the individual material errors which manifested or evidenced the Exceptions Error; and/or

vi) the combination of the individual material errors which manifested or evidenced the Automation Error.

B. Each of the above six fundamental breaches of warranty caused a severe adverse effect on the British Gas Residential Business such that each constituted a Fundamental Defect.

C. Alternatively, the six fundamental breaches of warranty in combination caused a severe adverse effect on the British Gas Residential Business such that there were one or more Fundamental Defects.

Accenture's contentions

28. Accenture contend that individual breaches of warranty asserted by Centrica cannot be combined whether for the purpose of establishing a fundamental breach or for the purpose of establishing a Fundamental Defect pursuant to Clause 15.4.3 of the Amended JPA. Instead, Accenture were only liable to do anything under Clause 15.4.3 if Centrica could establish, at the time it notified Accenture: (i) of the individual breaches of warranty of which Accenture were guilty; and (ii) that any such individual breach of warranty was in and of itself a "fundamental" breach of warranty which had already caused a severe adverse effect on the British Gas Residential Business. Accenture also contend that the obligation on it to take the steps specified in Clause 15.4.3 would only be triggered if Centrica served a timely notice specifying in respect of each individual fundamental breach relied on: (i) what warranty or warranties it was alleged had been breached; (ii) with what requirements of the Statement of Release Requirements ("the SoRR") it was alleged that Release 3B did not materially comply; (iii) the nature of the alleged material design, programming or

implementation errors; and (iv) the severe adverse effect that was alleged to have resulted from each breach.

29. Accenture also dispute Centrica's contention that the Notification Letter stands to be construed against the background of what Accenture knew of the defects at the time the letter was received.

30. As to Centrica's damages claim, Accenture plead that its liability for damages for Fundamental Defects under Clause 15.4.3 of the Amended JPA is limited to: (i) losses suffered after Accenture was notified of the Fundamental Defect(s); (ii) losses suffered after a reasonable time to allow Accenture to comply with its obligation; and (iii) losses calculated on the Time and Materials basis set out in Clause 15.4.3 in relation to its own obligation to fix (and not Centrica's right to claim damages).

31. Accenture also plead that a number of items of loss for which Centrica claims damages are irrecoverable by virtue of Clause 16.2 of the Amended JPA which excludes liability for "any losses, damages, costs or expenses whatsoever to the extent that these are indirect or consequential or punitive".

The Preliminary Issues to be decided

32. The few people who have read this judgment so far will realise that this is completely intractable litigation. No doubt in the light of that fact and of the rival contentions summarised above, Burton J ordered the trial of, inter alia, the following preliminary issues:

> 1. On a true construction of the Amended JPA:-
>
> 1.1 In order for there to be a Fundamental Defect, does each individual breach of warranty proved by Centrica have to constitute a "fundamental" breach of warranty, or can a "fundamental" breach of warranty be constituted by the breaches of warranty proved by Centrica?
>
> 1.2 In order for there to be a Fundamental Defect can the consequences of individual fundamental breaches of warranty alleged by Centrica be aggregated for the purposes of determining whether there was a severe adverse effect on the British Gas Business in order to constitute a "Fundamental Defect" or must an individual fundamental breach of warranty by itself cause a "severe adverse effect" without regard to the overall effect of different breaches?
>
> 2. In order for a "fundamental" breach of warranty to constitute a "Fundamental Defect", must the breach have caused an actual "severe adverse effect" on the British Gas Business before it was notified to Accenture under Clause 15.4.3? Or was it sufficient if, at the time of notification, the breach had started to cause or would cause a "severe adverse effect" if left unremedied?

3. On a true construction of the Amended JPA, to what extent is it legitimate to take into account the parties' prior knowledge of alleged defects in Release 3 when determining whether the letter of 12 February 2007 was a valid notice, in order to interpret it?

4. In order to provide valid notification under Clause 15.4.3, was Centrica required to state in the notification:

(i) what warranties it was alleging had been breached; and/or

(ii) with what requirements of the SoRR it was alleged that Release 3B did not materially comply; and/or

(iii) the nature of the alleged material design, programming or implementation errors; and/or

(iv) the severe adverse effect that was alleged to have resulted from each breach?

5. What is the correct basis for calculating the damages which can be claimed by Centrica for a Fundamental Defect under the terms of the Amended JPA? In particular:-

5.1 Is Centrica entitled to recover as damages its costs incurred in relation to the alleged Fundamental Defect before Accenture was notified of the alleged Fundamental Defect?

5.2 Are the losses recoverable by Centrica in relation to any alleged Fundamental Defect limited to those suffered after the expiry of a reasonable time for Accenture to comply with its obligations under Clause 15.4.3 following notification?

5.3 Is Centrica's entitlement to recover losses limited to losses calculated on a "Time and Materials Basis" in accordance with Clause 15.4.3?

6. In respect of the damages claim and the classes of loss claimed by Centrica in Schedule A, are any of those items of loss excluded under Clause 16.2 of the Amended JPA? If so, are they nevertheless (as a matter of principle) recoverable as sums expended in mitigation of Centrica's losses?

7. Can Centrica (in principle) recover for the cost of Hardware under clause 15.4.3 of the Amended JPA?

8. Does the release in Clause 27.4B(c) of the Amended JPA preclude Centrica from bringing any claim for breach by Accenture of the obligation to specify Hardware pursuant to paragraph 2.1.1 of Schedule 10 to the Amended JPA?

> 9. Is Centrica entitled to make requests for Hardware after 28th February 2007? If not, is Centrica otherwise entitled to purchase Hardware after 28th February 2007 under the Amended JPA?
>
> 10. If Accenture has unreasonably withheld or delayed consent to a request by Centrica for Hardware in breach of paragraph 1.4 of Schedule 10 to the Amended JPA, is Centrica (in principle) entitled to recover the cost of that Hardware as damages for breach, or as reimbursement under paragraphs 5.3 and/or 5.4 of Schedule 3 to the Amended JPA?

The factual matrix

33. The material on which Centrica relies as constituting the factual matrix of Clause 15.4.3 of the Amended JPA is voluminous. It is identified in a pleading called Statement of Facts which is some 85 pages in length. The judge said that the relevant background included: (i) the "high level" processes and functions which play a role in bills being sent to customers by a utilities provider in the UK; (ii) the nature of a utilities billing system, including the automated processes involved; (iii) the history of the Jupiter Project leading up to the JPA and the Amended JPA, including the Project Jupiter Qualification Report; the Memorandum of Understanding; the Programme Definition phase; the invitation to bid process; the design and development of Release 3; Release 3 documentation; the Release 3 SoRR; (iv) CCN 165; (v) the findings which he was to make on the oral evidence; and (vi) the events leading up to the conclusion of the Jupiter Programme Contract Amendment No.1 and the changes introduced by that agreement to the implementation of the billing system and the handling of defects.

34. Clause 15.4.3 also has to be construed against the background of the Amended JPA as a whole, including in particular certain relevant Recitals and clauses contained in the main body of the contract, and certain paragraphs contained in Schedule 1 to the contract.

35. During the Programme Definition Phase in the lead up to the execution of the JPA there was produced the Jupiter Programme Definition Report in June 2001. This recorded, inter alia, that "business processes will be re-designed to deliver a common customer focused experience…" It also summarised a list of 14 business requirements for billing, including bill production, account maintenance, payment methods, payments received, meter readings and customer enquiry.

36. The specific definition of these 14 requirements was worked out in subsequent documents, the detail of which it is unnecessary to set out but can be found in the judgment.

37. The judge then said that the relevant matrix facts were these. There had been disputes between Centrica and Accenture concerning the implementation of the first two Releases and Accenture claimed large sums were due for work which it contended was not covered by the JPA, whilst Centrica claimed that they were covered by the agreement. These disputes were settled on terms that the parties would be released from all claims arising out of the JPA except for warranty claims in respect of Release

3B and upon payment of an additional £10 million to Accenture. Working relations between the parties had deteriorated to the point that Centrica had decided that Accenture should leave the site and it (Centrica) would take over JAM (Jupiter Application Maintenance) and migration of customer accounts onto the billing system and its stabilisation, with a number of Accenture employees moving over to join Centrica's large team of experienced computer technicians. In addition, Releases 4 and 5 were cancelled. By the time of the Amended JPA, 4.5 million customer accounts had been migrated on to the new system but there were 12.5 million accounts still to be migrated.

38. The judge found on the evidence that amongst the automated processes involved in a utilities billing system there were very likely to be billing and control processes such as: (i) reading meters; (ii) creating meter read request files and handling the automated loading of meter reads into the billing process; (iii) identifying incorrect meter readings; (iv) calculating bills based on actual or estimated meter readings; (v) sending invoices to be printed; (vi) receiving payments and managing payments adjustments; (vii) handling key financial postings; (viii) handling customers moving house; and (ix) handling interaction between the utility and its customers.

39. The judge found other relevant background features in para 52 of his judgment as follows:-

i) the new billing system was immensely complex and involved inter-related processes and sub-processes;

ii) an error in one process could affect a related process;

iii) it was quite common to have defects in a billing system which in combination created an aggregated defect;

iv) design errors in different processes could cumulatively impact on other processes;

v) exceptions not designed-in could occur as customers' accounts were migrated and it could be very difficult to identify precisely what was causing those exceptions;

vi) if something went wrong when the system was running for real with the data flows operating it could be very hard to find out why;

vii) what appeared at first to be trivial non-functions could turn out to be more important; and

viii) the billing system was of critical importance to Centrica: if it failed to function properly to a significant degree there could be a serious impact on Centrica's revenues.

I see no reason to differ from the careful and detailed judgment in respect of any of these matters and can proceed to the first preliminary issue.

Fundamental Defect

40. The most critical dispute is in relation to the concept of a "Fundamental Defect".

41. Centrica's case in relation to this is or (at any rate) includes the following:-

i) defects came about because the Billing System was, in the words of the Release Warranties Provision, not free from

a) material design error; or

b) material programming error; or

c) material implementation error;

or because it did not meet in all material respects the Statement of Release Requirements for the Billing System;

ii) those obligations were "fundamental" obligations breach of which would be a "fundamental" breach if "fundamental" had any meaning independent of causing "a severe adverse effect" (which it did not);

iii) to the extent that the consequence of such breach caused "a severe adverse effect" that consequence was a Fundamental Defect;

iv) the requirement that the breach was to have a severe adverse effect was a requirement that a state of affairs must exist for there to be a Fundamental Defect;

v) if that state of affairs was not brought about by any single breach of clause 2 it could be brought about by a combination of breaches;

vi) those breaches need not necessarily themselves have individually caused a severe adverse effect but could have caused merely an adverse effect and themselves therefore be material breaches;

vii) but if, acting together, they caused a severe adverse effect there was then a Fundamental Defect.

42. None of these submissions was in terms accepted or rejected by the judge nor do they require decision by this court. The first preliminary issue addresses a part of Centrica's submission (vii) namely whether material breaches can, as a matter of law, if arising during the Warranty Period, cause a Fundamental Defect or whether it is, under the contract, impossible for material breaches, however seriously adverse their effect in combination may be, to cause a Fundamental Defect.

Issue 1

43. This issue is as follows:-

1. On a true construction of the Amended JPA:-

1.1 In order for there to be a Fundamental Defect, does each individual breach of warranty proved by Centrica have to

> constitute a "fundamental" breach of warranty, or can a "fundamental" breach of warranty be constituted by the breaches of warranty proved by Centrica?
>
> 1.2 In order for there to be a Fundamental Defect can the consequences of individual fundamental breaches of warranty alleged by Centrica be aggregated for the purposes of determining whether there was a severe adverse effect on the British Gas Business in order to constitute a "Fundamental Defect" or must an individual fundamental breach of warranty by itself cause a "severe adverse effect" without regard to the overall effect of different breaches?

44. The judge answered this issue in the following way:-

> 53. In my opinion, the meaning which Clause 15.4.3 would convey to a reasonable person having the background knowledge I have set out is: (1) a fundamental breach of warranty can be constituted by individual breaches of warranty all falling within the same subparagraph under Clause 15.2.1 or Clause 15.2.2; and (2) the consequences of such individual fundamental breaches of warranty can be aggregated for the purposes of determining whether there was a severe adverse effect on the British Gas Business.
>
> 54. In reaching this conclusion I have given careful consideration to all of Accenture's submissions, particularly those that focused on the distinct regimes established under the JPA for Material Defects and Fundamental Defects. In my judgement, the categories of Material Defects and Fundamental Defects are not mutually exclusive. There is no obligation under the JPA on Centrica to classify an apparent breach of warranty as either a Material Defect or a Fundamental Defect and I can see nothing in the agreement that prevents Centrica from asserting that a breach is a Fundamental Defect when to begin with they thought that the effects of the breach did not justify such an assertion, and may even have attempted to fix it. Nor do I see why Accenture should not come under the Clause 15.4.3 obligation even though they have paid a claim on the basis that the breach was a Material Defect. That obligation will not inevitably involve the further expenditure of money and if it does, it will go, together with the earlier expenditure, to reduce the Clause 16 cap.

45. In this court Accenture submitted:-

i) The most important background fact was that the parties had terminated their relationship and embarked on a new one; Accenture had left the site and was no longer responsible for fixing material defects (but only for funding the fixing of such defects by Centrica) and it only remained responsible for fixing Fundamental Defects; the judge had given far too little weight to what Mr

Smouha QC, on behalf of Accenture, called this "seismic shift" in the parties' relationship;

ii) There were two requirements for a Fundamental Defect to exist:-

a) There had to be a fundamental breach of one of the warranty provisions;

b) That breach, being already fundamental, had in addition to cause a severe adverse effect on Centrica's business;

iii) Any other defect was just a defect or a Material Defect. Thus the concept of a material defect would embrace

a) a non-fundamental breach of one of the warranty provisions which caused a severe adverse effect;

b) a fundamental breach of one of the warranty provisions which caused an adverse effect;

c) a non-fundamental breach of one of the warranty provisions which caused an adverse effect.

iv) While a single Material Defect could, by becoming more serious, become a Fundamental Defect, it was never intended that Material Defects could combine to become Fundamental Defects because the regimes in both the original JPA and the Amended JPA were different. Accenture could not be expected to begin to fix a defect to the level of effort for Material Defect (reasonable steps) but at a later stage have to fix it to a different level of effort (as for one's own business) if it became fundamental. This difference was even more critical after the amendment to the JPA when Accenture only had to fund the fixing of Material Defects by Centrica while remaining responsible for fixing Fundamental Defects.

v) When the parties wanted to include a concept of aggregation into their contractual scheme, they did so. Reliance was placed in particular on (A) clause 15.4.2(v)(f) of the Amended JPA in which prioritisation of Material Defects was to be in categories one of which (P4) permitted clusters of faults to be taken into account and (B) clause 21.3 in both the JPA and the Amended JPA which provided that the commission of a material breach for the purposes of a Termination for Default Clause was to include

> "the commission of a series of related or unrelated breaches of this Agreement which, taken together, constitute a material breach of this Agreement."

46. There was some debate about the consequences of the judge's answer to this preliminary issue. Mr Smouha submitted that the consequence was that the judge had held that the defects alleged by Centrica could be aggregated to create a Fundamental Defect. Mr Sumption QC on behalf of Centrica submitted that the judge had merely held that there was no obstacle in law to accumulating or aggregating individual Material Defects to constitute a severe adverse effect but left to the trial judge the

question whether any such aggregation did in fact produce a severe adverse effect. To my mind the use of the word "can" in both limbs of the issue indicates that Mr Sumption was right about that and that the judge did not purport to decide what the factual position was. That would have required factual evidence not deployed before the judge. But whatever the judge decided I would make clear that the decision of this court is confined to the legal questions whether it is contractually possible for individual breaches of warranty to be aggregated to produce a "fundamental" breach of warranty and whether the consequences of individual fundamental breaches of warranty can be aggregated to produce a severe adverse effect.

47. For my part I agree with the judge's conclusion. Although it is no doubt true that there was a substantial shift in the relationship of the parties when Accenture left the site and were no longer responsible themselves for fixing Material Defects but only for funding the fixing of them by Centrica, I doubt if the word "seismic" is appropriate. The heavy reliance placed by Accenture on the impossibility (or at least difficulty) of fixing defects, to different levels of effort under the original contract shows that there is a continuing contractual relationship. It would be very surprising if the answer to the first issue were to be different under the Amended JPA from that which it would have been under the original JPA and (to be fair) Mr Smouha did not suggest that it was.

48. As for the actual argument about different levels of effort for the fixing of Material and Fundamental Defects, I do not consider that that difference was anything like as significant as Mr Smouha submitted. The obligation to "take all steps reasonably necessary" to correct a Material Defect is not obviously different in kind from the obligation to "do what a commercial, reasonable and prudent organisation using the System to carry on its business would do when acting in its own best interests" in relation to a Fundamental Defect. On being pressed as to this, Mr Smouha was reduced to submitting that the latter obligation was intended to relieve Accenture from fixing a Fundamental Defect when the cost was so prohibitive that an organisation acting in its own interests would abandon the whole idea of correcting the defect. He might be right about that but (a) it is a little odd that the more serious the consequence of a Fundamental Defect is, the less there is any obligation to do anything about it and (b) to use this difference to argue that Material Defects cannot combine to create a severe adverse effect is, to my mind, altogether too far-fetched. The whole business of fixing defects has, on any view, to be a co-operative effort and the extreme case of the fixing of a defect having to be abandoned because it is too expensive can hardly govern the question whether a combination of defects can give rise to a serious adverse effect.

49. Moreover on Accenture's case, if I have understood it correctly, no Material Defect can, in the contractual scheme, be combined with any other material defect to produce a severe adverse effect for the purpose of constituting a Fundamental Defect. Yet if the submission in para 45 (iv) above is correct, this would have the effect that even fundamental breaches of warranty (individually causing an adverse effect) could not be combined, nor could breaches of warranty (of a non-fundamental kind) be combined although they each had a severe adverse effect. It is not likely that the parties could have contemplated such a (to my mind) bizarre result. This consideration might mean that Centrica's general submission as set out in para 41 (iii) above is correct but I would prefer not to express a final view on that since one can

never know in advance what facts will be proved at trial and deciding such a point without any factual background is too dangerous.

50. In the light of the above conclusion I do not think that the fact that the contract in the different context of termination for breach expressly permits aggregation of non-material breaches can take the debate very far. Still less can the wording in clause 15.4.2 of the Amended JPA in relation to clusters.

51. That leaves the point that post-amendment it would, say Accenture, be odd and unfortunate if a Material Defect which had been wholly or partially fixed by Centrica at Accenture's expense could be used to combine with another Material Defect to produce a Fundamental Defect; odd, because two (potentially hostile) parties would be responsible for doing the fixing; unfortunate, because if Accenture did work and incurred expenditure before (rightly) concluding that there was no Fundamental Defect, they would be unable to recover remuneration or expenses reasonably incurred. As far as Material Defects which had actually been fixed are concerned, Mr Sumption conceded (and it is right to record the concession) that, once fixed, a Material Defect could have no further part to play in constituting a Fundamental Defect. As for a partially fixed defect it is not likely that Accenture would have funded the fixing of it before it was finally fixed. It may well be right that Accenture cannot recover for investigating and (rightly) concluding that there was no Fundamental Defect. But that is the contractual scheme and is something which they would wish to do in any event rather than immediately accepting Centrica's contention that a Fundamental Defect exists.

52. Mr Smouha stated in reply that neither side had argued for the conclusion reached by the judge in para 53(1) and that the conclusion was, in any event, devoid of intrinsic significance. What matters, however, is the answer to the questions as recorded in the judge's order. If, of course, the parties can agree that a different answer to the question will, more aptly, reflect the conclusions to which I have come in relation to this preliminary issue, any such answer can be given but, in the absence of any such agreement, I see no reason to alter the answer given by the judge.

Issue 2

53.

> 2. In order for a "fundamental" breach of warranty to constitute a "Fundamental Defect", must the breach have caused an actual "severe adverse effect" on the British Gas Business before it was notified to Accenture under Clause 15.4.3? Or was it sufficient if, at the time of notification, the breach had started to cause or would cause a "severe adverse effect" if left unremedied?

54. This issue turns on the question whether the difference in the relevant part of the wording of the respective definitions of Material Defect and Fundamental Defect is a difference of substance. A Fundamental Defect is defined to be a fundamental breach of the warranty provisions

> "which causes a severe adverse effect on the British Gas Business."

A Material Defect is defined to be a breach of the warranty provisions

> "which has or is likely to have an adverse effect on the British Gas Business."

Both the definitions of the respective phrases and the warranty provisions themselves refer to "during the Warranty Period" or "for the duration of the Warranty Period" which must be relevant to this question of construction.

55. The judge recorded Centrica's submission that the word "causes" encompasses "could cause" and "will cause". He accepted that submission to the extent of holding that Accenture became under an obligation to take the steps prescribed by clause 15.4.3 where a severe adverse effect had not actually been suffered by the end of the Warranty Period but was "inevitably" going to be suffered.

56. On this matter I cannot agree with the judge. The contrast between "causes" and "has or is likely to have an adverse effect" is marked and, in an agreement drafted with sophisticated legal assistance, must be intended to have a different effect. Nor is it surprising that the parties would have wanted to draw a line in relation to any question of Fundamental Defect at the end of the Warranty Period. If it had not become clear by the end of that period that a defect was fundamental, the parties agreed that it was to be given no higher status than that of being a Material Defect.

57. The only difficulty about giving a different answer from the answer given by the judge is that the question focuses on the position at the time of notification rather than the end of the Warranty Period. Neither the definitions nor the warranty provisions make any reference to the date of notification; rather they refer to the Warranty Period. The answer to the question should therefore refer to the end of the Warranty Period rather than the date of notification. Since notification was given almost at the end of the Warranty Period, nothing much is likely to turn on the difference.

Issue 3

58. This issue and the judge's answer are as follows:-

> On a true construction of the Amended JPA, to what extent is it legitimate to take into account the parties' prior knowledge of alleged defects in Release 3 when determining whether the letter of 12th February 2007 was a valid notice, in order to interpret it?
>
> The letter of 12th February 2007 can be construed against the background of the parties' prior knowledge of alleged defects in Release 3 in order to determine its meaning. The question can then be decided whether, so construed, it is a valid notice.

59. I see no reason to disagree with the judge's answer. The House of Lords in Mannai Investment Co v Eagle Star [1997] AC 749 said of a notice to quit that its true construction depended on what a reasonable person in the position of the recipient

would have understood it to mean. The judge's answer still leaves open the question of the notice's validity and if, therefore, on the true construction of the notification requirement, the notification must notify the recipient of something which he already knows, with the result that in the absence of notification of that matter there is a complete defence to the claim, no doubt the trial judge will so hold.

Issue 4

60.

> 4. In order to provide valid notification under Clause 15.4.3, was Centrica required to state in the notification:
>
> (i) what warranties it was alleging had been breached; and/or
>
> (ii) with what requirements of the SoRR it was alleged that Release 3B did not materially comply; and/or
>
> (iii) the nature of the alleged material design, programming or implementation errors; and/or
>
> (iv) the severe adverse effect that was alleged to have resulted from each breach?

61. The judge answered each of these sub-questions in the negative. There is no express requirement in the provision for notification for any of these matters to be notified. It would not be right to imply any such requirement since no such implication is necessary to make the notification provision work. Indeed it would be surprising if the parties had impliedly agreed that a mini-pleading was effectively required as a condition for the existence of a claim.

Issue 5

62.

> 5. What is the correct basis for calculating the damages which can be claimed by Centrica for a Fundamental Defect under the terms of the Amended JPA? In particular:-
>
> 5.1 Is Centrica entitled to recover as damages its costs incurred in relation to the alleged Fundamental Defect before Accenture was notified of the alleged Fundamental Defect?
>
> 5.2 Are the losses recoverable by Centrica in relation to any alleged Fundamental Defect limited to those suffered after the expiry of a reasonable time for Accenture to comply with its obligations under Clause 15.4.3 following notification?
>
> 5.3 Is Centrica's entitlement to recover losses limited to losses calculated on a "Time and Materials Basis" in accordance with Clause 15.4.3?

The judge answered the first question Yes and the second and third questions No. The general question at the beginning of this issue requires the court to determine whether the parties have excluded Centrica's common law rights in respect of Fundamental Defects by clause 15.4.3. Common law rights to damages for breach of contract can only be excluded by a clear provision to that effect. It has been accepted law since Hancock v Brazier [1966] 1 WLR 1317 that an obligation to repair or make good defects in a contract for the provision of services does not of itself exclude common law remedies.

63. Under clause 15.4.3 Accenture's obligation in respect of a Fundamental Defect is to do what a commercial, reasonable and prudent organisation would do when acting in its own best interests provided that the cost spent on fixing (as defined in a special way) is not to exceed the cap fixed by clause 16. That is then said to

> "constitute Accenture's entire liability and Centrica's sole and exclusive remedy for a Fundamental Defect."

That is easy enough to apply to a Fundamental Defect fixed in accordance with the clause; but it must be doubtful whether that provision on its own would be clear enough to exclude any liability if Accenture do not fix the Fundamental Defect. However, the clause continues:-

> "For the avoidance of doubt, the only situation in which Centrica shall have a claim for damages for a Fundamental Defect shall be if Accenture does not promptly use the endeavours set out in this Clause 15.4.3 to correct the breach."

What is left doubtful is thus made explicit; the right to common law damages remains if endeavours to fix are not promptly used. That covers Centrica's claims in respect of Fundamental Defects in this case (if such defects exist).

64. It must then follow, as the judge has held, that Centrica's damages are at large and are not confined (to the extent that they may be different) to damages for failure to fix the defect. Mr Foxton QC submitted that damages in respect of a Fundamental Defect could only begin to accrue when the defect became fundamental. That would not be right in respect of defects which were always fundamental but whose fundamentality only emerged with the passage of time; it could only be right in respect of defects which were, on any view, only material or non-Material Defects but then (whether by process of aggregation with other defects or in some other way) became Fundamental Defects but the preliminary issue does not ask any question based on that distinction and the judge's answers to the specific questions posed in issues 5.1 to 5.3 must follow from his answer to the general question, with which I agree.

Issue 6

65.

> 6. In respect of the damages claim and the classes of loss claimed by Centrica in Schedule A, are any of those claims of loss excluded under Clause 16.2 of the Amended JPA? If so,

are they nevertheless (as a matter of principle) recoverable as sums expended in mitigation of Centrica's losses?

66. The judge held that none of these items of loss was excluded by clause 16.2 of the Amended JPA. That sub-clause provides that neither party is to be liable for:-

i) loss of profits or of contracts arising directly or indirectly;

ii) loss of business or of revenues arising directly or indirectly;

iii) losses or damages to the extent that they are indirect or consequential or punitive.

The judge considered each item and held that none of the losses claimed came within the second limb of Hadley v Baxendale (1854) 9 Exch. 341, were not therefore indirect and could therefore be recovered. This meant that the losses did not fall within 16.2 and to that extent I agree with the judge.

67. Separately from that question, Accenture also submitted that the claims for gas distribution charges in the sum of £18,700,000 and compensation paid to customers in the sum of £8,000,000 were on a true analysis claims for loss of revenue and thus excluded under 16.2.2. As to this submission:

i) the claim for gas distribution charges is pleaded as an amount overpaid to the distributors from whom they purchased their gas. As a result of the alleged Automation Error, Centrica was unable to provide meter data for 15% of the consumption of its gas customers. The distribution charge for the gas was not therefore made on meter readings from customers and over-estimated the consumption of those customers. The judge held the sums thus paid by Centrica to the distributors were not a claim for revenue but rather a claim for charges which they paid to distributors but would not have paid but for the alleged Automation Error. On the pleadings that seems to me to be correct and I would not disturb the judge's conclusion;

ii) Accenture's objections to the claim for compensation paid to customers was restricted in their skeleton argument to the assertions

a) that the claim was for an ex gratia payment and not one for which Accenture assumed responsibility under the Amended JPA; and

b) that the loss was an indirect or consequential loss falling within the second limb of Hadley v Baxendale.

Assertion (a) does not fall within the terms of issue 6 which asks if the claims are excluded under clause 16.2 of the Amended JPA. One would need to know much more than this court knows about the nature of this claim to be able to deal with this assertion and I do not think it would be right to deal with it at this stage. But, as a claim, it falls within the first not the second limb of Hadley v Baxendale.

68. Mr Foxton further submitted that the claim was pleaded (and rightly pleaded) as a claim to recover the cost of mitigating losses flowing from Accenture's breach

because Centrica was concerned that it might lose a number of customers and that the claim was, for that reason, a claim for loss of revenue. Mr Onions QC on behalf of Centrica submitted that the claim had always been pleaded as damages for loss of the good reputation Centrica had suffered with respect to its customers by reason of Accenture's failure to comply with its obligations. He accepted that there was an alternative claim for the cost of mitigating its losses. Naturally enough the judge expressed no view on this matter since it had not been argued before him.

69. Any claimant must have a choice how he pleads his loss. A claim for reputational loss has its difficulties although Mr Onions was able to refer to passages in McGregor on Damages and Chitty on Contracts which gave some slender legal basis to support the claim. But no preliminary issue has been framed to deal with this point and, as with the question whether Accenture assumed responsibility for the claim, it could probably not be decided without evidence of the facts behind the claim. But the claim as pleaded is not a claim for loss of revenue or loss of profit and is not excluded by the terms of clause 16.2. However the alternative way it is put as cost of mitigation must be for the cost of mitigating a particular claim and it is difficult to see (and Mr Onions did not suggest) that it could be anything other than a claim for revenue. It would, therefore, be useful to make that clear now with respect to that particular way of putting the claim.

Issue 7 – the cost of Hardware

70.

> 7. Can Centrica (in principle) recover for the cost of Hardware under clause 15.4.3 of the Amended JPA?

The question here is whether, if the existence of a Fundamental Defect renders it necessary for Centrica to buy in more hardware for the billing system, the claim to recover the cost of that hardware can only be made pursuant to the contractual provisions for hardware as set out in Schedules 3 and 10 to the Amended JPA or whether it can be part of the free-standing claim to damages under clause 15.4.3.

71. It is unnecessary to prolong this judgment by setting out the detailed provisions of Schedules 3 and 10 which are, in any event, to be found in the judge's second judgment of 23rd November 2009 [2009] EWHC 2966 (Comm.). It is sufficient to note that they provide for Accenture to specify and Centrica to purchase necessary hardware out of a projected budget. To the extent that Centrica could get the hardware for less than the projected price an amount would be payable to Accenture whereas, if it had to pay more, then Accenture had to reimburse Centrica for the excess. It was also provided that Centrica could not purchase hardware in excess of the budget unless Accenture gave their written consent such consent not to be unreasonably withheld or delayed. These are, however, all provisions applying and contemplating performance of the contract.

72. The judge held that there was nothing in Schedules 3 and 10 (or indeed elsewhere) in the contract which indicated that, if there was a Fundamental Defect (which ex hypothesi meant that there had been a fundamental breach causing a severe adverse effect on Centrica's business), there was no right to damages under clause 15.4.3.

73. I agree with that conclusion. The mere fact (if it be a fact) that part of the damages for the fundamental breach of contract is the cost of additional hardware does not mean that contractual provisions intended to apply to the performance of the contract in relation to hardware confine the natural consequences of breach of that contract. I have already noted that any exclusion of common law liability must be clear. Clause 27.4B of the contract does exclude liability based upon facts occurring prior to 31st March 2006 but expressly reserves any right

> "accruing to Centrica now or in the future to pursue the warranty provisions … in relation to a Release."

That clause is clear as far as it goes but does not clearly (or, in my view, at all) restrict claims for hardware consequent on a breach of warranty to sums which Centrica may be able to claim pursuant to Schedules 3 and 10 while the contract was being performed. That is not to say that no claim can be brought by Centrica pursuant to Schedules 3 and 10 if it wishes to do so, merely that that is not the limit of its entitlement.

Issue 8

74. There is no appeal in relation to issue 8 which need not therefore be further considered.

Issue 9

75.

> 9. Is Centrica entitled to make requests for Hardware after 28th February 2007? If not, is Centrica otherwise entitled to purchase Hardware after 28th February 2007 under the Amended JPA?

76. The judge held that, if Centrica was operating the provisions of Schedules 3 and 10, no request for permission to purchase hardware could be made after 28th February 2007 which by clause 21.1 was the date for the termination of Accenture's contractual services and which was also the closing date of the Warranty Period. Centrica does not challenge this decision. But Accenture submit that the judge should also have held that, if Centrica purchased hardware pursuant to those provisions because Accenture unreasonably refused or delayed their consent to requests made before 28th February 2007, recovery could only be made in respect of such purchases as were actually made before that date. This only applies to any such claim as Centrica might make pursuant to Schedules 3 and 10. Now that it has been decided that this is not the only claim it can make if the existence of a Fundamental Defect necessitated the purchase of additional hardware, the question whether any such hardware had actually to be purchased before 28th February 2007 is probably academic. But if it is not academic, I can see nothing objectionable in the judge's answer to this issue namely to decline to hold that if Accenture unreasonably withheld or delayed their consent to a request made prior thereto any purchase had to be made by 28th February 2007.

77. It follows from this that the judge correctly answered issue 10 and, since no separate grounds of appeal are advanced in relation to this issue, it is unnecessary to say anything more about it.

Conclusion

78. The only answer I would answer differently from the way in which the judge answered the issues is the answer to issue 2. Counsel will kindly draw an order to reflect this single difference.

Lord Justice Wilson:

79. I agree.

Lord Justice Mummery:

80. I also agree.