Case No: HT-02-164

Neutral Citation No. [2003] EWHC 725 (TCC)

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

TECHNOLOGY AND CONSTRUCTION COURT

St. Dunstan's House,

133-137, Fetter Lane,

London, EC4A 1HD

Date: 9 April 2003

B e f o r e :

HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.

- -

	ASTEA (UK) LIMITED	**Claimant**
	- and -	
	TIME GROUP LIMITED	**Defendant**

- -

- -

Cyril Kinsky (instructed by K Legal for the Claimant)

Sa'ad Hossain (instructed by Halliwell Landau for the Defendant)

- -

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

H.H. Judge Richard Seymour Q. C. :

Introduction

1.
Astea (UK) Ltd. ("Astea") carries on business as a provider of software, in particular a software package called "ServiceAlliance" ("the Software"). It is a subsidiary of a Delaware corporation, ASTEA International Inc., but is itself a small company, with only some twenty employees.

2.

As I understand it, the Software is designed for use independently of other systems to enable a user to undertake automated field service operations, that is to say, the provision to customers of the facility of having equipment belonging to the customer serviced at the customer's own location, as well as at the user of the Software's workshop. When used independently the Software is described as "out of the box" software, meaning that all that is required to use it is its installation in appropriate computer hardware. However, a customer has a number of options as to the precise form in which the facilities offered by the Software in its "out of the box" manifestation are enjoyed. These options are selected by use of something called the "AllianceStudio toolkit". The process of selecting and giving effect to options available as standard is called "configuration".

3.
The Software can also be linked with other software systems so as to provide, in conjunction with them, facilities beyond those which are the core elements of the Software itself. To enable this to happen links to the other relevant software have to be created by means of what are called "interfaces". The process of creating such interfaces is sometimes called "integration".

4.
The managing director of Astea is Mr. Pat Noble. At paragraph 7 of his first witness statement, dated 24 January 2003, in a passage which I accept as accurate, Mr. Noble described the three core elements of the Software in this way:-

"(a) Contract capability

ServiceAlliance will record information on the computer screen that tells the customer that a contract exists with a third party for maintenance of a certain product. If you take a simple example of a washing machine, perhaps the owner of this washing machine pays a [sic] £100 a year for one of our customers to maintain and fix the machine whenever necessary. Astea's product allows a customer to take a call from the owner of the washing machine to say that it is broken, the system checks as to whether a contract exists, and also whether it is still in date, and if all is in order the call is logged, and the customers determine whether billing is appropriate or not. This really represents the front end of the system, which allows the customer to get the money in the door.

(b) Call handling and despatch

This element of the product moves the system onto the next stage, and allows a customer to perhaps write onto the system that (in the washing machine example) there is water spilling onto to [sic] the floor. This detail is logged into the system, and so is the fact that an engineer is required to visit the client. The system itself will search for a field engineer at the correct skill level who can be available at the requested time, and that engineer can then be booked through the system. There are lots of clever options in this aspect of the product, and it is possible to send information that is logged to the engineer on his hand held terminal, and the opposite is true such that the engineer can record details of what he did on any particular visit, and return this information to despatch, or he can log it against the costs. This information (such as the types of visits that the engineers have been called out to do, the remedial work that is required, and so on) can all then be analysed so that the customer is able to become more client focused, and also on a very practical level can monitor stock. This would become relevant where the information coming back from the engineer is that he has had to for example replace a rubber seal that was broken. The system then knows that this was the part that was required for the job, which brings me onto the third core element.

(c) Spare parts

Astea's product will allow a customer to track spares, and also has a programme which can automatically reorder certain parts, to maintain a minimum level at all times. This is really the logistics module, which will not only record details of where the spare parts are, but also which engineer may have reasonable access to them and handle the job."

5.
Time Group Ltd. ("Time") carries on business as manufacturer and retailer of personal computers. The vast majority of its sales is, and has been, historically, to individual consumers. However, a relatively small proportion of sales – apparently some 2% or so - is, and has been, made to businesses and to educational establishments. Attached to every sale is a warranty in relation to the quality of the goods sold which is valid for a period. In the case of sales to individual consumers, if a claim is made upon the warranty the relevant goods have to be returned to Time for appropriate remedial action. However, in the case of business and educational customers a Time engineer will attend the customer's site to undertake repairs.

6.
As I understand it, a substantial part, at least, of the retail sales operation is conducted on the telephone rather than in shops, although Time also has a significant network of retail outlets. The telephone sales operation is conducted, as is now common, through a Call Centre, which in the terminology of Time is called the "Customer Care Centre", but to which I shall refer in this judgment simply as "the Call Centre". The Call Centre is, and was at all times relevant to this action, also charged with responsibility for dealing, in the first instance, with claims by individual consumers under warranties in relation to equipment sold to them. In the event of a claim being accepted a repair order, called by Time a "Return Material Authorisation", or "RMA", is issued and the relevant goods are sent to Time's service centre ("the Service Centre") for repair. The Service Centre is also the base from which the field service network is operated which deals with claims by business or educational customers under warranties. It seems that a means, perhaps the principal means, by which business and educational customers of Time notify claims for repair under warranty of goods supplied is also by telephone to the Call Centre.

7.
In order to operate the Call Centre effectively Time needed appropriate computer-based support. Until about the middle of 1999 that computer-based support was provided by a management information system called "Swan" installed on appropriate computer hardware. From about the beginning of 1999 Time was considering replacing Swan and was interested in utilising three different software packages to do so. The principal package was an office accounting package which provided a means by which customer orders could be taken and processed, stock could be managed, product manufacture could be scheduled and internal accountancy and financial functions fulfilled. In this judgment I shall call that package "the Accounting Package". A further package which it was envisaged would be required was one to facilitate the performance of the sales functions of the Call Centre by handling calls from existing customers, providing technical assistance and passing requests for repair of equipment to the Service Centre. In this judgment I shall call that package "the Call Centre Package". The third of the packages which was contemplated was one to manage all aspects of service and repair, whether undertaken on goods returned to the Service Centre or by attendance of a Time engineer at the premises of a business or educational customer. In this judgment I shall call that package "the Service Package". It was obviously envisaged that the Accounting Package, the Call Centre Package and the Service Package would be integrated the one with the others by appropriate interfaces.

8.
As matters turned out Time decided that a software product called “Tetra CS/3”, to which I shall refer in this judgment as “CS/3”, created by a company called Tetra International Ltd., but which traded under the name Sage Tetra, should be utilised as the Accounting Package. CS/3, as I understand it, is an “out of the box” software package, but it possesses the ability to be integrated with other software packages via appropriate interfaces. Time entered into an agreement in writing dated 3 March 2000 with Apex Computers Ltd., which traded under the style or title “Apex Systems”, for the supply of CS/3. Shortly after the agreement was made Apex Computers Ltd. changed its name to Lynx Commercial Systems Ltd., and its trading style to “Lynx Commercial Systems”. It is convenient to refer to that company for the purposes of this judgment by the name “Lynx”.

9.
Time decided to produce a bespoke software package to serve as the Call Centre Package. This package was in the event produced by Time itself using the services of contracted software developers, or programmers. The Call Centre Package came to be called, and will be referred to in this judgment as, “Pulse”.

10.
By about the beginning of April 2000 there were two main products in the running for selection as the Service Package. One of these, and that which was eventually chosen, was the Software. It will be necessary to a limited extent to consider what led up to it, but by an agreement (“the Contract”) in writing signed on behalf of Time on 14 July 2000 and on behalf of Astea on 23 July 2000 Astea granted to Time 20 full licences and 280 occasional licences to use the Software. Astea also agreed to provide services, to which in this judgment I shall refer as “the Services”, set out in Schedule C to the Contract. There was an issue in this action as to whether what I have called the Contract was, as a matter of law, a single agreement, as was contended on behalf of Time, or three agreements, as was contended on behalf of Astea. Curiously, given the analysis contended for on behalf of Astea, another theoretical possibility could be that it was two agreements. I shall return to this issue of how many agreements were contained, as a matter of law, in the Contract.

11.
In circumstances which I set out later in this judgment Time did not make to Astea payments for which the Contract provided. In this action Astea claimed the sums which it contended were due under the Contract. Time resisted that claim principally on the ground that, by its failure to complete the Services by about 6 March 2001, Astea had repudiated the Contract, Time had accepted that repudiation, and thus, so it was said, Astea was not entitled to payment of the sums claimed. However, it was also contended on behalf of Time that, if not a breach going to the root of the Contract, and thus a repudiation, the failure of Astea to complete the Services by about 6 March 2001 was still a breach of the Contract in respect of which Time was entitled to damages. Time sought to set off the amount of the damages to which it contended it was entitled against any liability it was otherwise under to pay to Astea the sums claimed under the Contract. It was denied on behalf of Astea that it was in breach of the Contract by reason of the fact, as to which there was no dispute, that it had not completed the Services by about 6 March 2001. It was contended on behalf of Astea that it was under no contractual obligation to complete the Services by about 6 March 2001 or any other specific date. Astea’s case was that it owed an obligation to use reasonable skill and care, subject to a proviso to which I shall return, to complete the execution of the Services by 1 August 2000, but that compliance with that obligation was in any event waived. Thereafter, its only obligation was to complete the execution of the Services within a time which was reasonable in all the circumstances. It was

contended that Astea was not in breach of that obligation because the causes of the delays in the completion of the execution of the Services up to about 6 March 2001 were not its fault. There were a number of other issues in the action, to the exact nature of which I shall return, but one of the answers advanced on behalf of Astea to the contention that it was in breach of the Contract by reason of non-completion of the execution of the Services by about 6 March 2001 was that, because, on proper construction, the Contract constituted three agreements, and in particular there were separate agreements in relation to the grant of licences to use the Software, on the one hand, and to undertake the provision of the Services, on the other, it was no answer to the claim in the action for payment of the balance of the agreed licence fees that there had been, if there had been, a breach of the agreement for the undertaking of the Services. It is for that reason that an issue arose as to whether the Contract as a matter of law constituted a single agreement, or three, or conceivably two, agreements.

The Contract

12.
The Contract was in a form substantially produced by Astea. It was enclosed in a cover which bore the legend, “ServiceAlliance License and Support Agreement Between”. No parties were identified on the cover, but the name of Astea appeared at the foot of it. Inside the cover was a front sheet which bore the same wording as the cover, but included the identification of the parties as “Astea International” and Time. The front sheet also gave an “Agreement No.”, SA170400001.

13.
The first substantive page of the Contract was numbered “Page 2 of 5” and was entitled “ServiceAlliance License and Support Agreement”, with the number of the agreement underneath. The text which followed was:-

“This ServiceAlliance License and Support Agreement is between Astea UK Ltd with its registered office at Trent House, University Way, Cranfield Technology Park, Cranfield, Bedfordshire MK43 0AN, UK (“Astea”) and Time Group Limited, with its registered office at Time Technology Park, Burnley, Lancs, BB12 7TG (“you” or “the client”). Intending to be legally bound, you and Astea agree to the terms and conditions stated in this Agreement.”

14.
Beneath the introductory words set out in the preceding paragraph the first page of the Contract went on to set out in tabular form details of the licences granted in sections numbered I and II. Section III was not completed. Section IV provided that:-

“You and Astea agree that Astea will provide, and you will purchase and pay for, support and maintenance services for the foregoing software at Time Technology Park, Burnley, Lancs (the “Central Site”) for the period ending on 16th May 2001 under the terms and conditions stated in this Agreement.”

There followed a table in which it was set out that the licence fees payable amounted to £170,400.

15.
Schedule C, which I have already mentioned was set out on a page numbered 3 of 5 in the Contract. Beneath the words “Schedule C”, which were a title at the top of the page, appeared the words “Order for Services”. There followed a table which included the name and address of Time, the identity of a

contact person, in fact Mr. Derek Brotherston, and the number of the agreement, SA170400001. Beneath the table appeared the words:-

“Reference is hereby made to that certain ServiceAlliance License and Support Agreement No SA170400001 dated …… (the “Software Agreement”) by and between Astea UK Ltd. (“Astea”) and Time Group Limited (“you”). This Schedule shall become valid and binding upon the parties only after it is signed by Astea and you. In the event that any of the terms and conditions of this Schedule conflict with the Software Agreement, this Schedule shall control for all purposes. In accordance with the Software Agreement, Astea shall provide the Services listed below upon the following additional terms and conditions.”

In a table entitled “Description of Services” below the words just quoted were set out:-

“ServiceAlliance Implementation Services Up to 72 days

Modifications to AllianceLink for Tetra CS/3”

The stated “Total Value of Services” in the table was £60,000.

16.
Also on page 3 of 5 were set out “Terms and Conditions for Services”. They were:-

“**Invoicing**

Services will be invoiced bi-monthly following performance of the services together with travel and living expenses, if applicable and are due and payable within 30 days of invoice date.

Working hours

The standard unit of charge is one day, which provides 7.5 hours of work. Standard working hours are from 9.00 am to 17.30 pm local time, with a one hour break for lunch. Hours worked in excess of 7.5 per day will normally be charged at pro-rata rates, although if the total hours in a week does not exceed 37.5, then the additional charges will not be made.

Travel time

No charge will be made for travel time to or from the place of work where the total time travelled does not exceed 2 hours. Any time in excess of 2 hours will be billed at pro-rata hourly rates. Where long-haul, overnight flights of greater than 5 hours are made, we expect that our staff should have the opportunity for 4 hours rest before commencing work. This time will be billed to the customer.

Expenses

All expenses for travel, accommodation and subsistence will be the responsibility of the customer.”

17.
Page 3 of 5 of the Contract was signed on behalf of Time by Mr. Richard Hope and dated 14 July 2000 and was signed on behalf of Astea by Mr. Noble and dated 23 July 2000.

18.
Pages numbered 4 of 5, 5 of 5 and 6 of 5 of the Contract contained what were described as “ServiceAlliance License and Support Agreement Terms and Conditions” (“Astea’s Conditions”). At the foot of each of the relevant pages appeared the indication “(Rev 1.2) Sept 1999 - UK”. Astea’s

Conditions were fairly obviously the written standard terms of business of Astea at the date of the Contract.

19.
Clause 1.1 of Astea's Conditions incidentally included a number of definitions in the course of granting a licence. The word "System" was defined as meaning "the Programs and Materials". The word "Programs" was defined as meaning "Astea's computer ServiceAlliance software program(s) identified on the first page of this Agreement or under any Schedule A and will consist of a set of information processing programs in machine-readable object code form only for use by you under this Agreement". The word "Materials" was defined as meaning "the documentation related to the Software, as described above or on a Schedule A and any related support material specified". No "Materials" seem to have been included within the Contract. The expression "Packaged Software" was defined as meaning "the Programs and the Third Party Software", and the latter was defined as "the software products and related documentation listed as such in, or on a Schedule A to, this Agreement." Again, it does not appear that any "Third Party Software" was included within the Contract.

20.
Included within clause 2 of Astea's Conditions, which was actually concerned with provision of "Software Support", was a definition of the latter expression as meaning "software support as described in this Agreement". In the same clause the expression "Support Period" was defined as meaning "the period from January 1 through 31 December or the remaining portion of a calendar year following the operation of the warranty period for the Packaged Software".

21.
By clause 6.3 of Astea's Conditions it was provided that:-

"Charges for out-of-pocket expenses will be invoiced as incurred by Astea. All invoices are due and payable within thirty (30) days after invoice date unless otherwise noted in this Agreement or on the invoices. Late payment charges will be imposed at the rate of 1.5% per month. Astea will also have the option to extend, on a day-for-day basis, the related delivery schedule for each day an invoice is past due."

22.
Clause 8 of Astea's Conditions was entitled "Termination". By clause 8.2 provision was made that:-

"If either party to this Agreement defaults in the performance of any of its obligations under this Agreement or any of the Schedules or Addenda attached to this Agreement and such default is not corrected within thirty (30) days after receipt of written notification of such default from the non-defaulting party, then the non-defaulting party may terminate this Agreement (or, if applicable, individual Schedules or Addenda to this Agreement) immediately upon delivery of written notice of termination to the defaulting party. If you are the non-defaulting party, you will be reimbursed for the unused portion of the Software Support Fee as of the termination date."

23.
Clause 10 of Astea's Conditions was entitled "Warranty". It was in these terms:-

"Astea warrants that the Packaged Software will operate in substantial conformity with the Materials (a) for a period that will end ninety (90) calendar days following the Delivery of the Packaged Software (the Applicable Warranty Period), and (b) during the current Support Period. This warranty

does not apply to any third party software or Packaged Software that has been altered or modified in any way by you. You acknowledge that you have had sufficient opportunity to review the Materials prior to the execution of this Agreement and understand the capabilities and limitations of the System. You agree to provide all reasonable assistance requested by Astea in identifying, researching and documenting the circumstances of any non-conformance of the System. During the warranty period set forth in this Section 10.0 Astea agrees to provide you with Packaged Software support services at no additional charge."

24.
Clause 11 of Astea's Conditions was entitled "Limitations". By clause 11.1 it was provided that:-

"Other than the warranties expressly stated in this agreement, Astea neither makes nor grants any warranties, representations or conditions, express or implied. Astea expressly excludes all implied warranties, representations and conditions, including specifically any implied warranty arising by statute or otherwise in law or from a course of dealing or usage of trade. Astea hereby excludes any and all implied warranties, representations or conditions of non-infringement, merchantability, merchantable quality, or fitness for any purpose, particular, specific or otherwise."

25.
Following the page of the Contract numbered 6 of 5 was what was called an "Addendum". That Addendum constituted three pages and was signed on behalf of both parties. It began:-

"The following Addendum shall modify the terms and conditions of that certain Master Software Agreement dated as of 14 July 2000 by and between Astea UK Ltd., with its registered office at Trent House, University Way, Cranfield Technology Park, Cranfield, Bedfordshire MK43 0AN, UK and Time Group Limited, with its registered office at Time Technology Park, Burnley, Lancs. BB12 7TG, United Kingdom, and each of the schedules and agreements attached thereto and incorporated by reference therein (collectively, the "Master Software Agreement"). Capitalized [sic] terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the Master Software Agreement. Any term or condition of the Master Software Agreement in explicit conflict with the terms or conditions of this Addendum shall be deemed to be specifically and expressly superseded by the provisions hereof."

26.
Following the words quoted in the preceding paragraph was a heading "Master Software Agreement Terms and Conditions". There followed a number of alterations to terms of Astea's Conditions. These included a new clause 11.2:-

"Except as provided in section 12 hereof, your sole and exclusive remedy for any damage or loss in any way connected with the System, this Agreement or any of the schedules, Addenda, amendments or attachments hereto, or for any damage or loss in any way connected with the enhancements, Software Support or any other material, information or services furnished by Astea hereunder, whether or not caused by Astea's breach of warranty, negligence or any breach of any other duty, shall be, at Astea's option, replacement of the System or enhancements, re-performance of the Software Support or services, or return or credit of the appropriate portion of any amounts received by Astea from you with respect to the System or Software Support. In no event shall Astea's liability exceed the amounts received by Astea for the System or Software Support under this Agreement during the twelve (12) month period immediately preceding your claim for recovery hereunder, even if Astea is advised of the possibility of such damages. You agree that Astea shall not be liable for any special, indirect, punitive or consequential damages hereunder, including but not limited to, loss of use or the

loss of data or information of any kind, however caused, or failure of the System to work or perform in any way, or any liability to end-users or to third parties.

No indemnification of any kind is provided by Astea hereby to you or any other person, except as expressly provided in Section 12.0 below."

27.
The Addendum also included a new clause of Astea's Conditions, clause 15, of which the material parts for present purposes were:-

"Section 15.0 In addition, the parties hereto agree to the following points of clarification and understanding regarding the Agreement....

15.4 The payment schedule shall be 1/3 on execution of the Agreement, 1/3 on delivery of the System, and 1/3 on 1st September 2000.

15.5 Provided Time Group has provided timely assistance and cooperation [sic] on its part, the scheduled date of implementation by Astea shall be 1 August 2000...."

28.
What I have called "the Services" were not defined in the Contract more specifically than in Schedule C. However, in general terms they comprised both the configuration of the Software to suit the particular requirements of Time (to which part of the Services I shall refer in this judgment as "the Configuration Services") and the integration of the Software with CS/3 and Pulse (to which part of the Services I shall refer in this judgment as "the Integration Services").

The sums claimed by Astea in this action

29.
I have already indicated that Time did not make payment of sums which Astea claimed were due under the Contract. In particular Time did not make payment of the second and third instalments of the agreed licence fees of £170,400. Those instalments together amount to £113,600. The sum payable as Value Added Tax at 17.5% on that amount is £19,880. In addition Astea rendered invoices to Time in respect of the Services which, inclusive of Value Added Tax at 17.5%, totalled £85,382.04. The breakdown of that figure was £63,483.31 claimed in respect of the time of Astea employees in providing the Services, £9,182.25 expenses and £12,716.48 Value Added Tax. Time did not pay any sum in respect of the provision of the Services. Thus in this action at the date upon which it was commenced the sum claimed on behalf of Astea was a total of £218,862.04, being £133,480 in respect of the unpaid balance of licence fees, together with Value Added Tax, and £85,382.04 in respect of the provision of the Services. A point which was taken in the Re-Amended Defence and Part 20 Claim of Time was that, under the Contract, the maximum sum which Astea could claim in respect of the time of its employees in providing the Services was £60,000 plus Value Added Tax. While not conceding that that point was sound, Mr. Cyril Kinsky, who appeared on behalf of Astea at the trial, limited the claim of Astea in respect of the time of its employees in providing the Services to the sum of £60,000 plus Value Added Tax. In the result, therefore, the sum claimed, exclusive of interest, by Astea in the action was £214,769.14, comprising, inclusive of Value Added Tax at 17.5%, £133,480 unpaid balance of licence fees, £70,500 (£60,000 plus £10,500 Value Added Tax) in respect of the time of employees in providing the Services and £10,789.14 (£9,182.25 plus £1,606.89 Value Added Tax) in respect of expenses. There was no dispute as to those figures as figures.

The defences raised on behalf of Time

30.
I have already indicated the principal line of defence advanced on behalf of Time, namely that by its failure to complete the Services by about 6 March 2001 Astea had repudiated the Contract and Time had accepted that repudiation. It was pleaded on behalf of Time that the Contract was a single agreement, such that the repudiation alleged, and acceptance thereof, put an end to all of the unperformed obligations of Time under it – in particular the obligation to pay the unpaid balance of the licence fees. As to the alleged repudiation and acceptance, the way in which Time's case was put in the Re-Amended Defence and Part 20 Claim was as follows, omitting underlining and words deleted by amendment:-

"7. Further, it was a term of the Master Software Agreement that the Claimant would provided "ServiceAlliance Implementation Services" in respect of the System provided under the Software Agreement part of the Master Software Agreement. The said ServiceAlliance Implementation Services were agreed between the parties and are contained in and/or evidenced by the following documents copies of which are attached to this Defence and Amended Part 20 claim:

(a) The document entitled "Time Computers – ServiceAlliance Business Requirement Call Centre System Integration" ("the BRD") dated 11 July 2000, produced by Mr. Ian Dundas, European Product Manager of the Claimant and agreed by the Defendant. The Defendant will rely on the BRD for its full terms meaning and effect. The BRD provided, inter alia, that "This requirement covers the integration requirements between [the Defendant's] call centre system [Pulse], ServiceAlliance and Sage Tetra's CS/3 Product." Together with the further BRD's [sic] produced by Ian Dundas on 11 July 2000 relating to the integration of ServiceAlliance with Tetra CS/3 and referred to in paragraphs 6(a)-(d) of the Defendant's further information.

(b) The document entitled "Service Centre ServiceAlliance Requirements Time Group Limited" produced by the Defendant and agreed by the Claimant setting out the agreed minimum requirements of the Defendant for phase 1 of the Implemented System and the further requirements to be completed in subsequent phases.

(c) The document entitled "Issues for Time Group Limited/Service Alliance Project" dated 7 July 2000, produced by the Claimant and agreed with the Defendant setting out those tasks to be completed in phase 1 of the Implementation Services and those further tasks to be completed in subsequent phases.

8. Further or alternatively, it was an implied term of the Master Software Agreement:

(a) by Section 14 (2), (2A) and (2B) of the Sale of Goods Act 1979, that the Implemented System, including both the System and the disk containing the software necessary for the implementation of the System would be of satisfactory quality and reasonably fit for all purposes for which goods of the kind in question are commonly supplied;

(b) by Section 14 (3) of the Sale of Goods Act 1979 and/or at common law, that the Implemented System, including both the System and the disk containing the software necessary for the implementation of the System would be reasonably fit for its purpose, such purpose being the fulfilment of the requirements set out in the Specification;

(c) if, contrary to the Defendant's primary case, there was no contractual time for completion of the Implementation Services, then the Implementation Services were to be completed within a reasonable

time. A reasonable time, having regard to all the circumstances, was 13 November 2000 alternatively the end of December 2000 alternatively 6 March 2001.

Variation of the Agreement

9. In or about July 2000, the System was delivered to the Defendant in readiness for the Implementation Services to be carried out. Thereafter it was agreed that the date for delivery and installation of all 5 integration software programs under the Services Agreement would be delayed until the end of October 2000. The said agreement is evidenced by an e-mail dated 17 October 2000 from Derek Brotherston of the Defendant to Ian Mapp of the Claimant and the further documents referred to in paragraphs 17-21 of the Defendant's further information. Further or alternatively there was an agreement that implementation would be by 6 November 2000 as evidenced by the documents described in paragraphs 22-4 of the Defendant's further information.

9A. It was an implied term of the Master Software Agreement that the Implementation Services would be completed, by which is meant the delivery, installation and testing of the said integration software by the Claimant, within a reasonable time. A reasonable time, having regard to all the circumstances, was 13 November 2000 alternatively the end of December 2000 alternatively 6 March 2001.

9B. If, contrary to the Defendant's primary case, no variation was agreed to the effect that the said integration software would be delivered and installed by the end of October 2000 alternatively 6 November 2000, it was an implied term of the agreement that the Implementation Services would be completed within a reasonable time. A reasonable time, having regard to all the circumstances, was 13 November 2000 alternatively the end of December 2000 alternatively 6 March 2001.

Breach of the Master Software Agreement

10. Wrongfully and in breach of the Master Software Agreement, the Claimant failed to complete and install the said integration software by 30 October 2000 or 6 November 2000 and failed to complete the Implementation Services by 13 November 2000 or at all:

(a) By 17 November 2000, some 8 weeks after the due date for successful Phase 1 implementation of the System, the installation and testing of the necessary interfaces between the System and Tetra CS/3 and Pulse had not been completed.

(b) Further delays ensued, as a result of which the Defendant instructed the Claimant that although it should continue to carry out all possible Implementation Services including implementation of the System on the Defendant's test network, it would not be permitted to implement the System on the core hardware used for the Defendant's business over the busy pre- and post-Christmas period because of the considerable disruption that would then be caused to the Defendant's business.

(c) During early 2001, the Claimant continued to attempt to provide the Implemented System, but even by 6 March 2001 the Claimant had still failed to provide the same.

11. The delay in the completion of the Implementation Services beyond 13 November 2000 was caused or substantially contributed to by the Claimant's negligence and/or unreasonable conduct in that it was caused by the Claimant's failure prior to the end of October 2000 to allocate adequate resources to the completion of the said integration software and its failure after the end of October 2000 to ensure continuity in its staff responsible for implementing the System or to ensure that employees with sufficient experience or knowledge and understanding of the Defendant's requirements were used by it in attempting to do so.

12. By reason of the Claimant's aforesaid delays in implementing the System the Claimant was in repudiatory breach of the Master Software Agreement entitling the Defendant to terminate the same.

13. On or about 6 March 2001 at a meeting between Mr. Mohsan, the managing director of the Defendant, and Mr. Noble of the Claimant, Mr. Noble informed Mr. Mohsan that the Claimant would need several more months in order successfully to provide the Implemented System. Mr. Mohsan informed Mr. Noble that he had lost faith in the Claimant's ability to perform the Master Software Agreement, that market conditions had changed and that the Defendant did not wish the Claimant to carry out any further work. In the premises, the Master Software Agreement was terminated at the said meeting alternatively by the Defendant's conduct in preventing further work, denying the Claimant's claim and at the very latest by service of this Defence on 24 June 2002.

14. By reason of the foregoing, the System delivered to the Defendant in its unimplemented form is of no value to the Claimant and the sums paid by the Defendant to the Claimant were paid for a consideration which has wholly failed. Further, such additional sums as the Claimant now claims would, if paid, be paid for a consideration which has wholly failed."

31.
The way in which the central plank of the defence of Time was put in its statement of case immediately threw up a number of obvious difficulties. It was not contended that it had been expressly agreed that Astea would do anything by a date proximate to March 2001. It was not contended that any notice had been given making time of the essence of the Contract in relation to Astea doing something by a date proximate to March 2001. What was contended, as at least part of Time's case, was that Astea had agreed to complete performance of the Services by the end of October 2000 or by 6 November 2000, dates which were long past by 6 March 2001 when it was contended that the Contract was terminated by Mr. Mohsan. One might suppose that it was highly probable that strict compliance with an agreement to complete by the end of October 2000 or by 6 November 2000 had been waived by 6 March 2001 by failure to treat such failure as repudiatory earlier and permitting Astea to continue with the performance of the Services. Mr. Sa'ad Hossain, who appeared on behalf of Time, sought to circumvent that difficulty by placing heavy reliance upon the alternative case based upon an implied term that Astea would complete the Services within a reasonable time. He contended that the failure to complete the Services within a reasonable time could itself amount to a repudiation of the Contract and thus entitle Time to accept such repudiation as bringing the Contract to an end. However, that way of putting the case is very vulnerable to findings that the time taken to complete the Services by the date of the supposed termination of the Contract had not exceeded a time which was reasonable in all the circumstances or that any supposed repudiation had not in fact been accepted.

32.
Apart from the principal line of defence contained in the Re-Amended Defence and Part 20 Claim a number of other points were taken in that statement of case. Astea was put to proof of the sums claimed in respect of the execution of the Services. However, in the event Mr. Hossain accepted, at least implicitly, that the sums charged were correct, as he based part of his attack upon Astea's dedication of resources to performance of the Services upon the details contained in the invoices sued upon. It was contended that had Astea used reasonable skill and care in the performance of the Services and they had been completed when it was contended that they should have been, the cost of them would have been less, specifically £42,647.83. That figure is simply half of the total sum originally charged by Astea in relation to the execution of the Services. No attempt was made at trial to justify the contention that had Astea undertaken the execution of the Services with reasonable skill

and care the cost to Time would have been £42,647.83, or any figure other than that in fact charged. In his closing submissions Mr. Hossain recognised this difficulty and restricted himself to contending that Astea's charges for the period after 13 November 2000, totalling £12,848.77 including Value Added Tax, should not be allowed. There was a plea that Time would seek to set off the sums claimed in its Part 20 claim against the sums claimed by Astea.

Time's Part 20 claim

33.
The main contentions advanced in Time's Part 20 claim were that the Software was of no use to it and thus as a result of the failure of Astea to complete the execution of the Services it had suffered loss in the shape of the sum which it did pay on account of the licence fees, £56,800 plus Value Added Tax, and other costs incurred in connection with attempting to integrate the Software with CS/3 and Pulse. Those other costs were said to be a sum of £89,417.50 paid to Lynx for its work on the integration of the Software and CS/3 ("the Lynx Element"), internal management and staff costs amounting to £22,307.54 ("the Management Element") and the cost of hardware acquired to enable the Software to be run, put at £3,700. Further alleged losses were the result, it was contended, of not making savings which could have been made had the Software been successfully integrated with CS/3 and Pulse. The relevant savings were in staff costs, put at £48,330 between October 2000 and March 2001 and continuing thereafter at £12,082 per month. As an alternative to the damages claim there was a claim for repayment of the instalment of the licence fees paid as money paid for a consideration which had wholly failed.

The Amended Reply and Defence to Part 20 Claim

34.
Various factual issues were raised in the Amended Reply and Defence to Part 20 Claim served on behalf of Astea. It is not necessary to set them out at this point in this judgment. I shall set out my findings as to the material facts later. However, it was made clear in the Amended Reply and Defence to Part 20 Claim that there were issues as to the material terms of the Contract. It was also denied that any of the variations to the Contract contended for in the Re-Amended Defence and Part 20 Claim had been agreed. It was indicated that reliance would be placed upon clause 11.1 of Astea's Conditions as excluding the terms which it was alleged on behalf of Time were to be implied into the Contract by statute, and also upon the new clause 11.2 set out in the Addendum as limiting the liability of Astea in relation to the Part 20 claim. It was initially in issue whether clause 11.2 fell to be treated as part of Astea's written standard terms of business for the purposes of Unfair Contract Terms Act 1977 s. 3, but in his closing submissions Mr. Kinsky accepted, sensibly as it seems to me, that it did. Each of clause 11.1 and clause 11.2 was said to satisfy the requirement of reasonableness set out in Unfair Contract Terms Act 1977. In relation to clause 11.1 it was pleaded in paragraph 19 of the Reply and Defence to Part 20 Claim that:-

"The above term satisfied the requirement of reasonableness because:

(1) The licensee under the Software Agreement was adequately protected by Clause 10.0 of the agreement.

(2) The nature of computer software is such that the conditions implied by the Sale of Goods Act 1979 are not appropriate.

(3) The balance of bargaining power between the parties was, if anything, tilted in favour of the Defendant."

So far as clause 11.2 was concerned, at paragraph 35 the matters relied upon in support of the contention that that satisfied the requirement of reasonableness were that the clause itself gave adequate protection to the licensee, that the balance of bargaining power was, if anything, tilted in favour of Time, and

"The liability of a provider of software, if unlimited, is potentially very high indeed, and insurance is therefore expensive or impossible to obtain."

Mr. Kinsky did not formally abandon reliance upon the provisions of clause 11.1 and clause 11.2, but Astea in fact made no attempt to justify by evidence the proposition that the provisions of either satisfied the requirement of reasonableness set out in Unfair Contract Terms Act 1977. As the onus of proving that they did was upon Astea, the failure to adduce evidence meant that a finding that they did not was inevitable. I need say no more in this judgment about these provisions.

35.
On the main issues as to alleged terms of the Contract, alleged variation, alleged breach, alleged repudiation and alleged acceptance the case set out in the Amended Reply and Defence to Part 20 Claim was this:-

"20. Further or alternatively, although it [is] admitted that the Software Agreement provided for the sale by the Claimant to the Defendant of the medium upon which the ServiceAlliance software was delivered,

(1) The Software Agreement was otherwise not an agreement for the sale of anything, but a licence to use the ServiceAlliance software, and

(2) The ServiceAlliance software was not "goods" within the meaning of the Sale of Goods Act 1979.

(3) The Sale of Goods Act 1979 therefore does not apply to the licensing of the software or the provision of the implementation services.

21. In the premises, paragraphs 8(a) and (b) are denied.

22. Clause 11 also applied to the terms of the Service Agreement and satisfied the requirement of reasonableness for the reasons set out in paragraph 19 above. Paragraph 8(c) is therefore denied.

23. As to the first sentence of paragraph 9 it is admitted that the ServiceAlliance software was delivered to the Defendant but the Defendant is put to proof as to the date.

24. The second sentence of paragraph 9 is denied.

(1) At the date when the Claimant delivered the ServiceAlliance software to the Defendant, both parties knew that it was not going to be possible to implement the system by 1 August 2000. In the premises, if there was a contractual obligation on the Claimant to implement the ServiceAlliance software by that date, it was waived by the Defendant and/or the contract was varied by consent so as to remove that obligation.

(2) The Claimant never agreed to implement the ServiceAlliance software by the end of October 2000. The e-mail relied upon in the third sentence of paragraph 9 does not evidence the agreement of the Claimant to do so.

(3) There was no agreed implementation date; at best, the Defendant was entitled to have the ServiceAlliance software implemented by the Claimant within a time that was reasonable in all the circumstances.

25. Paragraph 10 is denied:

(1) It is admitted that the ServiceAlliance software was not implemented by the end of October 2000. There was no breach of contract on the part of the Claimant and/or the cause of the delay beyond that date was not caused by any such breach.

(2) There was no “due date for successful Stage 1 implementation of the System”.

(3) Delay was caused by

(a) The fact that relations between the Defendant and Lynx deteriorated to a point where Lynx were very unwilling to cooperate [sic] on the project.

(b) The fact that Tetra CS/3 software was not working properly and/or the interfaces had not been developed by Lynx and/or by its subcontractors, VI Software and/or by the Defendant’s individual contractors.

(c) The team working on the Pulse software could not provide the data necessary for the Claimant to test the ServiceAlliance software and/or develop the necessary interfaces with Tetra CS/3 and Pulse.

(4) It is admitted that the ServiceAlliance software had not been implemented by early November, and that the Claimant had no access to the Defendant’s computer system between that date and the beginning of February 2001.

(5) As to paragraph 10(c) the Claimant admits that it continued to attempt to work on the necessary interfaces with Tetra CS/3 and Pulse but continued to be hampered by the provision of inaccurate test data.

26. Paragraph 11 is denied. The Claimant exercised reasonable skill and care in delivering the services it was obliged to provide under the Services Agreement.

(1) It is denied that any part of the process of implementing the System should have been completed by the end of October 2000. Due to delays in implementation and deficiencies in the performance of the Tetra CS/3 and Pulse software and interfaces, it could not have been.

(2) The Defendant was not entitled to and did not benefit from a warranty to the effect that individual members of the Claimant’s staff would remain the same throughout the project period.

(3) Further or alternatively the delays caused by the Defendant and/or Lynx and/or VI Software were outside the Claimant’s control and, to the extent that rotation of the Claimant’s staff resulted from those delays, the Claimant is not responsible for any subsequent delay.

(4) The allegation that the Claimant’s employees did not have sufficient experience or knowledge and understanding of the Defendant’s requirements is so vague as to make it impossible to respond to. For the present it is simply denied.

27. Paragraph 12 is denied. None of the breaches alleged (even if established) evidence an intention on the part of the Claimant no longer to be bound by the terms of any of its contracts with the Defendant.

28. Paragraph 13 is denied. It is admitted that on 6 March 2001 a meeting took place between Mr. Mohsan and Mr. Noble. At that meeting:

(1) Mr. Mohsan made no complaint at all of any alleged defective performance by the Claimant.

(2) Instead, he criticised the defective performance of Lynx, and identified that as the cause for the delay.

(3) He told Mr. Noble that the Defendant's staff had repeatedly complained about the performance of Lynx, but that he had heard no complaint about the Claimant's performance.

(4) He told Mr. Noble that trading conditions for the Defendant had deteriorated, and this had caused the Defendant anyway to lay off the staff that it had been planning to lay off when the new repairs management system went live.

(5) At Mr. Noble's offer to suspend implementation work for the time being, Mr. Mohsan agreed on the basis that he would have time to consider what he would do next.

(6) Mr. Noble and Mr. Mohsan then discussed, in an amicable fashion, whether it would be possible for the Defendant to sell its licenses to use ServiceAlliance to someone else, thus recouping some of the Defendant's cost of the abortive project.

(7) Mr. Mohsan made no mention of terminating any of the agreements between the Defendant and the Claimant and the agreements were not terminated at the meeting. In any event any purported oral termination would not have been effective to terminate them under clause 8.2 of the Software Agreement.

29. Paragraph 14 is denied. It was the Defendant, not the Claimant, that breached the agreements by changing its mind about wanting the software package it had agreed to take on license and requested the Claimant to implement. At all material times the Claimant remained willing to perform its obligations."

36.
In the Defence to the Part 20 Claim the various losses alleged on behalf of Time were denied. The point was made that:-

"It is irrelevant to consider whether or not the software delivered to the Defendant by the Claimant is of any value or use to the Defendant. The Claimant's contractual obligation was to licence and deliver the software, and it licensed and delivered it. Alternatively, the Defendant is required to prove that the software is of no value or use."

In relation to the alleged inability to make anticipated savings by reduction in numbers of staff it was pleaded that:-

"The Defendant has laid off the staff it was intending to lay off, and has therefore achieved the savings anyway."

The circumstances leading up to the making of the Contract

37.
For present purposes it is convenient to begin a consideration of the circumstances leading up to the making of the Contract by recording that, after initial contact, Time showed sufficient interest in the possibility of acquiring the Software for Mr. Brotherston, who was at that time employed by Time as,

in effect, project manager of the project for the acquisition and implementation of the Service Package, and Mr. Stephen Taylor, at that time the manager of the Service Centre, to consider it worthwhile to meet Mr. Noble at the premises of a customer of Astea called MSAS in Milton Keynes on 5 April 2000 to see the Software in action. There was little dispute between Mr. Noble, Mr. Brotherston and Mr. Taylor, each of whom gave evidence before me, as to what had happened on that occasion. The visit was followed by lunch, over which there was a general discussion about the Software. While neither Mr. Noble nor Mr. Brotherston had any very definite recollection of the discussion, it seems that there was some reference to Time needing the Service Package in time for its Christmas season in that year. Mr. Taylor's recollection was that he explained that the Service Package would need to be installed and integrated with the Call Centre Package and the Accounting Package before Time's pre-Christmas period, which started at the end of September. It probably is not very important exactly what was said, for Mr. Noble agreed in his evidence that he understood that the Service Package would be needed in time for Time's Christmas season in 2000, and that that would start some time before 25 December.

38.
There followed various technical and commercial discussions between representatives of Time and Astea the detail of which it is not material to set out. However, as matters proceeded it became increasingly clear that the likely selection for the Service Package was the Software.

39.
In any situation in which it is necessary for software programming on a bespoke basis to take place, as it was if the Software was to be integrated with CS/3 and Pulse, a usual, and prudent, step is to seek to identify what it is exactly that the client is expecting the bespoke software to do and how he is expecting it to do it in terms of the requirements of his business. A common means of addressing these questions is to prepare a document or documents in which the business needs to be met are set out. In the case of Astea such a document is called a "Business Requirements Document", or "BRD". In relation to Time the task of preparing appropriate BRDs was entrusted to Mr. Ian Dundas, who was at that time European Product Manager and is now an integration consultant. Mr. Dundas first tackled the job of seeking to prepare an appropriate BRD in about the middle of April 2000.

40.
From an e-mail sent on 15 May 2000 by Mr. Brotherston to Kevin Beel of Astea, a copy of which was put in evidence, it is plain that by that date, if not before, it was known within Astea that at that time Time was anxious that the installation of the Software be completed by 1 August 2000. Mr. Beel's response of the same date indicated that:-

"I think we need a statement from Time as to what you will require live by 1st August. We cannot expect to get the whole lot up by then, so we need to know the minimum acceptable. For example, is the Tetra/CCC interface required to be in place by then? What modules do you expect to be running live on 1st Aug?

You will have to concede that if we do not get the project going this week/next, then the 1st August is not feasible, no matter whose system you had chosen. That is not a basis for negotiation, it is a basis for a practical, and possibly achievable, project – We will not agree to any contract we don't think we can deliver on – no matter what the customer may think as to our motives. If we say it is not possible, then you'd better believe it is not, because we will walk away rather than sign – no matter how much money is involved. The decision on such matters lies with Ian Mapp, our Operations Manager, not me."

“CCC” was how, at the time, Pulse was known. Thus the significance of the question whether the Tetra/CCC interface was required by 1 August 2000 was whether it was expected that the Integration Services would be completed by that date. In an e-mail of 16 May 2000 to Mr. Beel Mr. Brotherston made clear that Time was seeking complete integration by the end of July 2000. In a reply to Mr. Brotherston Mr. Beel indicated that the concern on Astea’s side was with whether the Integration Services could be achieved by 1 August 2000.

41.
In the short term, at least, the focus of Astea’s attention was on obtaining a basis upon which it could commence work with the aim of meeting the requirements of Time for completion of the Integration Services by 1 August 2000. Mr. Noble decided that Time should at least send Astea a purchase order to enable work to proceed whilst negotiations in relation to the Contract continued. Mr. Brotherston sent a purchase order dated 8 June 2000 (“the Purchase Order”) to Mr. Beel under cover of a letter dated the same day. Attached to the Purchase Order were a number of special conditions. They included:-

“5. Payment terms shall be as follows:

1/3 on implementation date (see 6 below)

1/3 on delivery of software

1/3 on 1st September 2000 (assuming successful implementation by this date)

6. The date of implementation is 1 August 2000, which is a fundamental part of this agreement.”

In his covering letter Mr. Brotherston requested that Astea sign and return a copy of the special conditions. Astea did not do so.

42.
The Software in its “out of the box” form seems to have been installed by Astea at Time for training purposes on 13 June 2000. Responsibility for liaison with Time to ascertain its requirements in relation to the Configuration Services, performance of the Configuration Services and the conducting of what were called “workshops” was entrusted by Astea primarily to Mr. Nigel Vant, who was at that time employed by Astea as a business consultant. Much of the work for which Astea claims in this action in relation to performance of the Services was actually undertaken by Mr. Vant, but he is not central to the facts relevant to the matters which I have to decide. The Configuration Services were not complete by the date of the alleged acceptance by Time of a repudiation of the Contract on the part of Astea, but the focus of attention in relation to the alleged repudiation was the non-completion of the Integration Services, rather than the non-completion of the Configuration Services.

43.
An internal e-mail sent on 8 June 2000 by Mr. Brotherston to Mr. Keith Anyon of Time, a copy of which was put in evidence, indicated that by that stage it had been accepted within Time that completion of the Integration Services would not be achieved by 1 August 2000, for Mr. Anyon was being asked to look at the list of functions which he would require to be working for that date.

44.
Mr. Ian Mapp, who was, until the end of 2000 European Operations Manager of Astea, and then became European Product Director, sent to Mr. Brotherston an e-mail on 18 June 2000 in which he set

out how Astea then saw progress towards achieving Time's wishes in relation to completion of the Integration Services. What he said was this:-

"I have delayed releasing this until Ian Dundas had completed his discussions with yourselves/Lynx on the feasibility of the interfacing tasks – seen as the critical path for this project. These are the key events/milestones for the remaining weeks. I have not produced a formal MS Project plan as the tasks are fairly straightforward – but I assume that you will be incorporating this into your overall planning for the management of Time resources.

There are two assumptions built in:

-
there will be no electronic transfer of data from existing systems;

-
we will assist in the definition of reports from ServiceAlliance, but Time will be responsible for their production.

(oh, and the contract gets signed!! I am sure Kevin would not want me to miss an opportunity….)

Week commencing 19 June

-
Astea match documented process flows to ServiceAlliance to identify any potential gaps

(**Resources**: Astea – Nigel Vant)

-
documenting of interface specification begins

(**Resources**: Astea – Ian Dundas)

Week commencing 26 June

-
3 day workshop to identify screen/business rule changes and follow draft ServiceAlliance processes

(**Resources**: Astea – Nigel Vant, Time)

-
Milestone: confirmed processes

(**Resources**: Astea – Nigel Vant, Time)

-
Milestone: agreed interface specifications

(**Resources**: Astea, Ian Dundas, Time Lynx)

Week commencing 3 July

-
Coding work on interfaces begins

(**Resources**: Astea – Custom Development)

-

2 days of setup for production environment – database, clients

(**Resources**: Astea – Damon Bernd, Time)

-

AllianceStudio work begins on changes, including knowledge transfer to Time personnel

(**Resources**: Astea – Nigel Vant, Time)

Week commencing 10 July

-

Milestone: documented ServiceAlliance processes

(**Resources**: Astea – Nigel Vant, Astea – 2nd business consultant, Time)

-

Milestone: training materials produced

(**Resources**: Time)

-

Milestone: Reporting Requirements Defined

(**Resources**: Astea – 2nd Business Consultant, Time)

-

Project Review Meeting

(**Resources**: Astea – Ian Mapp, Nigel Vant, Time)

Week commencing 17 July

-

delivery /testing of interfaces begins

(**Resources**: Astea – 2nd business consultant, Time, Lynx)

-

user training begins

(**Resources**: Astea – Nigel Vant, Time)

-

manual data loading begins

(**Resources**: Time)

Week commencing 24 July

-

Milestone: User Training completed

(**Resources**: Astea – Nigel Vant, Time)

-

Milestone: Interfaces signed off

(**Resources**: Astea – 2nd business consultant, Time, Lynx)

Week commencing 31 July

-
Milestone: System signed-off for production

(**Resources**: Astea – Ian Mapp, Time, Lynx)

-
Milestone: Cutover to ServiceAlliance

(**Resources**: Astea – All, Time)

-
live running initial support

(**Resources**: Astea – Nigel Vant)

Week commencing 7 August

-
Project Sign-off meeting

(**Resources**: Astea – Ian Mapp, Time)

Please confirm your acceptance of this schedule, so that final arrangements can be made."

It does not appear that Time ever did confirm its acceptance of the schedule.

45.
Mr. Tahir Mohsan, the managing director of Time, gave evidence at the trial. I have to say that I did not find him to be at all a satisfactory witness. Over a number of matters his evidence in chief or initially in cross-examination was shown to be incorrect by reference to contemporaneous documents. It was suggested by Mr. Kinsky to Mr. Mohsan in terms that he was simply making up some of his evidence as he went along. I was initially sympathetic to the view that Mr. Mohsan is a gentleman who, at the time of the events which have given rise to this action, and now, has many calls upon his attention and not an especially good memory, particularly in relation to matters which he considered at the time they were happening not to be especially significant. Unhappily it became plain to me that, in relation to the evidence which he gave as to a meeting, to which I shall come, between him and Mr. Noble on 6 March 2001, what Mr. Mohsan said was so far at variance from contemporaneous documents of which he himself was the author, that his evidence was untrue to his knowledge. It also became plain to me that an alteration in Mr. Mohsan's evidence in relation to the basis upon which an assessment of the amount charged to Time by Lynx for work in connection with the integration of the Software and CS/3 was the result of Mr. Mohsan making up his revised evidence on the point in the witness box. Those conclusions have coloured my approach to all of his evidence. However, whether, as Mr. Kinsky suggested, Mr. Mohsan was to an extent making up his evidence of matters in addition to those which I have specifically mentioned, or whether his recollection of relevant events, other than as to those matters to which I have referred, is simply very poor, the net result was the same, namely that I did not feel that I could rely upon the evidence of Mr. Mohsan save in respects in which it was corroborated by contemporaneous documents.

46.
An example of the unreliability of the evidence of Mr. Mohsan is that he assured me that in his belief a contract was concluded between Time and Astea in the terms of the Purchase Order, that there were no negotiations between Time and Astea after the despatch of the Purchase Order, and that he was unaware of the fact that the Contract was in prospect or had been concluded until much later than the summer of 2000. That evidence cannot be reconciled with his receipt, which he did not dispute, of an e-mail dated 2 July 2000 from Mr. Brotherston and his response to that e-mail. In the e-mail dated 2 July 2000 Mr. Brotherston wrote:-

"I have just spoken to Astea and they appreciate the effort that has been made to complete the contract details in time for the end of month deadline.

Work is already progressing well and we have the technical design spec for the integration from Lynx, which both Astea and Lynx will be discussing at H/O on Monday.

However they need the contract to be dated for the 30th June 2000, as this is the last day of their current quarter.

If you have an opportunity to review the contract document, that Richard Hope has produced in conjunction with them, they need it faxed to their USA office on Monday.

The key requirement is for the date to be as given above.

I am assuming that there are no remaining issues with the contract, as Richard seems confident that all aspects have been covered.

I hope you will be able to sign the document over the weekend."

47.
Mr. Mohsan did not respond to the e-mail dated 2 July 2000 sent by Mr. Brotherston which I have quoted in the preceding paragraph. That prompted Mr. Brotherston to send a further e-mail to Mr. Mohsan, dated 7 July 2000. In that e-mail Mr. Brotherston wrote:-

"We seem to have reached an impasse with the Astea contract.

My understanding is that whilst they are happy for their US parent to guarantee the UK contract should it become necessary, we have extended the contract obligations through our wording of the guarantee.

The US CEO cannot sign the document he has been presented with at present.

I am not sure if you have prompted this extension of the terms or if it has crept in through the interpretation of the legal wording Richard has produced.

Astea UK are still working at the speed we need but I think Pat Noble is getting worried that the US may instruct him to hold back until the contract is signed.

Will you please give this some thought with an aim to resolve today if at all possible."

48.
In a facsimile transmission dated 3 July 2000 to Mr. Mohsan Mr. James Spencer of Lynx wrote, so far as is presently material, as follows:-

“The work involved to provide the Astea integration is 45 days development plus 5 days consultancy/ training; total 50 days. Hence the cost of this project will be (45 x £550 plus 5 x £650) £28,000.

As I have already asked our sub-contractor (VI Software) to commence work on the project in order to meet the required timescales I would appreciate a prompt purchase order.”

49.
It is clear that all was not plain sailing in relation to the installation of CS/3 or Pulse. In an e-mail dated 10 July 2000 to Mr. Brotherston Mr. Keith Anyon, who was, at that time, and remains, employed by Time as Business Process Re-engineering Analyst (Internal systems) and had a particular focus on service operations, wrote, with reference to “Astea/Lynx” :-

“Has there been any development on this front? If so, how does it affect current priorities, all the focus for the last 3 days, Friday, Saturday, Sunday has been on Pulse and CS/3 – no work done on Service Alliance.”

Mr. Anyon, who gave evidence at the trial, told me, and I accept, that he himself was diverted from doing any work in relation to the Software during the month of July 2000 and for half of August in order to concentrate upon the more important, from the point of view of Time, issues concerning the problems with Pulse and CS/3.

50.
By 11 July 2000 Mr. Dundas had produced four BRDs in respect of the integration of the Software with CS/3 and one in relation to the integration of the Software with Pulse. The four BRDs in respect of the integration of the Software with CS/3 were each titled with a reference to CS/3 but were otherwise called, “Customer Synchronisation and Installed Base Creation”, “Product Master Synchronisation”, “Integration – Stock Movement in ServiceAlliance” and “Integration – Billing and Cost of Sales”. The BRD in relation to Pulse was simply entitled “Call Centre System Integration”. Those BRDs were sent by e-mail on 11 July 2000 by Mr. Dundas to Mr. Brotherston, Mr Anyon and Mr. Steven Devine, at that time IT Manager of Time. They were copied to, amongst others, Mr. Khalid Elbarjaj, a developer employed by Astea at its Dutch office. The reason for copying the BRDs to Mr. Elbarjaj was that it was envisaged that it would be he who undertook the programming work necessary in order to effect the interfaces between the Software and Pulse and CS/3. The whole purpose of preparing a BRD was in order to obtain confirmation from a client that its requirements from a business point of view had been correctly understood by Astea, or clarification of what those business requirements were. In the event there was no reaction on behalf of Time to the BRDs to which I have referred until a meeting to discuss them took place on 30 and 31 August 2000. However, Mr. Anyon did send an e-mail on 12 July 2000 to Mr. Brotherston enquiring as to the procedure for signing off the five BRDs.

51.
The problems with CS/3 and Pulse, coupled with the time which it took to negotiate the terms of the Contract as executed, seem to have prompted Time to put back the date as at which it expected the Software to become operational, a point sometimes referred to in the contemporaneous documentation as “Cutover”. It appears that Mr. Brotherston told Mr. Beel of this decision on about 13 July 2000, the day before Mr. Hope signed the Contract on behalf of Time. Mr. Beel reported on the conversation in an e-mail dated 13 July 2000 to Mr. Noble, as follows:-

“Derek has advised me that they have now agreed to put the live date back to 1st September (partly because of the delays on Lynx’s side and because of the contract signing delays). I think we should not press them to amend the contracts that should be signed today. In the event that the contract still says

1st August, we get them they [sic] send a separate letter stating the change in deadline. Otherwise we will get further delays in getting the contract through.

Do you agree?"

Mr. Noble did agree, as he made known in an e-mail to Mr. Beel dated 24 July 2000. In that e-mail he asked Mr. Beel to press Mr. Brotherston to send Astea a letter to the effect contemplated in Mr. Beel's e-mail dated 13 July 2000 so that it was clear that Astea was not in breach of contract. No such letter was ever in fact sent, and the matter was not pursued on behalf of Astea.

52.
Mr. Anyon returned to the theme of having to devote his time to the important tasks of trying to get Pulse and CS/3 to work in an e-mail to Mr. Taylor and to Mr. Brotherston dated 14 July 2000. He said:-

"Until we have a system that will work on Monday, I cannot spend any more time on Astea as it will prevent me from completing my other work."

Mr. Brotherston replied the same day, so far as is presently material:-

"Don't worry about your time and Astea, I have put them on hold for next week anyway so that we can re evaluate our time commitments."

53.
Meanwhile thought was being given within Astea to the question of allocating resources to do the work which needed to be done in relation to the Integration Services. At that time all of the programming resources of Astea were based at its office in the Netherlands. Mr. Bart van den Hurk of that office sent an e-mail to Mr. Mapp on 17 July 2000 in which he said:-

"thinking about the discussions we have been having last week at Time in Burnley, I feel that it would be good (given that we have a deal by then) to plan Marc Tonen (or someone with similar qualities) for 1 or 2 days to work on some of the issues. Some of the AllianceStudio changes [i.e. configuration] are not difficult, but we also have hit difficult ones where expert level would be welcome. I believe that Marc can do all that work without being on site.

Are you doing the planning for Time? Can you then take this into account? Please consider that I will also be needing Marc for some WMData work very soon after his holiday ends (problems with invoice interface to their accounting system)."

54.
Mr. Mapp anticipated that it might be difficult for him to find the programming resources which he needed at the time he would need them. He thus enquired of Astea's American parent company as to whether it had spare capacity. He sent an e-mail to Mr. Bruce Breder on 17 July 2000 in which he said:-

"We are looking at some ServiceAlliance custom work to develop some interfaces to a customers Fiancancial [sic] and Call Centre applications. This work is specified and ready to go now. We have hit the vacation season here and do not have anyone available to start this work soon – do you have anyone by chance?

A speedy response would be appreciated (I guess that you don't have to think too hard!) so that we can look at other alternatives if necessary."

In fact there were no spare resources. Mr. Mapp was cross-examined about this e-mail. He explained that he was exploring options. While it was correct that all of the programmers working for Astea in Europe must have been occupied with other tasks, he could re-deploy some one or more of them. He could also bring in resources from outside, although Mr. Noble told me that that was not really an effective option for work of integrating the Software with other software because a good knowledge of the Software was necessary for that task, which an outside contractor would be unlikely to have.

55.
A full licence key to the Software was handed over by Astea to Time on 21 July 2000. As I have already recorded, the Contract was signed on behalf of Astea on 23 July 2000.

Progress between the signing of the Contract and the installation of the integration software

56.
While the formal position of Time on its statement of case was that it required Astea to prove the accuracy of the time and expenses sought to be charged on Astea's invoices in relation to the provision of the Services, Mr. Hossain in fact relied upon the invoices in question as an accurate record of time spent in cross-examining Mr. Mapp, in particular, to the effect that the resources devoted to providing the Services in a timeous fashion were inadequate. I am satisfied that that was an appropriate course to take and that the invoices were an accurate record of the time spent and expenses incurred. Mr. Hossain made a helpful analysis of the invoices which demonstrated that Mr. Elbarjaj worked on the programming of the interface between the Software and CS/3, or on the configuration of the Software, on 10 and 11 August 2000, 14 to 18 August 2000 inclusive, 28 to 31 August 2000 inclusive, 1 September 2000, three other unidentified days in September 2000, 5 October 2000 and 8 to 13 October 2000, inclusive. In addition the invoices rendered in connection with the Services showed that Mr. Vant worked on providing the Services, principally, on the evidence, in conducting workshops and doing other work at the premises of Time in Burnley, on 3 July 2000, 9 to 11 July 2000 inclusive, 28 July 2000, on twelve days in August 2000, six days in September 2000, thirteen days in October 2000, ten days in November 2000, three and a half days in December 2000 and two days in January 2001. In addition to this time the invoices to which I have referred indicate that Mr. Tonen did indeed spend the contemplated two days on working on the Services during August 2000, and that Mr. Mapp himself spent a total of one and a quarter days on the provision of the Services.

57.
As at 25 July 2000 the implementation of both CS/3 and Pulse was in crisis. That is clear from the fact that by an e-mail of that date to a large number of Time personnel Mr. Mohsan's secretary indicated the timing of daily meetings which were to take place with him that week in relation to the implementation of CS/3. The next day she sent an e-mail indicating that the meetings were thenceforth to take place three times each day. It had been envisaged that both CS/3 and Pulse would commence running, or, in the language of the projects, "go live", on 31 July 2000. In an e-mail sent early on that day Mr. Devine requested Mr. Anyon to make sure that no one used either CS/3 or Pulse. He repeated that message to a wider readership a little later on the same day. It was not until 5 August 2000 that Mr. Anyon indicated that Pulse could be used, although it was running slowly.

58.
On 31 July 2000 Astea raised its first clutch of invoices. The first sought payment of the first two one-third instalments of licence fees in respect of the Software. Invoices were also raised in respect of the

time and expenses of Mr. Vant and Mr. Dundas in respect of work in connection with the Services during the month of July 2000.

59.
After the anticipated date for the Software to become operational was deferred from 1 August to 1 September 2000 Time seems to have taken no steps to prepare for that to happen. That failure to take any steps prompted Mr. Mapp to send to Mr. Brotherston an e-mail on 7 August 2000 in which he said:-

“I am getting concerned that we do not seem to have re-established a proper project plan for the implementation of ServiceAlliance since the initial delay. Nigel is continuing to work on a week by week basis, but this will certainly result in missing the present 1 September target. I understand that other projects are dragging on resources, but I would like to create a more formal workplan.

Can you let me know whether the September date is still valid, and the availability of Time resources? Or should we be considering a postponement? I have run into a period of holidays for various of the consultancy team and I need to make some decisions regarding priorities between projects.”

That e-mail, as it seems to me, put the point very fairly to Mr. Brotherston. He responded the same day:-

“I share your concerns and, as you may remember I am on holiday from the 12th for two weeks.

Being realistic I think we should plan to implement the full system on the 11th September and then go live on the 18th

Will that work for you?”

60.
In an e-mail to Mr. Elbarjaj sent on 12 August 2000 Mr. Mapp asked him to specify what he considered would be the delivery dates for the interface packages upon which he was working. Mr. Elbarjaj replied on 14 August 2000 indicating that he thought that CS/3 Billing and Cost of Sales would be complete by 17 August 2000, CS/3 Stock Movement would be complete by 4 September 2000, CS/3 Customer Synchronisation and Installed Base would be complete by 13 September 2000, CS/3 Product Master Synchronisation would be complete by 20 September 2000, and Call Centre System Integration would be complete by 19 October 2000, each estimate being made on the assumption that he spent all his time on the Integration Services. In the light of those estimates it was obvious to Mr. Mapp on 16 August 2000 that it was unlikely that the dates proposed by Mr. Brotherston in his e-mail of 7 August 2000 could be met unless Mr. Elbarjaj was given some assistance in the required programming work. Mr. Mapp does not appear at that time to have sought to identify any source of such assistance. He may have had in mind that on the Time side there seemed to be a concentration of effort on resolving problems with CS/3 and Pulse, accompanied by a lack of attention to the question of the Software, as was evidenced in part by the fact that he had to raise with Mr. Brotherston what was the plan for completion of the Services, rather than Mr. Brotherston raising it with him.

61.
A “kick off” meeting to get the project for the operational implementation of the Software after completion of the Services started was held on 16 August 2000. Mr. Anyon made up a list of action points following the meeting. There were a number of fundamental matters to be addressed. According to Mr. Anyon’s list these included:-

•

“Determine the user platform, requirements, and traffic to identify real hardware requirements including fat, thin and concurrent users.

•

Test the current available hardware that exists with the service alliance package…

•

Set up a test network utilising the proposed hardware solution….

•

Complete specification of integration/interfaces and produce a prioritised list of additional requirements to inc. Accounts

•

Review the details of the integration/interfaces spec and agree a testing plan….

•

Produce a project plan.”

All of these activities required a contribution from Time. The first few action points all revolved around the selection and installation of appropriate computer hardware to permit the Software to run once integrated with CS/3 and Pulse.

62.
As was plain from the terms of Mr. Anyon’s list of action points, by this stage the sufficiency of the BRDs prepared by Astea still had not been considered by Time. In an internal Time e-mail sent on 17 August 2000 Mr. Anyon confirmed the need, set out in his list of action points, to agree the BRDs by 25 August 2000.

63.
From an e-mail sent by Mr. Taylor on 21 August 2000 it appears that by then he had seen and considered an implementation plan for the Software which:-

“…aims to go live on 18/9/00 with parallel running for 2 weeks leading to cut over on 2/10/00. The critical aspects are integration and completing the business process detailed workshops as intake volumes are likely to increase considerably during October.”

He told me in cross-examination, and I accept, that the business process detailed workshops referred to were a matter for Time internally to deal with.

64.
From an internal Time e-mail sent on 21 August 2000 by Mr. Paul Russell to Mr. Brotherston which was put in evidence it seems that by that time Astea was getting restive about the fact that the invoices rendered on 31 July 2000 had not been paid. Mr. Russell said in his e-mail that Astea were chasing for payment of the first and second instalments of the licence fees and sought confirmation from Mr. Brotherston that it was in order to make payment. In an e-mail of the next day to Mr. Mohsan’s secretary Mr. Anyon indicated that he had been contacted not for the first time by Astea seeking payment of the £133,000 which represented the first two instalments of the licence fees.

65.

While, ultimately, it appeared, at least to Mr. Mapp, according to his evidence before me, that Mr. Vant may have misunderstood the position, Mr. Vant certainly had the impression that the problems which Time was having with Pulse meant that it was considering an enhanced role for the Software. He expressed his fear that this might be so in an e-mail dated 21 August 2000 to Mr. Noble. It is not necessary for me to make any finding as to what prompted Mr. Vant to write as he did in the e-mail, or what grounds he may have had for the fear which he expressed, although there was some evidence that Mr. Devine was giving the question of an enhanced role for the Software active consideration at the time. In any event, that Mr. Vant was contemplating that Time might be thinking of abandoning Pulse was undoubtedly consistent with the difficulties which it is clear Time was having with Pulse in August 2000.

66.
Time was, and is, essentially a family company in which not only does Mr. Tahir Mohsan have a leading part, but also four of his brothers have prominent roles. The brothers who feature in the history of the matters with which I am concerned are, respectively, Zuber and Zia.

67.
Another issue which moved into prominence towards the end of August 2000 which had some impact on the progress of moving the Software to the point of being operational was the question of the computer hardware necessary to enable the Software to run satisfactorily once integrated with CS/3 and Pulse. That issue had been the subject of a number of action points which resulted from the “kick off” meeting on 16 August 2000. Mr. Anyon sent an e-mail on 22 August 2000 to, among others, Mr. Zuber Mohsan seeking to prompt him to discuss with Mr. Dundas the requirements for setting up the Software on a network for testing and inputting of data. In the event Time took the view, at least initially, that the hardware requirements communicated by Astea were excessive. The failure to acquire and instal appropriate hardware created problems, to some of the detail of which I shall return. For the present it is enough to record that in an e-mail sent on 25 August 2000 to Mr. Brotherston, to await his return from holiday, Mr. Taylor described the issue in relation to hardware as “critical”, because “Tahir and Zuber insist the application server architecture is maintained and Service Alliance conflicts with this strategy.” Mr. Brotherston’s reply, in an e-mail dated 27 August 2000 was:-

“The requirements for all hardware required by Service Alliance, and its configuration were agreed by Zuber and Steve Devibe [sic – in fact Devine], before we started this project.

Zuber has seen and agreed the spec as listed in Ian Dundas’ proposal which dates back to May/June.

The only point was that the client systems really need 128MB of ram and ours have 64MB, however Ian confirmed that this would only effect [sic] the speed of operation.

There has NEVER been any mention of a clash of architecture.

I am now surprised, confused and concerned!”

68.
On 24 August 2000 Astea raised two further invoices addressed to Time. One was for the final instalment of the licence fees due on 1 September 2000. The other was in respect of the time of Mr. Elbarjaj in providing the Services during the month of August 2000.

69.

Mr. Dundas sent a revised server specification in relation to the requirements of the Software as an attachment to an e-mail dated 30 August 2000 to Mr. Brotherston.

70.
I have already mentioned the fact that the sufficiency and accuracy of the BRDs was not addressed on behalf of Time until a meeting on 30 and 31 August 2000. That meeting was attended by Mr. Brotherston, Mr. Anyon and Mr. Taylor on behalf of Time and by Mr. Vant on behalf of Astea. Mr. Anyon went on holiday immediately afterwards. He did, however, prepare notes of the meeting before leaving. From those notes it cannot be said that the matter of agreeing or modifying the BRDs was dealt with at all satisfactorily. A number of points were raised, but effectively how matters were left was that Astea was to proceed on the basis that the points, "need to be addressed by Astea and, where necessary, update the Specifications accordingly or respond to questions that have been raised."

71.
On 31 August 2000 Astea raised an invoice in respect of the time of Mr. Tonen in undertaking the Services.

72.
Work on the resolution of problems with CS/3 continued as at the end of August 2000. As an attachment to an e-mail with a wide circulation sent on 31 August 2000 Mr. Devine distributed an up to date list of the outstanding issues surrounding CS/3. On the same day Mr. Tahir Mohsan wrote to Mr. Spencer of Lynx and set out how Time saw the situation with CS/3 at that stage. The main points which he made were:-

"1. The overall project is significantly over the budget that was agreed.

2. The data conversions which we are still coming to terms with went badly wrong. I have just been told that just last Thursday we got a new file for the Archives.

3. The locking issue was a problem that brought the company to its knees with up time averaging about 2 –3 hours a day for the first 2 – 3 weeks after launch.

4. The current performance issues, although appear to have disappeared, need to be identified and fixed. I assume based on what you have told me that service pack 2 from MS will fix this.

5. I am deeply concerned still that we do not have a system which is true client server. Despite repeated assurance from Sage Tetra, I remain to be convinced. Issues such as no waiting message or the "hour glass" add to my fear.

6. Because of the significant locking and data migration issue, we have significantly increased costs from our third party contractors such as the pulse system.

7. I am told that over the past two weeks, the Application servers have rebooted four times with the latest being Wednesday. I cannot see how you can call the system performance satisfactory if this is happening.

8. Phase 2 is significantly late due to the above issues."

73.
At the beginning of September 2000 it appears that enthusiasm for the Software at Time was waning, other than with Mr. Brotherston and Mr. Taylor. An important part of the background to this seems to

have been the problems which had been experienced with CS/3 and Pulse, and also with a new electronic point of sale ("EPOS") software package which had been introduced in Time's retail stores. Senior management at Time, in the shape of Mr. Tahir Mohsan's brothers Zia and Zuber, appear, from e-mails which they each generated on 1 September 2000, to have wanted to try to make Astea accept responsibility for all aspects of the Software, including in particular integration with CS/3 and Pulse. Mr. Zia Mohsan's e-mail was addressed to Mr. Brotherston. His reply included:-

"The problem is that due to the high degree of problems with CS/3, Pulse and EPOS nobody has been interested in Astea until now. Steve Taylor and I need this system to be in and working for the end of the month, it is not some form of nice add-on, it is an essential requirement for our service operations."

74.
Also on 1 September 2000 Mr. Taylor sent an e-mail to Mr. Devine on the subject of the hardware necessary to enable the Software to operate satisfactorily. He wrote:-

"Steve we are now at an advanced position with Astea and on track to implement by the end of September;

•
essentially we (the users) have completed 98% of the functional spec and process design which is fully documented

•
the integration spec has also been agreed with a few questions left to be clarified, this will be completed on Tuesday 5/9 ready for sign off (integration development has now been started by Astea)

•
the hardware platform/configuration/spec has been agreed between Astea, Zuber and Derek

The critical point now is setting up a production network using the agreed configuration, this is essential to allow us to set up the Service Alliance data, products, customers and warranties and to carry out functional testing.

We need to start setting the system up on Monday 4/9 and therefore must have the production network in place ASAP. I understand Paul Mangham needs a day to do this. If this cannot be achieved delays will occur that will have a significant operational impact."

75.
An e-mail sent by Mr. Vant to Mr. Mapp on 4 September 2000 indicated that Mr. Vant had doubts as to how realistic it was at that time to expect that the Software would be operational by 18 September 2000. However, at the Time end Mr. Brotherston was also expressing some concerns, focused on the question of necessary hardware. In an e-mail of 4 September 2000 to Mr. Zuber Mohsan he wrote:-

"I now have the signed copy of the hardware spec. document from Astea.

Given that this can be agreed at the meeting tomorrow (9.30) can we get the hardware together in time for Astea to attend on Thursday to configure the system?

We have a "go live" date of the end of September so we need to be installing the actual hardware that will be in use and not a small, dummy network.

The consultant from Astea will be coming from Holland so I need to let them know as soon as possible if we will be ready for him or not.

Please let me know by return."

The response was evidently that the hardware would not be ready and the attendance of the engineer should be cancelled, for in an e-mail of the next day to Mr. Zuber Mohsan Mr. Brotherston confirmed that he had cancelled the visit by the engineer and asked when the hardware would be ready. He pointed out that any delay beyond the end of that week would compromise the "go live" date then in contemplation.

76.
A meeting about the Software was held internally within Time on 5 September 2000. The outcome was recorded by Mr. Taylor in an e-mail of the same date to Mr. Zia Mohsan and others. Part of the outcome as recorded was that additional resource for integration of the Software needed to be found and that further work needed to be undertaken on Pulse to prepare for integration. As an attachment to an e-mail of 5 September 2000 to Mr. Brotherston Mr. Taylor sent an implementation plan concerning the Software which provided for cut over to the Software on 3 October 2000. However, about the plan the e-mail itself said:-

"Given the developments today regarding delays to hardware and lack of Time resource for integration we will need to rethink the implementation dates. In order to do this I need some commitment to actual delivery dates from Steven [Devine] and Zuber."

77.
On 6 September 2000 a further internal meeting concerning the Software took place within Time. Mr. Brotherston, who was the project manager of the Software programme at the Time end, was not invited. His perception, and that of Mr. Taylor, seems to have remained that only the two of them at Time were at all interested in achieving the successful implementation of the Software. Mr. Taylor in an e-mail to Mr. Brotherston sent on 6 September 2000 wrote, among other things:-

"Derek I was in a meeting this morning regarding how returns would be handled in store and pointed out that Service Alliance would probably be the solution but may not be until next year. Steven Devine said he was very nervous about being able to go live with Service Alliance in 3 to 5 weeks.

I am also getting exasperated with the apparent lack of will to achieve our deadline.

For now we will continue to do all we can, however I am on holiday next week and wont be around to fight. Keith [Anyon] will also be away for another week. I know you will be pursuing our joint cause…"

Mr. Brotherston replied the next day:-

"I think we are all nervous but there is nothing to loose [sic] by going for it anyway. It is disappointing that it is just the two of us that want the system in!

If we we [sic] sensible we would postpone until Zia, Tahir and Steve Devine are ready to support us."

78.
It appears that one consequence of the dissatisfaction of Time with the performance of Lynx in relation to CS/3 was that Time did not pay invoices rendered by Lynx. That was the subject of correspondence between Lynx and Time, including a letter dated 7 September 2000 from Mr. Peter

Lloyd, the managing director of Lynx, to Mr. Tahir Mohsan. The material part of the letter was in these terms:-

“As outlined in James Spencer’s letter of the 30th August, I am extremely concerned that your account is significantly in arrears. Whilst I recognise that Time Group Limited are a major and very important customer you nevertheless currently owe us in excess of one million pounds, of which over five hundred thousand is overdue (please see attached schedule). As you will appreciate this is not a situation that we can allow to continue indefinitely. That said, we recognise that a project of this nature is complex and difficult and as a reflection of our continued commitment and a demonstration of our consistently reasonable approach we are willing to accept, as you have already discussed with James, a payment on account of £200,000. Provided we receive this by Tuesday of next week (12th Sept) we would be willing to discuss a schedule of payment for the balance, and upon (and only upon) agreement of a new payment schedule, we would consider this to be an accepted amendment to our contract with you.

I am also aware that there is a significant amount of Adaptus bespoke work that has for some time been expected to start in September or earlier and that we do not currently have a purchase order from you for this work. Any further delay in raising a purchase order will make it more likely that this critical phase in the project will not be delivered within your desired time-scales. I therefore request that you send to us by return your written confirmation to proceed with the Adaptus work, together with your payment on account of £200,000.”

In fact the proposal set out in the letter was not acceptable to Time. Relations between Lynx and Time continued to deteriorate such that Lynx threatened to activate a time lock on CS/3 unless it was paid the sums which it claimed were due. On 1 December 2000 litigation was commenced on behalf of Time against Lynx seeking damages for alleged breach of the contract between them and, in particular, an order that Lynx be restrained from acting upon the threat to activate the time lock.

79.
In the action between Time and Lynx Time sought an interim injunction preventing Lynx from activating the time lock on CS/3. A number of affidavits were sworn in support of that application, including one by Mr. Devine on 29 November 2000. In that affidavit Mr. Devine gave an account, the accuracy of which he confirmed in his evidence before me, and which I accept, of the difficulties which Time experienced with CS/3 after it was supposed to have “gone live” on 28 July 2000. What he said was:-

“The Lynx system was supposedly designed to support a minimum of 2,000 users. At the “go live” on 28 July 2000 we had about 400 users. Even so, at “go live” there was a serious problem with the system going slow and locking e.g. on 25 September the cancellation of a particular order took 22 minutes. This should have been accomplished in one minute. Despite the efforts of Lynx “locking” has remained a persistent problem and continues to occur to this day. In the weeks following “go live” the system would slow down to the extent that it was almost unusable with the result that telesales, administration and dispatch operations would frequently come to a halt. Lynx has put a lot of resources into trying to resolve the locking problem and it has gradually improved but remains a significant issue. For example the batch release operation and picking list print operation are creating deadlocks within telesales and administration. Typically batch release and picking list print take about an hour to run. Frequently, when those programs are run, there will be a locking problem. This may manifest itself in the locking of the batch release or picking list print operation or the locking of either individual users or groups of users. Whichever operation is “locked out” has to be re run from the

beginning. Lynx acknowledge that this problem persists and are due to provide yet another fix later this week."

80.
As was plain from the evidence of Mr. Anyon, Mr. Taylor and Mr. Devine before me, the very real problems with CS/3 and Pulse, the former of which affected essentially the totality of Time's business, were the main focus of attention within Time during the period from the end of July 2000 up to at least settlement of the litigation between Time and Lynx just before Christmas 2000. Between about the end of August and the end of November 2000 the commitment of Lynx to resolving the difficulties was affected adversely by the continuing failure of Time to pay sums considered by Lynx to be due. Both the problems and the time taken to solve them had a significant impact upon the work of integrating the Software with CS/3 and Pulse, not least because it was necessary for Lynx and Astea to co-operate to a degree in order to achieve an effective interface between the Software and CS/3. On the Lynx side the work of developing the interface was sub-contracted to VI Software Ltd. ("VI"). For a period while the litigation between Time and Lynx was proceeding Lynx was not prepared to instruct VI to have any dealings with Astea, and that delayed work on testing integration software, as I shall relate.

81.
While non-payment of the invoices of suppliers with whose efforts he was not content may have seemed to Mr. Tahir Mohsan a sensible tactic, its effect so far as Astea was concerned was in September 2000 to provide a disincentive to commit resources payment for which was considered uncertain. This was explained to Mr. Mohsan by Mr. Brotherston in an e-mail of 12 September 2000. Mr. Brotherston wrote:-

"I am being chased, twice a day, by Astea for payment of their invoices.

They have now invoiced twice for the software, one for two thirds and one for the final third. The second is not due as the system is not yet in and working.

However the first is well overdue and we must pay it before it affects the implementation process….

There are other invoices due for other items included within the implementation but they are of lesser amount and importance…"

82.
Mr. Brotherston emphasised the point in an e-mail sent on 14 September 2000 to Mr. Zia Mohsan. He said:-

"With regard to Astea/Service Alliance, I am, on the one hand pushing them to commit resource to setting up the new hardware and trying to meet our deadlins [sic] and on the other receiving no help at all from Tahir with regard to paying their outstanding and overdue invoice.

Can you help at all?"

83.
It seems from the terms of an e-mail sent by Mr. Brotherston to Mr. Tahir Mohsan's secretary on 20 September 2000 that Astea's persistent requests for payment were fended off temporarily by a promise that Mr. Mohsan would speak to Mr. Noble about the matter. However, that had not happened and it is plain from an e-mail which Mr. Brotherston sent Mr. Zia Mohsan on the same day that Astea was again becoming restive so that:-

“The projects in danger of stopping if we do not move quickly, please let me know what you would like to do.”

84.
The question of payment of Astea had not been resolved by 22 September 2000. On that date Mr. Brotherston sent Mr. Tahir Mohsan an e-mail in which he said:-

“Will you please give the issue of Astea some serious thought and then let me know how you would like me to proceed.

We have currently come to a halt and need to get moving as soon as possible.

My recommendation is that we pay the first third of the licence cost and then review the rest as your confidence in the product builds.

I need to be able to plan our next stage and at present am unable to.

I will happily pass any message on to Pat if you let me know how you would like to proceed.”

85.
The matter of payment of Astea was not resolved until 27 September 2000, by which time Astea activities had been suspended for about two weeks. In an e-mail dated 25 September 2000 to Mr. Zia Mohsan Mr. Brotherston warned that:-

“We will lose this week as well unless I can make arrangements today, as we stand at present there will be no Service Alliance activity this week.”

Mr. Tahir Mohsan in fact accepted the recommendation of Mr. Brotherston as to the way forward. Mr. Brotherston put the proposal to Mr. Noble. He reported the reaction of Mr. Noble in an e-mail to Mr. Tahir Mohsan sent on 27 September 2000:-

“I have spoken at length to Pat Noble this morning.

I have put to him your proposal that we pay the first third (£58k) this week with the understanding that we need to see the system working before the second payment is made.

He is concerned that he has no control over the interfaces being produced by Lynx or our Pulse team and that these are required to demonstrate a “working system”.

He proposes that they install the software, load data from CS/3 and produce a working test system which will demonstrate the full facilities to the full user count.

I have told him that he needs to meet with his developers and Lynx to further discuss the interfaces as I am sure there will be issues here in the same way as there have been with Pulse and Epos.

Pat wants to continue to commit to the project and will work under the proposal we discussed.”

Payment of the first one-third instalment of the licence fees was made on 2 October 2000.

86.
In an e-mail sent on 26 September 2000 to Mr. Brotherston Mr. Anyon again mentioned the “need to have equipment that is to the required specification from Astea”. Mr. Zuber Mohsan at length announced in an e-mail dated 28 September 2000 to Mr. Taylor that the required upgrading of hardware to enable testing of the Software on a five user system would take place.

87.
Mr. Elbarjaj arranged to visit the premises of Time in Burnley on 5 October 2000. In advance of his visit Mr. Taylor prepared an agenda for the meeting with him and a revised project plan. The agenda and project plan were sent as attachments to an e-mail to Mr. Devine and others dated 2 October 2000. The agenda specified the first item for discussion as "Actions required to achieve go-live date 30th October 2000". That reference to "go-live" was to the Software starting to run. The revised project plan recorded 30 October 2000 as the date for "implementation phase" of the Software and 13 November 2000 as the date for "Cut over to Service Alliance". The dates set out in the revised project plan represented further modification of dates previously indicated by Time. They were again the product of revised requirements on the part of Time as a result of its continuing difficulties with CS/3 and Pulse and the resources which Time had to deploy to grappling with those difficulties, which in consequence were not available to devote to pursuing the project in relation to the Software. Those continuing difficulties were mentioned by Mr. Keith Bond, the manager of the Call Centre, in an e-mail sent on 2 October 2000 to Mr. Devine in which he said of Pulse:-

"Development should now be completed however I still do not have the basic functionality I need to be able to manage customer contacts in Q4 [that is, the months of October, November and December 2000]

The outstanding issues include the following:-

Speed – Nobody can confirm whether speed is a network or software problem….

Run time errors – still occurring on an ad-hoc basis; staff being thrown out of the application apparantly [sic] randomly…

Missing records – the overnight update (of notes etc) does not seem to happen regularly.

Proactive sales – seem unable to see previous accounts, therefore create new records for new sales transactions. This then knocks on to the CCC and makes our attempts to support the customer very difficult.

We cannot search effectively by postcode….

Reports – I still do not have access to reports despite regular chasing…

At the moment the application is not suitable for supporting anticipated winter traffic.

I know people are working hard on this, but I need to see some progress quickly please."

88.
Mr. Anyon prepared minutes of the meeting with Mr. Elbarjaj on 5 October 2000 which were put in evidence. The other people who attended the meeting were Mr. Vant of Astea and Mr. Michael Bredbury and Mr. Jonathan Cleaver, who were both engaged on the development of Pulse. Mr. Elbarjaj was recorded as reporting that only two of the four integration packages for CS/3 and the Software had been completed, namely CS/3 Billing and Cost of Sales and CS/3 Stock Movement in Service Alliance, while the others had not been started. He was also recorded as reporting that the integration package between the Software and Pulse had not been started either. That may be a true record of what Mr. Elbarjaj said. It may be a correct statement of what the position was as at 5 October 2000. However, it is surprising as it is not easy to reconcile with other evidence put before me. As I have already set out, as at 14 August 2000, according to his timetable of projected activities to develop the software needed for integration of the Software with CS/3 and Pulse, Mr. Elbarjaj was envisaging that

CS/3 Billing and Cost of Sales would be complete by 17 August 2000, CS/3 Stock Movement would be complete by 4 September 2000, CS/3 Customer Synchronisation and Installed Base would be complete by 13 September 2000, CS/3 Product Master Synchronisation would be complete by 20 September 2000 and Call Centre System Integration would be complete by 19 October 2000. The lengths of time which Mr. Elbarjaj indicated he then estimated to complete those integration packages were, respectively, 5 days, 7 days, 7 days, 5 days and 20 days. As, on the evidence of the invoices by which charges were made for his time, Mr. Elbarjaj had commenced work on the integration of the Software and CS/3 on 10 August 2000, by the time he gave his estimate on 14 August 2000 that it would take him 5 days to complete CS/3 Billing and Cost of Sales he had already been working on it for at least two days, and so should have been in a position to make a fairly accurate estimate. On the evidence of the invoices Mr. Elbarjaj in the event only worked on 15 days on CS/3 integration and on 4 days on what was described as “Customisation”, yet the integrated Software was delivered and installed by about 14 November 2000. There was some evidence that another developer in the Dutch office of Astea, Mr. Carlo Alberding, also worked on the integration of the Software, but no charge was sought to be made specifically for his time. A time sheet put in evidence showed Mr. Alberding spending 5 October 2000 working on CS/3 integration. In the result there was no clear evidence about how long it in fact took Astea developers to complete the work of integration of the Software with CS/3 and Pulse, and thus no clear evidence as to how accurate or otherwise the estimates made by Mr. Elbarjaj on 14 August 2000 proved to be. If his estimates were accurate the amount of time charged for his work prior to 5 October 2000 should have got him further forward than simply completing the two packages recorded in Mr. Anyon’s minutes of the meeting of 5 October 2000 as having been completed by then. The integration packages which were recorded in the minutes of the meeting of 5 October 2000 as not having been started Mr. Elbarjaj had estimated would take him 32 days to complete, yet in the event only 27 or so working days elapsed between 5 October 2000 and the date upon which the integrated Software was delivered and installed. Of those 27 or so days, Mr. Elbarjaj himself spent four working on “Customisation”, which I take to be configuration, and one, 12 October 2000, at another meeting at Time to which I shall come. Mr. Noble told me in cross-examination, and I accept, that in October 2000 the only developers employed by Astea in Europe were Mr. Elbarjaj and Mr. Alberding.

89.
Whatever may be the position concerning the accuracy of the record of progress made by Mr. Elbarjaj up to 5 October 2000 as set out in the minutes of the meeting on that date, the minutes did not record any expression of dissatisfaction with the recorded progress or any reservations as to the attainability of the then desired implementation date of 30 October 2000. Some of the “Discussions and Decisions” set out in the minutes were:-

- “Feedback on RMA acceptance by Service Alliance to Pulse still needs to be defined. There are several options including an error log and/or E-mail or separate error monitoring application/process etc.

- The Interface Table that was originally in the Pulse Database will now be in the Service Alliance Database….

- Existing Notes for customers will come through as Customer Attachments in Service Alliance i.e. the Notes will be viewed against the customer details

•

New Notes will come through as a Repair Order Attachment.

•

We agreed that we would DTS the following:

•

Companies 2 & 7 data.

•

The last 3 months of the rest.

•

The link from Service Alliance to Time's Despatch process in CS/3 will be controlled by Service Alliance…."

It is apparent from the list of "Discussions and Decisions" that a number of important matters were only considered for the first time as between Time and Astea at the meeting of 5 October 2000. In particular the question of communication between the Software and Pulse that an RMA had been actioned was recorded as an issue requiring definition, while the interface table between the Software and Pulse, previously intended to be in Pulse, was now to be in the Software. The significance of the references to Notes is a matter to which I shall return later in this judgment. "Companies 2 & 7" were Time internal code for business and educational customers, that is to say, those for whom service at their own premises was provided and which were thus a main focus of the operations of the Service Centre. The "others", essentially ordinary consumer customers, were coded by Time 1 and 4. As matters unfolded the transfer into the Software of data in relation to the last three months of transactions with such customers proved of some difficulty.

90.
The performance of CS/3 at this stage seems to have been the major question concerning Mr. Tahir Mohsan in relation to the software used by Time. In a letter dated 6 October 2000 to Mr. Spencer he wrote, so far as is presently material:-

"With reference to our telephone call of today, I am confirming our total dissatisfaction in the way the CS/3 system has been implemented.

The performance is almost non-existent with effective downtime of between 4 – 6 hours a day. As you are also aware, the despatch label must have the correct detail on them and also have the ability to despatch from the Blackburn warehouse. These are just some of the hundred or so issues which must be delivered.

We are now in a desperate situation and require urgent action.

I am expecting you personally to be on site until all these issues are fixed. Also, I need a plan of your staff cover for the month of October so that we can plan through this together."

91.
After the meeting on 5 October 2000 Mr. Elbarjaj returned to the Netherlands. Mr. Elbarjaj and Mr. Bredbury exchanged e-mails on 10 and 11 October 2000 concerning various questions relating to the integration of the Software with Pulse. Mr. Elbarjaj then came back to Burnley for a meeting on 12 October 2000.The purpose of the meeting was for him to meet representatives of VI and Lynx to

discuss the integration of the Software with CS/3. Mr. Anyon again attended this meeting and prepared minutes following it. The minutes included:-

“**Astea Integration work**

•
It was required that more resource should be assigned to this task to allow for completion by the end of October. Nigel Vant has spoken to Ian Map [sic], Ian will respond by Monday, 16/10/2000 with a schedule….

Target Dates

•
Installation of all 5 parts of the Integration work Monday, 30/10/2000…

Outstanding Programming issues

•
Khalid spent time with both Stuart and Mike Bredbury to resolve any issues he or they had, he was happy that all his points had been addressed and that he now had a point of contact with VI.”

The target date for installation of all five parts of the integration work of 30 October 2000 set out in the minutes confirmed the date for that operation in the revised project plan prepared in advance of the meeting of 5 October 2000.

92.
Once more Mr. Elbarjaj returned to the Netherlands and was in contact by e-mail with Mr. Bredbury on 13 October 2000 and again on 16 October 2000.

93.
On 16 October 2000 Mr. Mapp sent an e-mail to Mr. Anyon in which he indicated that, having looked at the work of integration between the Software and CS/3 and Pulse as then contemplated by Mr. Elbarjaj, and having considered the available capacity of Astea, he had in mind a staged delivery of integrated software which would not be fully completed until the end of November 2000. That prompted a response from Mr. Brotherston in an e-mail of 17 October 2000 in which he wrote:-

“Thank you for the work schedule.

I am rather surprised at the time scale.

Our original “go live” date was August, which was moved (through our needs) to the start of November. The interfaces between Service Alliance and both Pulse and CS/3 have not changed in specification since they were agreed back in July. I can see no reason why the work has not been completed; as it would have been needed two months ago had our deadlines not moved.

Khalid seemed unaware of some of the specification documents, when we met last week and also seemed to have only recently started the work.

I do appreciate that there was a two-week “hiccup” in activities whilst we resolved the contractual issues but this does not add up to the delays you are now suggesting.

We will not be able to implement new software and interfaces at the end of November as we are already into the quarter of the year where no changes are allowed to any mainstream system (due to

sales activities). We have negotiated a degree of latitude on this matter for the sake of implementing Service Alliance but this will not be extended into November.

The Customer interface, RMA generation and Product file synchronisation are essential modules that must be in place and ready for testing by the 30th October as put forward at the last meeting. If this cannot be achieved we will have to reassess the feasibility of installing SA this side of February 2001.

I do hope you are able to commit resource to prevent us having to take this damaging decision."

94.
Mr. Brotherston's comments in his e-mail dated 17 October 2000 seem to have caused Astea to consider whether it was correct that nothing had changed since July 2000 so far as the work of integrating the Software with CS/3 and Pulse was concerned. Mr. Elbarjaj produced a list of work which he regarded as additional to that originally taken on. The items which he identified were:-

"Recent notes are added as an attachment to the repair order.

Long history notes need processing as an attachment to customer.

Notes are going to be read only.

Additional processing for "SUSPEND".

Additional field "order number" to be passed to interface for reference purposes.

Upon shipment need to trigger a Time Computers DLL to print out labels and return a consignment number to store in the shipment document.

Stored Procedure/API."

Mr. Noble sent that list, which was accompanied by a list of information which Mr. Elbarjaj required from Time in consequence, to Mr. Brotherston as an attachment to an e-mail also sent on 17 October 2000. Mr. Brotherston replied the same day:-

"The inclusion of notes was always in the original spec.

RMA suspend status is an addition and not essential.

Passing the order number has become essential but is an addition and we may have to live without it on day one.

The customer interface is as specified in the original documents as discussed between Ian Dundas and Stuart Marshall some time ago. The use of APIs as apposed [sic] to stored procedures should not have suddenly appeared last week.

We have, as you know a serious deadline issue and I think you need to find the development resource to deliver the integration, as originally agreed, by the end of this month.

I am sure there will be many areas that need further attention but it is essential, for both companies, to get the process working to a reasonable level by this time."

95.
After the despatch of the e-mail quoted at the end of the preceding paragraph Mr. Brotherston and Mr. Noble spoke. The outcome was recorded by Mr. Brotherston in an e-mail of 18 October 2000 to Mr. Taylor:-

“I have spoken with Pat Noble and generally agreed the 30th as a testing date as proposed at the last meeting.

There are some issues with eaxtra [sic] work that we have “slipped in” and a need for some information. In particular they need the DLL which handles the despatch label system and the Stored Procedure from Lynx/VI for the customer interface.

Please will you arrange for them to receive these.”

96.
Mr. Noble confirmed the conversation with Mr. Brotherston in an e-mail to him sent on 18 October 2000. He said:-

“I confirm that we still expect to deliver before the end of October. I am copying this message to Khalid to ask him to leave out the functionality which you have agreed to be changes below. We can revisit these items after delivery as additional work. Please note that we are still waiting for the DLL for the label printing and the stored procedure for doing the update. The later the arrival of these items, the more risky is the delivery date.

It seems that the situation regarding the notes is a little grey. We originally specified that notes should be added to the transaction log, but with further information becoming available, we think this will not be practical and hence have discussed the use of attachments. We are hoping that we can deliver the new functionality on time but this is at risk since it is not fully specified yet.”

97.
Mr. Elbarjaj and Mr. Bredbury exchanged e-mails each day during the week commencing 16 October 2000, but no charge was sought to be made by Astea for any work done by Mr. Elbarjaj that week. Mr. Bredbury finished his work on the project at the end of the week, on 20 October 2000. Mr. Cleaver took over from him. At that stage the work Mr. Bredbury had been doing on the interface between Pulse and the Software was not complete.

98.
Mr. Noble made a progress report in relation to work on the interface between the Software and Pulse to Mr. Brotherston in an e-mail of 20 October 2000. It was:-

“As of midday today, we have still not received the stored procedure for retrieving customer information, nor the DLL to enable label printing. Khalid has completed initial coding of our interface code and is planning to commence testing of his work on Monday. The unavailability of these components means that Khalid would have to test without them, and given our timescales, the delivery date is now already at risk. Furthermore, it increases our workload since we would now have to test twice. Can you let us know as soon as possible when we can expect these deliverables since we may be better off delaying the commencement of testing until we have received them.”

The terms of the report certainly suggest that, in the event, the amount of work which Mr. Elbarjaj had to undertake on the interface between the Software and Pulse, estimated originally at 20 days, had been less than anticipated.

99.
In an e-mail to Mr. Anyon sent on 23 October 2000 Mr. Elbarjaj indicated that he was being held up on his integration work and testing by lack of information from VI. Mr. Anyon replied on the same day with information concerning despatch. His e-mail concluded:-

“This means we will install Service Alliance up to the point of Despatch and then add Despatch Process Integration when it is completed.”

100.
The delays in provision of information by Time to Astea appear to have encouraged Mr. Noble again to raise the practicality of completion of the installation of the integration software by 30 October 2000. In a conversation with Mr. Brotherston he suggested putting delivery back by a week. Time agreed to that. Mr. Anyon confirmed that agreement in an e-mail to Mr. Noble sent on 24 October 2000:-

“Following your conversation with Derek, he has asked me to mail you confirmation that we will accept delivery and installation of tested integration programs on Monday, 6/11/2000. This has moved the delivery date back 1 week. It is essential that we have a test plan for this software and need to be led by yourselves as to how we structure this.

We will have our Pulse work completed to the original timescale, (Jon Cleaver) and the work that needs completing by VI should also be in place as originally scheduled. (Allan Darlington – VI).

The Despatch work, at this end, will proceed as soon as the Pulse work is completed and Time resources become available (Jon Cleaver & Chris Warner). Ideally we would need to be ready to install as soon after the Service Alliance package is up and running to minimise the amount of time using a manual despatch system.”

101.
There were put in evidence a fair number of e-mail exchanges between Mr. Elbarjaj and both VI and those working on Pulse, like Mr. Cleaver, in the week commencing 23 October 2000. It seems that Mr. Elbarjaj again did work in that week for which Astea did not in fact seek to charge. At the end of that week, in an e-mail sent on 27 October 2000 to Mr. Anyon, Mr. Noble returned to the theme of information supplied late by Time and its implications for Astea’s work. The relevant part of the e-mail was in these terms:-

“Just so that we are clear, in case the issue is raised in the future, we had planned to deliver by the end of October, which is next Tuesday. This is quite a complex interface and we therefore had planned to be testing by Monday 23rd October at the latest. In the event, and despite many reminders, we had still not received from you critical information regarding the method of retrieving customer data from Pulse until that date so could not even complete development. You then changed the method of retrieving data from stored procedure (as described in the specification) to view, and this has caused a further delay to do research since we have not used this mechanism in PowerBuilder before. The delay is thus 3 working days which is totally attributable to the late supply of information and change to specification.”

Mr. Anyon’s response in an e-mail of 28 October 2000 was rather defensive. The effect of his reply was that:-

“…if many reminders had been sent, they were not sent to me.

2. The change of specification for viewing in Pulse, I will need to discuss with Jon Cleaver, Monday morning, to determine how much this has changed from the original specification.”

Mr. Noble replied in his turn also on 28 October 2000. He set out the e-mails in which reminders had been given and concluded in the light of his review of those e-mails that in fact the fault lay with VI.

102.

While there was almost no contemporaneous documentary evidence of Mr. Alberding working on the interfaces of the Software and CS/3 and Pulse, in an e-mail to Mr. Mapp sent on 1 November 2000 Mr. Noble wrote:-

“Having reviewed the status of the Time interface today, I do not think that it will be ready to install until Wednesday next week. The principle [sic] reason for the delay is that one of the developers, Carlo, was off sick for 5 days. Given the timescale for the studio work, would it be a good idea to inform Time that we will be on site on Wednesday to install everything and that Khalid and Keith [Louden] will then remain there for the remainder of the week? If so, could you inform Keith Anyon accordingly.”

Mr. Mapp passed on the news to Mr. Anyon in an e-mail dated 2 November 2000. Mr. Anyon accepted the position that there would be a delay to the commencement of the installation of the integration software until 8 November 2000, as he indicated in an e-mail dated 3 November 2000 to Mr. Mapp and others.

103.
Unhappily, after the illness of Mr. Alberding Mr. Elbarjaj himself went sick for a couple of days, and that put the date for installation of the integration software by Astea back to the week of 13 November 2000. Again Time seems to have accepted the position, which was recorded in a Lotus Notes document created by Mr. Anyon on 6 November 2000 in advance of a meeting with Mr. Brotherston and others within Time scheduled for the following day.

104.
In the event Mr. Elbarjaj returned to the premises of Time at Burnley on 14 November 2000 to instal the integration software. That appears to have been completed, initially at least, by the end of 15 November 2000. Some parts of the work of installation appear to have continued until about 24 November 2000, although there is a degree of confusion on the evidence to what extent what Mr. Elbarjaj in fact did in the week commencing 20 November 2000 was properly to be regarded as installation of software which he had already produced, and to what extent it was modification of that software to provide facilities not originally included, or participating in the testing of the Software by Time.

Events after installation of integration software

105.
Once the integration software had been installed by Astea the next main operation before the Software could become operational was testing of the Software as installed and integrated with CS/3 and Pulse by Time as user to make sure that the Software met its needs. In this phase the pace of work was primarily set by Time as the party undertaking the testing. The role of Astea in relation to testing was essentially to have an appropriate person available to assist Time with any problems with the Software encountered during testing. However, as is plain from e-mails already quoted in this judgment, there were some aspects of work desired by Time to the Software by way of addition or modification which had been put back into the user testing phase in order not to delay further the completion of the integration software. Mr. Vant’s perception of what remained to be done by Astea he set out in an e-mail to Mr. Mapp and Mr. Noble sent on 16 November 2000. He said:-

“Things that ASTEA needs to do for the integration testing.

1) Configurations – this requirement has not yet been implemented with regards creating the installed base per the BRD.

2) Multiple line items/products per BDR [sic] (repair order) functionality needs to be enabled in the ASTEA interface. Khalid had assumed that there would only be one product per BRD.

3) Time have changed the requirement from maintaining history notes in the transaction log to maintaining them as customer attachments.

4) There is an additional requirement to make Customer/Swan notes view access only.

5) The already identified customisation for an additional field to identify the total boxes delivered is outstanding.

Apart from the above requirements that will require to be enabled, I understand from Khalid that the ASTEA set-up is complete and awaits testing.

It is guestimated that from informal discussions which await formal confirmation that:-

1) Pulse will be set-up and ready to test by Next [sic] Monday.

2) Tetra/CS3 – from talking to Keith Anyon Tetra are set-up and are ready to test after the initial data-load to Service Alliance has been completed…"

106.
In an e-mail sent on 16 November 2000 to Mr. Anyon Mr. Allan Darlington of VI recorded that he would have to write a new program to enable data for Time's 1 and 4 customers from a certain date to be transferred into the Software. He also said that he did not know how long the actual transfer of the data would take once the program had been written.

107.
I need not, for the purposes of this judgment, descend into much detail in respect of the testing by Time of the Software. That process had not been completed by 21 February 2001 when an internal meeting took place within Time to which I should give some attention. However, it is appropriate to notice some of particular features of the period of testing.

108.
In an e-mail dated 22 November 2000 to Mr. Anyon Mr. Mapp set out how Astea then saw the position in relation to outstanding work which it was to do. He wrote:-

"Confirmation of status

Khalid has finished – total boxes value

- multiple repair order lines

- notes;

these will be delivered/installed on Thursday/Friday and testing commenced. His flight arrives at 7:40 and Nigel is collecting him from the airport.

Work on configurations can continue once testing is underway.

We are waiting for a DLL from Jonathan for the despatch process.

The question of timely confirmation of Repair Order creation is still open. It is still not clear how we can implement this in a way that gives you a positive result quick enough. We have implemented the functionality as described in the specification, and Derek agreed explicitly with Pat Noble that initial delivery would match the specification. We have moved on this position for configurations since it is fundamental to the core business process, but I consider that this confirmation does not fall into the same category."

109.
By 24 November 2000 relations between Time and Lynx had deteriorated to such an extent that Mr. Lloyd of Lynx sent a formal notification to Time that Lynx would terminate its contract with Time unless Time paid all sums alleged by Lynx to be outstanding by 30 November 2000. It seems that that threat was implemented, with the result that as from 30 November 2000 there were no Lynx or VI personnel at Time's premises able to assist with testing of the Software and the interfaces with CS/3.

110.
Apart from the work being done by Mr. Elbarjaj, Astea also sent Mr. Keith Louden to Burnley in order to deal with the question of the production of labels by the Software. This was a self-contained task in relation to which no particular issue arises, but whilst involved in the work which he was actually sent to Burnley to do Mr. Louden's assistance was enlisted by Time in trying to diagnose problems encountered during testing of the Software in conjunction with CS/3 and Pulse. This involvement arose, it seems, because after about the week of 20 November 2000 Mr. Elbarjaj returned once more to the Netherlands and provided assistance to Time during the testing phase from there. When Mr. Louden was on site at Burnley he was, as it were, flagged down by Time and asked to be the channel of communication with Mr. Elbarjaj, in particular explaining to him the symptoms of problems encountered by Time during testing. The real difficulty appears to have been that neither Mr. Anyon, nor anyone else involved with the testing at the Time end had sufficient knowledge or experience to be able to try to identify correctly whether particular symptoms manifested during testing indicated problems with the Software or with CS/3 or Pulse. An issue with which Time personnel seemed quite ill-equipped to deal was the problem of the rejection by the Software of data coming from CS/3 or Pulse which the Software regarded as invalid because it was not in the form in which the Software was expecting to be offered data. Mr. Anyon frankly acknowledged his limitations in an e-mail to Mr. Brotherston and Mr. Devine sent on 28 November 2000.

"I have spend [sic] a considerable amount of time this afternoon in conversation with Keith Louden trying to get Service Alliance set up on my machine for testing.

I find that I do not have sufficient rights to do a lot of the tasks that I am being asked to do. I also do not feel I have enough experience to deal with many of the issues that are coming up. This is a difficult task to do with a person on site, it is even more difficult to try to do it over the phone.

We should be doing this either with an Astea person on site or, through Jawaid who is the System administrator."

111.
The problem with transfer of "Company 1" records from CS/3 to the Software which I have already mentioned first surfaced as a major issue in an e-mail which Mr. Anyon sent to Mr. Mapp and Mr. Elbarjaj on 1 December 2000. It seems to have been particularly frustration over that which prompted Mr. Brotherston to seek to insist that Mr. Louden, who was not himself a developer and could do no more than try to help to diagnose a problem and explain it to Mr. Elbarjaj, should remain at Burnley

until all interfaces had been completed and tested by Time. That requirement was communicated to Astea by an e-mail from Mr. Anyon to Mr. Mapp sent on 1 December 2000. He replied the same day:-

“Keith Louden will be there on Monday (although not till mid-morning), and the plan will be:

-
to uncover any error records from the data synchronisation (you will probably start on this anyway)

-
to install the latest software for the RMA Engine machine

-
to structure a series of tests that will cover all foreseeable circumstances of the interfaces

-
to execute those test [sic] in conjunction with yourselves

-
to liaise with Khalid if changes/fixes are required.”

Although he duly arrived, Mr. Louden only remained on site at this stage for a few days. He returned the following week.

112.
The problem with transfer of “Company 1” records continued over a number of days. In an e-mail sent on 3 December 2000 to Mr. Anyon Mr. Mapp suggested that the cause of the problem was that the data being offered to the Software was being rejected by the Software as invalid. Mr. Elbarjaj confirmed that diagnosis in an e-mail dated 4 December 2000 to Mr. Anyon. Mr. Elbarjaj dealt with the problem. He continued for the time being to deal with others. However, he had given notice to Astea to terminate his employment and he left its employ at Christmas 2000.

113.
In an e-mail dated 12 December 2000 to Mr. Noble Mr. Brotherston recorded that:-

“We seem to be making very slow and painful progress at the moment.

I have not heard from Ian since we last spoke although I know the [sic] Keith and he have been in communication.

I have great concern that with the current approach we will never have the system implemented.

We really need a consultant/Developer on site.

What are your views on how we can finish this project off?”

Mr. Noble replied the same day:-

“To be honest, I would have put Khalid on site by now but it is Ramadin (don’t know if spelling is correct!) and he is VERY reluctant to travel. We have another developer in the Netherlands office and I am arranging for him to get up to speed this week so that he should be available to come on site. In the meantime, we have allocated Nigel to you for the remainder of this week to try and move things along. We will review the position during this week and determine actions accordingly.”

114.

As Mr. Tahir Mohsan accepted in cross-examination, in the early part of 2000 when the possibility of acquiring the Software was under consideration, what he and the senior management of Time anticipated was a continuing rapid expansion of the market for personal computers. What in fact happened in the last quarter of 2000 was the collapse of the market. Radical measures had to be taken by Time to reduce costs. In particular, a considerable number of employees were made redundant. By reason of the periods of notice to which some of the dismissed employees were entitled the process of departures of those made redundant lasted from about December 2000 to April 2001

115.
A settlement of the litigation between Time and Lynx was agreed on 20 December 2000. So far as is presently material the terms of settlement, which were set out in a formal written agreement, involved Time paying, in relation to a claim of Lynx to be paid a total of £1,069,570, sums totalling £504,000.

116.
By an e-mail dated 22 December 2000 Mr. Noble informed Mr. Anyon that:-

“Unfortunately Khalid is leaving Astea so we have had another developer, Carlo Alberding, working with him on your interface for the last week. Please communicate all issues with Carlo from now on until further notice. We do have another developer starting in the UK on 2nd January and plan to transfer the responsibility again during the first half of January. This will make it much easier to provide on-site assistance from that point.”

The developer referred to as starting on 2 January 2001 was in fact Mr. Peter Shergold. Although his employment with Astea commenced on 2 January 2001 Mr. Shergold told me in evidence that it took him two or three weeks to become familiar with the Software and it was perhaps another couple of weeks before he was fully on top of the work which Mr. Elbarjaj had been doing to integrate the Software with CS/3 and Pulse. At all events he did not visit the premises of Time in Burnley until 23 January 2001. However, he was corresponding with Mr. Anyon by e-mail as from about 11 January 2001.

117.
In an e-mail to Mr. Mapp sent on 17 January 2001 Mr. Anyon informed him that:-

“We had a meeting with Stuart Marshall of VI. It was agreed that they would now be available for you to contact with issues regarding the integration. It would be worthwhile you and Peter establishing contact with them today to make introductions for Peter.

I am still testing issues the VI side of things and I hope to finish today. If I have outstanding issues I will be contacting VI with these at the end of the day. I will give you an update at this time.”

21 February 2001

118.
The process of testing by Time of the Software and its integration with CS/3 and Pulse continued along what seems to have been an orderly, if not very speedy, path until 21 February 2001. The witnesses called on behalf of Time all acknowledged that relevant Astea personnel were helpful and attentive during this period of testing, although there was a suggestion that time might have been saved if Mr. Elbarjaj or another developer had been on site at Burnley during the testing prior to the first arrival on site of Mr. Shergold on 23 January 2001. The suggestion involved the notion that diagnosis of a problem might have been faster if a developer had been on site rather than someone

like Mr. Louden describing a problem to him over the telephone or in an e-mail. However, there was no hard evidence that time would have been saved, and I came to the conclusion that the significance of having someone like Mr. Elbarjaj on site was psychological rather than practical. In other words, if a developer had been present it would have made Time feel more confident that the resolution of problems was being taken seriously by Astea, but in practical terms would have made little or no difference to the speed with which issues were tackled. There was criticism by Mr. Hossain of the time which it took Mr. Shergold to become familiar with the Software and with the work which Mr. Elbarjaj had been doing. I have set out the effect of Mr. Shergold's evidence on the point, which I accept. However, the time which it took him to become familiar with the Software and with the work of Mr. Elbarjaj is immaterial unless it caused work to be delayed which would not have been delayed but for his need to master a product new to him. There was no evidence of any such delay.

119.
On 21 February 2001 an internal meeting took place within Time. The meeting was attended by Mr. Tahir Mohsan, Mr. Zuber Mohsan, Mr. Zia Mohsan, Mr. Brotherston, Mr. Devine and Mr. Anyon. In advance of the meeting Mr. Anyon was asked to prepare, and did prepare, a document called "Service Alliance Update". That document was in the following terms:-

"**Integration Status**

Initial Data Load for Testing

- Products load complete
- Customers load complete.
- Installed Base (Customers and Invoiced Items).
- Site creation for customers with different Invoice and Delivery Addresses (VI Proposal)
- Modification work on Serial Numbers almost complete (VI).
- Warranties to be attached to Customer Items.

RMA creation, according to Astea (as of Friday, 16/02/2001)

- Address Data mismatch in Pulse causing the RMA to fail.
- Serial Numbers being worked on by VI needed to complete the creation.
- Process testing to be done.

Stock Transfers

•

Not currently working in Astea – to be worked on after the RMA process is completed.

Customisation and Toolkit changes.

•

Some are done more need to be done.

Despatch

•

Work done by Jon Cleaver, needs to be linked to Service Alliance.

Feedback to Pulse

•

Work done by Jon Cleaver – needs testing once the RMA process is working.

Hardware Set up for Testing

•

Dependent on the above work being completed

Go Live

•

Dependent on all above.

Concerns

•

Priority that Time gets from Astea due to length of time the project has overrun.

•

No delivery – no payment to Astea.

•

Number of Astea staff available.

•

Initial Development work done in Holland.

•

Much of the work done remotely, very slow process.

•

Staff turnover at Astea – 3 developers have worked on this project at different times.

•

Loss of staff here – Jon Cleaver."

On its face that report seems to indicate that the principal matters outstanding at that time before the Software could become operational were the problems with the validity of the RMA data offered to the Software, and integration of the Software with work done in relation to Pulse. Mr. Anyon told me in cross-examination that the list of "Concerns" which he set out was not a list of matters which

necessarily were currently of concern at the date of the document, but a list of any matters which had ever been of concern to him during the project.

120.
Exactly what prompted the summoning of the meeting on 21 February 2001 was somewhat obscure. Although the status report in relation to the Software which I have quoted in the preceding paragraph was prepared for the meeting, Mr. Tahir Mohsan also asked his secretary to prepare an "Action Sheet" for the meeting. He told me that the purpose of having such a sheet at a meeting which he attended was so that a record could be made of what actions were to follow from the meeting. Rather puzzlingly, the "Action Sheet" for the meeting on 21 February 2001 was entitled, "Action Sheet IV Quotation meeting 21. 02. 01 @ 2.30 pm". The reference to "IV Quotation" was not satisfactorily explained. The "Action Sheet" bore upon it in the manuscript of Mr. Tahir Mohsan these words:-

"Staff savings 1 in QC

Goods

3 4 Allocation

SPARES

£200k +VAT £250 inc VAT"

The words written seem to indicate that possible savings in staff of the order of four or five were considered at the meeting. In very broad terms the monetary figures set out may have represented the sums outstanding due to Astea as at 21 February 2001 in respect of unpaid invoices. However, Mr. Mohsan's evidence was that he was not, in the notes he made, carrying out a comparison of staff savings against the cost of the Software. In the end no clear explanation was given by Mr. Mohsan of what the notes which he made in manuscript were supposed to relate to.

121.
Mr. Brotherston, Mr. Devine and Mr. Anyon each gave evidence about the meeting on 21 February 2001. None of them had any very definite recollection of it, but Mr. Brotherston did say at paragraph 62 of his first witness statement:-

"I do recall the meeting in the afternoon of 21 February, called by Tahir, the review the status of the Astea project. I think this was because the system was not live and he was also being pressed for payment of the outstanding invoices. This meeting was held at the head office in Burnley and lasted about an hour. While I cannot remember the meeting very well, I recall that Steven Taylor, Michael Flannagan, Steven Devine, Carol Newby (a TAG team member and a systems person who is now married to Tahir) and, I think Zia Mohsan, attended. At the meeting the ServiceAlliance project was discussed. Tahir ran the meeting and it soon became clear that the main issue was to decide whether to finish the ServiceAlliance project, which would entail having to settle the outstanding costs of around £200,000. Tahir said alternatively if we did not proceed with ServiceAlliance this would leave the sum of around £200,000 which was the cost of employing a number of staff. He explained to us that in Time's current financial state we either spent the money on staff or on the software. There was no discussion at this meeting about the quality of the product that had been installed, or the go live date, and no one believed that full implementation could not be achieved. I cannot recall every detail of the meeting but the feeling was that the project was nearly there, and it was a shame that it had not gone live. However when faced with that choice of paying Astea or keeping staff the decision taken by Michael Flannegan and Stephen Taylor was to keep the staff. It was accepted that the money

was owed to Astea but simply the choice was an economical one. Tahir then said that he would have to talk to Pat about the money and what could be done and asked me to arrange a meeting."

It seems fairly plain that Mr. Brotherston's recollection of the meeting which he described is not accurate in relation to the persons who attended a meeting at which both he and Mr. Tahir Mohsan were present. Mr. Mohsan's "Action Sheet" for the meeting listed the persons attending as I have recorded them. Mr. Taylor, Mr. Flanagan and Carol Newby were not listed as attending that meeting. Later the same day a meeting took place between Mr. Flanagan, Mr. Taylor, Mr. Keith Bond and Mr. Anyon notes of which made by Mr. Anyon and to which I shall refer later in this judgment. Mr. Brotherston seems to have conflated more than one meeting in his recollection, although he did not actually attend the meeting of which Mr. Anyon made notes.

122.
Mr. Tahir Mohsan in his second witness statement, at paragraph 18, commented upon the paragraph in the first witness statement which I have quoted in the preceding paragraph. He indicated that his recollection was different. He said that:-

"On or around that time I hade [sic] been informed by the TAG team members that the ServiceAlliance system could take another 3-4 months to implement and "go-live". I was told that people at Astea kept changing and that the view was that Astea were not sufficiently resourcing the project. The members were also concerned at the level of change in the Astea personnel. I appreciated that the cost of ServiceAlliance would be significantly in excess of the budgeted figure of £60,000. I became very concerned about the situation. From what I was being told the project was likely to be almost 10 months behind target, budgeted costs were likely to be materially exceeded and there was no guarantee that ServiceAlliance would work. Time no longer had a need for the number of licences originally envisaged. Furthermore, given changes in the PC market the level of cost savings that had been envisaged in July 2000 could no longer be achieved and the return on investment was far less. Derek states that there was no discussion at this meeting about the quality of the product that had been installed or the go-live date. This is completely untrue as these were particular matters that were discussed. I also take issue with the assertion that rather than paying Astea, Time decided to keep staff instead. Irrespective of whether there was a downturn in the market if the ServiceAlliance implementation was working Time would have been prepared to pay as it would have made savings through cost reductions. However, as far as I was concerned Astea were in breach of their obligations to deliver a working system and I had lost faith in their ability to deliver a working system within a reasonable time frame."

123.
The apparent suggestion in Mr. Mohsan's second witness statement that he decided at or before the meeting on 21 February 2001 that Time did not wish to proceed with the Software because of the time which it had taken to complete the integration software and the configuration of the Software to the requirements of Time was not borne out by the fact that after the meeting which he attended the further meeting involving Mr. Anyon, Mr. Taylor, Mr. Bond and Mr. Flanagan took place. The notes of that meeting made by Mr. Anyon recorded that it was a "Meeting to discuss the effect of not using Service Alliance". The terms of the notes indicate that the purpose of it was to seek to evaluate the implications if a decision was made not to continue with the Software. The notes included:-

"The meeting was called for the following reasons:

1. Identify requirements, from Pulse / CS/3 and other systems to allow the Service Centre to function effectively, without the benefit of Service Alliance.

2. To review any significant problems caused by developing Pulse as a replacement.

The main requirements from Pulse/CS/3 and Other for Steve Taylor are as follows:”

There followed a table setting out for each relevant area of the Service Centre Mr. Taylor’s requirements, the reasons for those requirements, and the benefits expected to accrue from satisfying them. In total benefits identified included saving 6½ full time staff positions. Below the table the notes went on:-

“The following are the major functions that would be lost by not having Service Alliance.

•
Repair Demand Balancing

•
Changes to the Configuration of Customer equipment after the Repair

•
Capture of Labour and Material cost of Repair.

•
Specific Service Centre Stock Management

•
Component usage analysis by Engineer

•
Component reliability analysis.

Concerns with switching to Pulse

•
Reliability of the system

•
Level of support if there are more users.”

It is, in my judgment, pretty obvious that the outcome of the meeting attended by Mr. Tahir Mohsan was an instruction from him to Mr. Anyon to consider with appropriate colleagues what would be the implications of not continuing with the Software and to report back. The notes were described in a Lotus Notes document produced by Mr. Anyon as “Minutes of Meeting to discuss the Service Centre requirements if we do not use Service Alliance”. There was no suggestion in the notes that the Software was inappropriate or unsuitable, or would not be ready soon enough to meet the then requirements of Time. Rather doubts were expressed as to the reliability of Pulse if it was sought to develop it as a substitute for the Software. What at this stage Mr. Mohsan wanted to know was what disadvantages would follow from not continuing with the Software. What advantages would follow was another question.

124.
Mr. Brotherston in his first witness statement at paragraph 64 explained that following the meeting which he attended on 21 February 2001 he sought to arrange the meeting between Mr. Tahir Mohsan and Mr. Noble which Mr. Mohsan had asked him to arrange. It is clear that Mr. Mohsan did at some point between 21 February 2001 and 24 February 2001 ask Mr. Brotherston to arrange such a

meeting, and the date fixed was 6 March 2001. In an e-mail to Mr. Mohsan sent on 24 February 2001 Mr. Brotherston wrote as follows:-

“Pat Noble has called me a couple of times in order to establish the agenda/reason for his meeting with you on the 6th.

I have told him that you would like a progress review discussion with him.

In response he has committed extra resource to the project so that he has more to demonstrate in the way of finishing the project before you meet!

I do not want to pre-warn him of our intentions but do not think it is correct that he digs an even bigger hole for himself over the next two weeks.

I know that he has gone out on a limb for me and for Time and convinced his bosses in the states that everything will be ok.

I don’t feel this is going to end up too well and may significantly damage his own standing in Astea. Let alone his relationship with us.

What can I tell him?

Please give this some thought and respond as soon as possible.”

Mr. Mohsan did not in fact respond, but it is plain from the terms of Mr. Brotherston’s e-mail that by the date he sent it he was aware that Mr. Mohsan had decided that he wanted to try to get Time out of the Contract and he, Mr. Brotherston, was concerned that Mr. Noble should have some idea that that was the real purpose of the meeting of 6 March 2001 before that meeting took place.

The meeting of 6 March 2001 and the aftermath

125.
In advance of the meeting of 6 March 2001 between Mr. Tahir Mohsan and Mr. Noble Mr. Mohsan’s secretary prepared an “Action Sheet” for it. The only people who attended the meeting were Mr. Mohsan and Mr. Noble. Mr. Mohsan made some manuscript notes on the “Action Sheet”, but otherwise there seems to have been no precisely contemporaneous record of it. However, there was correspondence shortly after the meeting between Mr. Noble and Mr. Mohsan the terms and tenor of which, in my judgment, indicate plainly the substance of the discussion. Mr. Noble and Mr. Mohsan each gave evidence at the trial of what happened at the meeting. Mr. Noble’s account was supported by the correspondence to which I have referred and the relevant parts of which are set out in the succeeding paragraphs of this judgment. Mr. Mohsan’s account was at considerable variance from the correspondence and his explanations for the discrepancies implausible. As I have already indicated, I am satisfied that the evidence of Mr. Mohsan concerning the discussion at the meeting was untrue to his knowledge.

126.
Mr. Mohsan’s manuscript notes made at the meeting on 6 March 2001 said only this:-

“Almost there with the Interface. But have been there before.

Issues with invalid data …. validation.

Transferred RMA 4 a week ago.

Almost there in terms of delivery.

Booked …. of the £200k last year."

Where gaps are indicated Mr. Mohsan was unable in the witness box to read his own handwriting.

127.
In his first witness statement Mr. Noble gave a full account of the meeting on 6 March 2001. That account was:-

"45. The meeting was held in a boardroom next to Tahir's office, and only last[ed] an hour or so. Tahir started the meeting, and explained firstly how difficult the market was for personal computers. After some further pleasantries, Tahir then asked me "where do you think we are with implementation?" I responded by saying that I thought that we were nearly finished, all of the systems had been implemented and we were just going through final testing. Tahir asked me at that time how much longer I thought it would take to implement in total, and I said that with VI and Pulse co-operation it may take 2-3 months for testing and go live. The reason I gave this kind of time scale was from experience I know that it takes that long for staff to be trained on a new system, though the pace of the training programme would be dictated by Time with input from Astea as and when necessary. Until such time as Time was happy with working on the system, it was not ready to go live.

46. Tahir informed me that he had recently made a number of staff redundant because the market for PCs had collapsed as it was saturated and there was no incentive for customers to upgrade as there was nothing new on the market. This was true, as evidenced by the reported difficulties experienced by other companies in this market. Tahir said that he had been gearing up the business, but realised in time that he had got it wrong, and as a result had rapidly reduced his cost base. He commented to me then that Tiny Computers had made a mistake by continuing to gear up, and failing to respond to the market slowdown. As a consequence of this situation, Tahir did not think that the projected savings of ServiceAlliance forecast in March 2000 were going to be realisable following implementation of the system. Tahir said that when he had started the project this was against a business plan of substantial growth of the Time business and implementation of the new system would have the effect of further streamlining his business to enhance even greater profits. This was no longer likely to be the case.

47. Tahir was scathing about Lynx, and said that he would never use them again, and that he could well understand if I had said to him that the reason for Astea being delayed was because of the lack of co-operation from Lynx which had caused a delay to the whole project. I was aware that there had been a large fall out between Lynx and VI and Time and also that Lynx/VI staff had been thrown off site followed by a complete breakdown in communication. Tahir confirm[ed] at the meeting that his staff had, however, not made any complaints, or said anything critical of Astea's staff in contrast to what had been said about those working for Lynx.

48. We discussed the unpaid invoices. Tahir remarked that as Time had paid about £70,000 to cover labour costs, Astea would not be out of pocket and really what was outstanding was the licence fee. I said, however, that the licence fee had been booked in to Astea's accounts and consequently the revenue had been recognised. Tahir seemed surprised by this. More importantly, I said to Tahir that my concern was that we had agreed a contract whereby a price would be paid for the use of the software, and I asked when he planned to make the payments due. Tahir seemed non-committal in response, and the idea was floated by me of selling the licences on to a third party. I suggested to him that if he was able to find another customer interested in licensing ServiceAlliance, as a means of

helping him out I may be able to do some sort of deal on the basis of an introduction. I had in mind crediting an introduction fee/commission if Tahir brought a new customer to us. Tahir indicated that he would give this some thought.

49. I asked Tahir what he intended to do about the project. Tahir suggested that we should suspend work temporarily until he decided what to do next, which I agreed to. Basically, I took the view that I had to agree to this, as he had not paid us for the work done so far, and I wanted to reach an amicable conclusion to the project if possible. I did not get the impression that Time could not pay, but as business was tough, I simply thought that payment would be made some months down the line. Tahir did not indicate at any point in the meeting that he was not going to be able to pay the rest of the sums outstanding, and in fact the meeting was quite amicable. When I came away from the meeting, I was not sure exactly what would happen, although I suspected that it may be that Tahir offered to pay a percentage of the sums outstanding up front, and the rest over a year. I did assume, however, that all of the sums outstanding would be paid eventually.

50. When I left the meeting it was agreed that Tahir would have some time to consider the matter further and then contact me. Indeed, Tahir wrote to me along those lines later that day referring to a "sensible commercial arrangement". I obviously thought that this meant settlement, and I did not for one minute think that he might not pay anything further, but that he might at worst try to agree with me that a lesser amount should be paid than that outstanding."

128.
One of the remarkable aspects of the evidence of Mr. Tahir Mohsan in relation to his meeting with Mr. Noble on 6 March 2001, which on any view was a very important meeting, was that in his first witness statement he dealt with it in rather general terms. Then, having seen the detailed account in Mr. Noble's first witness statement, in his second witness statement Mr. Mohsan gave rather more detail. It seemed to me that Mr. Mohsan wanted to have a good understanding of what Mr. Noble's evidence as to the meeting was before committing himself to any very definite account of his own.

129.
In his first witness statement Mr. Mohsan said this about the meeting on 6 March 2001:-

"18. On 6th March 2001 Mr. Noble of Astea attended Time's offices for a meeting with myself. The reason for the meeting being called was to discuss the issues arising out of Astea's implementation services. I do not accept Mr. Noble's version of what was discussed at this meeting [as set out in the Re-Amended Reply and Defence to Part 20 Claim] or that I made no complaint at all of any alleged defective performance by Astea. The whole reason for the meeting was Astea's defective performance of their implementation services.

18..1 I accepted that some of the difficulties and delays in Astea's integration work were contributed to by difficulties with Lynx but did not accept that they were the sole cause of the delay. Other than a general reference to problems caused by Lynx, I do not recall discussing these aspects in much detail. I certainly would not have advised Mr. Noble that no complaint about Astea's performance had been made by Time's staff. This would not have been true. I received complaints about Astea's performance of their implementation services by Derek Brotherston, Keith Anyon and Steve Taylor and particularly about difficulties caused by repeated staff changes at Astea. I do not recall mentioning Time's need to lay off staff at this meeting although some staff were being laid off at or around that time.

18.2 I asked Mr. Noble how long it would take to complete Astea's implementation services and he informed me that it would take three or four more months. I informed him that this was not

acceptable, whereupon Mr. Noble advised me that he had already booked the sums payable under the Agreement into Astea's revenue for that financial year (2000 – 2001). I was surprised at hearing this as Astea had still not completed their implementation services. Had these services been completed by 30th October 2000, Time would have paid the sums due under the Agreement.

18.3 I informed Mr. Noble that Time no longer wanted the ServiceAlliance package and were not prepared to waste any more time with Astea's implementation services. Mr. Noble informed me that he was prepared to put the implementation services on hold and look for a way forward with a view to moving the licences to another company as they had been booked out as revenue for that financial year. I informed him that we would try to assist him in transferring the licences but this was really a matter for Astea, not Time. I believe that Mr. Noble's primary concern was not to have to repay the first instalment that Time had paid from his clear anxiety to find another user for the licences so that there would be no reversal of Astea's revenue."

130.
In his second witness statement Mr. Mohsan expanded upon the account of the meeting of 6 March 2001 given in his first witness statement as follows:-

"29. Pat Noble's version of a meeting on 6 March 2001 contained at paragraphs 45-49 of his Statement is not a true reflection of the course of that meeting. Prior to the meeting Derek told me that from his discussions with Pat he anticipated that Pat was going to try and blame the delay and problems on Lynx. At the meeting I pre-empted Pat Noble by stating that I knew that he was going to try and blame Lynx for Astea's failure to implement ServiceAlliance and that Time would blame Astea. I did not want to become embroiled in such discussions. I expressed my serious concerns regarding the delay that had been encountered and asked Pat how much longer it would [take] to implement ServiceAlliance and provide us with a working system. I wanted to establish when ServiceAlliance would be delivered. In his statement Pat says that he said 2-3 months. My clear recollection is that he stated it would take 3-4 months.

30. At paragraph 46 Pat Noble refers to the projected savings against a business plan of substantial growth and increased profits. This is not strictly correct. Time looked at cost reduction rather than increased profits as this is still important even in times of a downturn in the market.

31. At paragraph 47 I dispute that I would have said I could understand Astea being delayed as a result of the lack of co-operation from Lynx or that I did not say anything critical of Astea's staff. Whilst our discussion did not descend to particulars I made it clear to Pat the level of staffing and the availability of Astea staff was not acceptable and that in my view Astea had completely under resourced the project.

32. In paragraph 48 I refute that Pat Noble did not express his concerns to me about the contract or when Time planned to make payments. I expect his main concern was to avoid Time demanding repayment of the £58,000. I also deny that I floated the idea of selling the licences on to a third party. This was a request that came from Pat Noble and he asked me if I would be prepared to sell the licences and whether I knew of any potential purchasers. I informed him that Time would be prepared to transfer the licences but he was best placed to identify potential purchasers.

33. In paragraph 49 Pat Noble says that I suggested that we should suspend work. This is incorrect. The suggestion came from Pat Noble himself. I would also put this in context. Our meeting on 6 March 2001 was at my request and was against a background that Astea had still failed to deliver a working system. From my prior discussions with Derek Brotherston I was aware that Astea would seek to

blame problems with Lynx as the reason for their failure to deliver. Derek and members of the TAG team had previously advised me that this was not the case. Pat was fully aware of Time's concerns prior to the meeting. I opened the meeting by saying to Pat that I knew that he would try and blame Lynx for the delays but that Time was blaming Astea. I recall asking Pat how long it would take for Astea to complete the implementation of ServiceAlliance. When he said 3-4 months, I informed him that this was simply not acceptable. The period of 3-4 months was longer than had originally been envisaged for implementation back in July 2000. I had completely lost confidence in Astea's ability to deliver ServiceAlliance and I informed Pat that this simply would not work for Time and the project was at an end, that is to [say] the contract was terminated. Whilst Pat accepted this to be the position he explained that Astea had booked the licence fee as revenue for that year and did not want to reverse this, as it would create real difficulties for him as far as his American parent company was concerned. I appreciated the difficult position he found himself in and wanted to assist as far as I was able. Pat suggested that we put everything on hold whilst he tried to find an alternative customer to take the licences. In this way he would avoid having to reverse the licence revenue. I agreed to proceed on this basis to try and help Pat although I should be clear that the contract was at an end and that Astea would not be receiving any further payments from Time regardless of whether an alternative customer could be found."

131.
The account given by Mr. Tahir Mohsan in his two witness statements of the meeting on 6 March 2001 does not seem to me to be remotely plausible. It was not made more plausible by the way Mr. Mohsan told the story in the witness box. In its essentials the tale which Mr. Mohsan would have me believe is that, after lengthy and inexcusable delays on the part of Astea in putting the Software into operational condition, he summoned Mr. Noble to a meeting for the express purpose of terminating the Contract, and did so, but yielded to the entreaties of Mr. Noble to take pity upon his personal position by accepting that in the first instance the project in relation to the Software should be represented as on hold, although it was actually terminated, to give Mr. Noble a chance to see if Astea could find another customer which would be prepared to take over the Software from Time. That story just makes no commercial sense. If in truth Mr. Mohsan did believe that Astea was in breach of the Contract by reason of the delay in completing the implementation of the Software, and he had decided on that account to terminate the Contract, there was no obvious reason for him to do anything other than tell Mr. Noble the glad tidings and send him on his way. There was certainly no reason for Mr. Mohsan to show compassion to this, on his version, incompetent company and its managing director, or to take any interest in trying to assist it avoid problems with its parent company. If, on the other hand, Time was, from Mr. Mohsan's perspective, stuck with an obligation to pay over £200,000 for software for which the business case had disappeared in the light of the collapse of the market in the United Kingdom for personal computers, there was every incentive, if Astea was willing, to seek to slough off that obligation by finding someone prepared to take an assignment of the licences granted under the Contract. That, I am satisfied, is the reality of the position, and that analysis is confirmed by the contemporaneous exchanges between Mr. Mohsan and Mr. Noble, to which I am about to turn. Before I do, it is material to record that in cross-examination Mr. Mohsan, unworthily as it seemed to me, identified what he described as aggressive United States accounting practices, with which he sought to associate the notorious names of Enron Corporation and other recent spectacular business failures in the United States, for the fact that Astea had booked as revenue for the then current year the licence fees payable under the Contract. In my judgment there was no substance in any suggestion that what Astea had done was in any way inappropriate. As of 1 September 2000 the totality of the licence fees was due, and it needed to be accounted for in the books of Astea accordingly. Not to have done so would inevitably have led to problems in relation to corporation tax and Value Added Tax.

132.
The ingratiating tone of the letter which Mr. Mohsan wrote to Mr. Noble on 6 March 2001 shortly after their meeting is wholly inconsistent with his account of what had happened at that meeting. What he said was:-

“It was a pleasure seeing you this afternoon and I hope you had a safe journey back to base.

With reference to the Astea implementation, as I indicated, we are running significantly behind timescales and the conditions of Time Group are such that the cost benefit analysis that was once put in place has now changed substantially. As we agreed at the meeting, we are to put all further developments on hold until we reach a sensible commercial arrangement moving forward.

I do intend to think about how we resolve this issue. As I indicated at the meeting, I was not aware that you had already booked the revenue in last years figures as that has confused the issue somewhat from our point of view. However, we do intend to find an amicable way forward. I will also consider your proposal of finding another customer who may wish to buy this product and resolve this issue of unbooking the revenue from last year.

I look forward to speaking with you Pat, later this week.”

The letter contained no criticism of any sort of Astea or of its performance of the Contract. It contained no suggestion that the Contract had been terminated. The letter was friendly in tone and identified the reason for putting the project “on hold” as the fact that the cost benefit analysis from Time’s point of view had changed. The reference to reaching “a sensible commercial arrangement moving forward” seems to me to be totally irreconcilable with the assertion that things were not going to move forward, they had come to an end. I was urged by Mr. Hossain to treat the reference to the project being “on hold” as being non-technical business language equivalent to “terminated”. However, it is plain from the context of the letter that the expression “on hold” should be understood in its ordinary sense as a common English expression. Having seen and heard Mr. Mohsan give evidence it is clear to me that he understood and used the expression in its usual sense. In other words, in the letter, as in the meeting, he was very careful **not** to indicate that he was terminating the Contract. I am satisfied that the suggestion of Mr. Kinsky to Mr. Mohsan in cross-examination that the confusion allegedly created from Time’s point of view by the booking by Astea of the revenue from the licence fees payable under the Contract was that it blocked the tactic of seeking to suggest that the payment already made covered Astea’s costs and should be accepted as sufficient to let Time off the hook was correct. I am also satisfied that, as was made plain by the promise at the conclusion of the letter that Mr. Mohsan would get back to Mr. Noble, it was Time which it had been proposed at the meeting should seek a new customer for Astea which would be prepared to take an assignment of the licences granted by the Contract, not Astea itself. There was no benefit to Astea in letting Time off the hook of the Contract if Astea found a new customer for the Software. On the other hand, if Time introduced to Astea a customer otherwise unknown to Astea, there was such a benefit.

133.
Mr. Mohsan did not keep his promise to get back to Mr. Noble later in the week beginning 5 March 2001. Mr. Noble caused Astea to suspend further work on integration of the Software, as agreed with Mr. Mohsan, but otherwise did not press for action immediately on the question of resolving outstanding issues between Time and Astea. Having heard nothing, he did write a letter to Mr. Mohsan dated 22 March 2001 in which he said:-

“Many thanks for your letter of 6th March and your indication that you intend to find an amicable way forward.

I do understand the difficulties that Time Group are experiencing and I can indeed understand your predicament. We do, however, need some sort of proposal from you very soon and I have not heard from you since your letter. Having satisfied the contractual conditions for the license revenue, and provided all of the services under the contract, we did indeed book the revenue in last years figures. Without a proposal from you our auditors will naturally start to query the ageing of the debt and I would like to avoid this if possible. Could you consider settling 50% of the outstanding amount immediately whilst we continue to search for an acceptable resolution?

I look forward to hearing from you.”

134.
Mr. Noble’s letter dated 22 March 2001 drew forth no response from Mr. Mohsan. Mr. Noble sent him a letter by recorded delivery on 5 April 2001 which was in these terms:-

“Further to my letter of 22nd March (copy enclosed) I am somewhat disappointed to have received no reply. As I am sure you will realise, without an acceptable proposal from you, Astea will be forced to take legal action to recover amounts due. I do not think that this is in the interests of either party and would like to avoid it if at all possible. I am getting certain pressures from my US management and I need to demonstrate some progress rather rapidly. To that extent, I would appreciate your proposal to settle the outstanding amounts within one week of this letter.”

135.
It was quite obvious, in my judgment, from the terms of Mr. Noble’s letters dated, respectively, 22 March 2001 and 5 April 2001, that he was expecting that Time would make some further payment to Astea, and was looking for some part of the sum which Astea considered to be due to be paid shortly, if legal action was to be avoided. In that context the terms of Mr. Mohsan’s reply to the letter of 5 April 2001 are surprising if Mr. Mohsan had any genuine belief that the Contract had been terminated by him for default on the part of Astea. He wrote, in a letter dated 17 April 2001 to Mr. Noble:-

“I am in receipt of your letter dated 5 April.

As you are aware, due to the timescales involved in implementing the Astea software, we have got to a stage whereby the cost justification of the software is no longer viable. We are currently reviewing this implementation. However, we are reviewing our service operation as an overall requirement and looking to deploy in store service into our shops whereby we might consider your software again.

As you are aware, we have paid up front £50,000 for the initial consultancy and bespoking. I was surprised to learn at our meeting that you had booked the entire sale as revenue for your year-end last year, which is slightly unusual considering that we have checked all of the inventory. As soon as we have finished reviewing our entire service operation, which we should expect to have completed by the end of May, then we will be in a position to come to a final conclusion on what we do with Astea software.

I have also looked at your suggestion as to whether we could help you resell this license on to other organisations. I am in discussion with a number of them and will keep you informed as to the progress. However, these discussions are at an early stage.”

Again there was no suggestion that the Contract had been terminated or that Astea had been in breach of the Contract. The repeated explanation for Time not wishing to proceed with the Software was that the cost justification for introducing it no longer existed. Essentially what it seems to me Mr. Mohsan was seeking by his letter to do was to fend Mr. Noble off for the time being with a vague hint of business to come out of the reconsideration by Time of the question of providing a service facility to customers in store and a vague indication that Time may yet come up with a customer to whom the existing licences of Time could be assigned.

136.
At this point Astea resorted to its solicitors, Messrs. McGrigor Donald, now known as KLegal. A letter dated 26 April 2001 was written by that firm to Time, marked for the attention of Mr. Tahir Mohsan, requiring payment within seven days of sums claimed to be due, failing which further action would be taken. There was no reply to that letter. Messrs. McGrigor Donald then, under cover of a letter dated 11 May 2001 sent a statutory demand in relation to the outstanding invoices. That action prompted Time to instruct its own solicitors, Messrs. Halliwell Landau. That firm first wrote to Messrs. McGrigor Donald on 24 May 2001 indicating that it had been instructed and was taking detailed instructions. What those instructions were was set out in a letter dated 7 June 2001, namely:-

“It was a condition of the Agreement that “the scheduled date of implementation by Astea shall be 1 August 2000”. This deadline was extended with Time’s consent until 30 October 2000 in an email from Derek Brotherston of Time to Ian Mapp of Astea dated 17 October 2000.

Notwithstanding this extension the implementation was not completed by 30 October 2000 and furthermore, it remained far from complete by 6 March 2001 when Mr. Mohsan of Time met with Pat Noble of Astea and put the implementation programme on hold. Between 30 October 2000 and 6 March 2001 Time have been put to considerable costs and expense attributable to the failure of Astea to implement the ServiceAlliance package by the agreed date.

Our clients are presently quantifying the loss caused by this breach of contract and intend to counterclaim by way of set off against the amount your clients are seeking. We are advised that the amount of the counterclaim is likely to extinguish the amount your clients are seeking and accordingly it would be quite wrong for your clients to present a winding up petition in respect of the debt referred to in your client’s statutory demand, there being a genuine dispute on substantial grounds.”

It is, it seems to me, not without significance that no assertion was made in the letter that the Contract had been terminated by Time. Rather the contention advanced was that it had been agreed at the meeting on 6 March 2001 that the integration of the Software with other relevant systems would be put “on hold”. There was also no suggestion that the sums claimed by Astea were not, as such, due, merely that Time had claims of its own which it could set off against its debts to Astea. Looking at the matter in the round, therefore, it seems to me that the terms of Messrs. Halliwell Landau’s letter dated 7 June 2001 in fact support the evidence of Mr. Noble as to what happened at the meeting on 6 March 2001 and not that of Mr. Mohsan.

137.
In the context of resisting the statutory demand Mr. Tahir Mohsan made a witness statement which he signed and dated 18 June 2001. In that statement, at paragraph 8, he dealt very briefly with his meeting with Mr. Noble on 6 March 2001. What he said was:-

“ Astea failed to implement the ServiceAlliance package or successfully integrate it with the other packages by 30 October 2000 and also failed to complete the implementation such that on 6 March

2001 I met with Pat Noble of Astea and requested that the implementation programme be put on hold."

The law relevant to issues of liability and the submissions of the parties

138.
In the event it was common ground between Mr. Hossain on behalf of Time and Mr. Kinsky on behalf of Astea that by 6 March 2001 the obligation of Astea in relation to completion of the Services was to complete them within a reasonable time. Mr. Kinsky submitted that that was the only obligation as to time which Astea had ever been under because the term of the Contract that, "Provided Time Group has provided timely assistance and cooperation on its part, the scheduled date of implementation by Astea shall be 1 August 2000." was known not to be achievable by the date the Contract was signed on behalf of the parties and was not intended to amount to a binding contractual obligation. Alternatively, he submitted, if the term did impose a binding contractual obligation, it was an obligation to use reasonable endeavours, or, as he put it, reasonable skill and care, to meet the target date, which obligation was superseded by the modification of the target date by Time for its own reasons. With the waiver on the part of Time of the benefit of any term of the Contract requiring Astea to do anything by a particular date, submitted Mr. Kinsky, there arose in place of such obligation an obligation to complete the Services within a reasonable time. Mr. Hossain took the position that it was academic whether Astea had ever accepted any obligation to complete the Services by any particular date because on any view the last such date for which he would have been able to contend, 30 October 2000, or 6 November 2000, or 14 November 2000, was long past by the date as at which Time contended that it had treated the failure of Astea to complete the Services as repudiatory of the Contract and had accepted such repudiation as bringing the Contract to an end, 6 March 2001. For that reason he too proceeded on the basis that the relevant obligation was to complete the Services within a reasonable time.

139.
Despite the agreement of Counsel that the relevant obligation on the part of Astea was to complete the Services within a reasonable time there was some difference of emphasis as to the precise nature of that obligation. Mr. Hossain submitted that in assessing what was a reasonable time I should take into account in particular the facts that the parties had a common timetable, that that timetable was broken down into elements, one of which was testing, in relation to which Mr. Mapp had originally thought it appropriate to allow one week, that on the evidence Astea was short of staff able to undertake the Services in the period up to 30 October 2000, and that Astea should have allocated to the provision of the Services that manpower necessary to achieve the timetable contemplated by Mr. Mapp when he prepared the e-mail of 18 Juen 2000. Mr. Hossain further submitted that I should consider delay to the completion of the Services in five periods, first from 11 July 2000 to 4 October 2000, second from 5 October 2000 to 14 November 2000, third from 15 November 2000 to 31 December 2000, fourth from 1 January 2001 to 14 February 2001, and finally from 15 February 2001 onwards. He also submitted that Astea should have directed Mr. Elbarjaj to spend all of his time working on the integration of the Software with CS/3 and Pulse as from about 10 August 2000 and should have allocated a second developer to work on the project as from about 16 August 2000. In other words, the focus of Mr. Hossain's submissions as to what an obligation upon Astea to complete the Services within a reasonable time meant was upon what Astea did, and upon what else it might have done in order to make more swift progress, although he did accept that Astea did not have to take responsibility for delays which were outside its control.

140.

Mr. Kinsky, on the other hand, submitted that the obligation upon Astea to complete the Services within a reasonable time was an obligation to complete the Services within a time which was reasonable in the circumstances in which Astea in fact undertook the Services, although it was not open to Astea to seek to rely upon its own failings as extending what a reasonable time would otherwise have been.

141.
The distinction between these two approaches seemed to be that Mr. Hossain in effect was contending that Astea was bound to complete the Services as fast as humanly or technically possible, subject only to being excused in respect of delays over which it had no control, while Mr. Kinsky sought to persuade me that the question was not so much how fast the Services could have been performed by Astea had it chosen to allocate to doing so the greatest possible resources and to maintain them for as long as necessary, but rather, considering all of the circumstances, how long, as things turned out, it was reasonable for Astea to take.

142.
Both Mr. Hossain and Mr. Kinsky endeavoured to seek support for their respective emphases from the well-known decision of the House of Lords in Pantland Hick v. Raymond & Reid [1893] AC 22. The leading speech in that case was that of the Lord Chancellor, Lord Herschell. At pages 28 and 29 of the report Lord Herschell said this:-

“The bills of lading in the present case contained no such stipulation [as to time for performance], and, therefore, in accordance with ordinary and well-known principles the obligation of the respondents was that they should take discharge of the cargo within a reasonable time. The question is, has the appellant proved that this reasonable time has been exceeded? This depends upon what circumstances may be taken into consideration in determining whether more than a reasonable time was occupied.

The appellant’s contention is, that inasmuch as the obligation to take discharge of the cargo, and to provide the necessary labour for that purpose, rested upon the respondents, the test is what time would have been required for the discharge of the vessel under ordinary circumstances, and that, inasmuch as they have to provide the labour, they must be responsible if the discharge is delayed beyond that period.

The respondents on the other hand contend that the question is not what time would have been necessary or what time would have been reasonable under ordinary circumstances, but what time was reasonable under existing circumstances, assuming that, in so far as the existing circumstances were extraordinary, they were not due to any act or default on the part of the respondents.

My Lords, there appears to me to be no direct authority upon the point, although there are judgments bearing on the subject to which I will presently call attention. I would observe, in the first place, that there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances. Upon “the ordinary circumstances” say the learned counsel for the appellant. But what may without impropriety be termed the ordinary circumstances differ in particular ports at different times of the year. As regards the practicability of discharging a vessel they may differ in summer and winter. Again, weather increasing the difficulty of, though not preventing, the discharge of a vessel may continue for so long a period that it may justly be termed extraordinary. Could it be contended that in so far as it lasted beyond the ordinary period the delay caused by it was to be excluded in determining whether the cargo had been discharged within a reasonable time? It appears to me that the appellant’s contention would involve constant difficulty and dispute, and that the only sound

principle is that the “reasonable time” should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under those circumstances I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee. I think the balance of authority, both as regards the cases which relate to contracts by a consignee to take discharge, and those in which the question what is a reasonable time has had to be answered when analogous obligations were under consideration, is distinctly in favour of the view taken by the Court below.”

143.
I was also referred by Mr. Kinsky to the speech of Lord Watson at pages 32 and 33 of the report, where he said:-

“When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of the contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted; and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably.”

144.
In Pantland Hick v. Raymond & Reid the issue was whether the consignee of a cargo was in breach of a contractual obligation to discharge the relevant vessel within a reasonable time, that is to say, a single obligation to do something within a reasonable time, rather than an obligation to do a number of things, where there was a single cause of delay, namely a strike of dockworkers, over which the consignee had no control and the effect of which, while it lasted, was to prevent totally performance of the obligation. In such a situation the application of the principle laid down by the House of Lords is straightforward. The application of the principle becomes more complicated if there is not a single thing which has to be done, but a number of things, and if there is not a single cause of delay, but a number of concurrent or interacting causes. Whether, where, under a contract, there are a number of things to be done to perform it, each of those things is to be done within a time which is reasonable for the doing of that thing on its own, or all of the things are to be done within a time which is reasonable for the doing of the aggregate is in my judgment, a question of construction of the contract with which one is concerned. I shall return to the issue of the construction of the Contract and to the question of whether, upon proper construction the Contract amounted in law to a single agreement or to two or three. In any case in which it is not said that there was a single all-embracing cause of delay, or a series of such causes, the focus of attention is likely to be upon the allocation of resources to performance of the relevant contractual obligations. In any sphere of commercial or personal life it is necessary for decisions to be made as to the relative priority of matters which need to be dealt with and as to the resources which it is appropriate to allocate to such matters. It would, I think, be wrong in principle to proceed upon the basis that an obligation to do something within a reasonable time was equivalent to an obligation to do it as soon as was practicably possible, subject only to not being held responsible for causes of delay outwith one’s control. After all, an obligation to do something under a contract within a reasonable time will only arise if either the parties have expressly agreed that that is the time within which performance will be given or, more commonly, the parties have not stipulated any particular time by which performance is to take place or the benefit of any such stipulation has been waived. What it seems to me the application of the test formulated by the House of Lords in

Pantland Hick v. Raymond & Reid involves in a case such as the present is a broad consideration, with the benefit of hindsight, and viewed from the time as at which one party contends that a reasonable time for performance has been exceeded, of what would, in all the circumstances which are by then known to have happened, have been a reasonable time for performance. That broad consideration is likely to include taking into account any estimate given by the performing party of how long it would take him to perform; whether that estimate has been exceeded and, if so, in what circumstances; whether the party for whose benefit the relevant obligation was to be performed needed to participate in the performance, actively, in the sense of collaborating in what was needed to be done, or passively, in the sense of being in a position to receive performance, or not at all; whether it was necessary for third parties to collaborate with the performing party in order to enable it to perform; and what exactly was the cause, or were the causes of the delay to performance. This list is not intended to be exhaustive.

145.
The next issue which arises for consideration is in what circumstances it can be said that a contract has been repudiated by reason of the fact that a party has been in breach of an obligation to complete performance of some contractual duty within what would have been a reasonable time. I was reminded by Mr. Hossain of the decision of the Court of Appeal in Charles Rickards Ltd. v. Oppenheim [1950] 1 KB 616. In that case the purchaser of a Rolls-Royce motor chassis wished to have a body built upon it and entered into an agreement for that to be done by a fixed date. The body was not completed by the stipulated date, but the purchaser continued to press for delivery. Delivery did not take place and eventually the purchaser gave a notice that unless delivery of the car with a completed body was effected within four weeks he would cancel the contract. The car was not delivered within the period of four weeks. However, thereafter the plaintiffs sought to deliver the car and, when delivery was not accepted, they sued for the sum due to them under the contract. The leading judgment was that of Denning LJ. He analysed the circumstances which I have summarised in this way, at pages 622 to 624 of the report:-

“If this had been originally a contract without any stipulation as to time and, therefore, with only the implication of a reasonable time, it may be that the plaintiffs could have said that they had fulfilled their contract; but in my opinion the case is very different when there was an initial contract, making time of the essence of the contract: “within six or at the most, seven months”. I agree that that initial time was waived by reason of the requests that the defendant made after March, 1948, for delivery; and that, if delivery had been tendered in compliance with those requests, the defendant could not have refused to accept the coach-body. Suppose, for instance, that delivery had been tendered in April, May, or June, 1948: the defendant would have had no answer. It would be true that the plaintiffs could not aver and prove they were ready and willing to deliver in accordance with the original contract. They would have had, in effect, to rely on the waiver almost as a cause of action..... If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation of substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it....

So, if the matter had stopped there, the plaintiffs could have said, notwithstanding that more than seven months had elapsed, that the defendant was bound to accept; but the matter did not stop there,

because delivery was not given in compliance with the requests of the defendant. Time and time again the defendant pressed for delivery, time and time again he was assured he would have early delivery; but he never got satisfaction; and eventually at the end of June he gave notice saying that, unless the car were delivered by July 25, 1948, he would not accept it.

The question is whether he was entitled to give such a notice, making time of the essence, and that is the question that Mr. Sachs has argued before us. He agrees that, if this were a contract for the sale of goods, the defendant could give such a notice. He accepted the statement of McCardie J., in Hartley v. Hymans, as accurately stating the law in regard to the sale of goods, but he said that that did not apply to contracts for work and labour. He said that no notice making time of the essence could be given in regard to contracts for work and labour. The judge thought that it was a contract for the sale of goods. But in my view it is unnecessary to determine whether it was a contract for the sale of goods or a contract for work and labour, because, whatever it was, the defendant was entitled to give a notice bringing the matter to a head. It would be most unreasonable if the defendant, having been lenient and waived the initial expressed time, should, by so doing, have prevented himself from ever thereafter insisting on reasonably quick delivery. In my judgment he was entitled to give a reasonable notice making time of the essence of the matter. Adequate protection to the suppliers is given by the requirement that the notice should be reasonable."

146.
A little later, at page 626 of the report, Denning LJ said:-

"The case therefore comes down to this: there was a contract by these motor traders, the plaintiffs, to supply and fix a body on the chassis within six or seven months. They did not do it. The defendant waived that stipulation. For three months after the time had expired he pressed them for delivery, asking for it first for Ascot and then for his holiday abroad. But still they did not deliver it. Eventually, at the end of June, being tired of waiting any longer, he gave four weeks' notice and said: "at all events, if you do not supply it at the end of four weeks I must cancel the contract"; and he did cancel it. I see no injustice to the suppliers in saying that that was a reasonable notice. Having originally stipulated for six or seven months, having waited ten months, and still not getting delivery, the defendant was entitled to cancel the contract."

147.
Mr. Hossain submitted that the ability of a party to a contract to give such a notice as was given in Charles Rickards Ltd. v. Oppenheim making time of the essence of performance of a contractual obligation by a specified date depended upon it having been a term of the relevant contract originally that the particular obligation in question be performed by a date as to which time was of the essence of the contract and the benefit of that term having been waived. In any other case, he submitted, the effect of giving what purported to be such a notice was purely evidential, a failure to comply with a notice requiring performance within a specified time, if that was in fact a reasonable time, being evidence of an intention not to perform the relevant contractual obligation. In support of that submission he drew to my attention a passage from the speech of Lord Simon of Glaisdale in United Scientific Holdings Ltd. v. Burnley Borough Council [1978] AC 904 at pages 946E-947A:-

"(4) Time is often spoken of as being "made of the essence of the contract by notice" – a concept which is reflected in the words "or to have become" in section 41 of the Law of Property Act 1925. Nevertheless, the phrase is misleading. In equity, and now in the fused system, performance had or has, in the absence of time being made of the essence, to be within a reasonable time. What is reasonable time is a question of fact to be determined in the light of all the circumstances. After the

lapse of a reasonable time for performance the promisee could and can give notice fixing a time for performance. This must itself be reasonable, notwithstanding that ex hypothesi a reasonable time for performance has already elapsed in the view of the promisee. The notice operates as evidence that the promisee considers that a reasonable time for performance has elapsed by the date of the notice and as evidence of the date by which the promisee now considers it reasonable for the contractual obligation to be performed. The promisor is put on notice of these matters. It is only in this sense that time is made of the essence of a contract in which it was previously non-essential. The promisee is really saying, “Unless you perform by such-and-such a date, I shall treat your failure as a repudiation of the contract.” The court may still find that the notice stipulating a date for performance was given prematurely, and/or that the date fixed for performance was unreasonably soon in all the circumstances. The fact that the parties have been in negotiation will be a weighty factor in the court’s determination. For the foregoing, see Smith v. Hamilton [1951] Ch. 174. To say that “time can be made of the essence of a contract by notice” except in the limited sense indicated above, would be to permit one party to the contract unilaterally by notice to introduce a new term into it.”

148.
I accept the submissions of Mr. Hossain to which I have referred in the preceding paragraph. It seems to me that, correctly understood, the principle laid down by the Court of Appeal in Charles Rickards Ltd. v. Oppenheim is, as such, of limited application, being confined to cases in which the benefit of an express stipulation as to a date for performance has been waived and it is sought thereafter to reinstate a requirement that time is of the essence in relation to performance by a later date. It is clear, in my judgment, from the explanation for his decision, with which the other members of the Court of Appeal agreed, which Denning LJ gave between pages 622 and 624 of the report, in the passage which I have quoted, that it was not intended to extend to any case in which time for performance had not originally been of the essence of the contract. However, it is not only in that class of case that the question can arise whether the failure on the part of a contracting party to perform his obligations within a reasonable time can amount to a repudiation of the contract. This is important in the present case because no notice seeking to make time of the essence in relation to completion of the Services was ever given on behalf of Time. In a case in which time never was of the essence, or in which the benefit of a stipulation that time should be of the essence has been waived and no attempt has been made to reinstate it, the question can still arise whether a delay in performance beyond a reasonable time amounts to a repudiation of the contract which can be accepted on ordinary principles. The issue arose in Universal Cargo Carriers Corporation v. Citati [1957] 2 QB 402, a decision of Devlin J. That the issue can arise and how it should be approached were explained by the learned judge at the beginning of his judgment, at page 426 of the report:-

“This case gives rise to a difficult question. How long is a ship obliged to remain on demurrage, and what are the rights of the owner if the charterer detains her too long? Translated into the terms of general contract law, the question is: Where time is not of the essence of the contract – in other words, when delay is only a breach of warranty – how long must the delay last before the aggrieved party is entitled to throw up the contract? The theoretical answer is not in doubt. The aggrieved party is relieved from his obligations when the delay becomes so long as to go to the root of the contract and amount to a repudiation of it. The difficulty lies in the application, for it is hard to say where fact ends and law begins. The best solution will be found, I think, by a judge who does not try to draw too many nice distinctions between fact and law, but who, having some familiarity both with the legal principle and with commercial matters and the extent to which delay affects maritime business, exercises them both in a common-sense way. This is the sort of solution which, upon the supposition that it was acceptable to business men, the commercial court was created to provide.”

149.
The decision of Devlin J. in Universal Cargo Carriers Corporation v. Citati was referred to and approved by the Court of Appeal in Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1962] 2 QB 26, of which decision I was reminded by both Mr. Hossain and Mr. Kinsky. In particular I was reminded of the test of the circumstances in which a party could be said to have repudiated a contract set out in the judgment of Diplock LJ at page 66 of the report:-

“The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?”

150.
Mr. Hossain submitted that the failure of Astea to complete the Services by 6 March 2001 at the latest amounted to a repudiation of the Contract, applying the test of Diplock LJ. While Mr. Kinsky did not dispute that the formulation of Diplock LJ was a convenient statement of the relevant test, he did submit that its application did not in the circumstances of the present case lead to the conclusion for which Mr. Hossain contended. As an alternative submission he contended that as the Contract, properly viewed, was not one single contract, but separate contracts in relation to the grant of the licences, on the one hand, and in relation to the Services, on the other, with a possible further subdivision between Schedule C and the Addendum, any repudiation on the part of Astea constituted by failure on the part of Astea to complete the Services within a reasonable time was a repudiation of the contract in relation to the Services only and not also a repudiation of the contract by which Time was granted licences to use the Software, which had been discharged by performance upon grant.

151.
The application of the test of repudiation formulated by Diplock LJ in Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. is most straightforward in a case in which no performance at all of the obligations of one of the contracting parties has taken place and there is a straightforward refusal of performance. In any case in which there has been any degree of performance before the alleged repudiation the application of the test requires a qualitative judgment of whether failure to perform the remainder of the obligations of the relevant party will deprive the other party of substantially the whole benefit of the contract judged against the commercial purpose of the contract. It is likely to be necessary to consider not only what has been done, but alsothe value of that to the other party if nothing else is done. However, a flat refusal to continue performance will probably amount to a repudiation however much work has been done. On the other hand, if considerable work has been done in performance of a party’s contractual obligations and what is alleged to amount to a repudiation is not a flat refusal to perform, but an indication of an intention to continue to perform at a speed considered by the other party to be unreasonably slow, it may be very difficult to conclude that in those circumstances what is being offered will deprive the other party of substantially the whole benefit of the contract. On the contrary, it may appear that the innocent party will eventually gain exactly the benefit contemplated. The question will be whether, by reason of the time which will need to elapse before that happens, in commercial terms the party entitled to performance will be deprived of substantially the whole of the benefit which it was intended he should derive from the contract.

152.

Mr. Hossain accepted, rightly in my judgment, that, even if Astea had committed a repudiatory breach of the Contract, that of itself did not bring the Contract to an end. It was necessary for Time to accept such repudiation. He submitted that it was not necessary for a decision to accept a repudiation to be made instantaneously upon the occurrence of the repudiatory breach. The innocent party in such a situation was entitled to a period in which to reflect and make a decision. He relied in support of that submission upon paragraph 87 of the judgment of Rix LJ in Stocznia Gdanska SA v. Latvian Shipping Co. [2002] 2 All ER (Comm) 768. In that paragraph Rix LJ said:-

“In my judgment, there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long, there may come a time when the law will treat him as having affirmed. If he maintains the contract in being for the moment, while reserving his right to treat it as repudiated if his contract partner persists in his repudiation, then he has not yet elected. As long as the contract remains alive, the innocent party runs the risk that a merely anticipatory repudiatory breach, a thing “writ in water” until acceptance, can be overtaken by another event which prejudices the innocent party’s rights under the contract – such as frustration or even his own breach. He also runs the risk, if that is the right word, that the party in repudiation will resume performance of the contract and thus end any continuing right in the innocent party to elect to accept the former repudiation as terminating the contract.”

I accept that submission as correct in principle.

153.
Mr. Kinsky submitted that, in fact, in the light of the inclusion within Astea’s Conditions of clause 8.2, it was not open to Time in any event, even if there had been what would otherwise be a repudiatory breach of the Contract, to bring the Contract to an end by accepting such repudiation. He submitted that clause 8.2 provided exclusively for the circumstances in which the Contract, or any agreement contained within it, could be brought to an end. Thus, he submitted, no written notification of any default having been given in this case, it was not open to Time to terminate the Contract. Mr. Kinsky relied in support of this submission on the decision of Mr. Timothy Lloyd Q.C., as he then was, in Country and Metropolitan Homes Surrey Ltd. v. Topclaim Ltd. [1996] Ch. 307. The issue in that case was the proper construction and effect of condition 6.8 of the Standard Conditions of Sale, 2nd edition, in relation to the giving of a notice to complete a contract for the sale of land. Mr. Lloyd held that that condition provided exclusively for the circumstances in which a notice to complete could be given in respect of a contract which incorporated the terms of the Standard Conditions of Sale, 2nd edition, and that any right at common law to serve a notice to complete was thereby excluded. In the course of his judgment Mr. Lloyd considered the earlier decisions of Walton J. in Rightside Properties Ltd. v. Gray [1975] Ch. 72 and of Mr. Gerald Godfrey Q.C. in Dimsdale Developments (South East) Ltd. v. De Haan (1983) 47 P&CR 1 in relation to clauses as to the service of notices to complete in other sets of conditions governing sales of land. Taking the decision of Mr. Lloyd with the decisions to which he referred together, it seems to me, and I do not think that in the end Mr. Kinsky really disputed this, that the question whether a term in a contract which provides expressly for circumstances in which it can be terminated should be treated as excluding any right at common law to terminate in other circumstances or as conferring a cumulative right, is a question of construction of the term in question. Mr. Hossain submitted that in the case of clause 8.2 of the Contract it was plain that the right granted was in addition to, and not to the exclusion of, common law rights. He relied in particular upon the fact that under clause 8.2 a notice could be served in the event of any breach of contract, not merely a breach which would be repudiatory at common law. I accept the submission of

Mr. Hossain. In my judgment, as was pointed out by Lord Diplock in Modern Engineering (Bristol) Ltd. v. Gilbert Ash (Northern) Ltd. [1974] AC 689 at page 717:-

“It is, of course, open to parties to a contract .... to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law ... But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.”

Clause 8.2 of Astea’s Conditions on its face is intended to provide a mechanism for termination of a contract in which it is incorporated in circumstances in which it would not be terminable at common law. There seems to me to be no warrant for construing clause 8.2 as excluding the rights which Time would otherwise have at common law in the event that the Contract or an agreement incorporated in it was repudiated.

154.
Another point which Mr. Kinsky sought to take in reliance upon Astea’s Conditions was that under clause 6.3, “Astea will also have the option to extend, on a day-for-day basis, the related delivery schedule for each day an invoice [for out of pocket expenses] is past due”, so that for so long as Astea had rendered invoices in respect of expenses which were unpaid, time was at large. Mr. Hossain’s answer to that point, which strikes me as complete, was that whether or not Astea had that option it never sought to exercise it.

155.
Mr. Kinsky submitted that the entitlement of Astea to payment of the sums which it claimed in this action was not contingent upon whether or not it was taken to have repudiated the Contract and that repudiation had been accepted. He relied in support of that submission upon a number of cases. One was Hyundai Heavy Industries Co. Ltd. v. Papadopoulos [1980] 1 WLR 1129. The views of the majority in that case on the basic principle can, I think, be considered as encapsulated in the reference by Lord Edmund-Davies at page 1141 of the report to the observations of Dixon J in McDonald v. Dennys Lascelles Ltd.(1933) 48 CLR 457 at page 476 as follows:-

“In McDonald v. Dennys Lascelles Ltd. (1933) 48 CLR 457, 476, Dixon J said, in a judgment unanimously approved of by this House in Johnson v. Agnew [1980] AC 367, 396:

“When a party to a simple contract, upon breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected.”

Despite an attempt by Mr. Curry to show that hire-purchase agreements are to be distinguished from the ship contract with which this House is presently concerned, they clearly fall within the general proposition propounded by Dixon J.”

Two earlier decisions at first instance in which it had been held that in particular circumstances the defaulting purchaser of goods (in one case) or land (in the other) were able to recover sums paid in part payment of the purchase price were distinguished. Different members of the House of Lords distinguished the earlier cases on different grounds, but the common theme of the majority was that the general principle was as I have set out. That general principle was restated, again by reference to

the statement of Dixon J in McDonald v. Dennys Lascelles Ltd., by Lord Brandon of Oakbrook in Bank of Boston Connecticut v. European Grain and Shipping Ltd. [1989] AC 1056 at pages 1098-1099. I accept the submission of Mr. Kinsky.

156.
Mr. Hossain submitted that in fact, if Astea had repudiated the Contract and that repudiation had been accepted by Time, Astea was not entitled to payment of the sums which it claimed. He contended that the reason for that conclusion was that, in the event postulated, there would have been a total failure of consideration. He relied upon an unreported, decision of H.H. Judge John Toulmin, C.M.G., Q.C., South West Water Services Ltd. v. International Computers Ltd., in which judgment was handed down on 29 June 1999. In particular he relied upon these observations at page 93 of the judgment which followed a consideration of a number of authorities in relation to a total failure of consideration:-

“In my view the hardware did not have any significant value to SWW in itself (except for a minimal second hand value). Equally I am satisfied that the customer contact and workflow SRS did not have any intrinsic value to SWW which would prevent SWW claiming in restitution. In my view SWW did not get any part of that for which they paid the purchase money. They paid the purchase money for ICL to devise and install a computer system to conform to SWW’s URS. They did not receive any part of the Computer System. SWW did not contract in a vacuum to receive management know-how. They contracted to receive management services to enable the computer system to be delivered not as an end in itself.”

With great respect to Mr. Hossain, it does not seem to me that those comments of H.H. Judge Toulmin are of any assistance to him in the circumstances of the present case. Those comments were, no doubt, entirely apposite in the circumstances of the case before H.H. Judge Toulmin, but the concept of a total failure of consideration is only relevant, in my judgment, in circumstances in which a payment has been made and the question is whether there has been consideration for that payment. They are not relevant in the context in which Mr. Hossain sought to rely upon them, namely on the issue whether a payment due under a contract, but not made, remained payable after a repudiation. On that issue, in the light of the authorities relied upon by Mr. Kinsky, the answer is as I have indicated. However, that notwithstanding, if there were a breach of contract which had the effect of depriving Time of any benefit from payments made or due, it is not an adventurous proposition that the amount of the payments made, and the liability to make further payments, should be brought into account in calculating the damages recoverable in respect of the breach. In the end, therefore, my rejection of this submission of Mr. Hossain is without practical effect, in the event that I find that there was a breach of contract on the part of Astea which deprived Time of any benefit under the relevant contract.

Consideration and conclusions in relation to liability

157.
I reject the submission of Mr. Kinsky that the Contract should be viewed in law as two or three contracts, namely one in relation to the grant of the licences to use the Software, one in relation to the provision of the Services, and perhaps treating the Addendum as a separate contract. That analysis strikes me as wholly artificial from a commercial point of view, and unjustified by a consideration of the form and contents of the Contract itself. From a commercial perspective what Time wanted was not the Software in isolation, although it was, I find, capable of use as free-standing, “out of the box” software. What it wanted was the Software customised to its requirements and

integrated with CS/3 and Pulse. The Contract was in form a single agreement behind a front sheet and title page and given a single agreement number. It called itself a “ServiceAlliance License and Support Agreement”, not just a licence. It was, apart from the Addendum, continuously paginated. Schedule C in which the nature of the Services was set out cross-referred to the licence and was given the same number as the agreement generally. The description “Schedule C” itself indicated that that part of the document was a subsidiary part of something larger. By Schedule C it was expressly provided that the Services were to be provided, “In accordance with the Software Agreement”. Astea’s Conditions, which followed Schedule C as the document was presented, were, from their terms, plainly intended to apply both to the grant of the licences and to the Services. Some provisions of Astea’s Conditions, and the terms relied upon by Mr. Kinsky, clauses 6.3 and 8.2, are good examples, could only in practice apply to the provision of the Services. The sole purpose of the Addendum was to modify Astea’s Conditions. While one has to admire the ingenuity of Mr. Kinsky in analysing the Contract as two or three agreements, it seems to me to represent a triumph of analysis over reality.

158.
In the light of my conclusion in the preceding paragraph I find that the Contract was a single agreement and that it was, following the waiver on the part of Time of any insistence that the Services should be completed by 1 August 2000, a term of that agreement by implication of law that Astea should perform the totality of its obligations under that agreement within a time which was reasonable in all the circumstances as they in fact transpired for performance of those obligations in aggregate. Had it been necessary to do so, I should have found that the obligation in clause 15.5 of the Addendum, “Provided Time Group has provided timely assistance and cooperation on its part, the scheduled date of implementation by Astea shall be 1 August 2000”, was not an absolute obligation, subject to satisfaction of the stated condition, but, as a matter of construction, an obligation to use reasonable endeavours to achieve that date. The expresssion “date of implementation” in that sub-clause was qualified by the adjective “scheduled”. If the sub-clause were construed as creating an absolute obligation, subject to the stated condition, the word “scheduled” would serve no purpose. It would be mere surplusage. In my judgment the court should proceed, in construing a term in a contract, on the initial premise that each word included in the express term has been included for a purpose, and should seek to identify, and to give effect to, that purpose, so far as is consistent with the broad approach to construction of written documents indicated by Lord Hoffman in Investors Compensation Scheme v. West Bromwich Building Society [1998] 1 WLR 896 at pages 912- 913, of which I was reminded by Mr. Kinsky. While used as an adjective in clause 15.5 of the Addendum, the word “scheduled” is actually the past participle of the verb “to schedule”. According to The New Shorter Oxford Dictionary, 4th edition, the primary meaning of the verb “to schedule” is “Put or enter in a schedule or list; spec(a) put (something) on a timetable or on a programme of future events”. In my judgment in clause 15.5 the word “scheduled” has the meaning of being put on a programme of future events, and in that sense the date stated was in the nature of a target to be attained if possible, not a date which was to be attained come what may. That date not having been met, or indeed required to be met if possible as matters turned out, the Contract was silent as to any obligation as to the time within which the obligations undertaken by Astea thereunder were to be performed, and thus the usual term which I have indicated fell to be implied as a matter of law.

159.
Although it is not strictly necessary to reach any conclusion about the matter, it does not seem to me that the effect of Mr. Brotherston’s e-mail of 17 October 2000 or any later communications prior to the installation of the integration software on about 14 November 2000 was to vary the Contract so as to

substitute a definite date for performance of the Services in place of the target date of 1 August 2000. The context of the discussion of all relevant dates was a further target to be aimed at, and moreover a target for achievement of a step which both parties recognised was intermediate to completion of the performance required of Astea under the Contract because it related only to the delivery and installation of integration software, not to the completion of the testing by Time of the Software as integrated.

160.
What Astea had to do in order to perform its obligations under the Contract was, essentially, first to provide the Software in “out of the box” form to Time and to grant licences to use it; second, to customise it; third, to develop interfaces to enable it to be integrated with CS/3 and Pulse; and fourth, to assist with the testing of the Software by Time so as to ensure that the objectives of the earlier phases of the work were achieved. Obviously to an extent these operations could overlap, in that, for example, customisation could proceed after development of integration software during the testing phase, because the customised product would not, as such, be required until the Software became operational, which would not be until after successful testing had been completed. In fact, the Software in its “out of the box” form was provided to Time before the Contract was made and the licences took effect upon the making of the Contract. In reality, therefore, the consideration of what would have been a reasonable time for performance of the obligations of Astea under the Contract must be concentrated on the later operations. Of those later operations, the customisation of the Software was within the control of Astea as to how long it took, subject only to being made aware of exactly what customisation Time required. The integration of the Software with CS/3 and Pulse required, first, the development of those packages of software as intended to be used by Time to the point at which they were sufficiently developed or designed for development of interface software by Astea to be practicable, and, second, the provision to Astea of the information as to CS/3 and Pulse requisite to enable Astea to develop the interface software. The testing phase was substantially under the control of Time as to time, for the identification of any difficulties with the interface software and the resolution of those difficulties depended upon the pace of testing undertaken by Time.

161.
Where under a contract work has to be done, and has been done, over a period, and the question arises whether the period over which the work was done exceeded what was a reasonable time, the onus is upon him who asserts that to demonstrate it. That is not simply to restate the burden of proof in civil litigation, but to point out the practical reality. There is no reason for a court to conclude that work could have been done any quicker than it was in fact done unless reasons can be identified as to why that is the correct conclusion. I make that rather obvious point because in the circumstances of the present case the manner in which the case of Time was presented betrayed little recognition of it. It is often the case, where the court is concerned with the undertaking of technical operations and with the issue what would have been a reasonable time for the completion of those operations, that expert evidence is led as to the period or periods which relevant operations ought to have taken as operations if entrusted to persons of appropriate expertise, or as to the expectations of the relevant industry as to the resources which it would have been appropriate to devote to the operations, or as to the impact which particular occurrences ought to have had. However, no expert evidence was led in the present case. In opening Time’s case Mr. Hossain made clear that that case depended upon two main assertions, namely that a comparison of the time scale estimated by Mr. Mapp in his e-mail of 18 June 2000, and Mr. Elbarjaj’s own estimate of 14 August 2000 of how much work was involved in the development of the necessary integration software to interface the Software, CS/3 and Pulse, with the indications in Astea’s invoices of how much time Mr. Elbarjaj in fact spent in developing the

integration software showed that Astea had devoted insufficient resources to the development of the integration software, and that time was lost as a result of the changes in the Astea personnel working on the project. As matters turned out the latter point seemed to become that the resignation of Mr. Elbarjaj and his replacement by Mr. Shergold resulted in Mr. Shergold being either ineffective, or of reduced effectiveness, while he familiarised himself first with the Software and then with the Integration Services which had been performed before he joined Astea. The significance attached to the point about how much work Mr. Elbarjaj in fact did never seemed to come to a firm landing. In particular there was a considerable fog around the comparison of his own estimate of the time necessary and the charges made for his time. The only sensible conclusion seemed to be either that his own estimate was excessive or that in the event resources for which no charge was made were devoted to the necessary work. However that may be, Mr. Hossain submitted that if only Mr. Elbarjaj had started work sooner, or, once he had started work, had devoted all his time and attention to the project, or had had more help, the integration software would have been completed and installed sooner, which would have meant that testing started earlier, which in turn would have meant that the problems encountered during testing would have been identified earlier and solved before they in fact were, so that by 6 March 2001 everything would have been finished. This was all put on the basis of being a common sense conclusion.

162.
The simplicity of the analysis for which Time contended concealed or ignored, as it seemed to me, fundamental difficulties. The most obvious was that, as Mr. Brotherston accepted at the time, and was not disputed before me, Time itself was not ready to receive installation of the integration software earlier than 30 October 2000 because of the continuing problems with CS/3 and Pulse. Thereafter there was a delay of two weeks in installation, principally on account of delay in provision of necessary information and illness. It may be that, had Astea put Mr. Elbarjaj to work sooner, or required him to work full time on the project, the impact of that illness might have been avoided and the integration software would have been ready for installation as soon as Time was able to receive it. However, what is quite clear is that the process of testing by Time took far longer than Mr. Mapp had contemplated back in June 2000. The reasons for this were not seriously investigated at the trial, although continuing problems with CS/3 and Pulse were revealed by the evidence. All of the Time witnesses who were cross-examined about it accepted that the Astea staff involved at this stage were willing and helpful. There was no suggestion that any particular operation of testing, or of modifying software to resolve difficulties encountered during testing, took longer than it should because of a failure of Astea to make staff available or to devote sufficient resources to problem resolution. There was a general suggestion that, had a developer been on site in December 2000 to observe problems as they arose, rather than Mr. Elbarjaj having the problems described to him by Mr. Louden, they might have been resolved sooner, but no solid grounds for that contention were advanced. I have referred to the general point made concerning Mr. Shergold. However, no instance was specified in which his absence from effective duty or inexperience resulted in work not being done which Astea should have done, or in it taking longer than it ought reasonably to have done. In the end the whole flavour of Time’s case that Astea had exceeded a reasonable time for completing the Services was of a “No frills” effort involving minimum expense and effort, at least on the part of everyone on the Time side other than Mr. Hossain, who put up an impressive struggle on Time’s behalf with minimal material. I am not satisfied on the evidence that Astea did exceed a reasonable time in performing its obligations under the Contract, or that it would have done so had it taken as long as Mr. Noble estimated in March 2001 it was likely to to achieve completion.

163.

Even if, contrary to my finding, Astea had been in breach of the Contract as at 6 March 2001 by having taken longer than a reasonable time to perform its obligations under the Contract, it does not seem to me that such a breach would have been repudiatory. Astea had not refused to complete the Services. It was not suggested that as at about 6 March 2001 the resources devoted by Astea to completion of the Services – essentially Mr. Shergold on call as required – were inadequate. It was not suggested that Mr. Noble's indication of an intention to complete the Services was not genuine. In all the circumstances, had I been persuaded that there had been a breach of contract, I should have held that it was one the consequences of which sounded in damages only.

164.
If I had found that there was a breach of the Contract on the part of Astea in taking longer than what would have been a reasonable time to complete performance of its obligations under the Contract and that that breach was repudiatory, I should still have found that that repudiation was not accepted. I have already indicated that I do not accept the evidence of Mr. Tahir Mohsan as to his conversation with Mr. Noble at their meeting on 6 March 2001 and that I prefer the evidence of Mr. Noble, which I am satisfied is correct in every material respect. Perhaps anticipating that conclusion, or at any rate wishing to guard against it, Mr. Hossain contended that Time accepted the alleged repudiation by preventing, alternatively not requiring, further performance by Astea of its obligations under the Contract, or by resisting the statutory demand served on behalf of Astea, or by defending this action, or by advancing a Part 20 claim in this action. Once more these arguments demonstrate the devotion of Mr. Hossain to performance of his duty to his client. However, in my judgment there is no substance in any of these analyses. Whilst recognising the validity of the point made by Rix LJ in Stocznia Gdanska SA v. Latvian Shipping Co. in the passage quoted earlier in this judgment, what happened in the present case was not that Time took an opportunity to consider whether to accept a repudiation on the part of Astea, but that it indicated by Mr. Mohsan that it did not require Astea to continue performance for the time being – the project was put "on hold". That was not done to enable Time to consider whether to terminate the Contract, it was done to give Mr. Mohsan a chance to try and think of a way of manoeuvring Astea into a position in which it accepted that Time was not going to pay the sums due under the Contract. I am completely satisfied that what prompted Mr. Mohsan to wish no longer to proceed with the Software was not any perceived dissatisfaction with the speed at which it was to become operational, but a change of mind on his part as to whether the benefits to Time in its changed circumstances justified the payment of the sum due to Astea.

165.
For the reasons which I have given I find that Astea is entitled to the sums claimed in this action as modified by Mr. Kinsky in opening Astea's case and that the Part 20 claim of Time fails and is dismissed.

Time's alleged losses

166.
Even if I had found that Astea was in breach of the Contract as alleged on behalf of Time, I should still have found that Time had failed to establish that it had suffered any loss by reason of such breach. I should have reached that conclusion on two separate grounds. The first is that I do not accept the evidence of alleged losses put forward on behalf of Time, for reasons which I am about to set out. The second is that I should have found that Time had failed to mitigate any losses by permitting Astea to complete the Services.

167.

Before turning to consider in detail the evidence relied upon on behalf of Time as proving its alleged losses it is material to note that the elements of loss claimed in any event involve impermissible duplication. Time sought to claim both the amount of expenditure said to have been incurred without benefit in connection with the anticipated installation of operational integrated Software, comprising the Lynx Element, the Management Element, and the alleged cost of computer hardware "necessary for the implementation of the System" in an amount of £3,700, and compensation for loss of the benefits of savings of staff costs which it was contended would have followed from successful implementation of an operational, integrated Software. So far as the latter were concerned, it was contended that reductions of three employees, from seven to four, would have been achieved in the "Customer/Admin/Upgrades" department of Time, of six employees, from twenty-seven to twenty-one, in the Logistics department, and of two employees, from twenty-nine to twenty-seven, in the Inventory department. The cost of employing each of the superfluous employees was said to be £8,500 per annum basic wage, plus £1,000 per annum bonus, plus oncosts at 11%. The alleged amounts of wages which could have been saved, so it was said, were claimed from October 2000 to March 2001, amounting to a total of £48,330, with the claim continuing at a rate of £12,082 per month thereafter until December 2002. Mr. Kinsky submitted that Time could not, as a matter of law, recover both compensation for the alleged non-realisation of the benefits expected in terms of savings of staff wages from successful operation of the Software once integrated with CS/3 and Pulse and the costs which would have had to have been incurred in any event in order to achieve those benefits. I think that that proposition is self-evident. However, just in case it was not, Mr. Kinsky reminded me that it had seemed to Sir Raymond Evershed MR to be self-evident in Cullinane v. British "Rema" Manufacturing Co. Ltd. [1954] 1 QB 292. At page 302 of the report Sir Raymond said:-

"It seems to me, as a matter of principle, that the full claim of damages in the form in which it is pleaded was not sustainable, in so far as the plaintiff sought to recover both the whole of his original capital loss and also the whole of the profit which he could have made. I think that that is really a self-evident proposition, because a claim for loss of profits could only be founded upon the footing that the capital expenditure had been incurred."

At page 308 Jenkins LJ expressed the same view.

168.
Whilst noting that there was impermissible duplication in Time's Part 20 Claim, so that, if proved, Time could not recover the full amount of each alleged element of claim, in fact in my judgment Time did not prove any of the elements in any amount whatever.

169.
The evidence in relation to the Lynx Element was particularly unsatisfactory. A breakdown dated 9 November 2000 apparently prepared by Lynx of sums claimed from Time recorded as the sum due in respect of "Astea Integration (X-DTET)" as at that date as £22,000. At paragraph 8.6 of a witness statement made by him dated 18 December 2000 for the purposes of the litigation between Lynx and Time Mr. Devine verified the sum of £22,000 as what Lynx had charged for the work of integrating the Software into CS/3. The composition of the figure of £22,000, a round sum, was not indicated in any evidence put before me. An earlier version of the breakdown, setting out costs as at 16 September 2000, indicated that what was envisaged at that stage was that Lynx, having spent nothing up to that point, would incur contractor costs of £7,040 in the future in relation to "Astea Link". None of the figures which I have mentioned so far in this paragraph are anywhere near the claimed figure of £89,417.50. That figure first appeared in Mr. Tahir Mohsan's witness statement dated 18 June 2001

made in response to the service of a statutory demand on behalf of Astea. At paragraph 15 of that witness statement appeared this sentence:-

“However, a conservative estimate of the cost of the ASTEA project to Time would be at least twice the original estimated cost of £38,050 i.e. £76,100 plus VAT making a total of £89,417.50.”

£89,417.50 is indeed £76,100 plus 17.5% of £76,100. As the Value Added Tax element, if valid at all, would have been recovered by Time as input tax in any event, it plainly cannot form any part of any loss in relation to the Lynx Element. In fact, the cost of work needing to be performed by Lynx in relation to the Software was estimated by Lynx originally, in Mr. Spencer’s e-mail dated 3 July 2000, not at £38,050, but at £28,000. At paragraph 12 of his witness statement dated 10 February 2003 made for the purposes of this action Mr. Tahir Mohsan again dealt with the figure of £89,417.50. This time he said:-

“There is no specific invoice for the Astea/CS3 integration work carried out by Lynx/VI but I estimate that the additional cost to Time for the work carried out by Lynx/VI would be at least twice the estimated costs of £38,050 plus VAT making a total of £89,417.50. Because the ServiceAlliance package was never implemented and was of no benefit to Time these costs were wasted.”

In cross-examination Mr. Mohsan said, for the first time, that the estimate of the amount of the sums paid to Lynx which was referable to work on integration of CS/3 and the Software was not his, but that of Mr. Spencer of Lynx and had been made by Mr. Spencer before the date of Mr. Mohsan’s witness statement. I am satisfied that that assertion was completely untrue and was made up by Mr. Mohsan in the witness box. I reject his evidence as to the sum referable to work on the integration of CS/3 and the Software which was paid to Lynx. There was no other reliable evidence of what sum had been paid to Lynx in respect of this work. All I know is that at one point in September 2000 Lynx contemplated a cost of the order of £7,040, while by 9 November 2000 it seems to have been claiming a sum of £22,000. The dispute between Lynx and Time was settled by payment by Time of a global sum of the order of half the total claimed by Lynx, and there was no evidence of what part, if any, of the sum eventually paid related to work on the integration of CS/3 and the Software. For these reasons I should not have found the Lynx Element proved in any event.

170.
The evidence in support of the Management Element was that of Mr. Sean Slater, who is employed by Time as an IT project manager. What Mr. Slater had been asked to do was essentially to undertake some calculations for the validity of which he was unable to vouch. The calculations involved taking a cost for employing Mr. Anyon, Mr. Brotherston, Mr. Cleaver and others identified only by description, and applying to such cost in each case an assessment of how much time the person or persons concerned spent on working on the Software project. A similar calculation was undertaken in relation to an outside contractor, Mr. David Plant. While in cross-examination he claimed to have some impression, at least, of how much time Mr. Anyon, Mr. Cleaver and Mr. Plant spent working on the Software project, Mr. Slater made no such claim in respect of the others whose alleged costs he had calculated. Where Mr. Slater had an impression it was not based upon any contemporaneous record. The only record of any sort produced by Mr. Slater was copies of the invoices relating to the time of Mr. Plant. Each invoice expressly mentioned an underlying timesheet, but the relevant timesheets were not put in evidence. While I have no doubt that Mr. Slater sought conscientiously to perform the task which he was asked to perform, there was no reliable evidence that the exercise was appropriate in any case. I reject the Management Element as not proven in any event.

171.

Mr. Taylor at paragraph 10 of his first witness statement dated 7 February 2003 commented that, of the hardware purchased to enable the Software to operate, some had been reused by Time. He did not say which, or for what purpose it had been used. He did not say which hardware had not been used or why. In the end I just had no idea which, if any, of the hardware originally purchased for use in connection with the Software had not been of use to Time or what the cost of that hardware had been. This element of claim therefore also fails for want of proof.

172.
It was also Mr. Taylor who gave evidence in support of the claim in respect of loss of the contemplated ability to make staff savings from the introduction to operational service of the Software. At paragraphs 20 to 23 inclusive of his first witness statement Mr. Taylor explained which roles in the various departments to which I have referred would have been able to be dispensed with had the Software become operational. A problem with this evidence of Mr. Taylor was reconciling it with paragraph 24 of the same witness statement, and also with other evidence to which I shall refer. At paragraph 24 of his first witness statement Mr. Taylor said:-

“These staff savings would I believe have continued until about the end of 2002 by which stage Time had further developed Pulse to add some additional functionality to it albeit that this is still someway short of what ServiceAlliance would have achieved.”

In other words, what Mr. Taylor seemed to be saying was that by the end of 2002 the contemplated savings had been achieved anyway through the development of Pulse. If that is right, then it is puzzling that in the meeting held on 21 February 2001 between Mr. Flanagan, Mr. Taylor, Mr. Bond and Mr. Anyon the staff savings which it was contemplated could be achieved through the development of Pulse were a total of six and a half full time employees, not the total of eleven of which Mr. Taylor spoke in his first witness statement. Either the estimate of eleven in total was excessive even if the Software had become operational, or the estimate of six and a half full time posts to be saved through the development of Pulse was overly pessimistic. The whole picture was complicated by two further considerations. The first was that, as Mr. Tahir Mohsan accepted in cross-examination, the thinking behind introducing the Software in the first place did not include the saving of existing staff posts, but rather handling a greater volume of business in the Service Centre without an exponential increase in the number of staff. However, no detailed thought seems to have been given to exactly how an exponential increase would have been avoided. The other complicating consideration was that, in the event, the downturn in the market for personal computers prompted Time to make considerable numbers of staff redundant anyway. Mr. Kinsky submitted that by that means the contemplated staff savings were made in any event. He put that suggestion to Mr. Taylor, who rejected it, asserting that, as it were, even more people could have been made redundant had the Software become operational. Logically that is a sound answer to Mr. Kinsky’s point, as it seems to me, subject to demonstration of where the further redundancies could have been made. In that context Mr. Taylor produced, and attached to his second witness statement, an analysis of manning levels in the Service Centre in each month of each of the calendar years 2001 and 2002. Those showed total staff of 28 in January 2001, 31 in each of February, March and April 2001, falling to 22 in May, 21 in June and 19 for the rest of 2001, save for October, when the number was 17. The year 2002 began with 15 in January, rising to 19 in February, to 21 in March, to 22 in April, to 26 in May, with the number continuing at 25 or 26 until November, when it fell back to 22, rising to 23 in December. The numbers of staff in each month do not obviously indicate scope for shedding 11 posts. Eleven is 35.48% of the largest number of staff recorded in any month, 31. If it were correct that by the end of 2002 Time was in the same position, so far as numbers of staff employed in the Service Centre was concerned, as it would have been had

the Software become operational, then the contrast seems to be between 28, or at most 31, and 23, a saving of 5 or, at most, 8 posts. However, in fact what the figures seem to indicate is a demand which was both dependent upon the health of the market, and seasonal. If one looked below the surface of total numbers of staff, according to Mr. Taylor six of the eleven posts which could have been saved had the Software become operational were in the Logistics department. His analysis showed the numbers employed in that department as 8 in January 2001, 9 in February, March and April 2001, 4 from May to October 2001, but rising to 16 by May 2002 and being 14 in December 2002. In other words, far from saving staff in the Logistics department, if it was in the position at the end of 2002 in which it would have been had the Software become operational, it actually increased in numbers by 6 as compared with January 2001. The “Admin” department, on the other hand, where Mr. Taylor said that three posts could have gone, declined in any event from 6 employees in January 2001 to one in July 2001, at which level it remained until December 2002. That reduction was obviously achieved entirely without reference to the Software. The remaining two posts which Mr. Taylor contemplated could have been saved were in the returns, or inventory, department. On Mr. Taylor’s analysis the numbers employed in that department declined from 9 in January 2001 to 6 by July 2001, and remained at 5 or 6 thereafter until December 2002. Again the reduction was apparently achieved entirely without reference to the Software. Thus of the three departments in which Mr. Taylor asserted that savings in numbers of staff could have been made had the Software become operational, and were made by December 2002, the Logistics department in fact showed a substantial increase in numbers by December 2002 as compared with January 2001, while the savings made in the other two departments were made long before December 2002, namely by July 2001. If one then reminds oneself that the pleaded case of Time in the Re-Amended Part 20 Claim was that a total of 63 employees in the Service Centre could have been reduced to 52, it becomes clear, in my judgment, that the alleged loss of the opportunity to save posts in the Service Centre was illusory. This was just an invented element of claim for which there was never any sound factual foundation.

173.
Mr. Kinsky submitted that even in the case of a repudiatory breach of contract which the innocent party has accepted and thereby brought the contract to an end, the innocent party remains under a duty to mitigate its loss. In support of that proposition Mr. Kinsky relied upon the decision of the Court of Appeal in The Solholt [1983] 1 Lloyd’s Rep 605. I am satisfied that that decision does support the proposition for which Mr. Kinsky contended. Its application in the present case, Mr. Kinsky contended, was that Time ought, even if there had been a repudiatory breach of contract on the part of Astea, to have permitted Astea to have completed the Services in reasonable mitigation of its damages. I accept that submission. By 6 March 2001 the work which Astea had to do to perform the Services was all but complete. What remained was essentially being available to assist Time with any further problems. Time’s testing itself appears to have been well on track towards completion. The principal task to be tackled before the Software could become operational was the training of the relevant Time staff. All the alleged wasted cost losses would have been avoided, and the allegedly lost savings in staff costs for the future at least would have been achieved, if Time had permitted Astea to complete performance of the Services. As I have already said, there was no suggestion that the Software itself was defective or that the Integration Services or the Configuration Services had not been competently performed.

Conclusion

174.

For the reasons which I have set out there will be judgment for Astea in the sum of £214,769.14, together with interest, as to which I will hear Counsel. Time's Part 20 Claim is dismissed.

175.
It only remains to express my gratitude to both Mr. Kinsky and to Mr. Hossain for the careful and thorough preparation each of them undertook of their respective clients' cases and for their clear and concise submissions, which I have found of great assistance.