MR JUSTICE COULSON

Approved Judgment

Fitzroy Robinson v Mentmore Towers

Neutral Citation Number: [2009] EWHC 1552 (TCC)

Case No: HT-08-97

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date:7th July 2009

Before :

MR JUSTICE COULSON

- -

BETWEEN:

FITZROY ROBINSON LIMITED **Cla**

- and -

MENTMORE TOWERS LIMITED

(A company incorporated in Jersey)

Defe

AND BETWEEN

FITZROY ROBINSON LIMITED **Cla**

-and-

(1) GOOD START LIMITED

(2) ANGLO SWISS HOLDINGS LIMITED **Defen**

(both companies incorporated in Jersey)

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Mr Peter Fraser QC and **Mr Zulfikar Khayum** (instructed by **Laytons**) for the **Claimants**

Mr Paul Darling QC and **Mr Marc Rowlands** (instructed by **Mishcon de Reya**) for the **Defendants**

Hearing Dates: 11th, 12th, 13th, 14th, 18th, 19th, 20th, 21st May and 11th June 2009

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Judgment

Mr Justice Coulson:

1. INTRODUCTION

1. This case concerns two of England's most iconic buildings: the former In & Out Club on Piccadilly [1], and Mentmore Towers, the former home of the Rothschild family, in Buckinghamshire [2]. The claimant, Fitzroy Robinson Limited ("FRL") were engaged to act as architects in connection with an ambitious scheme to develop the In & Out Club, and a number of surrounding buildings on Piccadilly, into an exclusive private member's club, with Mentmore Towers as an associated country house hotel. The overall project was referred to as the PM Club ("the project"). Sadly, the project was put on hold at the end of 2007 and there appears to be no imminent plan to revive it. In consequence, the In & Out Club, and the buildings that surround it on Piccadilly, stand empty and not a little desolate.

2. The In & Out Club, and some of its surrounding buildings, including Green Park Mansions at 90-93 Piccadilly, No 95 Piccadilly, and 12 White Horse Street, are all owned by Anglo Swiss Holdings Limited, a company incorporated in Jersey. On the other side of White Horse Street, in a large building which it is intended to link to the other buildings by a 'bridge of sighs', is 96-100 Piccadilly, owned by another Jersey company, Good Start Limited. A third Jersey company, Mentmore Towers Limited, owns the Buckinghamshire property.

3. Although the three defendant companies are linked, those involved in their control and operation are not altogether easy to identify. It appears that all three companies are owned by a trust called Ironzar III Trust and are run from Jersey by a company called Equity Trust (Jersey) Ltd. There was no evidence about the identity of their trustees or beneficiaries, nor the identity of their directors. I shall refer to the three companies collectively as "the Defendants".

4. For the purposes of the project, the Defendants were advised by Buckingham Securities Holdings Plc ("BSH"). They were named as the Employer's Representative in all three Contracts between the Defendants and FRL. The Defendants' principal witness at this trial, Mr Simon Halabi, described himself as an advisor to BSH. However it was clear that Mr Halabi had a much closer relationship to the project than that, since the evidence was that he lived at Mentmore Towers, and had a large office at 100 Piccadilly. He referred at one point to the owners of the properties as "my trustees". However, he denied that he was the beneficiary of the trusts.

5. FRL became involved in the project in the summer of 2005. The key member of the FRL team was Mr Jeremy Blake, the director who put together the two FRL Bid documents and was involved in all the pre-contract meetings. A period of 38 months was identified and agreed as being the period from the commencement of architectural work by FRL to the opening of the PM Club. Within this timetable, the period allowed for producing the design and obtaining planning permission for the Piccadilly element of the project was about 13 ½ months. It rapidly became apparent that this was a serious underestimate of the work involved and the time required to obtain planning permission for such a complex and high-profile proposal.

6. At the Defendants' request, FRL started design work in March 2006, at a time when their three separate Contracts of appointment were largely agreed, although some of the details (including the payment arrangements) were still being negotiated and had not been signed off. Documents produced at the time showed the future projection of the agreed 38 months, starting in April 2006 and leading to completion of the works at both Piccadilly and Mentmore Towers at the end of May 2009. On this basis, the planning phase on Piccadilly should have been completed by May/June 2007.

7. On 17th March 2006, almost at the outset of FRL's work, and before the Contracts had been finalised and executed, Jeremy Blake, the person whom the Defendants had been told would be the team leader throughout the project on behalf of FRL, running the PM Club project on both sites,

tendered his resignation. A few days later, on 21st March 2006, he rejected a counter-offer made to him by Mr Thompson, the CEO of FRL. No further counter-offer of any sort was ever made to him, but he was required to work out his notice period of one year. FRL did not inform the Defendants, or BSH, or Mr Halabi, that Mr Blake had tendered his resignation, either in March 2006 or at any time prior to 14th November 2006.

8. The two Contracts between FRL and Goodstart Limited and Anglo Swiss Holdings Limited, relating to the Piccadilly element of the project, were executed by FRL on 28th March 2006. They were counter-signed by the two defendant companies on 8th May 2006. FRL executed the Mentmore Contract on 20th April 2006 and that was counter-signed by Mentmore Towers Limited on 30th May 2006.

9. Throughout 2006, FRL, and Mr Blake in particular, were engaged in putting together the design documents for the purposes of the two planning applications. It was recognised by everyone involved that the application that was going to be the most difficult was the one in respect of the Piccadilly properties.

10. In November 2006, just as FRL were completing work on the design that was going to form the basis of the Piccadilly planning application, they informed BSH and Mr Halabi that Mr Blake had resigned. Unsurprisingly, this created a good deal of upset. Despite this, the planning application for Piccadilly was lodged on 1st December 2006. Mr Blake remained in the employment of FRL until 16th March 2007. Thereafter, he did some further work for them on an hourly basis, so as to allow the planning application for Mentmore Towers to be lodged in April 2007. That planning application was granted on 10th August 2007, and there are no issues arising out of that process in these proceedings.

11. The planning application in relation to the Piccadilly properties was much more troublesome. Two of the particular matters that emerged during 2007 as concerns on the part of Westminster City Council, the relevant planning authority, were the absence of a detailed acoustics report dealing, in particular, with the noise of the plant on the roofs, and a failure to identify the plant that would be sited there, particularly on the new (and higher) roof of 12 White Horse Street. It is now said by the Defendants that these concerns stemmed from failures on the part of FRL, which delayed the obtaining of planning permission and/or delayed the project. On 25th October 2007, Westminster City Council resolved to grant planning permission in respect of the Piccadilly element of the project, although there were a number of matters identified that required further resolution before the officers, through their delegated powers, could formally grant permission. It was common ground that these outstanding matters would be relatively straightforward to resolve.

12. After about May 2007 - the time when, in accordance with the programme, planning permission for the Piccadilly element ought to have been obtained - there were complaints about the Defendants' failure to make prompt payment to their various consultants. Payments to FRL stopped in June 2007. Some consultants stopped work during this period; others, like FRL, continued to work. It was common ground that, by Christmas 2007, FRL had achieved completion of Stage D, and were about 50% of the way through Stage E, with some fairly minimal work commenced on Stage F [3]. However, on 24th December 2007, FRL received notices of suspension in relation to their work under all three Contracts. On the evidence, it seems that the Defendants decided to put the entire project on hold at that point, although the reasons for their doing so were and are not at all clear. The project remains suspended.

13. In April 2008, FRL commenced proceedings for unpaid fees incurred in connection with Mentmore Towers. The claim was for £504,416 plus VAT and interest. A month later, on 7th May 2008, FRL

commenced separate proceedings, against Good Start and Anglo Swiss, in respect of the Piccadilly element of the project. In that claim, the total outstanding fees was said to amount to £1,075,000 odd, together with VAT and interest. Both claims were based on the monthly instalment figures identified in Schedule 2 to the three Contracts.

14. FRL issued an application for summary judgment on their fee claims, pursuant to CPR Part 24. However, in response, on 2nd September 2008, the Defendants served defences and counterclaims in both proceedings which raised a raft of disputes. In essence, however, those points boiled down to three principal issues, namely:

a) An issue as to the true construction of the Contracts between the parties, and whether, in the circumstances, the instalments needed to be adjusted. This point was put, in the alternative, as a claim for rectification, on the basis that the amounts of the monthly instalments were based on a programme which had long since failed to reflect the delayed progress on site, but which had not been expressly incorporated into the contract documents.

b) A variety of claims, encompassing fraudulent or statutory misrepresentation, breach of contract and/or warranty, deceit and negligent misstatement, all arising from what is pleaded as "the claimant's dishonest conduct" in connection with the resignation of Mr Blake, and the concealment of that resignation both before the Contracts were signed and thereafter, until November 2006. Those causes of action are said to give rise to a counterclaim, principally for delay, but also encompassing disruption and duplication.

c) Allegations of professional negligence in relation to the planning application for the Piccadilly properties, arising out of the alleged inadequacies in respect of the acoustic report and the roof plant, identified above. These allegations also give rise to a counterclaim, alleging delay both to the planning application and the project itself.

15. Following the service of these pleadings, FRL properly recognised that their Part 24 application would not succeed. Accordingly, the matter came before me on 3rd October 2008, when a trial of "all liability and causation issues" in both actions was fixed for Monday 11th May 2009 with a time estimate of 8 days. The parties complied, by and large, with the timetable set down at that hearing and the trial of liability and causation was concluded within that 8 day estimate. I am very grateful to Leading Counsel, and all those involved on both sides, for the efficient manner in which the trial was conducted.

B. GENERAL OBSERVATIONS

B1. The Structure Of This Judgment

16. Before addressing the specific issues in this case, it is necessary for me to make certain general observations which inform much of the remainder of the Judgment. Those general observations are set out in this Section. Thereafter, at **Section C,** I deal with the background to the Contracts and the contract documents themselves. At **Section D,** I identify the relevant terms as to the payment of FRL's fees, and deal with the issues between the parties as to FRL's entitlement to be paid the instalments set out in Schedule 2. Thereafter, at **Sections E, F and G,** I deal with those allegations concerning Mr Blake and the decision not to inform the Defendants of his resignation until mid-November 2006: at **Section E** I set out the relevant principles of law; at **Section F** I deal with the facts; and at **Section G,** I set out my analysis of this element of the Defendants' counterclaim. Thereafter, at **Sections H,** and **I,** I deal with the allegations of professional negligence arising out of the application

for planning permission in respect of the Piccadilly properties: at **Section H** I set out the relevant facts and at **Section I**, I deal with the specific allegations made, and my analysis of them. At **Section J** I deal shortly with the remaining issue, which is concerned with set off. There is a short summary of my conclusions at **Section K.**

B2. The Absence Of ADR

17. I was told that this was not a case in which the parties had undertaken any form of ADR. Superficially, perhaps, this might be regarded as unsurprising, given the allegations of dishonesty made by the Defendants, which, having been asserted, might be thought to require proper resolution at a trial. However, on further analysis, it seems to me that the parties should have endeavoured to resolve their differences by way of ADR, and their failure to do so has had at least two deleterious effects on the litigation.

18. First, I am in no doubt that ADR, even if it had been unsuccessful, would have brought about a considerable narrowing of the issues between the parties. In its absence, the parties adopted diametrically opposed positions in the run-up to the trial. The distance between them only began to lessen at the start of the the trial itself. The best example of this concerned the Defendants' case for rectification. The pleaded basis of that case was that, because FRL were saying that they were entitled to the instalments solely as a result of the effluxion of time, the three Contracts required to be rectified. In truth, that was not what FRL were saying or had ever said; their case was a rather more subtle claim for the instalments, regardless of the actual services performed or the delays, at least until the project was suspended. Once the real issue became apparent, the Defendants effectively abandoned their rectification claim at the start of the trial, and sought instead to argue that, on the true construction of the Contracts, FRL were not entitled to the monthly instalments without adjustment. That argument was not only a better and more realistic submission in all the circumstances, but it should and would have become apparent to the Defendants much earlier if the parties had undertaken ADR.

19. The second consequence of the failure to engage in any attempt at ADR concerns the nature and content of the central sections of this Judgment, dealing with the events surrounding the resignation of Mr.Blake. As was discussed on the first day of the trial, this is one of those rare instances where a number of the disputes between the witnesses cannot be ascribed to differences of recollection or memory lapse. The nature of the allegations involving Mr Blake and Mr Thompson leaves no room for 'fudge'; in relation to a number of the key elements of the story, everyone agrees that one or other man must not be telling the truth. It seems a pity that the parties were not able even to attempt to resolve their differences by way of ADR, so as to avoid my findings on these issues being made in a public Judgment.

B3. The Factual Evidence Generally

20. FRL called five witnesses. By far the most important was Mr Nicholas Thompson, FRL's CEO. He gave evidence about the events surrounding Mr Blake's resignation in March 2006, and his dealings with Mr Blake between March and September 2006. He also dealt with the decision not to inform the Defendants of the resignation until November 2006 and the consequences of that strategy. I make specific comments on his evidence in **Section B4** below.

21. The other witnesses called by FRL were Ms Suzette Vela, the architect most involved in the planning application; Ms Jhilmil Kishore, the architect involved in the listed building aspects of the application; Mr Colin Hobart, who nominally replaced Mr Blake, but who had a much wider role

within the FRL overall; and Mr Embley, a fellow director of FRL who had some (very limited) involvement in the events surrounding Mr Blake's resignation. I regarded all four as honest and helpful although, at least in one respect (see paragraph 197 below), I thought Mr Hobart was surprisingly cavalier in his attitude to the Defendants. However, save for Ms Vela's evidence about the planning application, which was directly relevant to the allegations of professional negligence, none of the evidence of these four witnesses went to the heart of the principal disputes between the parties.

22. The Defendants called Mr Blake, who gave evidence about his resignation and his dealings with Mr Thompson thereafter. I address his evidence in **Section B4** below. The Defendants only called two other witnesses: Mr Julian Reed, an interior designer whose evidence was of peripheral relevance, and Mr Simon Halabi. Mr Halabi I found to be an honest and straightforward witness; indeed, as I remarked during the closing submissions, he was often breathtakingly candid, such as when he admitted that he stopped paying his consultants once planning permission had not been obtained by the programmed date, regardless of what the contracts actually provided.

23. As I have already noted, the Defendants did not call anybody with any specific power and or authority within the defendant companies. Neither did they call anyone other than Mr Blake with any knowledge of or involvement in the proposed project between 2005 and 2007. Most tellingly of all, neither Mr Pyrgos nor Mr Anderson of BSH gave evidence, so that the Defendants were not able to contradict the detailed evidence about the development of the design and the progress of the planning application given by Ms Vela. The absence of these potential witnesses was not explained.

B4. Mr Thompson and Mr Blake

24. In relation to the matters on which they differed, I formed an overwhelming preference for the evidence for Mr Blake. He was careful, at times even pedantic, in answering the questions put to him by Mr Fraser, and there can be no doubt that he still feels aggrieved at his treatment by FRL, a company for whom he worked and of whom he was a director for 19 years. But he was at all times clear and patently honest. Importantly, on a number of occasions when it mattered, there was a contemporaneous document which supported his version of events.

25. I am afraid that I did not form a similar view of Mr Thompson. Although there were a number of reasons for that, the principal difficulty with Mr Thompson's evidence concerned his witness statement. This was a document which had been so artfully "spun" - so deliberately designed to belittle Mr Blake on all points, regardless of what had actually happened - that I was driven to conclude that it was a wholly unreliable document. I accept that there can be a regrettable tendency on the part of those preparing witness statements to 'accentuate the positive', but I have never before come across a witness statement which attempted to do so to such a gross extent that the document itself became evidentially worthless.

26. I deal with the detailed evidence relevant to the resignation issue in **Section F** below. However, I give four immediate examples of the gulf between Mr Thompson's witness statement, and what he was driven to accept had actually happened, in order to indicate at the outset of my analysis why I have concluded that Mr Thompson was such an unreliable witness:

a) Mr Thompson's witness statement said that Mr Blake was not 'a key player' and had not been the reason that FRL were being considered for the job in the first place. Mr Thompson was cross-examined by reference to his own and other contemporaneous documents, in which Mr Blake was described in precisely those terms, which led him eventually to accept that that his witness statement was inaccurate and wrong.

b) On a similar point, Mr Thompson made no reference to the Defendants 'liking' Mr Blake, even though one of his own contemporaneous memos again made that very point. When cross-examined as to why his statement had omitted this description, Mr Thompson was evasive and eventually conceded that, being objective and fair, it was something that should have been in his statement. More importantly, he also conceded that the fact that the Defendants liked Mr Blake was "probably" one of the reasons why FRL had been appointed in the first place (an important issue in the case): not only did his statement not contain any such evidence but it had been drafted to give precisely the opposite impression.

c) One of the most important issues in the case, dealt with in detail in **Section F** below, concerned the dealings between Mr Blake and Mr Thompson after the letter of resignation in March 2006, and before the Defendants were told of Mr Blake's resignation in November. Mr Thompson's statement said in terms that, between March and September he, together with his fellow directors and shareholders, engaged in detailed discussion and negotiations with Mr Blake to try and persuade him to stay. Mr Blake denied that absolutely. In cross-examination, this part of Mr Thompson's evidence fell apart completely. He had to accept that the reference to his fellow directors and shareholders was entirely wrong, and that the only discussions after 21st March had been solely between himself and Mr Blake. Critically, he also accepted that there had in fact been no negotiations at all, because no counter-offers had been made to Mr Blake after that date. He then sought to try and amend his statement to refer to "discussions which could lead to negotiations about further counter-offers". He accepted that this part of his statement was neither precise nor correct; in my judgment, as explained in greater detail below, it was deliberately misleading.

d) In his statement, Mr Thompson said that he did not understand why, if the Defendants had liked Mr Blake so much, this project had not been transferred to him following his resignation. Again, his cross-examination on the second day of the trial made plain that the clear and obvious answer to that was because Mr Thompson, in his negotiations with Mr Blake about the terms of his departure, absolutely refused to allow Mr Blake to work directly for the Defendants, following the completion of his notice period. Mr Thompson acknowledged that and was therefore bound to accept that his statement was both incorrect and incomplete. That passage of cross-examination ended as follows:

"Q: You knew that what you were saying was not true, did you not?

A: In that case, yes".

27. I emphasise that the above points are simply examples of important matters in Mr Thompson's witness statement, which he adopted wholesale at the outset of his evidence but which, even on his own evidence, were incorrect, misleading, inaccurate, unfair, and, in at least one case, knowingly untrue. In such circumstances, it is perhaps unsurprising that I am unable to accept Mr Thompson as a witness of truth. As we shall see, Mr Thompson admitted that he was aware of the potential consequences for FRL if the Defendants were told about Mr Blake's resignation and it is apparent that it was his fear of those consequences which led him to say nothing about Mr Blake's departure until November 2006.

C. THE BACKGROUND TO THE CONTRACTS

C1. The Relevance Of The Factual Matrix

28. Following the decision of the House of Lords in **Investors Compensation Scheme v West Bromwich Building Society** [1998] 1 WLR 896, in any case where there is an issue of interpretation

of a contract, it is necessary for the court to consider the factual background to the contract. As Lord Hoffman made plain, “subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it [the background] includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.” Subsequent decisions have made plain that the factual matrix should always be considered, even if the wording is unambiguous and sensible: see, for example, **Static Control Components (Europe) Limited v Egan** [2004] EWCA Civ 392 and **Wayne Martin v David Wilson Homes Limited** [2004] EWCA Civ 1027.

29. However, it is important to note that there are limits, even post-**Investors**, on the relevance or indeed the admissibility of pre-contract negotiations. In **Chartbrook Limited v Persimmon Homes Limited** [2008] EWCA Civ 183, the Court of Appeal rejected the appellant’s interpretation of the meaning of Additional Residential Payment (or ARP) in the contract. Rimer LJ said:

“If, and to the extent that, recourse can legitimately be had to prior negotiations to unearth any use by the parties of a ‘private dictionary’ said to be explanatory of their contractual language, I agree with Lawrence Collins LJ that there is no scope for it here. I also agree with him that there can be no justification for an attempt to invoke the course of the negotiations for the limited purpose of identifying ‘an agreed basis’ for the transaction. Persimmon’s purpose in going into the archaeology of the transaction is not to derive assistance in the interpretation of the ARP definition for which there is no need. It is to seduce the court into accepting that the parties’ subjective intentions with regard to the ARP calculation were different from what the ARP definition in the agreement actually provides, and then to invite the interpretation of that definition in a way that is in line with the alleged intentions. In short, the bid is to have recourse to negotiations for the purpose of rectifying the ARP, under the guise of interpretation. It in fact has nothing to do with the interpretation of that definition as included in the October 2001 agreement. As Lord Hoffman made clear in **Investors Compensation Scheme**, pre-contract material of the nature on which Persimmon seeks to rely can legitimately be invoked only for the purposes of a claim for rectification.”

C2. This Section Of The Judgment

30. In accordance with this approach, I set out below the background to the three Contracts. In so doing, it is also appropriate to set out the evidence about the centrality of Mr Blake to FRL’s proposals, because that is directly relevant to the second set of issues in this case, namely the allegations of misrepresentation, deceit and the like.

C3. The Parties

31. In April 2005, FRL had been part of a reverse takeover of Aukett Plc. The group is now known as Aukett Fitzroy Robinson. As noted above, Mr Thompson, an accountant by training, was and is the CEO of the new group. He monitored the performance of the other directors at regular meetings, in which financial information as to performance targets, results and so on were provided by Mr Umesh Lad of the accounts department. The merger had not been entirely smooth and Mr Thompson said that there were a number of FRL directors across Europe who were not happy with various aspects of the new arrangements. Mr Blake was one of those directors whom Mr Thompson described as “medium-unhappy”.

32. On the other side, I have already referred to the rather unclear structure and composition of the defendant companies. In his witness statement, Mr Thompson fairly said that “I do not believe it matters in these proceedings who in fact stands behind these companies”, a point relied on by Mr.

Darling in his closing submissions. Generally, I would accept that: certainly the disputes as to the proper construction of the Contracts, whether or not the Defendants should have been told about Mr Blake's resignation before the Contracts were entered into or at all events earlier than mid-November 2006, and the allegations of professional negligence, are all capable of being determined without knowing the identity of those actually controlling the Defendants, and without hearing evidence from them. But the lack of evidence from those behind the Defendants becomes more of a problem when the court is asked to consider whether, for example, they would have engaged a different firm of architects altogether if they had been told in March that Mr Blake was leaving, or what heads of loss and damage, if any, the Defendants themselves had suffered as a result of the misrepresentation.

C4. The First Contact

33. The first contact with FRL was made by John Blomstrom of BSH. He rang FRL on 5th August 2005. Mr Blake's evidence was that he subsequently found out that Mr Blomstrom had asked expressly to speak to him, but he had been on his annual leave, and so Mr Blomstrom had been put through to Mr Murdoch of FRL instead. Mr Murdoch was the only director available. He noted in a memo of the same date:

"They are a private family (Hallaby?) off shore fund of £2 bn property based in Mayfair.

They have two hotel projects in and around London in historic buildings each 100 keys.

They have planning and listed consent and section 106 on both. Top end of the market.

They are aware of Lanesborough and Grove and want to start both projects concurrently in September 05.

Presumably straight into working drawings.

The boss Simon Hallaby is in town for the interviews 22nd,23rd and 24th August.…

He has suggested one principal, one project architect.… "

34. Mr Thompson accepted in cross-examination that he could not disagree with Mr Blake's evidence that the call had initially been made to him and that he had therefore been wrong to try and make a point in his witness statement that the call – the Defendants' first expression of interest - had been directed to Mr Murdoch instead. He also agreed that his witness statement was wrong to say that he did not know that it was an offshore fund; that very point had been made in Mr Murdoch's first memo.

35. There was a second call that same day which Mr Murdoch again noted. He said that Mr Blomstrom "applauded our attitude" and went on:

"He said that we have a 'sponsor' (I guess a consultant or the Levy's?)

AFR he says is off to a 'flying start'.

Jeremy Blake is recommended by our 'sponsor' as our key player.

I think JMB must be at the interview."

This passage was then put to Mr Thompson, because despite the express reference to Mr Blake as 'our key player', Mr Thompson's statement had again sought to play down the role of Mr Blake and did not give him any credit for being a critical factor in BSH coming to FRL in the first place. Mr Thompson agreed that his statement had sought to play down Mr Blake's role; he agreed that his

statement “could have been more accurate” on this point; and agreed that, although it was “fairly obvious” Mr Blake had been mentioned at the outset as an important part of the FRL team in relation to the project, that was only obvious from Mr Murdoch’s memo, and not at all obvious from his witness statement, which actually said the opposite.

36. It should also be noted that the reference in Mr Murdoch’s first memo to The Grove was to a major project involving the conversion of a listed building into a hotel in Hertfordshire, which Mr Blake had overseen on behalf of FRL. Accordingly, I find that these two memos, taken together, make plain beyond any reasonable doubt that Mr Blake’s reputation and experience was one of the principal reasons why the Defendants (through BSH) had come to FRL in the first place. Mr Thompson’s attempts in his statement to suggest otherwise were obviously wrong, which explains why he was so easily caught out in cross-examination. It was the start of a lengthy - and in my judgment wholly unsuccessful - campaign by Mr Thompson to play down Mr Blake’s importance to the Defendants, in order to try and lessen the impact of Mr Blake’s resignation and the Defendants’ reaction to it.

37. During the Autumn of 2005, there were a number of meetings between FRL and BSH, acting on behalf of the Defendants. It appears that, whilst both Mr Blake and Mr Halabi attended those meetings. Mr Thompson did not attend any of them (save for the meeting referred to at paragraphs 40-42 below). Mr Blake’s evidence was clear that, at all these meetings, he said that, if FRL were awarded the contracts, he would be the team leader throughout the project. He was cross-examined about this evidence, but he repeatedly said that this is what he had said, and I accept his evidence. Although it was less clear whether he expressly told BSH/Mr Halabi that he had the authority to make such a representation on behalf of FRL, it did not seem to me that this point went anywhere, given that Mr Thompson had confirmed in his cross-examination that, as a director of FRL, Mr Blake had the authority to make such a representation in any event.

C5. The First Bid

38. FRL’s first Bid document was dated 20th September 2005. Mr Thompson accepted that it was a document which put considerable emphasis on FRL’s work at The Grove which, as noted above, had been Mr Blake’s project. In a part of the Bid document entitled ‘Strengths’, it referred to the fact that FRL had “AABC registered staff”, a reference to the register of ‘Architects Accredited in Building Conservation’. The evidence demonstrated that it was only Mr Blake who was AABC registered and that, after he left in March 2007, FRL had no AABC registered staff working on the project. The organogram included in the Bid described Mr Blake as the project director. His colleagues, Mr Vincent and Mr Embley, were described as the team leaders for the Piccadilly and Mentmore elements of the project respectively, reporting to Mr Blake. The Bid said that, as project director, “Jeremy Blake will oversee and be actively involved with all three projects”. He was shown as being involved throughout the 38 months that the work on both parts of the project was expected to take.

39. There were a number of references in the Bid Document to the proposed staffing being “available to resource these projects as the programmes require”. In cross-examination, Mr Thompson agreed that the reference to ‘programmes’ and ‘resources’ were references to the Resources Schedules that were included at the back of the Bid document itself. There were three of these Resources Schedules in all; one for each of the two elements of the Piccadilly project, and one for Mentmore. Each Resources Schedule was in the same format. Across the top, there was a column heading for each of the thirty eight months that the project was due to take. Below was a bar chart showing when particular stages of the design and the works on site would be carried out and completed. At the bottom, there was a list of each member of the FRL team who would be working on the project in any

given month, with a total figure for his or her hours for that month. Those hours were then multiplied by the rates applicable for each member of the team so as to arrive at a monthly fee. The Resources Schedules also demonstrated that Mr Blake was going to be there for the entirety of the project.

C6. Meeting Of 28 th September 2005

40. In the evening of 18th September 2005, there was a meeting between Mr Blomstrom of BSH and Mr Halabi, Mr Blake and Mr Thompson. The following day Mr Thompson produced a memo dealing with that meeting which said this:

"The client clearly likes Jeremy.

We are the Preferred Architect.

We were the highest Bid (by a long way)

We remain reassuringly expensive- actually the client commented 'well, they are Fitzroy's'…. "

The memo identified the range of Bids received from the competing architects, and said that "we were asked to sharpen our pencils… we are putting in our revised bid today". Mr Thompson confirmed that this meant that FRL had to reduce their tender figures.

41. It is instructive to compare this contemporaneous memo with paragraph 28 of Mr Thompson's witness statement, which purports to deal with the same meeting. He makes no reference whatsoever to "the client clearly likes Jeremy" or the conversation that had prompted him to record that. Instead, he again seeks to play down Mr Blake's role and involvement, and goes onto claim that Mr Halabi "did not mention at any point that Mr Blake was key or central to its decision to appoint FRL". These discrepancies were an obvious subject for cross-examination. Mr Thompson was forced to admit that, in truth, the fact that the Defendants clearly liked Mr Blake (and had made that plain at the meeting), was obviously relevant to the issues in the case; indeed, he admitted that it probably helped in FRL getting the job. Having admitted that "many of our clients appoint us because they like particular people", Mr Thompson's questioning went on:

"Q:Yes, and that's why this client appointed you; because he liked Mr Blake.

A: It probably was one of the reasons, yes.

Q: It probably was one of the reasons you were appointed, the client liked Mr Blake. Where do you say that in your witness statement?

A: I do not.

Q: Why not?

A: Because I have not included it."

42. Mr Thompson's admission - that the fact that the Defendants liked Mr Blake was probably one of the reasons why FRL got the job - was obviously important. There was no explanation, and he could offer none, as to why this critical evidence was omitted from his witness statement and why, instead, that witness statement suggested that FRL got the job for reasons wholly unconnected with Mr Blake himself. For the reasons I have already given, this is one of the reasons why I have found Mr Thompson's evidence to be so unsatisfactory.

C7. The Second Bid

43. As advertised in Mr Thompson's memo, FRL put in their revised Bid on 29th September 2005. The revised Bid was in precisely the same form as before, and included the same three Resources Schedules at the back, but the figures had been amended and produced a lower amount for the monthly payments. Mr Thompson said that he had reduced the numbers so as to reduce the overall fee payable.

44. It is not wholly clear what happened between the end of September 2005 and March 2006. At all events, by March 2006, it appears that negotiations between the Defendants and FRL were at an advanced stage and that FRL were sufficiently certain of winning the Contracts that they were prepared to start work whilst some of the outstanding terms were still being negotiated.

C8. March 2006

45. By March 2006, the total lump sum fees to be paid to FRL had been agreed. The parties had also agreed that those lump sums would not be exceeded. As Mr Thompson accepted, what remained outstanding was the agreement of various minor matters, and the precise payment mechanism for the fees. Mr Thompson had undertaken some research, which demonstrated that the Defendants' previous architects, EPR, were owed a large sum by way of fees and were "heading into litigation" (see the memo of 21st November 2005). He therefore wanted to be paid the monthly instalments in advance of the work being carried out.

46. During March there were a number of draft agreements passing back and forth between Mr Pyrgos of BSH and Olswang (the solicitors acting for the Defendants), and Mr Thompson and Mr Blake on behalf of FRL. It appears from those exchanges that the contract documents themselves were being negotiated and put together in something of a hurry. There were last-minute suggested variations to some of the provisions and some of the documents. These included Schedule 2, which was a schedule proposed by BSH/Olswang dealing with fees. It included some introductory words; beyond that, there was a simple list of 38 months (starting in April 2006) and, against each month, the amount of the instalment to be paid to FRL. The instalment figures were taken from the Resources Schedules attached to the revised Bid. In his e-mail to Olswang/BSH of 14th March 2006, Mr Blake commented on the first draft of Schedule 2. He said:

"Schedule 2 - Schedule of Payments. This is undeliverable as worded to service this project. We need to revert to our spread sheets which were the basis of our appointment for these projects with the wording clarifying Month 1 being March 2006 and Month 0 for Fee Payment Schedule being February 2006. This is all as previously submitted and agreed."

There can be no doubt that the spreadsheets to which Mr Blake was referring were the Resources Schedules attached to the revised Bid document.

47. On 16th March 2006, Mr Blake sent to Mr Pyrgos and to Olswang the Schedules "that formed the basis of our appointment", revised in the way outlined by Mr Blake in his e-mail. These were updated versions of the three Resources Schedules attached to the revised Bid. Although the figures stayed precisely the same, as did the 38 month period, the Resources Schedules were updated so as to indicate the actual commencement of work in April 2006, and showing, by way of an updated bar chart, that completion was to take place 38 months later, at the end of May 2009. From this exchange, it certainly appears that FRL thought that these Schedules would be included in the Contracts, a point later reiterated by Mr Thompson in his e-mail to BSH of 25th August 2006. Although there were further discussions about the wording of various parts of Schedule 2, with new points being raised very late by those acting for the Defendants (which understandably caused a certain amount of

frustration to FRL), there was one thing that appears always to have been agreed: the amount of the instalments - the sums that the Defendants would pay to FRL each month - would be those sums set out in the Resources Schedules attached to the revised Bid, and replicated in the BSH Schedule 2.

48. It appears that, following a further meeting on 27th March 2006, the final set of contract documents were put together by Mr Pyrgos and sent to FRL for agreement. This included a version of Schedule 2 with agreed introductory words and the simple list of 38 months with each fee instalment identified. For reasons which are unclear, the updated Resources Schedules themselves were not included, although the documents do not suggest that their omission was the result of a deliberate decision by either side, much less an express agreement between them that these updated Resources Schedules would be omitted. As noted above, FRL signed the two Piccadilly contracts on 28th March and the Mentmore contract on 20th April 2006. They were executed by the Defendants on 8th May and 30th May respectively.

C9. The Contract Documents

49. As noted, there were three separate Contracts of appointment between the Defendants and FRL. There was the Contract between Good Start Limited and FRL in connection with 96-100 Piccadilly. The second was between Anglo Swiss Holdings Limited and FRL in respect of 90-95 Piccadilly, which included the In & Out Club itself. Finally there was the Contract between Mentmore Towers Limited and FRL in connection with the proposed development of Mentmore Towers. However, each of these three Contracts was in precisely the same form and consisted of the same documents, amended only to refer to the specific works to the building or buildings in question.

50. Each of the three Contracts therefore included the following documents:

a) A written agreement containing 22 clauses;

b) Schedule 1, setting out the services to be provided by FRL;

c) Schedule 2, the schedule of the monthly instalments; and

d) Schedule 3, a deed of warranty.

For the purposes of this Judgment, the only provisions in the Contracts which matter are those concerned with FRL's entitlement to payment, and Schedule 2.

D. THE PAYMENT TERMS

D1. The Relevant Provisions

51. Clause 1 of each Agreement set out a number of important definitions, including the following:

"'Construction Period': the period beginning with the date of execution of the Building Contract (or if earlier the date of issue of any letter instructing the Contractor to commence preparatory works or to place orders in respect of the Development) and ending with the date of Practical Completion.

'Development': the development of the Site to include the following works:

[Each Agreement then set out the detailed works for the particular property in question]

'Employers Representative': Buckingham Securities Holdings Plc (Company No-3786223)

‘Fee’: means the fee payable for the due and proper performances of the Services in accordance with Clause 10 and Schedule 2

‘Practical Completion’: has the same meaning as in the Building Contract and any reference to the ‘date of Practical Completion’ shall be reference to the date stated in the Certificate or Statement of Practical Completion issued under the Building Contract as being the date Practical Completion of the Project is achieved/was achieved.

Pre-construction Period’: The period from the date of this Agreement to the date of execution of the Building Contract or the issue of any letter instructing the Contractor to commence preparatory works or to place orders in respect of the Development.”

‘Programme’: The outline programme for the Project including any variation to such programme made from time to time.

‘Services’: The services described in or referred to in Clause 3 (including any additional services carried out pursuant to clause 3.2 and any other duties provided for under this Agreement).

‘Team Leader’: Jeremy Blake or such other individual of comparable standing ability and experience as the Employer may at its discretion approve.”

52. Clause 2 was concerned with Appointment and Duration. It provided:

“2.1 The Employer appoints and the Consultant accepts the appointment to provide the Services fully and faithfully in accordance with this Agreement.

2.2 The appointment of the Consultant shall commence from the date of this Agreement or from the time when the Consultant shall have begun to perform the Services whichever is the earlier and this Agreement shall be deemed to apply to the performance of the Services from the date of commencement of the Consultant’s appointment.”

53. Clause 3 dealt with the services to be provided by FRL. They were the Services described in Schedule 1. The services listed there were described in a slightly different way, and given a different designation letter, to the Stages set out in the standard RIBA Appointment documentation. However, it does not appear that anything turns on these differences, and everyone appeared to be operating on the basis of the RIBA stages in any event. The appropriate standard of care was set out in Clause 4.

54. Clause 5 was entitled ‘Programming and Coordination’. It provided:

“5.1 The Consultant shall perform the Services and its obligations under this Agreement at such times as shall be appropriate having regard to the Programme and shall at all times keep the Employer fully and properly informed on all aspects of the progress and performance of the Services.

5.2 The Consultant shall immediately draw the attention of the Employer and the Other Consultants to any circumstances encountered or foreseen by the Consultant of which the Employer or the Other Consultants may be unaware and which might impair the efficient planning programming execution or completion of the Development or undermine prevailing costs estimates.

5.3 The Consultant shall at all times perform the Services in co-operation with the Employer the Contractor and the Other Consultants and their respective representatives offices agents and employees.”

55. Clause 7 dealt with personnel and provided, at Clause 7.1, that FRL "shall procure that the Team Leader shall be personally available and responsible for the overall management supervision and co-ordination of the Services and that there will be no change of responsibility without the prior written agreement of the Employer (such agreement not to be unreasonably withheld or delayed)".

56. Clause 10 dealt with remuneration. The relevant provisions were as follows:

"10.1 Subject to the Consultant performing the Services in accordance with this Agreement the Employer shall pay to the Consultant the Fee set out in the payment schedule annexed to this appointment at Schedule 2.

10.2 The Fee shall include all disbursements (with the exception of models, computer visualisations, special presentation materials and overseas travel) expenses and overheads of every kind incurred by the Consultant but shall be exclusive of Value Added Tax ("VAT") and shall be payable in accordance with the payment schedule at Schedule 2.

10.3 In relation to each instalment payment referred to in Schedule 2 the Consultant shall submit to the Employer invoices not later than ten days prior to the relevant date of sums due to the Consultant under this Agreement in such form and with such supporting documentation as the Employer may reasonably require. The due date for payment of each instalment shall be the relevant date referred to in Schedule 2 or if later the date of receipt by the Employer of the Consultant's invoice in accordance with this Clause 10.3.

10.4 The final date for payment of sums properly due to the Consultant under this Agreement shall be 28 days following the due date for payment of the relevant instalment.

10.5 Within 5 days after the date on which any payment becomes due to the Consultant under this Agreement the Employer shall give notice to the Consultant specifying the amount of the payment which it proposes to make in relation to the Consultant's invoice and the basis on which that amount is calculated. If no notice is given then the Employer shall be deemed to have given notice specifying that it proposes to make payment of the full amount stated in the agreed invoice.

10.6 At least 5 days prior to the final date for payment of any instalment under this Agreement the Employer shall give to the Consultant notice of any deduction or set-off which it proposes to make from any sum due under this Agreement and such notice shall specify the amount proposed to be withheld and the ground or grounds for withholding payment (and if there is more than one ground attributing relevant amounts to each ground specified). The notice mentioned in clause 10.5 may suffice as a notice of intention to withhold payment if it complies with the requirements of this Clause….."

The remainder of clause 10 dealt with FRL's right to suspend performance if sums were not paid and matters of that sort.

57. Schedule 2 was entitled 'Schedule of Payments'. Its introductory words, which were the subject of the detailed exchanges in March 2006, when the Contracts were being finalised, were as follows:

"The instalments of the Fee will be paid to the Consultant in advance of Services to be performed. The due dates for each instalment are for the month prior to the month in which those Services are to be performed so that the final date for payment of each instalment is on the 28th day of each month prior to commencement of those Services.

The resource and fee allocation over time may need reviewing subject to agreement by the parties to the Programme and any revision thereof. In the event that the Project is delayed or the overall Programme reduced the instalment schedule may be adjusted by agreement between the Employer and the Consultant and the Consultant's monthly fee allocation will be adjusted accordingly within the overall agreed fixed fee. There shall be no adjustment to the Fee due to increases in the cost of the Project or delay to the Programme subject to there being no material change of scope of the Project."

58. The Schedule then set out the list of relevant months, starting in April 2006 and going on to April 2009, in which a specific fee instalment figure is identified for each month. After 'April 2009' the next entry is entitled 'Practical Completion' and a further instalment figure is identified. There is then a final column entitled 'Issue of Notice of Completion of Making Good Defects' with a last instalment figure. The total lump sum fees payable to FRL were £2,291,736 on Mentmore; £955,668 on 100 Piccadilly; and £3,800,037 on 90-95 Piccadilly, (which included the In & Out Club itself).

59. Finally, it is necessary to set out Clause 16 of the Contracts, which was entitled 'Obligations following Termination/Suspension of the Services'. Clause 16.3 provided:

"In the event of any termination of the Consultant's engagement for any reason (other than those set out in Clause 14.1) or upon any suspension of the Services the Consultant will be entitled to a fair proportion of the Fee for any of the Services properly performed up to and including the date of termination or suspension having regard to the instalment schedule set out in Schedule [2] and the payments already made to the Consultant under this Agreement."

D2 The Original Issue: Rectification

60. As noted above, FRL's claims in these proceedings are for the unpaid instalments for June-December 2007 inclusive, in the sums set out in Schedule 2, on the three separate parts of the PM Club project. It is FRL's case that these sums are due pursuant to the Contracts, regardless of the progress on the project. They maintain that, as long as they were providing some services during the month in question, they were entitled to be paid the agreed instalment for that month, even if that instalment had been originally calculated by reference to different services to those actually performed (because the instalment had been calculated by reference to a programme that had not been kept to).

61. In response to this claim, the Defendants' original position was threefold. Their first case was that, on a true construction of the Contracts, there was a dependent relationship between the sums in Schedule 2 falling due, and "the occurrence and/or performance of work and/or services" by FRL. Unfortunately, this primary case was not further spelled out in the Defendants' pleading, so that it is not possible to see what the Defendants said was the effect (if any) of their primary case on construction upon the fee claim actually being pursued by FRL.

62. Perhaps as a result of this omission, all the parties' pre-trial focus was on the Defendants' so-called secondary case, which was to the effect that, if their construction was wrong, such that FRL was simply entitled to be paid as a result of the effluxion of time, the Defendants were entitled to rectification of the Contracts. The rectification they sought was by the inclusion of the Resources Schedules attached to the revised Bid (not, oddly, the updated Resources Schedules prepared in March 2006). Again, the precise consequences of the rectified Contracts (namely the contract including those Resource Schedules) are not set out in the pleadings. The Defendants' tertiary case was that, in the absence of rectification, the payment mechanism was unworkable and too uncertain to be capable of enforcement, and a quantum meruit case was advanced instead.

63. At trial, Mr Darling, on behalf of the Defendants, abandoned the rectification case. Instead, he made plain that he relied solely on the construction case, to the effect that, pursuant to the terms of the Contracts, the instalments required to be adjusted because of the delay in the programme and the services actually performed. He did not, however, entirely abandon the quantum meruit argument, alleging that concepts of reasonableness would or may be relevant to any adjustment mechanism identified by the court.

D3 The Real Issue: The Construction Of The Contracts

64. As a result of Mr Darling's concession (which, if I may say so, was entirely realistic) the issues between the parties as to FRL's entitlement to payment narrowed considerably. The real point was whether, prior to the suspension of works, FRL were entitled to be paid the monthly instalments as they fell due, in accordance with Schedule 2, regardless of the precise services being undertaken during that period and/or regardless of the delays, if any, to the Programme.

65. In considering that issue of construction, I bear in mind the following general principles:

(a) If a semantic analysis of words in a commercial contract leads to a conclusion which flouts business common sense, then such conclusion must be made to yield to business common sense: see **Antaios Cia Naviera v Salen Rederierna AB** [1985] AC 191 at 201;

(b) Such an approach can, however, only be taken so far. The language of a contract cannot be rewritten by the court in order to make the words used conform to business common sense: see **Co-operative Wholesale Society Ltd v National Westminster Bank Plc** [1995] 1 EGLR 97;

(c) It is often the case that contracts negotiated by businessmen will not always be in the form that a lawyer might have chosen, but the court must give effect to the intentions of parties, however inelegantly expressed: **Hillas & Co Ltd v Arcos Ltd** [1932] All ER 494 at 503 (per Lord Wright).

(d) A dispute as to how a contractual liability to make payment according to a specified objective standard is to be quantified is generally a matter of machinery for the court to resolve, rather than an issue which goes to the existence or otherwise of a contract: see **The Didymi** [1988] 2 Lloyd's Rep 108 at 115 and **Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD** [2001] 2 Lloyd's Rep 76 at pp. 89-90;

(e) However, in such circumstances, the court should be wary of implying terms as to reasonableness into detailed contracts provisions (particularly option arrangements), in circumstances where the provision would be difficult to operate in practice. A relatively extreme example of such a case is **Grow With Us Ltd v Green Thumb (UK) Ltd** [2006] EWCA Civ 1201 where Buxton LJ refused to imply the term requested and said:

"Mr Coppel by contrast said that that task of finding a reasonable solution would be simpler in our case. I am afraid I have to say that that submission was completely unreal. As soon as I was told by him that the court would be expected to conduct an inquiry into the present structure and likely development over the next five years of competition in the lawn maintenance market in the Aldershot area, I realised that the allegedly simple and uncontroversial implied term that it was said to be necessary to imply meant that the contract could only work in the way that the franchisee required by imposing on the court an exercise that no common law court, as opposed possibly to the Competition Appeal Tribunal, is equipped to perform."

D4. Should The Instalments Be Adjusted?

(a) Adjustment In Principle

66. There can, I think, be little doubt that FRL's entitlement to be paid their fees was linked to their performance of the services set out in Schedule 1 of each of the Contracts. Clause 10.1 (set out in paragraph 56 above) made that link explicit. Furthermore, the first paragraph of the introductory words to Schedule 2 (paragraph 57 above) also made clear the connection between the instalment and the performance by FRL of their services. Accordingly, I find that FRL's entitlement to fees was generally dependant on the services that they performed.

67. The real question is if, when and how any adjustment to the monthly fee instalments should be made, in order to reflect the services actually carried out (or, more accurately, to be carried out in the next month). It is the Defendants' case that adjustment is required because of the delay, and the fact that, as a result of the delay (and possibly other matters), the services being performed in any given month were not those which had been used to calculate the Schedule 2 instalments. It is FRL's case that no such adjustment to the instalment is required provided that, as here, they were performing some of the Schedule 1 services during the relevant month.

68. In my judgment, on a true construction of the Contracts, the parties agreed that, not only was there a link between the performance of services and the entitlement to fees, but there was also the need for adjustment to the instalments set out in Schedule 2 if, as a result of delay to the project, the services being performed in any given month were not those which had been used for the purposes of arriving at the monthly instalment. I reach that conclusion as a result of a number of factors.

69. First, Clause 5.1 (paragraph 54 above) makes plain when FRL are to perform the contractual services, namely "at such times as shall be appropriate having regard to the Programme…" Thus there is not only an express link between the services performed and the fees due, there is also an express link between the services and the time in which they were to be performed. There was an obligation on FRL to perform in accordance with the Programme, and their entitlement to the instalments was dependant upon such performance.

70. So what happens if the services were not provided in accordance with the Programme? That is also spelt out in the Contracts, in the second paragraph of the introductory words to Schedule 2 (paragraph 57 above). Those words made clear that "the resource and fee allocation over time may need reviewing subject to agreement by the parties to the Programme and any revision thereof." Thus, on their face, these words mean that, in the event of delay, the amounts to be paid may need to be reviewed, because the sums due were dependant on progress in accordance with the Programme.

71. There was a debate about the meaning of the word 'Programme', which is used in both Clause 5 and Schedule 2 of the Contracts. On behalf of the Defendants, Mr Darling said that this was a reference to the bar chart programme utilised in the Resource Schedules set out in the Bid documents and revised in the middle of March 2006 (paragraph 45 above). It seems to me that this submission made perfect sense, given that this part of Schedule 2 made express reference to "the resource and fee allocation over time" which is exactly what those Resource Schedules represented, and how they were described in the Bid. Moreover, those Schedules produced the precise monthly figures that are then set out in summary form in Schedule 2.

72. FRL's case as to the meaning of the word 'Programme' was rather more difficult to ascertain. Initially Mr Fraser made a reference to a programme produced prior to FRL's involvement by Mace, the project managers, and circulated in November 2005, but Mr Thompson was emphatic that this was <u>not</u> the programme to which FRL had agreed. Given that this did not show a duration of 38

months, Mr Thompson's evidence was entirely understandable. In his closing submissions, Mr Fraser said that the Programme consisted of no more than the 38 months produced by totting up each month set out in Schedule 2, which was in one sense a case that was not very different to that advanced by the Defendants. He said that, beyond the 38 months arrived at in this way, there was no agreed programme, and the words in question could not be a reference to the programme shown in the Resources Schedules because they were not contract documents.

73. It seems to me, given the use of the word 'Programme' (with a capital 'P'), the parties must be taken to have been referring to a specific programme document. The Resources Schedules are the only documents showing a 38 month programme that were in existence – and agreed - at the time that the Contracts were made. In my judgment, 'Programme' means something more than a simple adding up of a list of months: that would produce a duration for the overall project, but not a Programme. Moreover, there can be no inconsistency in finding that the agreed Programme was the updated bar chart programme set out in the Resources Schedules included with the Bid, given that the very same documents produced the agreed monthly instalment figures set out in Schedule 2.

74. In addition, I am in no doubt that the second sentence of the second paragraph of the introductory words to Schedule 2 (see paragraph 57 above) makes plain that, in the event of delay, the Defendants were entitled (in appropriate circumstances) to seek an adjustment of FRL's monthly fee allocation. It is true that the mechanics of the adjustment were left to be agreed between the parties but, as the cases noted in paragraph 65d) above make clear, that is not of itself fatal to a workable agreement. That an adjustment may be appropriate in principle, in circumstances of delay, is made plain by the words "in the event that the project is delayed …the consultant's monthly fee allocation will be adjusted…" Whilst there was no question that the overall lump sum fee would be increased or reduced in the event of delay, the second sentence of this paragraph makes it clear that the instalment payable for any given month may be adjusted in such circumstances.

75. The construction advanced by Mr Fraser, in his elegant submissions, was to the effect that no adjustment was necessary as long as some contractual services were being performed. Thus, in answer to a question that I put to him during opening, he said that, if it had taken FRL the entirety of the 38 months just to obtain planning consent, they would still have been entitled to the instalments set out in Schedule 2 for the whole of that period, because they were still performing contractual services during the relevant period. It seemed to me that this construction had the effect of ignoring Clauses 5 and 10, and the first two sentences of the second paragraph of the introductory words to Schedule 2. For the reasons that I have set out, it seems to me that those words made plain that, in the event of delay, the instalments would be adjusted, and they cannot be ignored simply because no adjustment mechanism was expressly identified. Consider the facts here, where there was delay because the planning permission on Piccadilly took much longer to obtain than the Programme allowed. Nobody was suggesting by late 2007 that the works would be completed by May 2009. But, despite that, FRL's submission has to be that they were still entitled to be paid the instalments stated in Schedule 2, regardless of that delay. I reject that contention because, so it seems to me, it ignores the clear words in the second paragraph of Schedule 2.

76. The final issue going to this point, namely whether an adjustment to the instalments is triggered as a matter of principle, concerns the Resource Schedules themselves. Although those Schedules were expressly updated by FRL for inclusion in the Contracts in March 2006, for reasons which are unclear, they were not actually included in the executed version of the three Contracts. FRL say therefore that the Defendants' case on construction, which I have accepted, amounts to rectification by the back door, and they rely on the decision in **Chartbrook** to contend that such an approach is illegitimate.

77. I reject that submission. I do not believe that, on a proper analysis, what the Defendants say about the proper construction of the Contracts does amount to a hidden case of rectification. There is no dispute between the parties that the instalment amounts in Schedule 2 were calculated precisely by reference to those Resources Schedules. There is also no dispute between the parties that the only programme document in existence and agreed at the time the Contracts were made was the bar chart programme included within those Resource Schedules. In such circumstances, no other sensible construction of the second paragraph of Schedule 2 is possible. For those reasons, I regard this case as miles away from the sort of situation that arose in **Chartbrook**. This is a standard case where, in my view, the second paragraph of Schedule 2 has only one commonsense business meaning, and that meaning is confirmed by the existence of FRL's own updated Resources Schedules, which were produced for inclusion in the Contracts, which they wanted to include, but which (due to what seems to me to be inadvertence, despite Mr Blake's checking of the contract documents), were omitted from the bound versions of the Contracts themselves. Moreover, those Schedules explain how the individual monthly sums, as set out in the Contracts, were calculated.

78. Accordingly, it seems to me that, on a true construction of these three Contracts as a whole, FRL's entitlement to fees was dependent upon the performance of the services in accordance with the agreed Programme, and the instalments set out in Schedule 2 were capable of adjustment if the services altered or were not performed in accordance with the Programme.

79. There are two final points which I would wish to make which further confirm my view that this is the only sensible interpretation of the parties' commercial intentions. The first is a practical matter. Let us assume that, for one of the disputed months in the last part of 2007, the principal element of that month's instalment, set out in Schedule 2, was the provision of an expensive on-site supervision team. This resource would have been included for the month in question because, according to the Programme, work would have progressing on-site, but, because of the delay, the work had not started on-site at that time (and has in fact never started). On FRL's interpretation, the fact that the relevant monthly instalment had been calculated by reference to an expensive element of their services which had not, in fact, been provided, was irrelevant to their entitlement. It seems to me that such a submission is contrary to the clear link between the fee and the services actually performed in clause 10.1 of the Contracts, contrary to the clear link to the services in clause 5.1; and contrary to the provision for adjustment in the words at the commencement of Schedule 2. That is a further practical reason why I prefer the Defendants' construction of the Contracts and conclude that an adjustment to the instalment is permissible in principle.

80. The second point concerns Clause 16.3. I have set out clause 16.3 at paragraph 59 above. This makes plain that, in the event of suspension, FRL's entitlement was to "a fair proportion of the Fee for any of the Services properly performed up to and including the date of determination or suspension having regard to the instalment schedule set out in schedule 2 and the payments already made". Mr Frasier relied on this provision to suggest that any adjustment should only be made after suspension, and would not affect FRL's right, pre-suspension, to the instalments as set out in Schedule 2. But, on analysis, I conclude that this provision supports my conclusion as to the potential, depending on the circumstances, for the pre-suspension adjustment of the instalments. The Clause 16.3 mechanism is very similar to the mechanism which I envisage for the adjustment process identified above. It is not driven by, or slavishly dependant upon, the instalments in Schedule 2, although they may well be relevant. In any event, since FRL's services have in fact been suspended it means that, although the Defendants have not pleaded any reference to clause 16.3, the calculation of "a fair proportion of the overall fee due" is required to be carried out. Accordingly, the existence of such a mechanism only

confirms my view that, in the circumstances which have occurred, the monthly instalments fall to be adjusted in such a way which arrives at a figure that reflects the bargain made between the parties and the services properly performed by FRL, but which also takes account of both the delay and the subsequent suspension.

81. Thus, I conclude that clause 16.3 amounts to a separate reason why, on the facts, FRL's entitlement is not necessarily to the instalments set out in Schedule 2, but to an amount adjusted to reflect the delay and the services actually performed. In addition, so it seems to me, such an exercise would include, where appropriate, reference back to the Resources Schedules, because it is not possible to calculate "a fair proportion of the capital fee" without regard to the agreed breakdown of that fee, which was of course contained in the three Resources Schedules, and nowhere else.

b) Adjustment in Fact

82. I set out in paragraphs 212 and 227-229 below some of the evidence of fact relating to FRL's under-resourcing of the project; the discrepancy between the make-up of the instalments set out in Schedule 2, and the services actually performed by FRL; and the adjustments to the fees which were agreed at the time.

83. From this evidence I conclude that, prior to suspension:

a) FRL did not generally provide the level of services which had been used to calculate the monthly instalments in Schedule 2;

b) FRL generally provided fewer services/resources than those which had been used to calculate the monthly instalments in Schedule 2;

c) If payments had been made strictly in accordance with Schedule 2 then, certainly as at the end of September 2007, FRL would have been paid a considerable sum (just less than £1 million) for services not yet performed or resources not yet utilised. The majority of this figure had in fact been paid by the Defendants by this date;

d) Mr Thompson admitted that he had agreed to adjust (downwards) the fees payable to FRL on three separate occasions to reflect FRL's under-resourcing and the delays.

84. Accordingly, it seems to me that, for what it is worth, my construction of the Contracts as to the need for adjustment to the instalments leads not only to a fair and equitable result, but also to one which was operated - at least up to a point - by the parties in practice. Any other construction would give rise to an uncommercial result - a windfall to FRL – which, on the facts, both parties recognised at the time and sought to avoid.

c) Adjustment in Practice

85. The last question, of course, is how the adjustment would work in practice. It does not seem to me that that should be overly difficult. At first blush, I consider that such an adjustment would reflect the services performed, and utilise the rates that were set out in the Resource Schedules and carried into Schedule 2. In addition, the adjustment must also reflect the overall lump sum agreement and the agreement that FRL would be paid one month in advance. It does not seem to me that the subsequent adjustment is complex, and it is far removed from the sort of difficulty (which was really the product of an option provision) which concerned Buxton LJ in **Grow With Us**.

86. However, I refrain from making any specific finding as to how the adjustment process should actually work in practice because I accept Mr Fraser's submission that, in the absence of any clear case set out in the Defendants' pleadings, it would be wrong for the court to make conclusive findings as to how the adjustment process should work in detail until proper submissions have been made. He was understandably anxious, if I did decide that adjustments were appropriate, to ensure that FRL were not prejudiced because the Defendants had not set out how they said the adjustments should work in practice. I accept that. An example of the potential difficulties can be seen in paragraph 37 of Mr Darling's closing note. He appears to be arguing that certain financial limits are appropriate on the fees payable, by reference to each RIBA Design Stage, regardless of the actual hours worked by FRL on each such Stage. This unpleaded argument could have a significant effect on FRL's entitlement, and it would be wrong for me to reach any conclusion on such an issue until I have heard proper submissions about it at the quantum hearing.

D5 Payment

87. The final sub-issue in relation to my analysis of FRL's entitlement to fees concerned clause 10.5. Mr Fraser submitted that, in the absence of any withholding notices, clause 10.5 (set out at paragraph 56 above) meant that FRL were entitled to be paid the instalments unless and until the court concluded that some other sums were due. He properly accepted that the mere fact that there was no outstanding notice did not establish an entitlement to the sum for all time, if (as I have found) the instalments had to be adjusted. But, he said, until some other sum was identified, the absence of a witholding notice meant that, pro tem, the instalment should be paid. In support of this submission, he relied on **Rupert Morgan Building Services Ltd v Jervis** [2004] BLR 18.

88. There can be no doubt that the provisions at clauses 10.3-10.6 of the Contracts were designed to mirror the payment regime provided for in the Scheme for Construction Contracts, which was itself introduced by the provisions of the **Housing Grants (Construction And Regeneration) Act 1996**. They gave the Defendants the opportunity of serving a notice identifying whether or not they intended to pay the amount invoiced and a subsequent notice, if relevant, setting out any sum that they intended to withhold from the sums otherwise due. Absent such notices, the instalment would be due. Thus, if there had been an adjudication at the time that the sums fell due, the adjudicator may well have been bound by clause 10.5 and ordered payment to FRL of the instalments claimed. This decision would have been temporarily binding, but would not have prevented the Defendants from commencing proceedings to argue that, as a matter of construction and on the facts, the instalments were not due. But that did not happen here. Instead, FRL issued proceedings in court, and those proceedings have been defended by the Defendants on the ground, inter alia, that the proper construction of the Contracts meant that the sums were not due. Furthermore, it was only the decision to split quantum off to a separate hearing which has given rise to the payment problem which now arises; if I was also dealing with quantum at this stage, I would be undertaking the adjustment exercise referred to above as part of this Judgment. For all these reasons, this is a different situation to that which arose in **Rupert Morgan**, which was a straightforward adjudication enforcement.

89. In all the circumstances, it would be wrong for me to conclude that the simple absence of a notice in accordance with clause 10.5 entitled FRL now to be paid the instalments invoiced, whilst at the same time acknowledging that such a result was contrary to the proper construction of the Contracts. Mr Fraser does not, I think, really contend otherwise. But at the same time, it is necessary to try and give effect to the contractual machinery which, as Mr Fraser correctly notes, has been completely ignored by the Defendants, and which failure has been compounded by their failure to provide any particulars of the sums which they say arise out of the adjustment mechanism.

90. The right course is for me to note first that, pursuant to clause 10, the instalments claimed were due and owing at the time that the invoices were sent. The Defendants were in breach of contract in not paying them, and FRL are entitled to interest on the unpaid sums in consequence.

91. That said, it would be artificial now to give judgment for the instalments, because I have found that the adjustment argument is correct, such that these instalments will have to be subjected to that process. Once the adjustment mechanism has been decided upon, the sums due (if any) ought to be a relatively simple matter of mathematics. I invite the parties to agree the appropriate adjustment mechanism; if they cannot, I will determine it myself following submissions. Moreover, that process must happen in the next 3 months or so, in order to ensure that FRL promptly recover such further sums as may be due to them.

D6. Summary/Instalments

92. For the reasons set out above, I have concluded that FRL are not, without more, entitled to the instalments set out in Schedule 2 for the months which are the subject of the dispute. They are prima facie entitled to be paid adjusted amounts to reflect the delay, and the services actually performed, by reference to the agreed hourly rates set out in the Resources Schedule and used to calculate Schedule 2

93. For the reasons noted above I decline to identify a precise formula for the adjustment of the instalments due but I reiterate my view that this ought to be relatively straightforward. Again, I cannot help feeling that an attempt at ADR would, at the very least, have caused the parties to see what (if anything) lay between them as to the mechanics of adjustment, if the Court were to find, as I have, that FRL's entitlement was not simply to the monthly instalments.

E. MR BLAKE /THE LAW

E1. Introductory Remarks

94. I observed at the outset of the trial that, notwithstanding the myriad ways in which the Defendants' defence and counterclaim was pleaded, the issues surrounding Mr Blake boiled down to one simple matter: once he had handed in his resignation letter on 17th March 2006, and refused the counter-offer of 21st March, should FRL have told the Defendants about his resignation, and was their failure to tell the Defendants an actionable wrong? The primary way in which the Defendants' case was put was by way of misrepresentation (fraudulent or statutory) and deceit. I deal with the relevant principles relating to those causes of action in **Section E2** below. The other potential ways in which the claims could be put, namely by reference to negligent misrepresentation/misstatement and/or breach of an implied term of the contract are dealt within **Section E3** below.

E2. Misrepresentation and Deceit

a) General Principles

95. To make a damages claim arising out of a fraudulent misrepresentation in circumstances such as these, the representee must demonstrate:

a) That there was a contract between the parties;

b) That the representor made a misrepresentation to the representee before that contract was entered into;

c) That the misrepresentation was fraudulent;

d) That the misrepresentation acted as an inducement to the representee to enter into the contract;

e) That the representee has suffered loss as a result.

96. In order for fraud to be established, it is necessary to prove the absence of an honest belief in the truth of that which has been stated. In **Derry v Peek** [1889] 14 App.Cas.337, Lord Herschell said:

“Fraud is proved when it is shown that a false representation has been made; (1) knowingly; or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false…To prevent a false statement from being fraudulent, there must, I think, always be an honest belief in its truth.”

97. The parallel claim under section 2(1) of the Misrepresentation Act also requires the representee to prove a), b), d) and e) above. It does not require proof of fraud; instead, it must be shown that the representor would be liable to pay damages had he been fraudulent, and that the representee has suffered loss as a result. This requires the representee to demonstrate that the representor intended him to act upon the statement as an inducement to enter into the contract (paragraph 6-028 of volume 1 of **Chitty on Contracts**, 30th edition).

98. Similarly, a claiming party may recover damages for deceit if it can be shown that:

a) The representor made a false representation;

b) This misrepresentation was made dishonestly;

c) The representor intended the representee to act in reliance upon that representation;

d) The representee has in fact acted in reliance upon that representation;

e) The representee has therefore suffered loss.

The ingredients of the test in deceit are set out **AIC Limited v ITS Testing Services (UK)** [2007] 1 All ER (Comm) 667, and in particular the judgment of Rix LJ at paragraph 251. In circumstances such as this, it is common ground that deceit adds nothing of substance to the claim for fraudulent misrepresentation.

b) Representation or Statement of Future Intent?

99. There is a dispute between the parties as to whether the statement that Mr Blake would be involved on the project throughout was capable in law of being a misrepresentation. It is FRL’s case that this was not a representation at all, but simply a statement of future intent. It is trite law that the term ‘misrepresentation’ will not include statements of future intent or predictions for the future; see, for example, **Inntrepreneur Pub Co (CPC) v Sweeney** [2002] E.G.L.R 132 at paragraph 62. This is in turn based on the principle espoused by Sir G. Mellish LJ in **Beattie v Lord Ebury** [1872] LR Ch App 777 at page 804 that:

“ …a representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a misrepresentation, if it is anything, it is a contract or promise”.

100. In his opening submissions, Mr Fraser developed this point by emphasising the difference between a representation which was false at the time it was made, and the non-occurrence of an intended event. In reliance upon paragraph 131 of the judgment of Elias J (as he then was) in **Hagen v ICI Chemicals and Polymers** [2002] I.L.R., he argued that the non-occurrence of something which

had been intended at the time that the representation was made was not itself an actionable misrepresentation, because there was no representation that the future intention would, as a matter of fact, be carried out.

101. The Defendants contend that the representation that Mr Blake was going to be the team leader, and be involved throughout the PM Club project on both sites, was a vital element of the two Bid documents, and was repeated at the meetings during the negotiation of FRL's appointments. It is their case that this was a clear representation, which became a misrepresentation on or about the 21st March 2006, when Mr Blake, having handed in his letter of resignation, refused the last counter-offer that was made to him. In support of this position, in his closing submissions, Mr Darling placed particular emphasis upon the decision of the Court of Appeal in **Spice Girls Limited v Aprilia World Service BV** [2002] EWCA Civ 15.

102. In that case, there were Heads of Agreement in March 1998, and a subsequent agreement in writing dated 6th May 1998 between the Spice Girls Limited (SGL) and AWS which described the Spice Girls as "currently consisting" of 5 named members. The agreement was for the promotion of a range of motor cycles. It subsequently transpired that Geri Halliwell had informed the other four members of the Spice Girls in March 1998 that she intended to leave the Spice Girls in September of that year, but this information had been kept from Aprilia. In the subsequent proceedings brought by AWS claiming a misrepresentation, a fax sent on behalf of the SGL on 30th March 1998, reiterating their commitment to the proposed agreement, became particularly important. In the judgment of the court, given by the Vice Chancellor at paragraph 29, he said:

"We consider that the fax of 30th March 1998 contained express representations by SGL as to the commitment of each of the Spice Girls to the future implementation of all the terms of the heads of agreement as subsequently incorporated into the formal agreement to be concluded between SGL and Aprilia. That statement was untrue because SGL knew that the term of the agreement for which provision was made in the heads of agreement was 12 months and that there was a risk that Ms Halliwell would leave after only six of them. The fact that SGL did not know of the terms of the fax and the fact that KLP did not know of the risk are not material to the question whether the fax contained a misrepresentation. The unqualified assurance as to the commitment of each Spice Girl to the entire commercial sponsorship described in the heads of agreement contained within it the implied representation that SGL did not know of any matter which might falsify the assurance. That was a representation of fact and it was false."

Subsequently in his judgment, he set out at paragraphs 51-63, a detailed analysis of the facts surrounding the alleged misrepresentation and the reasons why the representations in that case were false. The Court of Appeal allowed AWS' claim for much greater damages than had been allowed by the trial judge, pursuant to s.2 of the Misrepresentation Act 1967.

c) Duty to Disclose

103. A related point in the present case concerned whether or not FRL were obliged, as a matter of law, once the representation was no longer true, to inform the Defendants prior to the Contracts being entered into. It was FRL's case that there was no general duty as to disclosure in these circumstances. In this regard they relied on the words of Lord Cairns in **Peek v Gurney** [1873] LR 6 HL 377 (as approved by Park J in **Inntrepreneur Pub Co**):

"Mere non-disclosure of material facts would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or

at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."

104. The Defendants relied on the well-known passage in the speech by Lord Blackburn in **Brownlie v Campbell and Ors** [1880] 5 App Cas 925 at 950 when he said:

" I further agree in this; that when a statement or representation has been made in the bona fide belief that it is true, and the party who has made it afterwards comes to find out it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still more, inducing him to go on, upon a statement that was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly persevered in. That would be fraud too, I should say, that at present advised. And I go on further still to say, what is perhaps not quite so clear, but certainly it is my opinion, where there is a duty or obligation to speak, and a man in breach of that duty or obligation will hold his tongue and will not speak, and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was that he had nothing to say, I should be inclined myself to hold that that was fraud also."

105. In addition, on this point, the Defendants rely on the judgement of Lord Wright MR in **With O'Flanagan** [1936] 1 All ER 727 in which he approved **Brownlie** and made plain that the doctrine there set out by Lord Blackburn was not limited to cases of contracts of the utmost good faith, or situations where there might be an peculiar duty of disclosure, but was instead of general applicability.

106. The Defendants also relied on a number of passages in chapter 6 of volume 1 of **Chitty on Contracts,** and in particular paragraph 6-018, where the learned editors say:

"A statement may be made which is true at the time but which subsequently ceases to be true to the knowledge of the representor before the contract is entered into. In such circumstances the failure to inform the representee of the change in circumstances will itself amount to a misrepresentation, unless in the context it is quite clear to the reasonable recipient of the information that the party that gives it accepts no responsibility for its accuracy or for reviewing it.**"**

The following paragraph (6-109), entitled 'Continuity of Representations', makes plain that representations are treated for many purposes as continuing in their effect until the contract between the parties is actually concluded. That is one reason why an existing statement, which ceased to be true to the knowledge of the representor before the contract was concluded, can be treated as a misrepresentation, unless of course the representor informed the representee of the change in circumstances.

d) Inducement and Reliance

107. Inducement and reliance may be inferred from the purpose of the representor, the nature of the statement and the fact that the contract was entered into: see **Smith v Chadwick** [1884] 9 AC 187 at 196. The same case is authority for the proposition that the misrepresentation must be a material inducement to the representee to enter into the contract, but it does not have to be the only such inducement.

108. That said, for a claim under the Misrepresentation Act 1967, proof of reliance is required in order to provide the causal link between the statement and the loss, between the statement and the

representee's own actions which gave rise to the harm complained of. The materiality of the statement may raise a presumption in fact that it was relied on: again, see **Smith v Chadwick**. However, Mr Fraser maintains that this cannot be taken too far, and relies heavily on a passage from the judgment of Donaldson LJ (as he then was) in **JEB Fasteners Limited v Marks Bloom Co** [1983] 1 All ER 583 (CA):

"In real life, decisions are made on the basis of a complex of assumptions of fact. Some of these may be fundamental to the validity of the decision. 'But for' that assumption, the decision would not be made. Others may be important factors in reaching the decision and collectively, but not individually, fundamental to its validity. Yet others may be subsidiary factors which support or encourage the taking of the decision. If these latter assumptions are falsified in the event, whether individually or collectively, this will be a cause of disappointment to the decision- taker but will not affect the essential validity of the decision in the sense that if the truth had been known or suspected before the decision was taken, the same decision would still have been made."

e) Is The Position Different If Fraud Is Established?

109. Mr Darling submitted that, if he established fraud on the part of FRL, then this would affect the court's approach, because it would then be a fair inference that, but for the fraud, the contract would not have been entered into at all. In support of this proposition, he relied upon **Doyle v Olby (Ironmongers) Limited** [1969] 2 QB 158 and the discussion in **Chitty** at paragraph 6-049. In **Doyle**, it was held that damages for fraud were not the same as damages for breach of contract, in that they were not designed to place the innocent party in the position he would have been in if the representation had been true, but were instead designed to put him in the position he would have been in if the representation had not been made. In **Smith Newport Securities Limited v Scrimgeour Vickers Limited** [1997] A.C. 254, the House of Lords confirmed that **Doyle** re-stated the law correctly.

110. As noted, the fair inference that may arise if fraud is proved is to the effect that, but for the fraudulent representation, the claimant would not have entered into the contract: see **Esso Petroleum v Mardon** [1976] QB 801, and **UCB Corporate Services Limited v Williams** [2002] EWCA Civ 555. On this basis, the learned editors of **Chitty** conclude that, generally, the successful claimant ought to be awarded such damages as will put him back in the financial position he was in before the contract was made.

111. Thus one important difference between a claim under the Misrepresentation Act 1967 and a claim for fraudulent misrepresentation comes down to proof of reliance/loss. Under the Act, reliance needs to be proved to the civil standard. If fraud is made out, once it is proved that a false statement was made which is 'material' (in that it was likely to induce the contract) and the representee entered into the contract, it is likely to be a fair inference of fact that he was induced by the statement: see **Smith v Chadwick** and **Strachan & Henshaw Ltd v Stein Industrie (Uk) Ltd** (1997)13 Const LJ 418.

E3. Other Matters

a) Negligent Misstatement

112. The ingredients of a claim of negligent misstatement are well-known. The party asserting the claim must demonstrate that:

a) The representor owed him a duty of reasonable care to protect him from the loss which he has suffered;

b) The representor was in breach of that duty in making the representation which was in fact false and which could not have been made by someone exercising reasonable care;

c) The representee relied upon those representations and thereby suffered loss;

d) The loss that was suffered was of a kind which fell within the scope of duty (see **Hagen** at paragraph 77.)

113. In cases involving pre-contractual negotiations, I accept Mr Fraser's submission that the claiming party will usually pursue an action under the Misrepresentation Act 1967 rather than a claim for negligent mis-statement. Indeed, since here both parties entered into three subsequent Contracts, it seems superfluous for the Defendants to pursue a claim in negligent misstatement for events occurring prior to those Contracts being made. If, on the other hand, there was no actionable wrong before the Contracts were entered into, but the Defendants had a cause of action relating to the alleged misrepresentation arising out of the events post-contract (namely a cause of action which accrued between 21st March and 14th November 2006, during which period Mr Blake had resigned but the Defendants were not told about it), then such a claim is, in my view, more happily expressed as a claim for breach of an implied term.

b) Implied Term

114. It is trite law that a contract of this sort will include what might be termed the usual implied terms relating to co-operation: see **London Borough of Merton v Leach** 32 BLR 51. A proposition which I put to both parties during final submissions, and which was broadly agreed, was that because the Contracts defined 'Team Leader' as being Mr Blake "or such other individual of comparable standing ability and experience as the Employer may at its discretion approve", it meant that any prospective change to the Team Leader necessarily involved specific obligations of co-operation on both sides. It seems to me that the Contracts envisaged that the need for any potential replacement for Mr Blake would be identified promptly by FRL; discussed by the parties, with the Defendants taking, if they wished, a pro-active role in seeking a replacement; and that the chosen replacement would be considered by the Defendants, and approved or rejected in the exercise of their (reasonable) discretion. A very similar co-operation obligation was also set out in Clause 7.1 (paragraph 55 above).

115. In those circumstances, so it seems to me, as part of the necessary co-operation between the parties, FRL were obliged to notify the Defendants promptly once it became apparent to them that Mr Blake was not going to remain as Team Leader for the entirety of the project. If FRL wanted the Defendants to approve the replacement, then FRL were duty-bound to ensure that the Defendants were given as much time as possible to consider any suggested replacements and even to be involved in the search for that replacement. Accordingly, I conclude that there was an implied obligation on the part of FRL under these Contracts to inform the Defendants promptly once it became apparent that Mr Blake was not going to stay. The question of precisely when that might be said to have become apparent is a matter of fact, and is dealt with in **Section F** below [4] .

116. With these principles in mind, I turn to analyse the facts concerning Mr Blake and his resignation from FRL.

F. MR BLAKE/ THE FACTS

F1 The Importance of Mr Blake

117. I have set out in paragraphs 33-48 above Mr Blake's role and significance during the period between the Defendants' initial contact with FRL and the signing of the three Contracts. I am in no doubt that the involvement of Mr Blake was a very significant factor in the Defendants' decision to place the Contracts with FRL, despite the fact that they were apparently the most expensive of the bidders. In particular, I refer to:

(a) The fact that the initial contact came about as a result of Mr Blake (paragraphs 33-35 above) and that at that very first contact, Mr Blake was described in FRL's own documents as "our key player";

(b) The fact that Mr Blake attended all the negotiation meetings in September 2005 and that, in the one meeting that Mr Thompson attended, it was obvious to him (and he minuted it to the other members of staff) that "the client clearly likes Jeremy" (paragraphs 37-42 above);

(c) The fact that both the FRL Bid documents stressed FRL's previous involvement in The Grove (a project overseen by Mr Blake), and made plain that Mr Blake was going to be involved throughout the entirety of the project (paragraphs 38-39 and 43-44 above);

(d) The admissions made by Mr Thompson, when pushed on these topics in cross-examination, that Mr Blake was indeed the key player from the Defendants' point of view, and that the fact that the Defendants liked him was probably a reason for the appointment of FRL (paragraphs 33-44 above).

F2 The Resignation

118. It was common ground that Mr Blake was unhappy at FRL. Mr Thompson agreed that he knew that Mr Blake was unhappy, and that the principal reason for this was the fact that, following the Aukett takeover, Mr Blake's remuneration had been reduced. Mr Blake also said that he wanted an apology from the other directors because they had barred him from exhibiting at the RIBA Traditional Architecture Group, despite the fact that he was the honorary secretary of that Group. This was clearly something about which he felt very strongly, even now, and he referred to it as "demeaning in nature". Frankly, it sounded to me like a relatively minor point, but it was not in Mr Blake's nature to let a matter such as this pass without comment and, if he felt it appropriate, indignation. He was not, I think, always an easy man to work with.

119. But there were plainly limits to his unhappiness. For example, there was a suggestion that Mr Blake was unhappy about travelling to London from Cambridge, where he lived. But there was no hint of that in the contemporaneous documents and no oral evidence one way or the other. In the absence of any contemporaneous record of such a complaint, I find that this was not a matter that Mr Blake wished to renegotiate and was not a factor in his decision to resign, which again points up my conclusion that it was his remuneration which was the overwhelming source of Mr Blake's unhappiness at FRL.

120. Mr Blake said that, in January 2006, he asked to be reinstated on a level of remuneration consistent with his fellow London directors. He said that Mr Thompson indicated that he would get a significant pay increase but his February pay slip indicated that he was still receiving less remuneration than he had eighteen months earlier. He said that, at this point, he decided to resign.

121. There was a Business Plan Review attended by Mr Thompson, Mr Embley, and Mr Blake, on 17th March 2006. At the end of this meeting, Mr Blake tendered his resignation. He did this orally, and by then handing over a written letter of resignation.

122. Later that same day, Mr Blake met Mr Thompson and Mr Embley again. At that meeting, they made Mr Blake a counter-offer which, he told them, he would consider over the weekend. On Monday 20th March 2006, Mr Blake had a further meeting with Mr Thompson and Mr Embley where he raised various questions about the details of the counter-offer. Mr Blake said he discussed the answers to those questions with his wife overnight and on Tuesday 21st March, he had a further meeting with Mr Thompson and Mr Embley at which he formally declined that counter-offer. It was eventually common ground that no subsequent counter-offer of any sort was ever made by Mr Thompson, or anyone else at FRL, in an attempt to persuade Mr Blake to stay.

F3, The Request To Stay Silent

123. It was an important element of Mr Blake's evidence that, at the March meetings, he was instructed not to tell anyone about his resignation. As he put it in cross-examination, he was "sworn to secrecy". This was denied by Mr Thompson, who said that there was no such instruction. However, in cross-examination, Mr Thompson's evidence seemed to go a long way towards supporting Mr Blake's interpretation of what he was told. Mr Thompson said:

"What we discussed was that we weren't going to take it any further than ourselves and Mr Vincent [another director] and he wasn't going to talk to anybody else….we didn't instruct him not to tell anyone, we just agreed between us that we would keep the matter to ourselves."

Later on, Mr Thompson said:

"I don't recall specifically what was discussed, other than the fact that we weren't going to talk about it, Mr Embley and myself, outside of the confines of Mr Vincent."

In addition, Mr Thompson also expressly agreed that he would not have been happy for Mr Blake to tell Mr Halabi about his resignation because it was a possibility that, if he did, FRL would not get the job.

124. Mr Embley's evidence on the point was very equivocal. In cross-examination he said:

"That point remained silent…there would be no reason for him at that point to go and discuss it with anyone. Why would he go and discuss it with anyone? It was a matter of trust and disrespect. He wasn't instructed or told or forced or made to do anything. It wasn't discussed."

125. I have concluded that, on this topic, Mr Blake's evidence is to be preferred, and that he was instructed not to discuss his resignation with anyone until he was told that he could. There are a number of reasons for that conclusion. First, there is my general preference for Mr Blake's evidence as opposed to that of Mr Thompson. Secondly, it seems to me that Mr Thompson's evidence in cross-examination set out in paragraph 123 above, did go a long way towards admitting that such an instruction was indeed given.

126. Thirdly, Mr Blake said that, when a Management Consultant, Mr Graham Jackson, had asked him questions as part of a wider company review in May 2006, it had been very awkward because of his resignation and the fact that he was not able to refer to it in the interview. He said that the consultant subsequently congratulated him on his "professional integrity". This evidence not only supported Mr Blake's case that he had been told to tell no-one, but it was largely confirmed by Mr Thompson's own e-mail to Mr Jackson of 10th May 2006. This referred to "one issue that arises out of the interviews and when you come across it I would be grateful that you could ensure that you discuss it with me and nobody else. I have not appraised anyone else…of the position you may be confronted with…" Mr

Thompson's evidence was that this was "an oblique reference" to the resignation of Mr Blake and two others. The terms of the e-mail, and the cloak-and-dagger wording, are again only consistent with Mr Blake's case that this was a matter on which he was still "sworn to secrecy".

127. Fourthly, and perhaps most important of all, Mr Blake subsequently referred in writing to the instruction to him to keep silent, and the existence of that instruction was not thereafter contradicted by Mr Thompson. This exchange happened in November 2006, when Mr Blake wrote on 12th November 2006 to Mr Thompson to express his unhappiness about the fact that his resignation was still a secret. In the final paragraph of that letter he said:

"Having maintained silence about my departure as requested by the Company in March, I am increasingly concerned both morally and ethically in my professional conduct with clients, consultants and staff that these matters are still outstanding within the Company's revised timetable for my departure. I must request that such matters are resolved with mutual agreement during the coming week."

128. Mr Thompson replied to this letter on 23rd November 2006. He did not challenge Mr Blake's reference to the request to him to maintain silence about his resignation. When cross-examined about that, Mr Thompson admitted that he had not rebutted Mr Blake's statement and, when asked why not, he suggested that he did not regard it as a serious allegation. I cannot possibly accept that evidence. Given Mr Blake's express concerns in his own letter about his 'moral' and 'ethical' position, Mr Thompson must have known only too well how seriously Mr Blake viewed the matter, even if he did not share that view. If there had been no instruction to keep silent, Mr Thompson would have said so in his reply.

129. Fifthly, it seems to me clear on the evidence that Mr Thompson had a clear and obvious reason for asking Mr Blake in March 2006, to remain silent. That was because, on Mr Thompson's own evidence, he was concerned that, if Mr Halabi had found out about the resignation at the time, the Defendants might have gone elsewhere and not used FRL at all. That is the next topic to which I turn.

F4. Mr Thompson's Admissions

130. In cross-examination (although not in his statement) Mr Thompson was clear about what would have happened if Mr Blake had told Mr Halabi about his resignation:

"Q: So would you be happy for Mr Blake to tell Mr Halabi?

A: At that stage probably not, no… it was unlikely that he would do it. If he had, then matters would have unfolded quite differently.

Q: Matters would have unfolded quite differently?

A: Yes

Q: You mean Mr Halabi would have said: 'Thank you very much, it was Mr Blake we wanted. Good bye'?

A: Possibly"

131. There can be no doubt that, on the facts, Mr Thompson was keenly aware of the possible effect of Mr Blake's resignation. Mr Thompson was reminded of the many representations in which it had been said that Mr Blake was going to be involved in the project throughout. He expressly accepted that, if

Mr Blake left, then those statements would no longer be true. The relevant exchange continued as follows:

“Q: Wouldn’t the honest thing to have done, to have told Mr Halabi, even on your own version of events, that Mr Blake might not be there, you having said in the documents that he was going to be there?

A: That is a possibility I could have done that, but I didn’t do it.

Q: It would have been the honest thing to do, wouldn’t it?

A: Had I thought Mr Blake was definitely going to leave, then that would have been a fair position to have adopted.

Q: On your own case, you didn’t know whether he was going to leave or not. You knew he had given formal notice and that he very much might leave. If Mr Halabi had known that, that would have caused him to reconsider the position wouldn’t it?

A: It may well have done, yes.

Q: And the honest thing to have done would have been to tell Mr Halabi about the problem? In the context of the Bid?

A: In the context of the Bid? That is a possibility as well, yes.

Q: Not a possibility; the honest thing to have done would have been to have told Mr Halabi that the position in the Bid could no longer be guaranteed and had changed because Mr Blake had given his notice?

A: Yes, that would be fair.

Q: And that would have been the honest thing to do, and what you should have done, isn’t it?

A: With hindsight, it is one of the things I could have done, yes….

Q: Looking back on it now, do you think it is honest or dishonest?

A: I think, looking back at it now, with what has happened, then I should probably have gone to see him, yes.”

132. I make a number of findings as a result of this exchange. I find that Mr Thompson was well aware at the time that Mr Blake’s departure might well mean that the Defendants would decide not to proceed with FRL. He knew that, in consequence, this was a matter which he should at least arguably have raised with Mr Halabi direct and that, with hindsight, he believes that that is precisely what he should have done.

133. So why did he not say anything to Mr Halabi? When that point was put to Mr Thompson, he said that he did not tell Mr Halabi because he thought that he would be able to convince Mr Blake to stay. He accepted that his whole case on this aspect of the case therefore depended on his belief that he could convince Mr Blake to stay at FRL, and that, if he could not persuade him, then he would have gone to see Mr Halabi to tell him about the resignation. That evidence of Mr Thompson threw into sharp relief the events between 21st March and 5th September 2006 which I address in **Section F5** below.

134. In my judgment, the importance of these passages in Mr Thompson's evidence cannot be underestimated. It was put to Mr Thompson that, if someone had done to him what he did to Mr Halabi, he would have regarded it as unacceptable. Mr Thompson said with obvious understatement, that he probably would have been "displeased". The full exchange was in these terms:

"Q: If someone had done to you what you did to Mr Halabi, would you have regarded it as acceptable?

A: I probably would have been displeased.

Q: Displeased?...You would have thought you'd been 'had over'? 'How dare he not tell me!' That's what you would think, isn't it?

A: Possibly, yes.

Q: 'Possibly yes'. Shall we give an honest answer, 'yes'?

A: Yes

Q:...Assume his [Mr Blake's] position is final. At that point you would have had to tell, would you not, even on your own moral case, Mr Halabi?

A: Correct.

Q: Thank you. Not to tell him would have been dishonest, if Mr Blake's decision was expressed to be final?

A: I think that would be fair, yes."

So if Mr Thompson had thought that Mr Blake's position was final, by his own admission, he would have been acting dishonestly by not telling Mr Halabi of the resignation prior to the execution of the Contracts.

F5. 21st March – 5th September 2006

135. For these reasons, the events between 21st March and 5th September 2006 – the alleged discussions with Mr Blake – become critical. If Mr Thompson had thought that Mr Blake's decision was final then, on his own case, he would have been acting dishonestly if he had not told Mr Halabi. Since Mr Blake's decision was expressed to be final, and he had already turned down the counter-offer, this meant in reality that Mr Thompson had to believe or intend that a further counter offer would be made to Mr Blake. Putting it another way: if, in fact, there were no further attempts to convince Mr Blake to stay, and no intention to make such attempts then, on his own evidence, Mr Thompson had acted dishonestly in not telling Mr Halabi straight away about Mr Blake's resignation.

136. Mr Blake's evidence was clear. He said that at no time after 21st March 2006 were there any negotiations whatsoever between himself and Mr Thompson. As for the meetings at which Mr Thompson alleged that there had at least been discussions about his future, Mr Blake said that those meetings were simply his usual internal income target reviews at which Mr Lad was present, and there were no discussions during those meetings about how he might be persuaded to stay.

137. It is fair to note that Mr Blake was surprised that there were no such counter-offers during this period, and that there were no discussions "as to what could be done to persuade me to change my mind, or what were the root issues which the practice ought to be addressing to encourage me to change my mind". But he stated emphatically that "there were no such discussions". He made the

point that, given the instruction to remain silent, and given the secrecy surrounding his resignation letter, there could have been no such discussions at these meetings anyway, given the presence of Mr Lad.

138. Mr Blake summarised his position in cross-examination (on day four of the trial) as follows:

“You are implying that I was open to negotiate the terms on which I might consider staying at the practice. I was not. I had resigned. It was a final decision. They made me a counter-offer which I rejected. There was no further discussion. There was no further improved offer.”

139. What was the evidence the other way? The principal evidence came from Mr Thompson, but, again I am obliged to regard that evidence as fundamentally flawed. These difficulties again start with Mr Thompson’s witness statement.

140. It is worth considering the genesis of Mr Thompson’s statement on this topic. In his original affidavit, Mr Thompson said that between the 17th March 2006 and the 5th September:

“I (together with my fellow directors and shareholders) and Mr Blake had many discussions and negotiations with regard to Mr Blake staying with the company. Mr Blake had agreed to enter into discussions with FRL regarding potential counter-offers, and also agreed that he would properly consider those counter-offers before finally making up his mind as to whether to leave his resignation on the table or withdraw it…that series of discussions and negotiations culminated in the shareholders meeting on 5th September at which the shareholders asked Mr Blake to remain with FRL.”

141. In his statement in the proceedings, Mr Thompson then added a further sentence to this paragraph which read:

“Prior to that, from reviewing my diary as kept by my secretary and for the purposes of making this statement, I believe that I had meetings with Mr Blake to discuss both the business and his future on 6th April, 24th May, 14th July, 24th July, 7th August as well as 5th September. I do not believe there are any formal minutes of any of those meetings.”

The references to the diary bundle, made in manuscript on this part of Mr Thompson’s statement, turned out to be incorrect, and subsequently a full version of the diary was produced in a separate bundle. However, these documents, on analysis, do not assist one way or the other, because they simply refer to the meetings which, as income target reviews, Mr Blake always accepted had taken place. There is no reference at all to what may have been said on these 6 occasions.

142. In cross-examination, Mr Thompson’s evidence made all too clear the unreliable nature of paragraph 57 of his statement. First, Mr Thompson accepted that his statement was misleading because, whilst he discussed the matter with Mr Vincent and Mr Embley, who were both directors and shareholders, they did not enter into the discussions with Mr Blake. On this new case, only Mr Thompson was involved in the alleged discussions. Secondly, Mr Thompson admitted in cross-examination that he did not make any counter-offers to Mr Blake after 21st March. He was then asked why he had used the word ‘negotiations’ when at no point after that date did he ever make any counter-offer to Mr Blake so that, even on his own case, there could have been no negotiations during this period (Mr Thompson having agreed that there could not be a negotiation if there were no counter-offers). He said that his statement should have referred to “discussions which could lead to negotiations about further counter-offers”. Again Mr Thompson admitted that his witness statement on this critical topic was neither precise nor correct.

143. In all the circumstances, I accept Mr Blake's evidence that there were no discussions, negotiations or counter-offers after 21st March 2006. There are a number of reasons for that conclusion. First there is my general preference for Mr Blake's evidence over that of Mr Thompson, the fundamentally flawed nature of Mr Thompson's witness statement, and his unconvincing attempts to explain those deficiencies away. Secondly, Mr Thompson himself accepted that there were no negotiations and no counter-offers. As to the alleged discussions, Mr Thompson never identified what was allegedly discussed as to Mr Blake's future at the internal review meetings, and how or why this could be relevant to any attempt to persuade him to stay (particularly in the absence of any counter-offer). Thirdly, there is the complete absence of any record in the documents of any such discussions.

144. There was also the evidence of Mr Embley that he had discussed the matter with Mr Blake at the Arup garden party that summer. Although this then became an important element of FRL's case, I cannot help but note that it was not a matter to which Mr Embley had referred in his witness statement. When he was cross-examined about it, all that Mr Embley said about the meeting was this:

"We met at the garden party. There was a discussion. I asked him how he was getting on with the negotiations. He said there were still a number of issues to be sorted out and he still hadn't received an apology from the Fitzroy directors. He wasn't going to be drawn any further on it and that was the discussion we had."

145. It does not seem to me that, in such circumstances, Mr Embley's evidence could be said to support FRL's case that between March and September discussions about Mr Blake's future were somehow ongoing. It need hardly be said that to elevate the significance of a general discussion about other discussions (with a third person) at a summer garden party, as FRL now do, is perhaps, a measure of their evidential difficulties on this part of the case.

146. For the reasons that I have already explained, the existence of these discussions (and their content) was, on Mr Thompson's own evidence, an extremely important part of the case. He admitted that if he had thought Mr Blake was going to leave, he would have told Mr Halabi in March. Why did he think that Mr Blake was not going to leave? On his own case, it was because he thought he could persuade him to stay. But he never explained how he intended to persuade Mr Blake to stay in circumstances where, for reasons which he also never explained, he never made Mr Blake a counter-offer after 21st March 2006. I do not know whether Mr Thompson thought that Mr Blake might have changed his mind in any event, without a counter-offer, or was simply bluffing, to strengthen his hand in negotiations for better remuneration, but there was no evidence to support such a view, and Mr Thompson did not suggest otherwise. It was not my impression of Mr Blake that he was an irresolute or indecisive sort of man. Once he had resigned then, as he emphasised, as far as he was concerned, that was that, unless a counter-offer was put to him that was more advantageous than the counter-offer made on 21st March. In fact, Mr Thompson never made him another counter-offer, and there was no evidence that he ever intended to do so. I find, therefore, that Mr Thompson knew throughout this period that Mr Blake's departure was inevitable. Thus, critically and on Mr Thompson's own evidence, he should have told Mr Halabi about Mr Blake's resignation before the contracts were signed, and it was dishonest for him not to have done so.

E5 Meeting on 5th September

147. Although Mr Blake did not recall that the meeting had taken place on 5th September, it was common ground that in early September 2006 there was a meeting between Mr Blake and the FRL shareholders and directors. Mr Thompson put it at 5th September by reference to his diary notes and it seems clear that this was the relevant date. The shareholders and directors met first and Mr

Thompson told them about Mr Blake's resignation. Other than Mr Vincent and Mr Embley, this was the first time that the topic had been shared with the other directors. Mr Blake was then given an opportunity to explain the reasons for his resignation and the other shareholders made comments. Mr Blake left and the meeting then continued. There was no last-ditch attempt to persuade Mr Blake to stay.

148. On Mr Thompson's evidence it would appear that, once Mr Blake's resignation had been made plain to the shareholders and directors, and was thus final on any view, he should have informed Mr Halabi. But again, he did not do so. He said that he then sat down to look for a replacement to run the hotel part of the FRL practice. The evidence was that BSH/Mr Halabi were told about Mr Blake's resignation on 14th November 2006, nine weeks or so after the resignation had, on any view become irrevocable. Mr Thompson was pushed hard on this point in cross-examination and was unable to explain how such a long delay had been allowed to build up.

E6 Informing The Defendants

149. As I have said, despite the fact that everyone knew that Mr Blake would be leaving FRL, and despite the fact that his replacement, Mr Hobart, had already been lined up, by the second week in November 2006, FRL had still not informed BSH or the Defendants about Mr Blake's impending departure. I find that the impetus to tell BSH/Mr Halabi came not from FRL or Mr Thompson, but from Mr Blake's letter to Mr Thompson dated 12th November 2006 (the relevant part of which is quoted at paragraph 127 above), where Mr Blake expressed his 'moral and ethical concern' about clients, consultants and staff still not knowing of his imminent departure. It seems that it was only this letter that finally prompted Mr Thompson to inform BSH of Mr Blake's departure.

150. On 14th November 2006, Mr Thompson had a meeting with Mr Pyrgos of BSH, in which he informed him of Mr Blake's imminent departure. In his witness statement, Mr Thompson said that Mr Pyrgos' reaction was not what he would have expected if BSH and the Defendants had thought that Mr Blake was central or crucial to the project. But on Mr Thompson's own oral evidence, that could not be sustained: he agreed that Mr Pyrgos was "very concerned" on learning of Mr Blake's departure. Furthermore, the following day, 15th November 2006, Mr Pyrgos sent Mr Thompson an e-mail which described Mr Blake's imminent departure as "very concerning particularly as we are at a critical phase of both projects, both of which are due shortly to go to planning and are embarking on the detailed design phase." The e-mail went on to say that Mr Halabi was "particularly disappointed, as I was, to learn that Jeremy had resigned some months ago and that we had not been advised of the position."

151. Even then, Mr Thompson did not tell Mr Pyrgos or Mr Halabi that Mr Blake had in fact resigned many months earlier. They only learnt that when Mr Blake had a meeting with them on the morning of 15th November. I heard evidence about that meeting from both Mr Halabi and Mr Blake. They agreed that Mr Blake was apologetic about keeping the Defendants in the dark for so long. There was however a difference between them as to the way in which this was put. Mr Halabi said in his witness statement, and maintained in cross-examination, that Mr Blake had said:

"Simon, I profusely apologise for what has happened, they forced me to lie."

Mr Blake denied that he said that saying that such language was not his style. He said that he told Mr Halabi that he had been "sworn to secrecy".

152. It does seem to me that, contrary to Mr Fraser's submissions on the point, this was a straightforward difference of recollection between Mr Halabi and Mr Blake. On balance, I think it more likely than not that Mr Blake did not say that "they forced me to lie". It is clear that he was very apologetic and was personally concerned about what he had called the 'moral and ethical' position in which he had been placed. But I accept his evidence that it was not his style to say that he "lied". The difference in recollection is easily explicable: I am confident that Mr Halabi, who was not a man for whom English was his first language, believed that this was the effect of Mr Blake's silence, that it amounted to a lie. But it was not actually expressed in those terms at the meeting.

153. Mr Thompson was aware that Mr Blake had met Mr Halabi on 15th November. When he came back from the meeting, Mr Thompson said that Mr Blake had told him that "he didn't think I would like what he [Mr Blake] had said to [Mr Halabi] which slightly concerned me, but I didn't ask him what he did say." This was very odd. Mr Thompson was pushed as to why he had not asked Mr Blake what he had said, particularly given that Mr Blake was making it clear that it was something that Mr Thompson would not like. However, Mr Thompson maintained that he did not ask. It is clear to me, given the nature of Mr Blake's letter of 12th November, that the matter to which Mr Blake was referring was the fact that he had resigned as long ago as 17th March and that Mr Halabi had deliberately not been told about it. I am quite confident that Mr Thompson was well aware of this, and that it was at this moment that Mr Thompson realised the potentially difficult situation that he had created.

154. Following these meetings, on 16th November 2006, Mr Thompson wrote a memo to be sent to a number of people within FRL, about Mr Blake's departure. Although he said it was never actually sent, the memo included the following important passages:

"Whilst I may be over-reacting, I do believe there will be some elements of the departure reasoning that may amount to the re-writing of history. I am therefore setting out below what I believe to be the key issues (which you should not divulge) but which you should be aware…

Resignation

JMB handed in his notice on 17 March 2006. He agreed at that meeting that he would enter a discussion with us regarding potential counter-offers that he would properly consider before finally making up his mind as to whether to leave his resignation on the table or withdraw it. These discussions ended in the summer and following a meeting with the FR shareholders on 5th September his resignation was formally confirmed. It is important that everyone realises that there was an ongoing discussion with Jeremy, because otherwise a client may feel that we had misled them over Jeremy's role, particularly in the case of say, the Piccadilly Mentmore project. In relation to the latter, it was also agreed with Jeremy that we would properly populate the project team and include JAV and SAE in the project mechanism such that the client's interest was protected. At an appropriate juncture we would look to head hunt a Director to take over JMB's role, which we have duly done.

As I have said at the beginning, I think it is important that the information that is contained within this note is not used in discussion. However, I can quite easily see, from what has happened recently, that JMB will adopt the usual defence of his own position as a result of resigning, which effectively means blaming everybody else for what has happened. This is clearly not the case and I have listed above what I believe to be the key points."

155. I regard this memo as extremely misleading. I make a number of specific findings about it. First, in his re-examination, Mr Thompson said (for the first time) that the reference to "re-writing of

history" was a reference to Mr Blake's letter of 12th November, in which he said that he had maintained his silence 'as requested'. I reject that evidence out of hand. I have already found that, if Mr Thompson had thought that Mr Blake was re-writing history by stating in his letter of 12th November that he had been requested to stay silent in March, then he would have expressly rebutted that suggestion in his reply to Mr Blake, namely his letter of 23rd November 2006. He did no such thing. At paragraphs 125-129 above, I have found that Mr Thompson's failure to rebut that allegation in that letter has a much simpler explanation: he did not rebut it because what Mr Blake had said was true, and Mr Thompson could not deny it.

156. Secondly, I find that, in reality, the "re-writing of history" was happening in Mr Thompson's own memo. His description of the events after Mr Blake's resignation was wholly misleading: there were - even on his case - no counter-offers, and there were no 'discussions ending in the summer'. I find that Mr Thompson was now aware that his lack of negotiations and discussions with Mr Blake opened him up to significant criticism, because the fact of Mr Blake's departure from March onwards had not been divulged to the Defendants. It was this realisation which was the principal motivation for the memo, and subsequently much of Mr Thompson's unreliable witness statement.

157. Thirdly, in my judgment, this memo made clear that Mr Thompson was only too aware that, if there had been no such ongoing discussions - and there were none - the Defendants would feel that they had been "misled" over Mr Blake's role in the project. That of course was precisely right: it explains this entire element of the litigation. I regard the memo, therefore, as an important contemporaneous admission by Mr Thompson that, if it was ever discovered that there had been no counter-offers or negotiations with Mr Blake between March and September, the Defendants would justifiably feel misled, because they had not been informed of his resignation when it was tendered, before the contracts for the project were finalised and executed.

158. Mr Thompson also met Mr Halabi at this time and confirmed that Mr Halabi was "upset" as a result of these events. One of the consequences of this was that an original plan (whereby Mr Blake would cease work for FRL at the end of 2006) was altered, and Mr Blake was kept on until the middle of March 2007, exactly a year after he had handed in his resignation. It also appears that Mr Blake carried out further work after 17th March 2007 in relation to Mentmore, at an hourly rate of £150. This work was done through FRL. But through the operation of his non-competing covenants, Mr Blake was prohibited from working directly with the Defendants on either of these prestigious projects. Mr Thompson absolutely refused to concede this in his negotiations with Mr Blake, as the contemporaneous emails made clear. For completeness, I should make clear that I reject the argument, at paragraph 122 of Mr Fraser's closing submissions, that the non-compete provisions were waived for Mentmore. They were not; Mr Blake could not have taken the Mentmore project with him when he left FRL. All that happened was that, because it was in FRL's best interests, Mr Blake was used on Mentmore by FRL as a sub-contractor after 17th March, which is a very different thing.

G. MR BLAKE/ANALYSIS OF THE ISSUES

G1. Was There A Representation?

159. I find that FRL repeatedly represented to the Defendants during the pre-contract negotiations that Mr Blake would be involved throughout the duration of this important project on both the Piccadilly and Mentmore sites, in the crucial role of team leader. That representation was made orally, at the various meetings referred to in paragraph 37 above. It was also made in writing: I accept the Defendants' submission that the Bid documents were based almost exclusively on Mr Blake (and his work at The Grove) and the experience, expertise and skills that he would bring to this project.

160. That was not a statement of future intent. It was a representation of fact, as to the services and personnel that FRL would provide to the Defendants. It was indistinguishable from the actionable representation in the **Spice Girls** case. Perhaps, as Mr Darling observed, it was the first time in his life that Mr Blake had ever been compared to Geri Halliwell, but in terms of their personal importance to the contracts being negotiated, they were in a very similar position: indeed, it might be said that Mr Blake was even more important to this project because he was unique ("our key player") in his significance to the other contracting party.

G2. Was It Designed To Induce The Contract?

161. I find as a fact that the statements made about Mr Blake's continuous involvement as team leader were plainly designed to induce the Defendants to enter into the Contracts with FRL. It is clear on any view of the contemporaneous documents that the Defendants regarded Mr Blake as the key member of FRL's team, and was the principal reason why they contacted FRL in the first place. Mr Thompson was obliged to admit that the Defendants went to FRL because of Mr Blake's reputation, and quickly developed an obvious liking for him. He also agreed that this was one of the main reasons why FRL were eventually awarded the Contracts, and for that matter, the reason why he did not tell them about Mr Blake's resignation in March. In my judgment, those admissions - although made very late - were correct. The involvement of Mr Blake throughout the project as team leader was clearly and obviously a material inducement to the Defendants to enter into the Contracts with FRL who were, let us not forget, the most expensive of the architects who tendered for this project [5] .

162. I should note in passing that it does seem to me that this aspect of the factual background is atypical, and may be one reason why this Judgment will be of limited applicability to other contracts for professional or personal services. It is, in my experience, relatively rare in the construction industry for the promised involvement of one particular member of a large professional team to be so clearly and obviously the major reason why the contract is placed with that particular company or firm. However, on all of the evidence, including Mr Thompson's own admissions, that was definitely the case here.

G3. Was The Representation False?

163. I find as a fact that the representation was false. No later than 21st March 2006, when Mr Blake rejected what turned out to be the only counter-offer he was ever made, Mr Thompson knew that Mr Blake was not going to be the team leader for anything more than one year of the three years that the project was estimated to take to completion. Again, the situation is precisely on a par with the **Spice Girls** case (paragraphs 101-102 above). The representation may have been true up to that date, but thereafter it ceased to be true. Thus the failure to inform the Defendants of the change in circumstances amounted to a misrepresentation in accordance with the authorities.

164. I reject any suggestion that such a finding would amount to the imposition of a general duty of pre-contract disclosure (see paragraph 103-106 above). This was a significant representation which, before the Contracts were entered into, was known by Mr Thompson to be false or, at the very least, very likely to be false. To paraphrase the words of the Vice Chancellor in the **Spice Girls** case, the unqualified assurance as to the commitment of Mr Blake to a continuous involvement throughout the entire PM Club project carried with it the implied representation that FRL did not know of any matter which might falsify that assurance. That was a representation of fact and it was false for the reasons that I have explained.

165. Mr Thompson's various admissions amounted to this: he accepted that, if he had not thought that he would be able to persuade Mr Blake to change his mind, he ought to have informed the Defendants of his resignation. That is the effect of his evidence summarised at paragraphs 130-134 above. I also find that, even without his express admissions, that is the only sensible reading of Mr Thompson's evidence. Accordingly, on Mr Thompson's own case, the vital point was whether or not he honestly believed, after 21st March 2006, that he could change Mr Blake's mind about resigning.

166. On this critical issue, I am in no doubt that I must find against Mr Thompson. For the reasons set out in paragraphs 135-146 above, I have found as a fact that there were no counter-offers at all, no discussions with Mr Blake about his future that could ever have begun to make him change his mind, and no evidence of any intention on the part of Mr Thompson to make such offers or conduct such negotiations.

167. It was on this aspect of the case that Mr Thompson's evidence was particularly unsatisfactory. He knew how important this part of his written and oral evidence would be; he accepted that important elements of it, as set out in his witness statement, were incorrect and untrue; and he was, in the event, wholly unable to persuade me that his version of events should be accepted over that of Mr Blake.

168. There is, however, a second related aspect of the evidence which is also relevant to my conclusions. Let us assume that I am wrong, and that Mr Thompson somehow thought that on 21st March he could persuade Mr Blake to stay. Let us also assume that, no later than 5th September, Mr Thompson accepted that he was not able to persuade Mr Blake to stay. The question then becomes, on Mr Thompson's own version of events: what happened between those two dates to make him change his view about the likelihood of Mr Blake staying? When during his alleged discussions with Mr Blake did that change occur, and why?

169. Although anxious to give Mr Thompson the benefit of the doubt (given the nature of the allegations that he faced) I searched in vain for any evidence (written or oral) on these critical topics. If a key director has written a letter of resignation and rejected a counter-offer then, if there is any genuine intention to persuade that director to stay, a further counter-offer obviously has to be made, and sooner rather than later. Mr Thompson confirmed that no further counter-offer was ever made to Mr Blake and he gave no evidence that any such counter-offer was ever even intended, either on 22nd March or at any time thereafter. Neither did Mr Thompson say that, at a particular meeting, they discussed various aspects of Mr Blake's future on which they were miles apart, thus causing him to realise that any further negotiation was hopeless. On Mr Thompson's own case, therefore, it is impossible to identify any rational explanation for the alleged change in his estimation of the likelihood of Mr Blake leaving after 21st March, but before 5th September. He never once explained what element of these alleged discussions could or might lead Mr Blake to change his mind. His evidence about either his intentions or the content of the alleged discussions was entirely vague.

170. Accordingly, I find as a fact that, following Mr Blake's rejection of the counter-offer on 21st March 2006, Mr Thompson had no genuine intention of retaining Mr Blake or persuading him to stay with FRL. Had he done so, he would have made further counter-offers or had detailed discussions with Mr Blake as to his future in the days or weeks following 21st March. Neither of those things happened. Accordingly, I am driven to find that Mr Thompson knew, at the end of 21st March 2006, that the representation made to the Defendants about Mr Blake's continuing involvement was or was very likely to be false.

171. On the basis of the findings set out above, each of the first four ingredients for a claim under the Misrepresentation Act 1967 have been made out, namely a pre-contract misrepresentation; a subsequent contract; a liability to pay damages if the misrepresentation had been fraudulent; and a clear inducement to the Defendants to enter into these Contracts.

G4. Was The Misrepresentation Fraudulent?

172. I have identified the relevant test from **Derry v Peek** at paragraph 96 above. I have summarised the relevant findings of fact at paragraphs 159-170 above. The representation was that Mr Blake was going to remain throughout the project and that was false because, by the evening of the 21st March, he was not. Mr Thompson knew that. He also knew (because he admitted it) that this was something which, in other circumstances, he should have told the Defendants about. The only explanation for why he did not do so was because, he said, he believed he could get Mr Blake to change his mind. However, for the reasons set out at paragraphs 166-170 above, I reject that evidence. It was, on analysis, entirely untenable. It was also contrary to all the other known facts.

173. In those circumstances, therefore, it seems to me that, in the days and weeks after 21st March, before the Defendants executed the Contracts, Mr Thompson knowingly and dishonestly failed to correct the false representation as to Mr Blake's involvement in the project. Moreover, he did not do so because, as he admitted in cross-examination, he knew that that might well have affected whether or not FRL were awarded the Contracts at all. Thus, at the time that the Contracts were entered into, there was a false representation which was deliberate, and made for a specific purpose: to ensure FRL got the job. The evidence made clear that Mr Thompson knew that Mr Blake's decision was final so, even on his own evidence, dishonesty was made out. That finding is supported by Mr Thompson's various attempts thereafter to re-write the history of Mr Blake's resignation. In all those circumstances, the test for fraudulent misrepresentation has been satisfied. For what it is worth, the test for deceit has also been satisfied.

174. In reaching that conclusion, I have been very conscious of the decision of the House of Lords in **Re B** [2008] UKHL 35; [2008] 4 All ER 1, to the effect that, generally speaking, the more serious the allegation, the less likely it is that the event occurred, although their Lordships stressed that this is a factor that must be considered "to whatever extent is appropriate in the particular case." But here, I am in no doubt that such a finding is entirely justified, mainly because the vast majority of the relevant evidence that supports my conclusion came from Mr Thompson himself during his cross-examination.

G5. Loss

175. The final ingredient, of course, is whether or not the Defendants have suffered any loss as a result. Whilst the question of quantum is not an issue for this trial, the consequences of the alleged misrepresentation – being part of the issues of causation - fall to be considered as part of this Judgment. The original order made plain that this was to be the trial of all issues of liability and causation, and the list of agreed issues at no.20 included the validity or otherwise of the Defendants' claim for delay arising out of the alleged misrepresentation.

176. The first part of the Defendants' case that they suffered a loss centres upon the submission that, but for the misrepresentation, they would not have entered into these Contracts with FRL, and would have contracted with another firm of architects. This argument is strengthened by my finding above, that the representation as to Mr Blake's continuous involvement was a very significant inducement to the Defendants to enter into these Contracts. I also recognise - as Mr Thompson was obliged to

recognise during his cross-examination - that, if the Defendants had known that Mr Blake was not going to remain at FRL, there was a real likelihood that the Defendants would not have engaged FRL as architects on the project. It was, on any view, a highly 'material' inducement.

177. On the other hand, I am conscious that the representation only became false on the evening of 21st March 2006, when there would have been significant disincentives to the Defendants, no matter how upset they might have been at discovering Mr Blake's resignation, to go to another firm of architects at such a late stage: a late change of architects would inevitably have added to the delay.

178. Moreover, it seems to me that this is an area where I have to consider carefully the lack of any direct evidence from the Defendants' directors or trustees, as to what would have happened if, on the 22nd March, Mr Thompson had notified them of Mr Blake's resignation. I note that, when he was asked questions about this in cross-examination, Mr Halabi accepted that the Defendants were neither obliged nor required to take his advice and that they very often did not.

179. Accordingly, if the Defendants' claim had been made solely under the Misrepresentation Act, the first issue on causation would be finely balanced, although I should say that the compelling evidence as to Mr Blake's centrality to the Defendants throughout the pre-contract period would probably have led me to reach a conclusion in the Defendants' favour. But of course the dispute as to causation/ reliance does not end there because, for the reasons noted above, I have also found that the misrepresentation was fraudulent.

180. I apprehend that the Defendants' advisors have always been keenly aware that the causation/ reliance element of the claim under the Misrepresentation Act would not necessarily be clear-cut: this explains the emphasis in their pleadings on the allegation of fraud. This allows the Defendants to argue that if the misrepresentation was fraudulent, the fair inference must be that there would have been no Contracts with FRL (see paragraphs 109-111 above). It does seem to me that, no matter how finely balanced the causation/reliance issue might be under the Act, the fair inference arising out of the finding of fraudulent misrepresentation, when considered against all the evidence noted above, is that, but for that misrepresentation, the Contracts would never have been entered into. Thus I conclude that the first part of the necessary causation/reliance test has been made out.

181. But the mere fact that, but for the fraudulent misrepresentation, these Contracts would never have been entered into does not, of itself, establish that loss has actually been suffered by the Defendants in consequence. The second part of the issue on causation (given the absence of any claim for rescission) is what, if any, heads of loss have been shown by the Defendants to arise from these events. On analysis, it is not easy to see from the evidence, notwithstanding the inference to which I have referred, what heads of loss can actually be recovered by the Defendants arising out of the misrepresentation.

182. In a contract for the purchase of property, in circumstances of fraudulent misrepresentation, the losses comprise the difference between the price paid pursuant to the contract and a fair value of the property (see, for example, **Smith, Kline and French Laboratories Limited v Long** [1989] 1 WLR 1). Mr Darling sought to equate this situation with that, by claiming that in the present case the Defendants had entered into a contract on a false basis, such that the Contracts with the Defendants were worth less – they were a less valuable asset, he said - than they otherwise would have been if Mr Blake had been there throughout.

183. That proposition seems to me to fail for two distinct reasons. First, these were contracts for personal services, not a contract for the sale of an asset. If the Defendants had not entered into these

Contracts with FRL, they would have entered into contracts with another firm of architects. So in the absence of a claim for rescission, any loss could only realistically be measured by reference to the actual consequences of Mr Blake's departure part way through the PM Club project. It is not a diminution in value case.

184. Secondly, the Defendants' case is not pleaded either on the basis of diminution in value, or on the basis of the alleged damage to the value of an asset. Instead it is pleaded in just the way that I would have expected, by reference to the effect of Mr Blake's resignation on the course of the project. Paragraph 24.1 of the defence and counterclaim in the Mentmore action (repeated almost verbatim at paragraph 36.1 of the defence and counterclaim in the Piccadilly action) pleads the loss and damage as "the extent that [the misrepresentation/deceit] have deprived the Defendant of the opportunity to engage an architect and lead consultant which was fully able to address the requirements of the project without the delay, disruption, changes of personnel and/or loss of continuity which the untimely departure of Mr Blake [caused]." [6] Paragraph 24.2 then concentrates on the claim that Mr Blake's departure caused delay to the project. At paragraph 36.2 and 36.3 of the Piccadilly pleading, the delay claim is also set out in greater detail, but there it is bound up with the alleged consequences of the separate professional negligence claim in respect of the planning application. The delay claim generally was reflected in agreed issue no.20; it was plainly the principal head of loss put forward by the Defendants in this part of the case. Accordingly, I address in turn below the claims for i) delay, ii) disruption and iii) changes in personnel/loss of continuity, which I shall call duplication. I also deal with any alleged losses suffered by the Defendants or BSH directly as a result of the misrepresentation.

i) Delay

185. I reject the Defendants' pleaded case that Mr Blake's resignation caused delay to the project. There was no delay at all on Mentmore, the part of the project on which Mr Blake worked for FRL beyond mid-March 2007, and where the planning application was approved ahead of schedule. There were delays on Piccadilly as compared with the Programme, but they are the subject of the separate counterclaim for negligence, and are dealt with in detail in the subsequent sections of this Judgment. There was no evidence of any sort that Mr Blake's departure in March 2007, of itself, caused delay either to the Piccadilly planning application (which application was made months before his departure) or the project itself. Indeed, as I make clear in **Sections I6 and I7** below, there is no evidence that supports any delay claim of any kind against FRL; the delays to the project have been caused by the Defendants' decision to suspend in December 2007, which – even on Hr Halabi's case – had nothing to do with FRL.

ii) Disruption

iii) Duplication

186. I find that it was more likely than not that Mr Blake's departure caused disruption within FRL and some duplication of their work. Indeed, such a consequence must be inevitable when an important member of a professional team leaves part way through a large project. This was confirmed by the evidence of Mr Hobart (who spent a good deal of time at the outset of his involvement 'getting up to speed' on a project that Mr Blake knew inside out) and Ms Vela (who found herself suddenly being given much greater responsibility than she had had before).

187. However, it is important to note that there was no evidence of any disruption to the Defendants themselves, or any duplication of their own or BSH's work on the project, as a result of Mr Blake's

departure. No such claim was pleaded, and it was not included within the list of agreed issues. Even if it had been, the absence of any evidence of disruption or duplication from anyone at BSH, let alone anyone within the Defendants' organisation, would have been fatal to any such claim. Thus the claim arising from the misrepresentation/deceit is likely to be limited to reductions in FRL's fees by reference to the disruption to and duplication by FRL themselves (so that, for example, the Defendants are not required to pay for Mr Hobart to get up to speed). I also think that this claim is likely to be modest, since the Defendants' complaints were of under-resourcing by FRL, not the opposite.

188. Mr Fraser submitted that, in the light of the fact that this was a trial of liability and causation, the absence of any specific evidence about disruption or duplication meant that the Defendants' claim should be dismissed in its entirety at this stage. However, on this point at least, the dividing line between this trial and the trial on quantum is rather blurred. And, although the financial consequences of the disruption/duplication caused by Mr Blake's departure are recoverable by the Defendants, I have made clear that, in reality, this is likely to operate simply by way of a diminution of the fees otherwise due to FRL, which could not sensibly be investigated until the detail of the fee claim is itself scrutinised for the purposes of the quantum hearing. Accordingly, I conclude that the exercise as to what, if anything, falls to be deducted from FRL's fee claim for disruption/duplication is entirely a matter of quantification and is best performed when the fees are being scrutinised for the adjustment process referred to in the preceding sections of this Judgment.

G6. Summary/ The Misrepresentation Claims

189. Accordingly, for the reasons set out above, I consider that the representation as to Mr Blake's continuing involvement became false on the evening of 21st March 2006 when Mr Blake refused the last counter-offer ever made to him. As Mr Thompson expressly acknowledged, the principal reason why he did not pass this information on to the Defendants was because he knew that this might well lead the Defendants to look elsewhere. I find that the misrepresentation was made knowingly and deliberately by Mr Thompson, without an honest belief in its truth. It was therefore a fraudulent misrepresentation.

190. I find that the misrepresentation was a material inducement to the Defendants to enter into the Contracts. As a result of the finding of fraudulent misrepresentation, I conclude that, on all the evidence, it is a fair inference that, but for that misrepresentation, these Contracts would not have been executed. Whilst that opens up the possibility of a counterclaim for damages, such a counterclaim would not encompass delay (none being demonstrated as having been caused by the departure of Mr Blake) and would not encompass any disruption/duplication suffered directly by the Defendants or BSH (there being no pleading or evidence of such losses). Thus the only potentially recoverable area of loss is in relation to the disruption to or duplication by FRL arising out of Mr Blake's departure. The precise assessment of the financial consequences of this (if any) will have to await the quantum hearing, because it would, at most, lead to a reduction in the fees otherwise due to FRL.

G7. Breach of Contract

191. The analysis set out above deals with the Defendants' primary case, as to a pre-contract misrepresentation. For completeness I should say that, if I was wrong about that, so that there was no actionable wrong pre-contract, I would have no hesitation in concluding that, post-contract, FRL were in breach of the express and/or implied terms as to co-operation noted in paragraph 114-115 above. They should have told the Defendants about Mr Blake's resignation far earlier that they did.

192. This finding would give rise to a damages claim. However, in the circumstances, such a claim could not amount to more than will be recoverable as damages for misrepresentation, and would in all probability be less (because the damages for breach of contract would not encompass pre-contract losses). It is therefore unnecessary to say anything further about it.

H. PLANNING PERMISSION/THE FACTS

H1. Background

193. The Programme (paragraphs 71-73 above) showed the planning process on Piccadilly taking 13 ½ months from the start of work on design to the granting of planning permission. However, my firm impression is that this period was always over-optimistic, given the complexity and sensitivity of the Piccadilly site and the large range of buildings in respect of which the planning application was required. In the event, it took FRL from March 2006 to December 2006 (9 months) to produce the design and the subsequent detailed planning application, and from December 2006 to late October 2007 (nearly 11 months) for Westminster City Council to consider the application, come back on the detail and eventually pass a resolution granting planning permission, subject to various conditions. It is the Defendants' case that the delay (never identified, but presumably the difference between the 13 ½ months planned and the 20 odd months actual) was the responsibility of FRL.

194. Of course, one irony inherent in such a case is that, for a large part of the relevant period, Mr Blake - the key player as far as the Defendants were concerned - was closely involved in the production of the design and the subsequent planning application. Indeed the planning application was made when he was still the full-time team leader on the Piccadilly project. Despite that, the Defendants make no criticism of Mr Blake. This is one reason why I consider that these allegations of professional negligence are of narrow compass.

195. In August/September 2006, Ms Vela, an architect originally from Australia, became much more closely involved in the day-to-day running of the project on behalf of FRL. This was part of FRL's re-structuring to prepare for Mr Blake's departure. She was a relatively junior architect who then became the project architect for the Piccadilly element of the project. She accepted that she did not have the same experience as Mr Blake and had limited experience of listed buildings. She described herself as "the next level down" from Mr Blake in terms of seniority and experience but, despite that, the organogram produced in March 2007, following Mr Blake's departure, identified her as the team leader for the Piccadilly element of the project. In order to make up for Ms Vela's lack of experience in relation to conservation matters, that aspect of the project was handed over, on Mr Blake's departure in March 2007, to Ms Jhilmil Kishore.

196. As referred to above, in the autumn of 2006, again in preparation for Mr Blake's departure, FRL engaged Mr Hobart to become a director of Aukett Fitzroy Robinson with special responsibility for hotels. Ms Vela confirmed that Mr Hobart was never full-time on the project. This was confirmed by FRL's record of the hours billed. Indeed, as again Ms Vela accepted, following a good deal of time spent at the outset of his involvement getting up to speed on the project, Mr Hobart subsequently spent very little time on either the Piccadilly or Mentmore element of the project and considerably less time than Mr Blake would have done.

197. There was one surprising element of this evidence. It became apparent in the cross-examination of both Ms Vela and Mr Hobart that, because of the broad nature of Mr Hobart's role within FRL, it was inevitable that he would spend considerably less time on this project than Mr Blake. Unsurprisingly, Mr Hobart was asked whether this was something that had been explained to the

Defendants at the outset of his appointment. Although Mr Hobart hedged his answers repeatedly, it was clear that the true answer to that question was in the negative. In the end, Mr Hobart was driven to say that, because Mr Blake was not the FRL director responsible for all their hotel work, and he was, the Defendants should have worked out for themselves that he, Mr Hobart, was going to spend less time on this particular project than Mr Blake would have done. I am bound to observe that this was an extremely cavalier assumption for FRL to have made and is, I am afraid, all of a piece with their general attitude to the Defendants on this project, and their repeated failure to grasp the central importance of Mr Blake to the Defendants in particular.

H2. The Events Leading Up To The Planning Application

198. On 8th August 2006, there was a pre-planning application meeting between the development team and Westminster City Council. Mr Blake attended. At that meeting, Ms Sarah Spurrier, the area planning officer, expressly raised a query as to "whether every opportunity has been taken to minimise the amount of plant on the roofs of the proposed development." It was clear that the existence of plant on the roof, and the noise from such plant, was an important matter as far as the planning officers were concerned. Also noted in these minutes was the potential difficulty of removing the tree in the courtyard which the conservation officer said "added to the character and appearance of the courtyard."

199. Following that meeting on 19th September, Mr Gordon Chard, the director of planning and city development at Westminster, wrote to the Defendants' planning consultants, RPS, and, amongst other things, said this:

"Your scheme also involves provision of additional plant, to be located in the basement and within a new enclosure on the roof of 100 Piccadilly. In design terms, you should endeavour to locate the plant in the least [surely most?] unobtrusive positions, in order to minimise its visual impact. Where plant is located externally, it should be enclosed by appropriately designed screens which relate to the architectural style and materials of the existing buildings. Any future submission should provide full justification for the location of additional plant at roof level… any future application should be accompanied by a detailed acoustic report."

The letter also said that the removal of the tree was "likely to be considered contentious". [7]

200. RPS were engaged from the outset as planning consultants by the Defendants. They sent this letter onto FRL saying that the acoustic report was "already in hand". It was being prepared by ADT, acoustic consultants also engaged by the Defendants through BSH. The terms of their appointment are even now unknown, but were at the time the subject of some debate. Their first report was produced in September. Their second report was produced in November and it was apparently this second report which was included with the planning application documentation.

201. One of the Piccadilly buildings was located at 12 White Horse Street ("12 WHS"). The existing building had an open plant well at level 10. In October 2006, one of the Stage C+ Design options was to fill in that area with a dining room, and put the plant on the roof, at the next (new) level up. A drawing was produced, approved by BSH, with the plant going onto this new level 11. Ms Vela said that this did amount to "a new planning application for 12 White Horse Street. It was different. The roofscape was different." She expressly accepted that the change at roof level would, on its own, necessitate a new planning application. The instruction to make this design change was confirmed by BSH to FRL in writing on 15th November 2006.

202. At this point, something rather curious happened. In an e-mail from RPS to Ms Vela, dated 16th November 2006, RPS recommended that the reference to this new area of plant should be "removed from the drawings and dealt with by way of discharge of condition. If it is not, this could be an issue requiring a new full planning application". This was a reference to a condition of the existing planning consent for this building. It appears that the plan was to deal with this issue under one of the existing planning conditions, because the only other alternative was to make an entirely new application (which would presumably be time-consuming, and might give rise to difficulties and delay). The subsequent email exchanges from RPS confirmed that they wanted FRL to remove "all text and graphic profile references to plant" from the drawings in relation to 100 Piccadilly and 12 WHS.

203. A report produced by FRL at about this time referred to this as the "strategic removal" of the plant from the drawings to be considered by Westminster as part of the planning application. That description was confirmed by Ms Vela in cross-examination. It was not a strategy that was kept secret from BSH or the Defendants: the documents made express reference to it. Ms Vela said that she questioned Ms Carney of RPS quite extensively over this decision and that she felt that she understood the strategy. After a certain amount of fencing, Ms Vela confirmed that she had agreed with it as a strategy and had not advised against it.

204. She was asked about the purpose of the strategy. She said:

" As far as I understood it, as explained to me by RPS, as has been discussed previously, it was to deal with that as a condition because any permission, even this one, would have had quite strenuous conditions in terms of acoustics but also in terms of the appearances of the building… as I understood it, it was to not put in a new planning for the entirety of 90-95, rather just do a listed building consent."

205. Ms Vela repeated on a number of occasions that Ms Carney of RPS was responsible for the overall planning strategy to be adopted and that she followed that strategy. She understood that it could be dealt with as a condition rather than as part of a new application. She was pushed as to whether she understood now that such a strategy was incorrect:

"Q: Humour me, and just tell me whether you still believe that it could be dealt with as a condition, and as a matter of principle.

A: As a matter of principle, if it was a completely new application and plant was not indicated on the roof in terms of an annotation, I would suspect not.

Q: What caused you to suspect that now, when you previously thought it did?

A: Because as you might have gathered by the number of applications that were going in at the time, and as I said, there was an awful lot going on, and there were 100 drawings in this application, they were all divided up into different segments and at that point when Ms Carney and I were in correspondence she was quite clear and that is why I asked her so clearly: was she sure that was the way the strategy would work?.... there was a lot going on at the time. I asked the question, I got given the same answer, so I moved on. I was trying to get the drawings done."

206. At the same time, doubts began to emerge about ADT from within the rest of the professional team. For example, in December 2006, Faber Maunsell, the mechanical and electrical engineers, prepared a draft letter dealing with ADT's appointment by BSH. Mr Hobart commented on the letter that "by this stage of the process [ADT] should have provided clear guidance as to the minimum acoustic requirements representing the Clients' Brief/Employers' Requirements… for both M&E and

Architectural elements of the project". Although his e-mail does not say so, the obvious inference to be drawn from that remark is that they had not yet done so.

207. In the reply from Faber Maunsell on 22nd December, they said that neither ADT nor BSH considered that a review by ADT of Faber Maunsell's engineering design reports and drawings - and therefore the plant to be put on the roof - fell within the scope of ADT's appointment. Faber Maunsell stated that this arrangement was not in the best interests of the project, but that it was BSH's decision. Faber Maunsell also advised that "should issues be raised at a later date due to the acoustic consultant not providing timely advice then FM will expect to claim additional fees for any reasonable design works etc that this may cause".

208. In her cross-examination, Ms Vela confirmed that, in her view, "ADT was not actually providing much of the service in Stage C to Stage D. We were basically gearing up for Stage D and he was saying: 'I cannot attend meetings. I cannot give you this. I cannot give you that." She agreed that even at the time, she thought that the underperformance by the acoustic consultant was going to be a problem.

H3. The Planning Application

209. Throughout the period up to 30th November/1st December 2006, when the planning application was finally put in, FRL were preparing the design that was going to be the subject of that detailed application. Schedule 1 of their Contracts made plain that they would act as "principal lead designer and co-ordinator for the design of the project". Obviously, there were a number of other consultants involved in the planning process, including in particular RPS and Faber Maunsell. As to the interface between FRL and the other consultants, Schedule 1 made plain that FRL had to:

"Advise on the need for and scope of services of other consultants that may be required

Be aware of the work that other participants are carrying out and advise on any apparent errors or omissions consistent with the consultant's co-ordination role in relation to design produced by others

Co-ordinate design work with all other designers (including contractors with design responsibility) and maintain drawings and other documents up to date."

210. Ms Vela was asked in cross-examination about FRL's co-ordination role in connection with the planning application. She said:

"At stage C there was some co-ordination, which is quite early in the process, concept design. The planning application was dealt with in a completely separate set of drawings, because - I am not sure if it is clear, if everyone has picked up - there were some things on the stage C (i.e. the scheme that was progressing on the client's behalf) that were different to the planning drawings. The planning drawings were frozen per se.

So, in other words, the planning drawings rather had only the amount of detail on them that was available at the time the planning application was lodged, and then we moved onto the detailed design. So the role of co-ordination was only in so far as the concept design stage, which is basically getting basic input from other consultants to make sure the space parameters were right."

She confirmed that the application for detailed planning consent normally comes at the end of Stage D but in this case it had been moved forward to the end of Stage C. At the time that the planning application was made, Ms Vela confirmed that "she was the person at the coal face" and it was clear that she was working flat out on the project at this stage.

211. The planning application was made on 30th November/1st December 2006. It was validated in mid-February. It contained numerous drawings prepared by FRL. It also included, amongst other things, the ADT report. This consisted of 7 pages and a short glossary. It was largely concerned with an environmental noise survey for 100 Piccadilly, and the setting of design criteria for new plant installations. On analysis, the survey was hampered by the fact that "as there is existing plant on the roof of 100 Piccadilly, it was not possible to find any monitoring positions in this area that were not affected by noise from these installations". The section of the report dealing with the recommended design criteria consisted of just three short paragraphs.

H4. The Progress Of The Application

212. Of course, the planning application was made at a fraught time, because it was in November/ December 2006 that the consequences of Mr Blake's resignation were being addressed by the parties. In addition, on 7th December 2006, Mr Pyrgos expressed his concerns about what he saw as FRL's under-resourcing of the project. Mr Thompson's internal e-mail of 13th December 2006 made plain that he had no immediate response to the points made by Mr Pyrgos in his letter and, in cross-examination, he confirmed that he did not have answers to these criticisms, that they were correct. He confirmed that FRL were under-resourcing as compared with the Resources Schedules that had formed the basis of the calculations of the monthly instalments in Schedule 2. This explains the three separate occasions during this period when, as Mr Thompson accepted, FRL agreed a rescheduling of their fees on the basis that fewer resources were being employed than had been in the original Resource Schedules.

213. Picking up the story of the planning application again, it seems that, at about the time Mr Blake had finally departed in March 2007, points were arising as to the inadequacy of the ADT acoustic report. RPS's e-mail to Ms Vela of 15th March 2007 recorded that Ms Kelly Bilberstein, Westminster's environmental health officer, had objected to the proposals on the basis that the acoustic report contained insufficient information. The complaints were that, in the report, the ADT assessment was based on existing noise levels, as opposed to background noise level; that the assessments should have been undertaken on the basis of the impact of the proposals of the nearest residential windows; and that consideration should have been given to the noise implications of all plant, not just the plant at roof level.

214. From the subsequent exchanges, it also appears that part of the ADT report had been omitted from the application itself. In his e-mail to Ms Vela of 19th March 2007, Mr Lockwood of ADT said "I am completely confused/in the dark and really do not know what is going on." Ms Vela told me that she was "always very bemused" by Mr Lockwood's "phrasing of things". She said that "he seemed constantly a bit confused which did not necessarily mean that he was." She said that she was worried that his scope of ADT's services might not be extensive enough.

215. During this period, Ms Vela said that she was asked by the Defendants to get more involved in the planning process. It certainly seems that, up until that date, Ms Vela had been relying on RPS to co-ordinate all of the responses in relation to the planning application but, thereafter, she took a more active role. One of the matters that she therefore had to deal with was the ongoing difficulties with ADT. She said that it was "odd" that some of the pages of the report had not been included in the original planning application and that it was "frustrating". She said that she was "not relaxed" about the situation that had arisen on the acoustic report.

216. Ms Bilberstein continued to complain about the inadequacy of the acoustic report. Mr Lockwood of ADT continued to express his bafflement at her comments saying, in an e-mail of 10 th April 2007 to

Ms Vela: “I am really struggling to understand what this woman’s problem is - she does not seem to have a grasp of how these things work.” His complaint was that ADT could not give Westminster final details about each item of plant, and how that plant would be attenuated, because the plant had yet not been designed/specified. He said that this was no reason for Westminster to object to the planning application. He said that “she should not be asking for this level of information at this stage”. Ms Vela commented that she did not understand “why he was having a go at the environmental health officer”. She said that, in her view, the council’s officers were entitled to ask for any information that they wanted, whether the request might be considered as regular or irregular.

217. In April and May 2006, considerable work was done by the consultants, including ADT, responding to Ms Bilberstein’s objections. There were two detailed letters from ADT dated 18 th April and 10 th May 2007, which were sent to Westminster. Considerably more information was contained in these letters than had been contained in the earlier report, but the 10 th May letter concluded:

“As we have discussed before, the design is not sufficiently advanced to provide you with comprehensive details about each individual item of plant will be attenuated. However, we hope that this letter, in conjunction with the package of information about plant layouts and the location of the nearest residential windows now provides you with the reassurance you have been seeking that the development is being designed to satisfy the acoustic requirements of Westminster City Council.”

218. I should say that Ms Vela suggested that, during this period, she thought that ADT might have been having a problem being paid their fees by the Defendants. However, it is difficult to see how that would explain the inadequacies, if that is what they were, in the original report. I also note that this was not an excuse proffered by ADT themselves.

219. On 5th June 2007, Ms Vela produced a memo, to be sent to other members of the design team, setting out the design team requirements for ADT’s involvement on the project. That set out a large number of detailed matters which ADT would be expected to address. Given the earlier confusion over ADT’s role, and the concerns expressed earlier about ADT not being asked to produce a report on the noise consequences of the plant, it might be said that this list ought to have been provided before.

220. Ms Vela confirmed that, at this point, a group of residents, who were concerned about the roof plant and the potential noise, had had their cause taken up by a Councillor Roberts. Thus, the design team came under further pressure in relation to the potential noise from the plant on the roof. A meeting took place on 22nd June with Councillor Roberts which resolved the chiller positions but, as Ms Vela’s subsequent e-mail of 27th June to BSH made plain, there were still a number of matters outstanding in respect of the roof plant. In this way, through June and early July 2007, the question of noise from the roof plant remained a significant and ongoing difficulty.

221. As a result of this ongoing saga, and because of the concerns that FRL had previously noted about ADT’s performance, FRL recommended that the work done by ADT should be the subject of what Ms Vela called “a peer review or a second opinion”. She said in cross-examination that this peer review, to be performed by a firm called Hann Tucker, “was not to satisfy the Council. It was to actually to placate, just kill off the objections.” It appears that Hann Tucker became involved in mid-July 2007, and as we shall see, once they had produced further information, the difficulties in regard to the allegedly inadequate acoustic information were speedily resolved.

222. Unfortunately, it was just at this time that the ‘strategic removal’ of the plant on the roof of 12 White Horse Street (paragraphs 202-205 above) arose again. Ms Spurrier from Westminster sent an e-mail to RPS, dated 19th July, copied to Ms Vela, which pointed out that “although the application now

proposes additional plant on roof of 12 WHS, the revised acoustic report does not appear to refer to it. The new/amended report needs to refer to all plant proposals and drawings should show detail of all proposed equipment." In a subsequent e-mail sent later the same afternoon, following a discussion with RPS, Ms Spurrier went on to say "it looks as though there is also a new plant on the roof of No 94 which needs to be addressed in the acoustic report. I will need to re-advertise the applications for 12 WHS and No 94 to refer to the roof plant proposals so we can't be criticised for not having advertised the applications properly". It was put to Ms Vela that these e-mails showed that Ms Spurrier had 'rumbled' the strategic removal, a description with which she did not agree.

223. Following the involvement of Hann Tucker, Ms Vela reported to BHS on 26th July 2007 that, in their view, ADT's report thus far submitted to Westminster contained "insufficient detail to meet WCC requirements". Ms Vela pointed out that "this could be due to the fact that the information was not available at the time, but it is no surprise they are asking for more detail now. Hence it is imperative that the new reports are adequate."

224. On 11th August 2007, RPS sent to Ms Spurrier at Westminster four noise assessment reports, two from Faber Maunsell and two from Hann Tucker. They were sent under cover of a letter which set out detailed information in relation to plant and noise. Ms Vela confirmed in cross-examination that, thereafter, although one or two queries were raised, no significant further problems were experienced in relation to acoustics.

225. On 25th October 2007, Westminster City Council resolved to grant planning permission in relation to the Piccadilly element of the project. A number of matters were left unresolved. Those matters had still to be addressed by the Defendants, but the permission was structured in such a way that the outstanding matters could be signed off by the relevant officers under their delegated powers, so that the application would not need to come back to the Council. Mr Halabi confirmed in his cross-examination that the outstanding matters were all relatively straightforward. To all intents and purposes, therefore, planning permission had been obtained for the Piccadilly element of the project. Mr Hudson, FRL's expert architect, said that, given the complexities of the proposal, this was a significant achievement, and I agree with him.

226. However, although FRL continued to work on the project until the suspension on 24th December 2007, no further stages or milestones of significance were achieved. It does not appear that any work at all has been done on the project (at either location) over the last 18 months or so.

H5. FRL's Resources

227. It seems plain that, over the period from December 2006 to December 2007, FRL's resources were not at the level envisaged in the calculation of the monthly instalment: they were lower. This is apparent from a number of contemporaneous documents. The position in December 2006 has already been referred to in paragraph 212 above.

228. On 11th September 2007, Ms Vela sent Mr Thompson a memo in relation to the Piccadilly element of the project. The key paragraph said this:

" … we have not produced the quantity of information required (I have reviewed this week) in accordance with the programme and this has been for a variety of reasons; delayed and further planning information distracted key team members and resources, under performance of HDI in successfully resolving layouts which delays all internal packages, general lack of senior technical support and day-to-day monitoring of staff, team not understanding the importance and pressure of

deadlines and working 9-5 through the summer many staff on leave, staff churn due to market pressures. Some of the above are understandable, some are unacceptable…"

In cross-examination, Mr Thompson accepted that this passage reflected a material underperformance on the part of FRL. However, on this occasion, no abatement of the fees was offered in consequence, and there was no evidence to suggest that steps were taken to deal with the problems. For completeness, I should say that the 'programme' to which Ms Vela referred can only be to the updated Resource Schedules produced by FRL in March 2006 (paragraph 47 above).

229. At the end of September 2007, Mr Thompson did a detailed fee calculation, about which he was asked in cross-examination. This demonstrated the large payment of fees in advance to FRL. The calculation showed that, at this point, much of what FRL were claiming by way of outstanding fees was in respect of work not yet done and services not yet performed. For example, in relation to 90-95 Piccadilly, FRL were claiming some £660,000 by way of fees, of which about £525,000 was in respect of work not yet done. In total, of the £1.25 million accrued at this point under Schedule 2 (the vast majority of which had been paid by the Defendants), just under £1 million was in respect of work not yet done. Mr Thompson accepted that this was the effect of the fees claimed as at 30th September 2007; that, because of the delay, the majority of the fees paid and the fees said to be outstanding related to resources not yet expended and work not yet done.

I. PLANNING PERMISSION/THE ALLEGATIONS/OF PROFESSIONAL NEGLIGENCE

I1. The Issues

230. In essence, there are three issues arising on this part of the case:

a) whether FRL were responsible for the inadequate acoustic report and were in breach of contract/ negligent in allowing the planning application to be made on the basis of such a report;

b) whether FRL were responsible for the 'strategic removal' of the plant on 12 White Horse Street and whether the fact that the plant was removed from the drawings that were sent with the original application amounted to a breach of contract and/or negligence on the part of FRL;

c) whether, if FRL were in breach of contract and/or negligent in one or both of the ways indicated above, this caused or was a material contribution to:

i) the delay in obtaining planning permission;

ii) the delay to the project as a whole.

231. I address those allegations in this way. At **Section I2,** I make a number of observations about the expert evidence. At **Section I3,** I deal with the suggestion that FRL's responsibility for these matters was in some way limited or absolved by the involvement of the planning consultants, RPS. At **Section I4** I deal with the allegations in relation to the acoustic report and, at **Section I5** I deal with the allegations about the strategic removal of the plant. Thereafter, at **Section I6** I deal with the alleged delay to the obtaining of planning permission and, in **Section I7,** I deal with the alleged delay to the project as a whole.

I2. Expert Evidence

232. Allegations of professional negligence of this kind are habitually the subject of expert evidence and, very often, such evidence can be decisive. In this context, particular significance attaches to the

joint statement produced by the experts pursuant to CPR 35.12, in which the experts identify those matters on which they agree and, in relation to those matters on which they disagree, identify the short reasons for their disagreement. This will often be, as I never tire of saying, the most important evidence in a case like this.

233. Unhappily, the original CPR 35.12 statement in this case was of no value at all. I made some tart remarks about that at the outset of the trial, and required the experts to meet again. They eventually produced a much more helpful Joint Statement, albeit at the end of the first week of the trial. My analysis of the issues is based on that document.

234. When Mr Salisbury, the expert instructed by the Defendants, came to give evidence, the reasons for the earlier difficulties quickly became apparent. It appears that Mr Salisbury was continually being 'stood down' by the Defendants, during his preparation for the trial, presumably in order to save fees. As a result, Mr Salisbury had not seen all the relevant documents, either prior to the start of the trial or even now. This state of affairs reached its nadir when, at the joint meeting of the experts in April, Mr Salisbury was telephoned after 20 minutes and told to extricate himself from the meeting.

235. Mr Salisbury maintained that, although these events were of concern to him (because they obviously affected his ability to give meaningful evidence), he had expressly drawn everyone's attention to this difficulty in paragraph 10 of his report. Paragraph 10 reads as follows:

"As I have indicated in the appendix at page 35 I have read many but by no means all of the documents disclosed. To date, I have directed my reading so as to inform myself about the issues that I have been asked to examine. It may be that on seeing further documents, or on discussing evidence seen by AFR's expert Mr Richard Hudson, that I shall revise my opinion."

236. For the avoidance of doubt, I should say that I find that this alleged qualification did not begin to convey the difficulties that Mr Salisbury was placed under, and was far short of the necessary caveat which should have been attached to the entirety of his work as an expert, including his report. It was unacceptable that Mr Salisbury came to court, having been seriously hampered in his preparations, but without those problems being clearly stated in his report or in the first Joint Statement. It was only when he was cross-examined that the whole sorry story became apparent.

237. This unfortunate situation has naturally given me considerable cause for concern about the nature of Mr Salisbury's evidence in support of the case against FRL in negligence. It could not but do so. In addition, from a practical point of view, the lack of any cogent analysis of what would have happened if, say, the acoustic report had been fuller, or the strategic removal had not taken place, is a real problem. As we shall see, the Defendants' case on causation arising out of the allegations in negligence is very thin.

I3. The Scope Of FRL's Appointment

238. I have set out a number of FRL's obligations in relation to co-ordination of the work of other consultants at paragraph 209 above. The expert who gave evidence on behalf of FRL, Mr Hudson, took the point that these terms were somehow modified by virtue of the appointment of RPS as specialist planning consultants. On this basis, so the argument ran, FRL were entitled to leave to RPS both the contents of the acoustic report and the strategic removal of the plant at 12 WHS: they were the planning consultants, he said, and FRL could not be expected to give separate advice on these matters. Mr Hudson said in cross-examination that this view formed the basis of his whole approach to these issues.

239. It seems to me that this argument must fail at every level. As Mr Hudson properly accepted, what he was contending for amounted to some form of (rather vague) variation to the written contract between FRL and the Defendants. There was of course no such variation either proposed or agreed. Mr Hudson also accepted that, in circumstances where the lead consultant was saying that his role has been reduced as a result of the appointment of another consultant, he would need expressly to warn the client of such a reduction in the scope of his services. There was no such warning here. Lastly, Mr Hudson accepted that, in those circumstances, the fees would have to be adjusted (because the lead consultant's services would have been reduced). Again that was neither proposed nor agreed in the present case.

240. The architect is usually the lead consultant, as FRL were on this project. They have to co-ordinate the work of other consultants. They cannot be expected to turn their mind to every technical consideration arising out of the specialist work of other consultants; if they could, there would be no need to engage those other consultants in the first place. But, by the same token, architects such as FRL must do what they reasonably can to see that the work being done by the other consultants is done on time and in the right form and, to the extent they can sensibly comment on the technical detail of their work, to check that such content is generally suitable for its purpose.

241. For these reasons therefore, I reject Mr Hudson's first line of defence. It seems to me that, as a matter of contract law and as a matter of fact, it is untenable.

I4. The Acoustics Report

242. It seems clear beyond doubt that the original ADT report did not contain all of the acoustic information which Westminster were likely to need in relation to this sensitive project. It was, on any view, sketchy and Mr Hudson accepted that it did not comply with Westminster's stated requirements. Its lack of detail can be best illustrated by comparing the ADT report with the detailed information sent to Westminster by Hann Tucker in August 2007 (paragraph 224 above) which resulted in the resolution of the problems in relation to the acoustics. The first issue therefore, is why the ADT report of late 2006 did not contain the information that was provided by others in August 2007.

243. It seems to me that there are two reasons for that, and neither of those reasons was the responsibility of FRL. First, ADT were unable to produce further information in December 2006 because the plant had not been specified or designed. They could not undertake a report dealing with matters which had not yet been decided. The reason why the information was so much fuller in August 2007 was because the Stage C+ design was so much more advanced by then, a point made (often in rather unhelpful style) by ADT themselves in the correspondence, and rather more clearly by Ms Vela herself (paragraph 223 above).

244. The second reason why the original ADT report was so thin was also touched on in the contemporaneous e-mails. It appears from those exchanges that ADT had been expressly told by BSH not to deal with the acoustic consequences of the Faber Maunsell design and/or specification of plant. It is clear that Faber Maunsell, as the mechanical and electrical engineers, regarded that as a mistake and said so in clear terms (see, for example, paragraphs 206 and 207 above). Accordingly, the ADT report was more limited than it should have been, because that was what BSH had asked for. Again, that does not seem to me to be a matter on which FRL can be criticised now.

245. I do not believe that, in performing her co-coordinating role, Ms Vela or FRL fell below the standard to be expected of a reasonable architect. She could not require ADT to produce a fuller report in December 2006, given the preliminary state of the M & E design and the restrictions

imposed by BSH on ADT's services. Indeed, at that time, it would have been for Mr Blake, as team leader, to address any shortcomings with the ADT report, and it is not suggested that he was in default for not doing so. Thereafter, Ms Vela took on an increasing co-ordination role and, again as the e-mails show, was endeavouring to obtain fuller information from ADT for planning purposes in a way which, at least on occasion, RPS were not.

246. Eventually, of course, it was Ms Vela's idea to involve a second acoustic consultant, Hann Tucker, whose involvement largely resolved the outstanding problems. That happy result was achieved at least in part because, by the time that Hann Tucker were involved, the design was sufficiently advanced to allow the necessary information to be provided to Westminster. But, again, it does not seem to me that this developing situation leaves room for any legitimate criticism of Ms Vela.

247. Perhaps the highest that it can be put is that Ms Vela/FRL ought to have acted sooner, given her concerns about ADT, in obtaining a second acoustic consultant's report. However, that is not the way in which the case was pleaded and not a point made by Mr Salisbury either in his report or in the second joint statement. In any event, it seems to me that it is the product of 20/20 hindsight. Furthermore, in the absence of any evidence from BSH along the lines that, if they had known more clearly and at an earlier stage about the problems with ADT and/or the scope of their appointment, they would have acted in some other way, I am not prepared to find that matters involving ADT should or could have evolved differently.

248. For all those reasons therefore, I reject the submission that FRL were negligent or in breach of contract in dealing with the acoustic element of the planning application.

I5. Removal Of Plant

249. The "strategic removal" of the plant on 12 White Horse Street was, certainly with hindsight, a mistake. It meant that when, in July 2007, Westminster became aware of the plan for the new level and the plant on the roof there, they believed that they had no option but to re-advertise the planning application. It does not appear that Westminster believed that the issue could be dealt with as a condition and indeed, once Westminster had taken the point that the matter had to be dealt with fully, nobody (not even RPS) seemed to suggest otherwise.

250. There can be no doubt that this mistaken strategy was the responsibility of RPS. The documents demonstrate that clearly, and Ms Vela confirmed it in her oral evidence on a number of occasions. The question was whether FRL should have queried the strategy, or objected to it, or warned the Defendants of its possible consequences.

251. The first point to make is that, because the strategic omission happened in late 2006, it seems to me that it was primarily a matter for Mr Blake as team leader, but it is again not suggested by anyone that he was at fault. There is no doubt that Ms Vela queried the strategy; she repeatedly emphasised in her cross-examination her questions to Ms Carney of RPS on this point. At the time, Ms Vela was given an explanation, which she accepted, and this obviously explains why no warning was given by Ms Vela to the Defendants; at the time, she did not believe that there was anything to warn them about.

252. The remaining question therefore was whether Ms Vela should have accepted the explanation from RPS. She candidly admitted that, having been through the whole process, she would not accept such an explanation again. But at the time, she was entitled, so it seems to me, to rely on the advice and expertise of RPS. RPS were involved in this project because of their expertise as planning

consultants. They were engaged by the Defendants to fulfil that role. Although Ms Vela had a co-ordination role in relation to planning, it was not for her to pick over every single point of strategy determined by RPS. If this aspect of the strategy was queried (which it was) and if an answer was provided which Ms Vela accepted (which it was) then it is difficult to see what else she should have been done. I suppose that, in some cases, it might be said that the aspect of the application or strategy in question was so obviously deficient that no reasonable architect should have accepted the explanation given. Mr Hudson seemed rather equivocal on that point. But that was not how Mr Salisbury put the point in his evidence. Furthermore, on the basis of all the information available to me, it does not seem to me that the advice - that this could be dealt with by way of a condition to the existing permission rather than an entirely new application - was, of itself, so outlandish that it should have sent alarm bells ringing in the minds of the reasonably competent architect.

253. The rules surrounding planning applications - what to include, what not, how to present it - are complex: that is why consultants like RPS are engaged in the first place. They told Ms Vela to present this aspect of the application in a certain way because it was in the best interests of the Piccadilly element of the project, and therefore in the best interests of the Defendants. Ms Vela was entitled to follow that advice even if, with hindsight, it might well have been wrong.

254. For those reasons, therefore, I have concluded that FRL cannot be criticised in relation to this aspect of the planning application. Although their contractual obligations were not modified by the involvement of RPS, on the evidence they were not in breach of those obligations by raising the point with RPS and accepting the explanation given.

255. In the light of my findings that FRL were not in breach of contract or negligent in relation to either of the two allegations noted above it is, strictly speaking, unnecessary for me to deal with the question of causation. However, again out of completeness, it seems to me sensible that I should, particularly given that I have formed a clear view about these issues.

I6. Delay To Planning Permission

256. Let us assume now that I am wrong and that FRL were in breach of contract and/or negligent in relation to each of the two matters set out above. Have the Defendants shown that, on the balance of probabilities, those failures delayed the granting of planning permission? I do not believe that they have made out any such case.

257. I reject the suggestion that the inadequate acoustic report caused a delay to the granting of the planning application. If FRL were negligent, it was because they failed to advise that a more detailed acoustic report was required for the original planning application. Such a report could not have been produced until the design was further advanced which meant that, if the fuller report was necessary for planning purposes, the application for planning permission would itself have been delayed until the fuller report could be prepared. In other words, the production of a fuller report would have delayed the application for, and thus the granting of, planning permission. There is nothing to say that the notional delay in the making of the application would not have been the same as the alleged delay in the actual granting of the planning permission: the timetable would merely have been ‘shunted’ back, and there would be no identifiable delay due to FRL.

258. As to the strategic omission of the plant from the drawings of 12 White Horse Street, it is again not possible to say that this would have caused delay to the grant of planning permission. If the plant references had been left on the drawings, then queries in relation to acoustic issues/levels may well have been raised earlier. This may also have delayed the making of the application in the first place,

or the resolution of the queries would have had to wait until the design was further advanced. Either way, it could not properly be said that the omission - by itself - caused a delay in the granting of the planning application.

259. There is a further, overarching reason why I have concluded that the Defendants are unable to make out a case that the grant of planning permission was delayed as a result of these matters. It is common ground that there were a number of factors with which Westminster were dealing during 2007 arising out of the planning application. Some of these matters, such as the separate section 106 agreement, which involved a completely different property on a nearby street, and the tall London plane tree in the courtyard (paragraphs 198 and 199 above) which the Defendants wanted to remove but which, having seen it, seems to me to be an integral part of the landscape in that area [8], were both issues which generated a large amount of discussion and difficulty. Accordingly, even if the acoustic issues and the plant on the roof of 12 White Horse Street had both been resolved earlier, there is nothing to say that these other matters would also have been resolved earlier, thereby speeding up the grant of planning permission. There were a large number of planning issues being discussed over the middle of 2007, so there were in truth a number of potential causes of any alleged delay. The removal of two of those potential causes of delay would not, by itself, mean that the grant of planning permission would have been made any earlier.

260. In addition, it seems from the evidence of Ms Vela that, during 2007, there were delays because some of the professionals stopped work because they had not been paid by the Defendants. Whilst I consider that this point was exaggerated, nevertheless I cannot ignore the fact that non-payment of fees, and subsequent ‘pauses’ in the performance of services by others, is a relevant factor in any consideration of delay overall. For example, at paragraph 52 of his closing note, Mr Darling refers casually to the fact that HDI, the interior designers, “only” stopped work once or twice for this reason.

261. These other potential causes of delay bring me back to the point that I made at the outset of this Section in relation to the difficulties surrounding the expert evidence, and the absence of any proper analysis of how and when, but for the alleged default on the part of FRL, the planning application would have been granted. It is customary in a case like this for the relevant expert, in this case Mr Salisbury, to explain that, in his opinion, but for the alleged defaults, the planning application would have been resolved by a certain date (earlier than it actually was), and demonstrate why and how he had arrived at that conclusion. Mr Salisbury conspicuously failed to do that. Indeed, in the Joint Statement, he says that, whilst he believes that on balance there was a delay, “I cannot say this with certainty”. That is the most assistance that he can give the court on this aspect of the case. To my mind, this very general statement simply confirms that he has not been able to do any detailed analysis which makes out a cogent case that the granting of the planning consent on Piccadilly was delayed as a result of the alleged defaults on behalf of FRL.

262. For the same reasons, even if the Defendants had been able to show that the departure of Mr Blake in March 2007 had created delays generally (which they were not), they have not shown that his departure delayed the grant of planning permission beyond the date when, but for his departure, it would have been granted. Again, the absence of a proper delay analysis would have been fatal to that aspect of the counterclaim in any event.

I7. Delay To The Project

263. The Defendants also make a case that the alleged negligence on the part of FRL not only delayed planning permission, but also delayed the project as a whole. I emphatically reject that submission. There was no evidence of any kind to support it. Indeed, all of the evidence was the other way. Mr

Halabi made plain that, once the resolution to grant planning permission had been obtained, the outstanding matters were straightforward and could easily have been resolved. He also stressed that there was more than sufficient investment in place to allow the project to go ahead, if that is what the Defendants wished to do. He conspicuously failed to explain why, in those circumstances, the project had not gone ahead after all.

264. I find that the reason that the project has not gone beyond the planning stage is because, in December 2007, the Defendants chose to suspend it. There is nothing to link the decision to suspend with any alleged default on the part of FRL or any alleged delay in the obtaining of the planning consent on Piccadilly. Accordingly, I reject any allegation that FRL were somehow responsible for any delay to the project as a whole.

265. Similarly, this means that if (contrary to my primary findings) the Defendants had demonstrated that the early departure of Mr Blake led to a delay generally, they have still failed to show that this had any effect on the progress of the project overall. The project has been delayed for reasons which, even on Mr Halabi's case, were wholly unconnected with Mr Blake's resignation in particular or FRL generally.

J. SET OFF

266. There is an issue as to whether it is possible for Mentmore Towers Limited to set-off any claim arising from the counterclaim made by Goodstart Limited and Anglo Swiss Holdings Limited in the Piccadilly action (arising out of FRL's negligence and/or breach of contract), as against any claim by FRL for fees in the Mentmore action. There is also the question whether each of Goodstart and Anglo Swiss could set off any claims that the other might have had against FRL.

267. It seems to me that this issue is now redundant because I have dismissed the counterclaim for professional negligence in the Piccadilly action. Accordingly what is left is FRL's claim for fees, as adjusted by reference to delay and the services actually performed (**Section D** above) and after taking into account any counterclaim based on disruption and duplication caused by the fraudulent misrepresentation (**Section G** above). It is therefore unnecessary for me to deal with the set-off point further.

K. CONCLUSIONS

268. For the reasons set out in **Section D** above, I have concluded that FRL are not, without more, entitled to the instalments set out in Schedule 2, because adjustments to those figures may be necessary to reflect the delays to the programme and the services actually performed. I have not embarked on the adjustment exercise because I accept FRL's case that it would not be appropriate to do so in the absence of detailed submissions by the parties, although I remain of the view that it ought to be a relatively straightforward exercise. The adjustment process needs to be put in hand promptly and a further hearing will be required if the process cannot be agreed.

269. For the reasons set out in **Sections F** and **G** above, I have concluded that FRL's failure to correct the representation as to Mr Blake's continuous involvement throughout the project was a misrepresentation actionable under the Misrepresentation Act 1967. I have also concluded, almost entirely as a result of Mr Thompson's own evidence, that the misrepresentation was made knowingly and deliberately by Mr Thompson, without an honest belief in its truth, and was therefore fraudulent. I draw the fair inference that, but for the misrepresentation, these Contracts would not have been entered into. However, even on that basis, the Defendants have failed to show that the departure of

Mr Blake caused any delay to the project. Thus, the claim arising from this aspect of the counterclaim is likely to be limited to the disruption to and duplication by FRL arising from Mr Blake's departure and may therefore be quite modest.

270. For the reasons set out in **Section I** above, I reject the separate claims made by the Defendants that, in relation to the Piccadilly planning application, FRL were negligent or in breach of contract. Even if I am wrong, and a case in negligence had been made out on one or both of the grounds alleged, it has not been shown that the alleged defaults on the part of FRL caused any delay, either to the granting of the planning application, or to the project as a whole. The professional negligence counterclaim therefore fails in its entirety**.**

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[1] Originally known as Cambridge House, 94 Piccadilly was formerly the residence of Lord Palmerston and, from 1866 until 1999, the home of the Naval and Military Club.

[2] In The Rise of the Nouveau Riche (1999, John Murray, London), J. Mordaunt Crook describes Mentmore as "a paradigm of plutocratic luxury."

[3] The Stages here referred to are the RIBA Design Stages. Although the FRL Contracts defined the various design stages in slightly different terms, and designated them with different letters, everyone used the RIBA nomenclature both at the time, and during the trial. Ms Vela expressly confirmed this during her evidence.

[4] Although paragraph 4a of Mr Darling's Note on Causes of Action and Authorities, provided before closing submissions, suggested that a claim based on an implied term was not pursued, I took it that this was subject to the discussion on 21st May about the inter-relationship between the definition of 'Team Leader' and the general duty to co-operate.

[5] The point should also be made here that the Defendants always wanted one team leader/Principal to take charge of the whole project. We can see that recorded in Mr Murdoch's very first memo of 5th August 2005 (paragraph 33 above). It is clear that they saw Mr Blake as the perfect person to fulfil that crucial role.

[6] At the hearing on 11th June, arranged at my request, so that I could raise specific questions about certain matters, including the Defendants' pleaded claim for loss, Mr Darling sought to persuade me to allow the Defendants to amend the defence and counterclaim to plead loss in this new way. I decline that request; not only was it made much too late, but the application was also hopeless, there being no evidence on which such a claim could be sustained.

[7] The tree is dealt with further at paragraph 259 below.

[8] Mr Reed, an interior designer called by the Defendants, suggested that the tree should simply have been cut down overnight. I apprehend that I was not alone in regarding this evidence as both laughable and wrong.