Case No: HT-02-50

Neutral Citation No. [2003] EWHC 1617 (TCC)

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

TECHNOLOGY AND CONSTRUCTION COURT

St. Dunstan's House,

133-137, Fetter Lane,

London, EC4A 1HD

Date: 9 July 2003

B e f o r e :

HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.

- -

	HADLEY DESIGN ASSOCIATES LIMITED	**Claimant**
	- and -	
	THE LORD MAYOR AND CITIZENS OF THE CITY OF WESTMINSTER	**Defendants**

- -

- -

Andrew Burr (instructed by Irwin Mitchell for the Claimant)

Clive H. Jones and Adrian Pay (instructed by C. T. Wilson, Director of Legal and Administrative Services, for the Defendants)

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

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

Introduction

1.
The Lord Mayor and Citizens of the City of Westminster is the corporate body which is, among other things, the local housing authority for the area of the City of Westminster. In this judgment I shall refer to that body for convenience as “the Council” .

2.
The City of Westminster includes the district of Pimlico. That area, lying between Victoria Station and Battersea Power Station, sustained extensive damage from bombing during the Second World War. In the post-war period, in order to provide much needed housing, the Council caused to be constructed what became known as the Churchill Gardens Estate (“the Estate”). The Estate comprises 37 blocks of flats built in phases between 1950 and 1965. The flats were designed by the well-known architectural practice of Powell and Moya, which was successful in a design competition in 1946. The blocks of flats are now regarded as an important example of post-war architecture. The Estate was declared a conservation area in 1990, and six of the blocks were listed Grade II for the purposes of Planning (Listed Buildings and Conservation Areas) Act 1990 in 1999. The Estate is also the largest housing estate within the City of Westminster, providing some 1600 dwellings.

3.
With the passing of the years the fabric of the blocks of flats on the Estate deteriorated. By about the beginning of 1984 the state of the original windows had been identified as a matter of concern. The Council resolved to engage the services of surveyors or architects to undertake a survey of the condition of the windows.

4.
Messrs. Hadley Design Associates (“HDA”) was, in 1984, an unlimited company in which one of the principals, Mr. Howard Wright, was a surveyor, while the other two principals, Mr. Peter Bailey and Mr. Stuart McClinton, were architects. Mr. Bailey subsequently left the company before its practice was transferred, in 1993, to a limited company, Hadley Design Associates Ltd. (“HDA Ltd.”). Mr. Wright and Mr. McClinton remain directors and shareholders in HDA Ltd. HDA Ltd. is the Claimant in this action.

5.
In February 1984 Mr. Peter Warhurst was employed by the Council as Assistant Director (Technical Services) in the Housing Department. As such it fell to him to organise the obtaining of tenders from surveyors and architects for the work of surveying the blocks of flats on the Estate to ascertain the condition of the windows. He had had previous dealings with HDA whilst employed by the Council of the London Borough of Islington and he decided to invite the firm to tender for the survey work at the Estate. He wrote a letter dated 10 February 1984 in the name of Mr. C. C. H. Guy, Director of Housing, to HDA which began as follows:-

“ FEES FOR CONSULTANCY SERVICES

The City Council wishes to engage the service of consultant surveyors or architects for the following service:-

CHURCHILL GARDENS ESTATE PIMLICO (40 Blocks of Flats)

The inspecting and reporting on the above mentioned Estate with recommendations and estimates of cost to repair or replace as necessary the existing windows, the preparation of tender documents for

the said remedial work and the supervision of work on site, including valuations, certifying and final accounts.

It should be noted that the scale of this project is such that a programme spanning up to five years is envisaged.

You are invited to submit your tender for fees for this work, stated as a percentage of the final account sum (including loss and expense but excluding any arbitration or court award). In so doing you should note that if any instructions to you are withdrawn at any stage before commencement of a contract for the work on site, fee will be paid as follows:-

a) If no tender has been received. The appropriate work stage percentage of your submitted estimate of the cost of the scheme.

b) Where tender has been received. The appropriate work stage percentage of your submitted estimate or of the lowest tender, whichever is the lower.

Any engagement would be in accordance with the RICS Conditions of Engagement for Building Surveying Services (1981 Edition) work stages C-H, except for the following amendments:-… ”

6.
In response to that invitation HDA submitted a tender dated 5 March 1984. The percentage indicated in that tender as that which was offered by HDA was 6 ¾. The form of tender also invited the specification of time charges, and appropriate rates were set out by HDA. That tender was successful. Mr. Warhurst indicated the outcome in a letter dated 2 April 1984 which he wrote in the name of Mr. Guy. The material part of the letter was in these terms:-

“ Further to the recent discussions with Mr. Warhurst I confirm your appointment to carry out surveys of all of the blocks (39) on the above Estate to ascertain and report to me the condition of the windows, external doors and staircase screens. Your considered report is to make recommendations for repair or replacement of all found defective, with estimate of cost and give a view on the order of priority. You are also to check on incidence of spalling or cracking concrete on the external faces of the buildings and similarly report with recommendations and estimate of cost.

The terms of the engagement are as set out in my letter dated 10 February 1984 and it is initially on a time basis, with the hourly rates applicable being those set out in your tender offer dated 5 March 1984…..

Please confirm acceptance of this appointment,…

It is likely that you will later be appointed for full service in running the contracts for the work which you recommend, in which case, of course, the overall fee arrangement reverts to the quoted percentage. ”

7.
HDA then undertook a survey as requested and prepared a full report which was dated November 1984. The detail of that report is not presently material. It is enough to say that a substantial quantity of work was identified as being necessary. The undertaking of that work was divided into phases. The first actual phase seems to have been the undertaking of some urgent work to remove loose concrete and to examine brickwork. HDA was instructed to prepare a specification for that work, to invite tenders and to supervise the execution of the work. Those instructions were confirmed by Mr.

Warhurst in a letter written in the name of Mr. Guy to HDA dated 1 March 1985. The terms of the confirmation were:-

“ I think it appropriate to retrospectively formally confirm the instruction to you to specify, invite tenders and supervise the urgent work now in progress by VAT Watkins Ltd. for the removal of all loose or suspect concrete and examination of the brickwork in all of the blocks. The fee for this service, in accordance with the terms of your tender for work on the Estate, is 6.75% of the cost of construction, inclusive of normal expenses, and with the Conditions of Engagement as stated in the letter on invitation. ”

8.
The phase of work actually referred to as Phase 1 involved work to part of the block of flats on the Estate called Chaucer House. HDA undertook the preparation of specifications for that work, the invitation of tenders and the supervision of the work.

9.
Originally the Council separately employed a firm of structural engineers, Messrs. Bowden, Sillett and Partners (“BSP”), to advise in connection with the work needed to be carried out on the Estate. However, in a letter dated 18 October 1985 to the Director of Housing Mr. Wright proposed that:-

“ our appointment for the major works to the remaining blocks be at a fee percentage of 8% of the total contract sums. This figure is to be inclusive of Quantity Surveyor services, Structural Engineers’ services and normal out of pocket expenses, excluding testing and advertising. ”

10.
Mr. Eiles of the Council replied, in the name of the Director of Housing, to the revised fee proposal advanced by HDA in a letter dated 13 November 1985. What he said was:-

“ Regarding your fee proposals for the remainder of the Estate to include structural engineering services. Your proposals are at the moment a matter of discussion, but to avoid delay could you please proceed with the preparation of tender documents for the next phase (i.e. Keats and Shelley Houses). Please note that until I gain approval for your revised fees, your commission is not to include structural engineering services.

Hopefully I will have an answer to your proposals with [sic] the next two weeks. ”

11.
There were some discussions between Mr. Wright on behalf of HDA and Mr. David Wickersham, Assistant Divisional Director in the Housing Department of the Council, and Mr. Eiles concerning the proposal for a revised fee. Those discussions resulted in Mr. Wright indicating in a letter dated 23 January 1986 that he would be prepared to accept a revised fee of 7.85% as proposed on behalf of the Council for all on-going projects, on the basis that structural engineering services fell within the remit of HDA.

12.
In the summer of 1986 the Council seems to have decided that some greater degree of formality was required in the contractual arrangements between it and HDA. Mr. Wickersham wrote a letter dated 9 July 1986 to HDA, marked for the attention of Mr. Bailey, in which he said this:-

“ CHURCHILL GARDENS ESTATE

PROPOSED AGREEMENT

I attach hereto draft documents which I hope will form a satisfactory agreement in respect of services on the above Estate.

Would you kindly peruse these documents and advise me of your observations at your earliest convenience. ”

13.
It appears that a meeting took place on 31 July 1986 between Mr. Wright, on the one hand, and Mr. Wickersham and Mr. Richard Berry, on the other. There is a dispute as to what was said at that meeting and I shall come later in this judgment to deal with the nature of that dispute and my findings as to what transpired at the meeting. The fact of the meeting was mentioned in a letter dated 1 August 1986 written by Mr. Wright to the Director of Housing, marked for the attention of Mr. Wickersham. The text of that letter was:-

“ Churchill Garden Estate

Proposed Fee Agreement

I refer to my meeting yesterday with Mr. Wickersham and Mr. Berry concerning the above and in particular the Council’s proposal that we should directly employ the Structural Engineer but that the Engineers professional indemnity should rest directly with the Council. I am informed that this proposal would not be acceptable to Insurers as the Client and the party to be indemnified must be one and the same. It would therefore appear that, if the Council requires the Engineers indemnity to rest directly with itself, there is no alternative than that the structural Engineer be a direct appointment. ”

14.
Mr. Wright referred again to his discussions with Mr. Wickersham in a letter to the Director of Housing dated 11 August 1986. In that letter he wrote:-

“ Re: Churchill Gardens Estate

I refer to my recent discussions with Mr. Wickersham concerning all encompassing fees for Building Surveying and Structural Engineering Services on the above estate.

Our tendered fee of 6.75% was accepted by yourself in 1984 and, following our initial report which brought to light the concrete problems, you appointed Messrs. Bowden, Silett [sic] and Partners to provide all necessary engineering services. Earlier this year we were requested to put forward a proposed fee for structural engineering services and to express this as a percentage of the total contract sum and not relative to the structural engineering element in isolation and, taking into account the estimated costings available to us at this stage, we calculated this element to be 1.1% of the estimated total contract sums. Our proposal was put forward prior to any work commencing on site and the Engineers have since found from experience gained on Chaucer House that the areas in which structural engineering assistance is required are approximately double that which they had initially estimated. You will also be aware that the engineers were unable to carry out a detailed survey of the majority of the structure of the blocks prior to preparation of tender documents as the Council was not prepared to expend monies at that stage on the provision of cradles and/or scaffolding which would have enabled closely detailed inspection of the structure.

I understand that our original proposal for revised professional fees incorporating the structural engineering element and based upon information which was then available to us and which amounted

to 7.85% of the final account sum has been approved but in view of our recent findings and the likely cost to us of encompassing structural engineering services, I am now seeking your approval to a revised total percentage of 8.75%, this being made up of our original 6.75% tendered fee plus the proposed 2% engineering fee put forward by Messrs. Bowden & Sillett.

Should this revised proposal prove acceptable we are intending to employ Messrs. Bowden, Sillett and Partners to provide the structural engineering input; they are currently employed directly by yourselves in respect of Chaucer House and I understand that their fee agreement with yourselves amounts, in round terms relative to the total contract value, to a similar percentage to that proposed within our all encompassing fee. On this basis there would therefore be no additional percentage increase in respect of fees above the level which has already been approved for Chaucer House.

I would finally reaffirm that the professional indemnity liability of the structural engineers can only relate to their direct Client and therefore your choice of a direct appointment or otherwise may be decided by this requirement of their insurers.

I look forward to receiving your instructions in the near future in order that we may finalise the complete documentation for Keats and Shelley Houses and shortly thereafter invite tenders. ”

15.
It does not appear that the Council replied to the letter dated 11 August 1986 written by Mr. Wright. However, Mr. Berry did write a letter dated 21 October 1986 to HDA about Phase 2 of the work on the Estate. That letter was in these terms:-

“ CHURCHILL GARDENS ESTATE PHASE 2 KEATS & SHELLEY HOUSES

At its meeting of 13 October 1986 the Contracts Management Board approved your appointment as lead consultants for the above at a total fee levy of 8.05% for full Building Surveying, Quantity Surveying and Structural Engineering Services. Formal documents will be prepared and sent by the City Solicitor in due course.

I note your advice with regard to pursuing the option to negotiate the Phase 2 with the Phase 1 contractor and hope to be in a position to give formal instructions shortly. Negotiations should obviously not commence until you receive such instructions.

I suggest we meet on 22 October at a convenient time to discuss programme and document preparation generally I must emphasize [sic] that the Phase 2 documents must be as accurate a reflection as possible of the final scope of the works and I feel this is reasonably to be expected on Phase 2 bearing in mind the experience gained from executing Phase One. ”

16.
There does not appear to have been a response to the letter dated 21 October 1986. In a letter dated 19 December 1986 written in the name of the City Solicitor by Mr. Kenneth Anthonio to HDA what was said was:-

“ CHURCHILL GARDENS ESTATE PHASE 2 – (KEATS AND SHELLEY HOUSES)

Further to the communications between the City Council and your firm, I enclose a copy of the formal Agreement.

Please insert, where indicated the full names and qualifications of each partner and let me have the document back as soon as possible. Upon receipt of the same, I will have the Agreement engrossed to be executed by the parties. ”

17.
Mr. Wright replied to Mr. Anthonio’s letter dated 19 December 1986 in a letter dated 21 January 1987. The letter was in these terms:-

“ RE: Churchill Gardens Estate

I refer to your letter of 19 December 1986 received by ourselves on 24 December 1986, to our several discussions with Mr. Antonio and various other discussions with Mr. Berry and Mr. Wickersham of your Housing Department, and now return herewith one copy of the Draft Fee Agreement with our initial comments marked by hand.

As pointed out to Mr. Antonio I conducted discussions during the course of the summer with both Mr. Wickersham and Mr. Berry, but it would appear that a number of the points which were agreed in principle during these discussions have not yet been incorporated in this Draft Fee Agreement. The major points in this respect relate to sub-consultants and to the date of payment of fees and it was agreed that this would be within 28 days of receipt of our monthly invoices which would, in value, relate pro rata to the certified amounts under the building contract.

I would also point out that we are uncertain as to our professional indemnity insurers reaction to the proposal for collateral agreements with sub consultants and I would therefore naturally be grateful to receive your proposals in respect of the form of collateral warranty.

Furthermore we have not yet received a draft of the finalised Brief relating to the complete estate and until we have had sight of this we are naturally not in a position to comment as to how the terms of this might affect the remainder of the agreement.

In order to speed up the process of agreeing this matter, may I suggest that a meeting be convened as soon as possible between representatives of your own Department, the Housing Department, our Practice, the Quantity Surveyors and the Structural Engineers.

I look forward to hearing from you in the near future.”

18.
Mr. Anthonio sent HDA copies of the Council’s Brief and of the form of Sub-Consultant Warranty under cover of a letter dated 18 February 1987. Mr. Wright amended those documents and sent them back under cover of a letter dated 12 March 1987. Mr. Anthonio then, under cover of a letter dated 4 June 1987, sent a copy of the contemplated formal agreement for execution. That agreement (“the 1987 Contract”) was executed on behalf of HDA and returned by Mr. Wright under cover of a letter dated 17 June 1987 to the City Solicitor. The Council’s part of the 1987 Contract was executed, dated 1 July 1987 and sent to HDA under cover of a letter dated 2 July 1987.

19.
In a letter dated 8 July 1987 to HDA Mr. Berry wrote as follows:-

“ CHURCHILL GARDENS ESTATE PHASE 3

Now that your appointment for the rolling programme of works at Churchill Gardens Estate has been finalised I can instruct you to proceed with phase 3 of the works. I have prepared a short list of

essential requirements for consultancy services which is attached. This is intended to amplify the brief contained in the formal agreement and highlights certain areas of service which the City Council regards as particularly important. The blocks to comprise phase 3 are also listed.

The City Council naturally reserves the right to alter the scope of these proposed works in the light of financial or management consideration.

In view of the size of this phase and its importance to the City Council I expect the highest professional standard to be exercised at all times. ”

The 1987 Contract

20.
By clause 2 of the 1987 Contract it was provided that:-

“ The City Council agrees to engage the Consultants subject to and in accordance with this Agreement and the Consultants agree to provide the Services, subject to and in accordance with this Agreement. ”

The drafting of the clause is not particularly elegant, but it is tolerably clear from it that not only did “the Consultants” , defined as meaning HDA, agree to provide “the Services” , but also that it was to provide “the Services” that the Council engaged HDA.

21.
The expression “the Services” was defined in clause 1 of the 1987 Contract as meaning:-

“ the services which the Consultants are to perform under this Agreement. ”

That was not a particularly helpful definition. Happily more light was shed on what exactly HDA had agreed to do by clause 4 of the 1987 Contract, by which it was provided that:-

“ The Services to be provided by the Consultants at each stage shall comprise those of the Services set out in the Brief which is annexed hereto and marked “A” as may be necessary in the particular case. As part of the Services expressly set out in the Brief the Consultants shall give to the City Council such advice and assistance within the field of the relevant professional consultant as may be reasonably required in connection with the Services from time to time by the City Council. ”

22.
The Brief attached to the 1987 Contract (“the Brief”) included these provisions:-

“ 1. PROJECT TITLE

Churchill Gardens Estate

London SW1

2. ADDRESS OF THE PROPERTY (IES)

As listed on the attached schedule..

5. DESCRIPTION OF PROPOSED WORKS

Repairs, refurbishment and necessary improvements to the external fabric of the blocks listed in the attached schedule including inter alia roofing, concrete and structural repairs, window replacement together with any related ancillary works…

7. SERVICES REQUIRED

The Services shall include those matters contained in Sub-Clause 2.1.1 of the Conditions of Engagement for Building Surveying Services published by the Royal Institution of Chartered Surveyors as amended by the City Council's Conditions of Appointment.

Without prejudice to the generality of the foregoing the Services shall include the investigation of window replacement as a cost-effective alternative to repair with submission of a feasibility report if not already executed suitable for laying before the Housing Committee.

8. SCOPE OF SERVICES

The Services shall include architectural and related services if any building surveying, quantity surveying and all engineering services…. "

The schedule attached to the Brief listed all 37 blocks of flats on the Estate.

23.
Included within clause 1 of the 1987 Contract was a definition of the expression "the Conditions of Engagement" as meaning "the Conditions of Engagement for Building Surveying Services published by the Royal Institution of Chartered Surveyors in 1981" . Although the expression "the Conditions of Engagement" was defined for the purposes of the 1987 Contract, rather curiously the 1987 Contract did not state in terms that the relevant conditions were incorporated in it. However, it seems to me that such incorporation must have been intended, for clause 12 of the 1987 Contract commenced in this way:-

" The Sections, Clauses and Sub-Clauses of the Conditions of Engagement shall be varied and construed in accordance with the following notes amendments additions and insertions: "

The making of variations to "the Conditions of Engagement" is obviously not a worthwhile exercise unless, as so varied, the conditions were intended to be incorporated in the 1987 Contract.

24.
Oddly, given the terms of section 7 of the Brief, one of the variations to "the Conditions of Engagement" set out in clause 12 of the 1987 Contract was the wholesale deletion of "Section 2 – Scope of Work" . The comment which followed that deletion was:-

" The Scope of the work is as defined in the Brief. "

25.
Another part of "the Conditions of Engagement" which was varied in clause 12 of the 1987 Contract was clause 1.7.

26.
The Conditions of Engagement for Building Surveying Services of Royal Institution of Chartered Surveyors, 1981 edition ("the RICS 1981 Conditions") included, as paragraph 1.7:-

" **Postponement or Determination**

The agreement between the surveyor and his client may be postponed or terminated by the client, or terminated by the surveyor at any time on the expiry of reasonable notice, at which time the surveyor shall be entitled to remuneration in respect of that part of the original instruction which has been completed (see paragraph 3.5 below). Where the construction of works is cancelled or postponed on

the client's instructions or when the surveyor is instructed to stop work indefinitely at any time, the engagement shall be deemed to have been terminated. "

27.
The variations to that paragraph effected in clause 12 of the 1987 Contract were these:-

" In the first sentence of this Sub-Clause the words "(see paragraph 3.5 below)" are deleted and the following words shall be inserted "(see Clause 2.1 of the Professional Charges for Building Surveying Services as amended herein)".

Reasonable notice shall be one month.

The second sentence of this Sub-Clause is deleted.

Postponement of the Works shall not be a reason for termination of the engagement unless such postponement exceeds 12 calendar months from the date of written instructions from or on behalf of the Client to the Surveyor to postpone or indefinitely postpone the Works.

If a commission which was postponed is resumed before the end of the said 12 months the Services shall be resumed as if there had been no break in them and the Surveyor shall not be entitled to any payment for any extra work caused to him by the postponement unless the City council [sic] shall so agree in writing at the time of resumption. "

28.
Paragraph 1.8 of the RICS 1981 Conditions made this provision:-

" Any disputes arising between the surveyor and the client shall be referred to the arbitration of a person to be agreed between the parties, or failing agreement within fourteen days after either party has given to the other a written request to concur in the appointment of an arbitrator, a person to be nominated at the request of either party by the President of the Chartered Institute of Arbitrators. "

29.
In clause 12 of the 1987 Contract paragraph 1.8 of the RICS 1981 Conditions was deleted.

Termination of the 1987 Contract

30.
In a letter dated 15 February 1996 to HDA, which by this date had become HDA Ltd., the City Solicitor wrote on behalf of the Council as follows:-

" **RE: MAJOR WORKS CHURCHILL GARDENS ESTATE**

I act as solicitor to this authority. I have been asked to write to you by the Director of Housing.

I refer to the Agreement between this Authority and yourselves dated 1 st July 1987. Pursuant to Clause 1.7 of the Agreement I hereby give you one month's notice of the termination of this contract.

This authority requests that you continue to provide your services pursuant to the Agreement in respect of the instructions issued to you up to the date of this letter including services on all phases of major works up to and including phase 4C. I should be grateful if you would confirm your consent by return in this regard.

I confirm that you will be required in any event to pursue at no cost to the City Council the rectification of defective works executed under your supervision. An updated schedule of defects currently known to us will be sent to you within the next 7 days. ”

The claims made in this action

31.
The principal claim made in this action is that the termination of the 1987 Contract by the letter dated 15 February 1996 was wrongful and entitles HDA Ltd. to damages representing the profit which it would have made had it been permitted to complete all of the work which would have been involved in providing the services required under the 1987 Contract in respect of all the repairs necessary to any block of flats on the Estate. There is also a claim for further monies said to be due in respect of the carrying out by HDA Ltd. of the services required of it in relation to Phase 4C.

The alleged foundations for the principal claim

32.
The principal claim of HDA Ltd. obviously depends critically upon the proposition that, notwithstanding what appear to be the clear terms of the 1987 Contract as a result of the incorporation therein of the RICS 1981 Conditions with the modification of paragraph 1.7 of those conditions so as to define “reasonable notice” as “one month” , it was not open to the Council in fact to determine the 1987 Contract in reliance upon that provision.

33.
The case set out on behalf of HDA Ltd. in the Re-Amended Particulars of Claim was to the effect that the conclusion for which HDA Ltd contended could be reached by a number of different analyses. One seemed to be that the 1987 Contract was simply a formalisation of the pre-existing contractual arrangements between the Council and HDA brought into existence as a result of the acceptance by the Council of the tender of HDA for the provision of the surveying services in relation to the Estate submitted in response to the invitation to tender dated 10 February 1984, as subsequently varied, and that the effect of the agreement originally made was that HDA was retained to undertake all of the surveying services required in connection with the refurbishment of the blocks of flats on the Estate. The contention that the 1987 Contract provided for the undertaking by HDA of all of the surveying work required in respect of any of the blocks of flats on the Estate did not obviously address the issue whether such an appointment could be terminated. It seemed that it might be implicit that it was asserted that the appointment could not be terminated at all. However, in the event this line of argument was not pursued by Mr. Andrew Burr, who appeared on behalf of HDA Ltd. at the trial before me. It appeared from paragraph 14.5 of the Amended Reply that it was accepted that the 1987 Contract superseded any pre-existing contractual arrangements between the parties.

34.
As matters turned out at trial Mr. Burr relied heavily upon what it was contended had been said by Mr. Wickersham to Mr. Wright at the meeting which the two of them had on 31 July 1986 and which was also attended by Mr. Berry. The case of HDA was that Mr. Wickersham had said at that meeting that the Council would not seek to determine the 1987 Contract unless either HDA was in default or the Council ran out of money and so was unable to complete the intended works to the blocks of flats on the Estate. A similar assurance was said to have been given to Mr. Wright by Mr. Anthonio during a telephone conversation at the time Mr. Anthonio was engaged in drafting the final version of what became the 1987 Contract. Those assurances were said to have amounted to a contract collateral to the 1987 Contract by which the Council agreed that it would only seek to determine the 1987

Contract in the limited circumstances which I have mentioned. That seemed a difficult analysis, given the need for there to be consideration for such a collateral contract, as well as an intention to enter into contractual relations in respect of it, and the lapse of time of almost one year between the making of the alleged collateral contract and the conclusion of the 1987 Contract. Alternatively, the assurances were said to have been representations made in order to induce HDA to enter into the 1987 Contract upon which HDA did rely in entering into the 1987 Contract, with the result that the Council was estopped from "resiling from the true effect of the said representations and/or assurances in that it would be unjust and unconscionable for them to do so" .

35.
A further means by which in the Re-Amended Particulars of Claim, at least, it was sought to attain the result for which HDA Ltd. contended, was the allegation that there were implied terms of the 1987 Contract. The plea as to implied terms was contained in paragraph 11:-

" There were implied terms of the 1987 agreement, arising as a matter of law, or necessary in order to give business efficacy thereto:

11.1 That the Defendants would not purport to terminate the 1987 agreement for any reason other than the commission by the Claimant of such breach thereof as would, under the general law, entitle the Defendants to terminate the same;

11.2 That if (which is not admitted) the Defendants were enabled by reason of the 1987 agreement to terminate the same on some ground, or for some reason, other than such breach thereof by the Claimant as would, under the general law, entitle the Defendants to terminate the same, the Defendants would be entitled to terminate only:

11.2.1 If the purported termination were, in all the circumstances, a fair and/or reasonable exercise of the said power of termination and/or were made in good faith; or

11.2.2 If the Defendants had and/or could show, in all the circumstances, good and/or reasonable and/or serious cause for the said purported termination; or

11.2.3 If the said termination were not, in all the circumstances, capricious and/or arbitrary and/or unreasonable; or

11.2.4 If the said purported termination resulted from avoidable conduct on the part of the Claimant, which threatened the legitimated commercial interests of the Defendants under the 1987 agreement;

11.3 That, in the event of a purported termination of the 1987 agreement by the Defendants, the Defendants would give the Claimant good, substantial, consistent and credible reasons for the said purported termination, so as to enable the Claimant (other than in a case of a breach qualifying as repudiatory under the general law) to perform such corrective action as was reasonably possible within a reasonable time. "

36.
The final way in which the case for HDA Ltd. was put in the Re-Amended Particulars of Claim was this:-

" 12. Further or in the alternative, if (which is denied) the Defendants had any power of termination arising under or by reason of the 1987 agreement other than a power of termination arising on or by reason of the commission by the Claimant of a repudiation thereof, the exercise by the Defendants of

that said power of termination was constrained by law in the following manner and/or was lawful only if performed subject to the following requirements imposed by law:

12.1 That the Defendants would be entitled to terminate only:

12.1.1 If the purported termination were, in all the circumstances, a fair and/or reasonable exercise of the said power of termination and/or were made in good faith: or

12.1.2 If the Defendants had and/or could show, in all the circumstances, good and/or reasonable and/or serious cause for the said purported termination; or

12.1.3 If the said purported termination were not, in all the circumstances, capricious and/or arbitrary and/or unreasonable; or

12.1.4 If the said purported termination resulted from avoidable conduct on the part of the Claimant which threatened the legitimate commercial interests of the Defendants under the 1987 agreement;

12.2 That, in the event of a purported termination of the 1987 agreement by the Defendants, the Defendants would give the Claimant good, substantial, consistent and credible reasons for the purported termination, so as to enable the Claimant (other than in a case of a breach qualifying as repudiatory under the general law) to perform such corrective action as was reasonably possible within a reasonable time.

12A. The Claimant will rely in support of the facts and matters pleaded in the immediately preceding paragraph on section 3(2)(b) of UCTA, which provides that, where one party deals on the other's written standard terms of business:

"As against that party, the other cannot by reference to any contract term …

(b) claim to be entitled:-

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all

except in so far as (in any of the cases mentioned in this subsection) the contract term satisfies the requirement of reasonableness."

In the circumstances of the Claimant's legitimate expectation set out in paragraph 9.10 above, the Claimant will contend that a clause purporting to authorise the Defendants to terminate without reason on one month's notice purports to permit partial or different performance from that which the Claimant expected. Insofar as the precise terms of the statute are found not to cover this case, the Claimant will contend that the spirit thereof should be treated as a platform for invalidating or restricting the operation of such an oppressive clause in the circumstances of the present case. "

The reference to "UCTA" was a reference to Unfair Contract Terms Act 1977 .

37.
Whilst not abandoning the contentions that the assurances upon which HDA Ltd. relied gave rise to estoppels, that the terms pleaded in paragraph 11 of the Re-Amended Particulars of Claim were to be implied into the 1987 Contract and that the provisions of Unfair Contract Terms Act 1977 were applicable to the 1987 Contract and had the effect pleaded in paragraph 12A of the Re-Amended

Particulars of Claim, the whole focus of the case advanced by Mr. Burr at the trial before me was that the assurances allegedly given by Mr. Wickersham on 31 July 1986 and by Mr. Anthonio on the telephone gave rise to a collateral contract by which the Council limited its freedom to terminate the 1987 Contract to those circumstances of which it was said that both Mr. Wickersham and Mr. Anthonio had spoken to Mr. Wright. I therefore turn to consider the evidence in relation to those alleged statements.

The meeting on 31 July 1986

38.
There was no dispute that a meeting had in fact taken place between Mr. Wright, Mr. Wickersham and Mr. Berry on 31 July 1986. That there had been such a meeting was evidenced by the terms of Mr. Wright's letter dated 1 August 1986 to the Director of Housing. Neither Mr. Wickersham nor Mr. Berry, each of whom gave evidence before me, had any recollection of the meeting or of what had been said. This is hardly surprising as the meeting took place nearly seventeen years ago. Mr. Wright, on the other hand, claimed to have a good recollection of the meeting. That did rather stretch credulity, although I do accept that he has some memory of the meeting.

39.
In his first witness statement made for the purpose of the trial before me Mr. Wright included these passages in his detailed account of the meeting on 31 July 1986:-

" 36. Between Mr. Bailey's receipt of the draft agreement and my meeting with David Wickersham, Mr. Bailey, Mr. McClinton and I met to discuss it. Mr. Bailey had already written his own queries on the draft and I then added further queries which we raised during our discussions. Following this meeting I met with Stuart McClinton and added further points on which he required clarification. These notes were to act as an aide memoir [sic] to remind me to raise them with David Wickersham. In my meeting with David, I made a further set of notes on the agreement recording what was discussed and agreed between us.

37. I explain below all of the manuscript notes made on the copy agreement. Some Mr. Bailey made when going through it on his own, some I made when going through it with Peter Bailey, some I made in my meeting with Mr. McClinton and the rest I made in my meeting with David Wickersham. For ease of reference I have marked up in Roman numerals on a copy of the annotated agreement, all of the manuscript notes. I have not marked up the ticks but can confirm that save where I state otherwise these were all marked by Peter Bailey….

80. (xxi) There are two sets of notes at clause 1.7. The first one says: "Tender based on whole estate over five years. If stop short how do we recover other abortive costs".

81. I made this note at my meeting with Mr. Bailey. We knew that the earlier stages of the project would not be profitable and the project would only generate a real profit for our practice towards its latter stages. Therefore if for any reason the contract came to an end prematurely, HDA may be penalised by having front loaded its investment in the project in the interests of a later return. I wanted to know what compensation Westminster would be offering us to reflect this loss should the situation arise. This is what I meant by recovering the abortive costs and I made the note to remind myself to discuss the issue with David Wickersham.

82. The second note says: "Only if HDA default or Westminster does not have enough money".

83. This note I made in my meeting with Mr. McClinton when he raised the question of the circumstances in which it was intended the twenty-eight day notice period would apply. He had said that in his experience of building contracts, he had not come across a situation where a client could simply terminate a contract at will. Habitually, there would have to be default on the part of the contractor for this to be operable. We therefore assumed that the same applied here but we agreed that I was to check. I expressed my concern to Mr. McClinton about Westminster running out of money as this had previously been suggested and I was concerned that if this happened they may use this clause….

89. (xxii) [which Mr. Wright told me in his oral evidence was a note made during his meeting with Mr. Wickersham and Mr. Berry] The second note here says: "1.7 David W said that this would only apply if Programme stopped for more than a year or if Westminster sold the estate – private – or ran out of money which is unlikely as money had been set aside in budgets. Also, if HDA not did perform or went into liquidation etc.

90. It continues: "Westminster want HDA to look after whole estate. May be lots of little other jobs – including windows, roofing, decs etc."

91. When we came to discuss this clause, I said to David Wickersham that I was happy with the 28 day clause but only on the understanding that it would only apply if HDA defaulted on the contract. He said that the alternative would be if Westminster didn't have enough money and we agreed that it applied only in those two circumstances. He said Westminster would be very unlikely to run out of money because it was budgeted for. On that basis I was happy with this clause and I told Mr. McClinton and Mr. Bailey this when I discussed it with them after my meeting with Mr. Wickersham and they were reassured.

92. (xxiii) This note [beside the provision that paragraph 1.8 of the RICS 1981 Conditions should be deleted] says: "How would disputes now be settled". I wrote this in my meeting with Mr. Bailey because I was not clear, if this part of the RICS did not apply, how disputes would be settled.

93. (xxiv) This note says: "1.8 Disputes settled by RICS or arbitration"

94. This is what David Wickersham said when I asked him in the meeting and I agreed. "

40.
An obvious point in relation to the account of Mr. Wright set out in the paragraphs which I have quoted in the preceding paragraph of this judgment is that he did not mention either in his letter dated 1 August 1986 or in his letter dated 11 August 1986 any discussion of or understanding concerning the circumstances in which it was contemplated that the appointment of HDA in relation to work to be undertaken in respect of the Estate might be terminated. At paragraph 112 of his first witness statement Mr. Wright commented upon those letters in this way:-

" As my correspondence shows – and I refer to my letters to Westminster dated 1 st August and 11 th August 1986 … - the only controversial issue as far as I was concerned arising out of the 1987 Agreement was this issue of the appointment and responsibility for PI insurance of the structural engineers. The termination clause was simply not an issue. I had agreed with David Wickersham the narrow circumstances in which the 28 day notice period would apply. I had no reason to suspect that the agreement meant anything else. I did not see the need for HDA to take its own legal advice. What had been agreed was in my view straightforward and understood in exactly the same way by both parties. "

It does not seem to me that those comments are remotely satisfactory. If the question of the circumstances in which the appointment of HDA could be terminated was as significant as Mr. Wright now contended, with it being necessary for him to clarify the issue specifically with Mr. Wickersham, then logically it was important enough to require confirmation as to what had been agreed, if anything had, in at least one of the letters written by Mr. Wright shortly after the meeting. The absence of confirmation is therefore, it seems to me, a powerful indication that in fact nothing was agreed as to the circumstances in which the Council could terminate the appointment. It may also be significant that the focus of at least one of Mr. Wright's comments was not what Mr. Wickersham was alleged to have said, but what Mr. Wright considered the provision for termination under discussion actually meant. The significance which I am inclined to think that the focus of that comment has is that during his cross-examination Mr. Wright showed himself, in my judgment, to have a weak grasp of the basic principles of the law of contract. In particular he asserted repeatedly that he considered that from the time HDA was appointed to undertake a survey of the blocks of flats on the Estate and to produce a report the Council had engaged HDA to undertake all surveying work involved in any works recommended as necessary as a result of the survey because the undertaking of a survey was the first stage in the undertaking by a surveyor of building surveying services in accordance with the RICS 1981 Conditions.

41.
When in his letter dated 21 January 1987 Mr. Wright came to make comments upon the draft agreement which had been sent to HDA by Mr. Anthonio not only did he not mention in the main text the question of the circumstances in which the appointment of HDA might be terminated, but he only made one comment upon the proposed modification of paragraph 1.7 of the RICS 1981 Conditions, namely "(Note: Tender based on whole estate over 5 years. Abortive costs must be allowed for if over extended period)" . The focus of that comment was not a concern as to the circumstances in which the appointment might be terminated, but how to increase the fee recovery of HDA if the period over which the works on the Estate lasted was greater than five years.

42.
The conclusion suggested by the lack of contemporaneous confirmation of the alleged agreement as to the circumstances in which the appointment of HDA could be terminated was reinforced by the response of Mr. Wright to the letter dated 15 February 1996 by which the appointment was in fact terminated. Mr. Wright did not then assert that the termination was in breach of any understanding which he had had as to the circumstances in which a termination was possible under the 1987 Contract. He did not reply at all to the letter dated 15 February 1996 until he wrote a letter dated 7 March 1996 to the City Solicitor. In the latter letter he wrote:-

" **CHURCHILL GARDENS ESTATE**

MAJOR WORKS PROGRAMME

We wish to acknowledge receipt of your letter of 15 February concerning the above to which we had not replied earlier as we have yet to receive the schedule of alleged defects to which reference is made in the last paragraph of your letter and upon which we shall comment on receipt.

We further acknowledge the confirmation received from Council Officers that the reason to determine the contract dated 1 July 1987 is purely to "market test" the current level of professional fees which may be tendered for such a project and we are pleased that our performance to date has warranted our inclusion on this tender list.

You will be aware that, following competitive tendering, and the successful implementation of the first two phases, Westminster City Council requested that we enter into this contract in 1987.

We would confirm that we would be pleased to continue to provide our services on the basis of the contract between ourselves. Indeed, we would point out that HDA remain totally committed to the completion of the Major Works Programme on Churchill Gardens Estate in accordance with our appointment and request that you reconsider your decision to terminate our contract. However, on the basis that you wish to proceed with the determination, which comes into effect on 15 March, we look forward to receiving your immediate proposals in respect of the consideration which you feel appropriate to cover the financial loss which we shall sustain as a result of your decision. ”

It seems to me that, if ever there was a time to make the point that the termination of the 1987 Contract was in breach of an understanding between the parties that it would only be determined in limited circumstances, it was in that letter, in which the Council was being invited to reconsider the decision to terminate. Mr. Wright was challenged in cross-examination with the failure to make that point in the letter. His response was that he was concerned that the suggestion that work which HDA had supervised was defective might mean that there was in fact, even on his understanding of the circumstances in which the 1987 Contract could properly be brought to an end, a proper reason to determine it. He also said that in his letter he was trying to induce the Council to agree to the proposition that the reason for termination was the desire to market test the current level of professional fees for a project such as that in progress on the Estate. Those two points are not obviously mutually consistent. The first envisaged a fear that the termination of the 1987 Contract was indeed for one of the causes which Mr. Wright now said was permitted, while the second proceeded on the basis that there was no genuine reason for termination at all.

43.
The City Solicitor acknowledged Mr. Wright’s letter dated 7 March 1996 in a letter dated 11 March 1996. Mr. Wright then wrote a further letter, dated 19 March 1996, to the City Solicitor in which he also failed to make any reference to any alleged agreement as to the circumstances in which the 1987 Contract could properly be determined. What he wrote was:-

“ **MAJOR WORKS – CHURCHILL GARDENS ESTATE**

We refer to your letter of 15 February, to our reply of 7 March and to your response of 11 March 1996.

We are extremely concerned about the possible repercussions of the situation in which you place ourselves, and indeed yourselves, and wish to confirm that we still await the schedule of alleged defects referred to in your letter of 15 February.

In the spirit of the goodwill that has always existed between ourselves, we are presently continuing to provide our services in respect of the Major Works Programme in accordance with our appointment and would request your immediate proposals in further response to our letter of 7 March. ”

44.
The City Solicitor replied to the letters dated 7 and 19 March 1996 written by Mr. Wright substantively in a letter dated 3 April 1996. The reply was in these terms:-

“ **MAJOR WORKS – CHURCHILL GARDENS ESTATE**

Thank you for your letters dated 7 and 19 March. My apologies for the delay in replying.

Mr. David Wickersham, a quantity surveyor for the Director of Housing will be contacting you shortly in order to discuss the updated schedule of defects mentioned in the penultimate paragraph of my letter to you dated 15 February.

The City Council does not consider it appropriate to reconsider its decision to terminate as requested by you in the final paragraph of your letter dated 7 March. It is my view that termination has taken place pursuant to the conditions of contract and accordingly, you have no claim for any financial loss as a result of determination. ”

Again, one would have thought that receipt of a letter in those terms would have provoked HDA to respond with a reference to the alleged agreement as to the circumstances in which the 1987 Contract could be determined had it been Mr. Wright’s belief at the time that the agreement as to which he spoke in his evidence had actually been made. There was no such response. When, some months later, HDA instructed solicitors, Messrs. Hill Taylor Dickinson, to write to the City Solicitor on its behalf, again there was no reference to any alleged agreement made with Mr. Wickersham on 31 July 1986. The allegation that there had been such an agreement was not even made in the original version of the Particulars of Claim in this action.

45.
In fact prior to the giving of notice to terminate the 1987 Contract, actually in August 1995, a meeting had taken place between Mr. Wickersham and Mr. Wright at which Mr. Wickersham had explained that the question had arisen of compulsory competitive tendering for professional services required by the Council. Following that meeting Mr. Wickersham had written a letter dated 11 August 1995 to HDA in which he said:-

“ **RE: MAJOR WORKS – CHURCHILL GARDENS ESTATE**

Further to our meeting last week, I confirm that the City Council is considering the conclusion of your services on Churchill Gardens Estate following completion of Phase 4c. In such circumstances, a request to commence services on Phase 5 would not, of course, be forthcoming.

You will appreciate that considerable time has passed since your firm started work on the Estate in the 1980s and working practices have changed substantially since your initial appointment.

Conclusion of your services would enable the City Council to restructure its services on the Estate in line with its Building Maintenance Services model, with which you are familiar.

I must stress that neither our meeting nor this letter should be construed as notice of determination nor, for that matter, a statement of intent. The purpose of our meeting and this communication is to advise you of the possibilities which the City Council is considering. ”

46.
One might have thought that the receipt of a letter in the terms of that dated 11 August 1995 would have prompted a response in which the point was made that it had been agreed that the appointment of HDA would only be terminated in limited circumstances, if, indeed, such an agreement had been made. In fact the response of Mr. Wright, in a letter dated 17 August 1995 not only did not make that point, but seems, from its terms, inconsistent with any view at that time that such an agreement had been made. Mr. Wright was cross-examined about the failure to mention in his letter of 17 August 1995 any understanding with Mr. Wickersham as to the limited circumstances in which the appointment of HDA would be determined. His reply was that it was unnecessary to refer to the point because neither in the meeting nor in the letter of 11 August 1995 did Mr. Wickersham indicate that

the appointment **would** be determined. Given the terms of the letter dated 11 August 1995 that evidence seemed to me disingenuous.

47.
What Mr. Wright wrote in his letter dated 17 August 1995 was:-

“ **MAJOR WORKS – CHURCHILL GARDENS ESTATE**

I thank you for your letter dated 11 August, received on 16 August, concerning the Major Works Programme at Churchill Gardens Estate.

I consider that this project has progressed extremely well in terms of adherence to brief, budget, quality and programme, with the current phase following this pattern. Your records and your close liaison with ourselves will, I feel sure, fully support this view. We have built up a very good relationship with yourselves, the planners, the local estate office, tenants and lessees and other interested parties.

Our present team remains stable in respect of dual Director commitment since the inception of this programme, in respect of Associate Director and Tenant Liaison Officer involvement since Phase 3 and on-site Supervising Officer and Clerk of Works involvement since the commencement of Phase 4. This management team is supported both on site and at our Head Office by experienced qualified staff who have the benefit of a great deal of accumulated knowledge and stored data in respect of the Major Works programme. This continuity has enabled Hadley Design Associates to gain a unique appreciation of Churchill Gardens Estate in terms of the client and resident needs, the existing fabric of, and repairs required to, the buildings and the detail and supervision of the works. Our offices at Chaucer House, leased on the basis of our ongoing commitment to the Major Works Programme, will continue to provide an accessible on site facility for the administration of the Major Works Programme. You will appreciate that these factors have resulted in a reducing and now extremely straightforward input from your Project Liaison Officers.

We are immediately in a position to finalise general and specific details in order to make the necessary planning applications and prepare contract documentation in respect of ongoing phases in order that your programmed dates and expenditure can be met.

Hadley Design Associates are commissioned by the City Council in relation to the Major Works Programme for the whole of Churchill Gardens Estate and we would actively wish to complete this contract. Any delay at this stage surely cannot be in the best interests of the implementation of your Housing Programme, your budgetary requirements or the benefits to the Estate as a whole and we therefore very much look forward to receiving your ongoing instructions to complete the final phases of this programme. ”

The whole thrust of that letter was not that HDA had a contractual entitlement to undertake all of the surveying work necessary in connection with the repair and refurbishment of the blocks of flats on the Estate unless and until limited circumstances had arisen in which its appointment could be determined, but rather a plea that HDA had done well up to that point and it would be in everybody’s interests for it to continue.

48.
Mr. McClinton was called to give evidence on behalf of HDA Ltd. As it was not said that he had been present at the meeting on 31 July 1986 there was little of value which he could add to the account given by Mr. Wright. However, his contribution in his first witness statement was illuminating as

indicating an attitude which seems to underlie the principal claim made on behalf of HDA in this action. His first witness statement included these paragraphs:-

“ 34. In respect of clause 1.7, it was never my understanding that the meaning of this clause was that Westminster could terminate the project at will. Pursuant to the kinds of building contract with which we were familiar, a client could only determine a contract for a number of very specific reasons, which were generally repeated poor performance, financial insolvency and/or failure to act on architect’s instructions. I had never come across a situation where a client could determine a contract at will, or because he did not like the price.

35. On the basis of my then experience in the industry, I formed the view when I read the draft agreement that Westminster’s intention must have been that its 28 day notice period applied only in the usual default circumstances.

36. In all my years of practice (then and since), I have never had a client terminate a contract and, when considering this particular contract, I did not have in mind that it would ever be Westminster’s intention to terminate at will. As far as I was concerned, we had built up a relationship of mutual trust. Westminster knew that we at HDA had made short term sacrifices in terms of profit and that we had specifically engaged staff and moulded our practice for the purposes of performing the contract. We knew that Westminster urgently needed the work done and that, by engaging HDA they had obtained the work from a reliable and trusted contractor and for an extremely competitive fee. However, in my view, the position in respect of the proposed notice clause needed to be checked before the agreement was signed because I would not have been prepared for HDA to have signed an agreement pursuant to which Westminster could give 28 days notice at will.

37. **HDA meeting to discuss the draft agreement**

I discussed the draft agreement with both Mr. Wright and Mr. Bailey some time between Mr. Bailey receiving the draft agreement from Westminster under cover of its letter dated 9 July 1986 … and Mr. Wright’s meeting with David Wickersham on 31 July 1986. I discussed with both Mr. Bailey and Mr. Wright clause 1.7 in some detail. In particular we discussed my experience of the kind of circumstances which would give rise to the right by either party to give 28 days notice and the need to clarify what Westminster meant by this. Mr. Wright and Mr. Bailey both agreed that they would not be prepared to sign this agreement if Westminster could terminate it at will. They both agreed with me that Westminster must mean that they could terminate on 28 days notice only in the default circumstances. We all agreed that the point needed to be checked before the agreement was signed.

38. Mr. Wright agreed that he would check with Mr. Wickersham what were to be the events which would trigger the application of the 28 day notice clause and I understand that Mr. Wright made a note on his copy of the agreement to remind him to do this. Mr. Wright said that his particular concern was that Westminster could use this clause if they ran out of money and it was agreed that he would raise this point specifically in the context of the trigger events and that he would let us know when he had discussed it with Mr. Wickersham exactly what the trigger events were.

39. In the same clause as the 28 day notice period was a period for termination of the contract if the works were postponed for more than a year. I discussed this point also with Mr. Wright and Mr. Bailey. We came to the conclusion that, because of the nature of the project, this was very unlikely to arise in practice. The contract involved ongoing work and, even if not carrying out work on a new phase, we would always be involved in carrying out ongoing works because of the defects liability periods. We did not foresee that a postponement of more than one year would be a practical possibility.

40. **Feedback following Mr. Wright's meeting on the 31 st July 1986**

When Mr. Wright came back from his meeting with Mr. Wickersham on the 31 st July 1986, he assured me that Mr. Wickersham had said, first, that the 28 day notice period at clause 1.7 did indeed only apply on the operation of certain trigger events, secondly, that these were default or liquidation by HDA, or Westminster running out of money and, finally, that it would be very unlikely for Westminster to run out of money because the project was budgeted for. I was reassured by this and happy to bind HDA to the contract upon this basis. If the 28 days clause had not had this agreed meaning, I would not have agreed to commit HDA to the agreement. "

49.
What seems to me to be especially significant about the account given by Mr. McClinton is, first, that he found it inconceivable that it could ever be the case that the appointment of HDA might be determined simply by the giving of notice to bring the relationship between the Council and HDA to an end, and, second, that the issue from his perspective was not whether there should be any express limitation as to the circumstances in which a notice might be given, but rather what the provision for termination actually meant. If Mr. McClinton's perception was accurate, it was perhaps not to be expected that any discussion between Mr. Wright and Mr. Wickersham would have focused on express limitations as to the circumstances in which a notice might be given, because that was not the concern of Mr. Wright or Mr. McClinton. Their assumption was that the provision for termination could not mean what it said on its face, so rather than agreeing some modification to what was proposed, the inherent likelihood is that the discussion between Mr. Wickersham and Mr. Wright was more vague.

50.
Although Mr. Wickersham frankly accepted that he could not remember the meeting of 31 July 1986 at all, an important part of the background to it from his point of view was the decision of the Contracts Sub-Committee of the Council, that is to say a sub-committee of elected members of the Council, at a meeting held on 3 April 1986 that the Council enter into a formal contract with HDA. An extract from the minutes of the meeting of the sub-committee was put in evidence. That extract included:-

" 7. CHURCHILL GARDENS ESTATE – CONSULTANT'S FEES

7.1 The Sub-Committee considered a report of the Director of Housing setting out the existing situation regarding consultants on Chaucer House (Phase 1) and which made proposals for dealing with consultant's fees on the remainder of the estate.

7.2 RESOLVED: That Contract Standing Order 5 be waived and authorised that Hadley Design Associates be appointed as consultants dealing with both building and quantity surveying and incorporating structural engineering services for the negotiated fee of 7.85% of the value of the works, subject to the City Solicitor being satisfied that satisfactory contractual terms are agreed with Hadley Design Associates including:-....

(h) that the City Council should have an absolute determination provision as regards future stages of the project. "

Mr. Wickersham's evidence in his witness statement made for the purposes of the trial before me included:-

" 5.7 At that time I kept notebooks with me in which I would jot down anything I felt it useful to record. Entries would remind me of things I considered important or would prompt me of actions I

needed to take. Referring to the notebooks which cover 31 July 1986 I find that I made no record of the meeting with Mr. Wright. The fact that I made no notes supports my belief that it was an informal discussion. HDA's letter dated 1 August 1986 does not indicate otherwise nor does the subsequent letter from HDA dated 11 August 1986.

5.8 It is now contended by Mr. Wright that I agreed or represented on behalf of the City Council that clause 1.7 would be exercised only in certain, limited circumstances. I believe that this contention was first made in the Reply to the Defence. I certainly do not recollect any such contention being made orally before then and have not found it being made in any correspondence or other documentation prior to the commencement of proceedings.

5.9 This places me in the position of having to deal with a contention made in respect of a meeting which was some 17 years ago. I have to do so when there is no reference to the contention in the contemporaneous correspondence. The contention was not made in the letter from Mr. Wright dated 1 August 1986. Nor was it made in HDA's letter dated 6 July 1992 which was written in reply to the City Council's letter dated 29 June 1992. Nor was it made in answer to my letter dated 11 August 1995. Nor was not [sic] referred to in any of the protracted correspondence following termination. It is clearly at variance with the fact that the termination clause as initially drafted survived unqualified in the final drafting of the 1987 agreement.

5.10 Looking back I can make the following general observations. First, I was aware at that time that the City Council was insisting on there being an absolute determination provision. Second, I would not in those circumstances have had any authority to do anything which prevented the operation of clause 1.7 as drafted. Third, I would not have exceeded my authority and made any agreement or representations which did so. Finally, if Mr. Wright had indicated that clause 1.7 as drafted was unacceptable to him, I would have reported to the Contracts Management Board just as I did subsequently on 29 September 1986 when reporting the difficulty securing collateral warranties and on 13 October 1986 following Mr. Wright's request that his fee be increased. "

51.
Mr. Wickersham told me in oral evidence that he was confident that the note made by Mr. Wright that any disputes arising would be resolved by the Royal Institution of Chartered Surveyors or arbitration could not represent accurately anything which he, Mr. Wickersham, had said. The reason for his confidence was that the Council had been involved in arbitration proceedings the outcome of which it regarded as unsatisfactory and that in consequence it was Council policy not to agree to the inclusion of arbitration clauses in contracts.

52.
A matter upon which Mr. Clive Jones, who appeared together with Mr. Adrian Pay on behalf of the Council, placed some reliance in support of a submission that HDA cannot have considered at the time that the effect of the 1987 Contract was that HDA was entitled to provide all of the surveying services required in relation to the works of repair and refurbishment required to the blocks of flats on the Estate was what happened in 1991 in relation to Phase 4 of the works. HDA was invited to submit a tender in respect of the surveying services required in connection with Phase 4. Mr. Wright told me, and I accept, that this was not a competitive tender, but a mechanism for establishing the fee which HDA would charge if quantity surveying services, previously supplied through HDA by the firm of Badenoch Powling and Partners were thenceforth to be supplied directly to the Council. HDA did submit a tender dated 22 August 1991. Mr. Wright did not at that time make any reference to what he now said had been agreed with Mr. Wickersham in relation to the circumstances in which the Council

might rely upon paragraph 1.7 of the RICS 1981 Conditions as modified in the 1987 Contract, and it was that matter upon which Mr. Jones relied. In a letter to HDA dated 10 September 1991 the City Solicitor informed HDA that:-

“ RE: CHURCHILL GARDENS ESTATE – PHASE IV

I am pleased to inform you that the City Council has accepted your Firm’s tender dated 22 nd August 1991 in respect of lead consultancy services for the above project.

In view of the nature of the contract the City Council will require you to enter into a formal Contract under seal.

I am preparing the Contract and will forward this to you as soon as possible. ”

In fact a copy of the contemplated formal contract was sent to HDA by the City Solicitor under cover of a letter also dated 10 September 1991. That contract was in short form. The material provisions were simply these:-

“ WHEREAS the Surveyors have agreed with the City Council to provide professional lead consultancy services (hereinafter referred to as “the Services”) as set out in the Brief embodied in the booklet entitled Fee Tender documents (which together with the documents set out in the Schedule hereto is hereinafter called “the Contract Documents”)

NOW WITNESSETH as follows:-

1. In consideration of the remuneration referred to in the Contract Documents the Surveyors will perform the duties thereunder required of them at the time and in the manner therein mentioned

2. Should there be any conflict between these presents and the Contract Documents these presents shall prevail. ”

The documents listed in the schedule to the form of agreement included what were described as “Conditions of Appointment, marked “C”” , which were to a significant extent in similar form to, but not by any means identical with, the 1987 Contract, including, in particular, the incorporation of the RICS 1981 Conditions with the modifications to paragraph 1.7 made in the 1987 Contract. I shall refer in this judgment to the conditions referred to as “the Conditions of Appointment” and to the agreement made in 1991, together with the documents incorporated in it, as “the 1991 Contract” .

53.
At the time HDA was requested to submit the tender to which I have referred in the preceding paragraph Mr. McClinton did write a letter dated 16 July 1991 to the Director of Housing in which he said this:-

“ **RE: CHURCHILL GARDENS ESTATE SW1**

APPOINTMENT OF HADLEY DESIGN ASSOCIATES

Further to my telephone conversation with John Martin yesterday afternoon, I enclose herewith a copy of the relevant section of our Agreement in respect of works at Churchill Gardens Estate. Our appointment clearly states that the works “means the programme of works or any part or parts thereof intended to be undertaken at the Churchill Gardens Estate”, and was, of course, fee tendered on this basis.

We look forward to receiving your further instructions. ”

54.
In the circumstances it does not seem to me that much light is shed on what was said at the meeting on 31 July 1986 by what occurred in 1991.

55.
I accept that Mr. Wright’s recollection of making notes on the front of a copy of the draft agreement which he took with him to the meeting with Mr. Wickersham and Mr. Berry of matters of concern which he wished to raise is accurate. I accept that his recollection of making notes on the back of the pages of the draft during his discussion with Mr. Wickersham is also accurate. However, I am not satisfied that those notes necessarily reflect accurately what Mr. Wickersham actually said. In particular, I accept the evidence of Mr. Wickersham that he would never have indicated that the intended means of resolving any disputes was either through the good offices of the Royal Institution of Chartered Surveyors or by arbitration. Moreover, I do not consider that the interpretation which Mr. Wright sought to place upon the notes in relation to the discussion as to the circumstances in which the appointment might be terminated is accurate. If the matter had been as important as was now contended, and the assurances had been as definite as was now alleged, it seems to me that it is inconceivable that Mr. Wright would not have recorded contemporaneously in correspondence to the Council what had been discussed and agreed. Even if it had been believed that the issue was not the precise words intended to be used in what became the 1987 Contract, but what words considered to be ambiguous in fact meant, that is plainly something which needed to be recorded. That did not happen. Having seen and heard Mr. Wright give evidence it is plain to me that not only was his understanding of the law of contract weak, but that he was and is not very astute commercially. He seemed a genuinely nice man who dealt fairly with people and expected them to deal fairly with him, without the need for the armour of the law to be fastened firmly about him to make sure that his expectations were not disappointed. So far as the question of the circumstances in which the contemplated contract might be terminated was concerned, and the significance of that matter, in my judgment Mr. Wright was lulled into a false sense of security by the firmly held, but wholly erroneous, belief of Mr. McClinton that a contract could only be brought to an end for some substantial reason, even if the contract provided for termination by the giving of a notice. Mr. Wickersham also seemed to me to be a very nice man, certainly not the type of man who would either set out to mislead or allow someone to be misled, if he were aware that that was happening. Not only is that the type of man I find him to be, but he was at the time a friend of Mr. Wright, and they remain on good terms personally, as I understand it. Mr. Wickersham is, however, in my judgment, a cautious man who sought conscientiously to carry out his duties. I accept his evidence that he was aware at the time of his meeting with Mr. Wright on 31 July 1986 of the terms of the authorisation given by the Contracts Sub-Committee of the Council for the making of a contract with HDA, and in particular of the requirement that any contract should contain a provision entitling the Council to terminate the appointment of HDA at any time. In the light of his awareness of the terms of the resolution of the Contracts Sub-Committee it seems to me to be inconceivable that Mr. Wickersham would have given any assurance to Mr. Wright as to the circumstances in which what became the 1987 Contract could be determined, because he knew that he was not in a position to give any such assurance. Equally I am satisfied that he would not have said anything to Mr. Wright which he imagined that Mr. Wright would place any reliance upon. If Mr. Wickersham had understood that it was important to HDA that the right of the Council to give notice to terminate what became the 1987 Contract be limited in some way, I am satisfied that he would have told Mr. Wright that he was not able to give any assurances, but that he would refer the matter back for further instructions. In the result I find that, although there

was some discussion at the meeting on 31 July 1986 of the question of the circumstances in which the Council could terminate the appointment of HDA, it was in the nature of a general consideration of the sort of circumstances which might prompt the Council to give notice of termination. I find that the circumstances listed by Mr. Wright during the meeting on his copy of the draft agreement which he took to the meeting with him were examples only of such circumstances, and understood at the meeting to be examples only. They were not stated or understood as an exhaustive list of the relevant circumstances, as was now contended on behalf of HDA. Rather than the question of the possible circumstances in which a notice of termination might be given being one of importance at the meeting, I find that it was an issue upon which Mr. Wright was relaxed in the light of his discussions with Mr. McClinton and to which neither party attributed any particular significance because neither Mr. Wright nor Mr. Wickersham had it in mind that the giving of notice of termination was at all likely so far as the future could be foreseen at 31 July 1986.

The alleged telephone conversation between Mr. Wright and Mr. Anthonio

56.
At paragraph 116 of his first witness statement Mr. Wright said this:-

“ In late 1986/early 1987, I had a number of conversations with Ken Anthonio of the legal department about the proposed contract and terms discussed with David Wickersham. Ken Anthonio telephoned me to say that he had details of the terms of agreement reached between David Wickersham and I and wanted to confirm that I agreed everything before it was finalised. I explained to Ken Anthonio who confirmed his agreement, the major amendments that David Wickersham and I had made, including the percentage “on account” fee arrangement and the termination clause. In this latter respect, I told Ken Anthonio that David Wickersham and I had agreed that determination (aside from if the programme stopped for a period of more than one year which was specifically provided for in the agreement) could only be exercised on the default or liquidation of HDA or if Westminster ran out of money. I said that on that basis I was happy to enter into the agreement. Ken Anthonio agreed the termination clause only applied in those circumstances. ”

57.
Mr. Anthonio was called to give evidence on behalf of the Council. In his witness statement prepared for the purposes of the trial he said, so far as is presently material:-

“ 2. During 1987 my involvement with the contract between the Council and Hadley Design Associates (“Hadley Design”) dated 1 st July 1987 was very limited. I have seen a letter dated 2 nd July 1987 from the Council to Hadley Design that thanks them for the return of “the Formal Agreement signed and sealed on behalf of your Firm”. The letter was sent by me and my involvement was limited to dealing with the formalities required to exchange contracts.

3. I would have been given a draft of the contract containing all of its terms by my Head of Section, Chris Rowe, and told to prepare the contract to be sent to Hadley Design for their signature and for the Council to sign. This would have involved me getting the agreement typed, the typing checked and the agreement sent out by post.

4. I was not involved in the drafting of the agreement, in negotiating the agreement or with any of the committee meetings that would have been required to consider and approve the agreement on behalf of the Council. My role was purely formal and minor….

6. I have been referred to the Re-Amended Particulars of Claim and understand it to be alleged that I had a telephone discussion with Mr. Wright in or about February 1987 concerning the terms of a draft agreement which became the 1987 agreement.

7. I do not remember ever having spoken to Mr. Wright. In any event I would not have discussed the terms of the agreement. That was not for me to do. This was not only because I had no authority but also because I would not discuss terms for which I had no responsibility. Someone dealing with the formalities does not suddenly start discussing or explaining or negotiating the terms of the contract.

8. It is alleged that I went over terms previously discussed with Mr. Wickersham. I would not have known what was discussed by Mr. Wickersham. If Mr. Wright had sought to discuss the terms with me, I would have referred the matter to a more senior member of the department or to Mr. Wickersham. I would have made a note of this and sent it to the person to whom I made the referral.

9. It is alleged that I went through certain of the other clauses that I considered to be relevant and supposedly led Mr. Wright to understand that certain words had been changed because of local authority policy in respect of fees. This is just incorrect. I would not have known which clauses were relevant and would not have known about such changes. Such matters were completely outside my involvement and knowledge and I would not have dealt with them.

10. I am afraid that Mr. Wright's recollection is in error. "

58.
Mr. Wickersham told me in his evidence that what became the 1987 Contract was in fact drafted by Mr. Martin King of the City Solicitor's department and that it was that draft which was sent out by him under cover of his letter dated 9 July 1986. I accept that evidence. It was confirmed by Mr. Anthonio.

59.
I accept the evidence of Mr. Anthonio that he never had any discussion with Mr. Wright concerning any of the terms of what became the 1987 Contract. From his oral evidence it was plain that Mr. Anthonio was conscious of his limitations in relation to tackling any question as to the appropriateness of the terms of an agreement either from a commercial or a legal point of view. I am completely satisfied that if Mr. Wright had sought to raise any point on the draft sent by Mr. Anthonio under cover of his letter dated 19 December 1986 Mr. Anthonio would not have dealt with the point himself, but would have referred it to a superior in the City Solicitor's department, or, perhaps, to Mr. Wickersham. In fact it is plain from the terms of his letter dated 21 January 1987 what were Mr. Wright's main concerns at that time concerning the draft sent by Mr. Anthonio, and they did not include the issue of the circumstances in which termination of the appointment might occur. All of the points in which Mr. Wright was at that time interested were either mentioned in the letter itself or marked in manuscript on the copy of the draft agreement returned under cover of that letter. I find that Mr. Wright was simply mistaken in recollecting a conversation or conversations with Mr. Anthonio concerning the terms of what became the 1987 Contract. In the light of the references in the letter dated 21 January 1987 to telephone conversations between Mr. Wright and Mr. Anthonio I am inclined to accept that they did in fact speak on the telephone, although Mr. Anthonio now had no recollection of that. However, I am completely satisfied that nothing of any substance relevant to any issue which I have to determine was said during any such telephone conversations.

Conclusions in relation to the case relying on a collateral contract or estoppel

60.
In the light of my findings of fact the case as to a collateral contract limiting the circumstances in which the 1987 Contract might be determined by the Council fails for want of proof of the collateral contract asserted. As the representations sought to be relied upon as founding an estoppel preventing the Council from determining the 1987 Contract other than in the limited circumstances contended for have not been proved on the evidence, the case put forward in reliance upon those alleged representations also fails. I turn to consider the other ways in which the principal claim of HDA Ltd. was put.

The alleged implied terms

61.
The alleged alternative justifications for the implication of the terms pleaded in paragraph 11 of the Re-Amended Particulars of Claim were said to be that implication was required “as a matter of law” or was “necessary to give business efficacy” to the 1987 Contract.

62.
In my judgment it is helpful to notice before continuing consideration of this way of putting the case that the effect of the terms which it was contended were to be implied into the 1987 Contract was to inhibit the reliance which could be placed by the Council upon one of the express terms of the 1987 Contract, namely that by virtue of which either party could terminate the contract by giving one month’s notice to that effect. Mr. Burr did not feel it necessary or appropriate to consider whether the inhibitions contended for were equally applicable to HDA in the event that it wished for some reason to terminate the 1987 Contract, or, if not, why not.

63.
The most usual situation in which a term falls to be implied into a contract as a matter of law is where there is some statutory provision by virtue of which the implication is required to be made. However, it is possible for a term to be implied at common law as an incident of a contract of a particular kind. Mr. Burr did not identify any statutory provision by virtue of which he submitted that any of the terms which he contended were to be implied into the 1987 Contract fell to be implied. Rather he seemed to rely upon an implication at common law. In support of the submission that the relevant terms fell to be implied at common law into the 1987 Contract he drew to my attention the decision of the Court of Appeal in Timeload Ltd. v. British Telecommunications Plc [1995] EMLR 459. The circumstances in that case were very particular. At that time British Telecommunications Plc (“BT”) was the sole provider of a directory enquiries service for telephone subscribers. In order to access the service a subscriber telephoned the number 192. BT held a licence as a public telecommunications operator. It was a term of that licence that it provide telephone services on request to anyone who sought them. It was also a term of the licence that BT should not discriminate unduly against particular persons or classes of person. The claimant sought to operate a free telephone enquiry service for persons requiring various professional or commercial services. It sought, and was allocated, the number 0800 192192 and entered into a contract upon the standard terms of BT in relation to the use of a telephone line with that number. Once the telephone service using that line had commenced operation BT sought to terminate the contract by giving the notice of one month for which the contract provided. The claimant then sought an interlocutory injunction restraining BT from terminating the contract. It was contended on behalf of the claimant that it was an implied term of the contract that it could only be terminated by the giving of notice if there were good cause for the notice. It was further contended that there was no such good cause in that case. The judge at first instance granted an interlocutory injunction. The Court of Appeal dismissed the appeal against the grant of that injunction.

Mr. Burr submitted that the decision was authority for the proposition that it was to be implied as a matter of law in any contract, or at least any contract having the characteristic of the contract in Timeload Ltd. v. British Telecommunications Plc that it continued indefinitely until determined, which characteristic he contended it shared with the 1987 Contract, that notice of termination would not be given other than for good cause.

64.
The leading judgment in Timeload Ltd. v. British Telecommunications Plc was that of the then Master of the Rolls, Sir Thomas Bingham. About the submission that there was to be implied into the contract the term to which I have referred he said this, at pages 466 – 467 of the report:-

“ On behalf of BT Mr. Hobbs submitted that the meaning of the contract, particularly the meaning of clause 18.1, was quite clear. BT could terminate on a month’s notice at any time with or without reason, and no matter how great the loss such termination might, to BT’s knowledge, cause the customer. There was, he said, no inconsistency, as the learned judge had thought, between the power to suspend for operational reasons under clause 6 and the power to terminate under clause 18. He argued that the factual matrix was irrelevant, since this was a standard form contract applicable to many millions of customers and the meaning of the contract did not vary depending upon the peculiar circumstances of those who happened to be parties to it. Furthermore, he said that there was no room for implication since terms were to be implied into the contract only if they were necessary and not because they were thought to be reasonable. In other words, Mr. Hobbs propounded with great skill what could fairly and not pejoratively be described as an old-fashioned classical argument based upon a literal approach to the text of the contract. That may prove to be a good argument. It is certainly a view of the matter which has been accepted by judges on other occasions albeit in the absence of full argument.

For my part, however, I share the judge’s reservations. It is relevant to bear in mind that BT is a public telecommunications operator licensed by the Secretary of State under Telecommunications Act 1984 to provide a public telecommunications service. It is subject to the oversight of the Director General of Telecommunications who has certain powers if BT should fail to comply with its licence. It is quite plain, as one would expect, that BT is indeed obliged to observe the terms of its licence. The terms of the licence are not, as I have pointed out, part of the contract with the consumer, but they are, nonetheless, as I consider, an inescapable part of the background which falls to be considered…..

It is therefore correct, speaking very generally, to regard BT as a privatised company, no longer a monopoly, but still a very dominant supplier closely regulated to ensure that it operates in the interests of the public and not simply in the interests of its shareholders should those be in conflict. Against that background I am, for my part, by no means sure that the classical approach to the implication of terms is appropriate here. As Lord Cross pointed out in Liverpool City Council v. Irwin [1977] AC 239, 257, implied terms can find their way into contracts either because the law lays down a general rule that in contracts of a certain type a certain obligation should be implied, or on grounds of necessity for business efficacy. Thus, pure necessity is not the only ground on which a term can be implied and I can see strong grounds for the view that in the circumstances of this contract BT should not be permitted to exercise a potentially drastic power of termination without demonstrable reason or cause for doing so. ”

65.

Mr. Jones at paragraph 38 of his written opening submitted that I should not adopt the approach to the implication of terms which the Court of Appeal in Timeload Ltd. v. British Telecommunications Plc indicated it considered arguable. His submission was:-

“ Reliance is placed by the Claimant upon the interlocutory decision of the Court of Appeal in Timeload Limited v. British Telecommunications plc [1995] EMLR 459 but:-

i) whilst that decision is interlocutory, the classical approach which was recognised and acknowledged (p466) is clearly not;

ii) the reason why there was an arguable case notwithstanding the classical approach was because of the statutory background applicable to BT (pp466 and 467) and that has no relevance to this case;

iii) there is no such statutory background here to override (even in argument) the classical approach;

iv) the classical approach of the House of Lords is binding. ”

66.
What Mr. Jones called “the classical approach” was exemplified in his submission by the observations of Lord Simon of Glaisdale in delivering the advice of the majority of the Privy Council in BP Refinery (Westernport) Pty. Ltd. v. President, Councillors and Ratepayers of Shire of Hastings (1978) ALJR 20 at page 26:-

“ Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that “it goes without saying”; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract. ”

67.
Mr. Jones also drew to my attention the comments of Lord Steyn in Equitable Life Assurance Society v. Hyman [2002] 1 AC 408 at page 459A – D:-

“ If a term is to be implied, it could only be a term implied from the language of article 65 read in its particular commercial setting. Such implied terms operate as ad hoc gap fillers. In Luxor (Eastbourne) Ltd. v. Cooper [1941] AC 108, 137 Lord Wright explained this distinction as follows:

“The expression “implied term” is used in different senses. Sometimes it denotes some term which does not depend on the actual intention of the parties but on a rule of law, such as the terms, warranties or conditions which, if not expressly excluded, the law imports, as for instance under the Sale of Goods Act and the Marine Insurance Act … But a case like the present is different because what it is sought to imply is based on an intention imputed to the parties from their actual circumstances.”

It is only an individualised term of the second kind which can arguably arise in the present case. Such a term may be imputed to parties: it is not critically dependent on proof of an actual intention of the parties. The process “is one of construction of the agreement as a whole in its commercial setting”: Banque Bruxelles Lambert SA v. Eagle Star Insurance Co. Ltd. [1997] AC 191, 212E per Lord Hoffmann. This principle is sparingly and cautiously used and may never be employed to imply a term

in conflict with the express terms of the text. The legal test for the implication of such a term is a standard of strict necessity…. ”

68.
As I have already remarked, and as is plain from the observations of Sir Thomas Bingham, as he then was, in Timeload Ltd. v. British Telecommunications Plc, which I have quoted, and from the citation from the speech of Lord Wright in Luxor (Eastbourne) Ltd. v. Cooper made by Lord Steyn in the passage from his speech in Equitable Life Assurance Society v. Hyman which I have also set out, terms may fall to be implied into a contract in a number of different situations. Those which are relevant in the present case are implication as a matter of law and implication in order to give business efficacy to a contract. The authorities upon which Mr. Jones relied were in fact decisions in relation to implication in order to give business efficacy to a contract, while what was contemplated as being arguable in Timeload Ltd. v. British Telecommunications Plc seems to have been implication as a matter of law, for Sir Thomas Bingham said in terms that, “…pure necessity is not the only ground on which a term can be implied….” , so that the absence of any necessity was not a bar to the possible implication of an appropriate term in that case.

69.
It is, in my judgment, important to a correct understanding of the decision in Timeload Ltd. v. British Telecommunications Plc to note that the issue before the Court of Appeal was not whether the term contended for **did** fall to be implied into the contract in that case, but only whether it was **arguable** that it did. The decision is thus no authority for the proposition that any particular term falls as a matter of law to be implied into a contract of a particular type. The focus of the debate being what was arguable, it is readily understandable why counsel did not draw to the attention of the Court of Appeal, and the Court of Appeal did not consider, those authorities, of which BP Refinery (Westernport) Pty. Ltd. v. President, Councillors and Ratepayers of Shire of Hastings is one, but others are Miller v. Emcer Products Ltd. [1956] Ch 304 and Lynch v. Thorne [1956] 1 WLR 303, which support the general proposition that it is not permissible to imply into a contract a term which contradicts an express term. There is no doubt an exception to that general proposition in the case of a term implied by statute, if Parliament expressly or by necessary implication from the relevant statutory provision has decreed that that should be so. An example of Parliament so decreeing would seem to be the implication of terms under Housing Grants, Construction and Regeneration Act 1996 s. 114(4) . However, in many cases of terms implied by statute modification or exclusion is permitted, at least if stated conditions are satisfied. There is no authority for the proposition that parties to a contract may not by their express agreement exclude or modify terms which would otherwise be implied into the contract at common law. Thus, in principle, where it is said that a term should be implied into a contract by reason of a doctrine of the common law, rather than by virtue of some statutory provision, the general proposition that a term cannot be implied which contradicts an express term is applicable.

70.
What was said to make it arguable in Timeload Ltd. v. British Telecommunications Plc that the term contended for should be implied into the contract between the parties as a matter of law was the particular position of BT. That obviously is not a feature of the present case. In contradistinction to the position in Timeload Ltd. v. British Telecommunications Plc , in which it was BT which was **providing** a service which it was contended it was arguable it could not withdraw without good cause, in the present case the Council was **receiving** a service, and in effect what was contended was that it could and should be compelled to continue receiving that service unless it had good reason not to. Very

serious considerations of policy seem to me to arise in relation to any suggestion that a party to a contract should be compelled to receive services from someone from whom he no longer wishes to receive them when the contract between the parties contains a mechanism for determination by notice, which mechanism has been operated. Those considerations may be similar to those which have led to the well-established principle that specific performance will not be ordered of a contract of employment. No statutory justification for the implication of the relevant term was identified in Timeload Ltd. v. British Telecommunications Plc .

71.
In the result it is plain, in my judgment, that no such terms as those contended for in the present case fall to be implied into the 1987 Contract as a matter of law. No relevant principle of law has been established by reference to authority or statute. The implication of a term or terms which inhibit the operation of the clear term of the 1987 Contract providing for termination on one month's notice would be contrary to principle.

72.
Although conceptually different, the submission that the terms contended for should be implied in order to give business efficacy to the 1987 Contract fails for reasons similar to those which caused the submission that the terms should be implied as a matter of law to fail. There was no necessity for such implication. It is, perhaps, ironic, that if the 1987 Contract had been silent as to its duration, it would have been at least arguable that a term should be implied that it be terminable on reasonable notice – see Martin-Baker Aircraft Co. Ltd. v. Canadian Flight Equipment Ltd. [1955] 2 QB 894. Moreover, the implication of a term inhibiting the circumstances in which the express term as to termination could be relied upon would be wrong in principle, for the reasons which I have already explained.

73.
The result is that the case based upon the alleged implied terms fails.

Unfair Contract Terms Act 1977 and alleged analogous principles at common law

74.
The origin of this way of putting the case seems again to be some comments of Sir Thomas Bingham in Timeload Ltd. v. British Telecommunications Plc. A second point advanced in that case in the Court of Appeal was that it was arguable that it was open to the claimant to rely upon the provisions of Unfair Contract Terms Act 1977 s. 3(2)(b)(i) . The material part of Unfair Contract Terms Act 1977 s.3 for present purposes is in these terms:-

" (1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) Against that party, the other cannot by reference to any contract term - …

(b) claim to be entitled to render a contractual performance substantially different from that which was reasonably expected of him,… "

The expression "written standard terms of business" is not defined for the purposes of the section, although in s.14 of the Act the term "business" is defined as including "a profession and the activities of any government department or local or public authority".

75.

At page 468 of his judgment in Timeload Ltd. v. British Telecommunications Plc Sir Thomas Bingham said:-

“ The argument accordingly turns on section 3(2)(b) and that I find more difficult. Mr. Hobbs submits that the subsection cannot apply where, as here, the clause under consideration defines the service to be provided and does not purport to permit substandard or partial performance. He says that the customer cannot reasonably expect that which the contract does not purport to offer, namely enjoyment of telephone service under a given number for an indefinite period. That may indeed be so, but I find the construction and ambit of this subsection by no means clear. If a customer reasonably expects a service to continue until BT has substantial reason to terminate it, it seems to me at least arguable that a clause purporting to authorise BT to terminate without reason purports to permit partial or different performance from that which the customer expected. If, however, section 3(2) does not in its precise terms cover this case, I do not myself regard that as the end of the matter. As I ventured to observe in Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd. [1989] QB 433, 439, the law of England, while so far eschewing any broad principle of good faith in the field of contract, has responded to demonstrated problems of unfairness by developing a number of piecemeal solutions directed to the particular problem before it. It seems to me at least arguable that the common law could, if the letter of the statute does not apply, treat the clear intention of the legislature expressed in the statute as a platform for invalidating or restricting the operation of an oppressive clause in a situation of the present, very special, kind. I say no more than that there is, I think, a question here which has attracted much attention in Commonwealth jurisdictions and on the continent and may well deserve to be further explored here. ”

76.
In Timeload Ltd. v. British Telecommunications Plc there was no question but that the claimant had entered into an agreement with BT on the written standard terms of business of BT. That was accepted. The issue which Sir Thomas Bingham had to address in the specific context of Unfair Contract Terms Act 1977 s.3(2)(b)(i) was whether a provision for termination of a contract was a provision by reference to which the party seeking to terminate the contract was claiming to be entitled “to render a contractual performance substantially different from that which was reasonably expected of him” . The provisional view, at any rate, of Sir Thomas seems to have been that the exercise of a right of termination did not fall within the subsection. He commented on the submission of counsel to that effect that, “That may indeed be so” . His consideration of the possibility that English law might develop in the direction of treating “the clear intention of the legislature expressed in the statute as a platform for invalidating or restricting the operation of an oppressive clause in a situation of the present, very special, kind” was unnecessary unless his provisional view was that Unfair Contract Terms Act 1977 s.3(2)(b)(i) did not apply in relation to the exercise of an express right to terminate a contract.

77.
In the present case there were live issues both as to whether the Council had “written standard terms of business” which were relevant, and as to whether, if so, it had dealt with HDA on those terms. Evidence was put before me in the form of reports made by officers to committees of the Council that in 1984 the Council had it in mind to prepare what were described as “standard conditions for building surveyors” and in due course did so. The first report in which there was a relevant reference was one prepared by the Director of Housing for a meeting of the Contracts Sub-Committee on 13 March 1984 in which, in paragraph 1.02, there was mentioned a “desire first to complete draft standard Conditions for Building Surveyors” . The second reference was at paragraph 5.1.2.2 of a

joint report of the City Treasurer, the Chief Executive, the City Architect, the Director of Housing and the City Engineer prepared for a meeting of the Policy and Resources (Contracts) Sub-Committee on 5 April 1984:-

“ Officers have very recently finalised Standard Conditions for Building Surveyors for issue with a further tender invitation for surveying services on the following classification of works:-

a) House rehabilitation;

b) Housing Estate modernisation in blocks of flats;

c) Housing stock major renovation (including window replacement, concrete and brick repairs, roof renewal, services improvements etc.);

d) Private housing Works in Default/Means of Escape;

e) Housing stock external joinery repairs and cyclical redecoration. ”

It seemed from the evidence of Mr. Wickersham that standard conditions for building surveyors were in fact produced and used, but when this happened was unclear. Although Mr. Wickersham was not asked about them in terms, it seems to me that the Conditions of Appointment incorporated into the 1991 Contract may well be the “standard conditions for building surveyors” which the Council adopted. If that is not so, no other document was put before me which seemed to meet the description “standard conditions for building surveyors” . If it is so, the fact that the Conditions of Appointment were expressly incorporated into the 1991 Contract, but not into the 1987 Contract, would seem to suggest that they had not been adopted at the date what became the 1987 Contract was drafted.

78.
Mr. Burr asserted that the modifications to the RICS 1981 Conditions included in clause 12 of the 1987 Contract were the “standard conditions for building surveyors” of the Council . There was no evidence to support that assertion. The furthest that the evidence went was that some, at any rate, of the modifications included in clause 12 were modifications which the Council customarily sought in negotiating any contract which was to incorporate the RICS 1981 Conditions and that those modifications were also to a significant extent those made in the “standard conditions for building surveyors” . Mr. Burr contended that that was sufficient for the 1987 Contract to be on the “written standard terms of business” of the Council. I reject that submission. The concept underlying the provisions of Unfair Contract Terms Act 1977 s.3 , in my judgment, is that there should exist a stock of written, no doubt usually, at any rate, printed, contract conditions which was simply drawn from as a matter of routine and intended to be adopted or imposed without consideration or negotiation specific to the individual case in which they were to be used. That seems to me to be the force of the words “written” and “standard” in the expression “written standard terms of business” . In other words, it is not enough to bring a case within Unfair Contract Terms Act 1977 s.3 that a party has established terms of business which it prefers to adopt, as, for example, a form of draft contract maintained on a computer, or established requirements as to what contracts into which it entered should contain, as, for example, provision for arbitration in the event of disputes. Something more is needed, and on principle that something more, in my judgment, is that the relevant terms should exist in written form prior to the possibility of the making of the relevant agreement arising, thus being “written” , and they should be intended to be adopted more or less automatically in all transactions of a particular type without any significant opportunity for negotiation, thus being “standard” .

79.

The evidence of both Mr. Wickersham and Mr. Anthonio was that what became the 1987 Contract was specially drafted by Mr. Martin King of the City Solicitor's department for use as between the Council and HDA. I accept that evidence. It was supported by the form of the 1987 Contract as executed and every version of a draft of it which was put before me. Whereas one might have expected that, if there existed relevant "written standard terms of business" of the Council and it was desired to incorporate them into the 1987 Contract, they would be incorporated by reference or by attachment as an appendix to the 1987 Contract, as happened with the incorporation of the Conditions of Appointment in the 1991 Contract, in fact the amendments desired to the RICS 1981 Conditions for the purposes of the 1987 Contract were set out in extenso in the main text of the agreement.

80.
Mr. Jones drew to my attention two authorities in which the question of what was involved in dealing with a contracting party on "written standard terms of business" was considered. The first was a decision of Potter J, Flamar Interocean Ltd. v. Denmac Ltd. [1990] 1 Lloyd's Rep 434. The second was the decision of the Court of Appeal in St. Albans City and District Council v. International Computers Ltd. [1996] 4 All ER 481. In each of those cases it was not disputed that the relevant contracting party had what arguably were "written standard terms of business" and the real question was what was involved in "dealing" on those terms.

81.
In Flamar Interocean Ltd. v. Denmac Ltd. Potter J expressed the view that a party did not "deal" on the written standard terms of business of the other contracting party if the standard terms were the subject of negotiation to adapt them to the circumstances of the particular case. At page 438 of the report he said:-

" It is conceded by Mr. Isaacs that the plaintiffs are not a "consumer" within the terms of the Act, but he relies on the submission that the plaintiffs dealt with the defendants on their written standard terms of business. I reject that submission. The plaintiffs allege in the action as their primary case that the contract was oral, rather than on the terms of the management agreement. However, if it is contained in that agreement, it is plain that its form was negotiated between the parties, in that the standard form of management agreement which the defendants possessed at the time (and I leave aside the question of whether such standard form of agreement would in any event amount to "standard terms of business" in the sense contemplated by UCTA) was subject to a number of alterations to fit the circumstances of the plaintiffs' case before its terms were finalised between the parties. "

Although Potter J expressed no definite view as to what amounted to "written standard terms of business" for the purposes of Unfair Contract Terms Act 1977 s.3 , his comments in the passage quoted seem to me to be consistent with the view which I have expressed earlier in this judgment.

82.
The leading judgment in St. Albans City and District Council v. International Computers Ltd. was that of Nourse LJ. At pages 490J to 491H of the report he said this:-

" Mr. Dehn submitted that the question must be answered in the negative, on the ground that you cannot be said to deal on another's standard terms of business if, as was here the case, you negotiate with him over those terms before you enter into the contract. In my view that is an impossible construction for two reasons: first, because as a matter of plain English "deals" means "make a deal", irrespective of any negotiations that may have preceded it; secondly, because s. 12(1)(a) equates the expression "deals as consumer" with "makes a contract". Thus it is clear that in order that one of the

contracting parties may deal on the other's written standard terms of business within s. 3(1) it is only necessary for him to enter into a contract on those terms.

Mr. Dehn sought to derive support for his submission from observations of Judge Thayne Forbes QC in Salvage Association v. CAP Financial Services Ltd. [1995] FSR 654 at 671 - 672. In my view, those observations do not assist the defendant. In that case the judge had to consider, in relation to two contracts, whether certain terms satisfied the description "written standard terms of business" and also whether there had been a "dealing" on those terms. In relation to the first contract he said (at 671):

"I am satisfied that the terms in question were ones which had been written and produced in advance by CAP as a suitable set of contract terms for use in many of its future contracts of which the first contract with [the Salvage Association] happened to be one. It is true that Mr. Jones felt free to and did negotiate and agree certain important matters and details relating to the first contract at the meeting of February 27, 1987. However, although he had read and briefly considered CAP's conditions of business, he did not attempt any negotiation with regard to those conditions, nor did he or Mr. Ellis consider that it was appropriate or necessary to do so. The CAP standard conditions were terms that he and Mr. Ellis willingly accepted as incorporated into the first contract in their predetermined form. In those circumstances, it seems to me that those terms still satisfy the description "written standard terms of business" and, so far as concerns the first contract, the actions of Mr. Jones and Mr. Ellis constituted "dealing" on the part of [the Salvage Association] with CAP on its written standard terms of business within the meaning of section 3 of the [Unfair Contract Terms Act 1977]."

It is true that the judge found that the Salvage Association did not negotiate with CAP over the latter's standard terms and that he held that, in entering into the contract, the Salvage Association dealt with CAP on those terms within s.3. I do not, however, read his observations as indicating a view that the "dealing" depended on the absence of negotiations. I think that even if there had been negotiations over the standard conditions his view would have been the same.

Scott Baker J dealt with this question as one of fact, finding that the defendant's general conditions remained effectively untouched in the negotiations and that the plaintiffs accordingly dealt on the defendant's written standard terms for the purposes of s. 3(1) …. I respectfully agree with him. "

83.
I respectfully agree that, in a case in which a contracting party has "written standard terms of business" , it is a question of fact whether the relevant contract between the parties was on the terms of those "written standard terms of business" . That might well be a question of degree. If the only agreed contract terms are those of "written standard terms of business" the conclusion that the parties dealt on the "written standard terms of business" of the relevant party may be obvious. It is unlikely to be enough to avoid that conclusion that, apart from the "written standard terms of business" , some term was specially negotiated for the purposes of the particular contract. However, the role in the context of possibly voluminous documentation of a pre-prepared document setting out "written standard terms of business" may be so small in relation to the whole, or the modifications to a pre-prepared document setting out "written standard terms of business" may be so significant, that it may be an abuse of language to describe the resulting contract as a deal on the "written standard terms of business" of one or other of the parties. However that may be, in the circumstances of the present case, given my findings of fact, the Council and HDA did not deal on the "written standard terms of business" of the Council in concluding the 1987 Contract.

84.

Had I concluded that the 1987 Contract did amount to a deal on the "written standard terms of business" of the Council, it would have been necessary to consider whether, by giving notice of termination in accordance with paragraph 1.7 of the RICS 1981 Conditions as modified for the purposes of the 1987 Contract, the Council had claimed to be entitled "to render a contractual performance substantially different from that which was reasonably expected of him" . In the context of that question Mr. Jones drew to my attention the decision of the Court of Appeal in Paragon Finance Plc v. Nash [2002] 1 WLR 685. The only substantive judgment in that case was that of Dyson LJ. In relation to Unfair Contract Terms Act 1977 s.3(2)(b)(i) the issue which arose was whether that provision applied to a term in a loan agreement under which the lender had power to vary the rate of interest payable on the loan. Counsel for the borrower relied on the decision in Timeload Ltd. v. British Telecommunications Plc and a later case, to which I need not specifically refer, in support of the submission that Unfair Contract Terms Act 1977 s.3(2)(b)(i) did apply to the provision for variation of the interest rate payable in respect of the loan. About that submission Dyson LJ said, at page 711 of the judgment:-

" 75.In my judgment, neither of these authorities assists Mr. Broatch's submission. In both cases, the defendant telecommunications provider was contractually bound to provide a service. The question was whether the withdrawal of the service in the particular circumstances of the case was such as to render the contract performance (ie the provision of that service) substantially different from that which it was reasonable for the other contracting party to expect. The present cases are quite different. Here, there is no relevant obligation on the claimant, and therefore nothing that can qualify as "contractual performance" for the purposes of section 3(2)(b)(i). Even if that is wrong, by fixing the rate of interest at a particular level the claimant is not altering the performance of any obligation assumed by it under the contract. Rather, it is altering the performance required of the defendants.

76. There appears to be no authority in which the application of section 3(2)(b)(i) to a situation similar to that which exists in this case has been considered. The editors of Chitty on Contracts , 28 th ed (1999) offer this view, at para 14-071:

"Nevertheless it seems unlikely that a contract term entitling one party to terminate the contract in the event of material breach by the other (eg failure to pay by the due date) would fall within paragraph (b), or, if it did so, would be adjudged not to satisfy the requirement of reasonableness. Nor, it is submitted, would that provision extend to a contract term which entitled one party, not to alter the performance expected of himself, but to alter the performance required of the other party (eg a term by which a seller of goods is entitled to increase the price payable by the buyer to the price ruling at the date of delivery, or a term by which a person advancing a loan is entitled to vary the interest payable by the borrower on the loan)."

77. In my judgment, this passage accurately states the law. "

85.
Mr. Jones submitted that Unfair Contract Terms Act 1977 s. 3(2)(b)(i) could not apply in any event in the present case because the only contractual performance required of the Council under the 1987 Contract was to pay, in accordance with the terms of the contract, sums due to HDA for services rendered. That obligation, he contended, was unaffected by the giving of a notice of termination. It seems to me that that submission is well-founded. I am inclined to think that the doubts of Sir Thomas Bingham as to whether the terms of Unfair Contract Terms Act 1977 s. 3(2)(b)(i) could apply in any event to a determination of a contract in accordance with a power contained in the contract were also well-founded, for it is very difficult to see how the issue of what was the duration of the performance

of a contractual obligation which could reasonably be expected could be determined other than by reference to the terms of the contract as to duration. However, it is not necessary for the purposes of this judgment to consider that matter any further, given the nature of the performance required of the Council under the 1987 Contract.

86.
In the circumstances it is not strictly necessary to consider the question whether the term of the 1987 Contract as to termination satisfied the “requirement of reasonableness” set out in Unfair Contract Terms Act 1977 s.11 (1) . That requirement, as defined in that subsection, is “that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made” . What Mr. Burr contended on behalf of HDA did not satisfy the “requirement of reasonableness” was not the inclusion in the 1987 Contract of a provision for termination. It was not the incorporation by reference in the 1987 Contract of the RICS 1981 Conditions. It was not even the incorporation by reference of paragraph 1.7 of the RICS 1981 Conditions. It was the definition of the period of “reasonable notice” for which that paragraph provided as one month. What was unreasonable about that period, according to Mr. Burr, was that it was too short, having regard to the possible length of the period of time over which HDA might be engaged upon work in connection with the Estate. I reject that submission. In my judgment it is manifestly reasonable that neither the Council nor HDA should be locked into the 1987 Contract possibly for many years. Once it is recognised as reasonable that there should be some provision for determination, the only question is what provision would be reasonable. The provision adopted in principle, paragraph 1.7 of the RICS 1981 Conditions, could be operated by both parties and provided for termination by the giving of reasonable notice. Such a provision is almost by definition reasonable, but contains an element of uncertainty because there is no indication of what notice in fact needed to be given. The elimination of that element of uncertainty is in principle, in my judgment, reasonable. The only remaining issue is whether the period adopted to eliminate the element of uncertainty in paragraph 1.7 of the RICS 1981 Conditions was unreasonably short. That is something which it seems to me the court can only evaluate with the assistance of evidence as to any general practice in respect of commissions of this kind in 1987, or, perhaps, evidence as to any general practice in relation to engagements of building surveyors in 1987. There was no real evidence concerning these matters. The RICS 1981 Conditions in their unamended form were put before me, but they simply left open what was “reasonable notice” . A later version of the RICS Conditions was also put before me, but that dealt with termination in a different way. So far as termination by a customer of the engagement of a surveyor was concerned, what the later conditions provided for was the giving of immediate notice, but with provision for the payment of compensation. In the end, therefore, there was really no evidence which would justify a finding that a period of notice of one month was unreasonable, and it does not strike me that such a period, chosen to eliminate uncertainty and of benefit, potentially, to both parties, was manifestly unreasonable.

87.
For the reasons which I have set out I find that the provisions of Unfair Contract Terms Act 1977 s. 3(2)(b)(i) were not applicable to the 1987 Contract, but that if they were, they were not infringed.

88.
Whilst Mr. Burr asserted that there existed a principle of English law, independent of Unfair Contract Terms Act 1977 s. 3(2)(b)(i) , by application of which the court could find that it was not open to the Council to terminate the 1987 Contract by the giving of notice unless there was good reason for the

giving of such notice, he did not really seek to make good that assertion. In particular, he did not seek to respond to the indication given by Sir Thomas Bingham in Timeload Ltd. v. British Telecommunications Plc that decisions in Commonwealth jurisdictions and of courts in other European countries might deserve to be explored in order to see whether “the common law could, if the letter of the statute does not apply, treat the clear intention of the legislature expressed in the statute as a platform for invalidating or restricting the operation of an oppressive clause in a situation of the present, very special, kind” . What Mr. Burr did do was to draw to my attention the decisions of the Court of Appeal in Philips Electronique Grand Public SA v. British Sky Broadcasting Ltd. [1995] EMLR 472 and Balfour Beatty Civil Engineering Ltd. v. Docklands Light Railway Ltd. (1996) 78 BLR 42. He submitted that these decisions showed that English law was developing in the direction of implying a doctrine of good faith into contracts. He also shared with me some thoughts of Mr. Ian Duncan Wallace Q.C. on the subject of what are apparently called in the United States “convenience clauses” . I did not find any of this helpful. The authorities to which he drew my attention did not support the proposition for which Mr. Burr contended. The only arguably relevant reference in Philips Electronique Grand Public SA v. British Sky Broadcasting Ltd. was a comment in the judgment of the Court of Appeal, delivered by Sir Thomas Bingham, at page 484 of the report, that:-

“ …we would, were it material, imply a term that BSB should act with good faith in the performance of the contract. But it is not material. ”

The contractual arrangements at issue in that case were complicated and had been made in relation to the inherently risky undertaking of seeking to launch a satellite broadcasting system. The term to which Sir Thomas referred was not in the event implied, so the decision is no authority for the proposition for which Mr. Burr contended. That was also the position in Balfour Beatty Civil Engineering Ltd. v. Docklands Light Railway Ltd. The part of the judgment of the Court of Appeal in that case, again delivered by Sir Thomas Bingham, upon which Mr. Burr relied was at page 58 of the report. In the passage to which my attention was drawn Sir Thomas recorded the concession of counsel that the employer under a civil engineering contract by which it was provided that the entitlements of the contractor under the contract should be determined by the employer was bound to act honestly, fairly and reasonably in making his assessments. In the course of his comments which Mr. Burr put before me, Mr. Duncan Wallace observed that, “outside the United States there appears to be little or no authority on these points” .

89.
The development of the law in the direction anticipated by Sir Thomas Bingham at page 468 of the report in Timeload Ltd. v. British Telecommunications Plc would, it seems to me, be fraught with difficulty. It would seem to involve, first, the identification of a principle of the common law, the existence of which was hitherto unsuspected, on the basis of which the court could invalidate, or restrict the operation of, a provision in a contract. Whatever this principle was found to be, it would, or might, apparently only operate in situations of a very special kind, seemingly where a dominant supplier of a service had entered into a contract to provide that service. What might be the defining characteristics of situations in which the principle would be applicable is, for the moment, unclear. The application of the principle would depend upon the conclusion that the situation did not fall within the letter of some statutory provision. However, notwithstanding that upon proper construction of the statutory provision, Parliament had not seen fit to encompass the particular situation within its scope, nonetheless the court should by some means be able to discern from “the clear intention of the legislature expressed in the statute” that Parliament actually intended to achieve some result which a fortiori it had failed to achieve. I should not be prepared to venture into these treacherous waters

without the benefit of extremely full consideration of relevant authorities from all jurisdictions in which these issues have been examined. In the absence of citation of relevant authority I am not satisfied that the principle for which Mr. Burr contends exists in English law.

The reasons for termination

90.
In the circumstances I find that the Council was entitled to terminate the 1987 Contract by the giving of the notice which it did without needing any reason for doing so. I make findings in respect of the actual reasons why notice was given only because of the scandalous allegations made by Mr. Burr concerning those reasons.

91.
The actual reasons, as I find, for the giving of notice of termination were three, as explained by Mr. Wickersham in his evidence. The first was that by 1996 compulsory competitive tendering had become a feature of the statutory regime under which local authorities, such as the Council, acquired services from outside organisations, and there was a desire to see how the existing arrangements in respect of surveying services for the works of repair and refurbishment of the blocks of flats on the Estate compared with what might be obtained from a competitive tender. The second was that, as a result of a competitive tender, the firm of Dearle and Henderson had been appointed to provide services on the Estate as Building Maintenance Consultant, that is to say, dealing with routine maintenance, as opposed to the major works with which HDA had been involved, and it was desired to have a single firm dealing with both routine maintenance and major works of repair and refurbishment on each of the estates owned by the Council. The third reason was that there had been a degree of dissatisfaction expressed by residents of the Estate with the services provided by HDA. Mr. Jones made clear that the Council did not contend that HDA had been in breach of the 1987 Contract to an extent justifying termination, but that notwithstanding, Mr. Burr gave quite a lot of attention to the issue whether the complaints of residents were justified. The Council's position in relation to the complaints of residents was simply that, whether or not the complaints were justified, it was politically accountable to the electors of the City of Westminster, including the residents of the Estate, and therefore could not ignore their views.

92.
Mr. Burr made much of the fact that the letter dated 15 February 1996 concluded with this paragraph:-

" I confirm that you will be required in any event to pursue at no cost to the City Council the rectification of defective works executed under your supervision. An updated schedule of defects currently known to us will be sent to you within the next 7 days. "

He emphasised, as seems to have been so, that no schedule of defects ever was sent. However, he seems to have interpreted the reference to a schedule of defects as being to defects in the work done by HDA. In fact, as seems to me to be quite plain, the schedule of defects contemplated was a schedule of defective work done by the building contractor whose work HDA had been supervising. There was never any suggestion on behalf of the Council that the work done by HDA itself had been defective, although that was the effect of some of the complaints made by residents.

93.
Mr. Burr's starting position in relation to the actual reasons for determination of the 1987 Contract seemed to be that each and every one of them was self-evidently inadequate as a justification for

termination. He characterised the reasons as “political” as if that were a synonym for “deficient” . In his written opening submissions Mr. Burr sought to link the termination of the 1987 Contract with the housing policies which the Council pursued under the leadership of Dame Shirley Porter. That was unwise. There was not a scrap of evidence of any link. I was left with the impression that this serious allegation was made simply in the hope that its prejudicial effect might induce sympathy for HDA. In his oral closing submissions Mr. Burr evidently thought that it would assist me to know that:-

“ I for one have not seen a professional consultancy so shabbily treated by a local authority in 22 years of practice, and I say that with some degree of having thought about the matter and having considered the way in which the evidence has come out. ”

(Transcript Day 4 page 64 lines 12 – 17)

It did not assist me.

94.
In my judgment it is not for the court to second guess the views of a party to a commercial arrangement as to what is in its interests, whether commercial or of any other kind. Any organisation, not least a local authority which is a custodian of public money and accountable to electors, has an obvious interest in obtaining best value in relation to services which it wishes to acquire. What is best value – that is to say, how to strike the balance between cost and quality – is essentially a matter for the organisation. It is also a matter for the organisation how it wishes to arrange the obtaining of services. The judgment of the Council in 1996 was that it wished to have a single firm responsible for the provision of all surveying services on each of its estates. It is not for the court to criticise that assessment. For officers of a local authority to have regard to the views of residents on its estates might be considered a refreshing change from the attitudes of former times, rather than a criticism. Overall I conclude that the reasons which prompted the giving of notice of termination of the 1987 Contract by the Council were rational, honest and proper.

The claim for additional fees

95.
This was pleaded in the Re-Amended Particulars of Claim as a claim under the 1987 Contract. It should perhaps more properly have been put as a claim under the 1991 Contract, but the substance of the claim was not affected by under which agreement it was made.

96.
In paragraph 2.1 of the RICS 1981 Conditions provision was made for the division of the services of a building surveyor in relation to any particular project into a number of stages. One of these was Stage D, which was described as relating to:-

“ Preparing and presenting to the client, for approval, a complete design for the scheme together with estimated costs and a timetable for the execution of the project. ”

97.
Notwithstanding that Section 2 of the RICS 1981 Conditions, which included paragraph 2.1, was said in clause 12 of the 1987 Contract to be deleted in its entirety, paragraph 4.1 of the conditions, which was concerned with payment, was amended to read:-

“ Where stages of the service are defined in the relevant Scale of Charges the appropriate stage payment shall be due for payment on completion of the relevant stage. ”

A new Table 3 of Scale of Charges BS1 was substituted in clause 12 of the 1987 Contract, which read:-

“ Stage Stage Fee

A, B and C 10% of x% of approximation of cost (per Stage B)

D 20% of x% of estimated building cost (per Stage D)

E, F, G and H(i) 25% of x% of estimated building cost (per Stage D)

H(ii) – H(vii) 45% of x% of final account sum including loss and/or expense but excluding any arbitration or Court award; provided that no sum for loss and/or expense shall be included which arises from any default on the part of the Surveyor. ”

98.
The 1991 Contract included similar, but not identically worded, alterations to those set out in clause 12 of the 1987 Contract in relation to paragraph 4.1 of the RICS 1981 Conditions and Table 3 of Scale of Charges BS1. Section 2 of the RICS 1981 Conditions was not deleted in its entirety in the 1991 Contract, but fairly extensive alterations were made to it. The Brief incorporated in the 1991 Contract included a provision in paragraph 8.2 which was not included in the 1987 Contract, and was:-

“ The lead consultant is to obtain all statutory approvals and consents necessary to achieve the programme for the project. ”

99.
HDA undertook the provision of surveying services in respect of Phase 4C at the Estate. Periodically it raised invoices in respect of fees in accordance with Table 3 of Scale of Charges BS1 as revised for the purposes of the 1991 Contract. The invoice in respect of the fees due at Stage A, B and C was for 10% of the agreed fee percentage, 6.8% at that point, of the approximation of cost. The invoice, in fact dated 26 November 1993, in relation to the fees due at the completion of Stage D was for 20% of 6.8% of the estimated building cost at that point, £2,607,300. A further invoice was rendered in respect of the fees due at Stage E, F, G and H(i), calculated, as was required under the 1991 Contract, which differed in this respect from the 1987 Contract, by reference to the amount of the accepted tender for the works, £2,668,598. All of these invoices were paid. At this point a question arose as to whether the design for the windows to be replaced in Phase 4C prepared by HDA was appropriate. English Heritage became involved, as did the original architect, Sir Philip Powell. The outcome was that the windows had to be re-designed to suit the requirements of English Heritage. That necessitated a re-tendering exercise in respect of the Phase 4C works. The contract for the building works included in that phase was let in the sum of £3,052,879. The final account sum in respect of Phase 4C was £2,913,949. HDA claimed, and was paid, fees in respect of Stage H(ii) to H(vii) based on the latter sum. What was contended in the action was that HDA was entitled retrospectively to additional fees in respect of Stages A to H(i) inclusive calculated by reference to the sum in which the contract for the works was let following re-tendering, namely £3,052,879, credit being offered for the amounts of fees in fact invoiced and paid.

100.
Mr. Burr contended that the payment of the additional fees claimed was “equitable” and that HDA had not otherwise been remunerated in respect of the work of re-designing the windows replaced in Phase 4C. Insofar as he submitted that there was an entitlement under the 1987 Contract or the 1991 Contract to payment of additional fees, it seemed to be that the fees in all stages save the last should

be calculated by reference to the “estimated building cost” , which was not properly £2,607,300, but £3,052,879, and in any event Stage D was not completed until after the re-design of the windows.

101.
Mr. Jones submitted that all sums properly due under the 1991 Contract in respect of work done in connection with Phase 4C had been invoiced and paid and that there was no entitlement of HDA under the contract to be paid additional sums.

102.
It seems to me that the submission of Mr. Jones is sound. The entitlement of HDA under the 1991 Contract, which in principle did not differ from the 1987 Contract in this respect, was to be paid, at the designated points of completion of Stages of its work, the sums payable at those points respectively. The fee payable at the completion of Stage D was in terms to be calculated by reference to the estimated building cost at that time. In my judgment it is immaterial that the estimate of cost might subsequently alter. The express provision for calculation of the final tranche of fees envisaged that the sum of which a percentage was to be calculated would be different from the sum which would have been taken at an earlier stage. Indeed, under the 1991 Contract a different figure would form the basis of the calculation at each of the four stages at which fees could be claimed. Under the 1987 Contract the same figure would be used for calculation of the fees for the second and third stages, namely the estimated building cost as it stood at the conclusion of Stage D. The attempt of Mr. Burr to defer artificially the date of completion of Stage D by contending that that stage was not complete until after the re-design of the windows seems to me to be without merit. The fact of the matter is that the work covered by Stage D was in fact done in its usual sequence, completed and paid for. The fact that some part of it had to be redone does not alter that.

103.
I should also say that it is not obvious that HDA has not been remunerated in respect of the re-design of the windows in Phase 4C in any event. As a result, it would seem, of the re-design the final account sum, £2,913,949, was some £245,351 greater than the amount of the lowest tender for the works before the re-design, £2,668,598. Forty-five per cent of HDA’s total fees for Phase 4C only became due after the re-design and were based upon a figure which took into account the financial implications of the re-design. Instead of being paid 45% of 6.8% of £2,668,598, or £81,659.10, HDA was paid 45% of 6.8% of £2,913,949, or £89,166.84. Thus HDA seems to have been paid additional fees of £7,507.74.

Conclusion

104.
For the reasons which I have set out both the principal claim of HDA and its claim for additional fees fail. This action is therefore dismissed.