

JUDGMENT : HIS HONOUR JUDGE TOULMIN CMG Q.C. TCC. 8th March, 2000

1. This action concerns disputes arising out of the delivery of a computer system purchased by the defendant in the original action and the claimant in the action by counterclaim, Winther Browne ("WB") from B.M.L. (Office Computers) Limited ("B.M.L."), the second defendant in the original action and by counterclaim. The purchase was financed by Anglo Group PLC ("Anglo"), the claimants in the original action and the first defendant by counterclaim.
2. By a statement of claim endorsed on the writ dated the 21 July 1997, Anglo claims that under a leasing agreement dated 15 April 1996, Anglo leased to WB certain computer equipment for a period of 60 months to be paid for by an initial payment of 4,484.78 plus VAT and by 19 quarterly instalments of a like sum. Anglo claims that WB defaulted upon payment of the instalments and repudiated the agreement. Anglo also claims that it accepted WB's repudiation by a letter dated 19 June 1997. In essence Anglo claims the sum of 269.62 arrears at the date of termination and 61,736.29 damages making a total claim against WB of 67,005.91 together with interest from the 19 June 1997.
3. In its defence and counterclaim dated 7 November 1997, WB claims that the computer system suffered from numerous defects such that Anglo was in breach of the terms of the leasing agreement. WB contests the validity of the termination by Anglo but says that if the agreement was validly terminated, Anglo is entitled, if at all, to damages and not to the sum of 67,005.91 which has been claimed. It asserts that Clause 10 under which the sum has been claimed is a penalty and that Anglo is not entitled to reclaim VAT or to recover interest.
4. In its amended counterclaim, WB alleges that BML supplied a defective computer system. It alleges that between November 1995 and March 1996 BML made a number of representations to WB in order to induce WB to purchase or hire the computer system. It claims that the effect of the representations was that WB would be enabled to operate a computerised tele- sales, order processing, stock control and accounting system which, as well as being easy to use, would provide comprehensive management information in accordance with its stated requirements by 1 July 1996. The alleged defects are set out in a lengthy Scott Schedule originally containing 55 items but reduced before the hearing to 52 items. WB also claims that BML agreed on its own behalf and as agent for Anglo to provide all necessary hardware, maintenance, software support, training and qualified advice to enable the system to work
5. WB claims against BML that if the computer system failed to perform as agreed, it was understood that WB would suffer loss and damage by way of depression of net profits, additional costs in trying to remedy faults and breaches, failure to make anticipated costs savings, the costs of obtaining a replacement system and wasted expenditure on the hire of the BML system.
6. At the time when this hearing started WB was claiming, based on the advice of its expert advisers, FMC, as follows:
 - a) Claim for damages for alleged loss of gross profit. 791,479.
 - b) An additional claim largely representing the allegedly wasted proportion of salaries paid to WB's own staff. 133,780
 - c) Claim for additional damages in relation to acquiring the substitute computer system after WB had rejected the computer system. 95,085 1,020,344
7. In the course of the hearing WB's claim was reduced to 693,000 in respect of gross profit and 112,532 in respect of wasted salaries making a total claim of 900,916.
8. In its amended defence BML claims that the computer system which it supplied was sound and worked well notwithstanding that, as in all systems, there were bugs which needed to be put right. It asserts that such difficulties as WB had were grossly exaggerated by them. There was, BML claims, no justification for WB to repudiate the contract. In the Scott Schedule BML answers WB's detailed claims. Further BML makes a fundamental attack on all aspects of the damages claimed by WB
9. BML no longer relies on its written terms and conditions of sale which limit BML's liability for consequential loss but it relies on the terms relating to purchaser's responsibilities which require a purchaser to accept responsibility for the selection of the computer system to achieve its intended results, the management and

supervision of the computer system and the adequacy and accuracy of its data, instructions, programs and procedures. It asserts that the terms are fair within the meaning of the Unfair Contract Terms Act 1977.

- 10 In its amended reply, Anglo relies on the terms of its hiring agreement including clauses 3(c) and 6(b) under which WB acknowledged that Anglo was not responsible for any loss, damage or expense which it might suffer as a result of the computer system failing to function properly. Anglo also claims that in the circumstances its terms satisfy the requirements of reasonableness under the Unfair Contract Terms Act 1977. Anglo denies that it was in breach of contract or guilty of any misrepresentation.

THE PARTIES

- 11 BML is a computer company which markets a software package called Charisma. Charisma is a package of more than 2,500 programs covering all aspects of a business including sale orders, sales enquiries, purchase of stock, stock control, payments to suppliers, credit control, profitability and marketing.
- 12 Although Charisma is sold as a standard package it is possible to run bespoke software in conjunction with it. In this case Charisma was sold to WB as a standard package without bespoke software. The standard package is updated over time and the improvements are provided under a maintenance contract.
- 13 WB is a distributor and reseller of wooden and carved mouldings and other decorative items. Goods are produced to WB's order mostly from abroad. It supplies both large DIY stores in the United Kingdom (also referred to as Sheds) and smaller retail customers from its premises in North London and by mail order. It also has some export trade. In 1995 it had a turnover of about 5.27m and employed 26 staff. The turnover in 1996 was marginally down on 1995. It then rose to 5.41m in 1997 and to 7.30m in 1998. The gross profit increased from 1.68m in 1995 to 2.13m in 1996, 2.58m in 1997 and 3.04m in 1998.
- 14 Anglo is a finance company of general reputation which finances various different types of purchases.

THE FACTS

- 15 In July 1995 WB started its search to replace its existing unsophisticated computer system. It could have used consultants to assist it in seeking a replacement system but it did not do so. Instead it entered into discussions with a number of computer suppliers including BML.
- 16 On 28 July 1995, Mr David Smith, in charge of computers at WB, sent by fax a "list of vague system requirements" to BML indicating that WB wanted to make a decision on a new computer set-up within 12 months for a price in the region of 60,000-80,000. There was no special urgency and Mr Smith requested a meeting in October 1995.
- 17 On 1 August 1995 Mr Fairchild, a salesman employed by BML, replied sending an information pack, Update magazine and promotional video. He said that BML's package, Charisma, had been specifically written to satisfy the needs of both wholesalers and distributors. He emphasised that in order to gain a full appreciation of its capabilities WB would need to arrange for a demonstration. The accompanying brochure made it clear that BML was able to advise on and fulfil every aspect of a wholesalers' and distributor's requirements. The package which BML had available included "*comprehensive consultancy management and training from professionals who understand your industry.*" WB has set out in a schedule of particulars those parts of the brochure which they say constitute continuing representations. A preliminary meeting took place on 27 September 1995. At that stage the requirement was for a complete new UNIX based computer system and EDI (Electronic Data Interchange) to be used for receiving orders from a number of large multiple DIY stores.
- 18 EDI enabled documents to be sent direct from one computer to another by telephone line. When WB raised an invoice and transmitted it electronically to the store's computer it represented a substantial saving for the recipient since the invoice did not need to be entered manually. WB used a stand alone computer for receiving purchase orders from Sheds. These had to be re-entered on to WB's accounts system (non-integrated EDI). If EDI could be integrated into the Charisma system, purchase orders from Sheds would be automatically entered as orders on WB's system (integrated EDI).
- 19 WB met a rival bidder, Castle, on 14 November 1995. On 15 November 1995 Ms Eve Labbett, the Buyer Director, Mr Brian Lawson, the Finance Director and Mr Smith met Mr Fairchild of BML at a meeting at which Charisma was demonstrated.

- 20 After the meeting Mr Fairchild wrote to Mr Smith in a letter dated 20 November 1995 with a formal proposal for BML to sell computer hardware and software to satisfy WB's requirements based on the list of requirements of the 15 September 1995 which had been further clarified during the 15 November 1995 meeting. He advised "certainly we have no reason to believe your requirements could not be ably satisfied by standard "Charisma" and IQ". IQ (Intelligent Query) is proprietary software used to create reports. The letter warned WB that "the early part of our discussion focused on pricing and discounting which for any company is an important area, for yourselves it would require a change from your current methods completely, as the structure you maintain is non-compatible with computer methodology."
- 21 There followed a detailed proposal for a standard package without modifications totalling 65,814 to include hardware, software, IQ Query/Report Writer and a training package. In addition the draft contract provided for hardware and software support packages at a total annual cost of 8,702. It offered lease rental and lease purchase terms over three or five years. In relation to Electronic Data Interchange it noted, "EDI is an individual requirement that requires three days consultancy followed by the package cost and a number of days for document creation. Approximate costs from previous contracts suggest 4,000". It is said by WB that this amounts to a representation as to the cost of EDI on which WB relied.
- 22 BML made further presentations in November 1995 and early December 1995 in the course of a competitive round of presentations from BML and other companies.
- 23 WB changed its requirements to some extent as, of course, it was entitled to do. On 6 December 1995 Mr Smith wrote to Mr Fairchild that "the company would not benefit from modern PC style networking."
- 24 BML's revised proposals on 8 December 1995 increased slightly the cost of the hardware, software, IQ and training packages to 67,966 with an annual cost of support of 9,243. The summary at the end of the offer said that "the computer system proposed combines high quality powerful and reliable hardware together with the Charisma software package, providing your company with a sophisticated, multi-terminal system to meet both your current and future requirements."
- 25 There was a second demonstration by BML on 11 December 1995 at which Ms Labbett, Mr Lawson and Mr Smith were present. WB's note of the meeting said that "Elke (O'Toole) would require to utilise IQ to download and re-order details into Supercalc 3 to manipulate the data to determine optimum purchasing quantities, then upload into IQ SHOP." Supercalc was a proprietary and straight forward spreadsheet. It was not a BML product. IQ SHOP was the program which it was thought was needed to upload data from the spreadsheets into Charisma.
- 26 The note of the meeting said of Ms Julie Quinton, then in charge of credit control, that she "found the cost account screen too crowded purely because she is used to her existing system. She is very meticulous in her approach to credit control and resistant to change." It also noted that Mrs O'Toole would require a German keyboard to allow her to type faxes in German to be transmitted directly without being printed out.
- 27 On 21 December 1995 WB and BML entered into a written agreement that BML would supply the hardware and Charisma software specified in the agreement, at a price of 64,133, with an annual hardware maintenance and software support contract at an annual price of 7,843. Delivery was agreed to take place in February/March 1996. The contract was on a BML standard form and was expressed to be subject to BML's definitions, terms and conditions which were declared to be incorporated into the contract.
- 28 The sales order dated 3 January 1996 set out detailed prices and a schedule for the implementation of the project. The system was required to go live by July 1996. The schedule also detailed the amount of training, project management and consultancy which was to be undertaken by BML and to be included in the contract price.
- 29 WB still had to organise the finance for the project. On 3rd January 1996, Mr Forward of F & B Associates followed up an initial conversation with Mr Lawson having just been introduced to him by Mr Fairchild of BML. On 11 January 1996, F and B Brokers put forward leasing proposals to Mr Lawson. On 25 January 1996, they put forward a revised proposal of an initial payment of 4,809.60 plus VAT followed by a further 19 quarterly instalments of 4,809.60 plus VAT. It is agreed by the parties that the introduction of Anglo was via a credit broker for the purpose of the Supply of Goods and Services Act 1982. Under s9 of that Act there was an implied term that the system would be reasonably fit for the purpose made known to the credit brokers.

- 30 After further negotiations, WB entered into a lease agreement with Anglo on 26 March 1996 for the supply of the Charisma package for an initial payment of 4,484.78 plus VAT and 19 payments of an equal amount. This did not include EDI which was the subject of a separate agreement and was not financed by Anglo. The agreement was subject to Anglo's standard terms and a Finance and Leasing Association (FLA) check list. WB made its first payment to Anglo on 1 May 1996 and continued to make the agreed payments until April 1997. Also on 25 or 26 March Anglo issued a purchase order to BML for the delivery to WB of the Computer System for 67,137.50 plus VAT.
- 31 On 12 February 1996 WB ordered EDI and Data Transfer at an additional cost of 13,650 with a further annual cost of 750 for the EDI annual software support contract. The delivery was required to be in conjunction with the main order. The agreement was also on a BML standard form and contained the same terms as the main order. The contract also provided for three days consultancy for EDI and one day of training. The offer was made by BML in a letter dated 1 February 1996. Mr Smith faxed a reply "Please go ahead". There was no complaint that the cost was unacceptable in view of the 4,000 figure for EDI mentioned in the original agreement. I conclude that the original 4,000 figure was not intended to be a representation as to the actual cost to WB of EDI nor was it treated as such by WB.
- 32 On receiving notice that the installation of the new system was to be in March 1996, WB gave notice on 26 February of the termination on 31 August 1996 of its existing agreements relating to the Valedale system, which it was then operating, on the basis that the system would have been replaced by Charisma by September 1996.
- 33 On 15 March 1996 Ms Fisher (consultant) and Ms Baines (trainer), both of BML, conducted the initial consultancy meeting with WB. The initial Project Management meeting took place between BML and WB on 19 March 1996. At this meeting WB said that it was likely that EDI would not be required until several months after the new system went live.
- 34 The BML Project sheet of the 25 March 1996 said that EDI was required for delivery in September 1996 "to be confirmed by the customer". On 23 May 1996 WB said in a fax to Mr Bishop of BML that they were still undecided about EDI. On 11 June 1996 Mr Smith told Mr Bishop that the decision to integrate EDI with Charisma was agreed by WB's Managing Director subject to sorting out the final details at the final consultancy meeting. Mr Smith said that WB did not need to integrate EDI before September 1996 at the earliest.
- 35 On 18 June 1996 Mr Bishop warned Mr Smith that BML was organising its work to the end of 1996 and needed to know what WB required in relation to EDI in order that BML could see if they could find time to include it in their work schedule. The note warned Mr Smith that WB would need to establish specific requirements for each document type which WB required for its EDI customers.
- 36 On 26 June 1996 Keywill, the suppliers of EDI, sent a fax to BML. The fax makes it clear that WB had not made a final decision on whether they needed an integrated or non-integrated solution. It appeared likely at that stage that WB would need a manual solution at least for the short term. This would mean that they could transmit invoices electronically to the Sheds but would continue manually to enter purchase orders from Sheds.
- 37 An implementation schedule dated 1st April 1996 relating to the main agreement envisaged that the Charisma system would go live on 4-5 July 1996 to be followed by training on Purchase Ledger, GRN (Goods Received Notes) Matching on 15 July 1996, and a final consultancy meeting on Friday, 23 August 1996. On the 10 June 1996, the date for going live was fixed as 1 and 2 July 1996.
- 38 On 11 June 1996 Mr Smith produced a "short list of queries". These included, IQ SHOP, word processing required on the main system for use by all dumb terminals/printers, and the German keyboard. Dumb terminals are terminals which work when connected to a central computer but not on their own.
- 39 On the 24 June 1996 BML's Project Sheet noted WB's complaint that "when logging enquiries, volume discount is not calculated for printing on quotes." This is an early indication of one of the complaints of WB.
- 40 On 25 June 1996, Mr Bishop wrote to Mr Smith with a list of outstanding issues. This included Timed Save. Mr Bishop said "I understand you would like to incorporate the invoice update into the script used to carry

out a savefiles at a specific time. We can do this but would have to charge for the work required to set it up and test it works properly, the charge for this is likely to be in the region of 375." Later this service was provided free of charge.

- 41 On 1 July 1996 the Charisma system went live on time in accordance with the contract.
- 42 On 1 July 1996 Mr Fairchild of BML raised a number of questions with Mr Smith including EDI. In relation to EDI, he said that "Since our original conversations regarding your EDI requirements we have been able to define your requirements a little more accurately, however until such a time as we can confirm the layouts that each trading partner uses we are unable to give final costs." He then went on to quote a price based on a number of broad assumptions. A revised purchase order for EDI was completed on 8 July 1996. It included 3 days of consultancy and 5 days of Charisma Training. The overall price was similar to that quoted in February 1996. It is said by BML that the price was understood to be provisional since BML did not know what were WB's precise requirements. Although the basic EDI software was installed on 21 August 1996 it was not brought into use. For this to happen a link needed to be established between Charisma and the EDI software supplied by Keywill. WB needed to make it clear whether they required a full solution ie. data transmitted electronically in both directions or a manual solution ie WB would continue to enter purchase orders manually.
- 43 On 24 July 1996 Ms Labbett wrote a general letter of complaint saying that WB was disappointed at some of the limitations which it was encountering in the system.
- 44 This was followed by a meeting between Mr Fairchild and Mr Bishop of BML and Mr Browne, Managing Director of WB, which was noted by Mr Bishop. It was explained that BML took a two phase approach to the implementation of Charisma. The first phase concentrated on use of key parts of the system that were essential to the day to day running of a customer's business. The second phase would normally take place 3-6 months after the system went live. In this phase BML would review how work was being done on the system and explain to the customer the most effective way of using the system. This could most usefully be done after the customer was sufficiently familiar with how Charisma worked. There was a general complaint by WB that the process of using the programs was too long-winded. There followed five specific issues. Mr Bishop concluded that in general the implementation had gone smoothly but that there were "a number of niggles which needed to be resolved".
- 45 On 5 August 1996 Mr Lawson listed a number of matters which WB wanted to have resolved. These concerned, for the most part, routines which were possible to operate but where either the process was thought by WB to be too lengthy or there was no possibility to amend a mistake made in the course of entering data so that if the operator made an error the whole process had to be started again.
- 46 On 6 August 1996 Mr Ross, a computer programmer employed by BML, attended at WB's premises to give IQ training. He told WB that there was an incompatibility problem in downloading to Supercalc, the computer spreadsheet used by Ms Labbett, into Charisma. Its software component was SDI. It was not supplied by BML. Mr Ross' advice meant that BML did not attempt to transfer data between Supercalc and the Charisma System. Instead Mr Ross told Mr Smith to use Excel which was another spreadsheet. Mr Smith said that he tried this approach unsuccessfully and eventually in January 1997 WB complained to BML.
- 47 In a letter to Ms Labbett dated 6 August 1996, Mr Fairchild said that he had asked Mr Bishop to arrange for a Timed Save routine to allow WB to undertake invoice updates and system backup outside working hours. The letter also explained that due to circumstances beyond BML's control, BML was unable to supply UNIX Word Processing. BML proposed an alternative solution in a constructive manner.
- 48 In a further letter from BML dated 9 August 1996, Mr Bishop gave an explanation of a number of the difficulties which WB were finding in the system. Mr Bishop ended by saying that to achieve some of what WB required would need modifications to the standard Charisma package. Some of the other problems were a matter of WB staff having the appropriate training. He ended "Can I suggest that you keep a log of queries so that we can agree with you how to resolve the queries? This will also mean you and your staff can see any problems or concerns with use of the system are being addressed. As some of my answers would require some discussion can I ask that you call me so that we can agree how to best progress the various issues raised?" This was sensible advice.

- 49 On 6 September 1996 Ms Fisher made her second consultancy visit. This was an important meeting coming just over two months after the new system had gone live. She confirmed that the Timed Save script needed to be sent to WB so that they could do the backup and update invoices and credit notes automatically overnight. In relation to a number of other problems where WB staff were having difficulties, she said that these could be resolved by further training.
- 50 With regard to the problem over the spreadsheets, Ms Fisher advised that IQ SHOP worked with certain spreadsheets and it must be determined to see whether Supercalc was compatible or whether a different package needed to be used. This tempered the advice which had been given by Mr Ross on 6 August 1996 that there was an incompatibility problem between Supercalc and Charisma which was insoluble. Ms Fisher said that she was referring the problem to Mr Bishop for resolution.
- 51 There appears to have been genuine confusion on the part of BML. After speaking to Mr Smith in early October 1996, Mr Bishop thought that the problem was being resolved by using Excel, as Mr Ross had suggested, so he took no further action. It was not until the issue was raised by WB again on 17 January 1997 that BML made any further effort to resolve the problem. It is surprising in view of the very serious effect that WB claims that the compatibility had on its business resulting in claimed losses of gross profit of over 400,000 that Ms Labbett did not take urgent action to resolve the problem.
- 52 The Time Saved routine was installed on 23 September 1996 together with necessary updates of the existing software.
- 53 Further attempts were made to resolve problems over word processing. In a letter from Mr Fairchild to Mr Smith dated 8 November 1996, BML sent confirmation of costings of an alternative solution using Corel Word Perfect and said that the work could be undertaken at the beginning of December 1996.
- 54 There is no doubt that there were problems in the system between October and December 1996. A number of problems were being sorted out, albeit not as quickly as WB would have wished. It is conceded by BML that it could have responded more quickly to resolve some of WB's problems. I am also satisfied that some problems were caused by WB's reluctance to adapt its working practices to the standard system which it had purchased."
- 55 BML had every reason to have been surprised to have received a letter from Ms Labbett dated 10 January 1997 in the following terms. *"I am faxing you a list of problems most of which have been reported for weeks or even months. This list is long not forgetting the serious problem reported by David yesterday. The problems are serious, the failings are intolerable. The general lack of performance of the system is now having an adverse effect on our business; the shortcomings of the system are frustrating our legitimate attempts to obtain the benefits which we were promised when the system was purchased. Before embarking on any legal action we feel it is incumbent upon us to make an effort to settle this situation amicably. To this end we propose that a meeting be held at Winther Browne & Co beginning of February. Prior to this meeting we request from yourselves a full schedule for solving the attached problems and for addressing all queries."*
- 56 The list of outstanding items was prepared by 18 December 1996 but was not sent until it accompanied Ms Labbett's letter dated 10 January 1997
- 57 This letter, which was obviously written with outside assistance since it is not in Ms Labbett's normal style, appears to show a breakdown in WB's confidence in BML. The sudden thinly veiled threat of legal action is inexplicable on the face of the documents. It was not explained in any of WB's witness statements or in the written or oral opening. I would have expected that, before the letter dated 10 January 1997 was sent, there would have been expressions of increasing frustration with the level of performance of Charisma and demands that matters should be put right. There were no such letters in November or December 1996. I note also that the complaint was that the general lack of performance *"is now having an adverse effect on our business."*
- 58 The explanation for the sudden change of approach was given in the course of Dr Salmon's oral evidence as independent computer expert for WB although not in his expert's report. In fact, his firm, FMC, (although not Dr Salmon personally) was consulted by WB in December 1996 and it advised WB to write the letter which was sent dated 10 January 1997. Dr Salmon came before the court as an independent expert witness. His firm was retained by WB to advise on its claim against BML and also to advise on the new computer system

which WB purchased to replace Charisma. There was no suggestion before the hearing that this firm had been involved before February 1997.

- 59 WB's letter dated 10 January 1997 had been preceded by two letters from Mr Smith dated 9 January 1997 and 10 January 1997 complaining that the Charisma system had produced cost figures for 1996 which were distorted by a few credit notes with wild cost values which distorted all the figures. He asked for the problem to be corrected. Further similar cost errors from January 1997 were set out in Mr Smith's letter to BML dated 11 February 1997.
- 60 .The letter from Ms Labbett dated 10 January 1997 prompted detailed correspondence between the parties. By a letter dated 14 January 1997 Mr Bishop sought to deal constructively and in detail with the problems which she had raised. These included providing upgrades of BML software. He took justifiable exception to the threat of legal action which he did not regard as a fair reflection of the status and type of issues which Ms Labbett was raising.
- 61 The response from Ms Labbett dated 17 January 1997 was a belligerent refutation of Mr Bishop's letter. It also reintroduced the problem of the compatibility of her spread sheets (Supercalc) with Charisma. Surprisingly in view of the great impact which WB says that problem had on its business, this issue had not been raised in the letter of 10 January 1997.
- 62 At other levels co-operation continued between the parties. Also on 17 January 1997, Ms Baines conducted a three hour training session T12 with Mr Smith and Mr Lawson on various BML software routines. This was the last of the 12 training sessions, including the additional hours of training which WB had purchased, and dealt with a number of important topics including VAT report and year end report.
- 63 Ms Labbett, whom BML had understood to be ill, (and who had been in hospital) wrote a letter dated 3 February 1997 to Mr Bishop: *"I am very disappointed that you did not have the courtesy to respond to my letter of 17 January 1997. Unless we receive a satisfactory response in seven days we have no alternative but to seek expert opinion on this matter and seek recourse. We reserve our position in reference of the claim in damages."*
- 64 Mr Bishop wrote a further detailed letter in reply dated 4 February 1997 in which he pointed out that he had been in detailed discussions with Mr Smith since her letter of 17 January 1997. He said that the issues which Ms Labbett raised split into two categories. "1.Those which are issues which BML is currently dealing with, some of these are the result of software problems and it is BML's responsibility to resolve. 2.Those that are not problems with the system. Some of these are issues with how it is used against how Winther Browne wish to use it"
- 65 The letter sets out detailed points to be worked on with Mr Smith:
- 1.2 Quicker GRN matching (Goods Received Notes) (WB)
 - 1.4 Stock Processing (WB)
 - 1.5 SKR 9 Stock Report (BML)
 - 1.6 Negative Profit--factored items (BML)
 - 1.7 Analysis on items with stock cost errors (BML)
 - 1.8 Ref Files (BML)
 - 1.9 SKM1 Status Code (BML)
 - 1.10 Detailed in centre pro forma (+ 7 type info) (BML)
 - 1.11 IQ access to fields (BML)
 - 2.4 Fax box failing to get an answer (BML)
 - 2.5 Version 5.6.0 of Charisma (WB)
- 66 In the letter Mr Bishop went on to deal with other items. In particular he explained that often what appeared to be long-winded processes at the start of working on a completely new computer system were caused by the way the system was being used. These problems could largely be solved by use, further consultancy and refinements which avoided the long-winded processes.
- 67 He went on in paragraph 3.2 of the letter to set out benefits he acknowledged which had not been realised *"No WP (word processing) this, as we have advised, was outside our control, we cannot be held responsible if a third party supplier is sold and the new company puts a hold on the product we require."* (This had first been explained many months before). *"Can't fax Pro formas"*. (It was explained that Charisma was written this way). *"Can't*

use the Prospect file," please advise what you wish to do or if there is a problem what it is, from the discussion re Proformas I would think it may be to do with volume discount pricing." "Cannot use your Supercalc spread sheet, if your Supercalc spread sheet is compatible with either flat ASCII CSV type file or a Lotus works 3 file then you can import an IQ Report. IQ reports can be saved as either of these file types."

- 68 Ms Labbett replied on 10 February 1997 again in vigorous terms emphasising that WB's needs were very basic and representative of a smallish distribution company on which, according to its brochure, BML specialised. She said that BML had promised in specific terms what WB had asked for. She was insistent that at no point before the system was installed did BML warn WB that there was a problem between her Supercalc spread sheets and Charisma. She refuted in detail claims that WB had any responsibility for the items referred to as "WB's responsibility" in Mr Bishop's letter.
- 69 Mr Bishop replied by fax on 12 February 1997 saying that it was clear from her letter that many of the issues were to do with what the Charisma system will/can do. BML's conditions required purchasers to satisfy themselves that the software met their requirements "although this is done in conjunction with any discussions and specific points agreed to by the sales force." He proposed a meeting between Mr Fairchild and himself and those at WB involved in the purchase of the system to agree what was purchased and how in relation to each issue the parties should move forward. He stressed that this was not intended to be obstructive and that BML wished to work with WB towards a mutually satisfactory solution.
- 70 It is clear from Mr Smith's contact log for February 1997 that at a practical level the parties continued to cooperate and that BML was making significant efforts to deal with the outstanding problems. This was demonstrated in a separate note in which Mr Bishop set out the state of progress on a number of the points raised in the 4 February 1997 fax. Some had been dealt with. Others were being investigated or worked on.
- 71 On 17 February 1997 Ms Labbett said that WB would be delighted to attend a meeting in due course but that in the meantime it was taking advice on the matter. She asked BML to confirm that it would continue to support the system in line with BML's terms of contract.
- 72 The reference in her letter to "taking advice" was to the fact that WB was referring the matter again to FMC who wrote to Mr Smith on 19 February 1997 that the 7 March 1997 would be a suitable date for a strategy meeting to determine the way forward in their computer investigation and that Gary Wilkins, Operations Manager and Christopher Ball, Project Manager would attend on that date. This marked the end of cooperation between the parties at director level although cooperation continued between Mr Smith and BML.
- 73 B & Q returned all the 1997 invoices to Mr Smith having issued a new suppliers' requirement on 27 February 1997 that WB (and B & Q's other suppliers) should trade with B & Q using EDI. Mr Smith sent a fax to Mr Bishop on 7 March 1997 saying that WB required EDI as soon as possible and that the most urgent documents required were outgoing invoices (B & Q first). By a fax dated 24 March 1997 Mr Bishop sent a schedule for delivery of EDI invoice documents to allow them to be used in the software from Keywill for invoices in the week commencing 19 May 1997 but gave no date for incoming orders. The letter set out the information which WB needed to supply before EDI invoice documents from Charisma could be exported into EDI software.
- 74 Another complaint which caused annoyance to WB was that the Prospects Diary file was inaccessible for producing reports because it had been compressed, i.e. could not be used by that level of user although it could have been accessed by BML. There is a factual dispute between the parties as to why the problem continued to exist but it is clear that the problem could have been solved on 10 March 1997 when BML obtained the key to access the program and tried to activate the function for WB..
- 75 On 9 April 1997 there was a problem with an operator at WB who caused the screen to lock by entering an order locking the stock line on the screen and then entered another stock line. That screen was frozen but only that individual screen. WB say that they rang BML's help line at 8.40 am. There was no reply. The further call was logged by BML at 9.39 am and BML fixed the problem at 10 am. There appears to have been a further problem that day at or before 12.30 pm which was fixed at 1.35 pm. The first problem was an example of what came to be called "the deadly embrace". It was a risk which, it was agreed, BML had identified at an early stage and their trainers had told WB's employees in training how it was to be avoided. The issue is

whether or not training and warnings were sufficient or whether BML should have devised a system which made the deadly embrace impossible. It is to be emphasised that the deadly embrace only involved the one particular screen and did not adversely affect the whole system.

- 76 On 15 April 1997 WB instructed its bank to stop payment to Anglo of the 5,269.61 instalment due on 17 April 1997.
- 77 On 16 April 1997 WB wrote to Anglo notifying them that WB had instructed its bankers to terminate further payments to them under their lease agreement. The letter said: *"As you will know, we entered into the above Agreement on 26 March 1996, for a Computer System supplied by BML(Office Computers) Limited. You ought reasonably to know, that since that time, the system has not worked in several aspects, has not done what it was supposed to do and therefore has not given our company the benefits which were reasonably contemplated at the time of entering into the above Agreement". "We therefore hold your company to be in repudiatory breach of condition of the above Agreement, accept that wrongful repudiation and hereby discharge ourselves from that Agreement." "We have instructed our bankers to terminate further payments to you and immediately reserve our position in damages."*
- 78 In a letter to BML dated 16 April 1997, Mr Browne of WB wrote in somewhat similar terms to BML. *"As you know we entered into a contract with your Company on 19 March 1996 in respect of a computer system. Since that time, you will also know that this system has not performed properly and has not provided the facilities which were reported at the point of sale. The time has come to put an end to this whole affair. Although we accept your wrongful repudiation of the Agreement, we are going to attempt to settle this matter with you, and to this end, we will be writing to you in due course requesting your attendance at a meeting at our offices, at which time we wish to consider your Company's proposals for compensation. However we reserve our position in respect of our right to determine the Contract and our position in damages."*
- 79 BML says that this does not amount to an unequivocal notice of termination because the letter ends by only reserving the position in respect to WB's right to determine the Contract. It does not say that it does so unequivocally.
- 80 WB relies on this letter as notice of termination but says that if it is wrong about that it relies on the letter of 28 April 1997.
- 81 It appears that the letter of 16 April 1997 was followed by a telephone conversation between Mr Doubtfire, a director of BML, and Mr Browne and by an exchange of letters. The outcome of the list of items in Mr Bishop's fax of 4 February 1997 followed up in his note of 18 February 1997 was set out in Mr Doubtfire's letter of 25 April 1997.
- 82 Mr Doubtfire's letter dated 25 April 1997 indicated that the number of outstanding items had been substantially reduced although SKR-9 Stock Report, incorrect information appearing on body of Proforma and Faxbox--failing to get an answer, remained to be worked on by Mr Smith and Mr Bishop. Mr Doubtfire invited Mr Browne to raise any other queries to which he said he would respond promptly. He went on *"we would also welcome the opportunity to discuss any areas of the standard system that cause concern as it may be possible to handle them in a different way within the Charisma package." "I look forward to your reply and hope that we can soon achieve a solution to enable you to gain the maximum benefit from the system."*
- 83 WB says that this letter and BML's confirmation on 25 April 1997 on a Customer Contact form that Mr Smith was to send disks containing all his EDI information and that BML would run the invoice routine on EDI for all WBs EDI customers were self-serving and insincere gestures by BML. I do not find that this was the case. In my view BML was continuing to make genuine attempts to satisfy the requirements of WB to the extent that it was able to do so.
- 84 The letter from Mr Browne dated 28 April 1997 did not respond to Mr Doubtfire's invitation. It summoned BML to a meeting on 9 May 1997 at 11 am so that WB could hear BML's proposals for financial compensation. The letter went on, *"in the event that you do not confirm your attendance at this meeting by 2 May 1997 then we shall assume that you do not wish to amicably settle this matter and proceedings will be issued against you. We reserve our position in damages."* It is clear that WB regarded the contracts with BML as being at an end.
- 85 Mr Bishop tried on 28 April 1997 to arrange a meeting with Mr Smith to discuss the rebuilding of analysis data but in his reply Mr Smith responded politely that contact could only be made at director level.

- 86 A meeting took place between the parties on 9 May 1997. FMC attended with Mr Wilkins, Dr Salmon's co-director and Mr Dobbs. At the meeting WB made a claim for 350,000 made up of additional costs incurred by additional work that had to be done by staff and revenue that could not be generated by WB but which would have been generated if the computer system had met its expectations. It also included in the sum a claim for further losses otherwise unspecified. This figure is 1/3rd of that claimed at the start of this trial.
- 87 The specific problems raised at the meeting were that the GRN matching was too time-consuming and that the ancillary costs routines were also time-consuming. WB said that they had been faced with unexpected charges. They said that the cost of EDI had been estimated initially at 4,00 when in fact it cost 13,000. They said that they had to have it since large DIY outlets that used the system constituted 65% of their business.
- 88 BML did not make an offer of compensation but the Chairman of the parent company, EDP, sent a final letter dated 14 May 1997 to WB noting that BML had been expecting detailed input from WB since 18 February 1997 which had not been provided. The letter went on: *"the principle issues raised by Eve Labbett are as follows:1) SuperCalc--I understand data importing is a standard feature of this product. I would refer you to the Product Reference Manuals and the IQ Product Reference Manuals which describe how to accomplish this task. 2) EDI--This is the subject of a separate agreement. There is no reason why this facility may not be implemented. 3) IQ Reporting on Prospects--We are not aware of any difficulty remaining outstanding. Perhaps you would be kind enough to let me have the details of what it is you believe to be the problem and we shall respond in a timely manner. 4) WordPerfect AIX--The solution to the difficulty arising from the sale of the product by Novel Inc to Corel Inc when the product was withdrawn from the market for a period of time was the installation of PC's. WordPerfect for AIX 4.1.4 is now available as a certified character based product. 5) Credit Note Costing--We are awaiting your input before proceeding further. This issue, Part I was resolved on 11th February 1997 and Part II on 13th February 1997. 6) Pro Forma Invoices--The development work and certification is completed with the additional functionality of handling volume discounts via the quotation feature and is available in Version 5.7.1."*
- 89 The letter concluded by expressing a willingness to resolve the matter by constructive discussion but saying that otherwise any proceedings would be robustly defended.
- 90 On 19 June 1997 Anglo gave notice to WB of termination of the hire agreement and claimed the full amount of the loan.
- 91 On 27 November 1997 WB, using FMC as its consultants, entered into an agreement with Strategix for the purchase of a new computer system.
- 92 WB continued to use Charisma until it was replaced when the Strategix system went live on 1 April 1998. The lengthy time scale is surprising. FMC was retained in advance of the purported notice of termination of the Charisma contract in April 1997. One could have expected WB to have been able to purchase a system as a matter of urgency, to go live by 1 January 1998 at the latest, with the assistance of consultants who not only understood WB's requirements but also the options which were available to commission an alternative system to replace a supposedly seriously defective system. There does not appear to have been the commercial need for WB to proceed with much urgency.

THE EXTENT TO WHICH CHARISMA WORKED

- 93 At the end of the hearing the parties were asked to set out the extent to which Charisma worked.

WB's Case

- 94 WB's Case admitted that the hardware worked. The nominal ledger worked. It said that there were defects in all the other software but the purchase ledger could be used for sending purchase orders. The POP module could be used for issuing purchase orders. The sales ledger could be used for recording sales invoices and the SOP module could be used for issuing sales orders. It is not admitted that these items were free from defects.

BML's Case

- 95 BML said that each of the 2,500 or more programs that comprised within the Charisma system was installed and commissioned in working order subject to the following matters:
- 96 **Sales** : EDI was not yet integrated (Item 2 of the list of complaints). A bug had only partially been fixed and therefore was still affecting some credit notes on processed factored stock and a bug was still printing extraneous addresses on some pro forma invoices (Item 39).

- 97 **Purchases** : Direct faxes from the German keyboard had the French circumflex instead of the German umlaut (Item 3). I am not entirely sure that this is correct. The evidence is that originally the German keyboard produced circumflexes instead of umlauts but it was replaced by an English keyboard. This was described by Ms Labbett in evidence as an entirely trivial complaint. Although IQ Shop was installed and available, this was not yet on the menu. This may have been as a result of a misunderstanding but was easily rectified.
- 98 **Credit Control** : RECBAL needed to be re-run periodically possibly because of a bug.
- 99 **Profitability Report** : A bug was still having a limited effect on figures.
- 100 **Marketing Report** : One element "Diary at Prospects" file was still compressed. There is a dispute as to why this was so but BML says that it could easily have been rectified.
- 101 **THE 55 COMPLAINTS** : Of the original 55 listed complaints there is no agreement between the parties as to how many were raised specifically before FMC had intervened in December 1996 and WB produced its schedule delivered to BML on 10 January 1997. The parties agreed that complaints numbered 3, 8-11, 18, 20-23, 32, 34, 35-37, 39, 46-48, 49 and 51 were raised before December 1996. They also agree that Nos.2, 16, 17, 24-26, 40, 42-45 were first raised after 10 January 1997.
- 102 **The remainder**, Nos 1, 7, 12, 14 and 14a, 19, 28-30, 38, 52-54 and 55 are, so WB say, the subject of specific complaint and BML say are the subject of expressions of general dissatisfaction but not specific complaint before 10 January 1997.
- 103 Before the hearing the following complaints had been withdrawn--Nos 4, 27 and 50. In the course of the hearing five more complaints, Nos. 5, 6, 13, 15 and 41 were also withdrawn. Although all these five items are in the category of less important items the claim is thereby reduced by 44,923.19.

THE EXPERTS

- 104 Before making findings on the claims and addressing the issue of repudiation it is necessary to consider the position of the experts.

DUTIES OF EXPERTS

- 105 The Woolf reforms, building largely on the approach which was developed in this Court and the Commercial Court (with the support and encouragement of the users of these Courts) sees no inherent conflict between dispute resolution by parties in the course of the procedure and dispute resolution by the court at a full hearing at the end of the procedure. Dispute resolution in the course of the procedure may be achieved with assistance outside the court procedure by way of independent mediation; but it may also be achieved by techniques of case management pioneered in this court, e.g. by "*without prejudice*" meetings of experts, joint statements of experts setting out the matters on which they agree or disagree, early neutral evaluation or by the appointment of a single jointly appointed expert who may effectively resolve the technical issue or issues which are preventing the parties from settling their disputes; or by a combination of constructive case management and mediation. Many of these innovations underline the importance of experts retained by the parties acting at all stages as independent experts in order to assist the parties in reaching a resolution of their disputes or in narrowing the issues in dispute thus saving time and costs at trial.
- 106 The starting point in considering the duties of experts is the well known observation of Tomlin J. in *Graigola Merthyr Co Ltd v Swansea Corporation* [1928] 1 Ch 31 at 38 that: "*long cases produce evils ... In every case of this kind there are generally many "irreducible and stubborn facts" upon which agreement between experts should be possible and in my judgment the expert advisers of the parties, whether legal or scientific, are under a special duty to the court in the preparation of such a case to limit in every possible way the contentious matters of fact to be dealt with at the hearing. That is a duty which exists notwithstanding that it may not always be easy to discharge.*"
- 107 He went on to say that in these classes of case those concerned with the preparation of cases should more closely address their minds to restricting the areas of dispute.
- 108 In the case of the **The Ikarian Reefer** [1993] 2 Lloyd's Rep 68, at 81-82 Cresswell J analysed the role of the expert witness. The analysis, needs to be extended in accordance with the Woolf reforms of civil procedure.
- 109 1 An expert witness should at all stages in the procedure, on the basis of the evidence as he understands it, provide independent assistance to the court and the parties by way of objective unbiased opinion in

relation to matters within his expertise. This applies as much to the initial meetings of experts as to evidence at trial. An expert witness should never assume the role of an advocate.

2. The expert's evidence should normally be confined to technical matters on which the court will be assisted by receiving an explanation, or to evidence of common professional practice. The expert witness should not give evidence or opinions as to what the expert himself would have done in similar circumstances or otherwise seek to usurp the role of the judge
 3. He should co-operate with the expert of the other party or parties in attempting to narrow the technical issues in dispute at the earliest possible stage of the procedure and to eliminate or place in context any peripheral issues. He should co-operate with the other expert(s) in attending without prejudice meetings as necessary and in seeking to find areas of agreement and to define precisely arrears of disagreement to be set out in the joint statement of experts ordered by the court.
 4. The expert evidence presented to the court should be, and be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.
 5. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
 6. An expert witness should make it clear when a particular question or issue falls outside his expertise.
 7. Where an expert is of the opinion that his conclusions are based on inadequate factual information he should say so explicitly.
 8. An expert should be ready to reconsider his opinion, and if appropriate, to change his mind when he has received new information or has considered the opinion of the other expert. He should do so at the earliest opportunity.
- 110 It is clear from the Judgment of Lord Woolf MR in **Stevens v Gullis** (Court of Appeal Transcript of 27 July 1999) that the new Civil Procedure Rules underline the existing duty which an expert owes to the Court as well as to the party which he represents.
- 111 The formulation set out above is also consistent with the judgment of Laddie J in **Cala Homes (South) Ltd v. Alfred McAlpine Homes East Ltd** [1995] FSR 818 at 841 where Laddie J criticised a not dissimilar approach by an expert to that of FMC in this case. It is also consistent with the judgment of Pumfrey J in **Cantor Fitzgerald v Tradition UK Ltd** Judgment Transcript of 15 April 1999 paragraph 70 where he emphasised the particular importance of experts being scrupulously independent in highly technical cases like computer cases.
- 112 It needs to be recognised that a failure to take such an independent approach is not in the interest of the clients who retain the expert, since an expert taking a partisan approach, resulting in a failure to resolve before trial or at trial issues on which experts should agree, inflates the costs of resolving the dispute and may prevent the parties from resolving their disputes long before trial.
- 113 The fact that most experts, as a matter of course, adhere to the standards which I have set out, contributes substantially to the fact that over 90% of the actions in this court settle (excluding those referred to mediation), in many cases at a very early stage in the procedure.

THE EXPERTS IN THIS CASE

- 114 In this case Mr Lerner, BML's technical expert, and Mr Taylor, BML's quantum expert adhered fully to these standards. WB's technical and quantum experts Dr Salmon and Mr Martin both from FMC took a different confrontational approach. This is surprising because in **Gretton v British Millerain Co Ltd**, which His Honour Judge Thornton QC heard in 1998 and gave judgment on 2 November 1998, he made serious criticisms of FMC and in particular, of the way in which FMC had carried out its examination of the computer system and reported on it. (see paragraphs 66, 72, 73, 82, 89 and 118 of the Judgment). FMC was so concerned about the adverse criticism that it wrote to the learned Judge as a result of which a new paragraph 66A was added to the judgment to make it clear that the expert in that case was employed by FMC on a part-time basis as a self-employed consultant between January 1994 and March 1995 and as a normal full time employee from then until 26 July 1996. Thereafter FMC's services were terminated some seven months before the trial started and from that date the expert was employed directly by MB, (his clients). It was his conduct

in this period of direct employment by his client to which Judge Thornton's criticisms related. It is surprising in view of the importance that FMC attached to the criticism that they did not take note of the comments which His Honour Judge Thornton made in the course of that case and alter its procedures accordingly.

- 115 Dr Salmon's approach in this case is consistent with that set out in his paper on the role of the expert written in the autumn 1995 issue of the *Expert*, the journal of the Academy of Experts of which Dr Salmon is a member. This article appeared after the clear guidance given in 1993 by Cresswell J in the *Ikarian Reefer*. Dr Salmon said in this article that the decision of the House of Lords in **Whitehouse v. Jordan** [1981] 1 All ER 267 was often misconstrued. It should be noted that at page 276 Lord Wilberforce concluded his speech by saying that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation. To the extent that it was not, it was likely to be not only incorrect but self-defeating. This statement is entirely clear.
- 116 Dr Salmon nevertheless said in his Paper in 1995 that, "*an expert witness appointed under current procedure is under no duty to the court as an expert.*" The decision in **Whitehouse v Jordan** "*does not mean that an expert must not omit or understate legitimate points that he believes goes against his client*". "*My duty as an expert was simply to help my client win his case on the facts as defined in the statement of claim on truthful expert evidence that I had compiled, examined and presented - nothing more*". He went on "*It does not mean that an expert must be impartial as demonstrated by the fact that if asked the same question by either party he would give the same answer.*"
- 117 As an Appendix to his expert evidence in this case, Dr Salmon included a paper entitled "*Gambling with the future of UK Manufacturing Industry*". This paper was written in April 1999. It describes FMC as having two divisions--'Resolve' called in to provide specialist backup in IT cases and 'Consult' which specialises in rectifying problem systems. Dr Salmon readily agreed that Resolve was all about claiming and pursuing and winning. Most clients like WB are contacted by mail shot. The publicity said that over 600 claims had been handled since FMC was founded by Dr Salmon in 1980. Dr Salmon claimed that FMC had never lost a case. In cross- examination Dr Salmon admitted that he had only given evidence in court on two occasions.
- 118 In oral evidence Dr Salmon sought to make a distinction between his role as an expert witness and his role as a negotiator or claims consultant. "When I am an expert witness I am interested in an impartial disclosure of facts to the court. When I am a negotiator on behalf of an insurance company or a supplier maybe I have been appointed by an insurance company I am interested in settling through hard nose negotiation claims against the supplier. When I am representing the client I say "*get it settled, get the parties round the table. It will cost you a fortune if you go ahead. So we get the suppliers down and negotiate.*"
- 119 It is normally inappropriate for the same expert to undertake both roles. In this case it is clear that Dr Salmon was unable to distinguish between them. Apart from his written evidence Dr Salmon produced a video demonstration. It started by demonstrating the longest possible method of accessing the programs. Dr Salmon conceded in oral evidence that if I had not seen the clips produced by BML I could easily have been misled by his video.
- 120 BML supplied Dr Salmon with clips in August 1999 which were designed to show that Charisma works in a number of respects in which Dr Salmon said that Charisma did not work. In evidence Dr Salmon was asked about his challenge to the validity of the clips which he claimed did not demonstrate what they purported to demonstrate.
- 121 "Q - *If the clips show that it works in a number of respects in which you say it does not work the clips have a devastating effect on your work, don't they?* A--*Undoubtedly yes.* Q - *They negate a large part of your report?* A--*Without question.* Q - *And they have a devastating effect on your credibility as an expert in this case?* A--*I could not agree more.*" It was only on the last afternoon of the last day of evidence that BML was finally notified that WB would not be attempting to prove Dr Salmon's contentions. Dr Salmon declined to examine the clips to substantiate his claim although he had ample opportunity to do so.
- 122 I find that Dr Salmon failed to conduct himself in the manner to be expected of an expert witness.
- 123 This view of lack of independence in WB's experts from FMC is reinforced by the expert quantum reports prepared by Mr Martin, an employee of FMC. In evidence Mr Martin, with some embarrassment, described his initial report of 9 January 1998, written to support the defence and counterclaim and prepared under order of the court for presentation as an independent quantum expert's report, "*as a negotiating tool based on the*

representations primarily of Winther Browne. It was not made as an expert witness report and has never been intended as such." Mr Martin said that at the time when he had written the first report, he had recently joined FMC as a claims consultant. He was not trained as an expert witness. Subsequently he said he wrote the second report as an independent expert. It relied on the unrealistic and inflated assumptions of the first report. When asked whether it would have been better for someone else to take on the role of expert in view of his first partial report Mr Martin said that this would not have been possible because he was the only quantum expert witness in FMC.

- 124 I find that neither Dr Salmon nor Mr Martin conducted themselves as independent expert witnesses or in a manner acceptable to the court. I am unable to rely on their evidence in support of WB as independent expert evidence.

THE CONTRACT: PARTIES DUTY OF CO-OPERATION

- 125 It is important to understand the nature of the contracts between WB and BML. It is well understood that the design and installation of a computer system requires the active co-operation of both parties. Frequently a client employs a consultant to assist it in the process (as WB subsequently employed FMC to assist it in commissioning and installing the replacement system for Charisma). WB did not do that in relation to Charisma. Instead it invited proposals from selected hardware and software suppliers and developed its requirements in discussions with potential suppliers. It is clear that WB was always interested only in a package system and was not prepared to spend money on bespoke software which could adapt the computer system to WB's particular working practices. It was almost inevitable in these circumstances that while Charisma (or any other standard system) could be expected to provide an 80% fit or better with WB's existing procedures, it was unlikely to provide a 100% fit. This meant that it was inevitable that there would be some procedures of WB which WB would have to adapt to Charisma.
- 126 Mr Guy for WB accepted in his closing submissions that it was likely that all WB's requirements would not have been spelt out in advance. There would be aspects of the system which did not immediately fulfil the customer's needs and there would have to be a period of discussion between customer and supplier to see how the problems could be resolved. When clients of computer companies with limited computer knowledge like Winther Browne are investigating a new computer system, it may be difficult for them to discuss the system in technical terms. There may also be problems of communication when discussing in advance the client's requirements particularly when the client has not retained computer consultants. Mr Smith, who undertook the task for WB, was self taught and perhaps unduly modest about his capabilities. He was an impressive witness with a good level of knowledge of computers but he did not have, and never claimed to have, the knowledge and breadth of expertise of a computer consultant. This made the need for active cooperation between WB and BML throughout the project of crucial importance. The parties would have been prudent to reduce to writing precisely what special needs had been communicated to BML, precisely how it was agreed that they should be met and what follow up procedures were to be undertaken eg. systematic noting of problems, review meetings etc.
- 127 The duty of co-operation in my view extends to the customer accepting where possible reasonable solutions to problems that have arisen. In the case of unimportant or relatively unimportant items that have been promised and cannot be supplied each party must act reasonably, consistent, of course, with its rights.
- 128 In relation to a contract for the supply of a standard computer system it is an implied term that: a) the purchaser communicates clearly any special needs to the supplier, b) the purchaser takes reasonable steps to ensure that the supplier understands those needs, c) the supplier communicates to the purchaser whether or not those precise needs can be met and if so how they can be met. If they cannot be met precisely the appropriate options should be set out by the supplier. d) the supplier takes reasonable steps to ensure that the purchaser is trained in how to use the system, e) the purchaser devotes reasonable time and patience to understanding how to operate the system, f) the purchaser and supplier work together to resolve the problems which will almost certainly occur. This requires active co-operation from both parties. If such co-operation is not present it is likely that the purchaser will not achieve the desired results from the system.
- 129 These terms are somewhat similar to BML's written terms of business relating to purchaser's responsibilities which require a purchaser to accept responsibility for the selection of the computer system to achieve its intended results. It is sufficient for the purposes of this judgment to hold that the terms set out above are

incorporated into this contract. It is not necessary to consider whether BML's own terms are unfair in so far as they go further.

THE CONTRACT REPRESENTATIONS

- 130 I am satisfied that WB's list of vague system requirements on 28 July 1995 was not a contractual document. I am also satisfied that the information from Mr Fairchild of 1 August 1995 contained the representation that Charisma had been written to satisfy the needs of wholesalers and distributors and that this representation was true. I am also satisfied that BML offered a package which also included comprehensive consultancy project management and training from professionals. I also accept as correct Mr Fairchild's representation to Mr Smith in his letter dated 20 November 1995 accompanying his formal proposal, that there was no reason to believe that WB's requirements could not be ably satisfied by standard "Charisma" and IQ.
- 131 The same letter contained the warning that use of standard Charisma would require a change in current methods of pricing and discounting.
- 132 The revised proposal of 8 December 1995 represented that BML would provide WB with a sophisticated multi-terminal system to meet WB's current and future requirements. I have no reason to doubt the truthfulness of this representation.
- 133 With regard to individual items of complaint, WB says that the following were the subject of express agreement. No link from EDI to Charisma (Item 2) The German keyboard (Item 3) The provision of data transfer to/from Supercalc spread sheets (Item 7) The Prospect Diary for producing reports (Item 19) The provision of a reasonable work around to deal with multi branch customers (Items 28 -30) Direct faxing of Pro Forma Invoices (Items 35 -37) Some batch updating of the stock records (Item 45) Word processing (Item 51)
- 134 In relation to each of the other items of complaint, WB says that these were required by implied terms necessary to give business efficacy to the contract. BML says that there was simply an implied term that the software supplied would be of reasonable quality. It will be necessary first to consider whether the defects established by WB overall were such that WB was entitled to treat the contract as repudiated. I must then consider in relation to each item of alleged defect whether BML was or was not in breach of contract. I must then consider damages.

OVERALL PERFORMANCE

- 135 Before turning to the individual items of the complaint, I consider BML's, overall performance set against the general complaints set out in paragraph 13 of the Defence and Counterclaim. Mr Larner has done a detailed analysis which is set as Appendix 2 to his first Report. I accept his general analysis subject to consideration of the specific items of complaint by WB. I find as follows:
- a) the computer system would in general allow WB to operate a computerised telesales, order processing, stock control and accountancing system which would provide comprehensive management information. Subject to consideration of WB's specific requirements, it was easy to use.
 - b) since Item 4 in the list of complaints has been withdrawn, there can be no realistic dispute that the Charisma software was a fully intergrated specialised package which would provide the functions in a) above.
 - c) the software was ideally suited to distribution companies.
 - d) The software did enable Winther Browne to process orders quickly and efficiently.
 - e) The Charisma software could provide comprehensive reports and management information. While this was accurate as a general statement of Charisma's capability, it did not mean that whatever management information WB required could be provided.
 - f) The Charisma software did consist of the following modules: (i) telephone enquiries/orders (ii) quotations and lost order analysis (iii) sales order processing and invoicing (iv) stock control including kitting (v) purchase order processing (vi) sales ledger (vii) purchase ledger including multi-currency (viii) Nominal ledger including fixed assets (ix) Intrastat module (x) PC emulation software (xi) IQ query/report writer

THE MAJOR DEFECTS

- 136 In opening the case, WB divided the alleged defects into two categories-- major and those were which were not in themselves major, but were serious, individually and collectively. The major items were as follows: Item 2 EDI; Item 7 Spread sheets; Items 8--12, 14 and 14A GRN matching; Item 18 POP OUT; Item 19 Prospects; Items 20--23, 32, 46--48 Unit of Measure; Items 28--30 Multi Branch; Items 35--37 Pro Formas and Item 51 Word processing. I shall deal with each in turn. EDI (ELECTRONIC DOCUMENT INTERCHANGE) Item 2
- 137 I have already found that there was no offer by BML to supply EDI at a cost of approximately 4,000. The further complaint is that while WB was already using EDI for communication with certain large stores (Sheds), BML promised to provide EDI software to be integrated with Charisma but did not do so. EDI was the subject of a separate agreement signed on 12 February 1996 but on 19 March 1996 BML was told that "it is likely this (EDI) will not be required until several months after going live." In evidence Mr Smith confirmed that this was the case.
- 138 On 11 June 1996 Mr Smith told Mr Bishop that WB intended to integrate EDI subject to sorting out the final details. On 18 June 1996 Mr Bishop warned Mr Smith that BML was organising its work to the end of 1996 and needed to know what was required in order to include it in the work schedule. Mr Smith agreed in evidence that this was the date on which WB hoped to have EDI. It is clear from the fax of 26 June 1996 from Keywill, suppliers of EDI, that WB had not in fact made a final decision on whether to have an integrated or a non-integrated system.
- 139 On 1 July 1996 Mr Fairchild wrote to Mr Smith that until such time as BML could confirm the layout (templates) for each trading partner it was unable to give the final costs. He said that the quotation was based on certain specific assumptions set out in the letter..
- 140 On 8 July 1996 a revised order was agreed by WB and BML based on these assumptions at a price of 13,825 to include three days consultancy at 475 per hour and five days Charisma training at 350 per hour.
- 141 Thereafter as far as BML was concerned, EDI was not a pressing need for WB until 7 March 1997 when WB faxed through B & Q requirements set out in a notice to WB dated 27 February 1997 that in future B & Q required WB to trade with them via the EDI system. Mr Smith says in his third witness statement that he had not sent through the templates. He complains that he was not pressed by BML to do so. The position was that until BQ's requirement was notified to WB, there was no pressing need for the matter to be advanced because WB had no immediate need for EDI. In his final submission, Mr Guy accepted that WB hesitated until the B & Q notice in 1997 on whether or not to have integrated EDI. This answers WB's complaint of delay against BML. It was only by fax on 7 March 1997 that Mr Smith made it clear that WB wanted integrated EDI. The fax acknowledged that the most urgent priority was outgoing invoices starting with those to be sent to B & Q.
- 142 Mr Bishop's response dated 24 March 1997, set out a schedule of delivery for Charisma 5.7.1 by the end of April 1997 and for the setting up of documents to allow their export using EDI in the week commencing 19 May 1997. The Schedule made it clear what data needed to be set up by WB before EDI invoice documents from Charisma could be exported into the Keywill software. The letter did not give a date for the scheduling of incoming orders. Before incoming orders could be received using EDI, the system had to be integrated. BML notified Mr Smith on 25 April 1997 that it could run the invoice routine immediately Mr Smith had sent the information for the templates. He was reminded of this again on 8 May 1997 after all co-operation between the parties had ceased.
- 143 The issue between the parties is the timeliness of the delivery of EDI and the ability of WB to export documents from Charisma into the EDI Software. There is no claim by WB in relation to an alleged failure of BML to provide EDI for incoming orders. I am satisfied that BML was under an obligation to provide EDI within a reasonable time after it had received the information which it needed before EDI could be supplied. That information was not provided in July 1996 when the purchase order was given. I am satisfied that between July 1996 and March 1997 Mr Bishop (or Mr Fairchild) was waiting for templates from Mr Smith. If either side had thought that implementation was a pressing matter it would have been raised in discussion and the necessary information would have been given.
- 144 I am also satisfied that although the response in March 1997 was slower than WB would have wished, it showed an intention by BML to implement EDI with reasonable speed once WB had decided whether it

wanted integrated or non-integrated EDI and the necessary information had been given to BML by WB. WB must have known from the warning given by BML on 18 June 1996 that it might take time for BML to organise the necessary work. When pressed further about the urgency of the matter about the matter, I am satisfied that BML made a genuine offer to speed up the implementation of EDI. I find that this complaint has not been established. SPREAD SHEET (Item 7)#

- 145 Ms Labbett's spread sheets were designed to allow her to see the sales that had been made and to assess purchase requirements to replace stock. There is no dispute that BML agreed specifically to provide a facility whereby Ms Labbett could transfer data to and from Charisma and her spread sheets. The measure of damage claimed in respect of the failure to be able to download the information into Supercalc is claimed to be the cost of lost orders because Ms Labbett had to stay in the office keeping her spread sheets up to date when she would have otherwise been travelling around the world acting as a buyer for WB. BML did not supply Supercalc or its software component SDI. This was supplied separately to WB some time before the contract between WB and BML had been entered into.
- 146 It is accepted that Mr Ross, a programmer for BML, told WB at the first training session on 6 August 1996 that the transfer could not be achieved using Supercalc but that it could be achieved using Excel. The matter was raised again at the consultancy meeting with Ms Fisher as a result of which she produced her report on 6 September 1996. The report said:
- 147 *"IQ Shop works with certain spread sheets and it must be determined if Supercalc is compatible or whether a different package will need to be used."*
- 148 In her oral evidence Ms Fisher said that she passed the problem to Mr Bishop. Ms Labbett said in oral evidence that after the meeting on 6 September 1996, she was uncertain whether or not Supercalc was compatible with Charisma. I accept this evidence which conflicts with her assertion at other times in her evidence that she did not raise this issue more persistently because she was convinced that nothing could be done about it. I find that she, who had comparatively little computer expertise left the resolution of the question to Mr Smith. Mr Smith succeeded in transferring data using the Excel spreadsheet but could not use the results because of a basic error on his part. He could and should have asked BML for specific help to complete the process or to see whether Supercalc was in fact compatible with Charisma. Even if he had been successful with Excel I am not sure that Ms Labbett would have used Excel. She was wedded to the Supercalc that she knew.
- 149 In his oral evidence Mr Bishop said, and I accept, that he did not take any immediate action but spoke to Mr Smith in early October 1996. "He (Mr Smith) advised me that he was quite keen to make use of Excel and I knew at the time that Excel was a spreadsheet that was compatible with how IQ Shop would work so I did not progress the matter further at that stage." This, Mr Bishop said, resolved the compatibility issue in his mind unless it was raised again.
- 150 The matter was raised again by WB on 17 January 1997. It is surprising, if the results of the inability to transfer data from Charisma to the spread sheets caused such damage to WB's business, that the point was not taken up with BML between September (or October) 1996 and January 1997.
- 151 When asked in evidence if the problem had priority as far as she was concerned Ms Labbett replied: "My answer would be yes. It was a priority. But when I have to work longer hours it does not cost Winther Browne any money. I worked very hard and very long and often week-ends when things were not working with BML. If I had a log of my entries I could truthfully say that I work Saturday and Sunday to make up for the time."
- 152 This answer contradicts WB's case that it was losing substantial orders but suggests rather that Ms Labbett was carrying out the work in her own time for which she would not be paid by WB.
- 153 Mr Larner demonstrated on clips shown to me that, using an older version of Supercalc with SDI than WBs, it was easy to transfer the information. (See for example clip SS 5507) Dr Salmon admitted in evidence that the process of downloading was not cumbersome and long winded as he had previously said. Dr Salmon also accepted that Mr Smith could use SDI because he was and is a technical person. Ms Labbett is not a technical person and it is not surprising that she was unsuccessful in her attempts to do so. It is surprising that she did not ask Mr Smith to resolve the problem as a matter of urgency, if necessary with the assistance of BML.

- 154 The problem with Supercalc is not mentioned in Ms Labbett's list of problems sent to Mr Bishop on 10 January 1997 and drafted originally on or about 18th December 1996. It is referred to in Ms Labbett's letter to Mr Bishop of 17 January 1997 in the following terms "Prospect File--cannot use my Supercalc spread sheets etc."
- 155 In his detailed reply of 4 February 1997 Mr Bishop commented "*if your Supercalc spread sheet is compatible with either flat ASC 11 CSV type file or Lotus 3 file then you can import an IQ Report. IQ Reports can be saved as either of these file types.*" This turned out to be the correct approach. Unfortunately, even then Mr Smith did not follow this up or ask BML for specific help.
- 156 In her reply of 10 February 1997 Ms Labbett answered Mr Bishop's comment in the 4 February 1997 letter by saying in effect "how should I know this?" She also said that the absence of this facility was a great disappointment.
- 157 There the matter rested until Mr Larner made a successful attempt to download the information onto Ms Labbett's spread sheets. I am satisfied that this could have been achieved by WB in the autumn of 1996.
- 158 It is clear that neither Ms Labbett nor Mr Smith gave this any priority remotely commensurate with the claim that is now being made. The explanation that "*this is hardly surprising in view of the other matters which are outstanding*" is wholly unconvincing.
- 159 There was no agreement by BML that it would be responsible for training for SDI and no focused complaint or request for help was made by WB to BML.
- 160 I do not find this allegation proved. Any potential loss could have been prevented either by Mr Smith consulting BML to find out how Excel could have worked or, more likely by Ms Labbett and Mr Smith following up with Mr Bishop in October 1996 and obtaining from him an explanation of how Supercalc could be made to work with Charisma. GRN MATCHING (Items 8, 10-12 and 14A)
- 161 Items 8, 10, 14 and 14A relate to complaints by WB that in the case of over-delivery of stocks purchased by BML, it was difficult, if not impossible, to carry out a reconciliation between GRN (goods received notes) and purchase invoices. The only way it could be done, so it was said by WB, was by a long-winded manual process which required the user to perform long-winded mathematical calculations. WB claims that it was a term to be implied from pre-contractual documents and was necessary for business efficacy that it should be able to carry out the process easily using Charisma.
- 162 The tasks were the reconciliation of ancillary costs to stock items (Item 8); no amendments of lines so that if a mistake was made the operator must start again (Item 10); manual reconciliation was necessary if more than one invoice was received for one purchase order (Item 11); if a facility Intrastat was used for a declaration to Customs & Excise carriage and goods were not shown separately. Intrastat was one of the Charisma programs for making Intrastat returns to the Customs and Excise. The separate recording of carriage costs was not a VAT requirement (Item 12); Ancillary costs had to be calculated manually for each invoice line (Item 14 and 14A)
- 163 The problems arose because in deliveries, particularly from abroad, WB often received more than the number of items ordered. It was explained to me that this was only sensible since even if some items were damaged in transit, the order would still be filled as contracted. WB insisted on allocating unit and ancillary costs to such over-deliveries. The standard Charisma system did not accommodate such accounting methods easily.
- 164 Mr Taylor, BML's expert, gave evidence that it was a normal accounting practice to treat each order as a batch and to disregard any over-deliveries or to treat over-deliveries as zero cost items. I am satisfied that this was a normal practice adopted by most companies. It was explained to me, and I accept, that WB's process of spreading costs among all goods delivered including over-deliveries is contrary to Intrastat procedures.
- 165 In evidence Ms Fisher said, and I accept, that she was asked at the pre-contract stage if Charisma could handle over-deliveries and she said that it could. Unfortunately WB did not explain to BML its system for dealing with over-deliveries. The matter was raised at the review meeting on 6 September 1996. The report noted that project sheets had been raised, referring to PLP 10, one of the programs within Charisma for matching Goods Received Notes to Purchase Orders. "*PLP 10--when matching GRN's over deliveries are not always charged for*

and cannot easily be reconciled (Project sheet 12058)." "PLP 10—if a mistake is made you should be able to amend the entry rather than having to reject it all" (Project sheet 12059).

- 166 In relation to Project Sheet 12058, the sheet is endorsed "*modified as required*" with a date of 20 February 1997. In oral evidence Mr Bishop said that he did not know of the problem until January 1997. It is again surprising that, if the problem raised by WB had not been resolved satisfactorily at a much earlier stage, WB did not ask for a further meeting or meetings to see whether or not their problems could be resolved by upgrades or refinements or further training or by WB adapting its working procedures to conform to its new computer system.
- 167 I hold that the representation that Charisma could cope with overdue deliveries was accurate as far as it went. The system would have worked well if WB had adopted normal business practice and entered over-delivered stock at zero value. WB was buying a standard Charisma and not a bespoke system. It was unreasonable of WB to refuse to adapt its system to Charisma which reflected a business practice which was widely adopted. In contractual terms I do not accept WB's contentions that there was an implied term that standard Charisma would be able easily to carry out the reconciliation between GRN and purchase invoices using WB's system. I reject these complaints.

POP OUT (Items 18 and 34)

- 168 The facility allows a user to enter a second program without exiting the program that the user is in. The complaint is that the risk of locking-in when an operator popped out to access the same updatable record could and should have been avoided by appropriate programming. Lock-in is also referred to as a "deadly embrace." Once the deadly embrace has occurred, it was necessary for the operator to call for the assistance of Mr Smith who would then require the assistance of the BML support desk to reset the terminal.
- 169 The complaint (which was first made on 4 July 1996 in the form of a screen fault which was fixed in under 10 minutes) was that there was an elementary program error which could have easily be solved. Dr Salmon's opinion was that this was the case although he did not explain to Mr Larner or to the court how it could have been done. In the absence of any explanation I am unable to accept his opinion.
- 170 The solution which was found was that users were trained not to use the program in this way. It was not necessary to do so. There was an alternative way of retrieving the information through the Charisma system. If a user did make a mistake, only that screen was frozen. The evidence is that the training was successful and only very occasionally did the locking-in occur. On the few occasions when it did happen BML provided an immediate solution. I regard BML's solution as a reasonable discharge of its obligations to WB. In this respect I accept the evidence of Mr Larner. In any event even if training had not been a wholly acceptable solution this was a relatively minor matter since it affected only the individual screen and did not cause the whole system to crash. PROSPECTS (Item 19)
- 171 The complaint is that the Prospects Diary file was inaccessible for producing reports because it had been compressed and no key was provided for access to it. WB wanted to know whether persons who had responded to a particular advertisement by making an enquiry, went on to make a purchase. This was made clear by Mr Justin Browne, WB's Marketing Manager, when he gave evidence. It was not made clear earlier. WB claimed 347,569 damages in respect of this alleged fault.
- 172 It is agreed that BML had promised expressly that data entered could be retrieved in the form of a report. WB's case is that they could not access the file when it was reasonably required for use because it had been compressed. It is said that the absence of an effective Prospects file seriously compromised the effectiveness of WB's marketing. Unfortunately without telling BML, WB ceased to record manually information which it was entering on the computer.
- 173 In his expert evidence, Mr Larner says, and I accept, that by far the greatest number of reports that would assist in targeting clients came from the company @. information on the Customer files. On these files WB held details of the type of business the customer was in, whether the customer had expressed specific or general interest in WB's products and the source of the contact. This information was readily available to WB and formed the most important part of the information on which its marketing was based. I am satisfied therefore that the information that was crucial to marketing was readily available. If the information in the Prospects Diary file had been crucial, Mr Browne would have devised a system for providing at least part of

the records manually and would not have waited until the installation of the Strategix system in April 1998 to repair the alleged defect. Such an approach would have been wholly unreasonable if it was likely to cause significant losses to WB.

- 174 It is suggested that if WB had the information of Prospect it would have been possible for it to use IQ to produce a list of the number of clients to be added to the file. This system depended on WB logging in enquiries on potential customers.
- 175 The problem was that access was not obtained for the compressed files. This problem could have been overcome without any difficulty. As Mr Larner explained in his second report, it involved telephoning the supplier of IQ, registering the name of the customer where the key is to be used, and receiving the information over the telephone.
- 176 In my view BML should have done this soon after the original complaint in October 1996. Having said that, the problem was not raised again until 10 January 1997. The key was obtained on 14 March 1997. I accept BML's evidence that the modem link had been switched off by WB before the key could be supplied. It should be emphasised that WB was deprived of only very limited information. In addition to information available through Company @ records, Ms Labbett knew her business well. Had there been a risk of serious loss to WB from not being able to use the file I am sure that Ms Labbett would have made more specific and vociferous complaints to BML and would have arranged for manual records to be kept. I am not satisfied that in the event WB suffered any significant loss, I accept Mr Taylor's evidence in preference to that of Mr Martin. UNIT OF MEASURE (Items 20–23, 32, 46 to 48)
- 177 Mr Larner accepts that this was a part of the system which had not been fully used by other customers and a number of bugs appeared. There is a complaint (item 20) that BML represented that the software would produce reports identifying the customers who, having placed an enquiry did not pursue the enquiry to the purchase stage. I find that no such representation was made. Other complaints are that WB could not trust reports on profitability and stock reports because of manifest errors. The fact that they were manifest and obvious means that no one would sensibly rely on the mistaken figures. The initial complaint was that the system coped badly when sales representatives were not set up on the system and the result was that spurious stock figures were produced. This problem was fixed by 8 August 1996 based on project sheet 11568 (as WB concedes).
- 178 There was also a bug which caused credit notes to be generated on occasion with obviously corrupted figures. An example occurred on 1 November 1996 and was reported immediately to BML. The problem was fixed from 10 February 1997. Until the earlier figures were corrected there was a risk that later figures carried forward corrupted figures from before this date.
- 179 There was a further bug which gave rise to obviously incorrect stock figures when stock was purchased in meters instead of feet. This was fixed on 11 February 1997. WB had to take stock out manually and re-enter it (a work-around) from October 1996 to February 1997.
- 180 Unfortunately the figures on profitability would have been unreliable in any event because of other errors by WB including the over valuation of stock lines by 17.5% (the amount of VAT). In the course of his evidence Dr Salmon eventually conceded that this was the case.
- 181 I accept Mr Larner's evidence that the bugs were limited to a small number of records. In most cases they produced results which were obviously incorrect so that no one would rely on them inadvertently. The bugs tended to cause a consistent mathematical error so that it was possible to work out the correct figures. I find that BML was slow in sorting out some of the bugs. I do not find that WB have proved any losses attributable to the bugs.

HEAD OFFICE/BRANCH OFFICE (Items 28–30)

- 182 It is alleged that BML knew from the beginning that WB supplied Sheds. Goods were dispatched to branches but invoiced to head office. It is said that there was no suggestion in the pre-contract discussions that there would be a problem with credit control and, in effect, that BML promised to provide the facility.
- 183 I do not accept that BML made any representation that the system would be able to produce delivery notes for multiple addresses while producing invoices for all billing addresses (Item 28) or that the system would

- be able to produce information about the distribution of goods to each of the multiple addresses. (Item 29). I accept BML's case that it gave an explicit promise to provide a work-around to deal with Sheds.
- 184 Charisma permitted goods to be despatched to branches but the user was faced with a number of options. If the account address was the head office there was no analysis of turnover per branch (Option 1). If the branch was treated as the account there was a problem with checking credit because credit was arranged with head office (Option 2). Finally there was no individual credit control on orders placed by branches since actual invoices were transferred to the head office account.
- 185 The problem was resolved in the following manner. Where the customer was a Shed Option 1 was used. For smaller firms, each branch was set up as an account with a dead status. The orders were then cancelled and re-keyed into the head office account.
- 186 In the final written submission WB admits that it ought to have mitigated its loss by purchasing the "rollup" software offered as a modification on 12 August 1996 at a cost of 1,620. Until the final submissions, WB took the position that WB was justified in refusing the modification (offered six weeks after the system went live) until all other problems with the BML system had been resolved. Such a refusal was wholly unjustified and the concession, albeit at a very late stage, was entirely appropriate.
- 187 I accept Mr Lerner's expert evidence that this was a problem that WB needed to think through carefully before purchasing the system. WB was offered a number of work arounds. In his report Mr Lerner concludes "*I find it hard to believe that the loss of delivery instructions was adequate cause for opting to do without management controls. But in fact there was no need to choose. They could have had both.*" There was a simple solution offered at a small cost which they should have accepted and paid for. I am satisfied that BML was not in breach of contract and was not therefore required to provide the modification free of charge. PRO FORMAS (Items 35--37 and 42)
- 188 The complaint is that BML did not supply pro forma invoices as expressly agreed. BML's case is that WB did not make its requirements clear and BML entered into no express agreement to supply a facility for WB to fax proformas precisely in accordance with its existing procedures. The background is that WB negotiates over the telephone and uses pro forma invoices for buyers with whom they have not previously traded. Pro forma invoices are therefore faxed to potential customers who may or may not purchase goods. The customer telephones WB, is quoted a price and terms, and is sent a pro forma invoice for the goods he may wish to order. If the customer wants to take up WB's offer he returns the pro forma invoice with payment.
- 189 I accept Mr Lerner's evidence that this is unusual. He says that it is different to any other business he has come across. The normal method would be to send an invoice to actual customers only when they intend to buy. It is unusual to send pro forma invoices to potential buyers who have made an enquiry but have not agreed to buy.
- 190 The only consequence is that WB was unable automatically to fax pro forma invoices This carried with it a small administrative cost. Complaint No.36 is that the customer's name and address were not on the quotation. This was corrected on 1 October 1996. Complaint No.37 is that the wrong discount on the quotation was provided. This only applied until September 1996 when Ms Fisher advised on the preferred procedure to be followed. BML was not inflexible and did agree to modify the system from February 1997 to enable WB to calculate volume discounts on quotations. Complaint 42 could have been avoided had WB taken BML's advice and dated the forward orders well in advance. I am satisfied that if she had been asked, Ms Fisher would have given the appropriate advice.
- 191 Mr Lerner accepted that like any company which bought standard software, WB needed to make some accommodation in its procedures. This WB employees found it difficult to do.
- 192 Although WB claim that this was a fundamental requirement, it is not so described in the claimant's final submissions but only an express requirement. I do not regard this as a fundamental requirement. I do not find that it was an express requirement of the contract that BML would supply pro forma invoices in a form which would satisfy precisely WB's existing practices. BML was not in breach of contract. Had I found otherwise the damages would have been very small. WORD PROCESSING (Item 51)

193 It is admitted by BML that it agreed in July/August 1996 to provide multi-user word processing on dumb terminals, ie which worked when connected to a central server, but was unable to do so. I accept that this was not caused by the fault of BML who were unable to obtain a licence for WordPerfect from its new owners. Ms Labbett was informed of the position by Mr Fairchild in a letter dated 6 August 1996. In place of the original offer BML gained approval to license a copy of Unix WordPerfect at 145 per user. This proposal was set out in the letter. A quotation for providing the service was sent to Mr Smith on 16 October 1996. This was followed by a further amended quotation on 8 November 1996. The offer said explicitly that, if accepted, delivery would be at the beginning of December 1996. WB acted unreasonably in refusing to accept the offer which had been made.

THE OTHER DEFECTS

194 In addition WB claims for a number of defects which it says are less important. Some have been withdrawn. WB claims significant damages for the remaining items and says that while the defects individually may not have entitled them to treat the contract as repudiated, taken cumulatively and with the more serious defects, they show a pattern of conduct on the part of BML which entitled WB to repudiate the contract. Item 1

195 The complaint is that time was wasted and sales orders were lost by the need for WB in the first three months after the system went live i.e. from 1 July 1996, to run manual backup and update routines during business hours. On 23 September 1996 the Time Saved routine was activated. This is a facility which enables backup to be performed at a time when nobody is operating the system.

196 When the claim was made originally it was said that the system was closed down for one hour from 4.30 pm each day thus depriving WB of the opportunity of taking orders after that time. This claim was maintained by Ms Labbett when she gave evidence. Before the hearing but after the claim had been formulated, the P-Log was examined by BML. This showed that the disturbance time had been substantially exaggerated. The system was not closed down for one hour each day at 4.30 pm. Apart from end of the month routines, the backup routine took 30 to 35 minutes and was done at different times of the day although often in the period after 4.30 pm. It was possible for orders to continue to be taken in the half hour when the manual update and back up routines were taking place. It was simply that they could not be logged on the computer at that time.

197 In my view it was reasonable for BML to advise that it was necessary for WB to acquire the necessary experience of a manual routine for the first three months of the operation from the 1 July 1996. The time of 30 to 35 minutes was sufficiently short so that it could have been accommodated in a lunch hour or at the end of a working day. I understand that in order to accommodate Mr Smith, who told me that he had been working long hours which was disrupting his home life, WB might have had to make appropriate arrangements eg. by asking him to start later in the morning, but this could have reasonably been done. BML did not warrant that the installation of Charisma could be achieved without any change in WB's working practices. I therefore reject this complaint. In any event WB has not proved that it suffered damage. The claim set out in Mr Martin's report is fanciful. It was substantially reduced before the end of the hearing but it does not alter my conclusion that no damage has been proved Item 3

198 Under the contract, BML provided a German keyboard for the purpose of faxing German text direct to German suppliers. Unfortunately the fax box translated the characters into French rather than German. WB accepted a replacement English terminal. I accept that this was particularly disappointing to the secretary, Elke O'Toole, as she said in her statement. There is a claim under this item for 6,086.25 including 4,897.80 for the cost of internal management routines. Ms Labbett said in evidence that this was a trivial complaint and she was embarrassed that it was still included. This is an example of where BML explained to WB that it hoped to provide a service but was unable to do so. This explanation was accepted by WB. The complaint was blown up out of all proportion for the purposes of these proceedings. I do not accept that WB has proved that it suffered any loss. Item 4

199 This related to the allegation that comments were not displayed consistently. The complaint was withdrawn before the hearing in the face of Mr Lerner's evidence that it involved two design decisions both of which were entirely defensible. Item 5

200 The complaint was that on the Nominal Ledger, cash received was posted by individual transaction rather than by batches banked so that it was not possible to reconcile the batch total without manually adding up

- the total of the individual transactions and a Batch Book had to be kept manually for this purpose. This complaint was conceded as invalid by Dr Salmon on day 8 of the trial and has been withdrawn by WB. Item 6
- 201 This was a claim that there was no opening or c/f (carried forward) balance shown on the nominal ledger. This item was conceded by WB as unfounded in the course of trial. Item 9
- 202 When reconciling GRN (goods received notes) to purchase orders for stock, once the reconciliation of a particular line "had been accepted by the operator, an amendment of that line could be effected only by starting the operation again." The complaint is that the operator should have been able to select particular lines rather than having to cancel the process and start again.
- 203 I accept Mr Larner's evidence that re-matching need not be a complex task because the operator can simply tag all lines entered correctly. The need to alter an already accepted invoice would in normal trading be a rare event and would not cause difficulty. I also accept Mr Larner's opinion that this not a fault and does not involve an error in Charisma. Item 13
- 204 The complaint was that if the operator wished to delete an order for purchase of stock by WB the purchase order must be cancelled line by line. The complaint was conceded as unfounded by Dr Salmon in his evidence and was subsequently withdrawn. Item 15
- 205 The complaint was that an operator could not view an old purchase order for stock ordered by WB without using an IQ report. By the end of the hearing this complaint had also been withdrawn. Item 16
- 206 The complaint is that, contrary to an implied term necessary to give business efficacy to the contract, when a supplier queried why WB had not paid and WB had in fact paid the supplier, the WB operator immediately could trace and quote the date of payment but not the number of the cheque. There is no record of this complaint having been made by WB until after the litigation began. Mr Larner's opinion, which was not seriously challenged by Dr Salmon, was that the cheque could be traced with little effort. This complaint is of no consequence. The complaint was effectively conceded by Dr Salmon in cross examination as being unfounded. Item 17
- 207 The complaint is that once cheques were presented, the searcher needed to know the supplier's account number or otherwise had to search the whole print run in order to find the particular cheque. It was alleged to be an implied term of quality, alternatively to give business efficacy that the supplier's account number would appear on screen as well as the name. WB claims that it was not sufficient to know the supplier's name. This complaint was made for the first time after the litigation had started. In Mr Larner's view this problem could have been remedied by assigning an alpha numeric rather than a solely numeric number to the supplier. Dr Salmon in evidence described this as not a major problem but an inconvenience. The proposed solution was put to him in evidence and he seemed to agree with it. In any event I accept BML's contention that the problem could easily have been remedied. I do not find that the facility was required under the contract or that WB suffered any damage. Item 24—25
- 208 The complaint is that BML should have introduced WB to the automatic cash matching routine at the outset and that transactions were lost by the resultant manual procedure. This complaint also was not made until after the litigation had commenced. Mr Larner saw no fault nor any cause for damage. He said that BML's advice to start with manual cash matching was reasonable. I therefore reject this complaint. Item 26
- 209 WB's complaint is that it was a term of the contract to be implied to give it business efficacy that there should be a facility to sort the sales ledger into an order other than date order. I prefer Mr Larner's evidence and reject this allegation. Item 31
- 210 The complaint is that an operator cannot go back a page at a time through a long list when using the Sales Reconciliation program. The complaint was made in general terms on 1 August 1996. There is no record of a detailed complaint until after the dispute began. BML says that this is a trivial complaint. In the overwhelming number of cases the operator will know the record the operator wants and will be able to locate it. I reject this complaint as trivial. Item 33
- 211 The complaint, that an operator cannot go back a page at a time in the Customer Aged Analysis routine, is similar to Complaint 31 in that it is about a design detail that could have been observed prior to sale. The

- BML case is that the operator will know the record that he or she wants and will be able to locate it. I am not satisfied that there was an implied term that this facility would be provided. In any event I regard it as a trivial complaint. Item 38
- 212 This is a general complaint of slow enquiry and order processing. Mr Larner concluded that this complaint was unjustified if Charisma was being operated competently. He concluded therefore that the problem was self-inflicted. I accept his opinion and therefore reject this complaint. Item 39
- 213 This complaint refers to erratic printing on Pro-Forma Invoices. BML would have been able to provide a fix in June 1997. Examples were faxed to BML from September 1996 onwards. Those documents which contained errors were unfit for use. A project sheet was raised on 19 March 1997. Mr Larner said that the problem was not insoluble. Dr Salmon said that it was an elementary program error which would take less than a morning to cure. I am satisfied that it did cause a minor inconvenience but not that WB suffered a significant financial loss. Item 40
- 214 The complaint is that if WB was chasing a payment from a customer and wanted to send the customer a detailed payment history (as opposed to a current statement of the state of account), the history could not be faxed without being printed out first before being faxed.
- 215 BML argued that faxing a payment history direct was dangerous because it might go to the wrong recipient. Dr Salmon agreed that this could be a serious problem. The complaint was not formulated until after proceeding had started. I do not find that this facility was required to give business efficacy to the contract. Had I found otherwise I should have regarded it as a trivial complaint. Item 41
- 216 This related to the cancellation and deletion routines for sales lines. The complaint was that if WB sold goods to a customer and got as far as printing out a delivery note and then wanted to delete the order it was necessary to do so line by line. It was withdrawn by WB. Item 43
- 217 The claim of inefficient stock enquiry, i.e. that the operator could not move directly from one stock enquiry to another, is not regarded by Mr Larner as justified. I accept his evidence. Item 44
- 218 This complaint, made in general terms on 1 August 1996, was not formulated until after the dispute began. It was that if a particular order changed, the discount was not automatically recalculated. Mr Larner says that to cause the recalculation to be made it was necessary only to amend the order quantity on one or more lines. The system then gives the opportunity to recalculate the volume discount on the order. I was told and accept that this was how the system worked when it was demonstrated to WB. There is no breach of contract. The system worked as intended and as demonstrated. I note that Dr Salmon in cross examination was unable convincingly to support the complaint. The highest he was able to put this was that "*these items, the non material issues in themselves are not particularly irksome, not particularly important.*" I accept Mr Larner's evidence. I do not accept, therefore, that there was any breach of contract. Item 45
- 219 This complaint was not formulated until after the dispute began. The complaint is that there was some batch updating of stock records. Free stock and committed stock were updated in real time. Other updating routines were done by batch updating later although they could have been done in real time. Physical stock that had not been updated had to be checked in the warehouse. I accept Mr Larner's evidence that the system is real time in all necessary aspects. I do not accept that this is a valid complaint. Item 46
- 220 The complaint is that BML represented that the software supplied would enable unit of measure conversion capable of dealing with stock held in both imperial and metric measurements. I do not accept that BML made any representation that it would provide this facility. Item 49
- 221 After creating a new stock item with Status "N" for Nett it was necessary to go back into the stock record in Stock Amend because the "N" flag would disappear. All the operator had to do was to go into the maintenance program to reinstate it. The bug was fixed on 5 November 1996. This was a trivial complaint which caused, at its highest against BML, only a nominal loss to WB. It is symptomatic of the way WB's case has been conducted that there was a claim for 36,614.17 in respect of this item including a claim of 15,375.17 for unnecessary holding of stock and lack of savings on forward order financing. This claim was made for the period up to the 27 March 1998 even though the bug was fixed in November 1996. I do not accept that there was a breach of contract or that WB suffered any loss or damage. Items 52—55

- 222 These items relate to claims that training was not carried out as agreed. Item 52 claims that some of the training time was not used for proper training and was of negligible value. Item 53 claims that much of the training was of poor quality and that matters were not clearly explained to WB staff. Item 54 relates to the claim that some individuals who should have received training did not do so. Item 55 relates to the complaint that the support services were inadequate in that they did not correct many of the defects and those that were corrected were not done quickly enough. These complaints appeared as separate items for the first time after the litigation had started. It is not entirely clear from the comments on the final schedule that Items 53 and 54 are being pursued by WB. I assume that they are.
- 223 In my view these are generalised complaints which have already been considered in relation to the very detailed complaints which I have already addressed. There was in the early stages of implementation a complaint in October 1996 about Ms Baines' performance as trainer. Thereafter the complaints were not made again until after the litigation had started. Ms Baines was an impressive and careful witness who was not prepared to give a definite answer unless she was certain of the answer in her own mind. The complaints may have occurred as a result of a misunderstanding on the part of Ms Labbett who mistook as diffidence a desire not to give answers unless Ms Baines was sure that they were correct. I am satisfied that overall Ms Baines maintained a high standard of professional competence. I am not satisfied that the complaint that she spent time on other matters which should have been spent on training was made out. Indeed on one such occasion when a query was posed she said that she needed to get on with the training. I reject WB's complaints against BML under Items 52–55.

REPUDIATION

Introduction

- 224 WB's case is that it was entitled to repudiate the agreement with Anglo and BML, alternatively to accept BML/Anglo's repudiation by conduct in view of not only of major defects in Charisma but also in view of the number of additional more minor complaints which meant that WB was entitled to treat the contract as at an end.

The Law

- 225 It is trite Law that in some circumstances an innocent party may treat itself as discharged from a contract on account of the other party's breach or breaches of contract.
- 226 The test is set out by Diplock L.J. in **Hong Kong Fur Shipping Co v. Kawasaki Kisen Kaisha Limited** [1962] 2 QB 26 at 66. *"Does the occurrence of the event deprive the party who has further undertakings to perform of substantially the whole benefit which it was intention of the parties as expressed in the contract that he should obtain for performing those undertakings.?"*
- 227 It is clear that the cumulative effect of a failure to honour obligations may be taken into account by the court in arriving at a conclusion as to whether or not substantially the whole benefit of the contract has been lost. This was made clear by Lord Diplock in **Lep Air Services v. Rolloswin Limited** [1972] AC 331 at 349. He said: *"The debtor failed to perform voluntarily many of his obligations under the contract—both the obligation of which performance was guaranteed and other obligations. The cumulative effect of these failures by December 22 1967 was to deprive the creditor of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract. The creditor accordingly became entitled although not bound to treat the contract as rescinded."*
- 228 Upon discharge, the primary obligation of the party in default to perform any of the promises by him and remaining unperformed comes to an end. He is under a duty to pay the other party a sum of money to compensate him for the loss it has sustained as a result of the failure of the party in default to perform the remaining obligations—see **Moschi v. Lep Air Services** [1973] AC 331 at 350. At page 350 Lord Diplock also emphasised that a legal obligation to continue to perform is inconsistent with the withdrawal of a legal right to do so.
- 229 As Lord Cross of Chelsea said in his speech in **Laksmijit v. Faiz Sherani** [1974] AC 605 at 616, *"where a party has a right to rescission he must make an election whether or not to exercise it. The party must make it unequivocally clear that the agreement is at an end. It is only in these circumstances that the consequences of termination follow."*

230 In this case the following questions arise: Was BML's conduct such as to deprive WB of substantially the whole benefit which it was the intention of the parties that WB should obtain from the contract? Did WB make it unequivocally clear that it treated the contract as at an end?

THE FINDINGS

231 I have already found in considering BML's performance that it performed substantially what it contracted to do under the contract. BML's conduct was not such as to deprive WB of substantially the whole benefit which it was intended that WB should obtain from the contract. In addition I note that WB continued to use the system for nearly a year after the purported repudiation. If the system had not met substantially WB's requirements (whether communicated to BML or not) WB would have proceeded to acquire a new system much sooner than it did. I am also satisfied that BML made genuine efforts in early 1997 to meet WB's complaints and that WB was unjustified in withdrawing its full cooperation in trying to find acceptable solutions to its problems.

232 As far as individual items of complaint are concerned, while a failure by a computer company to deliver individual requirements and particularly those which constitute expected enhancements in a replacement computer system can, in principle, amount taken together to a fundamental breach leading to a right of repudiation. This has not happened in this case. Most of WB's complaints have been rejected. Those few complaints which I have not rejected either had been or could, given reasonable cooperation by WB, have been remedied before or 16 or 28 April 1997, the dates on which WB claim that it gave notice of repudiation. Taken as a whole they do not amount to a fundamental breach of contract giving a right of repudiation by WB.

233 In my view WB was justified in feeling frustrated by the slow response by BML in dealing with the problems of implementation of the system in the autumn of 1996 even though WB could have pressed harder to have the problems resolved. Mr Smith said in evidence that he did not like confrontation and he may well have given BML the erroneous impression that WB's needs were not urgent. On the other hand BML could and should have responded with more urgency to deal with the outstanding problems. In these circumstances WB was justified in taking a firm line at the beginning of January 1997 in insisting that the outstanding problems should be dealt with as a matter of urgency. BML responded positively to this approach and was in the course of making every effort to resolve the outstanding queries when in effect WB management withdrew its co-operation in February 1997.

234 On the issue of whether or not either the letter of 16 April 1997 or that of the 28 April 1997 was effective as notice of repudiation, I note that WB's primary case is that the letter dated 16 April 1997, which I have already quoted, was the effective letter of termination. The question is whether WB made it unequivocally clear in either letter that the agreement was an end. In my view the 16 April 1997 letter which ends with the sentence "however we reserve our position in respect of our right to determine the contract and our position in damages" is not unequivocal.

235 WB's secondary case is that the letter of 28 April 1997 was effective as a letter of repudiation. This letter must be read in the context that WB had rebuffed Mr Doubtfire's letters of 21 and 25 April 1997 which he wrote in his capacity as a director of BML. I am satisfied that the letter of 28 April 1997 was intended to make it clear that the contract was at an end. BML says that this is unrealistic because at WB's insistence it continued with the substantial maintenance contract until 1 April 1998 when the replacement system went live. BML points out also that WB failed to deliver up the system to Anglo when this was demanded by letters in May and June 1997. I do not find this to be decisive since, seen from the perspective of April 1997, WB had no option, if it wished to have a computer system, to continue with Charisma (including the support contract) until a replacement system was available.

DAMAGES

236 A number of issues arise. The first is whether WB was required to choose between a claim for loss of profit and a claim for wasted expenditure or whether it could claim both for loss of profit and wasted expenditure ie. for time spent by employees unnecessarily because the contract had not been properly performed. In addition WB claims the cost of obtaining a replacement computer system including the cost of retaining FMC as consultants although WB did not retain consultants in the search which resulted in the purchase of Charisma.

- 237 The law is set out in Lord Denning MR's judgment in **Anglia Television v. Reed** [1972] 1QB 60 at 63. "It seems to me that a plaintiff in such a case as this has an election: he can either claim for loss of profits: or for his wasted expenditure but he must elect between them. He cannot claim both. If he has not suffered any loss of profit—or cannot prove what his profit would have been—he can claim in the alternative the expenditure which has been thrown away that is, wasted by reason of the breach. That is shown by **Cullinane v. British "Rema" Manufacturing Co Ltd** [1954] 1QB 292, 303, 308". *"If the plaintiff claims wasted expenditure, he is not limited to the expenditure incurred after the contract was concluded. He can claim also for expenditure incurred before the contract provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken."*
- 238 At a late stage in the trial I pressed Mr Guy to make his election on behalf of WB. He said that if he was forced to make an election it would be to claim for loss of profits. He did not concede that he was required to make the election. In my view WB is required to choose between a claim for loss of profits and a claim for wasted expenditure. It has chosen to claim for loss of profits. Loss of Profits
- 239 In his expert accountancy report Mr Taylor analyses the trading results of WB before and after the introduction of the Strategix system. WB's case is that there were losses amounting to over 400,000 as a result of Ms Labbett's inability to travel because she was tied to her spread sheets. Mr Taylor notes that there was no significant increase in gross profits after April 1998 when the Strategix system was implemented. He also notes that the turnover in the period prior to the installation of the BML system in July 1996 is in general lower than the succeeding years. It appears that the turnover increased after the implementation of the BML system even though the manual analysis of marketing information was not maintained by WB.
- 240 After the installation of the Strategix system in April 1998 there was not a significant increase in the rate of WB's sales. This also does not support WB's claim. The rate of increase year on year was 24.2% from March 1996 to March 1997; 15.3% to March 1998 and only 5.4% to March 1999. The gross profit margins of WB have also not increased since April 1998.
- 241 Mr Taylor concludes in his Report, and I agree, that: *"4.15 - on the basis of the above I consider that a review of the trading results after the implementation of the Strategix system does not support the loss of turnover and profits being claimed by WB."*
- 242 Having heard WB's witnesses and considered the evidence on damages, even if I had found substantially in favour of WB on the individual items of complaint, I should have rejected Mr Martin's evidence in relation to loss of profit. In my view WB has not proved any loss of profit overall. WB has in particular not proved any loss of profit arising from Item 7 or Item 19 which together account for over 750,000 of WB's claim. WB has not proved that they lost any profits as a result of Ms Labbett being unable to undertake any buying visits abroad. If WB had really been suffering significant losses for this reason, they would have complained vociferously to BML that WB was suffering losses as a result of the failure of BML to provide, what had been promised, and/or they would have hired other staff to do the work which was then being done by Ms Labbett at very significantly less cost than that claimed. WB took neither course. Equally in relation to Item 19 I have found that the majority of information needed to determine WB's marketing strategy was readily available and the lack of access to the Prospects File caused no significant loss. Additional Cost of Staff
- 243 WB makes a further claim for the additional cost of staff in addition to the claim for loss of turnover in the sum of 25,731.
- 244 Mr Taylor comments from an accountant's point of view. *"5.20 - In my opinion WBL (WB) and FMC have effectively doubled-counted the loss by WB by including both the additional sales expected to be made by WBL through improved efficiencies and the staff costs that could have been saved through improved efficiencies regardless of whether those staff would be required to support the additional sales made."*
- 245 This view is reinforced in paragraph 5.47 of his report where Mr Taylor said *"In my opinion WBL has not actually incurred any additional costs for the time it is claimed was spent by WBL employees in performing the tasks that the BML system should have allegedly performed. In addition I consider that WBL have effectively double counted the loss suffered by including both the additional sales expected to be made and the staff costs that could be saved regardless of the fact that those staff would be required to support the additional sales made ... -- "5.48 I do not consider that a loss has*

arisen in respect of the cost of financing additional stock if stock turnover days are calculated having regard to stock levels throughout the period."

- 246 Mr Taylor supports from an accounting point of view, the existing law requiring a party to make an election on whether to claim for loss of profits or wasted expenditure.
- 247 I am also satisfied that even if I had accepted WB's claim on liability and WB had opted to claim for wasted expenditure instead of loss of profits, I would have concluded that WB had not suffered any significant loss. I decline to accept Mr Guy's invitation to invent my own claim for damages "*doing the best I can*" in respect of those few items where I have found fault with BML's performance. Cost of acquiring the Strategix System
- 248 In principle this element of claim can be made alongside a claim for loss of profit. In view of the fact that it does not arise as a result of findings which I have already made, I shall deal with it briefly. In my view this claim is also grossly inflated. The cash price of the substitute Strategix system was 81,706.57. The cost of Charisma plus integral EDI and emulation was a total of 76,234. It is conceded by Mr Martin that on the figure of 81,706.57 an allowance of 4,375 has to be made for software betterment. There is therefore no significant difference in the cost of the two packages. There is therefore no loss based on a comparison of the cost of the two packages.
- 249 As far as the claim for the cost of FMC's consultancy services in connection with the acquisition of Stratgix is concerned, I am not satisfied that the cost was reasonable or can be justified as a cost to BML when WB had not retained consultants to assist with the search which lead to the contracts with BML. I have not heard detailed evidence of the Strategix system but in so far as it was not a standard system, there is an important element of betterment in that WB was buying a system with the assistance of consultants which was to be adapted to its particular needs.
- 250 WB also claims substantial sums of the cost of WB's staff time in connection with acquiring and installing the Strategix System including over 4,000 for Mr Browne, nearly 5,000 for Ms Labbett and over 6,000 for Mr Smith. This part of the claim involves double counting with the loss of profits claim. In any event Mr Smith's time could not be the subject of a loss of earnings claim since he was not employed on fee earning work for WB. I am not satisfied that Mr Browne or Ms Labbett have proved any losses.

THE CONTRACT WITH ANGLO

- 251 On the basis of my findings, the question of whether Anglo is liable for breach of contract does not arise. I have already concluded that the Charisma Computer System supplied to WB was reasonably fit for the purpose. If I had reached a contrary conclusion this issue would have arisen. Mr Fairchild of BML introduced Mr Forward of F & B Brokers to Mr Lawson of WB around 3 January 1996, for the specific purpose of assisting in the financing of the original contract between itself and WB.
- 252 The lease document was sent to WB by Anglo by fax to WB on 25 March 1996. This was effectively at the same time that the hardware was delivered by BML to WB and the lease was signed on behalf of WB (in fact on 26 March 1996). The lease was countersigned by Anglo on 15 April 1996. Anglo had no known continuing business relationship with BML whereby, for example, it regularly provided finance for BML's computer transactions. WB believed that it had possible alternative sources of finance and was not bound to enter into a finance agreement with Anglo
- 253 By a letter dated 17 April 1997 WB gave notice to Anglo that it had instructed its bankers to terminate payments on the lease agreement. By letter dated 19 June 1997 received on 23 June 1997, headed "*Termination of Agreement*", Anglo wrote - "*We assume that you no longer wish to be bound by the Agreement and by this letter we are ending or terminating the Agreement.*"
- 254 It is clear that, WB having said that it had ceased to make payments under the Agreement and that it had no intention of doing so in the future, Anglo was entitled to terminate the Agreement and did so unequivocally on 19 June 1997.
- 255 At the time of WB's agreement with Anglo, it was understood by both WB and BML that the agreement was dependent on WB being able to obtain the necessary finance. WB was introduced to Anglo by Mr Forward of F & B, i.e. via a credit broker. It is claimed by WB that Section 9 of the Supply of Goods and Services Act 1982 applies and that a term must be implied into the agreement between WB and Anglo that the system would

be reasonably fit for the purposes made known to the credit brokers and also that BML was Anglo's agent for the purpose of making representations and for delivery of the Charisma system. It is accepted that the introduction of Anglo was via a credit broker but Anglo contests that there was a term in its agreement with WB to be implied by law that the Charisma system would be reasonably fit for the purpose.

- 256 Under Clause 6C of the Hire Agreement Anglo expressly disavows an agency relationship. Clause 6C provides: *"You acknowledge that the supplier is not our agent and that none of the supplier's employees or anyone else who is not employed by us is authorised to make any binding statements on our behalf."*
- 257 This is not conclusive. The question I have to decide is whether as a matter of fact an agency exists. If it does exist, the court will not be deterred by a declaration such as that in Clause 6C. The court will also look very closely and carefully at any attempt to exclude liability on the basis of agency.
- 258 It is agreed that the starting point is the judgment of the House of Lords in **Branwhite v. Worcester Works Finance** [1968] 30 ER 104 which considered a similar provision in the Hire Purchase Act 1965. At page 121 Lord Wilberforce (with whom Lord Reid agreed) explained that while in all hire purchase cases much must depend on the individual facts *"such questions as arise of the vicarious responsibility of finance companies for the acts or defaults of dealers cannot be resolved without reference to the general mercantile structure within which they arise, or if one prefers the expression, to commercial reality."* In the cases to which Lord Wilberforce is referring of which the purchase of a motor car is the most obvious example, the commercial reality involved a system whereby customers expected to acquire goods on hire purchase terms and for those terms to be made available at the place where the goods were exhibited and sold so that the transaction was in effect seamless. In such cases the responsibility of the finance company analogous to agency arose out of a structure which was to be assumed unless it was displaced by evidence of particular circumstances.
- 259 Lord Wilberforce went on to make it clear that this did was consistent with the existing principles on which the relationship of agency was based.
- 260 He cited the speech of Lord Pearson in **Garnac Grain Co Inc v. HMF Faure and Fairclough** (1967) 2 ER 353, 358 *"The relationship of principal and agent can only be established by the consent of the principal and agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship even if they do not recognise it themselves and even if they have professed to disclaim it ... The consent however must be given by each of them either expressly or by words and conduct."*
- 261 Lord Wilberforce went on to say: *"The significant words for the present purpose are 'if they have agreed to what amounts in law to such a relationship' These I understand as pointing to the fact that while agency must derive from consent, the consent need not necessarily be to the relationship of principal and agency itself (indeed the existence of it may be denied) but may be to a state of facts on which the law imposes the consequences which results from Agency. It is consensual not contractual. So interpreted this formulation allows the establishment of an agency relationship in such cases as the present."*
- 262 Section 9 of the Supply of Goods and Services Act 1982 provides that except as provided by sub-sections within Section 9 of the Act (and Section 10 Sale by Sample which does not apply here), there is no implied condition or warranty about the quality or fitness for any particular purpose of goods bailed under a contract for the hire of goods.
- 263 Section 9(4) of the Act provides that there is an implied condition as to fitness for purpose where the bailor bails goods in the course of a business and the bailee makes known - *"(a) to the bailor in the course of negotiations conducted by him in relation to the making of the contract, or b) to a credit-broker in the course of negotiations conducted by that broker in relation to goods sold by him to the bailor for forming the subject matter of the contract."*
- 264 By Section 9(6) of the Act, the implied condition does not apply even in these circumstances where the circumstances show that the bailee does not rely or that it was unreasonable for him to rely on the skill or judgment of the bailor or credit-broker.
- 265 This statute is entirely consistent with the pre-existing law on agency which I have set out. The exemption under Section 9(6) of the statute gives statutory force to Lord Wilberforce's exception to the general rule that in normal hire purchase agreements, agency is to be implied.

- 266 In this case the agreement between WB and BML for the supply of Charisma crystallised effectively on 21 December 1995. The first approach to Anglo took place only a very few days later taking into account the Christmas holiday. The hire agreement does not cover all the items in the supply agreement in particular it does not cover EDI and Word Processing. The contract between WB and BML required considerable negotiation between the parties. Its implementation required active cooperation by WB. There is nothing in the evidence to show that WB relied on the skill and judgment of Anglo. In the circumstances of this case it would have been unreasonable for WB to rely on Anglo's skill and judgment. In these circumstances I hold that Section 9(6) of the Act applies and there is no implied condition as to fitness of purpose.
- 267 This finding is subject to the question of whether contractual terms excluding Anglo's liability are valid under Section 7(2) of the Unfair Contract Terms Act 1977. Under Section 7(2) of this Act, liability can be excluded or restricted only to the extent and in so far as the term satisfies the test of reasonableness. Under Section 11 the term must be fair and reasonable having regard to the circumstances which were or ought reasonably to have been known to or to be in contemplation of the parties when the contract was made. Schedule 2 of the Act provides guidelines which require the Court to consider, in particular, five factors. The factors referred to are a) the relative bargaining positions of the parties; b) whether the customer received an inducement to agree to the term; c) whether the customer knew or ought reasonably to have known of the existence and extent of the term; d) whether it was reasonable at the time of the contract to expect compliance; and e) whether the goods were manufactured, processed or adapted to the special order of the customer.
- 268 Clause 6 of the Hire Agreement states in full
- a) *You will bear the cost of any loss, damage or other expense incurred by us in connection with the Equipment.*
 - b) *You acknowledge that we are not responsible for any loss, damage or expense which you may suffer as a result of the Equipment*
 - i) *Failing to function properly*
 - ii) *Not being delivered on the date you agreed with the Supplier*
 - c) *You acknowledge that the supplier is not our agent and that none of the Suppliers employees or anyone else who is not employed by us is authorised to make any binding statements on our behalf ..."*
- 269 I bear in mind that at all times WB had a right of recourse against BML and that the inclusion of the clause did not place WB in the position where acquisition by hire from a finance company rather than by purchase from a supplier became a trap. See **Purnell v. LMS** [1994] CCLR 127 at 137 and **Sovereign Finance v. Silver Crest** [1997] CCLR 76
- 270 I also take into account the statutory guidelines and all the circumstances of the case. In particular I note that WB was not bound to obtain its finance from Anglo. It could have done so from other sources. The customer was aware of the terms and accepted them. Although the system was standard Charisma, the process, to be successful, required considerable input and co-operation from the purchaser. I also take into account that Anglo had not been involved in the negotiations which led to the contract between WB and BML. In all the circumstances of this case I conclude that clause 6 of the Hire Agreement satisfies the test of reasonableness. I also conclude that clause 3c, excluding consequential loss arising out of the use of the software, is also reasonable.
- 271 I do not accept that Anglo's claim under clause 10 of the agreement amounts to a penalty on the principle of **Dunlop Pneumatic Tyre Co v. New Garage Motor Co** [1915] AC 79 at 86-88. It is not an extravagant cost to WB in relation to the loss suffered by Anglo "*nor is the sum much greater than the sum which ought to be paid*" as claimed by WB. This finding is supported by Mr Purvis, whose evidence, which I accept, was that future payments less a discount of 4% are an industry norm. I accept Mr Underwood's submission that neither the pre- estimate of damages nor the provision that interest is payable at 2% a month should be struck down as a penalty. The 2% interest rate represents a fair reflection of the opportunity cost to Anglo of the use of the money in 1996 and for the lifetime of the agreement. I note also that WB was not in fact required to return the computer system but was able to retain it until Strategix was installed in April 1998.
- 272 I conclude that WB defaulted on its payment under its hire agreement with Anglo starting with its instalment of May 1997. It is entitled to recover 67,005.91 together with interest from 19 June 1997.

CONCLUSION

273 In all the circumstances I find that Anglo succeeds on its claim against WB and is entitled to judgment in the sum of 67,005.91 together with interest from 19 June 1997, making a total of, 110,007.51 WB fails in its claim against BML and its counterclaim against Anglo. I dismiss Anglo's claim against BML.

Mr David Guy instructed by Messrs Moon Beever for Winther Browne & Co Limited

Mr Peter Susman QC and Mr Terence Bergin instructed by Messrs Irwin Mitchell for BML (Office Computers) Limited

Mr Ashley Underwood instructed by Messrs Edge Ellison for Anglo Group PLC