



Neutral Citation Number: [2024] EWHC 1694 (Comm)

Case No: CL-2023-000250

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 02/07/2024

**Before :**

**THE HONOURABLE MR JUSTICE CALVER**

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**Between :**

**CITYFIBRE LIMITED**

**Claimant**

**- and -**

**GCI NETWORK SOLUTIONS LIMITED**

**Defendant**

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**Yash Kulkarni KC and Paul Toms KC (instructed by Bristows LLP) for the Claimants**  
**Sa'ad Hossain KC and Tim Goldfarb (instructed by Goodwin Procter (UK) LLP) for the**  
**Defendants**

Hearing dates: 17, 18 and 19 June 2024  
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**JUDGMENT**

**This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on Tuesday 2 July 2024.**

**Mr Justice Calver :**

***Summary of dispute***

1. This dispute concerns the proper construction of a Network Access and Maintenance Agreement (“NAA”) dated 11 December 2015 between the Claimant (“**CityFibre**”) and KCOM Group Plc (“**KCOM**”), as amended and novated under a Novation Agreement dated 24 June 2021 between KCOM, the Defendant (“**GCI**”) and CityFibre (“**the Novation Agreement**”).
2. CityFibre is a telecommunications provider that installs full fibre broadband cables for homes and businesses across the UK. GCI is a communications service provider. In simple terms, CityFibre owned and operated the network infrastructure which GCI used to provide internet connectivity to its customers. At least some of this infrastructure is located in premises owned or leased by GCI (“**Locations**”). GCI paid CityFibre a fee to use its infrastructure. GCI has subsequently moved away from using the CityFibre infrastructure by constructing its own network pursuant to a plan which it calls the “**IP Core Network Project**”. It is this fact which has given rise to the dispute.
3. CityFibre commenced these proceedings under CPR Part 8. The parties are, however, in dispute as to the relevant factual matrix to the making of the Novation Agreement and accordingly Mr Justice Robin Knowles ordered that the claim should continue instead under CPR Part 7 and gave directions for this trial of two issues as to liability as follows:
  - (1) Is the project that the Defendant intends to implement to build a new IP core network and to cease use of the existing MANs and LDNs as defined in Sch. 1 of the NAA (the “**IP Core Network Project**”), and which it is implementing, a “Proposed Migration Project” within the meaning of Clause 5.20.1.1 of the Network Access and Maintenance Agreement dated 11 December 2015 (the “NAA”) as novated and amended by letter dated 24 June 2021 (the “Novation Agreement”)?
  - (2) If the answer to Question 1 is “yes”, does Clause 5.20 of the NAA operate to preclude the Defendant from exercising its rights pursuant to Clauses 14.7 and 14.8 of the NAA in connection with the Proposed Migration Project?

*The parties’ relationship*

4. The NAA in its original form was an agreement between KCOM and CityFibre that was entered into as part of a ‘sale-and-leaseback’ transaction by which CityFibre acquired part of the physical infrastructure comprising KCOM’s dark fibre cable network.<sup>1</sup> KCOM was in the business of providing network services to its customers, and the effect of this transaction was that KCOM’s network would operate on physical infrastructure owned by CityFibre. The NAA set out the terms on which

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<sup>1</sup> Paragraph 1 of the List of Common Ground and Issues.

CityFibre would provide KCOM with the use of its fibre assets.<sup>2</sup> KCOM was defined as the “**Customer**” under the NAA.

5. In late 2020, the owners of KCOM approached GCI (among others) in relation to a sale of the part of KCOM’s business that is relevant to this dispute.<sup>3</sup> GCI emerged as the preferred buyer and on 24 June 2021, GCI entered into an agreement to purchase KCOM’s business.<sup>4</sup>
6. On the same day, 24 June 2021, CityFibre, GCI and KCOM entered into the Novation Agreement, which amended the NAA and novated it to GCI and CityFibre. In effect, GCI stepped into KCOM’s shoes in its relationship with CityFibre: it became the “*Customer*” under the amended NAA.
7. GCI, which operates under the brand “Nasstar”, supplies network services (including internet connectivity) to its customers. The NAA sets out the terms on which CityFibre provides services to GCI, which include access to and use of CityFibre’s ‘dark fibre’ network. Dark fibre cable is unlit fibre optic cable which is laid in bulk by a network builder for the purpose of leasing it to others. GCI is currently pursuing its IP Core Network Project, which involves connecting its customers directly to a new network being built by GCI itself instead of relying on CityFibre’s network. As a result of this reconfiguration, GCI will no longer require the use of certain physical locations on CityFibre’s network, which it intends to vacate in order to save costs. The implementing of GCI’s project will lead to CityFibre incurring substantial costs (including in respect of the removing of its equipment from the various locations which it has to vacate).

*Relevant contractual provisions*

8. It is CityFibre’s case that liability for these costs is governed by the new clause 5.20 which is incorporated into the NAA by clause 1.18 of the Novation Agreement. Clause 5.20 provides as follows:

*5.20 The Parties acknowledge and agree as follows:*

*5.20.1 the Customer intends to:*

*5.20.1.1 implement a project to migrate certain End User Connections, reduce its use of MAN Connections and vacate certain related Locations during the Term (the "**Proposed Migration Project**"); and*

*5.20.1.2 review CityFibre’s Ethernet capability and evaluate the use of these products to provide connectivity in relation to existing and new End User Connections in connection with the Proposed Migration Project (each, a "**Proposed Migrated Connection**"). The Customer will, in accordance with the Ethernet Agreement, give CityFibre the opportunity to submit*

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<sup>2</sup> Paragraph 1 of the List of Common Ground and Issues.

<sup>3</sup> Witness statement of Wayne Churchill (“Churchill 1”), paragraph 11.

<sup>4</sup> Churchill 1, paragraphs 12, 25; Paragraph 3 of the List of Common Ground and Issues.

*offers in connection with the provision of Ethernet products in respect of Proposed Migrated Connections;*

*5.20.2 CityFibre will engage and co-operate with the Customer constructively and in good faith in relation to the Proposed Migration Project and related work schedules with respect to the Proposed Migration Project;*

*5.20.3 the Customer will engage and co-operate with CityFibre constructively and in good faith, using reasonable endeavours, to mitigate the impact of the Proposed Migration Project (including the impact of the Customer vacating the Locations) and in relation to the migration of End User Connections;*

*5.20.4 each Party will use reasonable endeavours to preserve CityFibre's interests in the Fibre installed at any Locations that the Customer vacates as part of the Proposed Migration Project; and*

*5.20.5 notwithstanding anything else in this Agreement (including Schedule 4 (Change Control) and Schedule 5 (Operational Processes))<sup>5</sup>, CityFibre will be entitled to recover from the Customer (and the Customer will bear) any costs that CityFibre can demonstrate that it has reasonably and properly incurred directly in connection with the implementation of the Proposed Migration Project (at cost plus a margin of 20%). CityFibre will use reasonable endeavours to mitigate those costs and will take into account any reasonable suggestions from the Customer on measures to reduce those costs.*

9. It follows that clause 5.20 applies to an intended project of GCI to:
- (1) migrate certain End User Connections;
  - (2) reduce its use of MAN Connections; and
  - (3) vacate certain related Locations during the Term.
10. The drafting of the NAA is rather convoluted, with many terms defined by reference to other defined terms which are in places scattered across the main body of the contract, its schedules, and its appendices. The parties agree, however, that the contractual definitions of the key terms are as follows:
- i) *Connection*: Connections shall be comprised of two strands of Fibre (a "Fibre Pair") between an A-End Connection Point and a B-End Connection Point but may traverse other Connection Points. Connections provide a point to point private transmission medium terminating on a pair of single mode ports on the ODF situated at the A-End Connection Point and the B-End Connection Point respectively.

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<sup>5</sup> Schedule 4 and Schedule 5 of the NAA deal with changing and terminating Connections respectively.

- ii) *Connection Point*: Any point of connection to the CityFibre Network via an ODF or Access Joint.
- iii) *ODF*: The primary optical distribution frame at a Location.
- iv) *A-End Connection Point*: A Connection Point designated in Schedule 2 (Existing Connections) or an Order Form (as applicable) as being the A-End of a Connection and connected to a B-End Connection Point via a Connection.
- v) *B-End Connection Point*: A Connection Point designated in Schedule 2 (Existing Connections) or an Order Form (as applicable) as being the B-End of a Connection and connected to an A-End Connection Point via a Connection.
- vi) *Location*: Each place at which a Connection Point is located, including any premises (or any part of premises) or any land owned, leased, controlled or occupied by the Customer (or another member of the Customer Group) or any End User.
- vii) *End User*: The Customer's (or a member of the Customer Group's) end user of the Network at a B-End Connection Point, as specified in respect of the relevant Connection in Schedule 2 (Existing Connections) or the relevant Order Form (as the case may be) and in each case provided that such End User is either: (i) using active services over the Network; or (ii) an Existing Dark Fibre User, a New Dark Fibre User, a New User or a Sole Dark Fibre User.
- viii) *Network*: CityFibre's network.
- ix) *End User Connection*: Any Connection that:
  - a) terminates on an End User Connection Point and terminates on an LDN Connection Point and which may traverse other Connection Points provided such Connection does not traverse more than one Regional MAN; or
  - b) terminates on an End User Connection Point and terminates on a MAN Connection Point and which may traverse other Connection Points provided such Connection does not traverse more than one Regional MAN; or
  - c) terminates on an End User Connection Point and terminates on an End User Connection Point and which may traverse any other Connection Point; or
  - d) any other Connection not being an LDN Connection or a MAN Connection.
- x) *End User Connection Point*: An A-End Connection Point or a B-End Connection Point on an End User Connection.
- xi) *End User Connection Change*: A shift of an End User Connection traversing a MAN Connection Point or LDN Connection Point so that the End User

Connection no longer traverses the Man Connection Point or LDN Connection Point but subsequently bypasses it.

- xii) *MAN or Regional MAN*: Metropolitan area networks, which are regional networks typically configured into metropolitan area diverse rings within a single city or localised cluster of regional cities.
  - xiii) *MAN Connection*: Connections:
    - a) that terminate on an A-End Connection Point and terminate on a B-End Connection Point, each situated on a Regional MAN; and
    - b) may traverse other Connection Points on the same Regional MAN (which may be LDN Connection Points or MAN Connection Points).
  - xiv) *MAN Connection Point*: An A-End Connection Point or a B-End Connection Point on a Regional MAN.
  - xv) *LDN*: Long distance network providing city to city connections.
  - xvi) *LDN Connection*: Connections:
    - a) that terminate on an A-End Connection Point and terminate on a B-End Connection Point, each situated on the LDN; and
    - b) are typically (but not exclusively) associated with different cities on the LDN; and
    - c) may traverse other Connection Points on the LDN.
  - xvii) *LDN Connection Point*: An A-End Connection Point or a B-End Connection Point on the LDN.
11. GCI also relies upon certain parts of clause 14 of the NAA (entitled “Access to Locations”) as follows:

*14.7 The Customer shall be entitled to terminate the rights of access and rights to use any individual Location granted pursuant to Clause 14.2, by serving not less than six (6) months’ prior written notice on CityFibre...*

*14.8 ... CityFibre shall by the expiry of the notice period described in Clause 14.7 ensure that all equipment of CityFibre (including the ODF of CityFibre) is removed from the Location and the Customer shall be entitled to remove such equipment of CityFibre in the event CityFibre fails to do so by the expiry of that notice period. CityFibre shall indemnify the Customer against all liability, losses, damages, costs, Claims, fines and proceedings that may be brought or awarded against the Customer arising from any failure by CityFibre or a member of the CityFibre Group to remove its equipment under this Clause 14.7...*

*Common Ground*

12. It is common ground between the parties that, for the purposes of clause 5.20 of the NAA, the IP Core Network Project involves a reduction in GCI's use of MAN Connections and the vacation of certain related Locations. The dispute concerns whether the IP Core Network Project is or is not a project which GCI intends to implement to "*migrate certain End User Connections*".
13. At the time of the Novation Agreement, it is also common ground that:
  - (1) GCI's customers were connected to CityFibre's network via End User Connections (as defined in Schedule 1 of the NAA as set out in paragraph 10(ix) above) terminating on an Optical Distribution Frame ("**ODF**"). These ODFs (which are owned by CityFibre) were housed in various Locations on the MAN, and each MAN was then connected to the LDN. The fibre cable that connected GCI's customers to the Location(s) and therefore to a MAN (via an ODF) is owned and operated by CityFibre<sup>6</sup>.
  - (2) The buildings which house ODFs at a particular LDN or MAN Location are, for the most part, leased and operated by GCI. Pursuant to the terms of the NAA, CityFibre is provided with access and use of the LDN and MAN Locations for the purpose of housing the ODFs and fibre cables which it owns and operates and in order to maintain its services, including the fibre cables that connect GCI's customers<sup>7</sup>.

*GCI's case*

14. GCI's case is that its *intention* at the time of the conclusion of the Novation Agreement came into being as follows:
  - (1) Prior to the sale of the KCOM National Business and entry into the Novation Agreement, KCOM had a plan to restructure its network by closing customer connections to CityFibre's MANs and instead connecting those customers directly to CityFibre's LDN, bypassing the MANs: see paragraph 7 of GCI's Amended Statement of Case ("**the Statement of Case**"). GCI refers to this as the "**Network Virtualisation Plan**".
  - (2) From around October 2020, GCI was aware of KCOM's Network Virtualisation Plan: see paragraph 8 of the Statement of Case.
  - (3) From at least May 2021 and continuing up to the execution of the Novation Agreement, GCI intended, after it had acquired the KCOM National Business, to continue with the Network Virtualisation Plan, albeit on a shorter timescale: see paragraph 9 of the Statement of Case.
  - (4) Prior to execution of the Novation Agreement, CityFibre knew that GCI intended to continue with the Network Virtualisation Plan by closing down the MANs and connecting customers directly to the LDN: paragraph 10 of the Statement of Case.

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<sup>6</sup> Paragraph 4 of the List of Issues.

<sup>7</sup> Paragraph 5 of the List of Issues.

- (5) This intention was communicated to CityFibre:
- (i) By receipt from KCOM of the KCOM Information Memorandum or “*through other communications from KCOM or others regarding KCOM’s plans*”: paragraph 10.1 of the Statement of Case;
  - (ii) By Mr Shaw of KCOM to CityFibre as part of negotiations prior to completion of the Novation Agreement: paragraphs 9 and 10.2 of the Statement of the Case;
  - (iii) During a meeting attended by representatives of CityFibre and GCI alone on 22 June 2021: paragraphs 10.4 – 10.5 of the Statement of Case.
15. So far as (i) and (ii) are concerned, as Mr. Kulkarni KC for CityFibre rightly pointed out, the documentary and witness evidence does not support the suggestion that CityFibre ever received this Information Memorandum<sup>8</sup> or that Mr. Shaw of KCOM ever communicated to CityFibre GCI’s intentions concerning the Network Virtualisation Plan. So far as (iii) is concerned, I address that below.
16. GCI then argues that the Network Virtualisation Plan, which it intended to implement at the time of the Novation Agreement and which was known to CityFibre, would have fulfilled the requirements of clause 5.20 because it was a project:
- (i) To “migrate certain End User Connections” in the sense of moving or relocating them from terminating in a CityFibre MAN Location to terminating in a CityFibre LDN Location;
  - (ii) to reduce its use of MAN Connections, since network traffic to or from GCI’s customers that were to be connected to the LDN instead of the MAN would not use MAN Connections; and
  - (iii) to vacate related Locations, that is those Locations no longer required by GCI as a result of (i) and (ii) above.
17. GCI then contends that this intention was subsequently abandoned by it and that it is no longer implementing the Network Virtualisation Plan but rather is now implementing the IP Core Network Project, which it alleges has the following (different) features to its originally intended plan:
- (i) The IP Core Network operates through GCI’s routers located at three “super cores” which are connected to 15 locations across the UK, which in turn connect to GCI’s customers via cabling and high capacity fibre infrastructure: paragraphs 14 and 15 of the Statement of Case.
  - (ii) The ethernet which connects to the IP Core Network is owned by Openreach (and accessed by GCI contracting with intermediary providers) or Virgin Media. GCI contracts with those third parties to use the ethernet to connect its

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<sup>8</sup> In any event, the Information Memorandum did not give “any real detail on the Plan” (see paragraph 58 below) and neither party took the court to it in argument.



customers to the IP Core Network, via NNI<sup>9</sup>: paragraph 16 of the Statement of Case.

- (iii) No fibre belonging to CityFibre is used to connect customers to the IP Core Network: paragraph 18 of the Statement of Case.
  - (iv) The IP Core Network is not connected to the existing MAN or LDN networks, or any ODF or fibre connecting to those networks, owned and operated by CityFibre: paragraph 18 of the Statement of Case.
  - (v) Once all of GCI's customers have been connected to the IP Core Network, GCI will not require any MAN Locations, LDN Locations, the MAN or the LDN, or any fibre or other equipment owned and operated by CityFibre at all (or any other services provided by it): paragraph 18 of the Statement of Case.
18. GCI accordingly submits that this IP Core Network Project is not a project involving the migration of certain End User Connections (within the meaning of clause 5.20), since (i) GCI did not intend it at the time of the Novation Agreement; and (ii) GCI is not migrating – in the sense of moving or relocating – CityFibre End User Connections. The project includes the replacement of a CityFibre End User Connection with a new network infrastructure that is not a Connection (as defined), or an End User Connection (as defined), being a connection that is not part of CityFibre's network at all. The customer will cease to be an End User (as defined) for the same reason.

*CityFibre's case*

19. By contrast, CityFibre's case is that:
- (1) It did not know, at the time of the conclusion of the Novation Agreement, what GCI's intentions were for the KCOM National Business which it was purchasing.
  - (2) It was aware that GCI would, subsequent to the KCOM asset purchase, aggressively seek to reduce costs but it did not know and was not provided with the details of GCI's specific intentions as to costs savings.
  - (3) On a true construction of Clause 5.20, any change in the way in which End Users of GCI were provided with connectivity fell within the scope of the clause, whether or not connectivity was provided via CityFibre's network or otherwise.
  - (4) Given the broad language of Clause 5.20, the clause cannot be interpreted narrowly to apply only to the implementation of whatever plans GCI might have disclosed to CityFibre prior to the Novation Agreement even if the communication of those plans forms part of the admissible matrix of fact.

*Principles of contractual construction*

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<sup>9</sup> Network to Network Interface, being a connection between two service providers' networks.

20. The parties agree that the relevant principles of contractual interpretation are correctly and recently summarised in *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821 at [18] and this is the approach that I apply in the present case:

*i) The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see Arnold v. Britton [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;*

*ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20;*

*iii) In arriving at the true meaning and effect of a contract or order, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract or consent order and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 17;*

*iv) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v. Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 per Lord Clarke JSC at paragraph 23;*

*v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 18;*

*vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v. Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 2 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 19;*

*vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v. Capita Insurance Services*

*Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent— see Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 13; and*

*viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11.”*

21. In the present case, it is convenient first to address the natural and ordinary meaning of clauses 5.20 and 14 of the NAA, and then to consider whether there exists any admissible and relevant factual matrix evidence which affects in any way that ordinary and natural meaning.

***The proper construction of clause 5.20***

22. The primary issue before me is whether the IP Core Network Project is a “Proposed Migration Project” within the scope of Clause 5.20 such that CityFibre can, pursuant to Clause 5.20.5, recover from GCI the costs of removing its equipment from the Locations as instructed by GCI.
23. In summary, GCI makes two main submissions as to why the IP Core Network Project does not fall within the definition of “Proposed Migration Project”. First, it argues that the IP Core Network Project was not the project that the parties understood GCI to have intended to pursue at the time the Novation Agreement was entered into. Second, it argues that the IP Core Network Project does not involve a “migration of End User Connections”.

***Intention***

24. GCI’s first argument focuses on the meaning of the words “*the Customer intends to*”. Mr Hossain KC for GCI submitted that the word “intends” limits the ambit of the clause to a project which was in fact intended by the Customer (GCI) at the time the Novation Agreement was entered into. This would require a factual inquiry into GCI’s actual intentions at that date. If the only project which GCI intended on 24 June 2021 was the Network Virtualisation Plan, it follows that any different project for which the intention was formed subsequently is not caught by Clause 5.20. Since GCI asserts that it only formed the intention to develop the IP Core Network Project after 24 June 2021, it is said that Clause 5.20 is inapplicable.
25. I do not accept this argument. Clause 5.20.1 begins with the words “*the Customer intends to*”. The ordinary and natural meaning of those words is that whatever follows them (i.e. Clauses 5.20.1.1 and 5.20.1.2) *is* intended by GCI as a matter of fact, and the parties acknowledge and agree that GCI does indeed so intend. The parties are describing what GCI’s intention is at the time of the novation. There is no obligation upon GCI to act upon the intention(s) it expresses in Clause 5.20.1. Considering the structure of Clause 5.20.1, the words “*the Customer intends to*” applies equally to

- 5.20.1.1 (“implement a project...”) and 5.20.1.2 (“review CityFibre’s Ethernet capabilities and evaluate the use of these products to provide connectivity...”). The agreement is recording the fact that GCI has an intention to do two things: (i) to implement a project to migrate certain End User Connections, reduce its use of MAN Connections and vacate certain related Locations, which is a “*Proposed Migration Project*”; and (ii) to review CityFibre’s Ethernet capabilities and evaluate the use of CityFibre’s Ethernet products to provide connectivity in relation to existing and new End User Connections in connection with that Proposed Migration Project.
26. The drafting of Clause 5.20.1.1 weighs against the interpretation which GCI advances. Taking the opening words of Clause 5.20.1 together with the wording of Clause 5.20.1.1, it is clear that the parties are describing or recording the fact that GCI intends to implement “a” project with three general features of the type then set out. The ordinary and natural meaning of the words used is that any project which corresponds to that description is a Proposed Migration Project.
  27. The wording of clause 5.20.1.2 is also important in construing 5.20.1.1. It provides that GCI intends to “*review ... and evaluate the use of [CityFibre’s Ethernet] products to provide connectivity in relation to existing ... End User Connections in connection with the Proposed Migration Project (each, a ‘Proposed Migrated Connection’)*”. This is inconsistent with an agreed and fixed intention on GCI’s part to implement the Network Virtualisation Plan, which would not have involved the use of Ethernet at all. Further, GCI’s stated intention in 5.20.1.2 was only to “*give CityFibre the opportunity to submit offers in connection with the provision of Ethernet products in respect of Proposed Migrated Connections*”. This means that Clause 5.20.1.2 necessarily contemplates a situation where Ethernet connectivity in relation to existing End User Connections is not provided by CityFibre but by others, which is again inconsistent with the Network Virtualisation Plan.
  28. In reply, Mr Hossain KC argued that the intention referred to in Clause 5.20.1 could only refer to an intention present at the time the Novation Agreement was entered into regarding a project which GCI intended to implement. He argued that clause 5.20.1.2 instead speaks of an alternative future possibility which cannot have been intended to be implemented as part of the Proposed Migration Project because CityFibre’s Ethernet capabilities had yet to be reviewed.
  29. This is not a tenable distinction. Even on GCI’s case, at the time the Novation Agreement was entered into, the Network Virtualisation Plan was a future possibility. Indeed, as has transpired, that possibility has not become reality. In any event, the fact that an “alternative possibility” was expressly provided for in clause 5.20.1.2 renders it even more unlikely that the parties had agreed that the Proposed Migration Project referred only to the Network Virtualisation Plan, despite the general description of “a project” used by the parties in Clause 5.20.1.1.
  30. GCI’s proposed approach is an impermissible attempt to interpret Clause 5.20 in light of what is said to be one party’s subjective understanding of its meaning. Contrary to GCI’s argument, there is no need for the court to determine its subjective intention, nor do the contractual words invite the court to do so. The parties have agreed and recorded GCI’s intention in their agreement.

31. On its true construction, the words “the Customer intends to” are declaratory: they are simply a general statement about what GCI intends to do in the future. The declared intention is set out in Clauses 5.20.1.1 and 5.20.1.2. The remainder of Clause 5.20 then addresses each party’s obligations in the event that GCI implements a Proposed Migration Project in accordance with its declared intention.

*Migration*

32. So far as GCI’s second argument is concerned, GCI’s description of the IP Core Network Project is not disputed. It is common ground between the parties that there has been a reduction in MAN Connections and certain Locations have been vacated in connection with the IP Core Network Project. The dispute is as to the meaning of “*migrate certain End User Connections*” and whether the IP Core Network Project meets that description.
33. At the liability issues hearing, the parties were essentially agreed as to the meaning of the word “migrates” in the context of computing and IT systems: it means a change, movement, or transfer of information, software, or hardware from one environment or system to another. This meaning is sufficiently wide to encompass a shift from one network to another. Mr Hossain KC accepted that moving a customer from CityFibre’s network to GCI’s own network is clearly, in ordinary language, a migration of that customer.
34. The dispute stems from the contractual definition of “*End User Connection*”. Mr Hossain KC’s argument runs as follows. “End User Connection” is a defined term in the NAA – it is a type of “Connection”. A “Connection” is defined by reference to “Connection Points”. “Connection Points” are in turn defined as points of connection to the CityFibre Network. It follows, according to Mr Hossain, that it is unintelligible to speak of migrating “End User Connections” to a non-CityFibre network because what were formerly End User Connections do not, post-migration, remain on the CityFibre network and they are therefore no longer “Connections”, much less “End User Connections”. Accordingly, he concludes that the IP Core Network Project does not involve “migrating End User Connections”, but rather terminating them.
35. Mr Kulkarni KC for CityFibre submitted, in contrast, that the definitions of “End User Connection” and “Connection” in the NAA simply serve to identify the relevant objects that are being migrated. Once identified, it is irrelevant that those objects might not correspond to the definition in the NAA after they have been migrated/moved. In other words, once the End User Connections have migrated to a third-party network, they may no longer be “End User Connections” as defined in the NAA, but that does not prevent the *migration of the End User Connection* from having occurred.
36. In other words, the words “*migrate certain End User Connections*” provide that End User Connections are to be migrated or moved but one is told nothing about *which* End User Connections are being migrated (the definition of End User Connection includes “any other Connection not being an LDN Connection or a MAN Connection”), the destination of the migration, or any further details of such migration. Only the object to be moved is identified by these words.

37. However, importantly clause 5.20.1.2 defines a “*Proposed Migrated Connection*” (i.e. something which it is proposed to be migrated), in connection with the “*Proposed Migration Project*” (as defined in clause 5.20.1.1). It provides that CityFibre has an opportunity to provide connectivity in relation to existing (as well as new) End User Connections in connection with the Proposed Migration Project (which is defined in clause 5.20.1.1), but no more than that. In other words, the contract expressly contemplates a case where ethernet connectivity in relation to an existing End User Connection is not provided by CityFibre but by someone else, such that a customer of GCI (formerly an End User) would no longer access the internet through CityFibre’s network and there would be no connection to the CityFibre network. CityFibre would have the opportunity to submit offers to provide ethernet connectivity, but GCI would not be obliged to accept those offers. Moreover, this is a “migrated” connection: the parties have expressly provided for the possibility of migrating End User Connections onto an Ethernet network, with or without CityFibre. Ethernet services from third parties can be used to provide connectivity to existing End User Connections, and such a change would constitute a migration. Since the agreement contemplates the eventuality that services to GCI’s customers are not provided by CityFibre, it cannot sensibly be concluded that the Proposed Migration Project is limited to the Network Virtualisation Plan or only concerns a situation where GCI’s customers remain connected to the CityFibre network post-migration.
38. This is also the answer to GCI’s argument that the defined term “End User Connection” is being used to identify the subject matter of the migration. In fact, defining the object to be migrated as an End User Connection in Clause 5.20.1.1 is entirely understandable because it specifically identifies the type of Connection with which the Proposed Migration Project is concerned. This is necessary because it distinguishes (a) what is to be done in respect of End User Connections from (b) MAN Connections (which the other words of Clause 5.20.1.1 state are to be reduced) and (c) LDN Connections (which are not reduced and accordingly left untouched).
39. Indeed, the possibilities catered for in Clause 5.20.1.2 provide the reason for the generalised drafting of a non-specific project in Clause 5.20.1.1. At the time the Novation Agreement was entered into, there was no certainty about the form which the Proposed Migration Project would take (as is apparent from the summary of the documentary and witness evidence set out below). The parties knew that GCI intended to carry out a project to reduce the number of MAN Connections and Locations, which, on the assumption that GCI did not wish to lose its customers, would necessitate migrating End User Connections. Clause 5.20.1.1 does not state how the migration is to be effected nor where End User Connections are to be migrated. Clause 5.20.1.2 contemplates that one possible method of migration is onto an Ethernet network which could be provided in whole, in part or not at all by CityFibre.
40. This interpretation of Clause 5.20.1 is also supported by the opening words of Clause 5.20.5: “*notwithstanding anything else in this Agreement (including Schedule 4 (Change Control) and Schedule 5 (Operational Processes))...*” Clause 5.20.5 is valuable from CityFibre’s perspective because it allows CityFibre to recover its costs so long as those costs are “*incurred directly in connection with the implementation of the Proposed Migration Project*”. Schedule 4 deals with changes to Connections, while Schedule 5 addresses the termination of Connections. They each allow

CityFibre to recover less than the amount provided for in Clause 5.20.5, which explains the clear priority conferred upon this bespoke cost recovery provision by the words “notwithstanding anything else in this Agreement” and the references to Schedules 4 and 5.

41. Moreover, the specific reference to Schedule 5 indicates that the termination of Connections was an eventuality which the parties contemplated could indeed occur “*in connection with the implementation of the Proposed Migration Project*”. It follows that the Proposed Migration Project, which is the subject of Clause 5.20, objectively understood, could include both changes to and the termination of Connections. The possibility of GCI terminating a Connection instead of changing it is accordingly consistent with a possibility that GCI would choose a third party to provide network services rather than CityFibre.
42. Mr Hossain KC had no real answer to this point. He pointed out that a new version of Schedule 5 was inserted by the Novation Agreement, but that does not assist him. It is common ground that Clause 5.20 makes specific provision for the consequences of implementing a Proposed Migration Project. Schedule 5 applies to situations where GCI asks for Connections to be terminated or ceased quite apart from any Proposed Migration Project. Schedule 5 does not, either expressly or impliedly, exclude terminating/ceasing Connections from the scope of the Proposed Migration Project. Mr Hossain argued that the Proposed Migration Project could only embrace Connection Changes, but if the parties had a clear common intention or understanding that “*migrate certain End User Connections*” referred exclusively to End User Connection Changes as defined in Schedule 4, one might have expected them to have clearly expressed that common intention/understanding in Clause 5.20.1.1, but they did not.
43. Clause 12.3 of the original NAA (which was left unchanged by the Novation Agreement) states that “*The Parties shall discuss in good faith opportunities to migrate connections that are provided by the Customer’s other third party service providers and that are used by the Customer’s customers onto the Network.*” GCI submits that if the parties had intended to embrace migrating End User Connections away from CityFibre’s network in Clause 5.20.1.1 and on to the network of a third party, they would have used non-defined terms (“connections”) of general application to include third parties, as they did elsewhere in clause 12.3 of the NAA.
44. I do not accept Mr. Hossain’s argument. Clause 12.3 addresses the situation where an object (a “connection”) external to the NAA (and therefore not defined by it) could subsequently come within the terms of the NAA. Such an object necessarily cannot be identified by the use of the defined term “*End User Connection*” because GCI’s customers using third party services are not End Users, so there is no End User Connection which can be migrated. Indeed, the usage of “connection” in this context is consistent with the relevant term simply being used to identify the object to be migrated. Furthermore, the term is no doubt being used to embrace a wide variety of connections generally, and it would be too restrictive to speak only of migrating End User Connections given that third party providers may use different methods to provide internet connectivity.
45. It follows that on an objective interpretation of Clause 5.20 of the NAA, as at 24 June 2021, the Proposed Migration Project was one which involved migrating End User

Connections, reducing the use of MAN Connections, and vacating Locations. There was no common intention or objective agreement about the method and destination of this migration, hence the lack of reference to a specific project and any relevant details. That was left for GCI to evaluate and determine at a later stage. Thus, GCI might splice the cable previously attached to the CityFibre MAN Connection Point to the CityFibre LDN Connection Point; or GCI might migrate the connection to CityFibre ethernet; or GCI might migrate the connection to non-CityFibre ethernet. Indeed, any combination of these options would also have been possible. Each of them would fall within the scope of “*migrate certain End User Connections*” within clause 5.20.1.

46. It is agreed that the IP Core Network Project involved GCI changing the way it provided internet connectivity to its customers. Before the migration, those customers were End Users with End User Connection Points connected to the CityFibre network through End User Connections. GCI’s customers are now connected to GCI’s own network through third party Ethernet connections. This constitutes a migration of End User Connections within the objective meaning of Clause 5.20. If CityFibre can demonstrate that its costs are “*reasonably and properly incurred directly in connection with the implementation of the Proposed Migration Project*”, being the IP Core Network Project, they are recoverable.

#### ***Factual matrix***

47. I do not consider that there is anything in the factual background at the time of the conclusion of the Novation Agreement which alters the proper construction of clause 5.20 (as set out above). Indeed, the factual matrix, in which the Novation Agreement was concluded, is consistent with the construction set out above.
48. In a case such as this, it is important to keep firmly in mind the approach of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), which was approved by Lord Kerr (in a dissenting judgment) in *R (on the application of Bancoult No 3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3 at [103] as follows:

*"Although said in relation to commercial litigation, I consider that the observations of Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm), paras 15-22 have much to commend them. In particular, his statement at para 22 appears to me to be especially apt:*

*"... the best approach for a judge to adopt ... is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has*



*confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

49. I apply this approach, which is apposite to this case. I found most of the witness evidence unhelpful, because it consisted to a very large extent in the witness telling the court what each party allegedly meant by the wording of clause 5.20 (see, by way of example, the witness statement of Mr. Ayres, at paragraphs 15-16; paragraph 16 of the witness statement of Mr. Pedler). The only relevance of the witness evidence is the extent to which it conclusively demonstrates what was known or reasonably available to both parties at the time when the Novation Agreement was concluded. As to that, the answer is not very much, as the documentary record shows that Mr. Churchill of GCI kept his cards very close to his chest in the run up to the conclusion of the Novation Agreement and did not allow CityFibre to learn of GCI's plans for its project other than in general terms.
50. The following sets out the factual background in the run-up to the conclusion of the Novation Agreement in the present case.
51. By 6 November 2020, GCI intended, after it had purchased the KCOM business, to *"transition KCOM customers onto a rebuilt GCI core network, which will be virtualised within the points of presence of Talk Talk or Virgin Media. The objective being to eliminate the KCOM fibre network."* In other words, the KCOM fibre network would be "decommissioned" entirely. This plan was expressly referred to in GCI's presentation paper of that date ("**the November 2020 Presentation**") which concerns its acquisition of KCOM's "Project Tiger" "network virtualisation" infrastructure. The November 2020 Presentation refers to this being a tried and tested route which GCI – in particular Wayne Churchill (CEO) – had adopted before.
52. The November 2020 Presentation then referred to a difference in savings or cost reductions which could be made between the KCOM (Tiger) strategy and GCI's proposed project, explaining that that would occur as GCI intended to use *a third party fibre network*, whereas the KCOM proposal was *itself* to build another fibre network across the UK. This was, therefore, GCI's plan from the outset: to use a third party fibre network.
53. The November 2020 Presentation further stated that in terms of making costs savings, *"network is the largest item and contains charges to interconnect, manage transmission devices, provide electricity and other related services. All will be removed as the new physical infrastructure is constructed and customers are migrated. To be illuminated during year 2"* (emphasis added). It goes on: *"The order of any network migration is firstly to remove the voice<sup>10</sup>, and then migrate the data once this is done there will be no customers using the layer 1 fibre network<sup>11</sup> and it can then be decommissioned. This can be executed in an incremental fashion, decommissioning commencement does not need to be delayed until the end of the synergy project"* (emphasis added).

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<sup>10</sup> "Tiger" was comprised of two principal business activities, namely (i) Voice and data networks and (ii) Cloud Transformation Services.

<sup>11</sup> Being the physical network infrastructure

54. So far as “voice” is concerned, it is stated that “*KCOM operates a legacy voice network on top of the fibre infrastructure. The legacy voice customers are to be migrated to a modern SIP voice service from Gamma, Talk Talk and/or BT. So far as data is concerned, it is stated that “a new layer three network will be built using Virgin Media, BT and/or Talk Talk network infrastructure. We will migrate all customer MPLS, Ethernet and broadband services across and decommission the existing... network” (emphasis added).*
55. It is notable that the November 2020 Presentation suggests that GCI was accustomed to use the word “migration” to simply mean moving customers, data etc from one network infrastructure to another, whether operated by GCI or by a third party.
56. A Network Expert Session, comprised of engineers from KCOM and GCI, was then scheduled for 14 December 2020. Mr. Churchill, who was in charge of this project for GCI, stated in an internal GCI email of 6 December 2020 to Mike Winder and others at GCI:
- “We will need to be careful that at this session we don't make it plain that we want to decommission the whole network, but [with] that in mind we can create the agenda.”*
57. This is because it was indeed GCI’s ultimate intention to decommission the whole of the KCOM fibre network in this manner as part of its project, as set out in the November 2020 Presentation. Mr. Churchill was keen to keep this from KCOM, no doubt because it would weaken GCI’s negotiating hand if it revealed this fact.
58. On 9 December 2020, on behalf of KCOM, Investec sent a Management Presentation on the Project Tiger asset purchase to GCI, including Mr. Churchill. This contained KCOM’s network overview and virtualisation plan. It referred to the fact that “*The [Information Memorandum] doesn’t give any real detail on the plan [to virtualise the network]”* and that:
- “We run a large nationwide network with presents in 97 nodes in 33 major towns and cities.  
Three main long distance network suppliers in CityFibre, Vodafone and Western Power.  
We successfully transitioned from an owned fibre, asset heavy network to an asset light network following the sale and leaseback transaction with CityFibre in 2015.  
CityFibre today provides us with end user fibre, MNS, long distance network, and dark fibre.  
The current contract with city fibre has 11 years remaining however the minimum commitment period expires in January 2021 providing increased flexibility going forward.”*
59. The Management Presentation included a high level plan showing the particular projects to deliver KCOM’s proposed network virtualisation. This included “*CFH MANs to close with redeployment of customers and site rationalisation to the LDN*

node.” And “CFH End User connections to close/ redeployment of customers and site rationalisation.” GCI’s proposed project intended to “transition KCOM customers onto a rebuilt GCI core network, which will be virtualised within the points of presence of Talk Talk or Virgin Media. The objective being to eliminate the KCOM fibre network” (emphasis added).

60. Full decommissioning of the fibre network remained Mr. Churchill/GCI’s plan as can be seen from Mr. Churchill’s email to Mike Winder and Kevin Budge dated 31 January 2021. In his email, Mr. Churchill warned as follows:

*“if the network restructuring project stalls or fails because there is something in there that means in the real world we can't decommission and eliminate the costs at the rate or in the scale that we're forecasting, then the whole business case is holed below the waterline (And by the way the more we tell them about our virtualisation plan the more nervous they will get. I know it's naive because they put the plan forward in their IM<sup>12</sup> but that was and IM, this is much more real. My experience is that the more we share with them about what we actually intend to do then less likely it is they will transact with us).”*

61. As the parties got closer to concluding a deal, KCOM wanted more information about GCI’s plans for its project. As can be seen from Mr. Churchill’s email dated 5 May 2021 to Mr. Winder and Mr. Budge, copied in to Mayfair Equity (who were the private equity owners of GCI), although KCOM were acting on behalf of CityFibre in relaying to them information provided by GCI about the project, Mr. Churchill of GCI and Mr. Shaw of KCOM agreed together to construct a letter for CityFibre which contained a counter-offer supporting novation that “works for both of us”. Mr. Churchill then stated:

*“2. CityFibre has proposed the following:*

*a. 620 Fibre circuits can be cancelled from January 2021 and they agreed to the novation of the network agreement (NAA) subject to all parties entering a settlement agreement on the following terms:*

*i. New spend commitment to buy CityFibre Ethernet and dark fibre for 5.5 years starting June 21 on heavily discounted pricing, amounting to 35 circuits in 2021 and 120 every year after that...*

*In short, I don't think this is an acceptable compromise from CityFibre. I don't think we can fulfil the spend commitment.*

*My opinion is as follows...:*

*We say to KCOM/Oakley that, In the spirit of compromise, we will concede to get this done as follows:*

*1 ...*

*2. We agree a minimum revenue commitment of £1.0m for 10 years for a set of core network locations*

*3. We disclose that we intend to rationalise the network over 24 months from completion, and will cease the circuits in a straight line from November 2021 to July 2023.”*

62. Mr. Shaw and Mr. Churchill then met on 6 May 2021 to discuss a counter proposal to put to CityFibre. Mr. Churchill emailed KCOM on 7 May 2021 to set out GCI's proposed response to CityFibre as follows:

*"We will shrink the KCOM national network down to 14 locations in the UK over 24 months post completion. The principle and the approach is broadly similar to the "network virtualisation" project that was designed by KCOM for Project Tiger, with the principle difference being collapsing the project timeline down to 24 months.*

...

*this 14 site network will then be the core of [GCI] network business and every new customer solution and every new product will be built on top of this core network.*

*Giving consideration to the strategy, we could concede a commitment to CityFibre as follows:*

- 1. we are willing to enter a 10 year agreement with a minimum revenue commitment of £1m per annum for the end state core network as described above.*
- 2. We can give CityFibre a commitment to a first right of refusal on any development and growth of this core network.*
- 3. We would want to build a strong trading relationship to use CityFibre Ethernet, dark fibre and other products, wherever they are competitive, to support new sales."*

63. Mr. Churchill accepted in cross-examination that this told CityFibre very little about GCI's plans and that they were presented "*at a high level of abstraction*" (day 2/p. 157/line 25 to p. 158/line 2).
64. The email exchanges suggest that Mr. Shaw presented this counter offer to CityFibre on 11 May 2021, but it is unclear precisely what he told CityFibre. Mr. Shaw was not called to give evidence.
65. On 30 May 2021 Mr. Churchill explained to Mayfair Equity precisely how the IP Core Network Project would work:

*"It follows that how our network restructure would work then is that we'll close down all the [78 network properties] as planned, shrinking 78 down to 14, and we will move the B-ends<sup>13</sup> of each of these CityFibre end user circuits into our 14 core locations<sup>14</sup>."*

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<sup>13</sup> i.e. the customer ends

<sup>14</sup> Which in turn would be connected to GCI's three "super cores".

66. On 17 June 2021 Mayfair Equity produced an Executive Summary of the proposed GCI project. They stated in particular as follows:

*“The transaction perimeter also includes a UK wide 2200 KM lease network which is a legacy offering and needs to be decommissioned with significant operational effort (i.e. transitioning customers off this legacy fibre onto a modern IP LED system, while terminating underlying fibre supply terms) by [GCI] at a material capital cost (although this also represents one of the key synergy opportunities for us)...*

*Engineering*

*[GCI]’s Plan is for Tiger’s points of presence to be reduced from 77 to 11 over 24 months ... This project is tried and tested having been similarly delivered by Wayne [Churchill] and the Mayfair partners during the Easynet/MDNX investment, when all customers were moved off asset heavy pan European infrastructure onto an asset light network over two years, delivering c. £10m of annualised opex savings...*

*£7.7m of exceptional capex over 24 months is needed to deliver the virtualization project relating to Tigers network infrastructure. [GCI]’s engineering plan assumes that the core network is reduced to 11 key locations, which will require new interconnect partners and the associated costs” (emphasis added)*

67. The plan is accordingly said to be to shrink the core network down to 11 locations and connect via new third party partners.
68. A document called “Tiger Synergy Plan” from around this time refers to the Tiger Network Transformation: *Today: “Legacy National fibre network”; End State: “Next Generation National Fibre Network; Aggregated Circuits (NNIs)<sup>15</sup>.”* This suggests that the overall plan was to move the end users to an entirely new network via the ethernet.
69. On 22 June 2021 a GCI “welcome meeting” took place which was attended by representatives of GCI and CityFibre. This is the meeting referred to above in paragraph 14(5)(iii) above. There are two manuscript notes of this meeting which are broadly consistent, one note (compiled by Mr. Litwin of CityFibre) is fuller than the other (compiled by an unknown employee of GCI), but neither note throws much light on precisely what was discussed at the meeting. Mr. Litwin’s note states in particular:

*“Ethernet aggregation... Critical National locations to support regions. Produce footprint in local area by use of Ethernet ... “E[nd] U[ser] circuits back to ethernet... Direct connection key site to E[nd] U[ser].”*

70. This lends some support to the suggestion that GCI’s plan was for the End User Connections instead to be migrated to direct ethernet connectivity.
71. Mr. Leigh Walgate of GCI attended this meeting and I heard evidence from him. Mr Walgate was part of GCI’s technical team. In his witness statement he states as follows:

<sup>15</sup> NNI is a reference to ethernet connectivity.

*“16. The meeting was led by Nick Gray of CityFibre and Mike Winder of GCI. Mike Winder was my boss at the time. He and I both provided an explanation in relation to GCI’s plans to modernise network connectivity, decommission legacy end-of-life technology (such as voice connectivity services which were no longer required), reduce the footprint of the network, and generally to make the network fit a model more appropriate for GCI’s business. I also explained that this involved closing the MANs and connecting customers to the LDN instead, which was possible as a result of GCI’s intention to remove legacy technology.*

*17. The legacy technology included “SDH” (or “Synchronous Digital Hierarchy”) which was only required to support voice connectivity services i.e. voice calls. This connectivity was no longer needed and would be decommissioned; all legacy voice services in the country will be end-of life by 2025, so we wanted to deal with that head on. This SDH technology was supported by the MANs. As a result of decommissioning SDH, the MANs were also no longer required. Mike Winder and I explained both of these points to the CityFibre attendees at the meeting. We explained that GCI’s intention post-*

*acquisition was therefore to instead connect the existing KCOM customers, who had previously been connected to the network via the MANs, via a direct connection to the LDNs. We expressly referenced the intention to decommission the MANs and to keep the LDNs in place; we wanted to use the LDN as an aggregation point around the country and to connect our customers to that. The MANs were no longer needed.*

*18. The meeting also involved a technical discussion between me and CityFibre’s engineering team about the legacy technology which GCI was about to acquire from KCOM. In particular, we discussed whether the best approach to connect customers to the LDN would be to: (a) re-splice the existing CityFibre fibre which connected customers to the MANs to instead connect those customers to the LDNs; or (b) whether there was the potential to investigate an alternative method that would not entail re-splicing the exiting fibre, but could involve using CityFibre’s NNI (or “network-to-network interface”) to connect to CityFibre’s ethernet services in order to connect GCI’s customers to the LDN.*

*19. GCI’s preferred position was option (a) (i.e. re-splicing the existing fibre). However, as part of the meeting we explored whether CityFibre had plans to build out a national ethernet network that could potentially serve as an alternative to the re-splicing. This was not a proposal for customers to use a separate ethernet connectivity service (for example, in the form that GCI is now using to connect to its IP Core Network through ethernet owned by Openreach, which was developed at a later stage post-acquisition). Rather, it was a potential option to use CityFibre’s ethernet network – instead of the existing fibre - to connect customers to the LDNs.”*

72. I do not accept this evidence. In cross-examination, Mr. Walgate said that the reference in the meeting note to “ethernet aggregation” referred to taking ethernet services from aggregators generally, although he then added that it could also mean taking ethernet aggregation from CityFibre. More importantly, he accepted (Day 2/p. 193/lines 19-23) that there is nothing in the notes of the meeting about GCI closing

the MANs and connecting GCI's customers directly to CityFibre's LDN. He fairly conceded that had GCI made that clear at the meeting, namely that the proposed project was a very specific project to close MANs and connect customers to the LDN, that he would have expected that to be noted. But it was not. This undermines Mr. Walgate's suggestion that he had a "very strong memory of what we said in that meeting."

73. Indeed, this important exchange then took place at 194/lines 1-5:

*"1 Q...So would you agree,  
2 just reading this note, it rather sounds like what you are  
3 talking about is reducing the use of MANs and migrating to  
4 ethernet, rather than connecting directly to the LDN?  
5 A. That's what's written in this document."*

74. Had GCI told CityFibre at this meeting that GCI's intention was to implement *a specific project* to re-splice the existing CityFibre fibre which connected customers to the MANs, so as instead to connect those customers to the LDNs, or to use CityFibre's NNI (network-to-network interface) to connect to CityFibre's ethernet services in order to connect GCI's customers to the LDN, then I consider that it would have been likely that this precise project would have been referred to in (i) clause 5.20 of the NAA; (ii) one of the notes of the meeting on 22 June 2021 and/or (iii) one of the emails passing between the parties at the time. But it was not.

75. On the same day, 22 June 2021, GCI's solicitors, Goodwin Procter, emailed CityFibre's solicitors, CMS, attaching a revised Novation Agreement. This included a change to the "good faith" clause 5.19 (what became clause 5.20) to reflect CityFibre/GCI discussions that day, which read:

*"5.19 CityFibre acknowledges that the Customer intends to migrate certain End User Connections, reduce its use of MAN Connections and vacate certain related Locations during the Term. The Customer intends to review Cityfibre Ethernet capabilities and evaluate the use of these products to provide existing and new End User Connections. CityFibre will engage and co-operate with the Customer constructively and in good faith in relation to the Customer's aforementioned plans and related work schedules with respect to any migration on End User Connections, any reduction of MAN Connections and/or disposal of or withdrawal from Locations. The Customer will engage and co-operate with CityFibre constructively and in good faith, using reasonable endeavours, to mitigate the impact of the Customer vacating the Locations and in relation to the migration of End User Connections, with each party using reasonable endeavours to preserve CityFibre's interests in the Fibre installed at any such Locations."*

76. Again, nothing is said here about this being a specific project to close MANs and connect customers to the LDN in one of the two specific ways suggested by Mr. Walgate. This clause 5.19 gets subsequently broken down into clauses 5.20.1 to 5.20.4 of the concluded agreement.

77. It is clear that on 22 June 2021 GCI had a discussion of some sort with CityFibre about their proposed project. We know this because on 23 June 2021 Mr. Churchill of GCI emailed Mr. Gray of CityFibre asking Mr. Gray not to openly discuss with KCOM the details of the discussion that they had had the previous day about how GCI “*intend to transform the network*”. Mr. Wilson of CityFibre agreed by reply email and also added that CityFibre was drawing up a response to what would become clause 5.20 “*with some reasonable requests around costs we may incur to support this project working collaboratively in a way which supports both parties.*”
78. It is far from clear, however, what was discussed in that respect. Indeed, Mr. Churchill accepted in his evidence that neither costs nor specific timelines for implementing the Network Virtualisation Plan were discussed with CityFibre at any point before the Novation Agreement was concluded (Day 2, page 175 line 24 to page 177 line 8). In re-examination he was taken to a document which suggested that he had shared the timeline with Mr. Tim Shaw at KCOM, but there was no evidence before the court that Mr. Shaw shared that timeline with CityFibre.
79. Had clause 5.20 been concerned solely with the Network Virtualisation Plan (i.e. migrating End User Connections onto CityFibre’s network), I consider that there would no doubt have been a documentary record of Mr. Churchill discussing the timeline of that project with CityFibre and the likely level of costs to be incurred within clause 5.20.5. But there is not.
80. The sending of Mr. Churchill’s email of 23 June led to the email dated 23 June 2021 sent by Mr. Wilson to Mr. Churchill, in which Mr. Wilson refers to the calls (not a meeting) which took place between them on 22 June “*around the network architecture project that [GCI] wish to embark on.*”
81. Again, had there been a discussion of the type suggested by Mr. Walgate at a meeting on 22 June, it could be expected that Mr. Wilson and/or Mr. Churchill would have referred to it in their email exchanges. But they did not. Mr. Wilson explained that CityFibre were happy to include the draft clause 5.19 (which now became 5.20) in the Novation Agreement subject to the following points:

*“(i) CityFibre will be likely to incur costs in carrying out the activities that are required to support Nasstar’s proposed network changes. We’d like to include an acknowledgement that CityFibre will be able to recover these costs (provided they are reasonably and properly incurred) from Nasstar. CityFibre will of course seek to mitigate these costs and will take into account Nasstar’s proposals to reduce them. Please see cl. 5.20.5 below.*

*(ii) Where Nasstar migrates away from End User Connections and onto Ethernet connectivity, CityFibre would like to ensure it has the opportunity to provide that Ethernet connectivity. We would therefore propose to include a ‘first look’ mechanism (on corresponding terms to the provisions that we’ve agreed to incorporate into cl. 12.1A of the NAA) in relation to these replacement Ethernet products in the Ethernet services agreement that is being novated to Nasstar. Please see cl. 5.20.1.2 and the new definition of “Ethernet Agreement” below.*



82. Nothing is said here about this being a specific project only to close MANs and connect customers to the LDN. Rather, this email makes clear that GCI had by now disclosed to CityFibre that its project entailed migrating away from End User Connections and onto Ethernet connectivity generally. CityFibre wanted to have a “first look” at providing the required ethernet products for that purpose but this necessarily implied that a third party or indeed GCI itself might instead provide the necessary ethernet connectivity.
83. Mr. Walgate was asked how his alleged “memory” of what was discussed at the meeting on 22 June fitted with this contemporaneous email. He had no real answer to the point and accepted that the migration project could involve moving away from CityFibre’s network altogether (Day 2/p. 300/lines 1-21):

*MR. JUSTICE CALVER: That is why I put to you surely the  
2 discussions must have been about migrating away to use  
3 ethernet connectivity generally, because otherwise why would  
4 CityFibre be asking to ensure it has got an opportunity to  
5 provide it?*

*6 A. I think for new connectivity there would be an option for  
7 CityFibre to use ethernet generally, and there was definitely  
8 an option discussed to use ethernet, when it was always  
9 discussed as attaching it to the LDN, always discussed as  
10 using the NNI. Having an NNI at the LDN locations.*

*11 MR. JUSTICE CALVER: Then why are CityFibre wanting to ensure that  
12 they have an opportunity to provide it? If the options are  
13 resplicing or CityFibre providing the ethernet connectivity,  
14 why would they be saying, "We must ensure we have the  
15 opportunity to provide it."*

*16 A. I'm not sure why he is saying that.*

*17 MR. KULKARNI: He is saying it because either because of what has  
18 been discussed or not, he is flagging a risk that the  
19 migration project would involve moving away from CityFibre's  
20 network, isn't he?*

*21 A. Okay.*

84. It is also apparent that CityFibre were not made aware of the *extent* to which GCI intended, as part of their project, to give notice to CityFibre to vacate the network properties (i.e. the Locations) and migrate from the End User Connections and onto ethernet connectivity. Mr. Churchill referred to this “leverage” that GCI had over CityFibre in his email dated 24 June 2021 to Mayfair Properties:

*“1. We have had three constructive engagements in the last 3 days at a management and engineering level with Cityfibre in which they have acknowledged that what we are proposing to do is sensible. And they understand the purpose. Moreover the commercial people now see this as an opportunity to grow revenue rather than revenue being lost. I have conceded an incentive in the novation agreement in this respect to confirm their belief.*

*(i.e. a first look commitment on Ethernet orders within the MAN areas, which is now drafted in the NAA).*

...

*3. A detailed discussion with Gordon Moir of Wiggin LLP, a telecoms regulation expert, confirmed that we do have the right to terminate the leases on the network properties on 6 months' notice and whilst Cityfibre can evoke Code Powers to blunt the damage they will suffer, fact is that the disruption to their national roll out will be so significant, that they will have to negotiate with us. I have asked Gordon to draft and advice note on how we manage this, which I should receive over the next day or so. I have already used this in negotiation with Cityfibre and alongside their good faith obligation, I have inserted one upon us in respect of the properties. This is constructive.*

*So, we have considerable leverage over them in point 3 (a factor not to be underestimated)."*

85. On the same date, Mr. Gawn, the in-house counsel for CityFibre sent an internal email in which he stated:

*"We have, as part of the transaction, settled all claims between CityFibre and KCOM and have consented to the novation of our network access agreement from KCOM to Nasstar with effect from the completion date. Over the course of the last few days, we have learned of Nasstar's intentions to move from the current structure (long distance, inter-city metro and end user connections), to a revised network reconfiguration (which moves away from the inter-city metro connections, to migrate end user circuits into our long distance network). We have been through this internally and have included additional clarifications and protections within the document concerning that migration project – including the principle that Nasstar will be responsible for covering our costs in effecting the migration, on a cost plus 20% basis."*

In the same email, in referring to GCI's commitments post-novation he stated (marking up the email in green):

*"First look and right to bid for CityFibre on core/backhaul circuits, not ethernet – this has now been expanded to include ethernet circuits that form part of [GCI]'s migration project."*

86. It is clear from this email that CityFibre were only just now beginning to glean a better understanding of GCI's proposed project. CityFibre now understood that ethernet connectivity was indeed an integral part of the GCI migration project but do not appear to have been told the extent to which GCI intended to migrate onto ethernet connectivity (which might lead to the closing down of numerous Locations) or how GCI intended to do so. Mr. Gawn's email suggests that he understood that there was a plan to move away from the current structure to a revised network configuration which would migrate at least some of the end user circuits into CityFibre's LDN, but he also understood the migration project to have been expanded to include connectivity via ethernet circuits which CityFibre could (only) bid for. Whatever form the revised network configuration took, it is clear that he understood

that GCI would be responsible for covering CityFibre's cost of the proposed migration.

87. In evidence, Mr. Gawn was asked about this email and he explained what he understood GCI's project to be at the time. I consider Mr. Gawn to be a reliable witness and I accept his evidence on this topic which I also consider to be consistent with the documents, or at least not inconsistent with them. In particular he stated as follows (Day 2/p. 111/lines 6-24 and p. 112/lines 7-17):

*“So I would have assumed that the use of the network would have comprised both of some of CityFibre's existing fibre network, which is where the end user connections come into the long distance network, but also that some of the circuits would be provided by way of CityFibre ethernet connectivity and then where our pricing isn't compelling enough that GCI could have bought third party ethernet connectivity. So our pricing I think was set in the document and we tried to push for some sort of, I think my e-mail here says, "First right of refusal" had become a "First look and right to bid" for ethernet circuits. So I think we would have assumed that Nasstar would have used some of the network going forward and they paid, they had agreed to £1 million MRG which we would have assumed they would be paying to use that, but we also would have assumed that some of their end user connections would have been provided by way of ethernet connectivity provided by CityFibre and in some cases provided by third parties. So I don't think one particular network reconfiguration would have been how we had anticipated it going.*

...

*So I would have anticipated that there would almost be four types of circuit that could be used to provide connectivity to those end users, CityFibre ethernet using our LDN, CityFibre ethernet not using our LDN, off net third party ethernet connectivity that CityFibre could set up, or some other form of ethernet connectivity not provided by CityFibre into that site. As I understood it, there are hundreds of these end user connections around the country and so it could be that some of them could be served in any combination of those four different possible solutions.”*

88. In all the circumstances, I find that the precise manner of GCI's intended implementation of its migration project was not clear at the time of the conclusion of the Novation Agreement, and (no doubt consequently) it is only recorded in general terms in clause 5.20 of the NAA. I find as a fact that, at the time when the Novation Agreement was concluded, the manner of implementation of GCI's intended project was not yet finally determined or fixed.
89. In particular, it was not fixed so as solely to move GCI's customers from one part of CityFibre's network to another part of CityFibre's network, nor did CityFibre understand that this was GCI's sole intended manner of implementation of the project. Indeed, CityFibre did not know precisely how GCI intended to implement its intended project. It knew, in general terms, that GCI intended, as part of its project, to reduce its use of certain MAN Connections and instead, in part at least, to utilise alternative ethernet connectivity in respect of both existing and new End User Connections. The parties anticipated that that connectivity might be provided in whole or in part by CityFibre (whether via its LDN or otherwise), but they also anticipated that it might

be provided entirely or in part by a third party or by GCI itself. This was still to be resolved.

90. Mr. Gawn gave evidence that there were a number of possible ways in which GCI could choose to implement its intended project (whether by itself, CityFibre and/or third parties), but he was satisfied that the wording of clause 5.20 was sufficiently broad to ensure that CityFibre would be protected regardless of the precise form which the project ultimately took. Whilst Mr. Gawn's views as to what the effect of clause 5.20 might be are irrelevant and inadmissible, I find that this is indeed, as a matter of construction, the legal effect of clause 5.20.

***Proper construction of clauses 14.7 and 14.8***

91. Finally, and since the IP Core Network Project falls within the ambit of Clause 5.20, the second issue arises, which is “*does Clause 5.20 of the NAA operate to preclude the Defendant from exercising its rights pursuant to Clauses 14.7 and 14.8 of the NAA in connection with the Proposed Migration Project?*”
92. Clause 14.7, which is set out above, allows GCI to serve written notice on CityFibre to vacate a Location with not less than six months' notice. Clause 14.8, also set out above, is conditional upon the expiry of the notice period in Clause 14.7. It allows GCI to remove CityFibre's equipment and claim an indemnity for losses arising out of CityFibre's failure to remove its equipment.
93. Clause 5.20.3 obliges GCI to “*engage and cooperate with CityFibre constructively and in good faith, using reasonable endeavours, to mitigate the impact of the Proposed Migration Project (including the impact of the Customer vacating the Locations) and in relation to the migration of End User Connections*”.
94. I do not consider that, on a proper construction of clause 14.7, the operation of that clause can be precluded entirely by Clause 5.20 because GCI has no alternative power to require CityFibre to vacate the Locations. Having accepted that, Mr Kulkarni KC submitted that Clause 5.20.3 may operate in some situations to preclude GCI from exercising its power under Clause 14.7 to serve a notice to vacate, assuming that such a notice is being served in connection with the Proposed Migration Project. He submitted that serving such a notice might be contrary to GCI's obligation to engage and cooperate with CityFibre in good faith and to use reasonable endeavours to mitigate the impact of the Proposed Migration Project. CityFibre's case is that removing its equipment and vacating the Locations is not straightforward because of “known unknowns” concerning the equipment which might be *in situ*: it may be difficult in any particular case to confirm that CityFibre's equipment can be safely removed and perform that removal within six months as a result.
95. As an illustration of the need for cooperation and the possible adverse consequences of vacating the Locations hastily, Mr Kulkarni KC took me to a set of emails in April 2023 between the parties' solicitors regarding the process of vacating a Location in Nottingham. It seems that GCI (or more accurately Nasstar, which can be treated as the same entity for current purposes) had issued a termination notice for the Location and CityFibre was in the process of vacating it pursuant to that notice. However, CityFibre's personnel were prevented from severing the fibre because it transpired that the cable was still providing connectivity for one of GCI's customers. If the cable

had been severed as required by the notice, the consequences for GCI and its customer would have been very serious indeed.

96. Another example given by CityFibre was of a situation where GCI had given CityFibre notice to vacate but had yet to inform the landlord which owned the Location of such fact. As a result, CityFibre was not in a position to negotiate with the landlord to take over the lease of the Location and was forced to move its equipment at short notice. Mr Kulkarni argues that this would also be a breach of the cooperation obligation in Clause 5.20.3.
97. Mr. Kulkarni KC accordingly submitted that where Clause 5.20.3 is engaged, a notice under Clause 14.7 cannot be served unless CityFibre can safely vacate the Location within six months.
98. Mr. Hossain KC, on the other hand, submits that GCI's power under Clause 14.7 cannot be limited. Mr Hossain KC suggested that the obligation under Clause 5.20.3 could bite after the notice had been served, but it could not affect the minimum notice period of six months stated in Clause 14.7. But this is also an unsatisfactory interpretation. On a plain reading of Clause 5.20.3, it would, for example, be a breach of that provision if GCI served a notice to vacate a Location within six months where on any reasonable view that could not physically be done.
99. I consider the proper construction of clause 14.7 to be as follows. Clause 14.7 grants GCI a right to require CityFibre to vacate a Location except that a *minimum* of six months' notice must be given: "*not less than six months*". Co-operation clause 5.20.3 does not prevent GCI from issuing a notice under clause 14.7 in any particular case, but it may require GCI to afford CityFibre more than six months' notice in a particular case, failing which GCI may be in breach of clause 5.20.3 in not co-operating with CityFibre constructively and in good faith in order to mitigate the impact of the Proposed Migration Project.
100. Similarly, if GCI were to give notice to vacate in respect of a large number of Locations at the same time which caused CityFibre significant logistical problems in vacating the Locations within the timescale set, that too might amount to failure to engage and co-operate with CityFibre constructively to mitigate the impact of the Proposed Migration Project, rendering GCI in breach of clause 5.20.3. Each case will depend on its own facts.
101. The answer to the issue as formulated is therefore "no". Clause 5.20 of the NAA does not operate to *preclude* the Defendant from exercising its rights pursuant to Clauses 14.7 and 14.8 of the NAA in connection with the Proposed Migration Project. GCI has the power to require CityFibre to vacate Locations in connection with the Proposed Migration Project. However, GCI's power under Clause 14.7 is subject to clause 5.20.3. That means that GCI must engage and co-operate with CityFibre constructively in order to mitigate the impact of the Proposed Migration Project when GCI determines the notice period for the termination of CityFibre's rights of access and rights to use any individual Location, failing which it may have acted in breach of clause 5.20.3.

### ***Conclusion***

102. It follows that the answers to the two issues of liability set out in paragraph 3 above are respectively:

(1) Yes.

(2) No. But see paragraph 101 above.