Case No: A2/2015/0535

Neutral Citation Number: [2017] EWCA Civ 75
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT, QUEEN'S BENCH DIVISION
MICHAEL BOWES QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)
HQ13X04269

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2017

Before :

LADY JUSTICE GLOSTER
(Vice-President of the Court of Appeal Civil Division)
LORD JUSTICE LLOYD JONES
and
LADY JUSTICE KING

- -

Between :

	BALOGUN	**Appellant**
	- and -	
	BOYES SUTTON AND PERRY (A FIRM)	**Respondent**

- -
- -

Nigel Woodhouse (instructed by **Simons Rodkin Solicitors LLP**) for the **Appellant**
Oliver Radley-Gardner (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondent**

Hearing date : Wednesday 25th January 2017

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Judgment**LORD JUSTICE LLOYD JONES :**

1. This is an appeal against the order of Mr Michael Bowes QC, sitting as a Deputy High Court Judge, made on 25 March 2015 dismissing the claim of Mr Abimbola Balogun ("the appellant") against Boyes Sutton & Perry, a firm of solicitors ("the respondent") for damages for professional negligence and/or breach of contract in connection with the appellant's acquisition of a 15 year commercial lease of a unit, Unit 1, on the lower and upper ground floors of a building at 214-218 Norwood Road, London SE27 ("the unit").

2. The order was made following a trial of preliminary issues relating to breach of duty, causation and contributory negligence. The judge found that the claimant had failed to

prove any breach of duty on the part of the respondent in relation to any of the grounds alleged against it. The claim therefore failed in its entirety and it was unnecessary for the judge to consider any issues of causation or contributory negligence.

Background Facts

3. The appellant instructed Mr Christopher Davies ("Mr Davies"), at that time a partner in the respondent firm, in February 2011 in connection with his proposed acquisition of a 15 year commercial lease of the unit. It was common ground that Mr Davies knew from the outset that the appellant intended to fit out and run a restaurant in the unit.

4. In 2011 the appellant owned two other restaurants in London, specialising in African cuisine, which he had been operating for a number of years. The new restaurant was also intended to specialise in this type of cuisine. The appellant is a qualified chartered accountant and a Fellow of the Association of Chartered Certified Accountants. The judge was satisfied that the appellant had substantial experience in operating a restaurant and was commercially aware in a general sense.

5. Mr Davies qualified as a solicitor in about 1976 and was a partner of the respondent firm until his retirement. He practised for 40 years in commercial conveyancing and private client work and was the senior partner of the respondent at the time that he acted for the appellant. The judge was satisfied that in 2011 Mr Davies was a highly experienced solicitor with substantial experience of commercial conveyancing work. Mr Davies stated in cross-examination that he had been involved with around ten leases of restaurants as shell fit-outs during his 40 years experience, around a third of the total number of restaurant lettings he had dealt with.

6. The premises within which the unit is contained were developed by Mizen Properties Ltd ("Mizen") following a grant of planning permission on 28 October 2006. They consisted of commercial units and a Health and GP centre on the ground and basement levels and residential premises above the ground floor. Following the completion of the development, on 13 February 2009 Mizen granted a 999 year lease ("the headlease") of the commercial units and the Health and GP Centre to Anacar Ltd ("Anacar"), an associated company.

7. Mizen then sold its interests to London & Quadrant Housing Trust Ltd ("L&Q"), so that at all material times L&Q were the head landlord and Anacar its tenant of the commercial units. The lease which the appellant was to acquire was therefore an underlease from Anacar in respect of the unit.

8. The unit had planning permission for restaurant use. A purpose built ventilation shaft led from the ceiling of the ground floor and ran through the entire building to the roof of the second floor. The shaft was part of the design of the building.

The underlease transaction

9. In late 2010, the appellant became aware that the unit was being offered as a commercial

letting with permitted planning use as retail (A1), office (A2) or restaurant (A3). The unit was being let out as a shell with capped services, ready for tenant fit-out. The appellant wanted to use the unit as a restaurant on the upper ground floor but as a dance/nightclub on the lower ground floor. In order to do so the appellant would have required further planning permission for change of use to A4 (which the unit did not enjoy) and a relaxation of the opening hours restrictions.

10. On 9 December 2010 the appellant contacted the lettings agency offering the unit on behalf of Anacar, referred to his recent visit to the unit and stated "I also confirm that there already exist *(sic)* an extractor vent as you stated you had been informed by your engineers".

11. Once the respondent had been engaged by the appellant in February 2011, negotiations proceeded between the respondent and solicitors acting for Anacar. The correspondence included an email from Anacar's solicitors to Mr Davies on 15 March 2011 which enclosed:

    (1) The draft underlease;
    (2) Official entries for Anacar's headlease;
    (3) Official entries for the freehold which was said to be in the process of being transferred to L&Q pursuant to a pre-existing agreement;
    (4) The deed of variation of Anacar's Headlease including a clean copy of the varied headlease; and
    (5) The planning consent granted to Mizen.

12. The appellant met Mr Davies at the respondent's offices on 8 April 2011. The parties differ in their account of that meeting, in particular regarding what was said about implementation works necessary to render the ventilation shaft operable. The judge accepted Mr Davies's account that he was told that no further implementation works were necessary, and that the shaft was in a condition whereby it could be put to use upon fit-out.

13. Completion took place on 26 April 2011. Subsequently, a dispute developed between the appellant and L&Q over the nature of the proposed works. In particular, L&Q were concerned over the size of the chimney above the ventilation shaft which was proposed by the appellant.

14. By June 2012 a firm of M&E experts had been instructed by the appellant. They produced documents setting out what they considered necessary for the ventilation system to be put in place.

<u>The issues in the High Court</u>

15. At the trial of the preliminary issues the appellant's primary claim was that the respondent failed to provide him with any or any adequate advice as to the permission he needed from the superior landlord, L&Q, in order to use the ventilation shaft which was essential to operate the restaurant. This claim was based on an alleged failure by Mr Davies to advise the appellant after the appellant's express instructions regarding the

ventilation shaft at the meeting on 8 April 2011.

16. The claim was also put on an alternative basis ("the secondary claim") that even if the appellant had not given express instructions, the respondent should nevertheless have advised the respondent to seek the agreement of Anacar to amend the underlease. It was said that the wording of the draft underlease created a "risk" in relation to which advice and drafting were required.

17. In addition the appellant claimed that

    (1) the respondent had failed to advise him adequately in respect of Condition 4 of the local planning authority's permission relating to the use of a flue to remove all fumes from cooking processes;

    (2) the respondent had failed to advise him adequately on the plans he submitted to Anacar;

    (3) the respondent had failed to advise him that plans registered at HM Land Registry in respect of Anacar's title did not show that the outdoor seating area fell within its title and that Anacar might not be able to lease the same to the appellant.

18. The central issue on the trial of the preliminary issues was whether Mr Davies had a duty to advise the appellant and to secure relevant rights and consents in relation to ducting work in the ventilation shaft based on express instructions given to Mr Davies by the appellant during the meeting on 8 April. This turned on what was said during the meeting, in particular whether the appellant explained to Mr Davies that ducting would need to be installed in the ventilation shaft.

19. The appellant's evidence was that he had informed Mr Davies at that meeting that implementation works were necessary to render the ventilation shaft operable. He remembered telling Mr Davies during the course of that meeting how pleased he was that, for the first time since entering the restaurant business, he had a purpose-built ventilation shaft in which he could install his ducting for the extraction of fumes. He remembered telling Mr Davies that the ducting would run from the premises to the top of the building. He had mentioned the ventilation shaft that ran from the premises to the roof and had said that that was where, for health and safety purposes, he would install the ducting from the kitchen extractor.

20. Mr Davies's recollection was very different. He recalled that he was told that no further implementation works were necessary and that the ventilation shaft was in a condition whereby it could be put to use upon fit-out. He stated that the appellant told him that the premises were purpose-built and had a pre-existing ventilation shaft in place for use in the kitchens. Nothing the appellant had said in relation to his intentions regarding the ventilation shaft gave Mr Davies any indication that any additional work was required before the shaft could be used. Mr Davies was satisfied on the appellant's assurance that

there was no outstanding structural work requiring the consent of L&Q and that Anacar had sufficient rights under the headlease to demise the same to the appellant. At no stage during that meeting or in any other conversation prior to completion had the appellant instructed him that he intended to do anything other than simply connect to the ventilation shaft.

21. The judge preferred the account of Mr Davies. He considered that Mr Balogun was in certain respects an unsatisfactory witness. By contrast he found Mr Davies to be an impressive witness who was self-exacting in relation to carrying out his instructions from a difficult client.

22. The judge found that the appellant did not explain to Mr Davies at the meeting on 8 April that ducting would need to be installed in the ventilation shaft. The judge found that the appellant did not know prior to completion what works might be required in relation to the ventilation shaft and consequently did not give Mr Davies any instructions in relation to such work. He found that the e-mails relating to the period after completion made it clear that the appellant only learned gradually about what work was needed in relation to the ventilation shaft. He also noted that no detailed schedule of works was produced by the appellant prior to completion, despite Mr Davies's encouragement to him to provide more detailed plans.

23. The judge held that Mr Davies correctly advised the appellant that the underlease carried with it the right to vent through the ventilation shaft.

24. The judge also found that the appellant wanted to obtain the lease at minimal cost and so had cut corners by not obtaining the necessary professional advice in relation to the ventilation shaft prior to completion. He considered that it was for the appellant to satisfy himself as to what his commercial and technical requirements were before giving his instructions to Mr Davies. Mr Davies was entitled to accept the appellant's instructions that nothing needed to be done in relation to the ventilation shaft and it did not form part of his duty of care to go behind the factual instruction in order to investigate whether this was true or not.

25. There is no appeal against the judge's findings of fact or against the dismissal of the primary case advanced below. However, that primary case and the basis on which the judge dismissed it have an important bearing on the grounds on which the appellant now argues this appeal.

Ground 1: The judge was wrong to find that the respondent firm of solicitors had not been negligent whilst acting for the appellant in the acquisition of a commercial underlease on the ground that there was no real scope for dispute that Clause 3.1(d) of the underlease gave the appellant the right to connect into and use the ventilation shaft which passed through the first and second residential floors above the demised premises.

26. The lease between Mizen and Anacar dated 13 February 2009 ("the headlease") provided in Schedule 1:

"The Tenant and those deriving title through the Tenant shall have the following rights in common with others during the Term (subject always to compliance with the Regulations):

…

2. a right to connect into and use (subject to the regulations of any appropriate authority) Conduits for the supply of services and drainage and such other Conduits as may from time to time be available for connection to individual Units including the right of free passage and running of water, drainage, gas, electricity, communication, other services and soil in and through the conduits; …"

Clause 1 of the Headlease defined the premises demised to Anacar as including

> "Conduits and Plant to the extent that they are within and exclusively serve the commercial units (but no other Conduits or Plant)"

The headlease as amended specifically excluded from the demise "all air space above the Commercial Premises and the PCD Premises and any part of the Building above the bottom of the floor slab separating the basement, ground floor and upper ground floor from the upper parts of the Building…".

"Conduits" was defined in the headlease as follows:

> "Conduit means any pipe, drain, culvert, sewer, flue, duct, gutter, wire, cable, optic fibre, conduit, channel and other medium for the passage of water, soil, gas, air, smoke, electricity, light, information or other matter and all ancillary equipment or structures."

27. The lease between Anacar and the appellant dated 26 April 2011 ("the underlease") provided in relevant part:

> "3. Ancillary Rights
>
> 3.1 The Landlord grants the Tenant the following rights (The Rights):
>
> …
>
> (d) the right to use and to connect into any Service Media at the Building that belong to the Landlord and serve (but do not form part of) the Property which are in existence at the date of this lease or are installed during the perpetuity period;…
>
> …
>
> 3.9 Except as mentioned in this clause 3, neither the grant of

> this lease nor anything in it confers any right over the Common Parts or any neighbouring property nor is it to be taken to show that the Tenant may have any right over the Common Parts or any neighbouring property, and section 62 of the Law of Property Act 1925 does not apply to this lease."

Clause 1.1 provided that "the property" meant Unit 1 which extended to part of the ground and lower ground floor levels of the building.

Clause 1.1(k) defined "Service Media" as follows:

> "Service Media: all media for the supply or removal of heat, electricity, gas, water, sewage, energy, telecommunications, data and all other services or supplies and utilities and all structures to and from the Property, pipes, machinery and equipment ancillary to those media."

28. The argument advanced on behalf of the appellant both below and on this appeal is essentially that the underlease did not correspond with the headlease and that as a result the appellant did not enjoy a right to connect to the ventilation shaft. In particular, Mr Woodhouse on behalf of the appellant argues that the ventilation shaft is not "Service Media" within Clause 3.1(d) of the underlease. Furthermore he submits that the ventilation shaft is not within the demised premises and therefore cannot be considered "Service Media… that belong to the landlord" within Clause 3.1(d). He points to the fact that the headlease defined Anacar's demise as including "Conduits and Plant to the extent that they are within and exclusively serve the commercial units (but no other Conduits or Plant)". He submits that the ventilation shaft was not within the commercial units and did not exclusively serve them. Furthermore, he points to the fact that the headlease, as varied, expressly excluded from the demise "all air space above the Commercial Premises and the PCT Premises and any part of the Building above the bottom of the floor slab separating the basement ground floor and upper ground floor from the upper parts of the Building".

29. The next step of the appellant's argument is that a right to connect to the ventilation shaft would necessarily have carried with it the right to insert ducting and to carry out works. Accordingly, it is said, by reason of the failure of Mr Davies in breach of duty to ensure that the sub-lease provided for a right to connect to the ventilation shaft, the appellant had been unable to use the premises for their intended purposes.

30. By the conclusion of the trial of preliminary issues this argument was run in two alternative versions. Under the first it was submitted that the underlease did not confer a right of access to the ventilation shaft. Under the second it was submitted that, even if on its true construction the underlease did provide such a right of access, there was a risk that it did not and Mr Davies should have warned the appellant of this risk. In regard to the latter the appellant relied on the decision of this court in *Queen Elizabeth's Grammar School Blackburn Ltd v Banks Wilson Solicitors* [2001] EWCA Civ 1360. The first version was pleaded at paragraph 18(ii) of the Particulars of Claim. The second version

was not pleaded. Nevertheless the judge allowed the point to be run. I note that no steps were taken to amend the pleadings. Both versions were pursued in the skeleton argument served on behalf of the appellant at the trial (Supplemental Skeleton dated 15 October 2014) and in the appellant's written submission at the conclusion of that trial.

31. Mr Davies was asked about this in cross-examination. He stated that he considered that the ventilation shaft fell within the definition of "Service Media" in the underlease. He had not considered at the time whether the ventilation shaft belonged to Anacar or the superior landlord. He accepted that, as a reasonably competent solicitor negotiating the grant of rights, he should have considered whether the ventilation shaft belonged to Anacar or the freehold owner. He accepted that the ventilation shaft was not within the commercial unit. He stated, having considered the definition in Clause 3.1(d) of the underlease, that it would be wrong to conclude that anything which was outside the commercial units belonged to Anacar.

32. The judge held, in relation to the first version of this case, that Mr Davies correctly advised the appellant that the underlease carried with it the right to vent through the ventilation shaft. He considered that the relevant rights conferred by Schedule 1 of the Headlease and Clause 3 of the underlease were sufficiently broad to allow the appellant to connect into and use the ventilation shaft in order to extract fumes from the unit. With regard to the second version of this case, the judge held that the appellant had never identified a clear risk factor of the type envisaged in *Queen Elizabeth's School Blackburn Ltd*.

33. No ground of appeal expressly challenges the judge's conclusion on the interpretation of the leases. Nevertheless Mr Woodhouse submits that this issue is within the scope of the first ground for which the appellant has been given permission to appeal. I accept that submission.

34. On the issue as to the meaning of the relevant provisions of the headlease and underlease and their correspondence, I have come to the following conclusions.

(1) By virtue of paragraph 2 of Schedule 1 of the headlease Anacar had the right to connect into and use the ventilation shaft. That provision also contemplated that such a right might be conferred on "those deriving title through the Tenant".

(2) The problem identified by the appellant relates to the terms of the sub-lease, in particular whether the words "any service media at the Building belong to the Landlord" are wide enough to include the rights enjoyed by Anacar under the Headlease.

(3) Contrary to the submission on behalf of the appellant, which it is fair to say was only faintly argued by Mr Woodhouse, I consider that the ventilation shaft is "service media" within the underlease.

(4) However, the ventilation shaft is not within the premises demised to Anacar

under the Headlease. While Anacar has a right under the headlease to connect into and use the ventilation shaft, that shaft is not within nor does it exclusively serve the commercial units.

(5) Nevertheless I consider that the words of Clause 3.1(d) of the underlease are sufficiently wide to confer on the appellant a right to connect to the ventilation shaft. The ventilation shaft is not the property of Anacar but Anacar has the right to use it under the headlease. The headlease creates an easement in favour of Anacar. To my mind, this is Service Media belonging to Anacar within Clause 3.1(d) of the underlease. Moreover, that reading gives effect to the presumed intention of the parties having regard to the position of the ventilation shaft and the obvious purpose of the transactions.

(6) Accordingly I consider that the underlease did confer on the appellant a right to connect to and use the ventilation shaft.

35. In these circumstances it is not necessary to address the further submissions based on section 63, Law Property Act 1925.

36. It seems to me, however, that there is more substance in the second version of the appellant's case under this ground. In the *Queen Elizabeth's School* case a solicitor was asked to advise the school on the meaning of a restrictive covenant which the solicitor had negotiated. In subsequent legal proceedings in professional negligence against the solicitor the court was not asked to rule on the meaning of the covenant but only on whether there was real scope for doubt as to what it meant. The Court of Appeal concluded that there was. Arden LJ (at [47]) considered that the solicitor knew that a dispute was potentially to emerge with a neighbour over the effect of the clause and in those circumstances it behoved him to point out there was a risk about his construction of the clause. The arguments supporting the contrary construction were of sufficient significance to meet the threshold that they should have been pointed out to the client. Sedley LJ (at [49]–[50]) considered that this was a covenant which was likely to give quite a lot of trouble to a court called on to construe it. However, even accepting that the solicitor's interpretation was entirely defensible, so that there was no way of saying that a competent solicitor could not arrive at it, it could on no defensible view have been so confident as to relieve the solicitor of the need to enter the caveat that a court might construe it differently. (See also *Herrmann v Withers LLP* [2012] EWHC 1492 (Ch), per Newey J. at [73] – [74].)

37. We were also referred to the recent decision of Roth J. in *Baker v Baxendale Walker Solicitors* [2016] EWHC 664 (Ch). At [147] Roth J observed;

> "I think it is notable that in all these decisions concerning a warning, the court found that the view of construction taken by

> the lawyer was either wrong (albeit not negligent) or at the very least there were such strong factors favouring an alternative construction that this should have been pointed out by a lawyer presenting a balanced view to their client. That is the basis, in my judgment, on which they hold that any lawyer exercising appropriate skill and care would have given a warning that there was a serious risk that his preferred interpretation might well be wrong. And in my view, it is also of relevance if the lawyer is on actual notice of the potential challenge to his construction at the time he gave advice, as was the case in *Queen Elizabeth's Grammar School* (opposition from the adjoining owner) and [*Levicom International Holding v Linklaters* [2010] EWCA Civ 494] (letter from Cleary Gottlieb)"

Later, at [178], Roth J. stated:

> "Whilst solicitors whose interpretation of a statute or document is incorrect, but not negligent, may be in breach of duty for failing to give a warning of the risk of an alternative view, I find it difficult to see that solicitors whose interpretation is likely to be correct are nonetheless in breach of duty for failing to warn the client that they might be wrong. That may perhaps be the position where the argument is finely balanced, so that any reasonably careful lawyer (of appropriate expertise) should have been alerted to the significant possibility of a contrary view. ..."

38. The question whether a solicitor is in breach of a duty to warn his client of the risk that a court may come to a different interpretation from that which the solicitor advises is correct will necessarily be highly fact-sensitive and will depend on the strength of the factors favouring a different interpretation and thereby giving rise to the risk. In the present case, there was no notice that a contrary view was held. Nevertheless, I consider that if Mr Davies had considered the relevant provisions as he should, he would have appreciated that there was a possible non-correspondence between the terms of the headlease and the underlease in relation to access to the ventilation shaft, a matter of great importance to his client's project. Notwithstanding my conclusion as to the correct interpretation of the provisions, I consider that the risk of a court coming to a different conclusion was sufficiently great to require Mr Davies to advise his client accordingly and to take steps to amend the draft underlease so as to remove the risk. Accordingly I consider that Mr Davies was in breach of duty owed to his client in failing to do so.

39. This conclusion is, however, not the end of the matter. The judge found that the e-mail correspondence made it plain that both Anacar and L&Q accepted that the claimant had the right to vent through the ventilation shaft. If this is correct, it would follow that the appellant has not suffered any loss as a result of the breach of duty by Mr Davies identified above.

40. On behalf of the appellant Mr Woodhouse submits that the judge's conclusion is based on a misinterpretation of the correspondence. At the hearing of the appeal we were taken to sections of the e-mail correspondence in some detail. I am satisfied that the judge was

correct in concluding that neither L&Q nor Anacar denied that the appellant was entitled to connect to and use the ventilation shaft.

41. So far as L&Q are concerned, their predecessor Mizen had granted Anacar the right to access and use the ventilation shaft. Moreover, the terms of the headlease made clear that it was contemplated that Anacar would confer such rights on its sub-tenants. Mr Radley-Gardner for the respondent relies in particular on a letter from Devonshires, solicitors acting on behalf of L&Q, dated 27 September 2011 in which they stated:

> "We do however accept that the tenant has a right to connect into the Conduits."

On behalf of the appellant Mr Woodhouse says that this reference to the tenant is a reference to Anacar and not to the appellant. As I read it in its context, the preceding paragraph referring to the position of Anacar and the appellant, it refers to both. Whether this reading is correct or not, however, the critical point is that nowhere in the correspondence do L&Q deny that the appellant was entitled to connect to and use the ventilation shaft. Rather, L&Q were contending that the appellant was not entitled to carry out the works he wished to execute. In view of the fact that his original proposal included the construction of a chimney rising substantially above the exit point of the ventilation shaft above the second floor, this is perhaps not surprising.

42. Furthermore, the problem faced by the appellant was not one which arose from the underlease but from the fact that the headlease did not permit the carrying out of the works which he wanted to execute. This was not a matter connected in any way with the breach of duty of Mr Davies. It was not a matter which could have been addressed by an amendment of the underlease.

43. Similarly, Anacar was not taking any point on lack of correspondence between the two leases, nor was it suggesting that the appellant did not enjoy the right to access and use the ventilation shaft.

44. The short point here is that nobody was disputing that the appellant had a right to access and use the ventilation shaft. The dispute was as to the extent of that right. The limitations on the works which the appellant wished to carry out, for which L&Q argued, did not arise from the underlease but from the headlease. It has not been argued on this appeal that any breach of duty on the part of Mr Davies had any bearing on the extent of that right. In these circumstances, I conclude that the fact that Mr Davies was in breach of duty in not advising of the risk that the sub lease might not confer a right of access to and to use the ventilation shaft had no effect because both L&Q and Anacar accepted that it did confer such a right.

45. For these reasons I would dismiss the appeal on Ground 1.

<u>Ground 2: The judge was wrong to find that the respondent had not been negligent by failing to request the written approval of the local planning authority in respect of the installation of all</u>

flues, ducting and other equipment in the ventilation shaft to extract cooking fumes.

46. Condition 4 of the planning consent provided in relevant part:

> "All fumes from cooking processes associated with the A3 uses shall be extracted via a flue. Details of ventilation and filtration equipment, including details of all external plant equipment and trunking, shall be submitted to and approved in writing by the Local Planning Authority prior to the commencement of each A3 use hereby permitted. All flues, ducting and other equipment shall be installed in accordance with the details subsequently approved prior to either of the A3 uses commencing and shall be retained for the duration of the use."

47. This convoluted ground of appeal takes as its starting point the judge's finding that the appellant told Mr Davies that no further work was required in relation to the ventilation shaft. It is said that it follows from this that the flues and ducting through which the cooking fumes would be extracted had already been installed. That could only have been considered satisfactory for the purposes of planning condition 4 if the planning authority had approved them in writing. Mr Davies is criticised for his failure to request a copy of the written approval from the local planning authority. It is said that if he had done so he would have discovered that he has been misinformed by the appellant and would have appreciated that nothing had been installed in the ventilation shaft.

48. The issue to which this ground of appeal relates was raised for the first time in the course of cross examination on the last day of the trial. It was not pleaded. It was not foreshadowed in the appellant's witness statement. The judge rightly considered that the appellant was advancing an entirely new case in respect of Condition 4. Nevertheless the judge considered that the arguments on both sides could be dealt with fairly within the trial process and accordingly permitted the appellant to rely on this new ground. There was no application to amend the pleadings.

49. In a respondent's notice the respondent submits that the appellant should not have been permitted to run this point. The respondent submits that the extreme lateness of this case meant that no evidence could be led in chief from Mr Davies who was deprived of the opportunity to look into the matter in detail in preparing his witness statement. It is said that, as a result, Mr Davies was required to deal with a new and nuanced case in cross-examination for which he was simply not prepared. It is submitted that the new case caused clear and real prejudice and that the appellant should not be allowed to rely on it.

50. I have real concerns about the fairness of the judge's decision to allow this point to be taken below.

(1) There was no reason why this point could not have been pleaded at the outset. In the event, the respondent was taken by surprise and had insufficient opportunity

to consider the matter.

(2) The respondent was deprived of the opportunity to produce evidence in relation to the issue, including evidence from Mr Davies and evidence of usual practice in relation to such planning conditions.

(3) Mr Davies was disadvantaged in cross examination by lack of prior notice. Here, the judge observed that if the case had been properly pleaded and developed then Mr Davies would have been able to consider before he gave evidence whether a duty to make further enquiries really did arise and whether, if it did, any further enquiries would have revealed anything to make him doubt his instructions.

Having read the cross examination of Mr Davies I have no doubt that he was placed at a disadvantage as a result.

51. This court is normally very reluctant to interfere with case management decisions of a judge at first instance. Nevertheless, in the circumstances of this case, I consider that there are grounds for doing so. In the light of the conclusions to which I have come in relation to the substance of this ground of appeal, however, I do not consider it appropriate to determine this ground of appeal on a pleading point.

52. In the course of cross-examination the appellant accepted that Mr Davies had specifically drawn to his attention six of the planning conditions, including Condition 4. He explained in cross examination that, prior to completion, he had spoken to the local planning authority which had informed him that there was no need for further planning permission for the extractor because permission had already been granted prior to the building being constructed. There is no reference in the appellant's witness statement to such a conversation. The appellant stated in cross-examination that he was not concerned about the planning condition. For the first time ever he had a purpose-built restaurant with a space built in for him to install his extractor with the ducts running through the ventilation shaft, so he was quite happy with that. He considered that there was no need for him to start getting written approval under Condition 4 prior to signing the lease. He had not started the process of obtaining written approval. He stated:

> "This is for me not something new, because this was – like I said earlier, in the two previous restaurants we had had to install extractors as well, you see. We have had to install extractor units which includes the canopy, which includes the fan, which includes the ducting. I already knew what was expected. I had spoken to the council and I knew what they expected as well. It is not something for Mr Davies to know…"

53. Mr Davies's evidence was that on 28 March 2011 he had sent the appellant a copy of the planning consent and had drawn his attention to Conditions 3–9. The appellant had not indicated that there was any issue arising out of Condition 4. In cross-examination it was suggested to Mr Davies that if he understood that the flues and ducting were already in place and there was nothing to be done, he should have requested a copy of the written

approval from the local planning authority. When pressed, Mr Davies accepted that it would have been prudent to do so and that that would be the normal thing which a conveyancing solicitor would ask for. He stated that he had not done that because he did not think of it.

54. The judge held that the appellant had failed to prove that Mr Davies had any duty to make any further enquiries in respect of Condition 4 in the light of the information he had been given by the appellant. He held further that even if such a duty did arise the appellant had failed to prove that any further information would have revealed anything to put Mr Davies on notice that the claimant's instructions were factually incorrect.

55. I have some difficulty in reconciling the transcript of the appellant's evidence with the judge's finding that the appellant told Mr Davies of his conversation with the local planning authority in relation to Condition 4. However, as will become apparent, in my view nothing turns on this.

56. Mr. Radley-Gardner submits that the judge was correct in concluding that Mr Davies did not have any duty to make further enquiries because of what he had been told by the appellant. To my mind, the appellant's statement that nothing remained to be done in relation to the ventilation shaft would not of itself necessarily relieve Mr Davies of a duty to enquire whether written approval had been granted, if he was otherwise subject to such a duty. Furthermore, although the appellant said in evidence that he had himself approached the local planning authority in relation to Condition 4, his evidence was that he had not told Mr Davies that. Mr Davies in his evidence agreed that he had not been told that. The first he had heard of that was during the cross examination of the appellant.

57. Nevertheless, I consider that in the particular circumstances of this case Mr Davies was not under a duty to investigate whether written approval had been given under Condition 4.

(1) There was nothing to put Mr Davies on notice that he had been misinformed by the appellant as to whether work had been done in the ventilation shaft.

(2) Mr Davies had drawn Condition 4 to the attention of the appellant. The appellant had not responded on the point.

(3) No detailed schedule of works was produced by the appellant prior to completion on the underlease despite Mr Davies's encouragement to him to produce more detailed plans. The judge found that prior to completion the appellant did not know what works might be required in relation to the ventilation shaft and so did not give Mr Davies any instructions in relation to such works. At that stage the restaurant had not been fitted out. It is difficult to see how written approval under Condition 4 could have been obtained in those circumstances.

(4) Written approval under Condition 4 was tied to the operation of the restaurant.

Written approval was only required prior to any of the A3 uses commencing.

(5) The appellant's very firm stance in cross examination was that the approval of the local planning authority was a matter for the future. He clearly considered that this was a matter which was not to be addressed before completion but which could be left until later. He had already spoken to the planning authority and knew what they expected. As the appellant put it in cross-examination "It is not something for Mr. Davies to know".

58. The respondent also says that the judge was correct to conclude that if Mr Davies had enquired of the local planning authority he would simply have been told what the appellant was told i.e. that planning consents were in place. However that does not follow. If Mr Davies had been under a duty in this regard he could have been expected to pursue the matter further.

59. However, if an enquiry had been made by Mr Davies of the local planning authority and it had become apparent that there was no written approval, that would not necessarily have told Mr. Davies anything about whether or not work had been done in constructing a flue in the ventilation shaft. Condition 4 is tied to the operation of the restaurant. Until the restaurant is to operate there is no requirement to comply with Condition 4. The fact that there was no written approval did not mean that no flue had been constructed in the ventilation shaft.

60. For these reasons I would dismiss the appeal on Ground 2.

LADY JUSTICE KING :

61. I agree.

LADY JUSTICE GLOSTER :

62. I also agree.