Scottish Hospitals Inquiry (the "Inquiry")

Royal Hospital For Children and Young People and Department of Clinical Neurosciences, Edinburgh ("RHCYP/DCN" or "Hospital" or "Project")

Closing Statement on behalf of IHS Lothian Limited ("IHSL")

Hearing commencing on 26 February 2024 covering the period from Financial Close to the Opening of the Hospital

1. INTRODUCTION

1.1 This is the Closing Statement on behalf of IHSL in relation to the hearing that commenced on 26 February 2024 (the "**Hearing**"). This Closing Statement covers the period from Financial Close to the opening of the RHCYP/DCN. It does not repeat the points covered in IHSL's Closing Submission dated 30 June 2023 but is supplemental to that earlier Closing Submission. That said, given the significance of the events that occurred prior to Financial Close on events that occurred thereafter, there will be some overlap with matters addressed in IHSL's previous Closing Submission.

1.2 This Closing Statement also supplements IHSL's responses to the Inquiry's further Provisional Position Papers 6, 7, 8 and 10.

1.3 IHSL is the Project Company (i.e. the special purpose vehicle) in relation to the RHCYP/DCN and is a Core Participant in the Inquiry. IHSL was granted leave to appear at the Hearing.

1.4 This Closing Statement has been prepared in response to the Closing Statement by Counsel to the Inquiry dated 7 May 2024 and which was circulated to Core Participants by the Inquiry team on that same date ("**Counsel's Closing Statement**").

1.5 This Closing Statement does not seek to respond to Counsel's Closing Statement on a paragraph-by-paragraph basis. IHSL broadly adopts the contents of Counsel's Closing Statement subject to the comments made in this Closing Statement. This Closing Statement includes IHSL's own brief Summary (which summarises what IHSL considers to be the key points from Counsel's Closing Statement and the Executive Summary contained in it). From section 3 onwards, this Closing Statement adopts the same section headings as those used in Counsel's Closing Statement. This Closing Statement is structured as follows:

1.5.1 Section 2 – Summary for IHSL;

1.5.2 Section 3 - the correspondence from IHSL dated 31 January 2019;

1.5.3 Section 4 - Financial pressures on IHSL at the date that SA1 was entered into;

1.5.4 Section 5 - Executive Summary in Counsel's Closing Statement;

1.5.5 Section 6 - Key Themes;

1.5.6 Section 7 - List of Topics;

1.5.7 Section 8 - The questions posed in Terms of Reference 1-12; and

1.5.8 Section 9 - Potential Recommendations.

1.6 The Chair requested Core Participants in Direction 6 dated 22 February 2024 (and the Note by the Chair attached to Direction 6) to address certain matters in their written closing statements. This Closing Statement seeks to address the issues highlighted by the Chair in Direction 6.

1.7 IHSL recognises Counsel to the Inquiry's wish (paragraph 9 of Counsel's Closing Statement) to highlight that it is not the function of the Inquiry to make any determination about parties' rights and obligations or to resolve disputes between them as to the meaning of documents, particularly the correct interpretation of contractual provisions.

2. SUMMARY FOR IHSL

2.1 The issues on the Project arose from a lack of clarity in NHSL's brief. For a project procured using the NPD model to be successful, a very clear brief requires to be set before the final contract is concluded. That did not happen on the Project.

2.2 Many of the witnesses at the Hearing highlighted the importance of a clear and finalised brief or said that on reflection the absence of a clear and finalised client brief caused problems on the Project (Mr Henderson, Transcript, pages 136-137; Ms McKenzie, Transcript, page 77; Mr Greer, Transcript, pages 138, 139,199-200, 204; Mr Maddocks, Transcript, pages 16-18; Mr Templeton, Transcript, page 193).

2.3 The matter of what did or did not constitute NHSL's brief on the Project is controversial, chiefly the status of the Environmental Matrix. The Environmental Matrix was originally created by NHSL and its design team when the project for the design and construction of a new Royal Hospital for Sick Children was intended to be capital funded. A significant amount of time and money had been spent by NHSL on the procurement of the capital funded project. The Scottish Government announced its decision in November 2010 that the new RHCYP with the addition of the DCN were to be delivered as a revenue-funded project using the Scottish Government's NPD model.

2.4 One of the decisions taken by NHSL and Mott Macdonald Limited ("**MML**") (NHSL's Lead Technical Adviser on the NPD project) was to use a reference design. The reference design would harness the design work already undertaken by NHSL and the design team on the capital funded project. Consequently, that design work (and the costs that NHSL had incurred) would not be wasted and the procurement programme for the NPD project shortened. The Environmental Matrix formed part

of the reference design and was developed by MML and its reference design team throughout the reference design period.

2.5 NHSL's clinicians complained of being disengaged from the design discussions (Inquiry's PPP9, Bundle 12, page 353). The clinical team had no real involvement in reviewing the Environmental Matrix (NHSL's 'Chronological Table of Clinical Input into the Design', 2023, Bundle 12, pages 104-109). Robert Menzies (Senior Healthcare Architect for BMJ Architects) referred to the problems encountered by the reference design team members during the reference design period (Witness Bundle Vol 1, page 343).

2.6 On completion of the reference design MML's reference design team gave written assurance that the reference design complied with the relevant Scottish guidance.

2.7 NHSL issued the developed Environmental Matrix to the bidders during the procurement phase. The status of the Environmental Matrix in the bid documents issued to the bidders from the start of the procurement phase in early 2013 is controversial. As late as August 2012, it was NHSL's and MML's intention that the Environmental Matrix that was to be issued to bidders through the procurement period would set out specific parameters and criteria which bidders required to meet (2023, Bundle 2, page 605). In other words, it would act as NHSL's brief. The Inquiry heard that NHSL's and MML's original intention subsequently changed. However, that change was not (or not clearly) reflected in the bid documents.

2.8 The Environmental Matrix was issued to bidders and was described in the bid documents as forming part of the "Room Information" which set out NHSL's specific room requirements. Bidders were required to prepare Room Data Sheets generated from the Activity Database but to "tailor" them to reflect the Room Information. The tender submission requirements indicated that the Environmental Matrix was mandatory and any changes would only be considered on an exception basis. The IHSL bidding consortium considered the Environmental Matrix to be NHSL's brief.

2.9 NHSL, in contrast, does not accept that the Environmental Matrix formed part of its brief. The Environmental Matrix was described as a "draft" and so in its view bidders should have been aware that it could not be relied upon. NHSL considered it was for the bidders to adopt or disregard the Environmental Matrix issue with the bid documents as they saw fit. Mr Maddocks does not offer any view on the status of the Environmental Matrix, but observes in his report (at page 6) that:

> *"the production of a project specific EM would, in my opinion, be viewed by an engineer as a statement of the client's specific requirements unless the contrary intention was clearly stated. There would be no point in issuing such a document unless it contained a client specific project brief. There would be no point in a client issuing a "draft" EM that could not be relied upon by the engineer."*

2.10 That was IHSL's main contractor's (Multiplex) understanding and its sub-consultant designer's understanding of the Environmental Matrix (Mr Pike, Transcript, pages 15-6; Mr McKechnie, Transcript, page 17).

2.11 The Project was unusual in so far as NHSL had decided to use a "reference" design (and not an "exemplar" design, which was up to that date standard practice on PFI/PPP projects). NHSL provided more extensive and more detailed briefing information to the bidders through the reference design than would otherwise have been the case had NHSL adopted an exemplar design. NHSL needed to ensure that by providing more detailed reference design information it did not breach the relevant accounting rules which required comprehensive design risk transfer to ensure that the Project remained "off-book". But NHSL's position is that following Financial Close IHSL could not rely upon any of the reference design. Ironically, while NHSL initially provided more detailed briefing information than would normally be the case through the reference design, if IHSL could not rely on it after Financial Close IHSL was left with little or no briefing information at all (i.e. less than IHSL would have received had NHSL adopted the customary route and used an exemplar design that IHSL would have been able to rely upon as a brief).

2.12 In any event, at the conclusion of the procurement phase there did not appear to be a clear, unambiguous and finalised client's brief. The *status* of the Environmental Matrix at the conclusion of the procurement phase is disputed. NHSL's closing submission following the hearing in May 2023 states that there was no such brief: properly considered, NHSL's "brief", they now say, was set out in the Board's Construction Requirements and specifically the obligation to comply with SHTM guidance. The *content* of the Environmental Matrix at the end of the procurement phase was also disputed. This was demonstrated by the fact that prior to Financial Close NHSL had highlighted certain issues with the Environmental Matrix, amongst them issues of alleged non-compliance with SHTM guidance. This, however, did not prompt a wider review of the Environmental Matrix by NHSL or MML.

2.13 In determining whether or not a health board's brief is sufficiently clear and unambiguous, appropriate consideration needs to be given to the element of judgement and interpretation of guidance which might be necessary for key building systems to meet the board's clinical needs. The health board is the party best placed to identify which output parameters of key building systems (such as ventilation) are essential for the particular clinical uses it has planned for the Hospital. Those output parameters should be specified by the board as part of its brief and not left to the judgement of the project company and its subcontractors during the design phase especially if those subcontractors had limited access to clinicians or the health board's medical planners.

2.14 NHSL's position in its closing submission following the hearing in May 2023 on what constituted its "brief" (i.e. the obligation to comply with guidance) relies wholly on the judgement and interpretation of the designers. If the health board is best placed to identify what output parameters are essential

for the particular clinical uses it cannot rely wholly on the judgement of the designers to second-guess those parameters (especially if those designers have limited access to the health board's clinicians and medical planners). NHSL's position on its brief would help explain the unsatisfactory way that the Environmental Matrix progressed through the RDD procedure.

2.15 The Project demonstrates the risks that can arise if design or specification-related material generated in the context of one funding model is then used, without proper assessment of the risks of doing so, after the funding model is changed. The risks of using the Environmental Matrix from the capital-funded phase were inadequately assessed or mitigated. The Environmental Matrix appears to have been provided by NHSL to bidders with insufficient assessment of how it was to be used.

2.16 Had it been NHSL's intention that the Environmental Matrix was not to be relied upon by bidders and it did not represent its brief, the bid documents failed to clearly reflect that intention.

2.17 The Environmental Matrix at the end of the procurement phased failed to meet NHSL's clinical requirements. This became evident when the dispute around the pressure regime arose in the multi-bed rooms in around 2016. The Inquiry heard at the Hearing of the significant input from clinicians, IPC personnel, estates and technical advisers following the postponed opening of the Hospital in July 2019 prior to the instruction of High Value Change 107 and the execution of Supplemental Agreement 2. The IPC team was involved in risk assessing every clinical space in the Hospital. Arguably, that was the level of input from all relevant stakeholders that should have been provided either (i) before the procurement phase commenced in 2013 (and certainly before the Project Agreement was finalised in 2015) if the Environmental Matrix had been intended as a brief or (ii) during the bid phase with an appropriate programme to accommodate that dialogue.

2.18 The genesis of the problems that ultimately resulted in the RHCYP/DCN not opening as planned was an error in the Environmental Matrix. That is why the Environmental Matrix (and the status of it) has played such a significant part in the parties' submissions and why its status has proved to be so controversial between certain Core Participants. The designers of the ventilation (Wallace Whittle) did not recognise it as an error because it was not inconsistent with its interpretation of the summary recommendations in Table A1 of SHTM 03-01.

2.19 The disputed status and content of the Environmental Matrix was followed through into the terms of the Project Agreement. The interpretation of the relevant provisions of the Project Agreement (particularly around the status of the Environmental Matrix) is also controversial between certain Core Participants. In particular, the relationship between the Environmental Matrix and the Board's Construction Requirements ("**BCRs**") is disputed. The bid documents had consistently pointed towards the Environmental Matrix forming part of the BCRs in the Project Agreement. The BCRs in the Project Agreement required compliance with the Environmental Matrix. However, the Environmental Matrix was identified as being reviewable design data ("**RDD**") and was found in the

Project Agreement alongside the Room Data Sheets (in Schedule 6 Part 6). The Environmental Matrix was not contained in the Project Co's Proposals (those were contained in Schedule 6 Part 4). The status of the Environmental Matrix as RDD led to ambiguity because it became subject to NHSL's approval. The extent to which the Environmental Matrix became subject to NHSL approval through the RDD process is also controversial.

2.20 The RDD procedure is a familiar concept in NPD and PFI/PPP contracts for developing and finalising the design post-financial close. While development of the design can be carried over to the RDD procedure (and, indeed, that is necessary because the design will not be finalised by a bidder through the bid phase before a contract is entered into) the clarification of the health board's brief should not. The RDD process on the Project was used by NHSL to clarify its brief (not just for IHSL and its contractor Multiplex to develop its design) which caused significant problems through the construction period. Consequently, Mr McKechnie expressed surprise at the range and volume of issues that NHSL identified each time the Environmental Matrix was submitted for review and the confusion caused by NHSL challenging the contents of what Wallace Whittle understood to be NHSL's brief. The RDD process might have been appropriate for the Environmental Matrix had there been consensus that it was limited to the few outstanding issues that had been highlighted by NHSL prior to Financial Close. The RDD process was not appropriate where NHSL considered that the whole Environmental Matrix was subject to RDD and felt free to undertake a review on a sample basis and comment each time the Environmental Matrix was submitted for review.

2.21 The significance of all of this lies in NHSL's position that the Project Agreement and the BCRs gave primacy to the SHTM guidance. That position is ill-founded. The Project Agreement and the BCRs did not give primacy to the SHTM guidance: in fact, they gave primacy to the BCRs themselves. This is demonstrated by clause 5.2.4 of the Project Agreement which stated:

> "*5.2 Project Co shall at its own cost be solely responsible for procuring that the Project Operations are at all times performed:*
>
> *5.2.4* ***except to the extent expressly stated to the contrary in the Board's Construction Requirements*** *or the Service Level Specification, in compliance with all applicable NHS Requirements; …"*

2.22 Clause 5.2.4 has its genesis in the Scottish Futures Trust's standard form of NPD project. The purpose of the clause is to enable a procuring authority to depart from NHS Requirements (which includes the SHTM guidance) and to impose its own project-specific requirements.

2.23 Paragraph 2.3 of the BCRs is to the same effect:

> "***unless the Board has expressed elsewhere in the Board's Construction requirements a specific and different requirement****, that Facilities shall comply with but*

not limited to the provisions of the NHS Requirements as the same may be amended from time to time:…. (h) HTM and SHTM…."

2.24 The BCRs communicated NHSL's Project-specific requirements to IHSL. NHSL did not need to demonstrate (at least as a contractual matter) that there had been a formal derogation from NHS Requirements (including SHTM guidance): the BCRs themselves were sufficient to communicate those Project-specific requirements to IHSL. IHSL had no visibility into how NHSL and its professional team had prepared the BCRs or how it had arrived at the relevant requirements contained within them. The IHSL bidding consortium had limited access to clinicians during the procurement phase and would have no or very limited opportunity to question the requirements set out in the BCRs. It was not incumbent upon NHSL to demonstrate any departure from guidance to IHSL by way of a formal derogation. The BCRs themselves had the contractual force of expressing what NHSL's Project-specific requirements were. NHSL's Ian Graham stated at the hearing in May 2023 that he had not realised that, given the drafting, the BCRs could impose a less onerous standard than was contained in the relevant guidance (he had only considered the BCRs imposing a stricter standard).

2.25 This misunderstanding that the Project Agreement and the BCRs gave *primacy* to the SHTM guidance led to a disconnect between what NHSL "wanted" and what was ultimately specified and delivered. This misunderstanding surrounding the primacy of the SHTM guidance is repeated throughout NHSL's submissions to the Inquiry's PPPs and its closing submissions following the hearing in May 2023.

2.26 A significant dispute arose between NHSL and IHSL (and its contractor, Multiplex) during the construction period relating to the pressure regimes in the multi-bed rooms in the Hospital. The dispute did not concern the air changes in those rooms.

2.27 The point of interest for the Inquiry is that this dispute led to NHSL and MML considering in detail and at some length the air change rates and the pressure regimes for multi-bed rooms, including those in Critical Care. NHSL wanted the multi-bed rooms to have a balanced or negative pressure relative to the adjacent corridor because it wanted to cohort infectious patients.

2.28 NHSL's position on the pressure regime in the multi-bed rooms in that dispute was founded upon clinical need. NHSL relied upon the terms of the BCRs, Project Co's Proposals and Good Industry Practice (a term defined in the Project Agreement) as imposing an obligation upon IHSL to design and deliver a system that met that clinical need. This was explained, for example, in NHSL's letter dated 13 March 2018 (Bundle 13, Volume 9, page 92). NHSL threatened legal proceedings against IHSL in which NHSL would have sought court orders compelling IHSL to design and deliver balanced or negative pressure in all the multi-bed rooms (including those in Critical Care, in non-conformance with the SHTM guidance) in order to meet its clinical requirements.

2.29 In the period both before March 2018 and thereafter, NHSL's estates team was focussed on delivering a system that met what the clinicians wanted (Mr Henderson, Transcript, page 71).

2.30 NHSL placed little or no reliance upon the SHTM guidance as a basis for the ventilation system it required IHSL to deliver. NHSL's case was based on clinical need. NHSL developed their requirement for balanced or negative pressure in multi-bed rooms in Critical Care having failed to identify that the summary recommendations in SHTM 03-01 19 recommended positive pressure for those rooms. There was little input from IPC professionals in developing that requirement, but it was developed with MML as the Lead Technical Adviser.

2.31 NHSL Project staff had the requisite knowledge but did not combine it when the requirement for balanced or negative pressure in multi-bed rooms was discussed. Mr Henderson, for example, was familiar with the table of recommended ventilation parameters in SHTM 03-01 but he did not realise that any of the multi-bed rooms under consideration were in Critical Care (even though information pointing to the room locations was readily available to him). NHSL's project clinical director (Janice McKenzie), in contrast, knew that some of the rooms under consideration were in Critical Care but neither she nor the clinicians she consulted were aware that the proposed solution to the pressure regime was a departure from SHTM 03-01.

2.32 NHSL developed their requirement for balanced or negative pressure in the muti-bed rooms based on clinical need. This was a clinical decision which IHSL was unable to challenge (NHSL's position was, after all, that Good Industry Practice demanded it) and a decision that an engineer would be unlikely to second guess. NHSL was best placed to identify which output parameters were required for the ventilation system for the particular clinical uses it had in mind for the Hospital. The primacy on this occasion was given to needs of the clinicians, not the guidance in Table A1 of SHTM 03-01.

2.33 The parties agreed to resolve the dispute through the execution of SA1. The negotiation of SA1 involved detailed and lengthy discussions around the requirements that the ventilation system required to achieve. The Technical Schedule which reflected the "Agreed Resolution" to the disputed ventilation issues was drafted by MML. The Technical Schedule specified 4 ac/hr at balanced or negative pressure for the 14 no. multi-bed rooms. NHSL had previously identified the 14 no. multi-bed rooms that were essential to have balanced or negative pressure at a meeting on 24 February 2017. The air change of 4 ac/hr reflected the room specific sections of the Environmental Matrix. There was no disagreement through the construction period over the air change rate for rooms in Critical Care: for both single and multi-bed rooms in Critical Care, the room specific sections of the Environmental Matrix specified 4 air change per hour and that remained the position throughout.

2.34 Although MML had prepared the Technical Schedule, MML did not consider that it was giving technical advice to NHSL.

2.35 Ms Goldsmiths' evidence was that the technical schedule and agreement in SA1 made it very clear what NHSL had agreed; it documented what NHSL had agreed met its brief and essentially what NHSL was buying; it made crystal clear where there wasn't clarity previously (Ms Goldsmith, Transcript, page 43). IHSL, and its contractor Multiplex, designed and delivered the ventilation system as clarified by NHSL and specified in SA1 as it was contractually obliged to do.

2.36 Malcolm Wright highlighted in his evidence the importance of getting "*the right people in the right places with the right skills"* (Wright, Transcript, page 6). SHTM 30 had highlighted the need for a partnership model which brought the relevant disciplines together. Had all the correct stakeholders been involved in late 2016/early 2017, when clinicians first expressed their clinical requirements for the system, the issues which led to the opening of the Hospital being postponed may have been identified much earlier. Too much weight appears to have been given to the clinicians' requirements for the ventilation system with insufficient input taken from IPC or technical advisers. NHSL appeared determined to deliver what the clinicians required: not all the relevant disciplines were involved at the right times.

2.37 Similarly, had all the relevant disciplines been involved in early 2018 when NHSL clarified its requirements through the discussions around SA1, the disconnect between what NHSL absolutely required to deliver a compliant hospital (compliance with the summary recommendations in Table A1 of SHTM 03-01) and what it told IHSL it wanted, would have been identified. The summary recommendations in Table A1 recommended 10 ac/hr and +10Pa in Critical Care areas. Those parameters had never been specifically noted in any of the technical documents in either the Project Agreement or SA1 and NHSL had never asked for those parameters. MML's position was that it did not provide technical advice to NHSL on the agreed solution in SA1 (notwithstanding that it had drafted the Technical Schedule and recognised that it was responsible for advising NHSL on compliance with SHTM guidance). MML considered it could not provide technical advice: it was concerned that the design risk transfer could be disturbed.

2.38 The decisions on ventilation of such significance as those taken by NHSL in early 2017 (when the requirement for balanced or negative pressure was first identified and developed) and in early 2018 (when legal proceedings were threatened and then a resolution reflecting clarification of the brief was agreed) required input from all relevant disciplines and stakeholders. Those were not decisions that could be taken solely by the clinicians and NHSL's project team. Had the ventilation issues been addressed by a group such as the Ventilation Safety Group (recently introduced by the new version of SHTM 03-01) the issues that led to the opening of the Hospital being postponed could have been identified much earlier.

2.39 In early January 2019, the Cabinet Secretary instructed Director General of Health and Social Care (Paul Gray) to write to all NHS Boards seeking assurance around maintenance and inspection standards. On 25 January 2019, Paul Gray wrote to the health boards seeking assurance on

maintenance and inspection standards. NHSL wrote to IHSL on 28 January seeking that assurance. IHSL, in turn, sought that assurance from Multiplex and BYES as its contractors. In addition to addressing maintenance and inspection matters (i.e. those matters with which Paul Gray's letter were concerned) Multiplex's letter of 31 January also referred to design, installation and commissioning being in accordance with SHTM 03-01 "as required". This was, in turn, reflected in a letter from IHSL to NHSL dated 31 January 2019. NHSL now say that they took a significant level of assurance from the letter of 31 January 2019. But NHSL wrote a further letter to IHSL on 12 February 2019. On that occasion, NHSL did specifically request assurance from IHSL regarding design and installation matters regarding building systems. IHSL's response was given to NHSL by letter dated 13 March 2019. That response made clear that the building systems in the Hospital had been designed and installed in accordance with the relevant standards in the Project Agreement as varied by SA1. When read in context, the 31 January 2019 letter was understood by NHSL at the time as addressing maintenance and inspection matters, hence the need for a follow-up letter on 12 February 2019 seeking assurance on design and installation matters.

2.40 The Cabinet Secretary made the decision not to open the Hospital on 4 July 2019 after testing carried out by IOM identified that certain rooms in Critical Care did not have positive pressure and 10 ac/hr. This decision was on the basis that the non-compliance with SHTM 03-01 was equated with a risk to patient safety.

2.41 No risk assessment was undertaken at the time to assess the risk of having 4 ac/hr as opposed to 10 ac/hr. The Scottish Government's position was that the Hospital was required to comply with the guidance. Consequently, there was no concluded assessment of the risk presented by the ventilation as installed compared to the ventilation parameters recommended by the guidance.

2.42 NHSL issued High Value Change 107 ("**HVC 107**") pursuant to the Project Agreement which included works to ensure that single bedrooms and multi-bed rooms in Critical Care achieved 10 ac/hr at +10Pa. Those are the parameters identified in the summary recommendations in Table A1 of SHTM 03-01. NHSL and IHSL entered into Supplementary Agreement 2 to give effect to HVC 107. The Hospital had a phased occupation commencing in April 2020 and became fully operational on 23 March 2021.

3. THE CORRESPONDENCE FROM IHSL DATED 31 JANUARY 2019

3.1 The Inquiry heard evidence at the Hearing on the correspondence which was issued by IHSL to NHSL dated 31 January 2019. The background to the letter from IHSL to NHSL dated 31 January 2019 is summarised in paragraphs 141 to 146 of Counsel's Closing Statement.

3.2 It is IHSL's position that the letter dated 31 January 2019 requires to be considered in its proper context.

3.3 That context is explained in the witness statement of Jeane Freeman (Witness Bundle, Volume 1, page 160 at page 170). Ms Freeman states at paragraph 34 of her statement:

> *"In January 2019 we had what had been referred to by some as the "Pigeon Incident" (the reporting of deaths where potential infection caused by pigeon droppings was a "contributing factor") at the QEUH. Once I became aware of the very concerning issues at QEUH, I wanted a greater level of assurance that the issues arising were being given particular attention by the Chief Executives in all our territorial boards, particularly those with ongoing infrastructure projects of all sizes, and that standards were being complied with. I instructed Paul Gray, as the Director General of Health and Social Care, to write to all NHS Boards to that effect, which he did. A letter was sent by Paul Gray to all the Chief Executives of the Health Boards in Scotland. It included a section relating to assurances being sought that all critical ventilation systems were being inspected and maintained in line with SHTM 03-01. This was to make sure that any maintenance issues were being followed through and that they were maintaining an adequate maintenance programme. The focus was on maintenance of existing estate because, at least in part, the issues arising at QEUH appear to have been exacerbated or contributed to by inadequate maintenance".*

3.4 On 25 January 2019, Paul Gray wrote to Scotland's health boards along the lines instructed by Ms Freeman. Having received Paul Gray's letter, NHSL then wrote to IHSL by letter dated 28 January 2019. The focus of that correspondence was on inspection and maintenance. IHSL, in turn, wrote to Multiplex and BYES reflecting the terms of the letter which it had received from NHSL. This resulted in Multiplex's written response to IHSL dated 31 January 2019 and IHSL's response to NHSL that same date. In addition to addressing maintenance and inspection matters (i.e. those matters with which Paul Gray's letter were concerned) Multiplex's letter of 31 January (and, in turn IHSL's letter to NHSL) also referred to design, installation and commissioning being in accordance with SHTM 03-01 "as required". Darren Pike was the author of Multiplex's letter 31 January 2019 and explained the preparation of that letter in his evidence at the Hearing (Mr Pike, Transcript, page 64 onwards) and any drafting ambiguity in it.

3.5 NHSL has suggested in its submissions to the Inquiry that it took significant assurance from that letter. However, Susan Goldsmith's evidence (Goldsmith Transcript page 70) was that NHSL took assurance "*but …we wouldn't have expected anything else, so I think we noted it and accepted it but that's probably as far as it went, to be honest".*

3.6 It is critical to note that NHSL's Brian Currie wrote further to IHSL on 12 February 2019 (around two weeks after that earlier letter dated 28 January) seeking written assurance on various matters, including specifically that "*engineering systems have been designed and are being installed and commissioned to meet current guidance and statutory requirements."* (Bundle 13, Vol.7 page 427).

Mr Currie's letter was copied to Susan Goldsmith as NHSL's Director of Finance. In contrast to NHSL's earlier letter dated 28 January 2019 (which concerned inspection and maintenance), NHSL's subsequent letter of 12 February 2019 did specifically address design, installation and commissioning of the ventilation systems.

3.7 IHSL wrote to Multiplex in the same terms as NHSL's letter dated 12 February 2019. Multiplex responded to that letter on 6 March 2019. In its response Multiplex confirmed that the ventilation system had been designed and installed to "*meet the relevant Construction Contract standards, as varied by the Settlement Agreement*." IHSL responded to NHSL's letter on 13 March 2019 (Bundle 4, page 246). In that response, IHSL stated that the engineering systems had been designed, installed and commissioned to meet the relevant Project Agreement standards as had been amended by SA1.

3.8 Had NHSL taken the level of assurance from the letter dated 31 January 2019 that is now suggested, there would have been no need for NHSL to have issued a further letter (around two weeks later) specifically seeking assurance on design and installation. It appears that, at the relevant time in January/February 2019, NHSL had understood IHSL's letter dated 31 January 2019 to be responding to the matters set out in NHSL's request of 28 January (i.e. inspection and maintenance matters). That is, NHSL understood IHSL's response in the relevant context of inspection and maintenance.

3.9 Had any assurance been taken by NHSL from the letter dated 31 January 2019, such assurance must have been short-lived because it was quickly superseded by NHSL's further request of 12 February 2019.

3.10 NHSL's further letter dated 12 February 2019 seeking assurance on the design and installation of engineering systems was issued 10 days before NHSL and IHSL executed SA1. NHSL's request for assurance around the design and installation was still extant, and IHSL's response still pending, at the date that SA1 was executed. NHSL executed SA1 notwithstanding that extant request for assurance on design and installation thereby demonstrating that NHSL took no real assurance at all from the letter of 31 January 2019 with regards to design and installation issues.

4. THE FINANCIAL PRESSURES ON IHSL AT THE DATE SA1 WAS ENTERED INTO

4.1 The Inquiry heard evidence at the Hearing on the financial pressures on IHSL when SA1 was executed in February 2019.

4.2 At paragraph 15, Counsel's Closing Statement states that SA1 was signed against a backdrop of financial pressure on IHSL. That is a fair summary of the position. However, some of the witnesses at the Hearing speculated on the extent of those financial pressures. Likewise, certain parts of Counsel's Closing Statement make statements around the extent of those pressures which are speculative and not supported by any evidence heard at the Hearing. There is a significant degree

of speculation in the witness evidence (particularly the NHSL witnesses) around the perceived risk of IHSL entering into insolvency which might have ultimately resulted in the Scottish Government having to pay £150m for the Hospital. The figure of £150m is also speculative: any such figure would have been subject to complex calculation or valuation through the provisions of the Project Agreement upon termination and those circumstances did not arise. Ms Goldsmith stated in her evidence that she was not sure how this calculation was made (Transcript, page 64). The figure can only be described as indicative.

4.3 Whilst it might be said that SA1 was signed against a backdrop of financial pressure on IHSL (given the delay in concluding the terms settling the parties' disputes which, in turn, led to a delay in the Hospital being certified as Compete), the "risk" of the company entering into insolvency was not one that the Scottish government considered to be a likely outcome (Alan Morrison Transcript, pages 113-114).

4.4 Mr Morrison explained to the Inquiry that when he was considering NHSL's business case for SA1 he did not consider this to be a realistic risk. Had it been a real risk it would have been escalated right up to the Cabinet Secretary. Mr Morrison's recollection was that he may have touched upon it with the Cabinet Secretary, but it was more along the lines of "*there is this possibility*". Mr Morrison's view was that it if it had been a real possibility of that being the outcome that would have been signalled very clearly to the Cabinet Secretary, but it was not. Mr Morrison's evidence was that he did not think that he was ever truly concerned that he may be at the point where he needed to speak to his central finance team asking for £150m. It was a risk he was aware of but didn't ever feel was a particularly likely outcome.

4.5 Jeane Freeman did not have any recollection of IHSL being in any form of financial distress (Transcript, page 36).

4.6 IHSL's Mr Templeton acknowledged that there would be the potential risk of insolvency but there would have been a number of different options available to the shareholders of IHSL, such as having further discussions with Multiplex with respect to liquidated damages, dialogue with the Senior Lenders regarding any restructuring or further injection of subordinated debt by shareholders. Further options may have included the pursuit of legal proceedings by IHSL (upstream against NHSL and/or downstream against Multiplex) or exercising such other contractual protections that IHSL may have had in place.

4.7 Had IHSL or the Senior Lenders taken no measures then it could be said that there would have been a risk of insolvency. But that speculates on what measures might have been taken had SA1 not been executed but that is an entirely hypothetical issue. The likelihood of either IHSL or the Senior Lenders taking no measures to prevent an insolvency, however, could be considered to have been remote.

4.8 NHSL appears to have made a different assessment of the perceived risk to the assessment made by the Scottish Government. In its submissions to the Inquiry, NHSL has gone so far as to describe SA1 as in effect being a "bailout" of the Project. Not only is such a view inconsistent with the evidence, but also this was not a view shared by the Scottish government which provided the additional funding for NHSL's financial contribution in SA1 (Alan Morrison, Transcript pages 125-125). Mr Morrison explained that he would not describe SA1 as a "bailout". His view was that "*it was more that it was necessary to get the project to the point where it was completed, the Hospital was handed over and services delivered to it*."

4.9 It is significant to note that parties agreed to resolve their disputes through agreement (rather than through legal proceedings) in around March 2018. But SA1 was not executed by the parties until 22 February 2019. Had NHSL truly considered SA1 to be a "bailout" at the time or had it been NHSL's intention to avert the threat of insolvency, NHSL could have taken steps much earlier that would have alleviated the financial pressures. For example, Multiplex had undertaken the reconstruction works on the ventilation system to reflect what NHSL wanted in the period from around May to October 2018. When it became evident that the negotiations to conclude SA1 were taking far longer than parties had first anticipated, IHSL proposed that a separate agreement around the completed ventilation works may have been capable of being carved out from the other issues to be addressed in SA1. Multiplex had undertaken and completed those ventilation works at its own risk. IHSL's suggestion for a separate settlement reflecting the value of the ventilation works undertaken by Multiplex was made in November 2018 but it was not taken up by NHSL (Mr Templeton's Witness Statement, Witness Statement Bundle Volume 3, page 244 at paragraph 129). Had NHSL wished to "bailout" the Project it could have taken earlier opportunities to alleviate any financial pressures, but it did not do so.

4.10 The reality was that NHSL had told IHSL in March 2018 that if handover of the Hospital had not been achieved by 31 October 2018, then the earliest that NHSL would accept handover of the Hospital would be February 2019 (Bundle 13, Volume 9, at page 10). NHSL had no contractual entitlement to dictate when it would accept handover of the Hospital: that was a matter for the Independent Tester to certify when the Hospital was considered complete. The certification of completion was, however, intrinsically linked to the execution of the SA1. That was because the agreed requirements to which the Hospital had been constructed were contained in SA1. The Independent Tester could not certify the Hospital as being complete until SA1 was executed. NHSL had clearly weighed up a number of relevant factors in deciding that SA1 was the best way forward for the Project. Crucially, NHSL executed SA1 at a time that most-suited it to accept handover of the Hospital.

5. EXECUTIVE SUMMARY

5.1 IHSL adopts the Executive Summary in Counsel's Closing Statement subject to the following comments.

Paragraph 7 - The "genesis" and the "root" of the problem

5.2 Counsel's Closing Submission states that the *genesis* of the problem that ultimately resulted in the RHCYP/DCN not opening as planned was an error in the Environmental Matrix. The Environmental Matrix was originally prepared by NHSL's design team through the reference design phase before being issued by NHSL to bidders during the procurement phase. Perhaps unsurprisingly, a significant feature of certain Core Participants' submissions to the Inquiry has revolved around which party was responsible for detecting the error or was responsible for the document which contained the error (although that it is not a matter for the Inquiry to determine).

5.3 The status of the Environmental Matrix in the Project Agreement is, therefore, controversial. There is disagreement on whether it represented NHSL's brief or whether it was a document on which no reliance could be placed. Counsel to the Inquiry notes that ambiguity in the terms of the Project Agreement contributed to a situation where there was a disconnect between "*what NHSL wanted*" the ventilation system to achieve and what the successful tenderer believed the ventilation system required to achieve.

5.4 Given NHSL (on the one hand) and IHSL and Multiplex (on the other) have firmly held opposing views of the interpretation of the Project Agreement, it might be said that there was "ambiguity" in terms of the Project Agreement that gave rise to a disconnect in the parties' positions.

5.5 To this IHSL would add that there was also ambiguity and inconsistency in the procurement documents provided by NHSL to tenderers which contributed to problems with the Project (again given parties take firmly held opposing views). These matters are addressed in Counsel's Closing Submission dated 2 June 2023 following the hearing in May 2023 and IHSL's Closing Submissions dated 30 June 2023. The status of the Environmental Matrix in the procurement documents is also controversial.

5.6 IHSL agrees with Counsel's Closing Statement (paragraph 22) that the issues on the Project arose more generally from a lack of clarity in the brief. This was a recurring theme throughout the Hearing. There was a lack of clarity (and therefore disagreement) on whether the Environmental Matrix was NHSL's brief or the design solution to that brief. Counsel's Closing Submission correctly states (paragraph 9) that "*the lack of a finalised document clearly setting out the technical requirements for the ventilation, at financial close, was at the root of the problems with the project."* (emphasis added)

5.7 Whilst the *genesis* of the problem may be said to be an error in a spreadsheet, the *root* of the problems with the Project was the lack of a finalised document clearly setting out the technical requirements for the ventilation at financial close.

Paragraph 7 – "What NHSL wanted…"

5.8 Counsel's Closing Statement refers (paragraph 7) to the disconnect between "*what NHSL wanted the ventilation system to achieve"* and *"what the successful tenderer believed the ventilation system required to achieve."*

5.9 The question of "*what NHSL wanted"* the ventilation to achieve is controversial. IHSL refers to its Summary in Section 2 of this Closing Statement. The Inquiry has heard from a number of witnesses from NHSL and MML describing what NHSL "wanted" the ventilation to achieve or what NHSL was "expecting" from the ventilation. The matter of "*what NHSL wanted*" is complex. The NHSL and MML witnesses described what "NHSL wanted" as a matter of subjective intention and with the benefit (or perhaps drawback) of hindsight. What NHSL wanted can only properly be assessed objectively. NHSL communicated what it wanted to bidders and to IHSL (as the successful bidder) through the procurement documents and the Project Agreement. Those documents of course require to be assessed objectively.

5.10 There was a disconnect between what NHSL absolutely required to deliver a compliant hospital (compliance with the summary recommendations in Table A1 of SHTM 03-01) and what it told IHSL it wanted. NHSL received the ventilation system it wanted because what NHSL wanted had been clarified and expressed in SA1.

5.11 Just as Counsel's Closing Statement invites the Chair to disregard the subjective views of witnesses in relation to the meaning of various contact documents, so too the Chair should bear in mind when assessing what it was that NHSL "*wanted*" or "*expected*" that those witnesses' subjective views are irrelevant. NHSL's subjective intention of what it wanted is at odds with what was communicated to IHSL in the following ways:

5.11.1 through terms of the Environmental Matrix issued by NHSL with the procurement documents which (i) described it as a document which set out NHSL's specific room requirements and (ii) which was issued specifically as part of the "Board's Construction Requirements";

5.11.2 through the terms of the Project Agreement which (adopting the SFT's standard form project agreement) stated compliance with all applicable NHS Requirements "*except to the extent expressly stated to the contrary in the Board's Construction Requirements"*;

5.11.3 in the expression of the clinicians' requirements for all multi-bed rooms to have a balanced or negative pressure;

5.11.4 in the expression of NHSL's ventilation requirements set out in the threatened legal proceedings in March 2018; and

5.11.5 through the clarification of NHSL's brief and the agreed terms of SA1 which was executed in February 2019.

5.12 In addition, even if it is accepted that what NHSL "wanted" was for the ventilation to comply with the guidance in SHTM 03-01, the very concept of "*compliance"* is ambiguous because of the nature of the guidance itself. These issues were addressed in more detail in IHSL's Closing Statement following the hearing in May 2023.

Paragraph 8 – reference to the Project Co's Proposals

5.13 At paragraph 8, Counsel's Closing Statement states that the Project Agreement reflected the unresolved status of the Environmental Matrix. Paragraph 8 also states that "*the schedule which gave the matrix status as reviewable design data suggested the matrix was part of Project Co's Proposals. By treating the matrix in part as if it were one of NHSL's requirements, and in part as if it were one of the contractor's proposals, the Project Agreement reflected the confusing presentation of the matrix in the tender documents."*

5.14 IHSL wishes to clarify that the Environmental Matrix was not contained in the Project Co's Proposals in the Project Agreement. The Project Co's Proposals are defined in the Project Agreement as the documents at Section 4 of Schedule 6. The Environmental Matrix was in fact found in Section 6 of the Schedule 6 (alongside the Room Data Sheets).

5.15 By treating the Environmental Matrix in part as one of NHSL's requirements (because the Board's Construction Requirements required compliance with it) and locating it in Section 6 and subjecting it to the reviewable design procedure, the status of the Environmental Matrix became open to disagreement.

Paragraph 14 - the letter of 31 January 2019

5.16 Counsel's Closing Statement (paragraph 14) refers to the letter of 31 January 2019 issued by IHSL to NHSL in response to a letter from NHSL seeking assurance on inspection and maintenance matters. Paragraph 14 notes that "*in those circumstances, and given the terms of the letter, it is not surprising that NHSL did not seek further assurance"*.

5.17 It is not clear to IHSL what circumstances Counsel to the Inquiry has in mind or what "*further assurance*" might be contemplated. In any event, NHSL issued a further letter to IHSL dated 12 February 2019 (prior to the execution of SA1) which specifically sought assurance on design and installation matters. IHSL's response was still pending as at the date of execution of SA1. No real assurance appears to have been taken by NHSL from the 31 January 2019 letter in so far as it referenced design and installation.

5.18 IHSL refers to its comments in Section 3 of this Closing Statement.

Paragraph 15 - IHSL's financial pressures

5.19 At paragraph 15, Counsel's Closing Statement states that SA1 was signed against a backdrop of financial pressure on IHSL.

5.20 IHSL refers to its comments in Section 4 of this Closing Statement.

References to "Settlement Agreement 2" should be to "Supplemental Agreement 2"

5.21 Counsel's Closing Statement (paragraph 20) refers to a further "settlement agreement" being concluded in the period following July 2019. Paragraph 20 and the remaining provisions of Counsel's Closing Statement proceeds to refer to that agreement as "*Settlement Agreement 2".*

5.22 IHSL wishes to remind the Inquiry that Counsel's Closing Statement is in fact referring to Supplemental Agreement 2 which was entered into between NHSL and IHSL. Supplemental Agreement 2 gave effect to HVC 107 which was instructed by NHSL pursuant to the terms of the Project Agreement. The distinction between "Settlement" and "Supplemental" is not merely one of semantics. Supplemental Agreement 2 did not "settle" any dispute between NHSL and IHSL. It gave effect to a Change that it had been instructed and paid for by NHSL through the relevant provisions of the Project Agreement. Supplemental Agreement 2 can be contrasted with Settlement and Supplemental Agreement 1 ("**SA1**"). SA1 was entered into between NHSL and IHSL in February 2019 and did settle a number of disputed matters between NHSL and IHSL at that time.

5.23 The references throughout Counsel's Closing Statement ought, therefore, to be to Supplemental Agreement 2.

6. THE TASK OF THE CHAIR AND THE APPROACH TO THE EVIDENCE

6.1 IHSL adopts Counsel's Closing Statement under this heading subject to the following comments.

6.2 Counsel's Closing Statement recognises (at paragraph 25) that Mr Currie (NHSL's project director) has provided a written statement to the Inquiry but was unable to give oral evidence. Counsel's Closing Statement notes that Mr Currie's evidence would likely have provided a counterpoint to the evidence of several other witnesses (notably those that worked for IHSL or Multiplex) and that, as a matter of fairness, the Chair should bear this in mind when assessing the evidence.

6.3 Equally, however, the Chair should bear in mind that neither Inquiry Counsel nor the Core Participants have had the opportunity to test or challenge Mr Currie's evidence or to raise specific issues or questions with him. Furthermore, Mr Currie's witness statement which was issued prior to the Hearing mainly addresses matters arising pre-Financial Close: these matters were dealt with at the earlier hearing in May 2023. IHSL would invite the Chair, similarly as a matter of fairness, to bear this lost opportunity in mind when assessing Mr Currie's evidence.

6.4 Counsel's Closing Statement recognises (at paragraph 26) that a number of witnesses gave evidence in relation to the meaning of the Project Agreement, SA1 and Supplemental Agreement 2. IHSL agrees that the Chair should disregard the subjective views of witnesses in relation to the meaning of various documents. These documents should be assessed objectively.

6.5 Counsel's Closing Statement suggests that witnesses did this to seek to be helpful to the Inquiry. Whilst that may be the case, it is IHSL's view that the work of the Inquiry has not been helped by factual witnesses advancing subjective views on the proper interpretation of contract documents which require to be interpreted objectively.

7. KEY THEMES

7.1 IHSL agrees with the Key Themes identified in Counsel's Closing Statement. IHSL adopts Counsel's Closing Statement under this heading subject to the following comments.

1.The lack of a clear brief set by NHSL

7.2 It was a common theme amongst many of the witnesses who gave evidence at the Hearing that a clear and finalised brief is required and the lack of such a brief was a problem on the Project.

7.3 IHSL agrees that the issues on the Project arose from a lack of clarity in the brief (Counsel's Closing Statement, paragraph 22).

7.4 IHSL also agrees with Counsel's Closing Statement that for a project procured using the NPD model to be successful, a very clear brief requires to be set before the Project Agreement is concluded. That is because at financial close on an NPD project, the construction costs for the project become fixed, as do the project company's borrowing costs. The balance of risks is concluded amongst the many different parties to the project. Changes that occur after financial close are subject to carefully drafted and detailed Change procedures. The Change procedures are intended to operate where there is a finalised set of BCRs. Neither the NPD model nor indeed any procurement model which anticipates a fixed price construction cost could accommodate attempts by a health board to complete its brief after a final contract had been signed without recourse to the contractual change provisions. The Project Agreement contained detailed Change provisions. The problem in relation to the Project was not the proper exercise of the Change procedures under the Project Agreement. The problem was an unclear and incomplete brief that NHSL sought to clarify so that it met its clinical requirements through the course of the construction period on the Project.

7.5 Counsel's Closing Statement further highlights (paragraph 427), that it is critical that the health board's brief for key building systems is clear, unambiguous and finalised before a contract is signed and financial close is achieved.

7.6 That did not occur on the Project.

7.7 During the procurement phase (i.e. prior to Financial Close) the content of the Environmental Matrix which had been prepared by NHSL's reference design team did not reflect NHSL's clinical requirements and did not reflect the summary recommendations in SHTM 03-01. That came to light when NHSL highlighted issues on the Environmental Matrix during the Preferred Bidder stage of the procurement phase.

7.8 The status of the Environmental Matrix by the end of the procurement phase is also controversial. The Inquiry heard evidence at the hearing in May 2023 that as late as August 2012 (shortly before the procurement phase commenced) it was NHSL's and MML's intention that the Environmental Matrix to be issued to bidders would set out specific parameters and criteria which bidders required to meet. MML's evidence was that this intention changed. Such a change to that intention was not translated into the procurement documents. Volume 1 of the bid documents informed bidders that the Environmental Matrix formed part of the "Room Information" which set out NHSL's specific room requirements. Furthermore, bidders were required to prepare Room Data Sheets using the Activity Database but to tailor those Room Data Sheets to reflect the Room Information. The Inquiry also heard evidence at the hearing in May 2023 that it was MML's understanding that the suite of documents which constituted the Room Information was to be used as an alternative to Room Data Sheets.

7.9 NHSL's position is that the Environmental Matrix did not constitute its brief for the environmental parameters. NHSL's closing submissions following the hearing in May 2023 was that there was no brief. NHSL's briefing tool (purportedly being of equivalent value to the Activity Database) was the BCRs themselves and, more particularly, the obligation to comply with the SHTM guidance contained therein. The identification of parameters was supposedly left entirely to the judgment of the designers so long as they complied with the guidance.

7.10 By the end of the procurement phase there was a lack of a clear brief.

7.11 A point associated with this key theme is the question of design risk and the transfer of risk to the private sector under an NPD model. It appears that both NHSL and MML confused the issue of setting a clear brief with accepting design risk for meeting that brief. That tension was a recurrent issue throughout the period post-Financial Close. It led to the unsatisfactory way in which the Environmental Matrix was progressed through the reviewable design procedure. The tension is evident, for example, in the negotiations around SA1. On MML's analysis, as NHSL's Lead Technical Adviser, MML gave no technical advice or assistance to NHSL on the solution set out in SA1 because MML could not agree to take on design responsibility.

7.12 As Counsel's Closing Statement suggests (at paragraph 194) the effectiveness of the design risk transfer relies on the clarity of the brief. The lack of clarity in NHSL's brief (or indeed the absence of

a brief at all) led to confusion amongst NHSL and MML around the transfer of design risk post Financial Close.

7.13 On the Project, ironically NHSL had provided more extensive and more detailed technical information through the procurement period because it adopted a reference design (rather than the more typically used exemplar design). But following Financial Close, NHSL's position is that IHSL was not entitled to rely upon any of it. If that was correct, IHSL would have had even less certainty than had NHSL adopted a simpler exemplar design (which IHSL would have been able to rely upon).

3. The interpretation of the published guidance

7.14 IHSL agrees with Counsel's Closing Statement at paragraph 32 regarding the difficulty of taking published guidance and requiring compliance with it in a contract. That is because it is open to interpretation and requires difficult judgements to be made on what guidance requires.

7.15 This difficulty is particularly acute in light of NHSL's position (in its Closing Submission to the hearing in March 2023) that the obligation to comply with guidance was in effect the briefing tool that it adopted in substitution to using the Activity Database.

7.16 NHSL was clearly best placed to identify which output parameters the ventilation system was required to meet based on the particular clinical uses it had in mind for the Hospital. NHSL say they left the identification of those parameters entirely to the judgement of IHSL and its designers.

4.Compliance with published guidance

7.17 At paragraph 40, Counsel's Closing Statement states, in the context of NHSL's failure to complete Stage 4 HAI-SCRIBE prior to handover of the Hospital, that NHSL's justification for non-compliance with HAI-Scribe was that the Hospital was already late, it was not sufficiently complete to allow the required checks to be carried out and IHSL was in financial distress. Furthermore, by accepting practical completion and handover of the Hospital in its incomplete state, NHSL triggered its obligation to pay IHSL, alleviating the risk of IHSL's insolvency.

7.18 That is not accurate. Ms Goldsmith's evidence was that she did not recall a discussion about the Stage 4 HAI-SCRIBE (Transcript, page 57). It did not appear to feature in NHSL's thinking prior to the execution of SA1.

7.19 The delay in concluding the terms of SA1 from around October 2018 (by which time Multiplex had completed the reconstruction of the ventilation in the multi-bed rooms) to February 2019 ironically provided a greater programme opportunity to undertake the Stage 4 HAI-SCRIBE prior to handover than the original contract programme would have done.

8. **LIST OF TOPICS**

8.1 IHSL adopts Counsel's Closing Statement under this heading subject to the following comments.

1.2 The development of the environmental matrix in relation to critical care and isolation rooms, including changes made to guidance note 15

Air change parameter for rooms in critical care left unchanged

8.2 At paragraph 89 Counsel's Closing Statement refers to an interpretation of the Project Agreement adopted by NHSL and MML which meant that any non-compliance with guidance which went undetected by NHSL or MML, in contractual terms, remained IHSL's problem to resolve.

8.3 At paragraph 90, Counsel's Closing Statement suggests that NHSL may well be correct in this interpretation of the Project Agreement (although recognising that it is not for the Inquiry to resolve that question). Nevertheless, NHSL's and MML's interpretation has an air of unreality about it given the origins of the environmental matrix in NHSL's and MML's reference design, the way in which it was used in the procurement process, and the fact that it was embedded in the Project Agreement.

8.4 IHSL does not accept Counsel's suggestion that NHS's interpretation may well be correct (the interpretation of the relevant provisions are controversial) but agrees that NHSL's position (regardless of the correct contractual interpretation) has an air of unreality about it given the Environmental Matrix was produced and developed by MML and its design team, it was provided to the bidders through the procurement phase as setting out NHSL's room specific requirements, it was embedded in the Project Agreement and the BCRs in the Project Agreement required compliance with it.

Single rooms

8.5 At paragraph 96, Counsel's Closing Statement refers to disagreement about whether or not the derogation in SA1 to 4 ac/hr applied to single rooms in the critical care department. As Counsel's Closing Statement notes, the fact that the purpose of the derogation was to confirm the basis on which 4 ac/hr had been selected for the single rooms may be seen as an indication that it was intended to apply to all single rooms for which 4 ac/hr had been specified (whether in the critical care department or elsewhere). The Environmental Matrix had specified 4 ac/hr for all single bedrooms (regardless of their location in the Hospital).

8.6 The position in relation to air changes in the single bedrooms appears to be the same as for the multi-bed rooms: that is, throughout the period after Financial Close, and until IOM's inspection, nobody considered the possibility that single rooms in the critical care department were by virtue of their location subject to particular ventilation parameter recommendations in SHTM 03-01.

8.7 The List of Topics includes (at 2.6) the question of whether NHSL agreed to a formal derogation from the requirements of SHTM 03-01: that question therefore requires to be addressed. However, the matter of the single bedrooms in Critical Care is one where hindsight now appears to be playing a significant part. Whether or not the single bedrooms in Critical Care were subject to the derogation in SA1 is a matter of objective interpretation. The fact is that there was no such disagreement in July 2019 onwards around the single bedrooms in Critical Care and whether or not they were captured by the derogation under SA1. The parties were alive to the issue at the time but arrived at no concluded view.

8.8 NHSL took legal advice on the matter. Tim Davidson (NHSL's Chief Executive at the relevant time) addressed the legal advice he obtained from NHSL's legal advisers at the time (Witness Bundle Volume 2, page 189, paragraph 72 at page 210). Mr Davison states:

> *"Later on in the day of 2 July, I asked our legal adviser to clarify the detail in SA1 of the rooms that had been included in the derogation to 4 ac/hr and learnt that arguably the rooms in critical care had been included in the SA1 technical schedule. I called a meeting of all key internal colleagues and our external legal adviser and technical adviser in the subsequent few days to begin to understand how the critical care rooms had arguably been included in the derogations. It was clear that multi-bed rooms had been included because the drawings referred to included 4 bedrooms located in critical care. As above, we had wanted multi-bed rooms to have balanced pressure but were unaware that was a derogation from Guidance in relation to multi-bed rooms in critical care. <u>It was not clear that the derogation for single bedrooms from 6 ACH to 4 ACH expressly applied to single rooms in critical care. However, given the error in the Environmental Matrix it was arguable that it did</u>."* (emphasis added)

8.9 This position was further reflected in the advice provided by NHSL's legal advisers dated 5 September 2019 (Bundle 7 Vol 3, page 372). This states:

"*The derogation for single bedrooms was accepted from 6 ac/hr to 4 ac/hr with mixed mode. In so doing, it is arguable that NHSL inadvertently agreed by implication to 4 ac/hr with mixed mode for single bedrooms in critical care as well as the single bedrooms in the rest of the Facility".*

8.10 Having obtained that legal advice, NHSL proceeded to instruct IHSL to carry out enhancement works to the ventilation in the single bedrooms in Critical Care pursuant to HVC 107. Those works were instructed and paid for pursuant to Supplemental Agreement 2.

8.11 The terms of HVC 107 and Supplemental Agreement 2 were subject to a huge degree of scrutiny and governance. Counsel's Closing Statement refers elsewhere to the level of governance that was exercised in relation to the formulation of the scope and terms of HVC 107 and subsequently the terms of Supplemental Agreement 2. Governance is also addressed in PPP9. That governance

included the creation of the Oversight Board (following NHSL's escalation to level 3 on the framework on 12 July 2019) and the appointment of a senior programme director (Mary Morgan) following NHSL's escalation to level 4 of the framework.

8.12 The governance over HVC 107 and Supplemental Agreement 2 took place at a national level.

8.13 The instruction to IHSL to carry out enhancement works to the ventilation systems in single bedrooms was given by NHSL as a Change pursuant to the Project Agreement.

8.14 Mr Henderson (NHSL) and Mr Greer (formerly MML, now NHSL) expressed a view in their witness statements that they did not think that single bedrooms in critical care had been included in SA1. Again, this is a matter of their subjective opinion whereas the documents require to be interpreted objectively. In any event, Mr Greer's and Mr Henderson's opinions are not consistent with the legal advice received by the NHSL board at the time.

8.15 The issue of the single bedrooms in Critical Care was raised by a Core Participant's Senior Counsel with Mr McKechnie at the Hearing (McKechnie, Transcript, page 147 onwards). One plank of those questions concerned whether or not there were openable windows in the single bedrooms in Critical Care. The purpose it appears of Senior Counsel's question was to draw out from Mr McKechnie that if the derogation from 6 ac/hr to 4 ac/hr was based on mixed mode ventilation, it would have excluded the single bedrooms in Critical Care because those rooms did not have openable windows.

8.16 The premise of Counsel's questions (i.e. that single bedrooms in Critical Care did not have openable windows) appears to have been misconceived. Multiplex addressed the issue of openable windows in its response to the Inquiry's PPP 8 (Bundle 12 Vol 1, page 123). That response indicates that the single bedrooms in the Hospital, including those in Critical Care, had in fact been constructed with openable windows but those windows were capable of being locked.

1.3 Issues that arose concerning the pressure regime….

8.17 At paragraph 103, Counsel's Closing Statement seeks to summarise in simple terms the nature of the dispute between NHSL and IHSL with regards to the pressure regime in the multi-bed rooms. Counsel's Closing Statement summarises NHSL's position as follows: "*NHSL considered IHSL to be obliged to deliver the balanced or negative pressure, regardless of any contrary requirement being set out in the environmental matrix, <u>because of the requirement in the Project Agreement to comply with SHTM guidance</u>."* (emphasis added)

8.18 IHSL wishes to clarify that NHSL's position in the dispute placed little or no reliance on any requirement in the Project Agreement to comply with STHM guidance. NHSL had taken advice from HFS about which entry in SHTM 03-01 might apply to multi-bed rooms in around mid-2016. That advice having been obtained, it is apparent from NHSL's subsequent correspondence and from the

draft summons that NHSL's position was predicated upon an obligation on IHSL to comply with the BCRs and Good Industry Practice.

8.19 NHSL's position was that the BCRs, Project Co Proposals and Good Industry Practice individually and collectively required the pressure regime to the four bedded rooms to be balanced or negative relative to the adjoining space to ensure that the clinical needs of the Hospital and, in particular, infection control were properly managed. NHSL's reliance on SHTM 03-01 was at best tangential: NHSL relied upon SHTM 03-01 because it referenced ADB Sheets (and untailored ADB sheets formed one plank of NHSL's argument for a balanced or negative pressure regime).

8.20 NSHL's position on the pressure regime in the multi-bed rooms was founded upon clinical need. It relied upon Good Industry Practice as described in the report which NHSL obtained from its expert, Rollason. NHSL and MML were focussed on delivering a ventilation system that met NHSL's clinical needs, not one that complied with the summary recommendations in Table A1 in SHTM 03-01.

8.21 The suggestion that NHSL's position in the dispute relied upon a requirement in the Project Agreement to comply with SHTM guidance is inaccurate.

8.22 At paragraph 125, Counsel to the Inquiry refers to the scope of Rollason's instruction, noting that it was dictated by what was understood by the parties to be the key aspect of their dispute i.e. what pressure regime was recommended by SHTM guidance for multi-bed rooms. This again appears to afford compliance with SHTM guidance greater significance in NHSL's position than in fact it had been given by NHSL at the time. The Rollason report emphasises the importance of infection control, and stated that Good Industry Practice to ensure infection control required the pressure in all 20 multi-bed rooms to be balanced or negative to the adjacent space. There is little or no consideration given to what the guidance in SHTM 03-01 said in respect of the pressure regime.

1.5 Correspondence sent by IHSL to NHSL on 31 January 2019 ……

8.23 IHSL's comments are set out in greater detail on this correspondence at section 3 of this Closing Statement.

8.24 At paragraph 144, Counsel's Closing Statement notes that on 12 February 2019 IHSL sought further written assurance from Multiplex that engineering systems (including ventilation) had been designed and commissioned to meet current guidance and statutory requirements. IHSL's correspondence to Multiplex was prompted by NHSL's letter dated 12 February 2019 to IHSL seeking written assurance on design and installation matters (Bundle 13. Vol.7 page 427).

2. The decision making and governance concerning the agreement reached between NHSL and IHSL on 22 February 2019 (Settlement Agreement No.1)

2.1 Why NHSL agreed to enter into the agreement

8.25 At paragraph 149, Counsel's Closing Statement states that "*a major commercial reason for the parties entering into SA1 <u>when they did</u> was to alleviate financial pressures which had built up on IHSL."* (emphasis added)

8.26 The reference to "*when they did"* is understood by IHSL to be a reference to SA1 being entered into on 22 February 2019.

8.27 The chronology of events towards the execution of SA1 on 22 February 2019 is significant. This is addressed in detail in Mr Templeton's witness statement (Witness Bundle Vol 3, page 208). NHSL had threatened legal proceedings against IHSL in mid-March 2018. On 22 March 2018, IHSL and Multiplex issued a proposal which averted the threat of those legal proceedings and formed the basis of the parties' commercial discussions. By the end of March 2018, NHSL had clarified that it wanted 14 numbered multi-bed rooms to have 4 air changes per hour at negative/balanced pressure. IHSL had understood that a commercial settlement would be concluded within weeks or just months of that clarification having been given and agreement in principle being reached.

8.28 IHSL's summary of the meeting held between NHSL and IHSL on 28 March 2018 (Bundle 13, Volume 9, page 110), recorded that NHSL's Jim Crombie had advised that NHSL were very keen on fixing an occupation date for first patients. The last realistic date that this could happen in 2018, NHSL stated, was 31 October, prior to winter pressures. Mr Crombie explained to IHSL that if this date was missed, the move would be postponed to late February 2019 (post-winter pressures). NHSL had no contractual entitlement to dictate when it would accept handover of the Hospital. Completion of the Hospital (which triggered handover) was a matter for the Independent Tester to certify under the relevant provisions of the Project Agreement. The execution of SA1 was necessary, however, for the Independent Tester to be able to certify completion. SA1 set out clearly what NHSL had agreed and documented what NHSL had agreed met its brief. SA1 clarified matters and resolved the parties earlier dispute but pending execution of SA1 that dispute was still formally unresolved. The Independent Tester was unable to certify Completion without SA1 being in place. As it happened, SA1 was executed by NSHL on 22 February 2019: the point at which NHSL had indicated (almost a year earlier) it would be prepared to accept handover.

8.29 NHSL's Finance and Resources Committee had approved the business case for SA1 on 25 July 2018.

8.30 NHSL obtained approval for its business case from the Scottish government to enter into SA1 on 8 August 2018.

8.31 It took a further 6 months from obtaining approval of the business case for SA1 to its eventual execution. Alan Morrison was surprised that it had taken NHSL a further 6 months to execute the proposed settlement agreement (Mr Morrison, Transcript, page 121). The Scottish government had approved SA1 in August 2018 and Mr Morrison thought that would lead to SA1 being signed in

August or immediately afterwards because he thought that both parties had reached a point where there was agreement.

8.32 In the period up to October 2018, Multiplex had completed the agreed ventilation works to the multi-bed rooms and the other disputed issues addressed by SA1.

8.33 IHSL and Multiplex had been working towards a targeted completion of 31 October 2018, that being the last date that NHSL would accept handover of the Hospital prior to winter pressures (Templeton, Witness Bundle Vol 3, page 208, paragraph 46). However, the Independent Tester could not certify completion until SA1 had been executed because the completion requirements were to be measured against the parties' agreed position in SA1. NHSL's latest date for occupation in 2018 (31 October) was therefore missed. NHSL had previously advised IHSL that in those circumstances the move would be postponed to February 2019.

8.34 The parties' commercial discussions drifted on through autumn/winter 2018 and into early 2019. That delay in executing SA1 similarly delayed the issue of the Certificate of Practical Completion. The Certificate of Practical Completion could only be issued upon the execution of SA1.

8.35 Counsel's Closing Statement fairly states (at paragraph 15) that SA1 was signed against a backdrop of financial pressure on IHSL. However, it would be wrong to conclude that NHSL entered into SA1 in February 2019 in order to alleviate the financial pressures on IHSL. In reality, the Hospital was completed with the exception of the agreed Post-Completion Works and Outstanding Works. The Independent Tester was ready to certify completion. NHSL entered into SA1 in February 2019 because it was a date that best-suited it due to winter pressures. NHSL had told IHSL as much almost 12 months earlier (on 28 March 2018).

8.36 Had NHSL wished to alleviate the financial pressures on IHSL, NHSL could have taken steps much earlier that would have alleviated those pressures. For example, Multiplex had undertaken the reconstruction works on the ventilation system to reflect what NHSL wanted at its own risk in the period from around May to October 2018. When it became evident that the negotiations to conclude SA1 were taking far longer than parties had first anticipated, IHSL proposed that a separate agreement addressing the completed ventilation works could be carved out from the other issues to be addressed in SA1. IHSL's suggestion for a separate settlement reflecting the value of the ventilation works undertaken by Multiplex was made in November 2018 but it was not taken up by NHSL (Mr Templeton's Witness Statement, Witness Statement Bundle Volume 3, page 244 at paragraph 129). If the primary reason NHSL entered into SA1 was to prevent an insolvency there were earlier opportunities that NHSL could have taken to alleviate the financial pressures, but they did not do so.

8.37 There were clearly a number of major commercial reasons for NHSL to enter into SA1. The major reason why NHSL agreed to enter into a settlement agreement in around March 2018 was because

it averted the threat of legal proceedings and resolved the dispute regarding the pressure regime in the multi-bed rooms. That dispute was a serious threat to the Project. NHSL has advised the Inquiry (NHSL's response to PPP10, Bundle 12 Vol 1) that Senior Counsel had given NHSL no more than a 60% chance of success in that dispute. Having been given little more than even odds of success, there were, in IHSL's submission, other major commercial reasons for NHSL to enter into SA1 than simply alleviating IHSL's financial pressures.

8.38 Paragraph 149 of Counsel's Closing Statement suggests that by early 2019 IHSL was at risk of defaulting on its loans. It is not clear what evidence Counsel to the Inquiry relies upon for this statement. It may be a reference to the further debt service payment that was due to Senior Lenders in March 2019. In any event, IHSL would be at risk of defaulting on its loans only if it failed to take steps to avoid that default. IHSL refers to its comments at Section 3.

8.39 At paragraph 150, Counsel's Closing Statement suggests that NHSL agreed to this (i.e. the execution of SA1) "*in the knowledge that the construction works had not been completed and would have to continue thereafter."* That is not, in IHSL's submission, a wholly accurate reflection of the position. The construction works had been completed by February 2019 subject to three specific areas of works that NHSL had accepted could be undertaken following completion. Following execution of SA1, IHSL (more accurately, Multiplex) returned to carry out those Post-Completion Works which ran in parallel with NHSL's post-completion works and commissioning.

8.40 At paragraph 151, Counsel's Closing Statement suggests that "*this arrangement meant it was not possible to carry out the Stage four HAI-SCRIBE process at the time of handover."* IHSL does not agree with this statement. Ms Goldsmith's evidence was that she did not recall a discussion about the Stage 4 HAI-SRCIBE. The timing of the Stage 4 HAI-SCRIBE does not appear to have been the subject of conscious consideration by NHSL, at least at the level of NHSL's board. The "arrangement" around SA1 did not prevent NHSL from carrying out the Stage 4 HAI-SCRIBE prior to handover had it intended to do so. Ironically, the delay to Completion from October 2018 to February 2019 would have allowed greater opportunity to carry out the Stage 4 HAI-SCRIBE than the original construction programme would have done.

8.41 At paragraph 154, Counsel's Closing Statement states that "*IHSL had by the date SA1 was executed (22 February 2019) confirmed compliance with SHTM 03-01 in the design, installation and commissioning of the ventilation systems, and in the maintenance of those systems such as to ensure compliance at handover."* IHSL refers to its comments in Section 3.

2.4.Whether the design parameters for the ventilation system set out in Settlement Agreement No.1 were appropriate for critical care rooms

8.42 Counsel's Closing Statement refers at paragraph 172 to the remaining uncertainty and disagreement about whether or not the derogation in SA1 applied to single bedrooms in the critical care department.

It is noted that the legal advice which NHSL received at the time was that the position was that arguably NHSL had agreed a derogation to the single bedrooms in Critical Care. IHSL refers to its comments at paragraphs 8.8 and 8.9 of this Closing Statement.

2.6 Whether NHSL agreed to a formal derogation from the requirements of STHM 03-01 and, if so, whether any prior risk assessment was conducted

8.43 Counsel's Closing Statement refers at paragraph 178 to the remaining uncertainty and disagreement about whether or not the derogation in SA1 applied to single bedrooms in the critical care department. It is noted that the legal advice which NHSL received at the time was that it was arguable that NHSL had agreed to a derogation to the single bedrooms. Having received that advice, NHSL proceeded to instruct the works to the single bedrooms in Critical Care as a Change.

2.8 What assurances (if any) were sought by…….

8.44 Counsel's Closing Statement refers at paragraph 183 to the Scottish Government's wish to avoid the risk of having to pay to acquire the Hospital if IHSL became insolvent. IHSL refers to its comments at Section 4 of this Closing Statement.

3.1Whether the financing arrangements for the project contributed to issues …..

8.45 IHSL agrees with paragraph 191 of Counsel's Closing Statement that the financial arrangements did not directly contribute to the issues and defects in the Hospital.

8.46 Paragraph 192 of Counsel's Closing Statement refers to NHSL's response to PPP10. IHSL disagrees with the position advanced by NHSL in its response to PPP10. If a clear brief had been set out at financial close, it is unlikely that the problems would have arisen on the Project. NHSL do not appear to accept that the problems on the Project were largely down to the absence of a clear, unambiguous and finalised brief for the ventilation systems. That failure was not due to the NPD model. Neither the NPD model nor any procurement model anticipating a fixed price construction cost could accommodate attempts by a health board to finesse, reinterpret and adapt its brief to clinicians' requirements after a final contract had been signed without recourse to the contractual change provisions. The Project Agreement did contain detailed and sophisticated change provisions (simpler provisions applied to lower value changes, more complex provisions applied to high value changes). But NHSL did not consider what it was doing amounted to the instruction of a Change. The NPD model did not directly contribute to the issues and defects in the Hospital: NHSL's behaviour implementing the NPD model on the Project did.

8.47 Paragraph 196 of Counsel's Closing Statement refers to the added risk factor in an NPD project being the solvency of the special purpose vehicle. It is important to recognise that the structures in an NPD model are directed at protecting the special purpose vehicle and ensuring that it is "kept

whole". That said, the unusual length and circumstances causing the delay (i.e. the on-going disputes) in reaching completion on the Project did present challenges for the NPD model.

8.48 Paragraph 197 of Counsel's Closing Statement refers to there being a real risk of insolvency by 2018. IHSL refers to its comments at Section 4 of this Closing Statement.

8.49 Paragraph 198 of Counsel's Closing refers to the Stage 4 HAI-SCRIBE not being completed before the Hospital was handed over due to the need for the payments to be made to service the debt. That is not wholly accurate. The evidence from NHSL was that they had given no specific consideration to undertaking the Stage 4 HAI-SCRIBE prior to handover.

9. THE QUESTIONS POSED IN TERMS OF REFERENCE 1-12

9.1 IHSL agrees with Counsel's Closing Statement under this heading subject to the following comments.

TOR 2

9.2 Paragraph 352 of Counsel's Closing Statement states that "*NHSL departed from standard procedures, including completing HAI-SCRIBE stage 4 prior to handover, because of the need to accept the hospital and trigger the payments to IHSL."* That is not wholly accurate. NHSL had given no conscious consideration to undertaking the Stage 4 HAI-SCRIBE prior to handover.

9.3 Paragraph 353 of Counsel's Closing Statement states that NPD contracts aim to transfer full design risk to the project company, except in relation to operational functionality. It should be clarified that the project company's design obligation is typically to meet the procuring health board's output requirements, which in the case of the RHCYP/DCN were described as the BCRs.

10. POTENTIAL RECOMMENDATIONS

10.1 IHSL agrees with Counsel's Closing Statement under this heading.

28 May 2024