JUDGMENT of HIS HONOUR JUDGE BOWSHER Q.C. TCC 8th March, 1999

Introduction

1. Co-operative Retail Services Limited (CRS) is a national retailer. It operates a variety of businesses ranging from food stores to funeral parlours. Business is undertaken from approximately 730 premises across the country. The shops vary widely in character from corner shops to large sophisticated stores. The number of premises and the equipment in them vary from time to time with acquisitions and disposals.

2. During 1994/1995 CRS decided to contract out to a national contractor the task of maintaining and repairing mechanical and electrical plant within its various premises. The Society appointed Wasp Management plc (Wasp) as its professional advisor.

3. By a written contract executed in October 1996 commencing from 5th February 1996 CRS contracted with the Plaintiff (Ellis Tylin) to provide the required maintenance and repair service.

4. The contract was for a period of 3 years with provision for revision of rates of payment at the end of the first and second years.

5. The contract was operated for a year. The relationship between the parties did not run smoothly. Ellis Tylin have acknowledged that they were not happy with the standard of service which they provided. As the first year came to an end, disputes arose between the parties, and the operation of the contract came to an end three months after the end of the first year, in May, 1997.

6. In this action, the parties ask for the determination of their respective rights under the contract and under an alleged oral collateral contract.

7. The action comes before me for trial of certain preliminary issues.

The Preliminary Issues

8. The preliminary issues are:

Collateral Contract

(1) Did the Plaintiff and Defendant conclude a collateral contract or additional oral term as pleaded at paragraphs 2.1 and 3.1A(b) of the Amended Statement of Claim?

(2) If so, did Mr Jolly of Wasp have actual and/or ostensible authority to conclude such contract on behalf of the Defendant?

Abatement

(3) Did the parties reach an agreement as pleaded in paragraph 3.5(a) of the Amended Statement of Claim?

(4) If the parties did conclude an agreement as alleged at paragraph 3.5(a) of the Amended Statement of Claim, did it have the effect contended for at paragraph 3.5(c)?

(5) Did the parties reach an agreement as pleaded in paragraph 8(e) and (f) of the Reply?

(6) If the parties did reach an agreement as alleged in paragraph 8(e) and 8(f) of the Reply, did it have the effect contended for in paragraph 8(g) of the Reply?

(7) If the parties did conclude an agreement as alleged in paragraph 3.5(a) of the Amended Statement of Claim and/or paragraphs 8(e) and (f) of the Reply and on the assumptions:-

i) that the Plaintiff failed to comply with the minimum maintenance obligations as pleaded at paragraph 43A(i) of the Defence;

ii) that the Plaintiff was required to undertake the specific Inspections as pleaded at paragraph 44 of the Defence; and

iii) that the Plaintiff failed properly to maintain plant as pleaded in paragraph 45 and Schedule 6 of the Defence;

iv) that the defence of abatement would be available to the Defendant in respect of the failure identified at (i) to (iii) above;

is the effect of the agreement made in September 1996 and/or in March 1997 to deprive the Defendant of the defence of abatement?

Repudiation/Termination

(8) Did the Plaintiff terminate the contract in accordance with the provisions of clause 1.8?

(9) If the Plaintiff did not terminate the contract in accordance with the provisions of clause 1.8, can it rely upon the matters pleaded at paragraph 4.4 of the Amended Statement of Claim, and if so, to what effect?

(10) Did the Plaintiff and Defendant reach agreement as to the amount of fees payable for the second year's services as alleged at paragraph 33 of the Defence?

(11) If such an agreement was reached, what is its effect?

(12) In the light of the answers to the questions given above, was the Plaintiff in repudiatory breach of contract by ceasing work as from 4th May 1997?

The Contract

9. Ellis Tylin submitted a tender on 21 September, 1995, and started work on 5 February, 1996 pursuant to a letter of intent. The contract was executed by the parties in October, 1996 with effect from 5 February, 1996.

10. For an annual fee of £435,418 Ellis Tylin undertook to provide "comprehensive preventative and reactive maintenance" to the plant at all the premises owned by CRS. Preventative maintenance involved monthly, quarterly, half-yearly and annual inspections as required by certain national standards. The frequency of inspection and the nature of the maintenance to be undertaken on each visit would vary with the type of plant at any particular site. Reactive maintenance is essentially a repair service. If plant malfunctioned Ellis Tylin was contracted to attend and undertake the necessary repair. Time limits were specified for the speed of service required. The reaction time would vary depending upon the nature of the failure. Emergency repairs were to be undertaken in either two or four hours. There was to be no extra payment for "call-outs" for reactive maintenance provided the equipment in question fell within the ambit of the contract.

11. Certain items were excluded from the maintenance obligation. One of the exclusions gave rise to considerable difficulty and has been much discussed in this case. In the first 90 days of the contract, Ellis Tylin was to inspect all plant and equipment and report to CRS all malfunctioning equipment not readily identifiable by visible inspection. Ellis Tylin were not to be responsible for defective plant and equipment identified within that 90 day period other than for normal maintenance and breakdown requirements. A practical problem arose. Ellis Tylin could only make a sample survey before the contract period began. There was some dispute as to the practicable size of that sample, which is perhaps not very important. Whether the sample could be small or large, the bulk of the equipment remained to be surveyed within the first 90 days, and until the survey was completed, the full extent of the obligations of Ellis Tylin could not be known. In making their tender, Ellis Tylin had to make an estimate of their obligations and take the risk that the price they tendered was adequate. If called out in the first 90 days to repair an item which had not been surveyed, it would be necessary for Ellis Tylin to report the equipment as defective before working on it if it was to go on the list of property for which they were not responsible: there was a provision (clause 1.6.1.11) which made them responsible for equipment which they had worked on. Ellis Tylin had a problem and it was their responsibility to solve the problem. They could do that by devoting sufficient resources to making the survey as quickly as possible and meanwhile to ensure that engineers sent on call-out to equipment which had not been surveyed had sufficient skill and experience to determine, before they worked on it, whether the equipment should be added to the list of defective equipment. Ellis Tylin have sought to involve CRS in solving this problem.

12. The written agreement is long and complex and in places not easy to understand. It includes the following terms:

7. In this Agreement (including the recitals) unless the context requires otherwise the following words and expressions shall have the following meanings:

1.1 DEFINITIONS

*1.1.1.2 "**Code**"*

the British Standard Codes of Practice, Statutes, Regulations, and Regulations and Guidance Notes issued by the Health and Safety Executive and any amendment(s) thereto and any other regulations and notes issued by any other authorities and bodies relevant in the reasonable opinion of CRS;

1.1.1.3 ***Comprehensive Preventative and Reactive Maintenance*** *the Agreement is based on all installed Plant & Equipment and services being functional within the parameters of usage and best practice. It is incumbent on the Contractor within the first 90 days of the agreement to inspect and report to CRS all malfunctioning equipment products or systems not readily identifiable by visible inspection.*

8. At cost to the Contractor and included within the Fees is the planned preventative and reactive maintenance of the Plant and Equipment. The Contractor shall operate, clean, service, maintain and repair the Plant and Equipment except where such malfunctioning equipment is in the opinion of CRS merely cosmetic.

9. Planned Preventative Maintenance of the Plant and Equipment shall cover breakdowns, repairs, emergency call-outs and supply of all consumable items, the provision of strategic spares and the replacement of all parts and components associated with the Plant and Equipment required through use or fair wear and tear.

10. The following are excluded:-

11. Repair or replacement due to storm, flood, fire, riot or act of war-,

12. Repair or replacement due to misuse of Plant and Equipment by others;

13. Repair or replacement due to vandalism or malicious acts by others;

14. Those items of Plant and Equipment which are excluded or which are to be replaced by CRS (but not their replacements) which may from time to time be identified;

15. Builders work (unless it is relevant to the replacement of Plant and Equipment under this Agreement);

16. Additional Works;

1.6.1.11 Within the first 90 days of this agreement it (CRS) will inspect all Plant & Equipment and report any malfunction or failure to function within the parameters of usage and best practice. The Contractor shall not be responsible for defective plant and equipment identified within this 90 day other than for normal maintenance and breakdown requirements. The Contractor shall not be responsible for failure 'of plant and equipment within this 90 day period unless such Plant and Equipment has been subject to works by the Contractor. Responsibility for such plant will be limited to normal maintenance and break-down requirements within this 90-day period.

1.6.1.12 It will provide the Preventative and Reactive Maintenance in respect of all Plant & Equipment which is not reported under Clause 1.6. 1.1 1 and in respect of all Plant & Equipment that has been reported once the reported malfunction is corrected by CRS.

1.6.1.13 To use its best endeavours to provide the services during the Core Service Working Hours and failing which during any remaining hour.

1.8 ***ALTERATION OF FEES***

1.8.1 After the expiry of 10 months from the date specified in Clause 10, either party may propose, and thereafter only once every twelve months, in writing to the other an alteration in the amount of the Fees to take effect from a date not being earlier than two months after the date- of its proposal.

1.8.2 If the amount of the proposed alteration is not agreed between the parties on or before the last day of the two month period referred to in Clause 1.8.1, this Agreement may be terminated by CRS giving to the Contractor not less than one or more than three month's notice in writing, or by the Contractor giving to CRS three months notice in writing. In the interim, the Fees shall continue to be paid at the rate and in the manner existing at the date of the proposal made under Clause I.8.1.

1.8.3 If required by the CRS, a new premise added to the Agreement, with a decrease or increase of the Fees in accordance with the standard unit costs detailed in Section Six Schedule 9, or as may be agreed from time to time by CRS and the Contractor. CRS shall give a minimum of 30 days notice of such an addition or omission.

1.9.1 Additional Work means any additional work to be carried out which is, in CRS' view, necessary to enable the Plant & Equipment to continue in use and which is not included within the scope of this Agreement. The Contractor is only authorised to proceed with Additional Work- when CRS issues an instruction for it.

1.9.2 The Contractor shall bring to the attention of CRS any work not included in the Agreement and considered by the Contractor to be Additional Work. The Contractor in its recommendations and proposals shall where possible indicate its charge not to be exceeded for the Additional Work. .

1.9.3Where the extent of the Additional Work is unknown, the Contractor shall calculate the charges from the rates for materials, labour and specialist sub-contractors shown in Section 6.

1.9.4 Invoices for Additional Work shall be submitted by the Contractor after the work has been completed and shall be accompanied by work sheets stating the precise nature of all problems encountered, the work carried out, materials used and hours expended (signed by the CRS representative).

1.9.5 If CRS deems that the Additional Work was due to poor performance of the Contractor of its obligations to fulfil the Service Objective, CRS may withhold payments of the disputed amount.

1.10 ***DURATION***

This Agreement shall come into force and operate on the fifth day of February 1996 and, save as otherwise provided in this Agreement, shall continue in force for a period of three years.

2.1.2.7 The Agreement is based on all installed Plant and Equipment and services being functional within the parameters of usage and best practice

It is incumbent on the part of the Contractor within the first 90 days of the commencement of the Agreement to inspect and report to CRS any malfunctioning equipment products or systems not otherwise identified and not readily identifiable by visual inspection. Any subsequent claim by the Contractor in this respect shall not be accepted.

The failure of either party at any time or times to require performance of any provision of this Agreement shall in no manner affect its right to enforce such provision at a later time. No waiver by either party of any condition nor the breach of any term, covenant representation or warranty contained in this Agreement whether by conduct or otherwise in any one or more instances shall .be deemed to be or construed as a waiver of the breach of any other term. representation or warranty in this Agreement.

1.22 WAIVER

No failure or delay by either party in exercising any right power remedy or privilege under this Agreement shall operate as a waiver nor shall any single or partial exercise by either party of any right power remedy or privilege preclude any other or further exercise of the same. or tile exercise of any other right power remedy or privilege. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies otherwise provided by law.

The Call Out Costings Promise

13. Ellis Tylin contend that at a meeting between some of their employees and employees of Wasp on 5 January, 1996 it was orally agreed that if a contract was concluded between Ellis Tylin and CWS, during the first 90 days of the contract, (i) Ellis Tylin would not be required to provide comprehensive mechanical and electrical services maintenance cover, and (ii) Ellis Tylin could and would charge for all time on site and for all materials used as a result of emergency call-outs to CWS premises over and above the fixed fee due under the contract until 5 May, 1996. It is further contended that that agreement was confirmed orally at a meeting on 23 January, 1996, and was also confirmed in writing in a letter dated 4 March, 1996 from Mr. Weir of Ellis Tylin to Mr. Jolly of Wasp.

14. There was a meeting on 5 January, 1996 attended by Messrs Blanco, Weir, Bloom, and Arrowsmith on behalf of Ellis Tylin, and by Messrs. Jolly and Glenister of Wasp. I heard evidence from Mr. Blanco of Ellis Tylin and from Messrs. Jolly and Glenister of Wasp.

15. There is no evidence that Wasp were authorised by CRS to make any contract on their behalf and I find that Wasp was not so authorised. It is alleged in the alternative that Wasp had ostensible authority to contract on behalf of CRS. It is clear that after Ellis Tylin had tendered on the basis of draft terms of agreement, Wasp were authorised to negotiate details of those terms for consideration by the parties with a view to their final agreement by the parties. The invitation to tender contained the following words: *" all matters hereunder are subject to the execution of a formal written agreement..."*.

The letter of intent from CRS dated 29 November, 1995, authorising commencement of the work stated that the agreement is -*"necessarily subject to final ratification of the contract agreement by both parties, and CRS Board approval."*

Despite evidence of Mr. Blanco to the contrary (from which he substantially resiled in cross-examination), it is plain that all concerned were clearly aware that any terms negotiated with Wasp

were subject to Board approval. There was no representation to the contrary, and the essential elements of ostensible authority were absent: **Rama Corporation Limited v. Proved Tin and General Investment Limited [**1952] 2 QB 147 at 149, 150.

16. If there had been any agreement such as is alleged by Ellis Tylin, there was ample opportunity for Ellis Tylin to insist that the agreement was spelt out in the terms of the written agreement signed by them months later. They did not raise the matter on signing the agreement. Both the facts and the law are against Ellis Tylin on this contention and I find against them.

17. Counsel for CRS cited the well known passage from the speech of Lord Moulton in **Heilbut Symons & Co. v. Buckleton [**1913] AC 30 at 47. "*...such collateral contracts must from their very nature be rare...the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, ...are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contract but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown*."

Similar statements are to be found in **Goldfoot v. Welch** [1914] 1 Ch 213 at 218 per Eve J. and **Henderson v. Arthur** [1907] 1 KB 10 at 12 per Collins M.R. and 13 per Cozens Hardy L.J.

18. Counsel for Ellis Tylin submitted that **Heilbut Symons & Co. v. Buckleton** should be read in the light of criticism of that case from Lord Denning M.R. in J**. Evans & Son (Portsmouth) Limited v. Andrea Merzario Limited** [1976] 1 WLR 1078 at 1081 and also in the light of other authorities cited in Chitty on Contracts, 27th edition paragraphs 12-004 and 12-005. The courts are now more ready to find that a pre-contractual assurance has given rise to a collateral contract, and there are many reported examples of such collateral contracts. But on the evidence, I find that there was no such collateral contract in this case. I now turn to review that evidence in more detail.

19. Mr. Thomas Blanco was in 1996 a director of Ellis Tylin with responsibility for the whole of England outside London. His responsibility was for the profitable operation of the company's business. In his diary note of the meeting of 5 January, 1996, he recorded; "*Interim period default in abeyance and price retrospective Health and Safety direct to Wasp."*

20. In evidence, Mr. Blanco explained that by that note he meant that it was agreed that during the 90 day (or "interim") period, Ellis Tylin would not be penalised if unable to provide comprehensive cover (i.e. to that extent the duty was "***in abeyance***"), and they would be able to charge for call-outs, pricing them retrospectively on raising an invoice (i.e. "***price retrospective***"). Even if that is the meaning to be attributed to that note, neither in the note nor in the evidence was it explained what was the extent of the right to charge for call-outs provided by collateral agreement. The Statement of Claim limits the alleged collateral agreement to a reference to "emergency" call-outs. Were Ellis Tylin to be entitled to charge for **all** emergency call-outs in addition to the substantial basic fee or only for some emergency call-outs, and if the latter, what call-outs? The allegation is that it was agreed that Ellis Tylin should receive the substantial basic fee for the first 90 days but should not be penalised for failing to do the work for which they were paid, and in addition, to the extent that they did do the work for which they were paid, they should be paid extra. That is a difficult proposition to swallow.

21. Mr. Jolly and Mr. Glenister denied that there was any such collateral agreement made on 5th January or confirmed on 23 January, 1996. At the latter meeting, Mr. Glenister was present, but Mr. Jolly was not.

22. The first mention of any agreement in such terms is in a document which appears to be either a draft or an unsigned copy not on headed notepaper in the following terms: *"I would confirm our understanding that, as discussed at our meeting on 5th January 1996 and at a consequent meeting on 23rd January 1996, the comprehensive element of the contract is not applicable until 90 days into the contract. To that end, Ellis Tylin will charge for all time on site, together with materials used as a result of an emergency call out to CRS premises until 5th May 1996."*

That document was addressed to Wasp for the attention of Mr. Jolly.

23. Mr. Jolly denies that he ever received the letter dated 4 March, 1996. Mr. Blanco says that he drafted it when he was away from his office, and it was typed by his secretary for the signature of the Contracts Manager, Mr. Eoin Weir. Mr. Blanco conceded that he could not say that to his knowledge the letter was sent. It appears from a fax dated 4 March, 1996 from Mr. Weir to Mr. Blanco that Mr. Blanco was consulted on this topic by Mr. Weir and I infer from all the evidence that the letter was never sent. There is certainly no reference to it in any later correspondence and other correspondence is inconsistent with any collateral agreement having been made in the terms now alleged.

24. Mr. Jolly was asked by Mr. Gartside of CRS to explain the position regarding the liability of CRS to pay invoices submitted by Ellis Tylin for payments over and above the agreed basic fee. In response to that request, Mr. Jolly sent to Mr. Gartside a fax dated 10 April, 1996. In that fax, Mr. Jolly quoted Clause 1.6.1.11 and explained its effect. Mr. Jolly made no mention of any collateral agreement varying that clause or varying any other clause of the agreement. I see nothing in Mr. Jolly's explanation inconsistent with the terms of the written agreement.

25. On 17 April, 1996, Mr. Gartside wrote to Mr. Weir accepting some invoices and rejecting others for reasons wholly consistent with the terms of the written agreement, which had not then been signed.

26. On 9 May, 1996, Mr. Weir submitted the invoices again to Mr. Gartside. If there were a collateral agreement between the parties, one would expect Mr. Weir to have said so at that stage, if not before, but he did not.

27. On 15 May, 1996, Mr. Gartside responded accepting some invoices and rejecting others and asking that others be corrected.

28. On 14 May, 1996 there was a meeting between Ellis Tylin and Wasp at which amendments to the draft contract were discussed and on 15 May, 1996 Mr. Jolly sent to CRS (with a copy to Mr. Blanco) proposed amendments to the draft of the agreement. It appears from that communication, as well as from a note in Mr. Blanco's diary, that clause 1.6.1.11 was considered and the only amendment proposed and agreed was that the words *"**usage and best practice**"* were substituted for *"**original design and usage**"*. If there had been any collateral agreement such as is now alleged, it would have required considerable redrafting of clause 1.6.1.11 and I cannot believe that the question would not have been then raised and discussed. In his letter of 15 May, Mr. Jolly wrote that the document which he hoped would be the final draft of the agreement *"has been drawn up to incorporate all items raised by Ellis Tylin at our meeting..."*

29. There was a further meeting on 23 May, 1996 and on 24 May, 1996, Mr. Blanco wrote to Mr. Gartside confirming that *"at the meeting of 23 May, 1996 the final wording of the contract was agreed"*. In the same letter, Mr. Blanco set out what he said were "operating principles" which were established at that meeting. Whatever may be the views of the parties as to the manner in which the agreement was to be operated, it is clear that the agreement was and is set out in the written agreement which was eventually signed by the parties without any variation by collateral agreement.

30. On 1 July, 1996 Mr. Gartside wrote to Mr. Blanco referring to questions raised by Ellis Tylin regarding payments made by CRS and expressing concern at the backlog of maintenance visits by Ellis Tylin. On 5 August, 1996 Mr. Blanco replied referring to difficulties faced by Ellis Tylin and then stating: *"For these reasons we sought, and received, assurances from Wasp Management in January 1996 that should some tasks be missed in the first quarter of the contract, Ellis Tylin would not be penalised. This was also known to you."*

    That was the first time that any such assurance was mentioned in correspondence, and that claim itself did not go as far as the contention now put forward.

    Eventually, in cross-examination, Mr.Blanco gave answers quite inconsistent with the existence of any collateral agreement. He was referred to a letter dated 24 June, 1996 by Mr. Arrowsmith who was then Managing Director of behalf of Ellis Tylin. Counsel for CRS put to Mr. Blanco:

    "Q. We can identify certainly, as at June 96, that Mr. Arrowsmith: (1) thought that the contract applied and (2) appreciated that the Society was entitled to withhold money for non-performance?

    A. Correct.

Q. He would not have written in those terms, would he, Mr. Blanco, if there had been any form of agreement or suggestion that the Society would not enforce its contractual rights?

A. Would not enforce its contractual rights? I do not know how to answer the question because I do not fully understand it. There was no dispute about the contract in existence. We were operating the contract and there was no dispute that within the contract CRS had the right to withhold payment for non-performance.

Q. Can you just then confirm for me, Mr. Blanco, that there is no reason why the Society, if it was entitled to, should not withhold rights if it satisfied the criteria of the clause?

A. Indeed."

31. I reject the evidence that there was any collateral agreement as alleged.

Repudiation/Termination

Did Ellis Tylin terminate the contract in accordance with the provisions of Clause 1.8?

32. The right of Ellis Tylin to terminate the agreement pursuant to clause 1.8 only arose if Ellis Tylin first took the action described in clause 1.8.1. That action was the making of a written proposal for the alteration of the amount of the fees. The proposal was clearly to be a proposal for alteration of future fees, not an alteration of fees payable in the past, because the alteration in the fees was to take effect from a date not earlier than 2 months after the date of the proposal. The written proposal was to be made after the expiry of 10 months from the date specified in Clause 10, that is, after the expiry of 10 months after 5th February, 1996.

33. By their Statement of Claim, Ellis Tylin allege: "*Ellis Tylin submitted its proposal for the second year by a letter dated 15th November, 1996 ("the Proposal").*"

34. By paragraph 29 of its Defence, CRS stated that *"By letter dated 15.11.96 Ellis Tylin ...submitted its proposals for year 2 of the Contract. The letter was for the purpose of clause 1.8.1 premature"*. The line taken in cross-examination and argument was inconsistent with that plea, but no objection was taken on that ground.

35. There has been much dispute between the parties
(a) as to whether that proposal was made too early,
(b) as to whether or not the time limits should be strictly complied with, and
(c) as to whether if the time limits were not adequately complied with Ellis Tylin are relieved from compliance by an estoppel by convention.

36. Despite the terms of paragraph 29 of the Defence, I take the view that the letter dated 15th November, 1996 was not a proposal for the second year at all. Accordingly, on the footing of the pleaded case, the 2 month period for agreement of a proposed alteration in fees did not begin to run and so the right to terminate under clause 1.8.2 did not arise. However, justice requires that I take a broader view. I hold that a proposal was made for the second year by a later letter dated 26 November, 1996. Because of the form of the pleadings, I gave counsel an opportunity after the close of the trial to make further submissions and I have received further submissions in writing.

37. On 7 November, 1996 Mr. Blanco prepared a draft letter which began with the words, "In accordance with clause 1.8.1 we now propose an alteration in the amount of the fee which will take effect on the anniversary date of the contract." That draft set out losses for the first year. It is common ground that the letter was not sent.

38. On 15 November, 1996 Mr. Blanco wrote and sent the letter relied on by Ellis Tylin. That letter began: *"At our meeting of 5th November, Ellis Tylin confirmed they would submit a summary of costs for 1996, and proposals for second year contract costs in accordance with clause 1.8.1."*. That letter repeated (with some variations of wording) a number of points made in the previous draft which were summarised as *"our fiscal proposals for 1966"*. The letter contained expressions of a wish to co-operate for the coming year. The letter as a whole was summarised by the last paragraph: *"Ellis Tylin is committed to working in partnership with CRS and our proposals for this year's contract uplift and ideas for the following year confirm that commitment. We trust CRS can meet with our proposals and enter dialogue in achieving our joint objective."*

An example of the "ideas for the coming year" was a suggestion that CRS might have direct access to Ellis Tylin's computers to give them on-line access to Ellis Tylin's fiscal information. While the letter of 15 November did contain ideas for the coming year, it did not put forward any proposal for alteration in the amount of the fees for the coming year.

39. In cross-examination, Mr. Blanco accepted that the letter of 15 November, 1996 did not contain any proposal for the fee for the second year: Counsel referred to the letter:

Q. So what we have when we read the introduction for your letter is, "At our meeting of 5th November, Ellis Tylin confirmed that they would submit a summary of costs for 1996 and proposals for second year contract costs in accordance with clause 1.8.1." Yes?

A. Yes.

Q. So what you were purporting to do was to do two things, a summary of costs expended in 1996 ----

A. Yes.

Q. ---- and proposals for the second year contract costs.

A. As you will see, my Lord, from the correspondence in this letter, we did not actually get to the point .... This was a combined discussion between myself and Mr. Arrowsmith at the time. We were actually focusing and trying to establish the basis of the fee or the costs, as you rightly put it, incurred at the time, and we did not incorporate a proposal for the following year.

Q. So can we agree, Mr. Blanco, that what you in effect did was set out here in this letter a summary of your costs or losses for 1996, but you did not actually get round to submitting proposals for the second year contract fee?

A. The way you put it, I would certainly challenge, but, in principle, what you say is absolutely right.

Q. It is rather more than that, Mr. Blanco. Turn please to page 574 of the file [the letter of 15 November, 1996]. Do you see the sentence just starting above the figures: "To summarize our fiscal proposals for 1996 ...." That is the year that is just, as it were, coming to an end?

A. Indeed.

Q. What you were doing here is setting out, we can compare the two if you want, but they are I think almost with a few adjustments the same items -- the same sums of money being the losses that were suffered on the year 96?

A. Mr. Dennison, my Lord, the word "losses" is not correct; they are costs.

Q. It was the word losses that you had used in the draft?

A. But, Mr. Dennison, these are costs that we are saying here. They are fiscal proposals for 1996, which is costs. It is not representative of loss.

Q In the draft it was loss; when you had developed the draft you thought, well in fact these represent our costs and so we are putting forward those in respect of 1996?

A. Indeed.

Q. What you were, in essence, seeking was an increase in the 1996 fee because of the additional costs you had incurred?

A. That is correct.

Q. In your statement, Mr. Blanco, I think we can perhaps correct paragraph 7.5, at page 21, please. Do you have halfway starting: "As a result of these discussions I wrote to CRS on 15th November"? Do you have that, Mr. Blanco?

A. I do, indeed.

Q. Would it be fair, as it were, effectively to delete the section starting 'setting out ET's detailed fee proposal for the year two'?

A. My Lord, I would accept that."

The last of those questions and answers referred to a sentence in Mr. Blanco's witness statement in these terms: *"As a result of those discussions, I wrote to the CRS on 15th November 1996, setting out Ellis Tylin's detailed fee proposals for the Year 2"*. It was the last phrase of that sentence which Mr. Blanco agreed should be deleted.

40. The letter of 15 November, 1996 not being a proposal, premature or otherwise, within the meaning of clause 1.8.1 one looks to see whether such a proposal was made later.

41. By letter of 22 November, 1996, Mr. Gartside told Mr. Blanco that he was unable to extract from the letter of 15 November, 1996 any proposals for year 2. Mr. Blanco said, and I accept, that he discussed the matter with Mr. Gartside and agreed to submit proposals at the end of November.

42. By letter dated 26 November, 1996, Mr. Blanco for the first time made a proposal for the second year. In that letter he wrote: *"In the matter of our proposals for second year costs, for the avoidance of doubt we confirm the sum of ...215,958 be added to the original contract sum of ...441,393, total ...657,351. A 3% cost-of-living increase would be proposed for 1997, giving a revised proposed contract price of ...677,072.*
In addition we have asked for consideration for the call out rates which will likewise be subject to a 3% increase."

    By that proposal, Mr. Blanco simply added his 1966 figure for "losses" or "costs" to the contract sum and also added an uplift for cost of living increase. A meeting was proposed for 27 November, 1996 to discuss the matter.

43. At the meeting on 27 November, 1996 Mr. Gartside regarded the proposal that Ellis Tylin should receive a 25% increase in fee for the second year as unrealistic and he believed that Ellis Tylin were looking for termination of a contract which they found unprofitable and which neither party regarded as being performed satisfactorily by Ellis Tylin. I agree that the proposal was unrealistic and it was not substantiated by detailed figures, but it was a proposal. Mr. Gartside asked for substantiation of the figures and for assurance that Ellis Tylin intended to continue with the contract in 1997. He repeated those requests in his letter dated 2 December, 1996. In that letter he also said he was willing to consider adjusting the fee to take account of an increase in the equipment owned by CRS and to be maintained: *"The various headings (your letter 15 November 1996) were discussed and I expressed CRS's willingness to consider increased assets as a basis for fee adjustment. .....*
I would ask you for clarification of your position with respect to your letters 15 November 1996 relating to additional moneys for 1966 and your letter 26 November 1996 relating to financial year 1997.
Specifically can CRS rely on Ellis Tylin continuing with this agreement during the financial year 1997 and that no disagreement with respect to clause 1.8 exists between us. Your written response would be appreciated."

44. Despite Mr. Gartside's request for a written response to that letter, no reply was written.

45. There was produced a letter dated 18 December, 1996 typed on Ellis Tylin's headed notepaper and addressed to Mr. Gartside by Mr. Blanco. On enquiry, it appeared that that document came from documents disclosed by Ellis Tylin and had been found in the file of a Mr. John Beeston (an employee of Ellis Tylin) to whom it had been copied. Mr. Gartside denies having received the letter. There is no direct evidence that the letter was sent, and I find that it was not. The letter refers to Appendices 1, 2, and 3, said to substantiate various costs. Those appendices were not disclosed, and I infer that although the letter was written it was not sent because the Appendices were not prepared. Later, a different schedule was prepared, being a schedule of increased assets and was sent with a letter of 11 February, 1997.

46. There was a meeting on 19 December, 1996 between Mr. Blanco and Mr. Gartside together with a Mr. Scutt of CRS. On 20 December, 1996, Mr. Blanco sent to Mr.Gartside a brief letter mentioning the meeting and looking forward to Mr. Gartside's "further instructions". Mr. Gartside wrote a longer letter of 23 December, 1996, which I accept accurately summarised what passed at that meeting. Mr. Gartside expressed willingness to negotiate an increased fee for the second year to take account of both RPI adjustments (2%) and increased assets. Mr. Gartside also expressed concern about failures of performance on the part of Ellis Tylin and said that CRS would closely monitor performance in January and February. Mr. Gartside did not record in his letter that he had formed the view that Ellis Tylin had made a substantial loss on the first year and were looking for a way to get out of the contract.

47. It is evident from a memorandum sent by Mr. Blanco to his Managing Director, Mr. Arrowsmith, on 24 December, 1996 that the letter from Mr. Gartside caused him to fear that CRS might terminate the contract for "non-performance" and it was necessary to "respond vigorously" first. Despite some prevarication from Mr. Blanco, I find that he was fully party to a letter sent by Mr. Arrowsmith dated 24 December, 1996 while Mr. Blanco was on holiday. In that letter, Mr. Arrowsmith said that an RPI

adjustment was unacceptable and even an adjustment for additional assets would be inadequate. The letter proposed that the adjustment for the second year should be considered fixed for the third year, and asked for CRS's proposals. The letter then continued: *"It is with considerable regret that after a most difficult year for both parties on this contract, we now must formally advise you that unless there is an agreement to the fees for the 2nd year, we intend to issue a formal notice of termination of this contract in accordance with clause 1.8.2. ..... We acknowledge that further meetings are arranged to try to resolve the fee issue and hopefully agreement can be reached to negate this formal notice."*

48. In the absence of Mr. Gartside, on 31 December, 1996, Mr. Scutt wrote a holding reply to that letter. Then on 2 January, 1997 Mr. Blanco wrote again to Mr. Gartside stating that he had put forward a fee proposal on 26 November, 1996. That I regard as a correct statement of fact. He then wrote: *"Our proposal is that from 5th February, 1997 the contract fee will be ...677,072.00, invoiced in accordance with previous established procedures. ..... Please confirm your acceptance of our contract fee adjustment or alternative proposals that Ellis Tylin may consider."*

49. On 6 January, 1997, Mr. Gartside replied to Mr. Blanco's letter of 2 January and Mr, Arrowsmith's letter of 24 December. Mr. Gartside did not contest Mr. Blanco's statement that the proposal of 26 November 1996 was intended to be effective from 5 February, 1997. That date was the first day of the second year of the contract.

50. In his letter of 6 January, 1997, Mr. Gartside reiterated his previous stance on any increase in fee and wrote: *"Can you confirm whether Ellis Tylin has issued a notice of termination of our Maintenance Agreement?"*

51. On 10 January, 1997, Mr. Gartside wrote to Mr. Blanco and his colleague Mr. Beeston complaining of unacceptable and uncompleted work, requiring the deficiencies to be put right. He made the point, "I have not to date withheld any payments regarding this incomplete work" and also warned, "We may need to review the cumulative payments made with respect to the overall quality of work carried out".

52. By letters of 16 and 20 January, 1997, Mr. Gartside raised with Mr. Beeston further matters regarding deficiencies in Ellis Tylin's work. Then on 20 January, he wrote to both Mr. Beeston and Mr. Blanco regarding proposed adjustment downwards of the fee for the previous year to take account of works not completed.

53. On 21 January, 1997 Mr. Blanco replied to Mr. Gartside's letter of 6 January, 1997 stating: *"We can confirm that Ellis Tylin has not issued formal notice of termination of our maintenance contract, and reiterate our commitment to the contract, and look forward to reaching agreement on current year adjustment and second year fee."*

54. On 3 February, 1997 Mr. Arrowsmith wrote to Mr. Scutt of CRS giving notice of termination in the following terms: *"Further to our letters dated 15th and 26th November, 1996.*
It is with regret that we have not been able to agree an alteration of fees on or before the last day of the two month period following our letter of proposed alteration to fees dated 15th November, 1996. In accordance with Clause 1.8.2 we hereby give 3 months notice of termination of the contract due to non-agreement of fees.
We will continue our efforts during the notice period to secure agreement on fees, however for the avoidance of doubt, the notice period will expire on 4th May 1997.
We hope that an agreement can be reached, the notice withdrawn, and the considerable work put into this contract allowed to develop to the benefit of all parties."

55. On 4 February, 1997, Mr. Blanco wrote to Mr. Gartside a letter received by him on 6 February, 1997 in the following terms: *"In accordance with the contract, Ellis Tylin have submitted proposals for fee adjustment, as our letter of 26th November, 1996 defines.*
At the anniversary of the contract, viz 5th February 1997, we have not reached agreement on fee adjustment for 1997.
We confirm that outline agreement has been established as of 3rd February, and subject to further clarification is to be ratified between our two companies at Rochdale on 14th February, any such agreement being backdated to 5th February 1997.

Should agreement not be reached on that date, we confirm that the notice of termination required in clause 1.8.2 is effective from 5th February 1997, and will expire on 4th May 1997.
We trust that our revised strategy and the efforts of both companies will be allowed to develop to the benefit of both companies."

56. As mentioned in those letters, there had been a meeting on 3 February 1997 at which Mr. Gartside had outlined the basis on which CRS would be willing to revise the fees for 1996 and 1997. Ellis Tylin were to provide more information, and there was to be a further meeting on 14 February, 1997.

57. By two letters dated 6 February, 1997, Ellis Tylin sent to CRS detailed proposals for adjustments to the fees for 1996 and 1997 respectively. On 7 February, 1997, Mr. Gartside replied that he considered those proposals premature since the parties had not yet met for a review meeting on 13 February at which the valuation of the first year works was to be discussed, and he set out various heads of deficiencies in the work for the first year which he considered needed to be discussed. In a second letter of that date, he commented on the fee adjustment proposal for 1997. On 11 February, Mr. Blanco sent a long schedule of additional assets.

58. On 14 February, 1997 there was a meeting at Rochdale at which were present Messrs. Tony Smith, Scutt, and Gartside for CRS and Messrs. Arrowsmith and Blanco for Ellis Tylin. Mr. Scutt took minutes of that meeting and distributed them to all present at the meeting. Both Mr. Blanco and Mr. Gartside said in evidence that those minutes were accurate. On 2 June, 1997, Mr. Blanco made a note for his file recording the outcome of that meeting.

59. There is a dispute between the parties as to whether there was at the meeting an agreement made for the fee for 1997.

60. Having heard the evidence of Mr. Gartside and Mr. Blanco as to what took place at the meeting of 14 February, 1997, and considering that evidence in the light of the surrounding documents, I accept the evidence of Mr. Gartside. I find that at that meeting, CRS and Ellis Tylin agreed the fees payable for the second year of the contract.

61. At the meeting on 14 February, there was a lengthy discussion about difficulties of the previous year. This led to and included a discussion of the meaning of the word "comprehensive" in the contract. Mr. Blanco has contended that in this discussion, CRS put forward a new term for the second year. I do not accept that contention. There were differences of view as to how the contract should be interpreted, but there was no proposal that the contract should be altered in that regard.

62. The cover to be provided under the agreement was varied in that store **lighting** was to be removed from the cover for the second year since Ellis Tylin did not have the expertise or capacity to deal with it, and the removal of the store **lighting** was to be reflected in the adjustment to the second year contract fees. This is not controversial.

63. At the meeting of 14 February, 1997, it was agreed:
(a) that the contract fee for the first year was adjusted to ...411,000 to take into account adjustments to the stores and to reflect a deduction proportional to the number of scheduled planned maintenance visits which had not been carried out. That adjustment was agreed without any agreement that CRS should lose any right to claim against Ellis Tylin for any under performance in the first year;
(b) That CRS would pay a further ...24,000 to Ellis Tylin in full and final settlement of call-out charges for the first 90 days of the contract;
(c) That subject to production of documents substantiating invoices for additional works, CRS would pay outstanding invoices of ...45,000.
(d) That the fee for the second year was ...547,767.

64. There was a further meeting on 27 February, 1997 between Messrs. Gartside, Arrowsmith, Beeston and Blanco at the Bristol offices of Ellis Tylin. The purpose of the meeting was to discuss the definition of "comprehensive" under the contract and there was such a discussion. A mechanism for monthly fee adjustments was agreed. There was some discussion about the outstanding invoices for the first year. It was again confirmed that the second year fee was ...547,767.

65. Mr. Gartside's understanding was that as the second year fee had been agreed, the notice to terminate given by Ellis Tylin was overridden by that agreement in accordance with the terms of Mr. Blanco's letter of 4 February, 1997.

66. I agree with Mr. Gartside's understanding of the position. Even if the notice (or notices) of termination were valid, they were withdrawn by the agreement made on 14 February 1999 for the second year, that agreement being backdated to the first day of the second year.

67. Mr. Blanco's file note made on 2 June 1997 contained the following: *"The meeting was positive and productive:*
I E.T strategy paper accepted.
II Fee proposal 1997 was agreed.
III Proposed valuation of ...485,000 for 1996 was discussed, but required clarification. DG given authority to negotiate on that figure.
Discussion took place on interpretation of "Comprehensive" and a proposal was to be made by DG to clarify this interpretation (never formally done but ET have a copy of draft for reference).
To maintain momentum, as MB was on jury service, JAA was to meet with DG and John Beeston to ratify the agreement. (Subsequently this was arranged for 27th February 1997 in Bristol)."

68. In his evidence, Mr.Blanco said that his file note, "Fee proposal 1997 was agreed" meant only that the figure was agreed and that this was subject to a counter-offer made by CRS as to the meaning of "comprehensive". I do not accept that as a correct account of what took place at the meeting. Neither party suggested that the terms of the contract as to "comprehensive" should be altered, though there was discussion as to its meaning. Nor do I accept that the agreement made on 14 February was expressed to require any ratification, though if ratification were required, it was in fact given on 27th February. As a matter of detail, although it had been anticipated that Mr. Blanco would be unable to attend the meeting on 27 February, he was released early from jury service and did attend.

69. On 17 February, 1997 Mr. Arrowsmith wrote to Mr. Gartside confirming the agreement reached on 14 February. His letter included the following: *"We drew to your attention our continued commitment to the contract despite considerable changes both in the understandings reached in pre-contract discussions with your consultants and the actual interpretation of the contract when started. We also re-affirmed our commitment to the contract for the future."*
That is the clearest indication that the notice of termination was withdrawn and that the contract was proceeding in the second year.
After referring to the agreement about payment for the first year, Mr. Arrowsmith continued:
"The total agreed contract figure excluding additions/dilapidations and other items not covered under the main contract and all light fittings and lamps, for 1997/98 is ...547,767 as per our letter dated 12th February, 1997."
That is a clear confirmation of the oral agreement for the second year fee.
Mr. Arrowsmith then stated that there were a few points raised which required clarification and he mentioned those.
Mr. Arrowsmith then referred to the discussion about "comprehensive":
"The contract is a preventative and reactionary maintenance contract which does not encompass total guarantee for a 'new for old replacement' contract. Whereas we may ultimately achieve a store by store agreement, this will be for the scope of works as included in clause 1.1.1.3."
That accords with Mr. Gartside's understanding. Neither party was seeking to change the contract. Both parties were affirming the contract but discussions as to its interpretation in practice continued. Mr. Arrowsmith then again indicated that the contract was on foot for the second year:
"We look forward to the next twelve months during which the lessons learned by all will develop to the benefit of CRS and ET."

70. Mr. Gartside on behalf of CRS confirmed the agreement of 14 February by his letter dated 18 February, 1997. That letter included the following: *"1997 Fee Adjustment*
The figure of ...547,779 is acceptable, provided that all assets are now covered. We do not anticipate or indeed accept "missed" items or any control systems as constituting a claim for additional monies. Where new assets are installed as - of a refit programme, additional monies may be due dependent upon circumstances. Ellis Tylin

accept, that subject to adjustment for inflation, and agreed variations in scope, this figure will apply for the next 2 years."

Mr. Gartside's proviso that all assets are now covered added nothing to what had been agreed. As Mr. Gartside said in cross-examination, all he was doing was making sure that the asset register provided by Ellis Tylin was accurate and complete. Mr. Blanco argued that the words "subject to adjustment for inflation, and agreed variations in scope, this figure will apply for the next 2 years" were another counter-offer which vitiated any agreement. That is incorrect. The agreement had already been made. In any event, the reference to the agreement applying to the next two years merely took up the proposal made by Mr. Arrowsmith in his letter of 24 December, 1996 and if Ellis Tylin wished to withdraw that proposal they could have said so.

71. A letter dated 20 February, 1997 was produced which in the light of the preceding letters is quite extraordinary. The letter was typed on Ellis Tylin note paper with Mr. Arrowsmith's name at the foot but was unsigned. It is in the following terms: *"Further to our letter dated 4th February, 97, our subsequent meeting in Rochdale and our letter dated 17 February, it is with regret that we advise you that there is still no agreement in connection with fees for the above contract moving into the second year.*
We confirm that we are still trying to reach an agreement during this notice period and look forward at the earliest possible time confirming agreement so that we all can move confidently forward into the second year of the contract."

CRS deny receiving that letter and I find that it was another letter which was not sent. It is quite inconsistent with what had happened.

72. The primary contention put forward on behalf of CRS regarding termination is that if Ellis Tylin are to rely on the termination provisions of Clause 1.8 they must show strict compliance with its terms as to time and they have not done so. Ellis Tylin's first answer to that is that strict compliance with time limits is not required by law.

73. Counsel for CRS submitted that Clause 1.8 of the contract may be construed either as a determination clause or as a break clause comparable to the type of provision found in leases. Strict compliance, he submitted, is required: the act of contractual determination is one which deprives the other party of the benefit of the contract it has concluded.

74. Counsel cited passages from text books relating to contractual rights to determine:
Chitty on Contracts (27th Ed.), at 22.046: *"The terms of the [termination] notice may provide that notice can only be given after a specified event Prima facie the validity of the notice depends on the precise observance of the specified event."*

Interpretation of Contracts by Kim Lewison Q.C. (2nd Ed.) at p.439: *"An option to terminate is construed in the same manner as any other option, and accordingly any condition must be strictly complied with. Any condition precedent must be strictly fulfilled. The clause must be exercised strictly in accordance with its terms."*

Hudson's Building and Engineering Contracts (11th Ed.) at 12.004: *"Exact and meticulous compliance by the determining party with any formal or procedural requirements laid down in the termination clause, for example, as to notices or time limits, will usually be required if a contractual termination is to be successful."*

75. Counsel for CRS also relied on decisions concerning leases, charters party and other documents. In **West Country Cleaners (Falmouth) Limited v. Saly** [1966] 1 WLR 1485 per Dankwerts L.J. at 1489 said: *"An option of this character [to extend the terms of a lease] is a privilege - a right which has always been treated by the law as requiring compliance with the terms and conditions upon which the option is to be exercised."*

In **Mardorf Peach & Co. Ltd v. African Sea Carriers Corporation of Liberia** [1977] AC 850 Lord Wilberforce p. 870 said: *"I would certainly go so far as to agree that the owner has to show that the conditions necessary to entitle him to withdraw [from a charterparty] have been strictly complied with".*

Counsel also relied on **Bathavon RDC v. Carlisle** [1958] 1 QB 461, a decision of the Court of Appeal concerning a notice to quit in a tenancy case, and on **Afovos Shipping Co. v. Pagnan** [1983] 1 WLR 195, a decision of the House of Lords concerning a charterparty. The House of Lords found a

termination to be invalid as the Owner had issued the notice of termination early. Payment was due by midnight on 14th June. The default notice purporting to terminate the contract was issued at 16.40 p.m. on the same day, after which it was considered impractical for the Charterers to pay the instalment. Lord Hailsham at p. 201F said: *"The question is not when the charterer would cease to be likely to pay on time but when, to quote clause 5 "punctual payment" would have failed. In my opinion this moment must relate to a particular hour, and is not dependent on the modalities of the recipient bank.* ***It is the hour of midnight*** *to which the general rule applies."*

Counsel also relied on authority regarding options to purchase. It has been held that a party can only exercise or enforce if the conditions precedent have been satisfied. In **United dominions Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd.** [1968] 1 WLR 74 a buyback option in a hire purchase agreement was considered. The aircraft manufacturer was obliged to buy back an aircraft from a hire purchase company on three conditions. (1) when the hire purchase company foreclosed on the purchasers, (2) where the manufacturer had been given notice of the purchasers' defaults and (3) (implied by the Court of Appeal) where the buyback was called within a reasonable time. It was held that due to non-compliance with (2) and (3) the hire purchase company could not enforce the option. Lord Denning M.R. at p. 81B said: *"In point of legal analysis, the grant of an option in such cases is an irrevocable offer (being supported by consideration so that it cannot be revoked). In order to be turned into a binding contract, the offer must be accepted in* ***exact compliance*** *with its terms. The acceptance must correspond with the offer."*

and Diplock L.J. at p. 86C said: *"Accordingly, the event giving rise to Eagle's unilateral obligation to buy the aircraft has not occurred and can never occur. There is no obligation: there can be no breach. The action must fail."*

76. Counsel for CRS also relied on cases concerning building contracts where terms providing for notice procedures to terminate the contract were strictly applied. Among such cases are Goodwin v. Fawcett (1965) EG 27, **Eriksson v. Whalley** [1971] 1NSWLR 397, **Hill v. London Borough of Camden** (1980) 18 BLR 31, and **Central Provident Fund Board v. Ho Bock Kee** (1981) 17 BLR 21. As I said in **Architectural Installation v. James Gibbons** (1989) 46 BLR 91 at 99, those cases should only be applied bearing in mind the approach of Lord Diplock in **Miramar Maritime Corporation v. Holborn Oil Trading Limited** [1984] AC 676 and **Antaios Compania v. Salen Rederierna** [1985] AC 191 and in particular Lord Diplock's words in the latter case at page 201: *"If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business sense, it must be made to yield to business commonsense."*

77. Commercial contracts should be construed with regard to their commercial purpose: **ICS v. West Bromwich Building Society** [1998] 1 AER 98. In that case, Lord Hoffman at page 113 cited that passage from the speech of Lord Diplock and prefaced his citation with the following words: *"I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in* ***Prenn v Simmonds*** *[1971] 3 All ER 237 at 240-242, [1971] 1 WLR 1381 at 1384-1386* ***and Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co*** *[1976] 3 All ER 570, [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of* ***'legal'*** *interpretation has been discarded. The principles may be summarised as follows.*

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes

absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see ***Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*** *[1997]AC 749.*

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in ***Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios*** *[1984] 3 All ER 229 at 233, [1985] AC 191 at 201: '... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.' ''*

78. Counsel for Ellis Tylin relied particularly on the decision in **Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd** [1997]AC 749 referred to by Lord Hoffman. That case concerned a clause in two leases giving the tenant the right to determine the leases by serving not less than 6 months notice in writing to expire "on the third anniversary of the term commencement date". The leases were for a term of 10 years from and including 13 January, 1992. The House of Lords held that an objective test had to be applied and the question was how a reasonable recipient would have understood them, bearing in mind their context: a reasonable recipient would have been in no doubt that the tenant wished to determine the leases on 13 January, 1995 but had wrongly described it as 12 January and that accordingly the notices were effective to determine the leases. At page 768, Lord Steyn said, *"It is important not to lose sight of the purpose of a notice under the break clause. It serves one purpose only: to inform the landlord that the tenant has decided to determine the lease in accordance with the right reserved. That purpose must be relevant to the construction and validity of the notice. Prima facie one would expect that if a notice unambiguously conveys a decision to determine a court may nowadays ignore immaterial errors which would not have misled a reasonable recipient.*

There is no justification for placing notices under a break clause in leases in a unique category. Making due allowance for contextual differences, such notices belong to the general class of unilateral notices served under contractual rights reserved, e.g. notices to quit, notices to determine licences and notices to complete: ***Delta Vale Properties Ltd v. Mills*** *[1990] 1 W.L.R. 445, 454E. To those examples may be added notices under charterparties, contracts of affreightment, and so forth. Even if such notices under contractual rights reserved contain errors they may be valid if they are "sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate:" the Delta case, at p. 454E-G, per Slade L.J. and adopted by Stocker and Bingham L.JJ.; see also* ***Carradine Properties Ltd v. Aslam*** *[19761 1 W.L.R. 442, 444. That test postulates that the reasonable recipient is left in no doubt that the right reserved is being exercised. It acknowledges the importance of such notices. The application of that test is principled and cannot cause any injustice to a recipient of the notice. I would gratefully adopt it."*

79. The commercial purpose shown by clause 1.8 of this contract is that the parties should be free to negotiate for variation of the fee effective from the first and second anniversaries of the contract, and if negotiations are unsuccessful, either party should be at liberty to terminate, in the case of Ellis Tylin by giving notice effective not earlier than three months after the anniversary.

80. To be entitled to take the benefit of clause 1.8, Ellis Tylin had to give the notices required by that clause. Equally, Ellis Tylin were not entitled to give a notice at a date or in terms calculated to produce a termination of the contract earlier than allowed for by the clause or otherwise produce a result inconsistent with the purpose which I have just mentioned.

81. The letter dated 26 November, 1996 was given less than 10 months after 5 February, 1996, but there could be no doubt of the intention of Ellis Tylin, namely that negotiations should take place for a revision of the fee from the beginning of the second year. Indeed that was the intention of both parties. There was some conflict of evidence as to whether the letter of 15 November, 1996 was written at the request of CRS, but the letter of 26 November certainly was so written. Both parties repeatedly referred to negotiation of the fee for the second year. There was no doubt in the mind of either party, and there was no attempt to shorten the period for negotiation, rather, it was lengthened. If CRS had not been willing to start negotiations until the end of the 10 month period, they could have said so. Instead, CRS tried to elicit the sort of details which they considered were necessary for the purpose of negotiation. It would be contrary to all business common sense and justice to allow CRS to say, a substantial time after the event, that the process of clause 1.8 never started because the notice under clause 1.8.1 was given too early.

82. Points are then taken by CRS that the termination notice was given on the wrong day to expire on the wrong day. Since the parties plainly understood that the negotiations were for an alteration in fees to come into effect on the first day of the second year, 5 February, 1997, the negotiations were due to end on the 4 February. To give notice on 3 February was on the face of it premature. If the parties had not been intending to continue negotiations, the letter would have cut short the negotiation period, but it is plain from the letter itself and from the evidence that they did continue to negotiate after the notice, so negotiations were not cut short. The statement in the letter that the notice period was to expire on 4 May, 1977 would have made it clear to any reasonable man that the intention was that the notice was to run from 5 February, 1997 to 4 May, 1997, that is, for the first three months of the second year. If the first letter was not plain enough (and I take the view that it was) Mr. Blanco spelt it out further in his letter dated 4 February where he expressly said that the notice period was to run from 5 February to 4 May. The period from the date of each letter was more than three months, but that does not cause the notices given by those letters to be defeated by the requirement by clause 1.8.2 of "three months notice in writing". Three months notice was given, and it was plain that the three months was to begin on 5 February. It is understandable that a party in the position of CRS might wish to insist on receiving the whole of the three months notice, because to receive any less would deprive them of a valuable right to have their equipment serviced. But I cannot conceive that the parties to the agreement can have intended that the notice given should be not a day more than three months.

83. Applying the principle of **Mannai Investment Co. Limited v. Eagle Star Life Assurance Co Limited** I take the view that by both letters of 3 and 4 February, 1997, Ellis Tylin gave valid notice of determination of the agreement. It is therefore not necessary for me to consider the issues raised by plea of estoppel by convention and the effect upon that plea of the clause against waiver.

84. However, the notices of determination were conditional, and as I have already indicated, they were overridden by the agreement which was made for the second year fees on 14 February, 1997.

85. By ceasing to work on 4 May, 1997, after the notices had been withdrawn by the agreement, Ellis Tylin repudiated the contract.

Abatement

86. By paragraph 3.5 of the Amended Statement of Claim, Ellis Tylin allege:

(a) At a meeting between Messrs. Blanco, Sussams, Beeston and Harris (for Ellis Tylin) and Scutt and Gartside (for CRS) held at Keynsham on 6th September, 1996, it was orally agreed that:

(i) Monthly payment of the Service Fees after 1st September, 1996 would be based on the percentage of completed visits measured against the plan for that month (with the result, for example, that if only 90% of tasks were completed, 10% of the Fee would be withheld);

(ii) Any retained sums would be released in the following month if the missed visits were completed therein;

(iii) No weighting would be applied to the type of planned visit; and

(iv) This method of valuing the monthly payment due to Ellis Tylin under the contract would also be applied retrospectively;

(b) By letter to Ellis Tylin dated 10th September, 1996, CRS confirmed inter alia that this formula would be used to determine any abatement in the Service Fees due to Ellis Tylin under the Agreement;

(c) So far as necessary, Ellis Tylin will contend that this agreement effected a variation to or constituted an additional term of the Contract, for the purpose of determining any abatement to the Service Fees due to Ellis Tylin for its performance of the service element of the Contract (excluding, for the avoidance of doubt, any moneys due for additional work or work falling outside the scope of the agreement);

(d) The Service Fees due to Ellis Tylin were duly calculated in accordance with the formula set out in this agreement."

87. CRS admits that there was an agreement made on 6 September, 1996 in the terms set out in paragraph 3.5(a) of the Amended Statement of Claim but deny that the agreement had the effect alleged in paragraph 3.5(c). The letter of 10 September, 1996 referred to in paragraph 3.5(b) of the Amended Statement of Claim is a long letter discussing the contractual rights of CRS to withhold payments on account of lack of progress or failure to perform agreed tasks and the manner in which those contractual rights should be applied. Apart from points of detail, that letter added nothing to the agreement pleaded in paragraph 3.5(a) of the Amended Statement of Claim.

88. The right of CRS to withhold payment is set out in clause 2.4.6 of the contract: *"In the event of repeated Underperformance leading to a backlog of planned preventative work, CRS reserve the right to reduce the monthly payment for planned preventative maintenance in proportion to the percentage of planned tasks not executed. In the event of any backlog not being redressed within a second month CRS reserve the right to impose a 10% reduction in the monthly payment for planned preventative works. This is in addition to withholding payment for the tasks not completed. Reference should be made to the reporting requirements Section 2 Clause 2.4.5.*

Any Under performance of the Plant and Equipment within the scope of the Agreement will be deemed to indicate Under performance of the Contractor, and an Underperformance Payment Reduction in the monthly payment in proportion to the degree of Under performance may be made. This Underperformance Payment Reduction is additional to any Underperformance Payment Reduction imposed for a backlog of planned preventative works."

89. As stated in the letter of 10 September, what was agreed was a formula for the application of that right. I reject the submission made on behalf of Ellis Tylin that it was intended by the agreement to compromise any right of CRS or to "close the transaction". The evidence, including the evidence of Mr. Blanco in cross-examination shows that the nature of what was agreed was accurately set out in two *paragraphs of the letter of 10 September: "There is however a clause within the contract, i.e. 2.4.6 and 1.3 which states the right of CRS to withhold payments for lack of progress.*

However, the formula for the same has now been established and hopefully in the future this will avoid any further delays."

Ellis Tylin had been much concerned at difficulties in their cash flow due to their invoices being rejected. The agreement reached was intended to mitigate those difficulties. There was no intention to compromise any rights of the parties.

90. Lord Diplock, in **Gilbert Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd** [1974] A.C. at p. 718 said: *"So when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up a breach of warranty in diminution or extinction of the price of material supplied or work executed under the contract. To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract."*

The principle is not limited to building contracts.

91. No such clear and unequivocal words were used by the parties either orally on 6 September, 1996 or in the letter dated 10 September, 1996. In particular, it remains open to CRS to pursue allegations:

- that Ellis Tylin were in breach for failing to meet contractual requirements as opposed to planned requirements;
- that Ellis Tylin had failed to do what it said it had done (and been paid for);
- that Ellis Tylin had failed to perform properly what it said it had done (and been paid for).

92. By paragraph 8(e), (f),and (g) of the Reply, Ellis Tylin allege a further agreement as follows:
"(e) At a meeting between Gartside (for CRS) and Blanco (for Ellis Tylin) on 24th March, 1997, CRS and Ellis Tylin agreed that the First Year's Fees would be ...411,000 plus VAT (without prejudice to Ellis Tylin's right to claim sums for works not covered by the First Year's Fee ("the Compromise");
(f) The terms of the Compromise were recorded by Ellis Tylin in its letter to CRS dated 15th April, 1997;
(g) By reason of the terms of the Compromise, CRS is precluded from making the claims set out in paragraphs 43 to 46 [of the Defence]."

93. By paragraphs 43 to 46 of the Defence, the Defendants plead an abatement (1) alleging loss of value consisting of the difference in value between what Ellis Tylin contracted to perform and what CRS received, (2) claiming the costs of remedial works to put right work which ought to have been done by Ellis Tylin, and (3) claiming the value of work which Ellis Tylin contracted to perform but did not perform.

94. A meeting took place on 24 March, 1997 between Mr. Blanco and Mr. Gartside. No notes were taken of that meeting, but Mr. Blanco says that he drafted a letter at that meeting, namely, the letter referred to in paragraph 8 (f) of the Reply. The letter is date stamped 15 April, 1997 but the typed date is 14 April, 1997. The letter was written by Mr. Blanco to CRS for the attention of Mr.Gartside and was in the following terms: *"We refer to the meeting between the writer and yourself at your offices on Monday, 24th March 1997 when the following agreement was reached between our two companies:-*
1. Our agreement for the first year's service valuation of ...411K + VAT is accepted.
2. Invoice applications not yet made and which are supported by a purchase order will be paid in full.
3. Where work of a beneficial nature to CRS has been carried out without a purchase order, but for which Ellis Tylin understood a valid instruction had been given, CRS will evaluate the application favourably on the basis of records of work done.

Where disagreement arises, CRS will negotiate a settlement with Ellis Tylin on an equitable basis for both parties.

For the 1997 contract year, Ellis Tylin confirm that: -
1. The contract fee of ...547,767.00 is accepted.
2. That the fee is based on the E.T.5 schedule of stores.
3. That the scope of work is in accordance with the contract, with the exclusion of ***lighting*** *systems and controls.*
4. That the charge-out rate for additional works is in accordance with our letter 6th February 1997 of: - [certain rates were set out]

On confirmation of the above agreements by CRS, Ellis Tylin confirm that the conditions outlined in our letter of 4th February 1997 have been met.

Our objective has been to accommodate payment applications submitted by Ellis Tylin not supported by a valid purchase order, and having been observed by both parties, will not recur in future years."

95. Taking that letter at its face value, it is saying that at the meeting of 24 March, 1997:
(a) Two agreements were made, one for Year 1 and the other for Year 2;
(b) Both agreements were subject to confirmation by CRS;
(c) The conditions set out in the letter of 4 February for withdrawal of the notice of determination would only be met if both agreements were confirmed.

96. In response to that letter, CRS did not send any confirmation, so on the face of that letter, there was no agreement (on Ellis Tylin's case) for either Year 1 or Year 2. The penultimate paragraph began, "On confirmation of the above agreements" in the plural. Ellis Tylin's case on this is confused, but one contention seems to be that it was only the agreement as to Year 2 which required confirmation and that there was a binding agreement for Year 1 but no agreement for Year 2. In accordance with that contention, Mr. Arrowsmith on behalf of Ellis Tylin wrote on 22 April, 1997: "*Further to our recent*

correspondence and in particular our letter of 4th February, 1997, we advise you that there is not an agreement for the above contract to move into the second year, therefore in accordance with the contract clause 1.8.2 the contract will end on 4th May, 1997, being the end of the three month negotiation period from the first anniversary date.

For the avoidance of doubt, the services provided by Ellis Tylin will cease at midnight on 4th May, 1997."

97. As I have already found, the letter of 4 February, 1997, like the letter of 3 February, 1997, was conditional only on agreement of the fees for the second year, and the termination from 4 May, 1997 was wrongful because the fees for the second year had been agreed on 14 February, 1997. Ellis Tylin's contentions as to what was agreed on 24 March, 1997 is inconsistent with those findings of mine, and also inconsistent with Mr. Blanco's letter of 14 April, 1997. However, I turn to the evidence concerning the meeting of 24 March, 1997 to see what was agreed (if anything) and the effect of any agreement.

98. Leading up to the meeting of 24 March, 1997, there were discussions between the parties particularly about invoices for the first year fees. In particular, there was a meeting on 27 February, 1997 between Mr. Gartside for CRS and Messrs. Arrowsmith, Blanco and Beeston for Ellis Tylin at Ellis Tylin's Bristol offices. The purposes were, so far as Mr. Gartside was concerned, to discuss the meaning of "comprehensive" for the purpose of the contract, and the mechanism for valuing Ellis Tylin's performance for the purpose of assessing the under-performance retention. A mechanism was agreed for monthly fee adjustments, and there was discussion about payments to be made for the first year contract. It was again confirmed that the second year fee was agreed at ...547,779 and Mr.Gartside thought that as the second year fee had been agreed the determination notices were overridden and the contract was going ahead. There followed some correspondence in which there was dispute about what had been agreed about the first year fees. Mr. Gartside arranged the meeting for 24 March to restore relations and to re-establish the basis on which the first year fee was agreed.

99. In his written witness statement, Mr. Blanco said of the meeting of 24 March, 1997: "*We dealt first with the first year service fee. E.T. agreed to accept a first year service fee valuation of ...411,000 plus VAT, subject to certain assurances set out in the letter I wrote to Mr. Gartside on 14th April, 1997."*

Mr. Blanco then continued: *"We then discussed the service fee for Year 2. At the outset I told him that I had reached the end of the line in negotiations. I considered that he had reneged on an agreement with my MD. I also said that if we were to agree terms, I would have to clear the matter with Mr. Arrowsmith first. We seemed to reach the basis of an agreement: namely a contract fee for Year 2 of ...547,767.00, based on ET5 (i.e. E.T.'s 5th Schedule of stores), with the scope of work excluding* ***lighting*** *systems and controls, and the additional works charged out at the rates set out in E.T.'s letter dated 6th February, 1997. Once these terms had been provisionally agreed, I spoke to Mr. Arrowsmith on the telephone. He and I agreed that any proposal for Year 2 would have to be confirmed by CRS in writing before ET would be bound. After speaking to Mr. Arrowsmith, I told Mr. Gartside that on CRS' written confirmation of the terms I have described above, ET would consider the conditions met for withdrawing its notice of 4th February, 1997. As far as I and Mr. Arrowsmith were concerned, written confirmation was an absolute precondition to agreement because we felt that Mr. Gartside had moved the goalposts in the past, and we had to commit him to a written position. We also wanted to ensure that any agreement was made with proper authority, as the agreement proposed would amend the scope of work under the contract."*

100. Although Mr. Blanco said that in his conversation with Mr. Arrowsmith they spoke of getting confirmation only of the Year 2 proposal, when he spoke to Mr. Gartside, he said, the requirement was that "***the terms***" needed to be confirmed. Mr. Blanco said that he was drafting the letter of 14 April, 1997 at the meeting as it progressed, and after speaking to Mr. Arrowsmith he added to the letter the penultimate paragraph, "***Upon confirmation of the above agreements .....".*** Mr. Blanco said that Mr. Gartside also made some contribution to the draft. Mr. Blanco said that after the letter of 14 April had been typed, he threw away the draft. The delay in typing and sending the letter was due to the death of Mr. Blanco's father-in-law on 23 March, 1997. Mr. Blanco said that at the meeting Mr. Gartside took a photocopy of the draft and kept that copy.

101. In cross-examination, Mr. Blanco again said that at the meeting on 24 March, 1997 there was provisional agreement but it had to be confirmed in writing. In cross-examination, Mr. Blanco did not

seek to suggest that one agreement was subject to confirmation and the other not subject to confirmation.

102. In his written witness statement, Mr. Gartside said that at the meeting of 24 March, Mr. Blanco repeated his agreement to the first year service valuation of ...411,00 plus VAT and reiterated Ellis Tylin's acceptance of the second year contract fee of ...547,7676 with chargeout rates being amended in accordance with Ellis Tylin's letter of 6 February, 1997. Mr. Gartside denied that any compromise was made which would preclude CRS from pursuing a claim against Ellis Tylin for failure to perform its contractual obligations. Mr. Gartside said that the agreement as to the sums to be paid for the first year was a repetition of what had been agreed at the meeting on 14 February.

103. In his oral evidence in chief, Mr. Gartside said that at the meeting of 24 March, he and Mr. Blanco reiterated what had previously been agreed as to how they would deal with various invoices, and they agreed the figure of ...411,000 "which was just this arithmetic process", and they agreed certain other payments would be made and that if there were any difficulties with order numbers they would take a fairly lenient view to finalise the figure at ...485,000. He did not recall discussing the second year's fees. He did not recall that a letter was drafted out by Mr. Blanco. In cross-examination on the same day he did not materially depart from that evidence. In cross-examination after the adjournment, Mr. Gartside again said that he did not recall Mr. Blanco drafting the letter of 14 April in his presence. Mr. Gartside did, however, accept the suggestion that the letter "fairly and accurately records the matters that were discussed and agreed on 24th March", while saying that he certainly did not recall being asked on 24th March to confirm the agreements.

104. While Mr. Gartside's acceptance of the terms of the letter of 14 April was inconsistent with the remainder of his evidence, I did not understand that answer to be intended as resiling from the remainder of his evidence. I prefer Mr. Gartside's account of the meeting of 24 March to that given by Mr. Blanco. Mr. Gartside's evidence was consistent with the remainder of his evidence and consistent with my other findings. The evidence of Mr. Blanco and the case of Ellis Tylin on the other hand contained inconsistencies and were not credible. For what it is worth, I also found the demeanour of Mr. Gartside in giving that evidence more convincing than that of Mr. Blanco.

105. Even if one were to accept the evidence of Mr. Blanco, it does not amount to evidence of an agreement with the effect alleged in paragraph 8 of the Reply. I cite again the speech of Lord Diplock, in **Gilbert Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd** [1974] A.C. at p. 718.

106. I reject the allegations of fact and the contention contained in paragraph 8 of the Reply.

CONCLUSION

107. In this Judgment, I have answered all of the issues put before me. No useful purpose would be served by setting out again each of the issues put before me and answering them point by point. In summary:

A. There was no collateral contract or additional oral term as alleged in paragraphs 2.1 and 3.1A of the Amended Statement of Claim.

B. By stopping work in May, 1997, the plaintiffs repudiated the contract and were in breach of contract.

C. The parties did not make any agreement which had the effects contended for in paragraph 3.5(c) of the Amended Statement of Claim and/or paragraph 8(g) of the Reply.

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