Case No: C40MA053

Neutral citation number: [2018] EWHC 2730 (Comm)

IN THE HIGH COURT OF JUSTICE
IN THE BUSINESS & PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QBD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

11 June 2018

BEFORE:

HIS HONOUR JUDGE HODGE QC sitting as a Judge of the High Court

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BETWEEN:

INFORM CPI LIMITED Claimant

- and –

LONDON BOROUGH OF TOWER HAMLETS Defendant

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Legal Representation

Mr Louis Doyle (instructed by **Linder Myers Solicitors**) on behalf of the Claimant
Miss Zoe O'Sullivan QC (instructed by **Tower Hamlets Legal Department**) on behalf of the Defendant

Transcribed from 11:15:20 until 13:09:57 and from 14:12:42 until 16:03:56

Reporting Restrictions Applied: No

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Judgment Approved

His Honour Judge Hodge QC:

1. This is my judgment on the trial of a claim by Inform CPI Limited against the London Borough of Tower Hamlets (to which I shall refer as "the council"), claim number C40MA053. This judgment is arranged under seven headings as follows:

   1 Background

   2 The trial

   3 The witness evidence

   4 The construction of clauses 4.2 and 4.3 of the terms and conditions of the software licence

   5 The expiry of the licence agreement

   6 The individual hereditaments and

   7 Conclusion

1 Background

2. The council is the local authority for the London borough of Tower Hamlets in the East End of London and, as such, is the billing authority for non-domestic (or business) rates in that borough. Prior to 1 April 2013, billing authorities collected local business rates and accounted for them to central government, but the *Non-Domestic Rating (Rates Retention) Regulations 2013* brought about a change in the law whereby local authorities became entitled to retain a percentage of receipts before remitting the balance to central government. In the Greater London area, London boroughs, such as the council, became entitled to receive 30% of the receipts, with 20% going to the Greater London Authority and the remaining 50% to central government. This change in the law gave local authorities an incentive, previously lacking, to improve and increase their collection of local business rates. The Claimant developed software which it supplies to billing authorities and which is designed to assist these to maximise their recovery of business rates from non-domestic ratepayers in their billing area and to manage their risk of exposure to successful business rating appeals.

3. The parties entered into a software licence agreement which is contained in the Claimant's Order Form dated 29 April 2014 under which the Claimant granted the council a one-year licence to use a bundle of software products under the brand name

'Analyse Local'. The licence was expressed to take effect for one year from 29 May 2014 and incorporated the Claimant's standard Terms and Conditions (although, by an apparent mistake, the copy supplied to the council related to the purposes of Wyre Forest District Council rather than the London Borough of Tower Hamlets). At paragraph 13 of his witness statement, Roger Jones, the council's Head of Revenue Services, said that he had been responsible for purchasing the software and had signed the order form on behalf of the council. At the time of signing the order form, he had not been shown the terms and conditions which the order form says were available on request. However, he did not suggest that the council was not bound by those terms and conditions.

4. The software bundle comprised three products identified as 'Analyse 8', 'Analyse Local Forecasting' and 'RV Hunter'. The licence fee payable was £7,500 plus VAT for an unlimited user licence for Analyse 8. The council paid the licence fee in full although, it would appear, belatedly. Analyse Local Forecasting was a software tool which helped the council to forecast and manage the risk of successful appeals by business ratepayers in relation to the rateable values of their properties. No further licence fee was charged for the use of Analyse Local Forecasting. The RV Hunter product comprised a database which could be accessed online by licensed users. The database contained Property Assessment Reports which set out details of properties where the Claimant believed that there was scope for an increase in the existing rateable value of the property, or for the property to be added to the local rating list for the first time. The licence provided for the payment of a contingency fee of 7.5% plus VAT in respect of the use of RV Hunter. The terms on which such a contingency fee was payable were contained in clause 4 of the Claimant's standard terms and conditions. The present dispute relates chiefly to the meaning and effect of that clause.

5. If the council believes that the rateable value of a property should be increased, or that a property should be added to the local rating list for the first time, it submits an electronic report, called an Electronic Billing Authority Report (or 'eBAR') to the Valuation Office Agency ('the VOA'). It is the VOA which decides whether the rateable value should be increased or whether the property should be added to the local rating list. The VOA regularly publishes schedules of amendments to the local rating lists, and it is common ground that the Claimant is only entitled to a contingency fee where the amendment has been validated by the VOA by publication in such a

schedule. In addition to validating eBARs submitted by local authorities, the VOA also makes amendments of its own initiative. These are known as a Valuation Office Report (or 'VOR').

6. It is common ground that, as a matter of construction of the software licence, in order to be entitled to a contingency fee, the Licensor (the Claimant) must have "supplied" information leading to the entry of a rateable property into the local rating list or an increase in the rateable value of such a property. For the purposes of the software licence, it is also agreed that 'supply' means that (1) the Licensor must have made information available about a property on its RV Hunter database, and (2) the Licensee must have both accessed and used that information in order to bring about the entry of the property into the rating list for the first time or an increase in its rateable value.

7. The Claimant has issued a number of invoices to the council in which it claims a contingency fee in respect of various hereditaments located in Tower Hamlets whose rateable value has increased or which have been added to the local rating list for the first time. Following an unsuccessful mediation in December 2015, on 14 July 2016 the Claimant issued proceedings in what was then the Mercantile Court in Manchester seeking to recover £1,997,661.60 on 78 separate invoices which are said to represent contingency fees arising out of validated increases in rateable value or newly identified hereditaments within the council's borough resulting from software licensed to the council by the Claimant. In its defence, the council admitted liability in respect of invoices totalling £16,438.45, but otherwise denied that any right to a contingency fee had arisen. Since then the scope of the dispute has reduced significantly, although not in terms necessarily of value, and it is now limited to 16 hereditaments.

8. By a consent order dated 27 April 2018 (1) the Claimant discontinued its claim in respect of the 62 hereditaments in Schedule 1 to the order, and (2) the council agreed to pay the Claimant £52,218 in respect of 35 'temporary allowance' hereditaments for which it admitted liability contractually. Both parties were to bear their own costs. On 25 May 2018, the council conceded liability in respect of Unit 1, Fondant Court, (in the sum of £1,530), and the Claimant subsequently withdrew its claim for £10,260 in respect of Fit4Less, The Pill Box, Bethnal Green. However, those concessions still leave over £1 million in issue in respect of contingency fees, together with significant contractual interest amounting to in excess of a further £250,000 at 8% over base rate,

which I am told by the Claimant is the interest rate conceded as applicable by the council in open correspondence.

9. The council admits the increases in rateable value or the identification of new hereditaments and does not dispute the actual quantification of the Claimant's claim. However, it disputes liability on the basis that the resulting increases in rateable value were not attributable to the use of the Claimant's software. The council says that the Claimant is only entitled to receive a contingency fee where the use by the council of the information contained in the RV Hunter database is the effective cause of the addition of a new property to the local rating list or an increase in the rateable value of a property already on that list. If the Claimant only supplies information which is already known to the council, it is said to have provided nothing of value. Similarly, if the council does not use the information on the database, no fee is payable.

10. The council says that it had no particular interest in the RV Hunter product and did not find it useful because the database only contained information of which the council was already aware from other sources, such as regular inspections carried out by its property inspectors. Where the council has denied liability for a contingency fee relating to a particular hereditament, this is because the council is said not to have used any information supplied by the Claimant to bring about the increase in rateable value or to add the property to the rating list.

11. The Claimant accepts that there must be a causal connection between the supply of information by it and the resulting increase in rateable value or addition to the local rating list. However, its pleaded case is that, as a matter of construction, the burden of proof falls on the council to prove the absence of a connection, rather than on the Claimant to prove that connection, unless the council has previously informed the Claimant that the council is aware of the existence of the property in question. The Claimant's pleaded case is that the burden of proof falls on the Claimant in the ordinary way to show that a contractual entitlement to a contingency fee has arisen. The council says that the Claimant is seeking substantial windfalls in respect of large commercial properties about which the council was already well-informed from other sources, and where any enhancement of rateable value has not been brought about by the use of the Claimant's RV Hunter database.

12. As the case developed at trial, the Claimant's case on the burden of proof has shifted to such an extent that, in closing, the Claimant's counsel indicated that there might be no real difference between the parties. He accepted that the ultimate burden of proof was on the Claimant to show that it had identified information about a hereditament on its RV Hunter database and that the council had accessed and used that information in order to bring about either the entry of the site into the rating list for the first time or an increase in its rateable value. But if the council sought to rebut the Claimant's case on the basis that it had notified the Claimant that it was fully aware of that hereditament, the council bore the burden of proving that it had been "fully aware" of the hereditament, in the sense that it had been knowingly in possession of sufficient information to enable it to have submitted an eBAR in relation to that hereditament. Without prejudice to their arguments on the burden of proof, both parties have adduced evidence on the issue as to whether or not the council used information supplied by the Claimant in relation to particular hereditaments.

13. Very much as a subsidiary issue, the Claimant also says that although the licence was expressed to be for one year from 30 May 2014, it was extended by consent to the end of July 2015, with the result that it is entitled to contingency fees arising in respect of the period between 30 May and 31 July 2015. The council says that no extension was agreed, and that the Claimant has misconstrued the relevant correspondence. As the case has developed, this issue now only affects one hereditament, Stebon Primary School, a claim for £3,465. The Claimant also says that it has a continuing and ongoing entitlement to contingency fees where information supplied and used during the term of the licence results in an increase in rateable value after the expiry of the licence. The council agrees in principle that a fee would be payable where the increase is attributable to the use of the RV Hunter database during the licence period but is only validated by the VOA after its expiry. However, it says that, as a matter of fact, in no case was the use of information supplied by the Claimant the effective cause of any such increase in value.

14. An agreed list of issues was prepared for the purposes of the case management hearing in this case but many of those issues have been overtaken by developments in the case and, in closing, neither counsel sought to address me expressly by reference to the agreed list of issues.

2 The trial

15. The trial was listed for hearing over the course of five consecutive days, starting on Monday 4 June 2018. The Claimant is represented by Mr Louis Doyle (of counsel) and the council by Miss Zoe O'Sullivan QC. Both counsel had produced detailed written opening notes, supplemented in each case by an appendix. In addition, Mr Doyle had supplied a chronology and dramatis personae. I had pre-read all of those forensic aids, and also the documents referred to in them, including the various witness statements.

16. The morning of day 1 of the trial was taken up with an oral opening from Mr Doyle, followed by a much shorter oral opening from Miss O'Sullivan and a brief reply from Mr Doyle. On the afternoon of day 1 and the morning of day 2, I heard from five witnesses for the Claimant. On the afternoon of day 2 and the whole of day 3, I heard from five witnesses for the council. Both counsel prepared written closing notes overnight and these were delivered on day 4 of the trial, with Mr Doyle going first, followed by Miss O'Sullivan, with a brief reply from Mr Doyle. At the conclusion of day 4, I adjourned until 11 o'clock today, Monday 11 June 2018, in order to deliver an oral judgment. I have spent Friday 8 June and much of the weekend of 9 and 10 June reading my notes of the evidence and oral submissions and re-reading the written opening notes and closing submissions more than once. If, in the course of this oral judgment I omit to deal with a particular point, it is not because I have overlooked it, but because I did not consider it to be material to my ultimate decision.

The witness evidence

17. For the Claimant I heard from five witnesses: (1) Mr Glenn Molden, a director of the Claimant, (2) Mr Paul McDermott, a director of the Claimant and its chief executive, (3) Mr Michael Fairhurst, the Claimant's Research Team Manager who was responsible for the council's caseload until about May 2014, (4) Mr Luke Gorham, the Claimant's Account Manager, and (5) Mr Thomas Horne, the Claimant's Research Team Leader who took over the Claimant's caseload from Mr Fairhurst. Of these, the most substantial time was spent in cross-examination of Mr McDermott and Mr Horne, who were both in the witness box for about an hour and a half.

18. In closing, Miss O'Sullivan made the valid point that not very much turns on the credibility of the Claimant's witnesses because all of them had very little evidence to give. She submitted that there had been a high degree of coaching and collusion amongst the Claimant's witnesses. All were said to have advanced the case theory that access to RV Hunter at level 1, that is to say without proceeding on to level 2 so as to consider the Claimant's Property Assessment Reports (or case records) for individual hereditaments by clicking on that property at level 1 to proceed to level 2, would have been sufficient to have alerted the council to a potentially missing or undervalued hereditament. However, Mr Gorham (who was said by Miss O'Sullivan to be the Claimant's only honest witness) was said by her to have destroyed this level 1 access theory by his evidence that he had not trained the council's employees to access hereditaments only at level 1, but had taught them to click on individual properties so as to proceed to access the Property Assessment Reports at level 2. It seems to me that there is some force in that point.

19. The two directors, Mr Molden and Mr McDermott, were criticised by Miss O'Sullivan for pursuing what was said to be a "greedy" case, continuing to press claims for fees to which they knew the Claimant was not entitled because its own records showed that the council had not accessed particular individual hereditaments at level 2. Indeed, Miss O'Sullivan said that it was not clear that Mr Molden had actually been giving any evidence at all. Mr Horne, in particular, was said to have been an unsatisfactory witness who had engaged in manufacturing what were described as elaborate factual scenarios and in arguing the Claimant's case rather than actually giving evidence. I accept these criticisms of the Claimant's witnesses.

20. Paragraph 11 of Mr Molden's witness statement made it clear that he personally had had no dealings with the council. As Miss O'Sullivan put it in the course of her cross-examination, there was not much he could assist the Court with. Even when he could give relevant evidence, I find him to have been an unreliable witness. For example, when cross-examined about paragraph 15 of his witness statement, he said that he could not recall having seen Mr Jones's email of 23 June 2015 (at D2/391) at the time even though he had been copied in to Mr McDermott's response of 26 June 2015 (at D2/391). I find that both Mr Molden and Mr McDermott caused the Claimant, through Mr Horne and others, to continue to submit the Claimant's Property Assessment Reports to the council for individual hereditaments after the Claimant had been

informed that the Defendant was no longer actually using the Claimant's software because the Claimant had already done the relevant work. As Mr McDermott put it: "It was a mechanism to get the work in progress passed over." Both Mr Molden and Mr McDermott ignored the fact that the licence agreement merely provided access for the council to the Claimant's database and was not a contract for the provision of information in return for a fee. Both directors refused to accept in cross-examination that this claim should not have been brought.

21. Mr Fairhurst espoused the level 1 access theory, maintaining that there was no need to go beyond the property details provided at level 1 by clicking on to an individual hereditament so as to look at the Property Assessment Report at level 2. This was because he said the information at level 1 told the council all it needed to go away and do its own research on the property. If that were so, one asks rhetorically why Mr Fairhurst (and later Mr Horne) had gone to all the time and trouble of preparing and uploading the Property Assessment Reports at all. As Miss O'Sullivan observed in closing, the level 1 access theory sits ill with the training provided to the council (and other billing authorities) by Mr Gorham, which did not suggest that level 1 access was enough, and involved going into every available piece of information on RV Finder, including the Property Assessment Reports at level 2.

22. Mr Horne was an even more enthusiastic advocate in support of the Claimant's case. When his original justification for the claim to a contingency fee for 30 North Colonnade/15 Canada Square was disproved (because the submission of the eBAR for this hereditament had predated the receipt of the Claimant's new case spreadsheet), Mr Horne came up with an even more elaborate case theory, which he set out at E/117 to 121, adding (in cross-examination) the suggestion that Mr Kinch had come up with the identify of KPMG as the proposed occupier of that property by "googling". I reject Mr Horne's case theory for reasons I will give when I come to deal with this particular hereditament. When it was put to Mr Horne that he had gone to exhaustive lengths to come up with this case theory, his response was that he was "… just doing my job." I do, however, accept Mr Horne's evidence in cross-examination that he had come up with the information for the Property Assessment Reports for Stebon Primary School and 29-32 The Oval from the council's own Planning Portal.

23. For the council, I also heard from five witnesses as follows: (1) Mrs Julie Pipe, the council's Non-Domestic Rates Liability Team Leader, (2) Mr Gareth Colechin, one of the council's two Business Rates Inspectors as from 3 August 2015, (3) Mr Roger Jones, the council's Head of Revenue Services, who had succeeded to this position when his line manager, Mr McDermott, had left the council in 2009, (4) Mr James Glover, the council's Digital Development Project Manager, who had joined the council on 1 September 2014 as interim Non-Domestic Rates Manager to replace Robert Sparks who was on long term sick leave, and (5) Mr Gurmer Singh Bhaker, the council's Senior Rate Base Officer, who had been responsible for the submission of all eBARs to the VOA on behalf of the council, at least until after the Rate Base Team was restructured in April 2015. Mrs Pipe and Mr Colechin occupied very little of the Court's time. Mr Jones and Mr Glover each gave evidence for about an hour, and Mr Bhaker gave evidence for about three and three-quarter hours.

24. In cross-examination, Mrs Pipe told the Court that she would have drawn any opportunities to maximise available resources to the attention of her team, but she also said that she did not recall discussing any particular properties with anyone else. She said that she had accessed the system to browse, in case other members of the team had asked her how it worked. She could not remember having looked at any specific properties or clicking around, and she was surprised to be told by Mr Doyle that she had accessed as many as ten property records. In closing, Mr Doyle rightly described Mrs Pipe as a straightforward witness; but he questioned whether her level of access had simply been to see how the system worked. However, when he came to give evidence, Mr Bhaker confirmed in cross-examination that Mrs Pipe had not spoken to him about any individual cases on Analyse Local.

25. I accept Mrs Pipe's evidence that she did not pass on the details of any specific properties she had accessed on Analyse Local to Mr Bhaker or to anyone else. That is consistent with the fact that none of the three high-value properties which Mrs Pipe accessed on 25 June, and which are in issue in this case, were accessed by Mr Bhaker when he had access to level 2 on 26, 27 and 30 June or 1 and 2 July. Mr Bhaker did not access 31st Floor, One Canada Square until 3 July 2014, and he never accessed the other two. I find that Mrs Pipe was merely accessing specific properties in order to navigate her way around the system so as to ensure that she could respond to any enquiries about its operation that she might receive from members of her team.

26. I accept Mr Colechin's evidence. When he re-joined the Rate Base Team as a Business Rates Inspector on 3 August 2015 he told the Court that he had decided to target buildings at Canary Wharf because it was a highly-rated area. Mr Bhaker revealed in cross-examination that he had been aware that Mr Colechin had been targeting Canary Wharf because they had discussed it at their regular meetings. Mr Colechin visited 5 Churchill Place on 24 September 2015 and again on 7 October 2015 as a result of viewing documents from the council's Building Control records. He did not have anything to do with Analyse Local. I accept all of that evidence.

27. In closing, Mr Doyle submitted that I should approach the evidence of both Mr Jones and Mr Glover with some caution so far as it was relevant to the issues in the case. I do not find Mr Glover's evidence to be particularly helpful to the resolution of those issues. He had only joined the council on 1 September 2014. He had had no involvement in the purchase of the software or the terms of the licence. He never accessed the RV Hunter software and he had no knowledge of it. Mr Bhaker did not report directly to Mr Glover, and Mr Glover was entirely reliant on Mr Bhaker and Mr Kinch for information about missing and undervalued hereditaments. Mr Glover's evidence that RV Hunter was of no use to the council is not easy to reconcile with the second of the specific requirements identified in the Business Rates Retention Specialists Tender Documentation. However, Mr Glover did confirm Mr Jones's evidence that there was a backlog of work and delays in submitting eBARs.

28. I accept Mr Doyle's submission that I need to view Mr Jones's evidence with some caution in view of the differences between that evidence (at paragraphs 18 and 23 to 25 of his witness statement) and the evidence of Mr McDermott (at paragraph 19 of his first witness statement) as to when the council first indicated that some of the invoices submitted by the Claimant would be challenged. Mr Jones accepted in cross-examination that there was some delay in notifying a dispute over the invoices. In closing, Miss O'Sullivan invited the Court to reject the evidence of Mr McDermott that there were no discussions about invoices in 2014 and that no dispute over them was raised until early 2015. She invited me to find as a fact that there were informal discussions in 2014 between Mr Jones and Mr McDermott where Mr Jones had made his position clear.

29. Broadly, I accept what Mr Jones says in his witness statement about his telephone conversations with Mr McDermott and the meeting at the Claimant's London offices on 27 November 2014. Mr McDermott made it clear in his cross-examination only that he had no recollection of such matters being discussed at that meeting. However, I find that, whilst expressing objection in principle to paying the Claimant for work which the council was already doing itself, on the basis that the Claimant would be adding no value, it was not until the email of 9 February 2015 (at D2/306) that Mr Jones first notified Mr McDermott in terms that actual invoices would be disputed. That finding is consistent with Mr McDermott's response to this email: "We've not heard this before" (which went unchallenged by Mr Jones at the time); and it is also consistent with the terms of Mr Jones's earlier emails of 20 October 2014 (at D2/302) and 23 January 2015 (at D2/305). It is consistent also with the terms of Mr Jones's later email of 23 June 2015 (at D2/391). However, nothing seems to me to turn on the resolution of this conflict of evidence however it falls to be resolved.

30. Finally, I turn to Mr Bhaker. As Mr Doyle acknowledged in closing, he was the most important witness in the case. Miss O'Sullivan portrayed him, in closing, as a witness of truth. Mr Doyle submitted that I should approach his evidence with caution. Mr Doyle acknowledged that he was very knowledgeable about rateable values and how the system of submitting eBARs worked. Mr Doyle described Mr Bhaker - in my judgement rightly – as "clued up" and "commercially savvy". Miss O'Sullivan, in closing, described him as a conscientious and thoughtful individual. I accept these descriptions of Mr Bhaker, which accord with my own assessment of him when giving his evidence. Mr Doyle submitted, nevertheless, that Mr Bhaker was not a good witness because he refused to accept the obvious, even when it was put to him in straightforward terms. In the case of the three properties where it could be shown that Mr Bhaker had cut and pasted property descriptions from the Claimant's Property Assessment Reports when drafting the relevant eBARs, he had refused to accept that the Claimant's Analyse Local software had brought about the submission of those eBARs. It was only in cross-examination that Mr Bhaker, for the first time, was said to have identified Mr Kinch as what Mr Doyle described as the "main cog in the wheel" and that he had just been following Mr Kinch's instructions. Miss O'Sullivan submits that this is an unfair criticism when one has regard to the totality of Mr Bhaker's two witness statements.

31. I reject Mr Doyle's criticisms of Mr Bhaker's evidence. I found him to be a thoughtful, a truthful, and a reliable witness. He told the court that the council's Rate Base Team had never caught up with the existing backlog of work, which had predated his arrival in the department. I accept Mr Bhaker's evidence that he went into the Analyse Local system as a 'cross-check' against information already provided to him by Mr Kinch. I also accept that when Mr Bhaker went into the system and played around with it, he did not find it to be particularly useful. That is confirmed by the fact that after an initial flurry of activity at the end of June and in early to mid July 2014, Mr Bhaker only accessed the system again on 14 July (but not at level 2), on 23 September (in only one case at level 2), and on 25 November 2014 (on five occasions at level 2). There was no further access by Mr Bhaker to the Analyse Local software until about the time the present dispute arose (on 18 and 25 June 2015).

32. There is a dispute of evidence between Mr Gorham (see paragraph 13 of his first witness statement), and Mr Bhaker (see paragraph 5 of his second witness statement) about whether, in September 2014, Mr Bhaker had indicated to Mr Gorham that Mr Bhaker was intending to submit more cases to the VOA arising from information he had found on RV Finder. Mr Gorham's evidence is supported by his email to Mr Jones of 24 September 2014 (at D2/301) which was copied to Mr Bhaker and was not challenged by him at that time. I accept that Mr Gorham was expressing his genuine understanding in his email; but I also accept that he must have misunderstood what Mr Bhaker had been telling him because after accessing one property at level 2 on 23 September 2014, Mr Bhaker did not go back into Analyse Local, even to access the landing page, for another two months, until 25 November 2014.

33. In answer to a question from the Bench in relation to 30 North Colonnade, Mr Bhaker said that there would have been no reason for him to go to the Property Assessment Report on level 2 if a hereditament was already on Mr Kinch's New Development spreadsheet. Mr Bhaker said that if it were not on that spreadsheet, he would have gone to level 2 to check up on the property. Mr Bhaker said that if he did not click on a property, it was because he did not consider the information at level 1 to be significant in the light of what the council already knew. Later in cross-examination Mr Bhaker said that if he were to see a property at level 1 of which he was not aware, he would have accessed it at level 2.

34. When being asked, early in his cross-examination, about how he could have raised an eBAR in relation to 44-46 Cannon Street Road without access to the Claimant's Property Assessment Report in RV Finder, Mr Bhaker replied that he had been lazy in cutting and pasting the information he had found there, but that even without that information Mr Kinch would have told him what to put in the eBAR. Mr Bhaker then added: "As bizarre as it may sound, that is the way it was." I accept this evidence from Mr Bhaker. I do not consider that the fact that Mr Bhaker went to the Property Assessment Report on this property (and also on 8b Huguenot Place and, later, 29-32 The Oval) in order to save time when drafting the eBAR leads me to reject Mr Bhaker's later evidence (previously cited) about not accessing level 2 when researching properties (as distinct from drafting eBARs) of which he was already aware from Mr Kinch's New Development spreadsheet.

35. Finally, I should record that I have not heard from two potentially highly-relevant witnesses for the council. The first is Mr Dave Kinch, the council's Rate Base Management Officer. He was said by Mr Glover to have been with the council for 40 years. Since January 1980 he had been a property inspector. His knowledge of hereditaments within the council's area was legion. His record-keeping, on the other hand, was said by Mr Glover to have been "not particularly great". He was said to have kept a lot in his head. The other missing witness is Mr Sparks, who was the council's Non-Domestic Rate Manager. He was Mr Glover's predecessor and Mrs Pipe's line manager. Both of those witnesses have since left the council's employment, in the case of Mr Sparks after a long and serious illness. Mr Doyle rightly did not criticise the council for not having called either of them as witnesses. I should also record that I have not heard from the two junior Rate Base officers with the initials AK and NB who apparently submitted certain of the later eBARs, in the second half of 2015.

4 The construction of clauses 4.2 and 4.3 of the terms and conditions of the software licence

36. The relevant order form is to be found at D1/21. It is headed: "Inform CPI Limited Order Form - Analyse Local." It is dated 29 April 2014 and is expressed to be between the Claimant as 'Licensor' and the council as 'Licensee'. The operative part states that the Licensor grants to the Licensee from the 30th day of May 2014 - defined as 'the Start Date' - a non-exclusive, non-transferable Licence to use the product of the

Licensor in accordance with the terms and conditions set out in the Licence Agreement between the parties (which said agreement it acknowledges having read and fully understood) for the period of one year. There is then a table. The table identifies three products as follows: First, Analyse 8. That is expressed to be an unlimited user licence for £7,500 per annum plus VAT. The second product is Analyse Local Forecasting, which has online access and is said to be included. The third is RV Hunter, in respect of which there is said to be an RV Finder Contingency of 7.5%. The package is said to include Analyse 8 installation on servers and individual computers and training, in the form of an initial session at the time of installation plus regular timetabled review meetings, support by telephone and all relevant bi-monthly/bi-weekly updates. Under the heading: "Payment" it was said that a VAT invoice would be issued upon the receipt of the order form. The Claimant's standard payment terms were full payment prior to the installation date. The contingency fee for new and increased rateable value was said to be set out above, and also in the Terms and Conditions.

37. I move on to the Terms and Conditions. As I have already mentioned, clause 2.1, relating to the grant of the Licence, referred to the use of the product exclusively for the purposes of Wyre Forest District Council. Clause 3 of the licence dealt with its period. By clause 3.1, the licence agreement was to commence on the start date and to continue in full force and effect for a period of 12 calendar months from such date, unless terminated earlier by the licensor in accordance with clause 10. Clause 4 dealt with payment. It comprises six sub-clauses, of which only two are relevant for present purposes. Clause 4.2 reads as follows:

> "In addition to the base price subscription as set out in the Order Form, the Licensee agrees to pay the Licensor a percentage contingency fee (such percentage as set out in the Order Form) - i.e. 7.5% - of all identified and validated increases to 'rateable value' supplied by the Licensor which are inserted into the 2010 rating list by the Valuation Office Agency. The Licensor will invoice for such fees within 30 days of entry into or amendment to the rating list and the Licensee shall pay invoices on a monthly basis as set out in the Order Form."

Clause 4.3 provides as follows:

> "In order to be eligible for the relevant Contingency Fee, a new hereditament must have been identified by the Licensor and it must have physically existed for a minimum of six months from the date the new or increased value first appears in the local rating list. The Licensee must notify the Licensor of any hereditaments missing from its local rating list of which it is fully aware and therefore no fee will be payable."

38. In his written opening, Mr Doyle had taken me to the Supreme Court's recent clarification and confirmation of the correct approach to contractual interpretation in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, reported at [2017] AC 1173, at paragraphs 8 to 15 in the judgment of Lord Hodge JSC, with which all the other members of the Court had agreed. Mr Doyle submitted that the following points, as relevant to this case, might be drawn from that judgment:

(1) The Supreme Court's decision in *Arnold v Britton* [2015] UKSC 36, reported at [2015] AC 1619, had not involved any recalibration of the guidance previously given in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, reported at [2011] 1WLR 2900. Rather, the two cases were said to have been saying the same thing about the approach to contractual interpretation. *Arnold*, it seemed, had provided an explanation of the guidance in *Rainy Sky*. Mr Doyle noted that in *Wood*, in seeking to argue a distinction in approach as between the two cases, the appellant's counsel had been told to advance his case without having to refer to the well-known authorities on contractual interpretation with which the Supreme Court was said to be familiar.

(2) The Court's task was to ascertain the objective meaning of the language used in the contract. That was not a literalist exercise focused solely on a parsing of the wording of the particular clause. The Court must consider the contract as a whole and, depending on its nature, formality and quality of drafting, give more or less weight to elements of the wider context in reaching its view as to the contract's objective meaning.

(3) Where there were rival meanings, the Court could reach a view as to which construction was more consistent with business common sense. In striking a balance between the indications given by the language and the practical implications of

competing constructions, the Court must consider the quality of the drafting of the clause and be alive to the possibility that one side had struck a bad bargain.

(4) Contractual interpretation involved an iterative process where each suggested interpretation was checked against the provisions of the contract and its commercial consequences investigated. In the words of Lord Hodge:

> "To my mind, once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions, or a close examination of the relevant language in the contract, so long as the Court balances the indications given by each."

(5) Textualism and contextualism are not conflicting paradigms. Both can be used as tools to ascertain the objective meaning of the language used in a contract, and the extent to which each tool will assist will vary according to the circumstances. Some contracts might be successfully interpreted principally by textual analysis (for example, due to their sophistication and complexity, or where they have been negotiated and prepared with the input of skilled professionals), while the correct interpretation of others might demand greater emphasis on the factual matrix (for example due to their informality, brevity or the absence of skilled professional assistance). In the words of Lord Hodge:

> "The extent to which each tool will assist the Court in its task will vary according to the circumstances of the particular agreement or agreements … The iterative process … assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

39. Mr Doyle submitted that *Wood* lended itself to the following approach:

(1) The specific language employed in the contract must be identified and considered.

(2) On a reasonable reading, objectively speaking, was there more than one meaning attributable to the words used? As Lord Hodge had expressed it in *Arnold* (at paragraph 77):

> "… there must be a basis in the words used and the factual matrix for identifying a rival meaning. The role of the construct, the reasonable person, is to ascertain objectively, and with the benefit of the relevant background knowledge, the meaning of the words which the parties used."

(3) If more than one meaning was capable of support by the reasonable person then, applying the iterative approach in determining what the parties meant by the words used, the rival meanings were tested against the provisions of the document as a whole, and in the context of the commercial consequences.

40. I did not understand Miss O'Sullivan to take issue with this approach. Mr Doyle submitted that the relevant factual matrix by way of facts known to both parties at the time of the contract featured: (1) the Claimant's expertise in the provision of software for the specific purpose of identifying potential increases in rateable value attributable to local business rates; (2) the council's status as a local authority with some 15,500 non-domestic hereditaments, with a combined rateable value of about £824 million, and its entitlement to retain 30% of the local business rates collected; (3) the Claimant's absence of knowledge as to information in the possession of the council relevant to the identification of potential increases in rateable value save for any hereditament disclosed by the council as missing from its local rating list but of which the council was fully aware; and (4) the size and sophistication of the council as a local authority and its awareness of the matters identified in (3) above.

41. At the time of his written opening, Mr Doyle referred to a fundamental dispute between the parties as to what the relevant clauses meant. By the time of his written closing, however, Mr Doyle submitted that at a basic level there appeared to be some, if not complete, consensus as to the proper construction of clauses 4.2 and 4.3. What appeared to be in dispute was the evidential threshold test for the triggering of the Claimant's entitlement to a contingency fee.

42. Both counsel were in agreement that clauses 4.2 and 4.3 were poorly drafted. First, the second (and last) sentence of clause 4.2 is difficult to reconcile with the first sentence of clause 4.3. The perception of this inconsistency may have led the council's legal and procurement team to include in the tender specification a new provision (at D2/321) whereby, at note 4 to the pricing schedule, it was said that the tendered price would need to take account of, amongst others, the requirement for payments to be made as soon as the increases appeared in the relevant local list and, in the event of future amendments affecting the increase, the company would be invoiced for any sums to be repaid. Second, the first sentence of clause 4.3 is ambiguous as to whether it applies to existing as well as new hereditaments. In my judgement, it applies to both. Third, the second sentence of clause 4.3 only applies to missing, and not to overvalued, hereditaments. There is no logical justification for this distinction. Fourth, the second sentence of clause 4.3 does not say when the notification is to be given or identify the consequences of any failure to notify. Fifth, the second sentence of clause 4.3 uses the expression "fully aware" without providing any guidance as to what "full awareness" means.

43. In closing, both counsel reminded me of Lord Hodge's indication in *Wood* that in striking a balance between the indications given by the language and the practical implications of competing constructions, the Court must consider the quality of the drafting of the scheme, whilst also being alive to the possibility that one party had struck a bad bargain. It was common ground (and I find that it is undoubtedly the case) that the first sentence of clause 4.2 should be read as though the words "arising out of information" should be inserted immediately before the word "supplied". Having made that addition, the first sentence of clause 4.2 should be construed as if it read as follows:

> "In addition to the base price subscription as set out in the Order Form, the Licensee agrees to pay the Licensor a percentage contingency fee (such percentage as set out in the Order Form) of all identified and validated increases to 'rateable value' **arising out of information** supplied by the Licensor which are inserted into the 2010 rating list by the Valuation Office Agency."

44. In relation to clause 4.2, Miss O'Sullivan submits that with the addition of those words, clause 4.2 is relatively straightforward to interpret. It is not merely a supply of information which gives rise to a fee. It is the supply of information which is used to bring about a rise in rateable value. That is the contingency which is said to trigger the right to a fee. This was the position accepted by the Claimant as common ground in the agreed case summary. Such an interpretation is said to make complete commercial sense. No reasonable billing authority would contract to pay a fee for information which it had not, in fact, used. On the other hand, if the Claimant had alerted the council to information of which it was not already aware, there was a proper basis for the Claimant to claim to have earned a fee if that information was used by the council to achieve an increase in rateable value. It is also said to reflect what the parties in this case had actually thought the position to be.

45. The system had been sold by Mr McDermott to Mr Jones as enabling the council to discover information of which it was not already aware. The increase must be "validated", but that was said to present no problem because both parties agreed that "validated" meant that the new or revalued hereditament should appear on the VOA's weekly schedules showing an entry into or amendment to the rating list. Clause 4.2 clearly applied to both new hereditaments and existing hereditaments which have increased in value, hence the reference to "entry into or amendment to" the rating list. I understand that none of this is in dispute between the parties; but, to the extent that it is, I accept Miss O'Sullivan's submissions.

46. What is in issue between the parties is the nature and extent of the causal connection which must be demonstrated between the supply of the information and the resulting entry into or amendment to the rating list; in particular, the level of knowledge required of the council so as to avoid liability on its part for a contingency fee, and the extent to which information accessed on Analyse Local triggered the submission of the relevant eBAR. Mr Doyle relies upon the words "fully aware" in the second sentence of clause 4.3 as providing a clue as to the requisite level of knowledge on the part of the council. The first sentence of clause 4.3 introduces a further condition: that a new hereditament must have been identified by the Claimant and it must have physically existed for a minimum of six months from the date the new or increased value first appears in the local rating list. At first sight, that sentence appears to apply only to new, and not existing but missing, hereditaments; but, in my judgement, the

subsequent reference to six months from the date the new or **'increased'** value first appears in the local rating list indicates that it applies to **all** hereditaments, whether new or existing but missing. After all, there is no reason why this additional condition should not apply to both categories of hereditament. In any event, this particular requirement does not give rise to any live issue in relation to any of the disputed hereditaments and invoices.

47. The second sentence of clause 4.3 requires the council to notify the Claimant of any hereditaments missing from its local rating list "of which it is fully aware and therefore no fee will be payable". It was common ground between the witnesses in evidence that the purpose of this provision was to avoid duplication of work in relation to hereditaments of which the council was already fully aware. On its face, it applies only to missing, and not to existing but undervalued, hereditaments, and I do not consider that it can properly admit of any wider meaning, however sensible it might be to construe the second sentence as extending also to existing but undervalued hereditaments. The clause in terms imposes a notification requirement on the council, but it does not say when such notification must be given or what consequences follow if there is no notification, nor is there any indication provided as to what is meant by the expression "fully aware" and how it differs from merely being "aware" of a particular hereditament. In my judgement, if the second sentence of clause 4.3 is to achieve its apparent intended objective of avoiding the duplication of work already carried out by the council, it is necessary to imply a term that such notification will be given as soon as reasonably practicable after the entry into the licence agreement or, if later, as soon as reasonably practicable after the existence of the missing hereditament first comes to the council's notice; what Mr Doyle described in his oral closing as "given in a timely fashion". In my judgement, the requirement that the council is "fully aware" of the missing hereditament is satisfied if the council is aware of circumstances that would give rise to the entry of this hereditament into the rating list. But, in my judgement, it is not necessary (as Mr Doyle submits) that the council should be in possession of sufficient facts to enable a successful eBAR submission to be made. In my judgement, that would be going too far because it would prevent notification being given in any case where the council knows that in the future a new hereditament will be created, or an existing hereditament will be increased in value, which should be entered on the valuation list, but where the works to the property are not yet sufficiently advanced in terms of fitting-out so as to be available for occupation,

and thus sufficient to enable an eBAR to be submitted. In the present case, Mr Doyle's limitation would prevent notification in relation to, for example, 5 Churchill Place, One Canada Square and 30 North Colonnade, where it was possible for the council to identify hereditaments which were likely to be available to be added to the local rating list in the future but which were not then sufficiently developed so as to enable an eBAR to be submitted at that time. In my judgement, if such future hereditaments were already on the council's radar, it would not be commercially sensible or reasonable to attribute to the council, or to the Claimant, an intention to exclude, in relation to them, the application of the notification requirement in the second sentence of clause 4.3. In my judgement, the necessary causal connection is only established if access to information on the Claimant's Analyse Local database is the effective, although not necessarily the immediate, trigger for the submission of an eBAR to the VOA seeking an amendment to the local valuation list.

48. In closing, Mr Doyle had addressed what was required to demonstrate the necessary causal connection. He accepted that the council must have engaged with the Analyse Local product; but he submitted that the use of the system need not be the determining factor in whether an eBAR was submitted. Mr Doyle submitted that it was sufficient that the council had used the Claimant's software in some substantial or meaningful way for the purposes of the eBAR submission. Huguenot Place, 44-46 Cannon Street Road and 29-32 The Oval were all said to be examples of this since Mr Bhaker had used the descriptions in the Claimant's Property Assessment Reports as the basis for his eBAR submissions. Mr Doyle submitted that even if Mr Bhaker had only consulted information on Analyse Local by way of a cross-check, if he did not already have the basic knowledge to submit the eBARs without the details on the Claimant's system, then the necessary causal connection was established. Access to the system did not actually need to trigger the submission of the relevant eBAR. Even if this came at some later time, if the eBAR would not have been submitted but for access to the Claimant's system, even at level 1, at some earlier date, then the necessary causal connection was established. Mr Doyle submitted that it mattered not that the council would have got around to that property in the end if it could not have got there by the date of the eBAR submission without prior access to the Claimant's system. In his reply, Mr Doyle submitted that it was sufficient if access to Analyse Local had prompted action on the part of the council. Even the mere cutting and pasting of information from the Claimant's Property Assessment Reports into the eBAR

submission might, Mr Doyle submitted, be enough. In closing, Miss O'Sullivan accepted that access to the Claimant's software need not be the immediate trigger for the submission of an eBAR, but she otherwise rejected Mr Doyle's approach.

49. In my judgement, Mr Doyle's submissions seriously understate what must be shown to establish the necessary causal connection. In order to be entitled to a contingency fee, clause 4.3 requires that the Claimant must have identified the hereditament to the council. In my judgement, it does not do that if the hereditament is already actively on the council's radar. As I have said, in my judgement the necessary causal connection is only established if access to information on the Claimant's Analyse Local database is the effective, albeit not necessarily the immediate, trigger for the submission of an eBAR to the VOA seeking an amendment to the local valuation list. It is for the Claimant to establish, on the balance of probabilities, that that is made out on the evidence in relation to each disputed invoice. That is a matter that I will address when I come to section 6 of this judgment. In my judgement, the chain of causation will not be broken merely because an eBAR is not actioned by the VOA, provided its submission is the trigger for the VOA to raise its own VOR in respect of the same property.

50. On the issue of the burden of proof, in my judgement it remains at all times for the Claimant to demonstrate, on the balance of probabilities, the necessary causal connection between the council's use of the Claimant's data and the entry of the new hereditament, or the increase in value of an existing hereditament, on the local rating list. However, if in the case of a missing hereditament the council seeks to rely on a defence of notification to the Claimant under the second sentence of clause 4.3, then it is the council that must bear the burden of proving that it had notified the Claimant of that hereditament as soon as reasonably practicable after the entry into the licence agreement or, if later, as soon as reasonably practicable after its existence had first come to the council's notice, and also that the council had been fully aware of the hereditament, in the sense of knowing that it was likely to be available to be added to the local rating list in the future, even if it was not then sufficiently developed to enable an eBAR to be submitted at that time.

51. It is necessary for me to address two further matters. The first is the waiver of the alleged notification requirement by an email sent by Mr Gorham to Mr Bhaker on 23

September 2014 (at D2/299). This is pleaded at paragraphs 20C to 20I of the amended defence. I quote paragraph 20C:

> "In a later email to Gurmer Bhaker of the Defendant dated 23 September 2014 confirming an earlier telephone conversation that day, Mr Gorham expressly stated: 'As discussed, our original processes and requested when setting up a new client for Analyse was to get a spreadsheet of properties that you and your team were aware of where an RV increase may be apparent; often refurbishments or extensions in your authority. However, this was yet another task for someone to carry out on your side and there was a need to keep this up to date. We have therefore moved away from this and will now identify everything we possibly can to refer through the system....'"

I interpose to say that, significantly, the pleaded citation omits the words immediately following from the email. These were:

> "The system then allows you to monitor all properties and to change statuses accordingly even for those that you are aware of and allows you to add notes where applicable."

Reverting to the amended reply, at paragraph 20D it is pleaded that:

> "Mr Gorham represented that the Claimant did not require the Defendant to provide a new list of properties where it was already aware that there was potential for an addition of a new hereditament to the rating list or an increase in rateable value of an existing hereditament and that the Claimant would proceed to refer properties to the Defendant without the Defendant providing any such information."

52. Paragraph 20E reads:

> "The Defendant relied on those representations in not providing any further such information to the Claimant."

53. Paragraph 20F pleads that:

> "It would be unconscionable in all the circumstances for the Claimant to be permitted to resile from the representations made by Mr Gorham and relied upon by the Defendant."

54. Paragraph 20G alleges:

> "In the circumstances, the Claimant is estopped from alleging that the Defendant has failed to comply in any respect with any obligation under clause 4.3 to notify the Claimant of any properties where the Defendant was aware of the potential for the addition of a new hereditament to the rating list or an increase in rateable value of an existing hereditament."

55. Paragraph 20I pleads:

> "Further, or alternatively, by Mr Gorham's email of 23 September 2014, the Claimant waived any obligation of the Defendant to submit such information."

56. In its amended reply, the Claimant alleges (at paragraph 8C) that the two paragraphs of the 23 September email set out in the amended defence do not convey the full substance of the email, in particular by way of the additional words I have previously cited. It is said that the 23 September email, rather than waiving or freeing the Defendant from the notification obligation, actually proposed an alternative method by which the Defendant could seek to comply with the ongoing notification obligation by way of the words not pleaded in the amended defence:

> "The system allows you to monitor all properties and to change statuses accordingly even those that you are aware of and allows you to add notes where applicable."

As the Defendant would have been aware, Mr Gorham referred, by those words, to the Analyse Local portal, to which the council had access and which the council used regularly and by which means the council could easily have notified the Claimant, as

suggested by Mr Gorham, where it was aware of the potential for the addition of a new hereditament to the rating list, or an increase in rateable value of an existing hereditament, for the purposes of clause 4.3. It is pleaded by the Claimant that the substance of what was conveyed by the words used by Mr Gorham was to propose an alternative means by which the council could seek to discharge the ongoing notification obligation.

57. In my judgement, the true meaning and effect of the 23 September email is as pleaded by the Claimant in its amended reply. It proposed an alternative method by which the council could seek to discharge the ongoing notification obligation, namely by making a note on the Analyse Local system that the council was already fully aware of a missing property. At a time when the Claimant was advancing a pleaded case that, as a matter of the true construction of the terms and conditions, the burden of proof falls on the council to prove the absence of a causal connection between the supply of information by the Claimant and any resulting addition to the local rating list or increase in value of an existing hereditament, the need for, and the manner of, compliance with the notification requirement may have been a matter of some importance. As the case has developed, however, I do not consider that my resolution of this waiver issue has any practical significance for the outcome of this case in relation to any of the disputed invoices and hereditaments. As Miss O'Sullivan observed in closing, if the requirement in clause 4.3 has no real meaning, its waiver does not matter.

58. Finally, there is the matter of an application by the Claimant to amend its pleaded case. On Day 1 Mr Doyle identified a possible need to amend paragraph 8 of the particulars of claim, and I pointed out that such amendment might need to extend also to paragraph 11.3. The Court indicated that it would hear submissions on any application to amend after the conclusion of the evidence but that the parties should approach the cross-examination of the witnesses on the footing that Mr Doyle's proposed amendment might be allowed. The Court put this forward as a pragmatic way of moving the case forward as a matter of case management, and in accordance with the overriding objective. Mr Doyle raised the issue of amendment in his written closing. He pointed out that the meaning of the notification obligation in clause 4.3 was pleaded in paragraph 9 of the particulars of claim. The pleaded case was that the notification obligation was limited to hereditaments missing from the list of which the council was

fully aware. The council's own case, at paragraph 19 of its amended defence, was that:

> "… any obligation to notify related only to any hereditaments missing from the local rating list of which the Defendant was fully aware, not to hereditaments which were already on the local rating list (of which both parties were necessarily already aware) but whose rateable value it believed to be understated."

There was therefore said by Mr Doyle to be no issue on the point. Mr Doyle accepted that paragraph 8 of the particulars of claim, as presently drafted, by referring to the so-called notified list provided by way of Miss Bhatti's email of 30 May 2014 at D1/30, asserted that the purpose of the notified list was in discharge of the clause 4.3 notification obligation and the council informing the Claimant of existing, as well as missing hereditaments, which had been undervalued on the list. That paragraph was said not to plead the Claimant's case as to the meaning of clause 4.3. Rather, and this was said to be spelled out in paragraph 7 of the amended reply, the Claimant was pleading that the notified list constituted the council's response to a request by the Claimant for all missing and undervalued property of which the council was already aware. It was for that reason that paragraph 8 had addressed both categories of property. Although only relevant to two of the notified properties, Stebon Primary School and 29-32 The Oval, because the third existing property, namely 8 Huguenot Place, had not been included in the notified list, the Claimant sought permission to amend the particulars of claim so as to remove the words "or being undervalued in the list" from paragraph 8A of the particulars of claim, and also to remove the words "and/or (b) any other hereditament so notified by the Defendant to the Claimant by way of the Notified List or otherwise" from paragraph 11.3 of the particulars of claim. Mr Doyle relies upon the following four grounds: First, the inclusion of existing but undervalued properties within the notification obligation was inconsistent with the meaning of clause 4.3 as pleaded by the Claimant and also as pleaded by the council in its amended defence. Second, there was said to be no prejudice to the council by any such late amendment because (a) the amended defence did not condescend to particulars of any specific property as this had only become an issue at trial, and (b) the council's own case as pleaded was that there was no notification obligation in respect of existing properties. Third, there was an obvious prospect of the Claimant's

case proceeding in its amended form because the inclusion of the reference to existing properties was inconsistent with the Claimant's case as otherwise pleaded and was plainly inconsistent with the express wording of clause 4.3. Fourth, in all the circumstances, and even at this late stage, it would be contrary to the interests of justice to deny the Claimant its amendment. Mr Doyle pointed out that the need for such amendment had not previously been alluded to by the council.

59. Unsurprisingly, Miss O'Sullivan had not addressed the issue of the amendment of the particulars of claim in her written closing. In oral submissions, she made the point that even if the Court were to allow the proposed amendment, it would make no difference because it would not touch upon what was said to be a clear admission by the Claimant in the first sentence of paragraph 8 of the particulars of claim, which was unaffected by the proposed amendment. The first sentence of paragraph 8 reads:

> "The Claimant further admits that at or around the date of the Order the Claimant received from the council a list of properties ('the Notified List') in respect of which, in accordance with the Terms or otherwise, the Claimant would be unable to seek payment from the council."

Miss O'Sullivan also relies on the terms of paragraph 9.2 of the particulars of claim, which pleads that the Notified List was provided pursuant to the Notification Obligation. The notification list included (at D1/61) Stebon Primary School and also 29-32 The Oval. Miss O'Sullivan submits that the amendment proposed by Mr Doyle does not detract from the fact that the Claimant has formally admitted that the Claimant is unable to seek payment from the council in respect of either of those two properties. Miss O'Sullivan submits that the Claimant should be held to its formal admissions.

60. I must confess to some confusion as to how the terms of the first sentence of paragraph 8 and paragraph 9.2 of the particulars of claim are to be reconciled with paragraphs 8A.4 and 8A.5 of the amended reply from the Claimant, which read:

> "8A.4 It is denied that the spreadsheet attached to the 30 May 2014 email either constituted a list of properties relevant for business rate purposes by way of what was envisaged by Mr Gorham's email to be the Notified List or, for the avoidance of doubt, had been produced as a result of the Defendant having interrogated the

Defendant's planning file. Rather, the spreadsheet self-evidently amounted to no more than a dump of information from the Defendant's planning department.

8A.5 As such, if this is the Defendant's case, it is denied that the spreadsheet attached to the 30 May of 2014 email constituted the Notified List and/or the discharge by the Defendant of the Notification Obligation."

61. Be that as it may, I would allow Mr Doyle's proposed amendment. I do for this for the following reasons. First, it merely reflects the true meaning of the second sentence of clause 4.3. Second, it accords with the council's own pleaded understanding of this contractual provision. Third, the amendment causes no prejudice whatsoever to the council. The council has prepared its case not simply by reference to a perceived admission on the Claimant's part but also it has addressed the claim in respect of each of Stebon Primary School and 29-32 The Oval on its substantive merits. Fourth, as this case has developed, the amendment has no practical significance for the outcome of the case in relation to either of those two affected disputed hereditaments. I can see no reason why the amendment should not therefore be permitted. In the event, it will have no real effect on the outcome of the case.

(luncheon adjournment)

62. This is the continuation of my judgment in case number C40MA053.

5 The expiry of the licence agreement

63. The software licence was for a period of one year from 30 May 2014: see the Order Form and clause 3.1 of the Terms and Conditions. In his written opening, Mr Doyle submitted that the extension of the period of the software licence beyond 29 May 2015 was relevant to only one remaining hereditament, namely Stebon Primary School. He submitted that, in effect, the council's use of the software extended beyond 29 May 2015 and continued until such time as the council gave notice in writing to the Claimant, by way of letter dated 2 July 2015, that the contract would come "to a natural conclusion at the end of July 2015": see the letter at D2/394. That letter contained a detailed response to individual invoices raised by the Claimant to the council.

64. For present purposes, it is sufficient to focus on the first page of the letter, which was from Mr Glover to Mr McDermott. The second paragraph expressed Mr Glover's gratitude to Mr McDermott for sending a copy of the terms and conditions applicable to the order and for the confirmation that those applied to the signed agreement dated 29 April 2014, which took effect from 30 May 2014 and had by then expired. Three paragraphs on, Mr Glover confirmed that the council had ceased to use the product and that he had already arranged for it to be removed from the council's servers as soon as possible. In the following paragraph he said that as far as the final point was concerned, the current contract would come to a natural conclusion at the end of July 2015 so that this should alleviate any potential ongoing issues at that stage.

65. The letter from Mr McDermott to Mr Glover under reply (which was in terms dated 15 June although it is clear that it was drafted, and should have been dated, 19 June because it made reference to the meeting of 18 June 2015) had, in the penultimate paragraph, asked Mr Glover to confirm whether he would like to continue with the RV forecasting and utilising Analyse, particularly as the existing licence expired on 1 June 2015. Mr McDermott had said that if so, he would provide a new quotation by return.

66. Miss O'Sullivan submits that it is a wilful misreading of Mr Glover's letter of 2 July to treat it as extending the licence agreement until the end of July 2015 when it clearly stated, in the second paragraph, that that agreement had "now expired". Miss O'Sullivan points out that any extension of the licence agreement would have required a variation of the contract, as to which the requisite elements of offer and acceptance would have had to be made out. Objectively read, she submits that the letter of 2 July 2015 did not offer any extension to the existing software licence agreement, and the Claimant did not purport, by anything that it did, to accept any extension. Miss O'Sullivan points out that words of offer and acceptance should be interpreted objectively in their relevant context, and without regard to evidence of subjective intent. She refers to and relies upon paragraph 15 of the judgment of Moore-Bick LJ (with which the other two members of the Court, Jackson and Patten LJJ, agreed) in the case of *Destiny 1 Ltd v Lloyds TSB Bank Plc* [2011] EWCA Civ 831. There Moore-Bick LJ said that it was:

> "… necessary to bear firmly in mind that the law decides whether a contract has come into existence by looking objectively at what each party

said to the other, not at their subjective intentions or understandings. Communications, whether oral or written, are to be understood in the way that a reasonable person in the position of the recipient would have understood them."

67. I accept Miss O'Sullivan's submissions. The letter of 2 July 2015 must be read against the background of the last paragraph of Mr Jones's email to Mr McDermott of 23 June 2015 and also Mr McDermott's response on 26 June 2015 (at D2/392 and 391 respectively). In his email of 23 June, Mr Jones had said that bearing in mind the nature of their then relationship, he thought it would be prudent to remove any access to the Claimant's systems for all the council's staff until the situation was resolved. Mr McDermott's response of 26 June 2015 was that, as discussed, if Mr Jones would let Mr McDermott have the contact details of the person in IT whom the Claimant could liaise with to remove Analyse 8 from the council's network, the Claimant would arrange that immediately. With regard to Analyse Local, Mr McDermott said that the Claimant would suspend new work immediately and would contact the council individually as to work in progress.

68. The reasonable reader of Mr Glover's letter of 2 July would also have had in mind that, as pointed out by Mr McDermott in the penultimate paragraph of his letter of 19 June 2015, since the existing licence had expired on 1 June, if there were to be any extension it would be necessary for the Claimant to provide a new quotation by return. Against that background, in my judgement no reasonable reader of the letter of 2 July could possibly have construed it as extending the duration of any software licence to the end of July. That would have been inconsistent with the express language of the second paragraph. At best, the letter as a whole is ambiguous and required clarification before it could possibly be construed as amounting to any extension of the licence period. I therefore reject the Claimant's case that there was any extension of the software licence beyond 30 May 2015.

6 The individual hereditaments

69. Both Mr Doyle and Miss O'Sullivan began their oral closing submissions in relation to the individual hereditaments with some general observations. Mr Doyle pointed out that at the time the licence was in force, the Rate Base Team at the council had been

in a state of what he described as "administrative chaos". The council had a substantial property portfolio, but it had neither the diary nor the record systems to trigger property inspections. That was said to dictate a quizzical approach to what the council was now contending about what it knew about individual properties. Mr Doyle sought to draw a distinction between records which were essentially asleep and those which were actively being moved forward towards an eBAR submission. He said that there was no way of knowing that the council was actually going to do anything in relation to any particular property. That was said to be consistent with the delay in the submission of eBARs.

70. There was a clear backlog of work and the council clearly needed assistance with what it was doing. It was that that had led to the tender specification in the autumn of 2014, which was issued in the early part of 2015. Mr Glover had been responsible for the specification, which had been drawn up by the council's procurement and legal department. It was a specific requirement of the tender that the council would like to identify a supplier which could identify and report on additions and changes to properties within the borough to ensure the accuracy of the local rating list. That was said by Mr Doyle to demonstrate that the council was not on top of the process leading to the submission of eBARs. Level 1 access in the right hands was said by Mr Doyle to give a huge potential amount of information. The council had, since 2013, an incentive to collect in as much money as possible by way of business rates. The Court should not underestimate what was available at level 1 on the Analyse Local system and the ability of those using it to access and use information. Even at its lower level, the system was said to be a very potent one.

71. Those observations about the backlog in the processing of information by the council's Rate Base Team accord with Mr Glover's own evidence that his restructure of the council's Non-Domestic Rates Section, effective from April 2015, had been designed to make it more efficient, and his observation that usually restructures operate to reduce the headcount whereas - and unusually - this particular restructure had actually increased it. I bear all of those observations in mind in my approach to the individual hereditaments.

72. Miss O'Sullivan submitted in closing that the Claimant's access records were the most important evidence in the case. They were not in dispute. She pointed out that there

was no evidence of level 1 access to any particular hereditament, except where there had been access at level 2 to that hereditament's Property Assessment Report. A record of level 1 access might mean merely that the user had arrived at the system's landing page, without clicking on further into RV Finder itself. Miss O'Sullivan submitted that the mere opportunity for level 1 access was not sufficient to prove that the council had used the system so as to trigger a contingency fee. Mere opportunity was, she said, not enough. Miss O'Sullivan submitted that it would be bizarre for any user not to click on the hereditament to level 2 if the user was interested in that particular hereditament. Mr Bhaker had said that he would click only if he did not know about a property. In such circumstances, he said that it would be his duty to do so. In the case of 30 North Colonnade, he was said to have already known about the property from Mr Kinch's spreadsheet.

73. Miss O'Sullivan submitted that the right inference for the Court to draw was that if there was no level 2 access in relation to any particular hereditament, then the person accessing Analyse Local was simply not interested in that particular property or its Property Assessment Report. Miss O'Sullivan submitted that if there were no level 2 access, that of itself should be enough to lead the court to dismiss the claim. That was sufficient, she submitted, to dispose of the claims in relation to 30 North Colonnade, Café Forever and Stebon Primary School. Even if there was access at level 2, however, it was necessary to look at who had accessed it and when. In the case of 5 Churchill Place and 9th Floor, 20 Canada Square, the only level 2 access had been by Julie Pipe on 25 June 2014. There had been no challenge to her evidence that she had made no use of that information. In relation to those properties, Miss O'Sullivan submitted that the claim was dead in the water once Mrs Pipe's evidence that she had made no use of the information had gone unchallenged.

74. Miss O'Sullivan invited the Court to look at each individual property on a case by case basis. That is what I now propose to do, by reference to Miss O'Sullivan's written closing note. I will take the disputed hereditaments in the order of that note.

A: 30 North Colonnade: Scott Schedule, page 64.6

75. This is addressed by Mr Bhaker at paragraphs 33 to 41 of his first witness statement and paragraphs 13 to 16 of his second witness statement. The invoice is dated 9 July 2015 and the claim is for £356,400 including VAT. This property is a large

commercial office block. Floors 6 to 13 are physically connected to the adjoining hereditament at 15 Canada Square and the VOA decided to combine them into a single hereditament under the name: "(including 6 - 13 Floor, 30 North Colonnade) 15 Canada Square". Both floors 6 to 13 and 15 Canada Square are occupied by KPMG as their London head office. The evidence shows that the council's building control department gave unconditional approval for the fit-out of levels 5 to 13 on 6 December 2013. The record notes that the application was made on behalf of KPMG. This document was kept in the file maintained by Mr Kinch. Mr Bhaker told the Court that he and Mr Kinch had regular discussions with building control about new hereditaments. Mr Kinch's New Development spreadsheet (at E 86) was updated on 11 June 2014, apparently at 16:22, and was sent out under cover of an email by Mr Kinch to Mr Jones at 17:04 on 11 June: see E/86, E/89 and E/99. That spreadsheet shows that he was aware, on 11 June 2014, that Floors 6 to 13 were due to be occupied by KPMG. In an email exchange of 5 December 2014 (at E/100) Mr Bhaker informed Mr Jones that he had discovered that Floors 6 to 13 had been let to KPMG and that he was liaising with the agents to ascertain an effective date so as to proceed with an eBAR. Although Mr Bhaker used the word "discovered" that was not something which had just come to the council's attention, as the earlier documents demonstrate. Mr Bhaker then corresponded with KPMG by email in February and March 2015 to ascertain the date on which they were moving into this hereditament. He then raised an eBAR on 23 April 2015, effective from 1 January 2015: see E/106. This eBAR was returned marked "No action" by the VOA, which then combined Floors 6 to 13 with 15 Canada Square and raised a VOR on 7 July 2015. This VOR does not appear to be in the bundle but it was referred to in the Claimant's summary document at E/121.

76. I would accept that if the Claimant could demonstrate the necessary causal link between access to Analyse Local and the submission of the eBAR by Mr Bhaker, then the fact that this eBAR resulted in no action would not of itself preclude the liability for a contingency fee because it would have been Mr Bhaker's eBAR that had prompted the VOA to raise the VOR. This hereditament was highlighted by the council as already known to it when it returned Mr Horne's template BAR on 29 April 2015: see D2/370 and 372. By that time, of course, the council had, in fact, already submitted the eBAR.

77. The Claimant does not dispute that the council had no level 2 access to this hereditament, as confirmed by the Scott Schedule and the log-in records. It was not put to Mr Bhaker that he had relied on the Analyse Local software in raising the eBAR for this particular property. Miss O'Sullivan submits that it is obvious that the council did not acquire any of the information which it needed to submit the eBAR from the Claimant's database and that it already had the necessary information from Building Control. The Rate Base Team had effectively been monitoring this hereditament, using its own New Development spreadsheet.

78. Mr Doyle, in his written closing, accepted that there had been no level 2 access in relation to this hereditament. He also accepted that the property had featured on the New Development spreadsheet emailed by Mr Kinch to Mr Jones and Mr Bhaker on 11 June 2014 at 17:04. What he says is fundamental to this case is how Mr Bhaker had discovered Floors 6 to 13, as reported in his email to Mr Jones of 5 December 2014. Mr Bhaker was said to have been unable to give any explanation for this in cross-examination. Neither was there anything disclosed by the Defendant which suggested how that information had come to Mr Bhaker's knowledge.

79. What the Claimant relies on is the fact that the massively increased rateable value of the property disclosed at level 1 would have been capable of prompting Mr Bhaker to the conclusion that something had changed in relation to the property such as to warrant further enquiry by him, knowing that the property was on the New Development list previously distributed by Mr Kinch. Mr Doyle accepts that that is a matter of inference, and that it is not an inference that would be drawn in the face of some competing evidence adduced by the council. But, he says, in fact the council can point to nothing, whether through Mr Bhaker or otherwise, to explain how it became aware of the fact of the property having been let.

80. In relation to this property, I accept the submissions of Miss O'Sullivan. The council had been actively monitoring this hereditament, using its own New Development spreadsheet. There was never any access to this property on level 2 by Mr Bhaker or anyone else at the council. That indicates, consistently with Mr Bhaker's evidence, that he had no need to access this property at level 2 because it was already on the council's radar. I accept that evidence.

81. Miss O'Sullivan submits that both Mr Molden and Mr McDermott had accepted in cross-examination that if the council had never accessed a case record, the Claimant was not entitled to a fee. I am not sure that the evidence of either gentleman went so far, and I make no such finding. However, there is nothing to indicate that there was any causal connection between the appearance of this property on the Claimant's Analyse Local software and the submission by Mr Bhaker of an eBAR. There is no more than pure speculation on the Claimant's part.

82. Mr Horne invented what were described by Miss O'Sullivan as not one but two fanciful case theories as to how the council might have relied upon information supplied by it, despite never actually having opened the record for this property at level 2. The first theory advanced by Mr Horne, in a case assessment report which is not in the bundle, was that the council must have relied upon information about this hereditament contained in the spreadsheet which Mr Horne had sent to Mr Glover on 23 April 2015 (at D2/364). As Miss O'Sullivan points out, Mr Bhaker had rebutted this evidence at paragraph 14 of his second witness statement, where he had pointed out that that email had been sent by Mr Horne to Mr Glover at 15:34 on 23 April, whereas Mr Bhaker had already by then raised the eBAR at 11:53 that morning: see E/116.

83. In the face of that refutation, Miss O'Sullivan points out that Mr Horne had come up with what she described as an even more elaborate theory, which was set out in the appendix to his second witness statement and appears in bundle E, at pages 117 to 121. This theory centres around the New Development spreadsheet sent by Dave Kinch to Roger Jones on 11 June 2014, with a copy to Mr Bhaker at 17:04. That theory appeared to involve Mr Jones logging in to the system at 16:02 on 11 June 2014, spotting that there was a potentially large increase in value at 30 North Colonnade but, without going through to level 2 so as to access the actual Property Assessment Report, doing some quick research to find out that it was KPMG who were moving in, and then somehow passing that information on to Mr Kinch in time for him to update the spreadsheet some 20 minutes later (at 16:22) and send it back to Mr Jones at 17:04. In the course of cross-examination, Mr Horne suggested that Mr Jones could, in fact, have "googled" it and told Mr Kinch that it was KPMG who were moving in.

84. In my judgement, it is simply ludicrous to suggest that Mr Jones would have undertaken a Google search rather than accessing the actual Property Assessment

Report at level 2 on the Analyse Local software. That would have been the obvious thing to do if Mr Jones were concerned to seek to identify the occupier. I accept Miss O'Sullivan's submission that this preposterous and silly argument only illustrates the Claimant's determination to hang on to its claim at all costs and in defiance of the facts. I accept her submission that it ignores the fact that the council was already aware from Building Control of the fit-out of Floors 6 to 13, for which it had given approval the previous December. It presupposes that Mr Jones, having asked Mr Kinch to update him on new assessments, then undertook that task himself, but without mentioning in any of the emails between them on that date that he had just come across a major new development. It presupposes that when Mr Jones logged in to the system at 16:02, he went on to look at RV Finder rather than simply Analyse Local. It presupposes that Mr Jones, having identified this major new development, did not even bother to look at the actual Property Assessment Report, and it was only that actual case report that made any reference to KPMG.

85. Miss O'Sullivan points out that if there had been anything in this argument, the council would rapidly have submitted an eBAR after 11 June 2014. The fact that the council did not submit one until some ten months later, on 23 April 2015, illustrates that it did not rely on any information supplied by the Claimant. Miss O'Sullivan also points out that this fanciful story was not put to the council's witnesses, especially not to Mr Jones in cross-examination. She says that it should be assumed that the Claimant has abandoned any reliance on it. I note that it does not feature in Mr Doyle's written closing note.

86. In my judgement, it is pure speculation, for which there is no foundation whatsoever in the evidence, that anything supplied by the Claimant contributed in any way to the submission of the eBAR for this property. There is no evidential basis for the Claimant's case in relation to this property whatsoever. I therefore accede to Miss O'Sullivan's invitation to dismiss the claim for a fee in relation to 30 North Colonnade.

<u>B: Various hereditaments at 5 Churchill Place: page 64.12 of the Scott Schedule</u>

87. Mr Bhaker's evidence on this is at paragraphs 40 to 43 of his second witness statement. The Claimant is seeking to recover fees totalling £440,825 in relation to seven hereditaments on the 5th to 9th and 12th Floors of 5 Churchill Place, as set out in invoices

dated 28 January, 17 February and 10 March 2016 (at E/242 to 244). 5 Churchill Place is a new office development owned and partly occupied by J.P. Morgan.

88. The evidence is as follows. The building control records show that levels 10 and 11 were approved as complete on 10 March 2015. They also show that the subdivision of level 8 into two parts was approved on 18 August 2015. Mr Colechin, one of the council's property inspectors with responsibility for inspecting properties at Canary Wharf, explains in his evidence that it was the building control records which led him to pay visits to the property to ascertain its status. He was not challenged on that evidence. As he explains, Mr Colechin visited the site on 24 September and 7 October 2015 as a result of which he ascertained that Balfour Beatty had moved into half of Floor 8 and the whole of Floor 9 and that work was still in progress on Floors 10 and 11.

89. At a later visit, on 13 January 2016, he ascertained that the works on Floors 10 and 11 should be finished to category A standard by 22 January 2016 and that the fit-out should be complete by 4 June that year. By email on 17 November 2015 (at E/234) Mr Colechin asked Mr Bhaker to issue completion notices for Floors 5 to 7, 8 south and 12, and Mr Bhaker issued the eBAR on 21 November 2015, with a future effective date of 18 February 2016: see E/235. On 2 December 2015, Mr Colechin asked Mr Bhaker to issue completion notices for Floor 8 north and Floor 9, the floors which were already occupied by Balfour Beatty. Mr Bhaker issued the eBAR for Floor 8 north on 10 December 2015. The eBAR for Floor 9 does not appear to be in the bundle but the council's internal diary note indicates that one was issued with an effective date of 1 July 2015: see the quote from the diary note in the Claimant's summary sheet at E/262. These hereditaments were highlighted by the council as already known to it when it returned Mr Horne's template BAR on 29 April 2015. Mr Colechin's evidence was not challenged in cross-examination.

90. The Claimant's claim to a fee in respect of these hereditaments rests on the fact that Mrs Pipe accessed the records three times on 25 June 2014. In his closing note, Mr Doyle states that the Claimant's position is that it is inherently implausible that a team leader, such as Mrs Pipe, would have accessed the record as she did but made no mention of anything as to its content, and the disclosed significant rateable value increases available, so as to prompt Mr Kinch or others into action. Mr Doyle also

points out that the fact of Mr Colechin having apparently targeted Canary Wharf as a project by means of which he could acquaint himself with part of the borough of Tower Hamlets has never been referred to before Mr Colechin made reference to it in the witness box. Until he said it, Mr Colechin's targeting of Canary Wharf was said not to have been known to the Claimant.

91. Miss O'Sullivan points out that Mrs Pipe's evidence is that she was a systems administrator for Analyse Local and would have accessed the records purely to see how the system was operating. It is not disputed that she never looked at a single record again. She also says that she did not pass on any information from the records to her colleagues. Mrs Pipe was not challenged on her evidence that she had not passed any of the information in the records to her colleagues. That is said to demonstrate that the council cannot have used the records to derive any information about the hereditaments for the purpose of submitting the eBARs. Miss O'Sullivan submits that by electing not to challenge Mrs Pipe, the council had effectively abandoned its claim.

92. I have already indicated, when reviewing the witness evidence, my acceptance of Mrs Pipe's evidence. I accept her evidence that she did not pass on details of any specific properties she accessed on Analyse Local to Mr Bhaker or anyone else. I have already observed that this is consistent with the fact that none of the three high-value properties which Mrs Pipe accessed on 25 June and which are in issue in this case were accessed by Mr Bhaker when he had access to level 2 on 26, 27 or 30 June or 1 and 2 July. In fact, Mr Bhaker did not access this property at all. That is entirely consistent with Mrs Pipe not having identified the property to him. Had she done so, I am satisfied that Mr Bhaker would have accessed the property on one of his visits to level 2 in late June or early July 2014.

93. In my judgement, Miss O'Sullivan is right to say that the claims in respect of these hereditaments were always hopeless. I therefore dismiss the claim for fees in relation to these hereditaments.

C: Floor 9, 20 Canada Square: Scott Schedule, page 64.7

94. This property is addressed by Mr Bhaker at paragraphs 59 to 60 of his first witness statement and paragraphs 17 to 19 of his second witness statement. The invoice is

dated 17 September 2015, and the claim is for £118,800 inclusive of VAT. This large office building is occupied by BP and, in the case of Floor 9, by the publisher McGraw-Hill. The evidence shows that the council completed an ad hoc inspection request form dated 1 March 2006. A manuscript note at the foot of the document is in Mr Kinch's writing and states "Work in progress 1/1/15". The council's spreadsheet (at E/138) confirms that the property was inspected in January 2015 and found to be still shell and core but was expected to be ready in July 2015. It stated: "To reinspect."

95. This hereditament was highlighted by the council as already known to it when it returned Mr Horne's template BAR on 29 April 2015. The eBAR was raised by a council employee with the initials AK on 15 July 2015. Once again, the Claimant's claim to a fee rests on the basis that Mrs Pipe accessed this record on 25 June 2014, over a year before the eBAR was raised. Her evidence was that she had not passed on any of the information in this record, and that evidence was not challenged. Mr Bhaker confirmed that Mrs Pipe had not spoken to him about cases on the system.

96. Mr Doyle, in his written closing, points out that Mrs Pipe's level 2 access on 25 June 2014 would have given a user sight of the fact that the 9th Floor of 20 Canada Square had undergone refurbishment and was currently occupied so as to produce a rateable value increase of some £1.32 million. The material apparently relied upon by the council is said to be scant. Mr Doyle submits that it is insufficient, in itself, to demonstrate that the council was "fully aware" in relation to this property. He submits that it is inherently implausible that a team leader, such as Mrs Pipe, would have accessed the record as she did but made no mention of anything as to its content, and the disclosed significant rateable value increase available, so as to prompt Mr Bhaker into action, albeit the Claimant accepts that the eBAR was not sent to the VOA until 15 July 2015.

97. For essentially the same reasons as in the case of 5 Churchill Place, I find that the claim to a fee in relation to this hereditament is also hopeless. There is no proper evidential basis for establishing any causal connection between Mrs Pipe's access to the Property Assessment Report for this property on 25 June 2014 and the subsequent submission of an eBAR in respect of this property over a year later, on 15 July 2015. Had Mrs Pipe drawn the attention of Mr Bhaker to this property, then the likelihood is that he would have accessed this property at level 2 on one of his exploratory visits to Analyse

Local at the end of June or early July 2014. It is common ground that he did not do so. I therefore dismiss the claim for a fee in relation to this hereditament.

D: Floor 31, One Canada Square: Scott Schedule, page 64.11

98. This is addressed in Mr Bhaker's second witness statement at paragraphs 44 to 46. The fee claimed for this property, by way of an invoice dated 17 February 2016, is £80,100. This is one of the floors in Canary Wharf Tower. A council diary entry (at E/200 to 201) indicates that an inspection carried out on 9 April 2010 had found this property to be void, with work in progress. A further diary entry (at E/202) shows that a further inspection was made in April 2014 which found that the property had been completed to category A standard but was not yet occupied and noted: "To reinspect."

99. The same document states that a further inspection had taken place on 18 June 2015 and had found that the property was occupied, with the date of occupation to be confirmed. There was some suggestion that there was a challenge to the authenticity of the document at E/202. Miss O'Sullivan submitted that it was now too late to make any challenge to this document. In my judgement, that submission is well-founded. CPR 32.19 has the effect that the authenticity of the document is deemed to be admitted. Moreover, there was no challenge to the inclusion of the document in the trial bundle, as required by paragraph 3.9 of Practice Direction 39A. As Miss O'Sullivan also submits, this document shows that the council had at least some appropriate procedures in place for properties to be re-inspected.

100. This hereditament was highlighted by the council as already known to it when it returned Mr Horne's template BAR on 29 April 2015. The eBAR was raised on 21 November 2015, apparently again by AK, with an effective date of 18 June 2015, reflecting the date of the most recent inspection: see E/208. Julie Pipe had looked at this record on 25 June 2014, but, for the reasons I have already given in relation to other properties, I am satisfied that she did not pass on any information from that record to her colleagues. Mr Kinch also looked at the record on 25 June 2014. Mr Bhaker too looked at the record for this property at level 2 on 3 July 2014. In my judgement, the fact that he did not do so until that date, although he had previously accessed the Claimant's system at level 2 on 26, 27 and 30 June and on 1 and 2 July, indicates to me that he did not look at the Property Assessment Report for this property

on 3 July as a result of anything said to him by Mr Kinch. The fact that the eBAR was not submitted until 21 November 2015 is said by Miss O'Sullivan strongly to suggest the absence of any connection between Mr Bhaker or, indeed, Mr Kinch having looked at the record and the raising of the eBAR. Miss O'Sullivan submits that it is clear that it was the council's inspections of the property which were the trigger for the submission of the eBAR.

101. In his closing submissions, Mr Doyle indicated that the Claimant did not accept that the property had been inspected in April 2014. The inspection that is said to have followed, on 18 June 2015, is said to be consistent with the uploading of the case description on 27 May 2014 **after** the earlier alleged inspection in April.

102. I have already indicated that there can be no proper challenge to the document at E/202, and no such challenge was advanced in cross-examination in any event. Mr Doyle's submission in relation to this property is that the council is relying on a secondary source of information, namely a comment on a spreadsheet, as evidence of a site inspection. The Claimant does not accept the provenance of this document or that it is sufficient. There are said to be other examples of unreliable record-keeping on the part of the council. As I have indicated, I reject this challenge to the document at E/202. I am satisfied that there was an inspection in April 2014, which concluded with a note that reinspection was required. The further reinspection took place on 18 June 2015 because of that earlier inspection in April 2014. It was nothing to do with Mr Bhaker having accessed the Property Assessment Report for this property on 3 July 2014. The interval in time between that access on 3 July 2014, and the submission of the eBAR some 16 months later, on 21 November 2015, negates, in my judgement, any causal connection between the two events. The further inspection took place simply because it had been noted that reinspection was required. For those reasons I dismiss the claim for a fee in relation to this hereditament.

<u>E: Floor 1, 40 Bank Street: Scott Schedule, page 64.4</u>

103. Mr Bhaker's evidence in relation to this property is at paragraphs 45 to 49 of his first witness statement and paragraphs 11 to 12 of his second witness statement. The invoice is dated 22 January 2015 and is for a fee of £55,350 including VAT. 40 Bank Street is a skyscraper 32 floors high, occupied by, amongst others, Shell Oil. The

occupier of Floor 1 is Cantor Fitzgerald. The council's inspection records file contains a printout relating to this property, which has been annotated in Mr Kinch's writing. The note at the bottom of the page refers to an eBAR for Floors 5 to 9 and 33 and adds the comment that Floor 1 is void. That eBAR is dated 11 February 2008, thus indicating that, as of that date, the council was aware that level 1 was void. A further note by Mr Kinch at the top of the page shows that he re-inspected the property on 12 June in a year whose date is obscured by the initials DK. Mr Bhaker, in his written evidence, suggested 2008, which would be consistent with Mr Kinch reinspecting the property following the eBAR dated 11 February 2008.

104. The general remarks in the VOA schedules, reproducing what was in the eBAR, refer to an email from Canary Wharf confirming that the floor had been occupied by BGC International, also known as Cantor Fitzgerald, since 2005: see the Claimant's summary at E/67. Mr Bhaker recalled that the eBAR had been raised in reliance on that email. The email is not available, but Miss O'Sullivan submits that it clearly did exist. The note at the top of E/52 is by Mr Bhaker and refers to the raising of the eBAR for level 1 on 3 December 2014: see E/62. Mr Kinch viewed this property at level 2 on 25 June 2014. Mr Bhaker accessed the record for this property on 30 June 2014 and 25 November 2014.

105. Mr Doyle submits that it was the access at level 2 by Mr Kinch on 25 June, Mr Bhaker on 30 June, and again by Mr Bhaker on 25 November 2014 that led to further investigations being undertaken, culminating in the submission of the eBAR on 3 December 2014. He submits that the evidence produced by the council is very, very thin as to why the eBAR was submitted. Miss O'Sullivan points out that the lapse of a mere eight days between Mr Bhaker accessing the record on 25 November and submitting the eBAR on 3 December gives rise to a case to answer on the part of the council that Mr Bhaker had been prompted to submit the eBAR by accessing the record. However, she says that Mr Bhaker did answer that case, and it blew the Claimant's existing case theory out of the water. Mr Bhaker explained that Mr Kinch would not have been willing to submit an eBAR on the basis of a third-party report without carrying out his own investigations, and that eight days would not have been sufficient time for Mr Kinch to do so. Mr Bhaker said that eight days is not enough turn-around time for the council to raise an eBAR. Mr Bhaker explained that he had gone into level 2 access for this property on 25 November because he had had the tool

available and there was no reason for him not to use it, but he said it was just "cross-checking".

106. In the course of cross-examination, the court suggested that an alternative possibility was that Mr Kinch might have been prompted to make contact with the agents for the property as a result of having looked at the record on 25 June 2014. Mr Bhaker accepted that that was a reasonable connection. In cross-examination, Mr Doyle suggested that the wheels had been in motion from 25 June and that that was why Mr Bhaker had accessed the property on 30 June. However, Mr Bhaker's response was that at no time had Mr Kinch gone into the system and spoken to Mr Bhaker about it. Mr Bhaker also said that it was Mr Kinch who was the property inspector. If he had identified anything from the system which required further action, then Mr Bhaker said that Mr Kinch would not have instructed Mr Bhaker to undertake the investigation, rather he would have done so himself. Mr Bhaker reiterated that he had been instructed to raise the eBAR by Mr Kinch.

107. Miss O'Sullivan submits that there is no time basis for inferring any connection between access to this property at level 2 in either June or July 2014 and the later submission of the eBAR on 3 December 2014. It is pure speculation, she says, to infer any connection between the two series of events. When the Claimant had originally linked the case report to the eBAR, there had been a case to answer because the dates, 25 November 2014 and 3 December 2014, were close in time. Mr Bhaker had now answered that case, and she submits that it has effectively been abandoned and replaced by a new case. She submits that no new case to answer is raised simply because Mr Kinch accessed the record on 25 June 2014 and Mr Bhaker raised an eBAR on 3 December. Miss O'Sullivan submits that the basis for inferring any connection between these two events has simply fallen away.

108. There may have been any number of reasons why Mr Kinch thought it was time to raise the eBAR in November/December 2014. It seems likely that he was in contact with the agents for Canary Wharf, who were Coppinger, because Mr Bhaker has told us that they had a good relationship. There is, however, no basis at all for suggesting that Mr Kinch got in touch with the agents in relation to level 1 because of the access to the system and the later submission of the eBAR. Miss O'Sullivan submits that no inference can properly be drawn because of the mere lapse of time between the

council's first awareness of this property in 2008 and the submission of the eBAR in November 2014. She says that it cannot properly be inferred that it was the accessing of the record on Analyse Local which brought this particular property back to the council's attention. Any access in November 2014, immediately before the submission of the eBAR, was simply a cross-check.

109. Miss O'Sullivan points out that prior to rates retention, the council had not been particularly motivated to hunt for missing rateable value. That had all changed from 1 April 2013. From that time on, the Rate Base Team had been actively identifying and working through a portfolio of potential missing hereditaments. It appeared that they had got around to Floor 1, 40 Bank Street by November 2014. Mr Doyle had suggested that it had been a breach of the council's duty under Section 6 of the Local Government Finance Act 1988 not to have addressed this missing hereditament much earlier than it did. Miss O'Sullivan's response was that the allegation of breach of statutory duty should have been put to the council's witnesses and it had not. Miss O'Sullivan submits that if the court is in any doubt as to the position, it should apply the burden of proof and find that the Claimant has failed to prove that the council used the information in the Analyse Local case record to bring about the increase in rateable value.

110. I accept Miss O'Sullivan's submissions. In my judgement, there is nothing that has been produced in evidence that enables the Claimant to discharge the burden of proving the necessary causal link between access to the record for this property on Analyse Local and the submission of the eBAR in early December 2014. I therefore dismiss the claim for a fee in relation to this hereditament.

F: Stebon Primary School: Scott Schedule, page 64.10

111. The information about this is to be found at paragraphs 61 to 62 and 65 of Mr Bhaker's first witness statement and paragraphs 37 to 38 of his second witness statement. The claim is for £3,465 including VAT, founded upon an invoice dated 3 December 2015. Miss O'Sullivan submits that because there was no level 2 access to this record from any council employee, the claim should fall on that ground alone. This was a case that was only uploaded to Analyse Local on 6 July 2015. The Property Assessment Report

was sent by Mr Horne to Robert Sparks under cover of an email on that day (at D2/403). Mr Sparks' immediate response by email of the same day was to say:

> "I can advise you that we have not reviewed the contents at this point in time due to the current situation relating to the invoices previously issued. We've advised Inform to refrain from sending any further emails or information until such time as the outstanding issues have been resolved. Once the issues have been resolved we will revert back to you. However, in the meantime please do not send any further messages until further notice."

112. I have already held that the licence agreement had expired by this time. That is sufficient basis for dismissing the claim, even apart from the lack of proof of any access to this property at level 2. There is nothing to challenge Mr Sparks's statement that the council never reviewed the Property Assessment Report sent to it for this property by Mr Horne. That is another ground for dismissing the claim in relation to this hereditament. Further, this property had been referred to in the Planning List sent by the council to the Claimant on 30 May 2014.

113. Miss O'Sullivan submits that on the basis of the express admission made in paragraph 8 and paragraph 9.2 of the particulars of claim, the Claimant has accepted that it cannot claim a fee in respect of this hereditament. I would not decide this case on that pleading point alone in view of the inconsistency produced by the later pleading in the amended reply previously referred to. Miss O'Sullivan also submits that in any event it was the Planning List that was the source of the information on the Property Assessment Report at E/185. Mr Horne had accepted that the council's Planning Portal was the source of the information. The Portal merely reproduced what was in the council's Planning List. Therefore, the Claimant must have known that the council was aware of the alterations to this hereditament. The wording of the Property Assessment Report was taken from the council's own planning information recorded on the Property Portal. Miss O'Sullivan therefore submits, with justification, that the Claimant is claiming a fee for providing information to the council where the source of the information is the council itself. In such circumstances, the Claimant cannot meaningfully assert that the council has made use of information supplied by the Claimant. Rather, the council has made use of information which was known to it at

the inception of the licence agreement. The eBAR was raised on 10 September 2015 by an officer bearing the initials NB.

114. Mr Doyle accepts that there was no access in relation to this property and that the eBAR description submitted to the VOA follows not only the case description uploaded by the Claimant but also the planning record. He submits that there is no way of determining from which alternative source the author of the eBAR (NB) derived the information contained in it. Neither is there any positive evidence of the author having used the planning record as the source. Mr Bhaker was unable to give evidence as to how the eBAR came to be submitted, and there is no evidence from the individual, NB, who was responsible for it.

115. I am entirely satisfied on the evidence that the claim for a fee in relation to this hereditament is wholly unjustified and falls to be dismissed. It is quite clear that the original ultimate source of the information in the eBAR was the planning records of the council. I accept Miss O'Sullivan's submission that the Claimant cannot claim that the council has made use of information where the information was ultimately derived from the council itself. It was not the Claimant that identified this property to the council. Effectively, the council identified this property to the Claimant. In any event, as I have said, the information provided by the Claimant was so provided after the expiry of the licence. For all of those reasons there is no valid claim in relation to this property.

G: 1st Floor, 29-32 The Oval: Scott Schedule, page 64.5

116. This is addressed by Mr Bhaker at paragraph 56 of his first witness statement. The Claimant is claiming £1,395 by way of an invoice dated 30 March 2015. This is a former warehouse which had been converted into an events venue. This is a case where the Property Assessment Report of the Claimant was accessed by Mr Bhaker at level 2 on 25 November 2014. This is the sole instance on which Mr Bhaker made a note on the council's diary system indicating that he had carried out research on the property on Analyse Local. At E/71 it is noted that Mr Bhaker had recorded "eBAR raised as per research from Analyse Local." Miss O'Sullivan submits that this was rather generous to the Claimant because the information was, in fact, derived from the council's own Planning List at D1/61. It is also said to support Mr Bhaker's evidence

that where he did make use of Analyse Local, he made a note of this on the case record. The eBAR was raised on 25 November 2014, on the same day that Mr Bhaker accessed the record. Miss O'Sullivan's first point is that, as with Stebon Primary School, the Claimant has expressly admitted in the particulars of claim that it cannot claim a fee for any hereditament which was notified in the planning report. I have already indicated that I would not be prepared to dispose of this case simply on the basis of admissions in the pleadings, given the state of the amended reply. Miss O'Sullivan goes on to submit that, in any event, where the information has been derived from the council's own planning records, the Claimant cannot meaningfully claim to have supplied the information. It has added no value which would merit the payment of a fee. Again, I would accept that submission from Miss O'Sullivan.

117. Mr Doyle's submission is that the eBAR in this case was effectively cut and pasted from the description on the Claimant's Property Assessment Report, and Mr Bhaker has expressly acknowledged that the eBAR was raised from research from Analyse Local. Mr Doyle submits that Mr Bhaker's maintenance that it was not RV Hunter that was responsible for the submission of the eBAR in this case is completely unrealistic. The eBAR was based upon information in the Property Assessment Report. Mr Bhaker's evidence was that he was instructed to raise this eBAR by Mr Kinch and that he cut and pasted the information from the Property Assessment Report because it was simply quicker to do so. Had that information not been available to him, he would have simply asked Mr Kinch to provide what was to go into the eBAR report. I accept that evidence.

118. In my judgement, the effective cause of the submission of the eBAR report was the instruction from Mr Kinch and not Mr Bhaker's accessing of the Analyse Local system for this property at level 2, which was merely done by way of cross-check. I accept Mr Bhaker's evidence to that effect. Had I taken a different view, then I would not have disallowed the claim for a fee in respect of this property merely because this particular hereditament did not enter the list as the result of the council's own eBAR. True it is that this eBAR was "not actioned" by the VOA on 4 February 2015, and the VOA then raised its own VOR on 28 March 2015. However, I am satisfied that the raising by the VOA of that VOR was itself triggered by the council's eBAR. Had there been the required causal connection between the accessing of the Claimant's data and the submission of the eBAR, then I would have taken the view that the chain of

causation was not broken by the VOA's refusal to action the council's eBAR and the raising of its own VOR. However, for the reasons I have given as to the lack of causal connection between the accessing of Analyse Local and the submission of the eBAR, I dismiss the claim for a fee in relation to this hereditament.

H: 44-46 Cannon Street Road: Scott Schedule, page 64.2

119. This is addressed by Mr Bhaker at paragraph 55 of his first witness statement and paragraphs 7 to 10 of his second witness statement. The claim is for £1,777.20, by an invoice dated 7 August 2014. This is an Islamic girls' school located in a former shop. The council's records include an application for planning permission made on 16 January 1991 to convert the premises into a religious school. A note on this document records that it became a new school with effect from 1 April 2010. The property was inspected by the council on 29 July 2010 and found to be empty.

120. The eBAR was raised on 30 June 2014, on the same day that Mr Bhaker accessed the record. The trigger for raising the eBAR was said by Mr Bhaker to be an oral request received from Mr Kinch. This property had not previously been accessed by Mr Kinch or by Mrs Pipe on level 2. Mr Bhaker noted the raising of the eBAR on Analyse Local's system, but he did not say that its raising was on the basis of research he had conducted on Analyse Local. Mr Bhaker accepts that he had cut and pasted information from the case record into the eBAR, but he said that that was for convenience. If he had not been able to access the system, he would still have submitted the eBAR, but he would have to ask Mr Kinch for the necessary wording. The only use of the system made by Mr Bhaker was to cut and paste the information once he had been instructed to submit the eBAR by Mr Kinch. Miss O'Sullivan submits that the system was not the trigger for the submission of the eBAR because Mr Kinch had never accessed the record.

121. I find that Mr Bhaker is a witness of truth and I accept his evidence that he received an oral instruction from Mr Kinch to raise this eBAR. In my judgement, the mere fact that Mr Bhaker cut and pasted information from the Claimant's case record into the eBAR is not sufficient to establish the necessary causal connection between access to the system and the entry of the property into the valuation list. I therefore dismiss the

claim for a fee in relation to this hereditament. In doing so, I reject the submissions at paragraphs 3.2 and 3.3 of Mr Doyle's written closing note.

I: Café Forever: Scott Schedule, page 64.8

122. This is dealt with by Mr Bhaker at paragraphs 57 and 58 of his first witness statement. The claim is for £1,170, by way of an invoice dated 19 January 2015. This is a café in a former church hall. Mr Doyle accepts that there was no level 2 access in relation to this property, but he points out that the property did feature in the template BAR emailed by Mr Horne on 29 April 2015. In terms of the documents relied upon by the council, the email from Mr Kinch on 9 October 2013 to Mr Bhaker, saying that this one will need a visit as it is possibly re-rateable, and what appears to be a webpage printout with a handwritten note, dated 1 April 2010, are said by Mr Doyle to be hopelessly weak in demonstrating the council's level of knowledge to the "fully aware" threshold.

123. Miss O'Sullivan submits that the Court should dismiss this claim on the grounds that there was no level 2 access to the record. Further, she points out this hereditament had been on the council's radar from at least 9 October 2013 when Mr Kinch had sent Mr Bhaker the email noting that this one will need a visit as it is possibly now rateable. The eBAR was not submitted until 9 September 2015 by the initials AK. Miss O'Sullivan submits that the Claimant's case essentially rests on the inclusion of this property in the unsolicited spreadsheet sent by it to the council on 23 April and 29 April 2015. The council's response had been to highlight this property as already known to it. At that point, both parties had been fully aware that they were engaged in a dispute and the Claimant knew very well that the council would not be using the spreadsheet. Mr Bhaker's evidence was that he could not recollect seeing it and that he had only ever had access to the database and not to written spreadsheets.

124. In my judgement, once again the Claimant has not made out its case by establishing the necessary causal connection between the supply of information about this property and the submission of any eBAR. There was no access to this property on level 2, and there is no evidence that anyone at the council had any regard to any information submitted to it about this property by the Claimant. I therefore dismiss the claim.

J: 8B Huguenot Place: Scott Schedule, page 64.1

125. This is addressed by Mr Bhaker at paragraph 55 of his first witness statement. The claim is for £378 including VAT under an invoice dated 24 July 2014. The Claimant's case rests on the fact that the eBAR for this property was raised by Mr Bhaker on the same day that he accessed the case record, 30 June 2014, and that the general notes on the eBAR, as recorded in the VOA's disclosure, make reference to the presence of a mezzanine floor.

126. Mr Bhaker's evidence was that he was instructed by Mr Kinch to raise the eBAR. He accepted that, as with 44-46 Cannon Street Road, he had probably cut and pasted an extract from the case description on the Claimant's Property Assessment Report into the eBAR because that was convenient. Had he not had access to the system, he said he would still have submitted the eBAR but he would have had to ask Mr Kinch for the wording. Mr Bhaker noted the raising of the eBAR on Analyse Local, but he did not say that it had been raised on the basis of research from Analyse Local. Mr Bhaker's evidence was that he raised the eBAR in response to a request from Mr Kinch. There is no documentary evidence of that request, but Miss O'Sullivan submits that that does not mean it was not made. She submits that this particular instance depends on the personal credibility of Mr Bhaker. The council submits that the Court should accept his evidence that he was asked to raise the eBAR by Mr Kinch and that he only used the system as a convenient source of the information to be included in the general note section of the eBAR.

127. I accept those submissions; but, in my judgement, that is not the end of the case with regard to this particular property. One has to go on to pose the question: why did Mr Kinch instruct Mr Bhaker to raise an eBAR for this particular property at the time when he did? Mr Kinch had accessed the Property Assessment Report for this property on 26 June 2014. This is the only instance of a possible access close in time to the raising of an eBAR on the part of Mr Kinch. There had been nothing done by the council in relation to this property for many years. I have not heard any evidence from Mr Kinch as to why he instructed Mr Bhaker to raise the eBAR on this property at this particular time. I do not criticise the council for not calling evidence from Mr Kinch, but, nevertheless, it means that I have no evidence, beyond the fact that he had accessed this property at level 2 on 26 June, as to why he instructed Mr Bhaker to raise this

particular eBAR after so many years since the property had first been on the council's radar.

128. On the balance of probabilities and bearing in mind also that the burden of proof is on the Claimant, I find that it was Mr Kinch's access to this property at level 2 on the Analyse Local system that prompted him to instruct Mr Bhaker to raise the eBAR for this property. On this basis, I find that the claim for this fee is justified and I will therefore enter judgment, in relation to this claim only, for £378, plus interest from 7 August 2014, being 14 days after the date the invoice was raised.

7 Conclusion

129. For the reasons previously given, I will enter judgment for the Claimant against the council for £378, plus interest from 7 August 2014. In the absence of any further submissions on the rate of interest, I would adopt the rate of 8% per annum simple interest mentioned by Mr Doyle in his written opening. That concludes this judgment.
