Case No: CH-2014-0452

[2016] EWHC 1089 (CH)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday, 8 April 2016

BEFORE:

MR JUSTICE NORRIS

BETWEEN:

Flanders Community Centre

Claimant/Respondent

- and -

London Borough of Newham

Defendant/Appellant

MISS C. ROBERTS (instructed by London Borough of Newham Legal Services) appeared on behalf of the Claimant

MR E. HEWITT (instructed by VT Law) appeared on behalf of the Defendant

---

JUDGMENT
(As Approved)

Digital Transcript of WordWave International Ltd trading as DTI
8th Floor, 165 Fleet Street, London, EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Web: www.DTIGLOBAL.com Email: TTP@dtiglobal.eu
(Official Shorthand Writers to the Court)

No of Words: 6,061
No of Folios: 84

1. MR JUSTICE NORRIS: 100 - 116 Napier Road, East Ham is a plot of land and a building owned by the London Borough of Newham. On it was a purpose-built post-war structure which comprise basically a traditional brick and block structure with a simple ridged-tiled roof and verged gables together with an adjoining flat-roofed annex.

2. In 2001, all of its original window fittings, eaves, gutter boards and so forth were in soft wood but with much evidence of rot. The building was at that time in part boarded up, grilled, or protected by roller shutters because it had suffered from vandalism.

3. By a lease dated 1 March 2001, the Borough let that property to the Flanders Road Community Association Limited to use as a community centre. The terms of the lease provided that the grant was for the term of seven years expiring in March 2008, that the annual rent was, subject to a particular provision in the lease, £1 (if demanded) payable by four equal quarterly instalments in advance and, in addition, such sums as should be expended by the Corporation in insuring the premises in accordance with a covenant on the part of the Corporation contained in the lease.

4. The qualification to the rental obligation concerned a tenant's obligation in clause 2.25 of the lease to carry out physical works (which were referred to in the condition survey) to the satisfaction of the Corporation's director within one year of the date of the grant, and if such works were not carried out within that time-scale, then the rent reserved by clause 1 should be £1,200 per annum.

5. The condition survey estimated the total cost of the work at £14,300 with the most urgent works required to preserve the timber, roof, gutter and fencing amounting to some £8,700. If that urgent work was done, the building was thought to remain relatively cheap to maintain for five years.

6. The other terms of the lease to which I must refer are these. By clause 2.3 was an obligation to repair and keep the exterior and interior of the buildings in good and tenantable repair. In clause 2.13 there was an obligation to ensure that any person leaving the premises did so in an orderly manner without causing any undue disturbance or lingering for any reason. In clause 2.15 there was an obligation not to allow the premises to be used for any purpose not permitted by the Memorandum and Articles of Association of the Flanders Road Community Association Limited. By clause 2.16, there was an obligation to ensure that at all times some competent person or persons were in charge of the activities carried out by the Association on the premises, and that such persons should remain on the premises the whole time the same was in use by the Association. By clause 2.17 there was an obligation to ensure that no person was refused admission to the premises on the grounds of his or her race, religion, sex, sexual orientation, age or membership of any political party subject to compliance with the Licensing Acts. By clause 2.18 there was an obligation on the Association's management committee to ensure that there was regular monitoring of the Association's activities and an obligation to take such steps as were necessary to ensure that the activities reflected "the approximate proportions of the nature and of each category of the user within the local community or catchment area of the Association."

7. In Clause 2.21 there was an obligation to give reasonable notice to the Corporation's directors of all association meetings held by the Association, its committees, sub-committees, groups and sections with matters relating to the management or use of the premises, and to permit the director to attend those meetings. By clause 2.22 there was an obligation upon request to make available to the council a full and complete list of the membership of the centre and of the user groups, and of the hire records of the centre "showing them as to age, race, sex and disability." In clause 2.23 there was an obligation that in the event that the Corporation took the view that the Association's activities did not properly reflect the local community and the Corporation served a notice of imbalance, then to take immediately "all such steps necessary to rectify such imbalance."

8. That is a sufficient recitation of the terms to indicate that this was not at all a usual commercial lease. It duly expired in 2008. The Association remained in occupation having the right to a continuation tenancy under the 1954 Act. Negotiations were entered into with a view to the Association being granted a new lease. But those negotiations did not prosper and eventually in February 2011 the Association issued proceedings seeking the grant of a new tenancy.

9. There was at that time in circulation or perhaps shortly afterwards a draft lease which dealt with most of the terms. The draft lease then in circulation had been produced by the Corporation and was radically different in many respects from the lease under which the Association continued in occupation of the premises. But negotiations continued upon its terms. Those negotiations did not themselves result in any agreement.

10. There were two real issues. The first was as to the extent of the land to be included in the grant. During the course of the original tenancy, the Corporation had constructed what was called the Bobby Moore Pavilion on part of the land included in the original demise to the Association, but no one had sorted out upon what basis they did so and what was the impact on the Community Association's lease. So all of that had to be formalised. The Association wanted a grant of the original area and the corporation said it could only have a grant of the reduced area.

11. The second real battle was over rent. At the time when it issued its proceedings, the Association gave as the particular to its current tenancy "original rent reserved £1,200 per annum, current rent £1,200 per annum." It proposed a new rent of £1,200 per annum but wanted a rental concession at the commencement.

12. So far as the council was concerned it wanted a commercial rent for the premises which it then put at £23,000. So the parties were a huge way apart.

13. In June 2013, the Association amended its claim form. It had secured permission from the court to amend its claim form to raise squarely the issue of what land should be included in the grant, but it took the opportunity to amend both its recitation of the current terms of the tenancy and its proposal as to the terms of the new tenancy.

14. As regards rent, the claim was amended to say that the rent was a pound per annum (if demanded) together with such sums as should be demanded by the Corporation in respect of its insurance obligation. The proposed new rent was a pound (if demanded) together with the insurance rent.

15. After that amendment, a further iteration of the draft lease was produced. It is not possible to say exactly when it was produced, but it appears to have been in being in September 2014. This new lease went back substantially to the terms of the 2001 lease which I have recited. The difference was that it was to be for a contractual term of ten years with a rent review after five years. The repairing obligation was the same. There were the same obligations as to user, as to the presence of competent persons, as to the restriction upon the ability to refuse admission, as to the monitoring of those who use the premises, as to the giving of notice to the Corporation enabling it to attend all relevant meetings, as to the making available to the council of membership lists, as to the obligations to ensure that the activities properly reflected each category of user within the local community, and as to the requirements to comply with any notice of imbalance.

16. But this iteration of the draft lease differed from that first circulated in two respects. First, it did not expressly permit the sale of alcohol on the premises, which the first iteration of the proposed new lease had suggested, nor did it contain an obligation on the part of the Association to achieve such targets as to use as the council might set, the obligation remaining as one to monitor use and to comply with any notice of imbalance served by the council.

17. Each side appointed an expert as to rental values. The Association's expert was Mr Murphy. I should very briefly note the contents of his report so far as relevant to this appeal. He noted that the property was a 40-year-old purpose-built community centre. He noted that the property was in fact in some disrepair. He attempted to conduct a valuation on the basis of comparables, but many of the comparables were of leases at a nil rent. Some of the comparables were leases which were not yet granted but were the subject of current negotiations. Many were managed by the Corporation itself.

18. Mr Murphy turned from comparable valuations to the accounts method of valuation; in other words, to look at what rent might be sustainable out of the income of a business of the nature of the Flanders Road Community Association conducted from the premises. He noted that the lease had very onerous clauses which effectively allowed the landlord to control how the premises were run. He expressed the view that he could not envisage a situation whereby an organisation that was subject to such interference by its landlord would agree to pay a rent, particularly as the activities and uses were unlikely to produce a profit. He did not specifically refer to which version of the proposed new lease he was referring to, but his comments are equally applicable to the continuing 2001 lease. He expressed the view that, on the comparable method of valuation, the property would fail to have a market rental value, so he fixed a pound. On the accounts' method of valuation, he thought that a tenant would not have the ability to pay a rent, so he spoke to a value of a pound again.

19. The Corporation engaged the services of Mr Kinch. I should briefly refer to some parts of his report. He noted that the community centre comprised of a main hall, a further room (then used as a preschool room) a kitchen, a bar servery area, some office space and some ancillary storage. He noted that in previous versions of his report, he had had regard to the original draft lease which had been circulated, but that he understood that the new travelling lease was different. But he said:

> "Overall I do not consider they impact on my opinion of the rental value and if anything the travelling lease could be considered less restrictive."

20. The valuation method he employed was the comparable method. He said that he did not consider that an accounts-based method would be appropriate since these were usually used to derive a capital value. He said he proposed to adopt as a basis for valuation an open market rent. He thought that was £16,000. He set out in an appendix the comparable evidence to which he had had regard. This included four community centres at Granwell, Woodman, Granville, and Haringey Grove.

21. He said at paragraph 23.1 of his report:

> "The evidence from community buildings and facilities can be difficult to analyse as there are often incentives provided if the organisations are providing a service to the wider area which has a perceived benefit to the council, so without understanding the detailed terms of the lease, it is difficult to make specific comparisons. The buildings also tend to serve different functions with the accommodation of individual buildings being very different."

22. Subject to that caveat, he referred to the four community centres which I have mentioned. Granwell Community Centre was let on a 10-year lease to a nursery at a rent that worked out at about £7.79 per square foot. Woodman Community Centre was a new letting to a charity working with deaf children, which would make available the hall for general community uses. The rent they paid was £4 per square foot. The Granville Community Centre was a former social club but was used exclusively for a nursery. The Haringey Grove Community Centre was a similar property. The lease had expired but the passing rent on expiration had been £4.20 per square foot.

23. In his analysis of the comparables, Mr Kinch said that, having regard to those transactions, it was his view that considering the location of the Flanders Community Centre and restrictions placed on the property in terms of lease conditions, a rent of £4 per square foot for the main space was appropriate, but a lower rent for other areas coming out at an averaged rent of £3.73 per square foot. He said there was a wide range of rents, but the location of the property at the end of a cul-de-sac and having

regard to its age and the conditions attached to the lease, it was unlikely to achieve a higher rent if exposed to the open market.

24. He commented in paragraph 24.2 that the proposed lease did set targets for the use of the centre and this could be construed as an onerous requirement particularly as the targets were not set out in the lease. He said, "I have regard to this in my valuation." In that he was in error since the then travelling proposed lease did not contain the target covenants, containing only the monitoring and the rectifying of imbalance obligations. He noted that the current travelling lease did not forbid the sale of alcohol. That was the evidence that was deployed at the trial of the application for the new tenancy.

25. I need not to refer to the dispute about the scope of the land to be included in the new grant. I can focus on what happened about the rent.

26. By section 34 of the 1954 Act, the rent that would be payable under the new tenancy granted to the Association in default of agreement would be:

> "… determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor…"

subject to certain statutory disregards.

27. By contrast with section 35, there is no automatic default as regards rent to the terms of the current tenancy, section 35 requiring the court "to have regard to the terms of the current tenancy and to all relevant circumstances." It is however agreed that passing rent is in fact a relevant matter to take into account, though of itself because it may have been set historically, it is not necessarily a good guide to the current rent.

28. In **Trans-World Investments Ltd v Dadarwalla** [2007] EWCA Civ 480 at paragraph 30, Mummery LJ said:

> "…the judge was wrong to disregard the passing rent and the rent of [an adjoining property] on the basis stated by him. The rents under the current lease … are relevant valuation evidence of market rent of the Property without the need for the court to require the party relying on those rents to produce positive evidence of the circumstances in which they were determined. Rather it is for the party who challenges the relevance of the passing rent … to adduce evidence of circumstances relied on to show that the rents are *not* relevant factors in the valuation exercise of determining the open market rent."

29. On 25 July 2014, Judge Faber made an order that the new lease would be:

> "at a rent of £1 (one pound) per year if demanded payable by four equal quarterly instalments in advance on the usual quarter days, the first of such payments to be made on demand, and also of such sums as shall from time to time be expended by the Corporation in insuring the premises in accordance with the clause in the new lease which is in the same terms as clause 3 (ii) of the lease dated 1 March 2001."

That reference being a reference to the landlord's insuring obligation.

30. The judgment which led to that order had been delivered in June 2014. It is unnecessary to refer to much of the judgment because Her Honour Judge Faber had dealt with what was clearly the focus of the hearing before her, namely the scope of the grant having regard to the existence of the Bobby Moore Pavilion.

31. At paragraph 8, she noted that she had read the documents to which she had been specifically referred. She had carefully considered the evidence, being the witness statements and the oral evidence including that from Mr Murphy and Mr Kinch, but that she intended to make reference in the judgment only to so much of that material as was necessary for the parties to comprehend her judgment. She therefore dealt with matters succinctly. The issue as to rent was dealt with in four paragraphs:

> " 60. Mr Kench said in his report (see 257/24.5) that he did have regard to onerous lease requirements in relation to the FCC. However in his comparative exercise he did not, as he admitted in cross-examination, have access to the terms of the leases of the Granwell Community Centre or of the Woodman Community Centre or of the Haringey Grove Community Centre. Thus he could not compare the terms of the FCC lea e with those of at least three of hi comparators those being the properties on which he laid most emphasis in his report (see paragraph 23). As to the fourth property on which he laid emphasis, Hartley, he accepted that it was a quite different property from the FCC
>
> 61. He also accepted that these types of property are not easy to value and that he was not going to get precise figures and the range was from £3-£14 per square foot for one sort and that there were other where community centres use office space which is significantly more valuable and he had gone to the bottom of the range. His proposed rent is £3.73 per square foot.
>
> 62.Mr Murphy, the claimant' expert, has taken irrelevancies into account in his proposal. Those are as to the poor condition of the premises and the Claimant's inability to pay a substantive rent. The latter being the accounting method of valuation which is not appropriate save for valuation of businesses. The former is the tenant's responsibility under the lease.

> 63. He investigated other community centres in the same Borough and found a number had nil rent but he did not have access to the date on which the rent had been agreed. So they cannot be used a. evidence of current market value.
>
> 64. The Defendant· s expert has produced com parables but has not discounted for the onerous term of the lea e. So his proposed rent are not evidence of current market value of the premises in issue and I cannot guess as to how much more of a discount there should be. Thus l have no option but to say that there is no evidence before me as to current market rent and 1 cannot make a finding on that issue. In those circum lances I can only find that the rent should not change "

32. The Corporation appeals the order made on the basis of the reasons given by the judge in those paragraphs on five grounds. First, that the judge was wrong to find that there was no evidence as to the current market value of the premises and that therefore she could not make a finding on the issue. Second, that she was wrong in fact and in law when she rejected evidence as to comparables and in particular when she found that Mr Kinch had not discounted for any onerous terms of the lease. Third, that she had erred in law and in fact because she had not picked up on Mr Kinch's mistake in his report about the existence of the target obligations. Fourthly, that she had failed to consider whether in fact there were any erroneous terms under the draft lease and/or had failed to give reasons for any finding to the effect that the lease did include such terms. Fifthly that, if the learned judge thought the correct approach was not to change the rent from that payable under the old lease, then she erred in law and in fact in thinking that the rent under the old lease was £1 because the rent was actually £1,200, (which sum should have been adjusted to reflect the passage of time and the general increase in rents since the date on which the rent was originally fixed).

33. I remind myself that, according to CPR 52.11(3), I can only allow the appeal where the decision of the lower court was wrong, ie, contained an error of law or was unjust because of a serious procedural error. The second limb does not arise in this case. I am therefore concerned only with whether Judge Faber made an error of law. This means in relation to findings of fact that either there was no evidence to sustain the finding of fact, or alternatively that the conclusion expressed on the evidence adduced was perverse and no reasonable judge could have reached that finding of fact.

34. In approaching that task, I bear in mind the salutary words of Lewison LJ in **Fage v Chobani** [2014] EWCA Civ 5 at paragraph 114 through to paragraph 117. I simply highlight certain observations contained in that passage. First, I should not interfere with Judge Faber's findings of fact unless compelled to do so. Second, the trial is not a dress rehearsal. The trial before Judge Faber was the first and last night of the show. Third, in making decisions, Judge Faber will have had regard "to the whole sea of evidence presented to her whereas an appellate court will only be island-hopping". Four, the primary function of Judge Faber was to find facts and identify crucial legal points and advance reasons for deciding them in a particular way. Her duty was to give reasons in sufficient detail to show the parties and, if need be, the applicable court the principles on which she acted and the reasons that led her to her decision. She was not

obliged to give reasons that were elaborate. Last, she cannot be expected to deal in detail with matters that were not in dispute before her.

35. To those observations I would add this. The judge was only obliged to address the arguments deployed by each side. It was not her task to think up different arguments that might have been advanced by one side or the other. Duly warned, I approach the grounds of appeal.

36. The first ground is that Judge Faber was wrong to say that there was no evidence of comparables. What she actually did was to note that Mr Kinch accepted that it was necessary to have regard to onerous lease requirements (that being the last sentence of paragraph 24.5) but that, in his comparative exercise as had been established in cross-examination, he did not have access to the terms of the leases of the Granwell Community Centre, the Woodman Community Centre, or the Haringey Grove Centre, so he could not compare the terms of the instant lease with those of at least three of his principal comparators. In cross-examination, he had also accepted that the fourth property was quite different from the Flanders Road Community Centre.

37. As to Mr Murphy's evidence, she thought that he had taken irrelevances into account in his report. As to the poor condition of the premises, she said that was down to the tenant, it being the tenant's responsibility under the lease. As to inability to pay a substantive rent, she did not consider that the accounting method of valuation was appropriate in the case of something that was not a business. As regards his evidence of nil rents payable, she noted that he did not have evidence of when that agreement had been reached, and so she could not treat that as current evidence.

38. When she said, "I have no option but to say that there is no evidence before me as to current market rent," she plainly meant that there was no reliable evidence capable of analysis as to current market rent. That is what she meant when she went on to say, "I cannot make a finding on that issue." It is also why she said that in the circumstances she could conclude only that the passing rent should continue.

39. The process which it appears to me she went through, was to say: “There is no reliable evidence, what am I to do? The only thing I have is the passing rent. It is accepted by both counsel before me that the passing rent is a relevant factor”. It was then for her to give such weight as she thought fit to that factor. It is not for me to re-weigh that evidence. That is the function of the trial judge.

40. It was argued that that the brief statement of reasons in paragraph 64 of the judge's judgment contains an error of principle: that where the judge finds that the evidence of neither expert is satisfactory, then the judge should him or herself conduct an analysis.

41. The basis for that submission is the decision in **Rombus Materials v Lamb Properties** (unreported) 18 February 1999. The appeal judge had there commented that the trial judge had said that he could not pluck figures out of the air and decide what is reasonable himself but that in fact, having so directed himself, that was exactly what he did. The appeal judge said:

> "In my view the proper approach would have been to look at the comparables and look at the calculations from them at a rent of £8.59 psm amounting to £20,000. From that £20,000 figure, the learned judge would have been entitled to discount down on the basis of any weaknesses he saw in the comparables. I consider the fair figure for the discount would have been one of about 10 %. Lest it be thought that the exercise I have engaged upon is another example of plucking figures from the air, I would point out that the necessity for this court to embark on the exercise comes about because the learned judge misdirected himself in failing to pay any regard to the comparables. In that situation, the choice for this court is either to do the exercise itself if it can properly do so or to order a new trial. The reasons of saving of time and cost which cause me to favour the former course are obvious."

42. He then continued to say that he was able to do so because he was in as good a position to assess the merits of the expert evidence and to make findings as was the learned judge.

43. It was said that Judge Faber should have conducted the same exercise in the instant case. I accept that she might have done so. The question is whether she was wrong in law to give weight to the passing rent rather than to undertake that exercise. There were no reliable comparables to start with. The points of difference were not pleaded, and the significance of the points of difference was not valued. As she pointed out, "I cannot guess as to how much more of a discount there should be." The point is that nobody had given her any help on that issue. She took what she thought was the most reliable evidence. I shall revert to the question of whether the passing rent was a pound or £1,200 when I address the fifth ground.

44. The second ground was that she was wrong to reject the evidence of the comparables of Mr Kinch. This is in essence a challenge to her assessment of a witness who she had seen cross-examined and of whose evidence in cross-examination there is no record for me to consider. This is where the judge saw the whole sea of evidence, whereas I would only be island-hopping. I have only the report; I do not have any note of the cross-examination on that report. It seems to me that the judge's point that the reliability of a comparable is deeply undermined by an acknowledgment that the terms of the lease and the nature of the property are crucial to understanding the value of the comparable and that Mr Kinch had neither. I see no ground to set aside the judge's findings of fact as disclosing an error of law.

45. The third ground is in essence that the judge made a mistake about the terms of the new lease, and the terms of the new lease are clearly crucial to setting the new rent. It has to be said that, if a mistake was made, that it was made by Mr Kinch, it was made by all counsel in the case and nobody drew the "mistake" to the attention of the judge. She can hardly be held to have erred in law by failing to address a point which nobody made before her. That is why it is important to remember that the trial is not a dress rehearsal for some second round. In my judgment, the judge did not make any error of

law in determining the rent on the basis of the evidence which each side adduced, even though part of that evidence not drawn to her attention may have contained a version of the lease which differed in one small respect from that on that basis of which the experts had prepared their reports and she was addressed by both counsel.

46. The fourth ground is that the judge failed to consider whether there were in fact any onerous terms in the lease. She said in paragraph 64 that Mr Kinch had not discounted for the onerous terms of the lease, i.e. he had not done the comparative exercise between the rent payable under the unknown terms of the comparable leases and the rent that ought to be payable under the known terms of the Association's proposed lease.

47. One needs to understand what clauses were drawn to the attention of the judge in the course of argument as to what were regarded as onerous terms. Of that of course there is no record. But I have recited sufficient of the terms of the 2001 lease carried over into the travelling draft of the 2014 lease to demonstrate that there was ample scope for regarding many terms of the lease as onerous, i.e. restricting the tenant's freedom of action in a way that is not usual in commercial leases and might not have been present in the terms granted to the other community centres and nurseries on which Mr Kinch relied.

48. As to the failure of the judge to identify what particular onerous terms she had in mind, it was her duty to state succinctly the reasons for her views. If her expression of view was thought to be too succinct, then it was the obligation of counsel to draw to her attention that it was thought she had not sufficiently clearly expressed herself and to afford her the opportunity, if she thought it appropriate, to spell out what particular terms she thought of as onerous. This course was not taken, probably because all those involved in the case actually knew what she meant when she referred to "onerous terms of the lease" because they would have known what was argued. I do not consider that this ground of appeal is made out.

49. The last ground I have found the most difficult. The judge settled the rent at a pound treating that as the passing rent. But as I have indicated, another view might be taken. The Association itself originally thought that the passing rent was £1,200 being the sum payable if it did not carry out repairs. As Miss Roberts puts it, what was effectively happening was that the rent payable under the 2001 lease was £1,200 per annum: but if within one year the Association put the property into repair in accordance with the annexed schedule by spending £14,300 upfront, then for the remainder of the term, it could enjoy a reduced rent of a pound. So the passing rent was really £1,200 but it had been reduced to £1 on the assumption that the repairs had been conducted.

50. For the Association, Mr Hewitt said that, on its face, the lease reserved a rent of £1 but provided for an increase in that rent if certain works were not undertaken, that there was no evidence before the court as to whether the works had or had not been undertaken, that Mr Kinch in his report had assumed as the Corporation's witness that the works had been undertaken because only £1 had been paid (if that) and that nobody at trial had raised the issue of whether the works had or had not been undertaken and in what circumstances only a pound (if demanded) passed as a rent. It was his submission that nobody at trial had sought to argue that the passing rent was £1,200, even though

that had been the tenant's original position until amended in June 2013. Nobody had argued that the Corporation was actually entitled to more than £1 as the passing rent, and that accordingly the point had never arisen for argument at the trial itself.

51. Whether the works have or have not been undertaken, I do not think is in fact material. The Association was obliged to undertake the works under the original lease and it remains subject to its repairing obligation insofar as not already performed. It is still obliged to spend the £14,300 or whatever it now costs to do the works it promised to do. In the light of that, I do not think the judge was wrong in law to have taken the passing rent as only £1. That is what was actually passing, nobody argued before her that it should be a higher sum. The economic reason for it being £1 still existed in that the liability to spend the money on the property appears still to exist.

52. Accordingly, I do not consider that the judge erred in law on that ground either. It was for her to weigh the significance of the passing rent having regard to the arguments that were actually addressed to her. It was not her function to think of points that might have been made but were not made. Had they been made, evidence might have been adduced or called for as to how the point might be answered. It is not for me as an appeal judge to entertain a point which ought to have been raised at trial if material but was not raised. In the circumstances, I am unimpressed on analysis by ground five.

53. I therefore dismiss the appeal.