Neutral Citation Number: [2019] EWHC 945 (TCC)

Claim No: HT-2015-000219

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Date: 17 April 2019

B e f o r e :

MR JUSTICE WAKSMAN

WALTER LILLY & CO. LIMITED

Claimant

- and -

MR JEAN-FRANÇOIS CLIN

Defendant

David Thomas QC and Matthew Finn (instructed by Pinsent Masons LLP, Solicitors) for the Claimant
Simon Hughes QC and Tom Coulson (instructed by DLA Piper UK LLP, Solicitors) for the Defendant

Hearing dates:26-28 March and 1 April 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. This is a claim brought by Walter Lilly & Co. Limited ("WL"), a building contractor, against Mr Jean-François Clin, the employer, pursuant to a JCT Standard Building Contract with Quantities (Revision 2, 2009), with amendments, entered into on 25th September 2012 ("the Contract"). The works consisted of the removal of the entire interior and parts of the front and rear elevations of two adjoining properties at 48 and 50 Palace Gardens Terrace London W8 ("the Properties"). The Properties were to be rebuilt as a single dwelling with 6 floors including a swimming pool at basement level.

2. The Properties were not themselves listed buildings but they were in a Conservation Area. This meant that if the works entailed their demolition, Conservation Area Consent ("CAC") was required from the local planning authority, being the Royal Borough of Kensington and Chelsea ("RB").

3. Various planning permissions had been obtained before the works commenced in February 2013 but no CAC for the project as a whole had been sought. Following visits to the Properties in April and May 2013 by members of RB's planning department and after communicating with Mr Clin's architects, PTP Architects London Ltd ("PTP"), RB sent to PTP and WL, two letters on 17 July 2013 ("the July Letters"). These expressed the view of RB that CAC was required in the light of the demolition works undertaken and intended, and that to continue the works without CAC would constitute a criminal offence. Further, in that event, RB reserved the right to issue an enforcement notice. WL duly stopped work.

4. Ultimately, in June 2014, CAC was obtained so that the demolition work which was preparatory to almost all of the building work could continue. Effectively, therefore, progress on almost all of the project had been delayed by just over one year, in fact 53.2 weeks. WL claims that it is entitled to an Extension of Time ("EOT") for the whole period of delay together with the loss and expenses caused thereby. Mr Clin for his part resists these claims and advances a mirror-image claim for liquidated damages.

5. The core question in this case is whether in fact CAC was necessary as RB maintained. If it was, then WL has to establish certain further matters before its claims can succeed. But if in fact no CAC was needed (Mr Clin's later applications for CAC were made expressly without prejudice to his contention that they were not necessary) WL accepts that it must lose the case.

THE IMPLIED TERM

6. On 19 January 2016 Edwards-Stuart J held a trial of preliminary issues in this case. These included the question as to what duty (if any) Mr Clin had as an employer under the Contract to obtain relevant planning permissions and consents for the works. Judgment was handed down on 24 February 2016 and parts of it were amplified in a supplementary judgment set out in the order of 5 May 2016. This decision was appealed and at this stage I need refer only to the key finding of the Court of Appeal which allowed the appeal in part. At paragraph 37 of the judgment of Lindblom LJ (with whom Davies and Flaux LJJ agreed), he said that the relevant implied term ("the Implied Term") was as follows:

> "the Employer will use all due diligence to obtain in respect of the Works any permission, consent, approval or certificate as is required under, or in accordance with, the provisions of any statute or statutory instrument for the time being in force pertaining to town and country planning."

7. This was amplified in paragraph 38 which reads:

> "The concept of the "Employer" using "all due diligence" to obtain planning permission-or any other relevant planning approval-for the "Works" would extend to an obligation to make a timely application for any such permission or other approval or ensure a timely application was made on his behalf to ensure sufficient information was provided to the local planning authority in support of the application, and to cooperate with the authority in the statutory process. A timely application would be one that assists each party in the performance of its obligations under the contract, and with a view to avoiding any delay to the "Works".

8. WL submitted that from this one can extract three "Limbs" to the implied term to use all due diligence:

   (1) Limb 1: the Employer must make a timely application for the relevant permission or ensure that one was made on his behalf; an application is timely if it assists each party in the performance of their obligations under the Contract and with a view to avoiding any delay to the Works;

   (2) Limb 2: the Employer must ensure that sufficient information is provided to the local planning authority ("LPA") in respect of such application; and

   (3) Limb 3: the Employer must co-operate with the LPA in the statutory process.

9. Mr Clin did not disagree with this formulation which obviously follows from paragraph 38 of the judgment.

10. Lindblom LJ added this at paragraph 40:

> "the obligation for the obtaining of planning permission and other relevant planning approvals under the contract lies with Mr Clin as "Employer" under the implied term as to planning permission. The consequent allocation of risk is addressed in the relevant express terms of the contract."

11. Although the obligation is directed to Mr Clin as employer, it is common ground that the acts and omissions of PTP in this regard must be imputed to him because of its role as architect responsible for planning and as the Employer's Agent to which it has also been appointed by Mr Clin.

THE ISSUES

12. These are best described by reference to WL's principal contentions and those of Mr Clin in response.

13. WL contends as follows:

   (1) The demolition works which WL was required to carry out needed CAC;

   (2) As at July 2013, no such consent had been obtained;

   (3) In the circumstances of this case Mr Clin (through PTP) was in breach of the Implied Term;

   (4) That breach amounted to both a Relevant Event for the purposes of clause 2.29 of the Contract and a Relevant Matter for the purposes of Clause 4.24 thereof; this would generate the rights to an EOT for a period of 53.2 weeks and a claim for loss and expense, with no liability for liquidated damages;

   (5) As a result,

(a) WL is entitled to an EOT for the delay caused by the absence of CAC which is accepted to be 53.2 weeks;

(b) in addition, it is entitled to loss and expenses for that period; and

(c) by the same token, it is not liable to pay to Mr Clin liquidated damages for that period;

(6) Alternatively, the absence of the required CAC amounted to a Statutory Requirement as defined in Clause 1.1 of the Contract; if so, the same results as set out in sub-paragraph (5) above will follow.

14. As against that, Mr Clin contends that:

(1) No CAC was required;

(2) That being the case, there was no breach of the Implied Term, but even if CAC was required, there was still no breach;

(3) Mr Clin accepts in principle that if (contrary to his submissions in (1) and (2) above) he was in breach of the Implied Term, then the consequences set out in paragraphs 13(4) and 13(5) above will follow; and

(4) The alternative claim based on Statutory Requirement is denied in its entirety.

THE EVIDENCE

15. For WL, I heard from Andrew Postlethwaite, its Pre-Construction Director and for Mr Clin I heard from Satish Patel, a director of PTP, who was involved in this project from 2011 onwards, as well as from Mr Clin himself.

16. Each side also called an expert witness. For WL I heard from Dr Chris Miele, a chartered town planner and member of the Institute of Historic Buildings Conservation. He is the senior partner of Montagu Evans LLP, property consultants, based in Central London. For Mr Clin, I heard from John Bowles, BSc, Dip.TP, DipSur and also a chartered town planner. He is a Director in the Planning Department of Savills also based in Central London. They produced a joint statement of non-agreed matters on 24 January and of agreed matters on 25 January 2019.

17. So far as the lay evidence is concerned, there is not much by way of dispute on questions of primary fact. Where there is, for the most part, the very extensive contemporaneous documents, especially emails, are of considerable assistance in showing where the truth lies. In general terms, however, I found Mr Postlethwaite to be a reliable and straightforward witness. Mr Patel was less so for the reasons I give below when dealing with his evidence. Mr Clin generally gave his evidence in a straightforward manner but in truth it did not assist much on the issues.

THE LAW

Introduction

18. There is something of an overlap here between the legal debate before me on important questions relating to CAC, and the expert evidence which also deals in part with the same matters. Indeed, as will be seen, Mr Patel has and has had, his own particular view as to what the CAC regime requires. Ultimately, of course, the correct interpretation of that regime is a matter for the Court.

Conservation Areas-relevant legislation and policy

19. Section 69 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Conservation Areas Act 1990"), headed "Designation of conservation areas" provides that every LPA shall from time to time determine which parts of their areas are areas of special architectural or historical interest, the character or appearance of which it is desirable to preserve or enhance, and in such a case shall designate those areas as conservation areas.

20. Section 74 (1) then provides as follows:

> "A building in a conservation area shall not be demolished without the consent of the appropriate authority (… referred to as "conservation area consent)".

21. Section 72, headed "General duty as respects conservation areas in exercise of planning functions" provides at sub-paragraph (1):

> "In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

22. This obligation will be applied to any LPA which is deciding the question of permission or consent in respect of any building in a conservation area. This obligation is hardly surprising since the driver for designating an area as a conservation area is the desirability of preserving or enhancing its character and appearance.

23. The need for CAC if s74 is engaged is additional to any other planning permission required in respect of the relevant development. As from 1 October 2013 CAC was replaced by "demolition planning permission" by the Enterprise and Regulatory Reform Act 2013 which repealed s74 but added a new requirement for demolition planning permission by adding s196D of the Town and Country Planning Act 1990 ("the Act"). It is not suggested that there was any substantive change as between the two regimes which is in any way relevant to this case. I shall refer to both CAC and demolition planning permission as "CAC" for the sake of convenience.

24. Part of RB's Local Plan, the "RBKC Core Strategy" adopted on 8 December 2010 is Policy CL 3 dealing with Heritage Assets and Conservation Areas. It provides as follows:

> "The Council will require development to preserve and to take opportunities to enhance the character or appearance of conservation areas, historic places, spaces and townscapes and their settings.
>
> To deliver this the Council will:
>
> a. require full planning applications in conservation areas;
>
> b. Resists substantial demolition in conservation areas unless it can be demonstrated that:
>
> i The building or part of the building or structure makes no positive contribution to the character or appearance of the area;
>
> ii. a scheme for redevelopment has been approved;…"

25. Since CL3 forms part of RB's development plan, it must determine any relevant planning application in accordance with it unless material considerations indicate otherwise; see s70 of the Act and s38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act").

26. For the reasons set out below I consider that sub-paragraph (b) of CL3 is engaged once an application for CAC has been made and RB has to decide whether to grant it or not. It is typical of a number of policies which may affect how LPAs are to deal with applications for planning permission, what factors they should (or should not) take into account and what weight should be given to them. CL3 has nothing to do with whether a particular proposed demolition requires CAC in the first place.

27. As for the need for general planning permission (i.e. other than CAC) this is dealt with by s55 of the Act. Planning permission is required for any "development" which includes building operations which themselves include demolition or rebuilding of and structural alterations to buildings. Where the work to be done falls within "permitted development rights" planning permission is not required.

28. In the case of the conservation area within which these properties are situated, the entire terrace at numbers 2-58 (even) was the subject of what is known as an Article 4 Direction made pursuant to what was then Article 4 of the Town and Country Planning General Development Order 1977. This removes what would otherwise have been permitted development rights in relation to alterations, improvements to and extensions of any part of the front or rear elevation of these properties. Accordingly, general planning permission was required for any such works here.

29. I should add that works relating solely to the interior of a property normally fall within permitted development rights. That does not mean, however, that for the purpose of ascertaining whether CAC is needed, interior demolition works are irrelevant.

The Meaning of "demolition" and the Shimizu Case

30. The leading authority on what constitutes demolition for the purposes of CAC is *Shimizu v Westminster City Council* [1997] 1 WLR 168. This case was actually concerned with the meaning of "demolition" for the purposes of listed building consent not CAC but it is not suggested that this makes a difference to the application of *Shimizu* here.

31. In the case itself, listed building consent had been sought and obtained where what was intended was demolition of the whole of the building save for its facades, chimney breasts and stacks, being preparatory to redevelopment of the whole site ("the original proposal"). The actual question was whether a later proposal to remove the chimney breasts amounted to an "alteration" or "demolition"

32. At p185F-H, Lord Hope said this:

> "I should like to make it clear that I do not see the word "demolition" as applying only where the proposal is that every single part of the listed building should be pulled down. It is now commonplace, especially in towns and cities, where the exterior of a building contributes to the architectural or historic interest of a group of buildings such as buildings in a terrace, for the facade to be left standing while clearing the remainder of the site for redevelopment. That indeed is what was done in this case.… In the case of demolition works, planning permission for the redevelopment of the site was granted at the same time as the original proposals received listing listed building consent and conservation area consent. It seems to me to be plain that the original proposal was for the demolition of the listed building for all practical purposes, so that a scheme of redevelopment could be carried out. It went far beyond what could reasonably be described as its alteration, as the works was so extensive and so much was to be pulled down and taken away, although the facade and the chimney breasts and chimney stacks were to be retained. The question is ultimately one of fact for the decision of the Lands Tribunal, and I do not think that any more precise definition of this expression is required….
>
> In any event, I do not think that what [Lord Diplock] said in that case [C&E Commissioners v Viva Gas [1983] 1 WLR 1445] can be taken to mean that, in the context of listed building consent, works which will involve the removal of so much of the old building as to clear a site for redevelopment cannot be held to amount to demolition works for the purpose of Part I of the Act of 1990, and in particular for the purposes of Part I of the Act of 1990 and in particular for the purposes of section 8 (2)."

33. Accordingly,

(1) for there to be "demolition" of a building it is not necessary that every part of it is removed; works involving the removal of so much of the old building as to clear a site for its redevelopment can amount to demolition;

(2) in any given case it is a question of fact (and both parties here have added the words "and degree") as to whether the proposed works constitute demolition of the building; and

(3) the original proposal in *Shimizu* itself did amount to demolition.

34. Mr Bowles in his report and in oral evidence maintained the position that whether or not a proposal amounted to demolition itself included a consideration of the extent to which the elements to be removed themselves contributed to the character and appearance of the conservation area. That view had a number of consequences:

(1) First, it informed his overall opinion that the works of demolition here did not amount to demolition of the Properties because much (though not all) of the front and rear elevations would remain intact;

(2) Second, it had the corresponding effect of downgrading or limiting the significance of the demolition of the interior (even of all of it) since by definition, that did not itself contribute to the character and appearance of the conservation area; and

(3) Third, and as he admitted in evidence, so far as questions of contribution to character and appearance are concerned, there was and should be a "conflation" between (a) whether CAC was needed at all because what was intended was demolition in the required sense and (b) whether in any given case, CAC, if applied for, should be granted.

35. In support of this argument, Mr Bowles referred to sub-paragraph (b) of CL3, quoted in paragraph 24 above, and said that the expression "resist substantial demolition" in relation to RB was concerned not (or not only) with the grant of CAC if sought, but whether CAC was necessary at all.

36. Dr Miele took the opposite view and said that questions of contribution to character and appearance do not relate to the first question at all (i.e. whether there is demolition so as to require CAC) but only the second i.e. the grant or otherwise of consent.

37. As indicated above, ultimately this is a matter of law for me to decide but I consider that the view of Dr Miele is clearly correct and that Mr Bowles is clearly wrong.

38. First, there is nothing in the very clear judgment of Lord Hope in *Shimizu* to suggest that the question of demolition or not involves a consideration of whether the elements to be removed themselves contribute to the character and appearance of the conservation area. It would be extremely odd if it did, because that would then require a judgment to be made on those matters which are not simple questions of fact and degree and moreover which are then to be considered again at the stage of deciding whether or not to grant consent. The issue of demolition or not is akin to the question as to whether there are building operations amounting to development so as to require general planning permission.

39. Mr Bowles' invocation of CL3 to justify his approach demonstrates why his view is wrong. Policies such as CL3 govern how an LPA is to deal with the grant or otherwise of permission. They have nothing at all to do with what amounts to demolition in the first place Mr Bowles' construction of "resist substantial demolition" is misconceived. That expression obviously means no more than that RB will not grant consent for such demolition unless factors (i) and (ii) exist. If Mr Bowles' view is right, it would follow that whether or not there is demolition depends not only on questions of character and appearance but also whether there is an approved scheme for redevelopment. That, with respect, would be absurd. In order to deal with that point, Mr Bowles suggested that factor (ii) was not, or might not be a necessary pre-condition for consent, as imposed by CL3, at all; rather it should be seen as an "and/or" to factor (i). So it could simply be made a condition of planning permission once granted. That, in my view, is even more absurd. The intention of sub-paragraph (b) of CL3 is that, so far as policy is concerned, there needs to be both (i) and (ii). Such factors are typical of the sort of matters that an LPA can say, as a matter of policy through the local plan, are material to the question of whether or not to grant consent.

40. Mr Bowles also suggested, consistent with his theory, that when one speaks of "substantial demolition", "substantial" must be understood in a qualitative not (or not only) quantitative sense. Hence, if there is to be only removal of only 1% of a front facade which contributes greatly to the character and appearance of the conservation area, then the proposal would or could amount to demolition of the building for the purposes of CAC. Conversely, if there is to be removal of 99% of the facade (or facades) which do not in fact so contribute, this is not demolition. In my judgment, those propositions have only to be stated to be rejected. They entirely conflate (in an inappropriate way) the separate tests for whether CAC is required and whether any CAC should be granted. It would make it quite impossible for any developer to have a reasonable idea of whether demolition works needed CAC or not. While there could be differences of view as to whether something amounts to substantial demolition or not on the basis of *Shimizu*, that would be as nothing, compared to the uncertainty engendered if developers had to predict the need for consent based on Mr Bowles approach. Moreover the notion that removal of 1% of a façade could be demolition for these purposes flies in the face of *Shimizu* which refers to "clearing the site for redevelopment" – see paragraph 32 above.

41. Of course, if there is an important facade (as here) then the way in which an alteration of even a small part of it, is protected is because general planning permission is needed anyway, by virtue of the Article 4 Direction.

42. In general, it is fair to say that Mr Bowles did not in his report explicitly apply the *Shimizu* test. In cross-examination he said that he had done so in paragraph 8.35 of his report, but that was all about applying a 50% rule of thumb. It is true that he makes reference to *Shimizu* in paragraphs 8.13 and 8.14 but not in the sense of applying it. At para. 8.15, he refers to Circular 01/01, published 18 January 2001 by the Secretary of State. This is all about when an application for planning permission or CAC should be referred onwards to certain interested bodies concerned with heritage assets, for example, English Heritage. But the applications that are the subject of the circular are only those which affect the setting of certain listed buildings or ones which affect the character or appearance of a conservation area involving buildings of a certain area of land or height above ground level. In this paragraph of his report he refers to Appendix D of this circular which summarises the *Shimizu* decision. He quotes that part of the summary which says that works for the demolition of an unlisted building must also involve the total or substantial destruction of the building concerned. Thus, many works which involve the destruction of the fabric of only part of a building would not be works of demolition. That is correct, but again, it is not an application of *Shimizu* to the facts of this case.

43. At paragraph 8.16, he refers to sections 15 and 26 of this circular. Section 15 deals exclusively with applications for listed building consent. It says that such applications must be referred to the identified institutions where, or among other things, there are works for the alteration of any Grade II listed building which include demolition of a principal external wall of the principal building or demolition of all of or a substantial part of the interior of a principal building. Sub-paragraph (3) states, among other things, that a proposal to demolish any principal internal element of the structure shall be treated as a proposal for the demolition of a substantial part of the interior. Section 26 contains similar definitions. From this Mr Bowles draws the conclusion in paragraph 8.16 that loss of a principal facade or the complete loss of the interior and/or roof are both alterations, not demolition, consistent with *Shimizu.* But this does not follow at all. These sections are simply concerned with alterations which themselves involved demolition work so as to make the application for listed building consent one which should be referred on to particular institutions. It is not in any way setting out how to define demolition for the purposes of CAC and moreover the propositions advanced here by Mr Bowles do not reflect what is said in *Shimizu*. If correct, it would mean that a scheme of demolition which involved the entire loss of a principal facade together with the complete loss of the interior and roof could not amount to demolition. That is not the law and it is not consistent with *Shimizu*. I therefore agree that it is a fair criticism of Mr Bowles report that it does not in truth apply the *Shimizu* test to the demolition works in question here.

44. In his evidence, Dr Miele accepted that a proposal for the complete demolition and rebuilding of the internal envelope of a building would not constitute "development" if there was no external manifestation would be classed as an "alteration". So the context of these questions (internally or otherwise) was put as "development" is for the purpose of s55 of the Act which is not the relevant question here. See in particular s55 (2) (a) which refers to alterations affecting the interior only and which do not affect the external appearance of the building. But in any event, as Dr Miele went on to say, there was an external effect of the internal demolition here because of the alignment of the windows and cornice at the rear elevation and there were other changes made for example turning both houses into one which included removal of the party wall between them and the creation of new floor levels. What he did not accept, in general, was the notion that the demolition of the interior for the purposes of CAC was somehow lessened in impact because it did not contribute to the character and appearance of the conservation area.

45. What follows from this is that I reject Mr Bowles' approach to the test for demolition and I agree with that taken by Dr Miele. As will be seen below, this has obvious consequences for the assessment as to whether what was proposed here by way of demolition was substantial demolition requiring CAC - or not.

46. Indeed, Mr Bowles' approach was in my view, so unjustified that it affects the reliability of his opinions as a whole.

47. I now should refer to the views of Mr Patel. This is not because he is an expert witness but because the chronology of this matter shows that PTP's entire approach to the obtaining (or not) of CAC was largely if not wholly dictated by what Mr Patel considered was relevant to that question.

48. In both his oral and written evidence, Mr Patel said that as far as he was concerned, the fact that the whole of the interior was to be demolished was irrelevant to the question of whether there was demolition and so whether CAC was required. He said that this was because it did not and could not contribute to the character and appearance of the conservation area. In other words, this is a more extreme version of the approach taken by Mr Bowles. In closing arguments, Mr

Hughes QC for Mr Clin said that Mr Clin effectively parted company with Mr Patel in this regard, instead relying upon the somewhat more nuanced approach of Mr Bowles. So, no expert or party is actually contending that Mr Patel's view is correct.

49. Mr Patel does at least have the merit of consistency since he frankly stated in cross-examination that he still adheres to this view as to when CAC is required by reference to demolition. However, that consistency does not help him when his view is completely wrong, for all the reasons advanced above.

50. On the other hand, this is a key explanation of why, in my view, PTP never sought to obtain CAC prior to July 2013. It was not because PTP was mistaken as to the nature and extent of the demolition works to be done (as to which see below); rather it was because it was wholly mistaken as to what the law of CAC required. This is demonstrated by the fact that both Mr Patel and Mr Bowles rejected the notion that when considering the demolition involved in this project as a whole, there was even a risk that CAC might be required or that RB might consider that it was required.

51. For the sake of completeness I should add that at points in his evidence it appeared to be Mr Patel's view that temporary works of demolition (for example of the front bay window at number 48 for the purpose of giving access to the piling rig) which would be followed by the replacement "like-for-like" of what had gone before simply fell outside the CAC regime altogether. That is misconceived. After all, all demolition is essentially temporary in this context because it is a precursor to rebuilding. The fact that some demolition is needed in order to provide means of access for equipment to do with the works, and will be replaced with a structure or facade exactly as before (albeit new) does not make it any the less demolition. Rather the nature and purpose of such works will feature in the LPA's decision as to whether or not to grant consent. Mr Tigg appears to have been under the same misapprehension when discussing the access for the piling rig at a meeting on 4 January 2012 - see paragraph 89 below.

DETAILED DESCRIPTION OF THE PROPERTIES PRIOR TO WORKS COMMENCING

52. The two original properties can be seen clearly in the photographs at pages 1322 and 1370 showing the front and rear elevations. Each had a basement or lower ground floor ("LGF") and 3 floors above. In addition, number 50 had a mansard roof. The existing internal plans of the properties can be seen in what I shall refer to hereafter simply as the "Demolition Drawings" which are at pages 818-824, as prepared by PTP. The ground floor (GF) plan shows the existing steps up to the doors of the properties and also the extensive gardens to the rear, then occupied partially by a concrete terrace and a conservatory, among other things. As can be seen, the depth of the properties (excluding the garden) is slightly greater than their combined width. Their height, if the mansard roof is included, is significantly greater than their width but only slightly greater without it.

53. As there is a slight slope to the terrace, these houses were not horizontally aligned. Thus, on the front elevation, the windows and door of number 48 were higher than those at number 50 and the same at the rear. The internal floors reflected this. In addition, the cornicing at roof level was not aligned either. Finally, number 50 was in addition setback from number 48. All of this can be seen from the photographs and from the Demolition Drawing at page 822.

THE PLANNING HISTORY

54. In early 2010 Mr Clin engaged PTP on the project. Its terms of engagement are contained in a memorandum of agreement dated 24 May 2010 which was revised on 26 July 2010 and which

included standard architects' appointment terms. The services to be provided included not only those of design but also the making where required of applications for planning permission. As already noted, the Properties were subject to an Article 4 Direction so that any alteration or improvement to the front or rear elevation required planning permission in its own right. This is quite separate from the question of any CAC required.

55. In the drawing dated 2 June 2010, PTP showed the demolition of the whole of the interior of the 2 properties and the moving of the windows on the rear elevation of number 50 so as to align them with those at number 48, together with the demolition of significant parts of the rear elevation. See p1259 of the trial bundle.

56. In evidence, Mr Patel suggested that although such plans bear the date June 2010 this only indicated when they were started not when they were completed. I did not find that convincing. The ordinary interpretation of a date on a plan is when it has been completed or produced. If there was then a later revision, the date of the revision would be shown as well, as it has been on PTP's plans. I therefore proceed (though not much ultimately turns on it) on the basis that if the plan is to say June 2010 then that is when they were produced. I suspect that Mr Patel was reluctant to accept this because it shows that the essence of the project (including demolition) was actually in place at an early stage and soon after Mr Clin had purchased number 48, at which time he already owned number 50.

57. The fact that the drawings must have been done in June (or thereabouts in) 2010 are supported by the fact that by August 2010 the structural engineers, Lucking and Clark ("L&C") had not only been appointed by then (by an agreement dated 21 June 2010) but had produced their own drawings dated August 2010 - see pp798-804. It is also supported by the fact that PTP was engaged on the basis of combining the two properties as one, as Mr Patel accepted in evidence. Indeed, Mr Clin in his evidence confirmed that this is what he wanted to do once he had acquired number 48. His intention was that his son (whom he had cared for and educated himself since his wife sadly passed away some years before) should live close by and as he said, living with him in the same house would be even better than having him live next door.

58. The applications referred to below were made on an RB form which showed that they would be treated as applications for both planning permission and CAC where appropriate.

59. The first application was made on 13 August 2010 ("Application 1"). That application expressly stated that it was for a conservatory, light well, Juliet balconies, reconstruction of a mansard roof and making one window out of 2, all in relation to number 50. But in fact, the plans submitted had moved the windows at the rear elevation so that they would now align with those at number 48. This was not explicitly mentioned nor would it have been easy for RB to spot it without having a plan of number 50 and comparing measurements. Equally, the cornicing was moved to align it with that at number 48. Mr Patel accepted in cross-examination that this was the position. Permission was granted for Application 1 on 17 November 2010.

60. On 18 October 2010 PTP sought planning permission for a new mansard roof at number 48 ("Application 2"). Permission was granted on 15 December 2010.

61. On 4 March 2011, PTP sought pre-application advice from RB on a scheme which involved combining both properties, removal and rebuilding of the entire interior, and aligning features across the rear elevation and demolishing the whole of the front elevation of number 48 which would then be rebuilt in complete alignment with number 50.

62. In its letter of advice dated 29 March 2011 to Mr Peter Tigg of PTP, RB said that it would require planning applications in conservation areas and then quoted from CL3 (b) in terms of resisting substantial demolition works unless factors (i) and (ii) were present. The letter then stated as follows:

> "Whilst the submitted information does not provide definitive confirmation that the works would involve substantial demolition, it is considered highly likely due to the desire to reconstruct the front and rear facades and align all the internal levels. Given the fact that both properties contribute positively to the character and appearance of the conservation area, their substantial demolition would be contrary to Policy CL3 and would be resisted should any formal applications be submitted. Furthermore, the proposed reconstruction works requiring planning permission that would bring number 48 level with number 50 would be considered unwelcome due to the inherent harm to the historical integrity of the terrace as outlined above. Notwithstanding the above, an application for Conservation Area Consent would be required for substantial demolition works, in addition to a planning application for the reconstruction works."

63. All of the above contradicts Mr Bowles' view of how and at what stage CL3 operates.

64. What is important about this letter is that RB emphasised the need to apply for CAC as well as for planning permission if there was to be substantial demolition. The fact that it was focusing on the particular proposal submitted, as to which it said it was likely to constitute substantial demolition, does not detract from the general point that PTP was clearly put on notice about CAC to the extent that it needed it. As it happens, Mr Patel's evidence was that he was always aware of the need for CAC in cases of demolition; the real problem, as noted above, is that he was mistaken as to how to assess the existence or otherwise of substantial demolition.

65. On 27 March 2011, PTP had sought planning permission for a basement room under number 48 and also a light well, refuse store, conservatory and sliding doors ("Application 3"). In fact, the drawings submitted also showed the window alignment at the rear though not expressly referred to in the narrative as Mr Patel again accepted in evidence.

66. On 6 April 2011 PTP sought permission for a basement room under number 50 and again the drawings showed the aligned position of the windows at 2nd floor ("2F") level along with the cornice ("Application 4"). One of the plans submitted suggested that approval had already been obtained for this. That was incorrect. The experts are agreed about this; see paragraph 92 of Dr Miele's report. Mr Patel also agreed that there was no approval here. He could not explain how this had happened other than by some error. He said that in any event what RB had approved was all that was shown on the submitted drawings. He pointed to the approval notice dated 12 September 2011 in which RB said that consent had been given for, among other things, "elevational alterations to rear facade". However, when one looks at the Planning Officer's Report for the Planning Committee (which is what the latter would focus on in its deliberations), the changes to the rear elevation described in the former did not include the realignment of the 2F windows or the cornice; see paragraphs 2.1 and 4.17 of the report. Ultimately Mr Patel accepted this in evidence.

67. On 28 September 2011, PTP sought planning permission for the creation of a swimming pool at basement level ("Application 5"). This was granted on 22 December 2011.

68. There were no further material planning applications prior to the making of the Contract or the issuing of the Notice to Proceed with the works by PTP to WL ("NTP") on 15 February 2013.

69. In evidence, Mr Patel accepted that this series of individual applications did not disclose the full extent of the overall scheme and in particular the full extent of the intended demolition, to RB. However, he went on to say at one stage that even if the scheme as a whole had not been presented, but only in piecemeal fashion it was effectively for RB to put it all together from the planning history. Though he said that he was not thereby saying that it was the for the planning authority to work out what the applicant was trying to do this, in my view, was the effect of his evidence. He said that the planning authority would always look at the planning history of the property. That is true, but this is because it is important background information. It does not mean that the planning authority is obliged to bring together numerous applications made by the same applicant and stitch them together so as to create a picture of the overall scheme as intended.

70. On 13 June 2011, PTP had made an application for a Certificate of Lawful Proposed Use or Development ("Certificate") to the effect that the amalgamation of the two properties into a single house was not a material change of use and therefore did not itself require planning permission. The Certificate was granted on 17 August 2011. It is important to be clear what the Certificate did - and did not - do. It simply meant that use of the properties as one was not "development" (which covers both building operations and use). It said nothing, and consented to nothing, so far as the demolition and building works required, so as to create the single property. In other words, insofar as the need to obtain planning permission or CAC for particular works or the scheme as a whole was concerned, it was irrelevant. It would be relevant when the question of whether or not to grant such permission or consent arose but that is a different matter.

THE INTENDED DEMOLITION WORKS

Generally

71. As already noted, Mr Clin's intention was to join the two properties together, entirely reconstruct the interior, create a new roof space and now have 2 floors below GF at the front and a large swimming pool at the rear. In total, the new property would have 6 floors. In addition, all the windows at the rear would be changed and aligned with a new 5-panel window opening onto a new terrace, with aligned cornicing at roof level. However, there would be no such alignment at the front elevation see plan 606-C2 at p831.

72. It is common ground that the demolition works required included the complete removal of the interior including all the floors and internal walls and what had previously been the party wall between numbers 48 and 50. In addition the mansard roof at number 50 would be demolished. It is also common ground that there would be demolition of the entire rear elevation at LGF level together with the removal of the existing windows and surrounding brickwork as well. I deal below with the precise extent of such demolition.

73. At the front elevation, at all levels above LGF, the windows themselves would be removed and replaced. But there would be some demolition below the LGF windows; see the Demolition Drawing at p822. However, it was also known at all material times between WL and PTP that temporary access would be needed through the bay window at number 48 in order to allow an 8-tonne piling rig to enter the properties so that it could undertake both temporary and permanent piling work. (There would also have to be a route out of the properties at the rear so that the rig could get into the former garden to instruct piles for the structures to be created there; that, however, was more straightforward because the LGF at the rear was going to be demolished anyway). I deal with the detail of the demolition of the front bay window below.

Rear Elevation Demolition-Detail

74. The Demolition Drawing at p822 shows what, on any view, the intended demolition consisted of. It will be noted that at number 50 at GF and above, the windows would be moved up so as to align with those at number 48 with some consequential adjustment to those at number 48. In addition, the windows at number 50 would all be moved to the left. Thus, unlike the front elevation there was a significant amount of demolition apart from that entailed in the simple removal and replacement of individual windows. The shading on the Demolition Drawing at p822 shows this.

75. However, WL's case is that in fact the intended demolition at the rear at GF level was more extensive. According to Mr Postlethwaite, the true position as at the stage of NTP and is notified to WL was shown in a plan prepared for the trial by a member of WL's design team. It is at p3619.1 and I shall refer to it as the "Marked-up Plan". It has taken the Demolition Drawing at p822 and superimposed upon it, coloured sections in yellow, green and blue. Mr Postlethwaite had corrected one aspect of this before trial and another before cross-examination; the latter is that the green area to the right should in fact be yellow. His evidence was that all of the coloured sections indicated demolition in which case effectively the whole of the GF of the rear elevation would be demolished. Although Mr Hughes QC, when cross-examining Mr Postlethwaite asked him about his corrections and the provenance of this plan (none of which cast his evidence in any doubt) he did not challenge Mr Postlethwaite's actual evidence as to the extent of the demolition denoted by the coloured sections. On that basis, his evidence should be accepted without more.

76. However, when Mr Thomas QC questioned Mr Patel the latter took issue with some of those points and I propose therefore to deal with them even though Mr Postlethwaite was not challenged about this.

77. Mr Patel accepted that the green area to the left would be demolished. That is because it had to make way for the new, larger, 5-panel door referred to above in respect of which planning permission had not actually been sought at all. But it was shown in PTP's 602 General Arrangement GF Plan, Revision C1, and in the 606, Revision C 2 Elevations plan.

78. As for the blue area, Mr Patel accepted that the left blue area represented demolition. It was in fact shown as such in a GF floor (as opposed to elevation) demolition plan at 051-C1 p819. However, he disagreed that the blue area to the right was truly demolition because this was only space occupied by a window previously. I do not accept that point. First, 051-C1 shows the area as demolished and secondly it does not alter the fact that the whole prior window structure was being removed; see the structure at 054-C1.

79. That leaves the yellow areas. The demolition of the brickwork here is implied by the fact that Drawing 003, Revision C5 (January 2013), as produced by L&C, showed steel columns where the rear elevation brickwork had been, and indeed no brickwork is shown as retained at GF level at all (see vertical line F). The same is in fact true of the revision of that document from October 2011. However, in Revision 6, dated 17 May 2013, three vertical sections of brickwork are shown as retained and within the top two the steel columns are shown as embedded (see F/2 and F/3). This feature was repeated in Revision 7, dated 10 June.

80. Mr Postlethwaite explained that while L&C had thereby proposed that the columns should be inserted within the brickwork (and thereby retaining at least some of it as would appear from the outside of each elevation) this scheme could not actually have been built. That is because

there was not enough depth of brickwork to accommodate the columns. The depth of the brickwork (described in evidence by Mr Postlethwaite as "an existing slender nineteenth century brick pier") was about 13.5 inches while the column itself, apart from being heavy, was 10 inches thick. Therefore, according to Mr Postlethwaite, the only way that the column could be placed at this point would be by demolishing completely the brickwork previously there (which in fact the earlier drawings implied). No doubt there would be some form of replacement covering on the rear elevation but there would be demolition nonetheless. Even with this detailed explanation in answer to a question from Mr Hughes QC it was not challenged. That the columns could not be inserted this way was referred to in WL's Request for Information ("RFI") dated 12 July 2013 (dealt with below). In his evidence Mr Postlethwaite originally said that the "problem" (of putting the steel columns in retained brickwork) arose in July. In fact, as we have seen and as he later accepted it was first shown in Revision 6 dated 17 May 2013. However, in my judgment nothing turns on this.

81. For his part, Mr Patel said that an engineering solution could have been found and one could keep half a brick on the front (elevation) side of the steel column or perhaps consultations with the structural engineer would find a solution by using smaller steel columns. I did not find this persuasive and I accept Mr Postlethwaite's evidence as a senior representative of a large building contractor that the necessary implication of L&C's drawing was further demolition. In the event, the actual solution later on was to mount the steel columns further into the interior of the Properties and behind the external brickwork at the rear, not within it at all. See Revision 8 dated 28 August 2013.

82. What follows from all of this was that as at February 2013 the L&C Drawings showed no retention of brickwork at GF level of the rear elevation. But when some brickwork was shown as to be retained this was a feature that could not be built. Either way, Mr Postlethwaite was correct to say that the yellow area on the Marked-up Plan did show further brickwork to be removed.

83. As to that, Mr Postlethwaite's evidence originally was that this refinement came in around July 2013. On further questioning it appeared that it was somewhat earlier, in around May 2013 because retained brickwork not shown on earlier plans was shown on the L&C drawing at p2542 and Mr Postlethwaite accepted this. But I fail to see what difference this makes. May 2013 was well after the demolition work was started. Moreover, the actual Architect's Instruction to move the steel columns inwards (AI no.24) was only issued on 22 August 2013. And the plan at p2542 (referred to in AI no.10) seems still to show the columns embedded in the brickwork which is what Mr Postlethwaite said could not be done. Finally, the first application for CAC in August 2013 still showed demolition of the whole of the rear elevation at GF level.

84. For all of those reasons, and to the extent that it matters, I find that the true extent of the rear elevation demolition is as set out in the Marked-Up Plan.

The Front Bay Window at number 48

85. As previously indicated, there was some demolition work intended at the LGF area of the bay window in any event - see 054-C1. As Mr Postlethwaite put it in cross-examination, the demolition was for the full width of the GF bay window at a low level i.e. under it (excluding the removal of the wider brickwork) which meant that the whole of the front elevation directly above it at number 48 had to be supported. Because those works were part of the Contract and because access was needed through the front of the Properties somewhere for the piling rig the

obvious choice of location was the front bay window at number 48 where there would be demolition work anyway. The rig would enter number 48 at the light-well (LGF) level and drive into it. However, as it was a large piece of mobile equipment, it would be necessary to remove both the GF and LGF bay windows and reinstate them later.

86. WL had made it clear to PTP at the outset that access by this means would be necessary in its original and revised Method Statements dated November 2011 and October 2012 respectively. They stated that:

> "All the contiguous piles and bearing piles will be constructed using restricted access piling rigs working from the existing lower ground level or garden level in the case of the rear contiguous piles. The rigs will access the works from the front of number 48, using a ramp and make their way into the building through an opening at lower ground. Another ramp will be made in the rear to allow the rigs to track from lower ground to garden level."

87. Reference is also made to WL's sketch plan 11048/SK 06.

88. It might be thought that the narrative of the Method Statements suggested that there was no removal at GF level but the sketch SK 06 from October 2011 shows that the access scheme would involve the removal of the spandrels surrounding the GF bay windows which themselves would be removed in any event. This is also reflected in the later Construction Programme issued on 5 March 2013 in which item 27 states "Form access through front bay window for piling rig" for which 5 days was allowed from 25 March.

89. It is also important to refer to what was said at a meeting at PTP's offices on 4 January 2012. Item 13 referred to the 8-tonne unit which would require a clearance of 8m above existing ground level. While it might be possible to use a smaller rig, which would only require a 5-6.5 m clearance this would be at additional cost to the current tender offer (which PTP did not want). Item 15 records that "DF" (which should be "DB" i.e. Derek Brattle of WL) illustrated what size of opening would be required to be made through the front bay of the building and Mr Tigg of PTP felt that this was a practical arrangement and, since it was only a temporary measure, would not require any planning permissions. The option of using a smaller rig at greater cost was not taken up.

90. It was not suggested to Mr Postlethwaite in cross-examination that the extent of the demolition actually undertaken for the purpose of the piling rig access (over and above that which was required in any event) was excessive. Indeed, much later, when the first application for CAC was made on 1 August 2013, the Design and Access Statement ("DAS") referred to the demolition of the front bay which had already taken place and had been seen by Mr Plaster during the site visit on 3 July 2013. The DAS stated that as soon as works permit the bay would be reinstated and "Owing to the design and layout of the property no other access solution was available. The contractors have produced a statement dealing with this matter which is appended to this document." In cross-examination Mr Patel said that the DAS put the matter that way because it is what WL had said and the demolition had already happened but that does not explain why PTP made it clear that access could not happen in any other way unless it was being disingenuous. And while Mr Patel at one stage suggested that the demolition intended by WL was more than necessary, he had already admitted in cross examination that from WL's tender PTP knew that they wanted access to the bay window at GF and LGF level. There was no challenge to this suggestion at that stage, and I have already referred to what was said at the meeting on 4 January 2012.

91. On 15 March 2013 WL sent copies of (among other things) drawing SK 06 (see above) to Mr Clin's structural engineers, L&C to say that they would be commencing this work shortly. This does not appear to have been sent directly to PTP but they did not appear to have been surprised when they did, and there was never any suggestion that WL should not proceed as they intended.

92. In answers to questions from Mr Thomas QC Mr Postlethwaite said that the amount of demolition across the front bay window had crept up from representing 6-7% from the PTP demolition drawings then another 4-5% in the tender proposal and then another 4-5% in the construction issue drawings when the work commenced. However I do not accept that the planned demolition at the GF bay window (including for temporary works) was significantly different by the time the works started and certainly not for the purposes of the obligations imposed on PTP by the Implied Term (see below).

93. In my view, and to the extent that it matters, PTP was at all material times aware of what the access scheme essentially entailed and in particular that it would involve at least some demolition at GF level. That is not simply because of the documents and communications referred to above. It is also because, consistent with his general approach described above, Mr Patel did not actually think that this was problematic from a planning point of view since the relevant works would be temporary only and would be reinstated later. Accordingly, knowledge of the access would not produce an adverse reaction on his part.

94. I should add that Mr Bowles did not specifically deal with the access scheme in his report because these works did not feature in the NTP. However, in fact, that did not mean that PTP was not aware of them – see above.

Conclusion on the Extent of the Demolition Works Intended

95. Accordingly, the works relevant for the question of whether CAC was needed included the extent of demolition at the rear elevation as shown on the Marked-up Plan and at the front, the bay window at number 48 at LGF and GF levels. I deal with one further point about the latter work at paragraphs 133-145 below.

96. There is no need at this stage to say anything further about the making of the Contract or the issuing of NTP. And in the preceding sections I have dealt with the extent of the demolition in play at both of these stages.

EVENTS IN 2013

97. On 26 March 2013 WL sent a Demolition Notice to RB as required by s80 of the Building Act 1984. The notice was given in a *pro-forma* document made available by RB for these purposes and all the relevant parts of it were filled out, including the location of the works. Although s80(3) requires the notice to state the actual demolition works to be undertaken there was no space for this on the form and WL did not provide such details. Mr Postlethwaite said that WL would "slavishly" follow whatever form was relevant in terms of the LPA involved. He also said that the sending of such a form did not require liaison with PTP. It was a matter for WL. It is not clear why RB devised this abbreviated form of demolition notice. It may have been because it was the practice of RB to visit every such site to see for itself the intended works but in any event, this does not matter because it is not suggested that the way in which this form was filled out contributed in any way to the problem of the lack of CAC. What the notice did do however was to cause RB to visit. (WL has pointed out that the lack of detail in the Demolition Notice was not something pleaded by Mr Clin and so no further investigation of

this matter was undertaken for the trial. However, since I have found that the form of the notice as sent by WL does not matter, any lack of further investigation into it, equally does not matter).

98. As it happens, by a letter dated 3 April 2013, Mr Goodever-Docker, Mr Clin's adviser, wrote to RB saying in effect that Council tax should not be payable over the period when the Properties were "in the process of being demolished in their entirety and then there will be a new building erected in their place." Mr Clin, in evidence sought to downplay the significance of this statement saying effectively that the position had been somewhat exaggerated and this was all in the context of seeking a Council tax rebate. It is hardly determinative on the question of the need for CAC but this letter does at least show what the essential aim here was.

99. Following the visit of Mr Plaster of RB in April (by which time the front bay window had been removed at GF and LGF level) Ms Harmer of PTP wrote an internal email to Mr Tigg and Mr Patel which said as follows:

> "KP has [been] visiting site where he has been told by WL that there is demolition of the ground floor rear elevation, all floors and roof. KP wishes to establish if this amounts to substantial demolition. If in it his opinion it does then a full Plans Application for Planning Permission and Conservation Area Consent for Demolition… Will need to be made all applications to date have been submitted and the Household the Application for Planning Permission for work or extension to a dwelling and Conservation Area Consent.… KP also made reference to the pre-application we applied for where we requested to demolish the front and rear elevations which is causing KP concern. He also noted floors are being removed how the front and rear elevations being supported.… He has requested red hatch demo plans and a cover letter by the end of the week. I have attached the existing plans and elevations showing demo we have, it is a sensitive issue so I need some guidance on the cover letter."

100. The only reason why it could have been a "sensitive" issue, read objectively, is because PTP would have appreciated that to date, RB had not been apprised of the full extent of the demolition works contemplated. This is borne out by what happened next.

101. Mr Patel's response to Ms Harmer's query was to email her saying that they should "stall it" until the following week and there were 2 different agendas.

102. On 2 May, Ms Harmer wrote to Mr Plaster enclosing some drawings but not those showing the full extent of the intended demolition works or the front and rear elevations, even though PTP had them and Ms Harmer had specifically sent them to Mr Patel and Mr Tigg. One can only conclude that the reason why Ms Harmer did not send them straight away to RB is because PTP would have preferred RB not to have seen them.

103. Predictably, Mr Plaster came back later the same day and said:

> ".. There is no front and rear elevations in your submission. When I visited last week there was no ground floor front and rear elevation walls at ground floor level.… I was also advised that all floors and spine walls within and between 48 and 50 were being demolished. You will also need to submit the extent of demolition (hatched in red) for each floor level and front and rear elevations for our consideration."

Ms Harmer replied on 3 May and again did not enclose the drawings sought by Mr Plaster. Rather, she said this:

> ".. Before we respond it will be helpful for us to explain our understanding.… We only mark the part that are proposed to be demolished and replaced within the approved proposals. Whereas there are internal demolitions that are not relevant for planning for this property. There are also parts, such as the right front bay window that the Contractor is removing temporarily, for temporary works purposes, which will be fully reinstated as existing.… Clearly the demolition notice refers to all internal parts and some temporary

works that will be reinstated which we have not shown since these are not relevant in planning terms but perhaps relevant for the demolition notice.…"

104. On 21 May, Mr Plaster responded saying that it would appear he had not yet received the demolition drawings as requested and asking when he would receive them.

105. Remarkably in my view, on 28 May, Ms Harmer replied, still not enclosing the requested drawings but said that it appeared that Mr Plaster had not had a chance to review the comments made in her email of 3 May. She said that his clarification on this matter would be helpful in preparing "the additional drawing you request as the internal demolition that you refer to is not relevant to planning issues." Finally, on 14 June 2013 Ms Harmer sent further drawings. Even here, however, while these included the "Information" plans at pp2554-2556 showing front and rear elevations, these did not include the plan at p2531 showing the removal of brickwork around the French windows at the rear of No. 50 as Mr Patel accepted. However, he said that in fact he had had a telephone conversation with Mr Plaster prior to submitting the drawings on 14 June which led to the actual plans sent, suggesting that PTP sent precisely what RB wanted. I do not accept this. The conversation was not in Mr Patel's witness statement, the only conversation referred to by RB was one on 11 July and Mr Patel was fairly vague about it anyway. I should add the entirety of the interior demolition was also missing from the 14 June Drawings.

106. It is impossible to review the email trail referred to above and not conclude that there was a considered attempt to avoid showing the relevant demolition plans to RB. To some extent Mr Patel accepted this because he said he saw no reason to send them since they were irrelevant (i.e. there was not demolition which generated a need for CAC). If that is what he really thought then it is a rather cavalier approach to the situation when RB was insistently demanding that the drawings should be provided and where this issue was unlikely to go away.

107. On 8 July 2013 Mr Paul Mace of WL wrote to Mr Patel. He said that they had just been visited by Mr Bates, the Contract and Enforcement Officer for RB. He had wanted to know how much of the buildings were to be demolished and what was to be kept. He was aware the front facade was to be retained and also aware of vehicular access and that part of the rear facade is to be kept. He wanted to know how the facades were to be kept in place while all the internal structure was removed. Mr Mace showed him temporary work schemes and gave them a copy of CDS drawing 04J. (CDS were structural engineers employed by the basement sub-contractor engaged by WL.) Mr Mason said that Mr Bates had been shown around the site and took photographs of the rear facade and vehicle access. He was apparently particularly interested in how the new floor levels across the two properties would work with the windows which he had understood would remain as they were.

108. There then followed the July Letters. They read as follows:

"I write further to my officer's visit to the above-mentioned properties on 3rd [this should be 8th] July 2013 regarding demolition work undertaken. Whilst the extent of demolition at this time was not substantial demolition and a breach of the above Act had not occurred, my officer was shown plans from the on-site engineer that indicated the following demolition works: -

- rear elevation of both 48 and 50 to be demolished below the cill of the first-floor windows,
- the whole of the internal envelope of both buildings from third to lower ground level to be demolished
- the removal of the roof from each property.
- the removal of the ground and lower ground front bay of 48 Palace Gardens Terrace

You are advised that the extent of demolition proposed above is considered substantial demolition requiring Conservation Area Consent from the Council. I confirm that such an application has not been sought or obtained.

I must also advise you that carrying out unauthorised substantial demolition works to a building in a conservation area is an offence under Section 9 of the Planning (Listed Buildings & Conservation Areas) Act 1990. Any person found guilty of such an offence is liable of a fine of up to £20,000 upon conviction in the Magistrates' Court [and an unlimited fine **if** convicted by the Crown Court]. Continued non-compliance can result in further prosecutions for a similar offence, incurring similar fines. The Council may also issue a conservation area consent enforcement notice, which is served on all parties having a material interest in the property. It is entered on the Local Land Charges records which could make the future sale or financing of the property more difficult.

If **it** is your intention to proceed with the above demolition works, I would wish to receive an appropriate application **within 28 days of the date on this letter.** You will need to demonstrate why the above demolition works are structurally necessary and what temporary works you are proposing to secure the stability of the buildings. I would also wish to receive written confirmation of your intentions, **within 21 days of the date on this letter.**

If you fail to do so, and the works proceed without the necessary consent, I will consider initiating formal prosecution proceedings in this matter.

If you do not understand what you are being asked to do, please contact the case officer whose name is at the top of this letter. Even if you do so, the above deadlines and requirements must still be met…
Bruce Coey Team Leader, Planning Enforcement
For the Executive Director, Planning and Borough Development"

109. As already noted, the effect of these letters was that WL stopped all demolition work. PTP then submitted an application for CAC on 1 August 2013 to cover all the anticipated demolition works, and which show demolition of the whole of the rear elevation up to GF level; this was withdrawn by Mr Clin as it was likely to be refused.

110. After protracted and somewhat pointless attempts to persuade RB that CAC was not in fact necessary, the planning consultants Nathaniel Litchfield and Partners ("NLP") were contacted. With their assistance Mr Clin then put in a revised application for CAC in December 2013. This was eventually approved by RB in June 2014. It is not necessary to go any further in the chronology.

WAS CAC NEEDED FOR THE DEMOLITION WORKS?

111. I have already made some observations on the views of each of the experts above.

112. I approach this question having already found as a matter of law that:

(1) The fact that some of the demolition at the front was the temporary works only with the removed section later to be reinstated is irrelevant to the question of whether there is substantial demolition;

(2) The demolition of the whole of the interior is not insignificant simply because it does not contribute to the external character and appearance of the conservation area; and

(3) Questions of such contribution and appearance do not arise in the context of whether there is substantial demolition so that CAC is required.

113. Dr Miele's view, set out in paragraphs 29-33 of his report, which he maintained in cross-examination, was that even without the temporary works involving the removal of brickwork at the front elevation bay window or at the rear elevation, and looked at as a whole, the proposed

works amounted to substantial demolition. The important elements for him were the demolition of all of the internal floors, all internal partitions from each property including the spare bay, demolition of the whole of the party wall between them from the footings to its expression above the roofline including chimney stacks, removal of both structures in their totality, removal of the lower ground floor areas under the former properties and the removal of the lower ground floor rear facade and significant amounts of brick on the rear of the ground floor.

114. He added (and it is obvious in any event) that the removal of all of the interior meant that the party walls at numbers 46 and 52 and the front and rear elevations would need to be supported entirely, both while the interior of the new house was constructed and then afterwards on a permanent basis. In practice this meant that there was an initial temporary shell erected to support these walls and then, within it as it were, a new permanent steel frame would be constructed to form the structural basis for the new 6 floors and the ultimate support for the walls. The extent of the internal demolition is made clear in the demolition photographs especially numbers 17 and 6 at p 3593. Some of the other photographs on that page also showed just how great the internal void was including that at p3595.

115. Dr Miele made the additional point, with which I agree, that the removal of the partition wall between numbers 48 and 50 was particularly significant because it served the structural purpose of supporting at one end all of the internal structures at numbers 48 and 50. Overall therefore, he took the view that the sites of both houses were indeed being cleared for redevelopment.

116. Mr Hughes QC suggested in argument that this greatly overstated the position because in truth one still had, after, as well as before, a "box" representing the house i.e. the party walls with numbers 46 and 52, together with most of the front elevation and a large part of the rear elevation. In one sense, of course, that is true but the mere retention of walls (or most of them) does not mean that there cannot be substantial demolition. For the same reason I do not accept the suggestion made by Mr Hughes QC in closing that the proposed external demolition was more than a "façade retention scheme". If the latter can mean that the works as a whole are demolition for *Shimizu* purposes, then I fail to see how yet more external demolition produces a different result. Equally, the idea that the site was not "cleared" here in the *Shimizu* sense because there were substantial temporary and permanent steel structures does not assist Mr Clin. Indeed it assists WL because it points to what was necessary to hold up the only remaining structures which (apart from the party walls with Nos. 46 and 52) were most (though not all) of the front and rear elevations which would otherwise fall down, unsupported. The fact that a new steel frame was needed for the new house does not mean that the site was effectively cleared. It was cleared, prior to the arrival of the new frame.

117. Mr Bowles' approach, on the other hand, was dictated largely, though not exclusively, by his erroneous view that demolition of the interior, even if total, does not count for very much in relation to substantial demolition. See, for example, paragraph 8.23, 8.25, 8.28 and 8.29 of his report. Paragraph 8.28 introduced the further notion that the demolition to the rear elevation (more extensive than at the front) itself should carry less weight since it contributed less to the character and appearance of the conservation area as a whole. That, as I have explained above, is misconceived.

118. Equally misconceived was his view that simply because RB had rejected at the pre-planning advice stage a demolition scheme which entailed the removal of the entirety of the front elevation at number 48 and the rear elevations, this somehow meant that any scheme falling short of that would not require CAC. See his paragraph 30. That simply does not follow.

119. It is at this stage worth noting, simply as a piece of evidence that RB itself very firmly concluded that there was substantial demolition here, in the July Letter. It is true that RB refers to the removal of all of the rear elevation at GF level as one of the factors causing it concern, but (a) in my view that was the effect of the various plans, (b) this was indeed what had been proposed in the first (unsuccessful) application for CAC made on 1 August 2013 and (c) it is doubtful if RB would have taken a different view if the extent of demolition at the rear GF level was somewhat less and only, for example, that which had been shown in the original hatching at Demolition Drawing 054-C1.

120. It is also worth noting that this was a view (that CAC was required) which both experts agreed was not an unreasonable one for RB to take even though Mr Bowles disagreed with it. Of course, if in truth, the removal of the interior was only of limited significance it is hard to see how Mr Bowles could even have accepted that RB's view was not unreasonable - but he did. Although not stated in the Joint Statement dealing with reasonableness at paragraph 3.20, in his report at paragraph 7.17 Mr Bowles sought to qualify that by saying that RB's view was reasonable because it took into account the demolition already done at the front and the removal of the whole of the rear elevation at GF level. He also there referred to the absence of demolition information which RB had sought, as giving rise to reasonable concern on the part of RB. However, as he made clear towards the end of his evidence, his own view was that the demolition works at the front and rear did not make the whole works need CAC. In other words they were immaterial. On that basis he accepted that whether RB's opinion as set out in the July Letters was reasonable or not did not turn on the extra factor of these works, as it were.

121. Some further support for RB's view, although more nuanced, came in email advice from NLP who had been instructed while the initial application was still pending, and who later took on the next planning application which ultimately succeeded. In its initial email dated 24 September 2013, NLP also took the view that the interior demolition, certainly taken on its own would be of very limited relevance but then they say that this was not to say that RB could not choose to interpret the works in this manner. While this would represent a departure from RB's previous position it is not to say that it is unreasonable "as cumulatively the alterations to the building in total may very well be considered 'substantial". And then, in its later email of 25 September 2013, its advice was more refined. While it said that it was their experience that CAC was not generally required for the removal of internal floors and walls it went on to say this:

> "However, the extent of demolition proposed here is on balance extensive. It not only appears to include all of the removal of the internal floors and walls but also the main porch party wall between the 2 properties… This represents a substantial removal of fabric in itself and based on the cases I have reviewed and considering the rough proportion of those buildings that have been removed (internal or external fabric-without a need for Conservation Area Consent) this removal has never exceeded 50% of the total building fabric.… In this case while we do not have an exact figure on the percentage of the total fabric you intend to remove, this does seem on an initial assessment to be close to or more than 50% of the total building fabric present."

122. And of course, in *Shimizu* itself, Lord Hope was of the view that there was substantial demolition where the facade and chimneys were retained.

123. There was much debate about the significance or otherwise of a 50% "rule of thumb" as to whether the intended works amounted to substantial demolition or not. There is a reference to 50% in Circular 01/01 referred to above. Section 15 (3) (a) states that a proposal to retain less than 50% of the surface area of that part of a principal building represented on any elevation would be treated as a proposal for the demolition of a principal external wall. However, as I have already indicated, this is all in the context of listed building consent and which applications

must be referred on to the particular institutions interested in heritage assets. I therefore do not see this as directly relevant and it is certainly not support for the notion that there is any kind of rule that a building like the Properties here would only be regarded as the subject of substantial demolition if more than 50% of the external facade was to be removed.

124. Of more relevance is the answer to some "FAQs" on RB's own website. This included the statement that planning permission would be required for, among other things, the following: "substantial demolition - at Kensington and Chelsea this is considered to be more than 50% of the structure." Of course, at best this is guidance and not a formal policy of RB but more importantly, it refers to 50% of the structure not 50% of an external facade. In his report, Mr Bowles concentrates only on the latter. In his view, the intended demolition, for both front and rear elevations taken together came to some 20-31%. This was allied to his point that the interior demolition is of much less significance because of its failure to contribute to character and appearance.

125. However, if it is the structure which is relevant for the purpose of any percentage calculation it is obvious, having regard to all the drawings that if one counted the area of all the internal floors and walls to be removed, the extent of the structure to be demolished would be far more than 50%. Mr Bowles accepted that it would be possible to undertake such area measurements but he did not do so-because he was focusing on the facades. In cross-examination Mr Thomas QC sought to put to Mr Bowles a series of dimensions: of the height, width and depth of the Properties taken from one of the plans which would demonstrate that the area affected by demolition would be a high proportion of the total. I did not permit him to put the particular calculations to Mr Bowles because they had not been foreshadowed in the written openings or in Dr Miele's report or discussed for the purposes of the joint statement. For the same reason I did not allow him to develop an argument based on those same calculations in his closing note. However, the reality is (as I expressed it in closing argument) that one hardly needs particular calculations to conclude that of course if the area of internal demolition is taken into account then very much more than 50% of the total structure will be removed. To the extent that it is said that RB routinely applied this calculation, then if they did so here (though not expressly referred to in the July Letters), they obviously took the view that the threshold was exceeded (as indeed it is) since they said that CAC was required.

126. So, to the extent that a 50% test is used, it does not actually help Mr Clin. Rather it helps WL. However, in my judgment, any percentage test is only of limited value when the Court has to decide for itself whether there is substantial demolition.

127. Reliance was placed by both sides on PTP's Preambles and Trade Specification number 3, issued on 15 February 2013 as part of the NTP under the heading "C20 Demolition",

(1) Paragraph 120 stated:

> "EXTENT OF DEMOLITION
>
> General: Subject to retention requirements specified under Clause C 20/150 demolished structures down to and including Lower Ground floor level; including roof structures; rear extension; is all concrete and all timber floor plates, chimney breasts and stacks were not shown to be retained and raised, and all finishes to the Party Walls."

(2) While paragraph 150 stated:

> "FEATURES TO BE RETAINED

> General: Keep in place and protect the front facade including front porch and entry steps and all balustrading up front boundary front steps and first-floor balconies… Major sections of rear facade as indicated on drawings, Party Walls, some Party Fence Walls and the shared chimney stack above roof level…".

128. Mr Thomas QC said that this pointed to substantial demolition while Mr Hughes QC said that it pointed to substantial retention. But in truth this summary adds little or nothing to the much greater detail to be found in all of the relevant drawings. So it is not important in my view.

129. As for Mr Bowles' evidence on the facts here, as distinct from the law and policy relating to CAC which I have referred to above,

(1) In cross-examination he felt unable to express any opinion as to the structural significance of the internal wall (cf Dr Miele) because it was beyond his expertise; I found that surprising;

(2) At paragraph 8.35 of his report he accepted that on the basis of the application made on 1 August 2013 (which showed the removal of the whole of the rear elevation at GF level) the demolition applied to 53% of the rear elevation. While recognising that this exceeded the 50% threshold, he had earlier referred to he said that in effect this did not matter here because of the retention of the first and second floor parts of the rear elevation. And because of the lesser contribution to character and appearance of the rear elevation. I did not find those points persuasive at all; if one was to apply the 50% threshold, I fail to see how such matters can dislodge the fact that it was exceeded and in fact of course they are irrelevant;

(3) In general terms Mr Bowles simply did not apply in a straightforward and clear manner the analysis required by *Shimizu*; and

(4) Overall, and for all the various reasons given above, I thought that Mr Bowles' approach was flawed and unpersuasive; on the other hand, I thought that Dr Miele was a generally impressive and reliable expert witness on the points he had to deal with. If there is a conflict between them which I have not specifically addressed, then I would prefer the evidence of Dr Miele to that of Mr Bowles.

130. In my judgment, it is plain, simply looking at the nature and extent of the proposed demolition works that they amounted to substantial demolition of the Properties. To say that there remained a box (with significant removals to the important front and rear elevations thereof) and therefore the building actually remained is completely unrealistic in my view. This was in every practical sense a clearing of the site occupied by the two houses for the redevelopment intended to take place as one. The only reason why any parts of the facades were retained (i.e. not to be demolished and reinstated or recreated) was because PTP knew that it would not obtain CAC for the pre-application scheme. While it is true that the two party walls for numbers 46 and 52 were retained, that is simply a function of the fact that the Properties were within a terrace.

131. I should add that my conclusion would be the same even if the temporary demolition works to the front bay window at number 48 were left out of account. And the same is true of any temporary works to the rear elevation although in fact there does not seem to have been very much of that (in the sense of access points etc) certainly none which has occasioned debate in this trial. Equally, even if the Marked-up Plan should not be accepted with regard to those elements with which Mr Patel disagreed, it would still make no difference to my conclusion. That accords with the primary position adopted by Dr Miele whose evidence I accept.

132. Accordingly, therefore, there was to be substantial demolition and CAC was required.

BREACH OF THE IMPLIED TERM

Preliminary Point 1 - the status of the temporary works to the front bay window at number 48 ("the access works")

133. Mr Clin contends that, to the extent that CAC was required in respect of the access works (whether by themselves or in conjunction with other demolition works) they do not fall within the ambit of the Implied Term and accordingly should be left out of account. Instead, it was for WL to seek the relevant consent.

134. This is said to be because of Clause 2A.6.2 ("the Clause") which provides as follows:

> "The Contract or in submitting the Contractors Proposals for the Contractor's Designed Portion and the Contract Sum Analysis in accordance with the terms and conditions of this Contract thereby confirms that it is satisfied that:….
>
> 4. Any of the Works designed by the Contractor will fully comply with the Statutory Requirements and in accordance with the Employers Requirements and this Contract."

135. Mr Clin contends that the access works were designed by the contract or here, i.e. WL, and compliance with Statutory Requirements here meant that they conformed with all planning law requirements including the need for CAC; in other words, it was for WL to obtain that consent.

136. The Clause was considered by Edwards-Stuart J in the preliminary issues trial because its scope had to be determined in relation to WL's contention that the implied term then being put forward required Mr Clin to seek all relevant consents. At paragraph 53 of his judgment he said this:

> "By clause 2A.6.2 of the Contract… Walter Lilly confirmed that any works that it designed would comply with the Statutory Requirements, that is to say either that such works would comply with existing planning permission or conservation area consent, or that any necessary consents would be obtained. In my view, this clause does not transfer the general risk of obtaining planning permission or conservation area consent to Walter Lilly, but makes it responsible for obtaining consent for any work that goes beyond that set out in the Employers Requirements. One example of this could be temporary works: if, for example, the contractor wished to demolish a wall in order to gain access to the site with a view to reinstating later, the contractor may well be responsible for obtaining any necessary consents to that demolition. For the purposes of this judgment, I will assume that the demolition works referred to in RBKC's letter of 17 July 2013 formed part of the Employers Requirements. Whether or not that assumption is correct is not a question that I can decide at this stage on the basis of the material before the court."

137. In the Court of Appeal, Lindblom LJ agreed with that part of paragraph 53 of Edwards-Stuart J's judgment up to the reference to works going "beyond that set out in the Employer's Requirements". He did not comment on the rest of paragraph 53.

138. For my part, respectfully, I am not sure precisely what the limitation on the operation of the Clause to works going "beyond the Employer's Requirements" really means. It seems clear from the introduction to the Clause and the other sub- paragraphs thereof that the subject matter of sub-paragraph 4 is the Contractors Designed Portion ("CDP") of the Works which themselves are defined in Clause 1.12 include the CDP. But if so, it is very hard to see how the CDP goes "beyond the Employers Requirements since it is there to fulfil those requirements. On that footing, the limitation to works "beyond the Employer's Requirements must in some way be cutting down what would otherwise be the ambit of the Clause. And if so, it follows

that obtaining relevant planning consents for the CDP is not (now) the responsibility of the contractor under the Clause.

139. To some extent this is borne out by the definition of CDP as set out in the 9th Recital which is:

> "Pool, associated equipment, HVAC in pool hall,
> Passenger lift.
> Dumb waiter.
> Specialist glazed elements including conservatory.
> Shoring/facade retention.
> Temporary piling and plunge columns.),
> Temporary support works!
> Permanent piling.
> Designed joints in in situ concrete.
> Waterproofing to below ground structures and cavity drainage system
> Connections in structural steelwork
> High security reinforced external door sets
> Below ground surface and foul drainage
> Above ground surface and foul drainage
> Main staircase structure half landings finishes and balustrades
> Architectural metalwork
> Bespoke joinery"

140. But it is not suggested that to the extent that any planning permission was necessary for such items, WL ever sought it or was asked to seek it. Indeed, we know that specific applications for planning permission for the conservatory and the swimming pool were made by PTP.

141. If the CDP is not to be regarded within the Clause, at least as far as the requirements of planning law are concerned, that would then accord with the form of the Implied Term as found by the Court of Appeal which, as described in paragraph 37 of its judgment, relates to "the Works" i.e. the expression as found in the Contract which includes CDP. It is impossible to read the formulation of the Implied Term in any other way. Since that is part of the essential *ratio* of the case (whereas the limitation on the scope of the Clause is not) it follows that the CDP is (now) covered by the Implied Term. And that would be consistent with the limitation of the scope of the Clause only to works which go beyond the Employers Requirements. On that basis there is no conflict between what is said in paragraphs 21 and 37 of the judgment of the Court of Appeal but if there was, paragraph 37 would prevail.

142. I should say at this stage that this particular issue has led me to question whether the compliance with "Statutory Requirements" mandated for the works covered by the Clause was intended (at least in that context) to deal with issues of planning law and consents at all. There is much to be said for the view that there was no such intention and that "Statutory Requirements" here should be looked at more narrowly. However, Edwards-Stuart J (and by implication the Court of Appeal) clearly thought that the Clause did cover planning matters and so the point I raise is for discussion on another day and in another case.

143. How, then, does one characterise the access works here? They do not strictly fall within the listed CDP items themselves. On that footing it could be said that they would not fall within CDP. But in my view they did, because it can be said that they were necessarily ancillary to the construction of the temporary or permanent piling, themselves within the CDP. On that basis they would be subject to the Implied Term as set out above. But even if they were not within CDP, they would not otherwise be caught by the Clause because in my view, they do not go "beyond the Employer's Requirements". Again, that is because they are clearly necessary in order for the substantive works to be carried out. Indeed, at one stage later, PTP asserted this to RB. See paragraph 90 above. Either way then, the access works must fall within the Implied Term. I appreciate that Edwards-Stuart J used temporary access works as an example of what may go beyond the Employers Requirements but that part of his judgment was strictly *obiter*

because he did not have to decide the issue in relation to any particular access works and did not do so.

144. Even if the access works fall within the Implied Term as I have held they do, there could still have been a residual question as to whether Mr Clin had used all due diligence in seeking consent for them. For example, if neither he nor PTP were aware that they were being proposed despite having made all proper enquiries, that may mean that there was no failure to use all due diligence so far as those works were concerned. However, that does not arise here because, as I have found, PTP was aware of them at all material times. See paragraphs 85-93 above.

145. Accordingly, there is no need to treat the access works differently from any other of the intended demolition works so far as compliance or otherwise with the Implied Term is concerned. Moreover, on my primary view of the demolition works, CAC would be required whether or not there were to be the access works; see paragraph 131 above. I therefore return to consider generally, the question of compliance with the Implied Term.

Preliminary Point 2 – the rear elevation

146. I have already addressed above what I consider to be the true extent of the demolition required at the rear elevation. In closing arguments Mr Clin contended that WL was obliged to ensure that the Employer's Requirements were entirely understood and only those elements of the existing structure requiring demolition were removed – see Clause 5.2.1 of L&C's Specification for Demolition Work. I follow that, but on the basis of what I have found in relation to the Marked-up Plan (see above) it cannot be said that WL was proposing to demolish more than it should have done.

147. It is also said that Clause 2.15 of the Contract itself provided that if the contractor becomes aware of any discrepancy in any of the drawings issued by the architect, he should immediately give notice to the architect so that an instruction can be given. Mr Postlethwaite was then cross-examined about the Requests for Information Nos. 30 and 31 sent to PTP on 12 July 2013. This asked for clarification on how much of the rear facade was to be removed because there was (a) a conflict between PTP plan 054-CO1 and L&C plan 003-CO7 (Revision 7, mentioned earlier) which showed the retention of brickwork where the columns would be (see above) but less retained brickwork than in the PTP drawings. In response, on 17 July, Ms Harmer said that WL should carry out the permanent works as per the L&C plan Revision 7 (ie retain less brickwork) and undertake whatever demolition work was needed for the temporary support of the rear elevation from first floor (1F) upwards. This Request came after RB had visited the site. Mr Postlethwaite said that WL only issued the Request in July because it realised by then that there was a conflict which would have been avoided had co-ordinated plans from PTP been issued earlier. I agree that this does not entirely answer the question why WL did not raise the matter somewhat earlier. The L&C drawing referred to is dated 10 June and in fact Revision 6 from 17 May 2013 also showed the greater amount of demolition (although earlier L&C drawings implied even more, as noted in paragraph 79 above). But I fail to see where this goes. The critical time in terms of compliance with the Implied Term is not May 2013 but much earlier and in that regard I have already set out above the true extent of the demolition required at the rear elevation. Moreover the answer given by PTP was in any event that there should be the greater amount of demolition. Finally, Mr Postlethwaite pointed out that WL had to issue very many Requests for Information because of the numerous discrepancies and inconsistencies in the instructions from PTP. So that would bear upon when it was reasonable to expect WL to raise the Requests in question here.

148. A further point was taken that at one stage Mr Postlethwaite accepted that a contractor should look at the demolition drawings first off, while later he said that they would look to the structural engineer "to create structural certainty". I do not see any conflict here. All Mr Postlethwaite was saying is that in terms of particular detail they would have to follow the engineer's drawings which they would follow religiously – and which, after all is presumably why they were issued by PTP to WL. And they would put works to support part of the structure to be maintained if that is what the L&C drawings dictated. And indeed in the answer to the Request from July that is exactly what PTP told them to do. The only problem would come if the L&C drawing implied a different overall design to that shown in the PTP drawings. But in that case I would agree that it is the responsibility of the PTP (which is supplying both sets of drawings to WL) to make sure they are co-ordinated. And any delay by WL in picking up discrepancies here is irrelevant in my view, as explained above.

149. Again, therefore, there is no basis for removing the true extent of demolition at the rear elevation from the ambit of the Implied Term.

Did Mr Clin use all due diligence?

150. Although WL has pleaded breaches of the Implied Term as taking place both before and after the July Letter, it is not now necessary to look beyond the date of that letter. This is because Mr Clin concedes that if a breach can be established before or as at July 2013, he will be liable for the whole of the delay period of 53.2 weeks.

151. I consider this first by reference to the primary obligation under the Implied Term which is to make a timely application for all relevant permissions and consent which here means CAC for the works as a whole; in other by reference to Limb 1 as set out in paragraph 8(1) above.

152. The starting point is that CAC was indeed necessary for the demolition works which WL were instructed to carry out. Those works were implicit in the scheme that appeared from the outset for the reasons given above. I do not accept that PTP's drawings dated June 2010 did not emerge until much later. Even if some element of the demolition works was not finalised until later, the point is that the sort of scheme being contemplated which involved the entire removal of the interior including the partition wall so as to amalgamate the properties and significant alterations to the rear facade which required demolition first was obviously one which was likely to require CAC. That is because it was likely to constitute substantial demolition.

153. And even if PTP needed some further reminder of this, they had it in the form of RB's pre-application advice letter of 29 March 2011. While that scheme, and the one actually proceeded with were not quite the same and the former was more extensive, there was sufficient similarity between them in my judgment to make any architect responsible for planning applications realise that there was at least a very real risk that any similar scheme would require CAC.

154. Accordingly, an application for CAC should have been made on any view shortly after receipt of the pre-advice letter. Such an application was not made at any time prior to the July Letters. Indeed, Mr Clin does not suggest that any such application for CAC in respect of the whole works was made.

155. On the basis of those simple facts, it seems obvious that Mr Clin (through PTP) did not use all due diligence to obtain the CAC.

156. In answer to that, Mr Clin says first that because it can be assumed that RB did not consider the individual planning applications gave rise to questions of CAC (since none of the planning permissions included CAC) it could reasonably be assumed by PTP that none was required for the scheme as a whole. But that ignores the crucial point that the scheme as a whole was never presented as such to RB. The proof of the pudding is in the eating: as soon as RB was provided with all of the facts in May and June 2013, it took the view that CAC was required as firmly stated in the July Letter.

157. In this context, the fact that the "Informative" sections of each of the planning permissions did not alert PTP to the need to apply the for the CAC in respect of the demolition scheme as a whole is irrelevant. It was for PTP to consider the implications of the totality of what the scheme involved in terms of seeing what consents were necessary, not RB.

158. Moreover, even in the planning applications which were made key demolition items on the rear elevation were not explicitly mentioned and in one case wrongly represented as having been approved already, all of which support a lack of due diligence on the part of PTP.

159. This is reinforced by the fact that on Mr Patel's own case, he saw no need to seek CAC, nor even a risk that it might be needed; this was due to his incorrect approach to what could and could not amount to substantial demolition. In fact, his whole approach was wrong. If CAC was never applied for because of that wrong approach, on the part of a professional purporting to know all about CAC, that in itself is a failure to use due diligence.

160. It is suggested by Mr Clin that the email from Mr Perkins of RB dated 19 September 2013 shows that even it had a more nuanced approach than earlier and that the works to the rear elevation themselves, and by themselves, might not constitute demolition. But that ignores the internal demolition which he also addressed. At the end of his email he said that whether removal here of all floors and walls was Development within s 55 (or possibly demolition requiring CAC) "a challenging question". But none of this, in my view, affects the point that there was at all material times an obvious risk that the proposed demolition would require CAC. In the event of course, with the assistance of NLP such consent was applied for in December 2013.

161. For all those reasons, there was, as at July 2013 a clear breach of Limb 1 of the Implied Term. That is so, whether CAC was required on the basis of demolition works which included the temporary works to the front and rear elevations or which did not (see paragraph 131 above).

162. In those circumstances it is not necessary to consider whether there was in addition, or in the alternative, a breach of Limbs 2 or 3 of the Implied Term, which Mr Thomas QC accepted were really parasitic on breach of Limb 1 which I have found.

FURTHER MATTERS

163. In the light of those findings, and as contended for by WL in paragraph 13(4) above and as indicated by Mr Clin in paragraph 14(3) above, it follows that there has been an act of impediment, prevention or default which is a Relevant Event under clause 2.29(6) and a Relevant Matter under clause 4.24 (6). WL is therefore entitled to the EOT as sought, along with compensation for the loss and expense caused by the delay period. Conversely, Mr Clin has no claim to liquidated damages.

164. A further consequence is that it is not necessary for me to deal with the following alternative cases presented by WL:

(1) A claim that even if I had not found on the facts that this was a case where CAC was required, there was still a "decision" by RB to the effect that it was, which would then have the same consequences as if I had found that CAC was required;

(2) A further claim that the need for CAC itself, as expressed by RB, amounted to a Statutory Requirement under the Contract, with the consequences set out in paragraph 28A of the Re-Re-Amended Particulars of Claim.

CONCLUSION

165. WL is thus entitled to the declarations sought in the Prayer to the Re-Re-Amended Particulars of Claim, save that the relevant period is now fixed at 53.2 weeks and the declaration as to breach of the Implied Term can be limited to the first limb thereof.

166. I am very grateful to Counsel for their most helpful oral and written submissions.